

REFUSAL TO PAY?

How to Collect Private Pay Due to Your Facility



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Topics

- Admission Agreements
- Responsible Parties
- CMS/Consumer Financial Protection Bureau
Guidance
- Who?
- Causes of Action
- Guardianships
- Estates

Admission Agreements

- The Admission Agreement is a legally binding and enforceable contract between the parties.
- Each party has respective duties and obligations.

Admission Agreements

- Signed by:
 - Resident, as individual responsible for his/her own obligations under the Admission Agreement, and/or
 - Responsible Party, as third-party responsible for the RP obligations set forth in the Admission Agreement.

Admission Agreements

- Interest, Costs and Attorneys' Fees:
 - Add provision requiring payment of interest, costs of collection, and attorneys' fees in the event of default.

Admission Agreements

- Patient Pay Obligations:
 - For Medicaid pending residents, facility can require payment of estimated patient pay obligations from Resident and RP.

Admission Agreements

- “Specific Performance” Language:
 - Require Resident and RP to “specifically perform” their contractual obligations.

Admission Agreements

Remedies for failure to cooperate:

- Breach of contract and damages.
- Specific performance of contractual obligations.

Responsible Parties

- “Responsible Party” obligations should be clearly defined in the Admission Agreement.
- The individual signing as “Responsible Party” should be clearly identified as the “Responsible Party.”

Responsible Parties

Federal Regulations:

The facility must not require a third party guarantee of payment to the facility as a condition of admission or expedited admission, or continued stay in the facility.

Responsible Parties

Federal Regulations (Cont.):

However, the facility may require an individual who has legal access to a resident's income or resources available to pay for facility care to sign a contract, without incurring personal financial liability, to provide facility payment from the resident's income or resources.

Responsible Parties

Pennsylvania Regulations:

Responsible person—A person who is not an employee of the facility and is responsible for making decisions on behalf of the resident. The person shall be so designated by the resident or the court and documentation shall be available on the resident's clinical record to this effect. An employee of the facility will be permitted to be a responsible person only if appointed the resident's legal guardian by the court.

See 28 Pa. Code §201.3.

Responsible Parties

Pennsylvania Regulations (Cont.):

The resident may be permitted to name a responsible person. The resident is not required to name a responsible person if the resident is capable of managing the resident's own affairs.

See 28 Pa. Code §201.24(a).

Responsible Parties

CMS and Consumer Financial Protection Bureau
Joint Notification Letter to Nursing Facilities and
Debt Collectors – September 8, 2022

https://files.consumerfinance.gov/f/documents/cfpb_nursing-home-debt-collection_joint-letter_2022-09.pdf

- The NHRA prohibits nursing facilities from requesting or requiring that a third party personally guarantee payment to the facility as a condition of a resident's admission or continued stay in the facility.

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Responsible Parties

- Contract terms that conflict with the law are unlawful, and alleged debts resulting from such unlawful contract terms are invalid and unenforceable.

Responsible Parties

- Nursing facilities that violate the law's requirements may be subject to enforcement action by state agencies and by CMS.
- CMS/CFPB urged nursing facilities and their debt collectors to examine their practices to ensure that they comply with the NHRA, FDCPA, and FCRA.

Who?

CIVIL LITIGATION

Who are the potential defendants?

- Resident
- Responsible Party
- Power of Attorney
- Spouse, child, or parent
- Recipient of transfer from resident

Causes of Action

CIVIL LITIGATION

- Quantum Meruit
- Breach of Contract Specific
Performance/Injunction Proceedings
- Statutory Duty of Support
- Breach of Fiduciary Duty of Power of Attorney
- Voidable Transfer

Quantum Meruit

- Facility provided services to Resident.
- Facility expected compensation for the services provided
- Resident accepted the services Facility provided.
- Facility has an outstanding debt due and owing for the services provided.

HYPO

Rhonda was admitted to Facility on January 1.

No one signed the admission agreement.

Rhonda listed the amount of money in her bank account as \$100,000. Facility has received no payment since Rhonda's admission, and Rhonda is refusing to pay.

- What are facility's options?

Breach of Contract against Resident

- Facility provided services
- Resident accepted services
- Resident is obligated to pay for the services

HYPO

Rhonda was admitted to Facility on January 1 and signed the admission agreement. Upon admission, Rhonda listed the amount of money in her bank account as \$100,000. Facility has received no payment since Rhonda's admission, and Rhonda is refusing to pay.

- What are facility's options?

Breach of Contract against Responsible Party

- RP signed contract.
- RP agreed to perform the obligations set forth in the agreement.
- Cannot be held personally liable for resident's debt simply by signing the agreement.
- May be subject to pay for the damages sustained by the facility only if the damages were caused by and as a result of the RP's breach of contractual obligations.

HYPO

Bob was admitted to Facility on January 1. Bob's brother Ted signed the agreement as the RP. The agreement required the RP to cooperate with the MA eligibility process. Ted cooperated with the MA process, but Bob was assessed a transfer penalty due to the gifting of cash to his children over the last few years. As a result, the facility has a large private pay balance for the transfer penalty period.

Is Ted responsible for the balance owed? NO.

Specific Performance

Use to compel compliance with contractual obligations in the Admission Agreement, including payment from resident's resources, and duty to cooperate in the MA application, waiver, and appeal process.

Ties back to provisions in Admissions Agreement.

Remedy sought: Court order compelling performance, as opposed to just a lawsuit for damages.

Injunctive Relief

Remedy sought is the same as if the Admission Agreement specifically requires “specific performance.”

However, potentially more difficult because the standard for this type of equitable relief is irreparable harm to the plaintiff.

HYPO

Jackie Jones was admitted to the Facility on January 1. She signed the Admission Agreement. Her son James also signed the Admission Agreement as Responsible Party. No payments have been made and no MA application has been filed. The business office manager speaks to the resident, and also calls the son regarding the outstanding balance. Both deny any responsibility to help the facility obtain payment.

- What can the Resident and/or RP be obligated to do by the Admission Agreement?

Statutory/Filial Duty of Support

23 Pa.C.S. §4603 - Relatives liability; procedure

...all of the following individuals have the responsibility to care for and maintain or financially assist an indigent person, regardless of whether the indigent person is a public charge:

- (i) The spouse of the indigent person.
- (ii) A child of the indigent person.
- (iii) A parent of the indigent person.

Statutory/Filial Duty of Support

23 Pa.C.S. §4603 - Relatives liability; procedure

Paragraph (1) does not apply in any of the following cases:

- (i) If an individual does not have sufficient financial ability to support the indigent person.
- (ii) A child shall not be liable for the support of a parent who abandoned the child and persisted in the abandonment for a period of ten years during the child's minority.

HYPO

Randy was admitted to Facility on August 1, 2022, and Sonny was on vacation, and no one signed the Admission Agreement. Sonny is a local physician. Facility has received no payment since Randy's admission. Facility discovers Randy has no resources available to him, but his MA application was denied for failure to provide verifications.

- What can the Facility do?

Breach of Fiduciary Duty as Power of Attorney

- Power of Attorney obligated to use powers in best interest of principal.
- Failure to pay for care and services not in the best interest of principal.
- Failure to cooperate in establishing Medicaid eligibility not in best interest of principal.

Breach of Fiduciary Duty as Power of Attorney

- May only apply if POA had some active involvement with the resident and/or the Facility.
- Civil court for remedies and/or specific performance.
- Petition for Accounting in Orphan's Court (contempt/surcharge).

HYPO

Ralph was admitted to Facility on September 1, 2022. His daughter and Power of Attorney signed the Admission Agreement as RP. Ralph became eligible for Medicaid effective September 1, 2022. Facility is not receiving Ralph's Social Security payments as required by Medicaid. Facility cannot achieve Representative Payee status because daughter will not authorize it.

- What can Facility do?

Pennsylvania's Uniform Voidable Transactions Act

- Action against transferor, or
- Action against transferee

Pennsylvania's Uniform Voidable Transactions Act

Occurs if debtor made a transfer:

- With intent to hinder, delay, or defraud any creditor,
- Without receiving a reasonably equivalent value in exchange AND the debtor:
 - Intended to incur, or reasonably should have believed the debtor would incur, debts beyond the debtor's liability to pay as they become due

Pennsylvania's Uniform Voidable Transactions Act

Remedies:

- Avoidance of the transfer to the extent necessary to satisfy the creditor's claim
- An attachment or other provisional remedy against the asset transferred or other property of the transferee

HYPOTHESIS

Arnold is admitted to the facility on August 1, 2022, and he applies for Medicaid benefits on August 15. Medicaid benefits are granted but there is a transfer penalty due to a transfer of Arnold's home on December 1, 2021. The facility finds out the home was transferred from Arnold to his son, Tom, for \$1.00. The transfer results in a Medicaid penalty period of ten months.

- What are the facility's options?

HYPO

Arnold is admitted to the facility on August 1, 2022, and he applies for Medicaid benefits on August 15. Medicaid benefits are granted but there is a transfer penalty due to transfers of cash to his son Tom over the last year. Tom is his father's POA and had transferred the sums of money from his father's account to himself.

- What are the facility's options?

Guardianships

Very effective and often used to assist in obtaining MA eligibility and/or liquidation of resources.

HYPO

Rose was admitted to Facility on February 1. No one signed the Admission Agreement. Rose's son, Peter, is Power of Attorney for Rose. Peter initially was involved in her care but has been nonresponsive to requests for financial information. Rose is suffering from dementia. She and her husband owned a nice home, purchased 40 years ago, but the husband passed away years ago.

- What steps should the Facility take?

Estates

Filing a claim or opening an estate may be necessary to assist in obtaining MA eligibility and/or payment from resources.

HYPO

Randy was admitted to Facility on January 1. His daughter Mary signed the Admission Agreement as Responsible Party. Mary began a Medicaid application for Randy but he passed away prior to completion of the process. At the time of his passing, there were six months of unreimbursed care, resulting in a private pay balance of \$60,000. Randy owned a property free and clear of any debt worth approximately \$40,000. The daughter stated she will not be opening an estate.

- What are Facility's options?

Questions?