Revisiting Nursing Home Contracts

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Despite HCB Care Emphasis . . .

- **Substantial care continues in skilled care facilities:**
  - Between December 2003 & December 2013
    - Annual number of residents occupying “certified” CMS nursing facility beds decreased -- from 1,447,222 to **1,371,818***
    - Decrease affects occupancy ratios & therefore operating revenues
      - 2003-2013 median occupancy ratio decreased from 88.4% to 85.7%
  - 1997: Reimbursement changed from cost-base to per-diem PPS
  - 2010: ACA requires MedPAC to analyze NH Medicaid revenue/use
  - 2011: Medicare reimbursement rates decreased by 11.1%
  - 2012: “Middle Class Tax Relief & Job Creation Act” phased down SNFs’ good faith “bad debt” reimbursement options (100% to 65%)
  - 2010-2012: Many states reduced/froze Medicaid reimbursement rates

*Data from American Health Care Association, using CMS Nursing Facility OSCAR Standard health survey data, December 2013*
Under Federal Law...

- NH (SNF) may **not** require applicants to waive rights to Medicare or Medicaid benefits
- NH may **not** require oral or written assurances of private pay
- NH must provide individuals with info on how to apply & use Medicare/Medicaid or receive refunds
- NH may **not** require a “third party guarantee of payment to the facility as a condition of admission (or expedited admission) to, or continued stay, in the facility”
  

- States may adopt “stricter” standards governing admissions
- NH may require individual “who has legal access to resident’s income/resources” to “sign contract (without incurring personal financial liability) to provide payment” from those sources
  
  -- 42 USC § 1395i-3(5)(B) & 42 USC § 13964 (c)(5)(B)
1. “Applicant must pay privately for a minimum of two years...” (printed in red on information sheet completed by potential customers during first tour)

2. “Resident has right to name Responsible Party” (from pp 5-10 of 29 pages)
   - “Responsible Party shall sign this agreement ... with intent to be legally bound”
   - “Responsible Party affirms that he/she has access to Resident’s income & resources and that Resident’s income & resources are available to pay for care”
   - “Responsible Party is obligated to pay Facility from Resident’s financial resources”
   - “When Resident’s financial resources warrant it, Responsible Party shall take all actions necessary to apply for Medicaid” even if “Facility choses to assist in application”
   - “Responsible Party liable for damages, attorneys fees and costs incurred by facility in enforcing this agreement,” including “in the discretion of the Facility, an amount equal to any revenue lost by failure to timely submit & complete Medicaid application”
   - “This agreement shall not be construed or operate as a third party guaranty”
Connecticut Case Examples

- **Sunrise Health Care Corp. v. Azarigian**, 821 A.2d 835 (Conn. App. Ct. 2003), holds daughter liable for mother’s nursing home costs:
  - Medicaid denied because of pre-admission transfers by mother’s husband;
  - Daughter who signed as “responsible party” was liable under contract;
  - Daughter’s “fault” (breach?) was using mother’s funds for private companion for mother, while waiting on Medicaid application.

- **Aaron Manor Inc. v. Brown**, 57 A.3d 342 (Conn. 2013), holds daughter is not liable for mother’s nursing home costs:
  - Post-admission transfers of mothers’ funds by her brother;
  - Daughter signed as “responsible party;”
  - But daughter not liable under contract because she had no authority over mother’s accounts (neither agent/guardian);
  - Additional research discloses brother used POA to transfer mother’s funds to self & sister.
2005: Legislature moved “Filial Support” from Welfare to Domestic Relations Law - encourages suit by providers

2011: repealed Filial Law citing potential for misuse & confusion in nursing homes

2013: Supreme Court held son liable to NH for “fraudulent conveyance” in failing to use parents’ assets to pay NH; remands for issue of siblings’ share of liability under filial law
State Law Alternatives - Part 2

• Effective October 1, 2013: Connecticut Law permits NHs to collect debts for unpaid care for a resident from “transferor” or “transferee” if resident has been denied Medicaid because of transfers by or to those parties, causing ineligibility (plus costs & attorneys fees) Conn. Pub. Act No. 13-234, §§ 128-130

• Effective July 2, 2013: New Hampshire Law makes a “fiduciary” who “possesses or controls” income or assets of a resident of a long term care facility liable to the facility for negligence in “failing to promptly and fully complete and pursue an application for Medicaid benefits” New Hampshire S. Bill 128-FN
Forecast...

- Family “self-help” measures (often confused with permissible Medicaid-planning) are continuing target

- Courts look for “fault” but ...

- States pushing/cooperating with NHs in seeking private pay to cover “gaps,” thus reducing state role; authorizing suits against:
  - Contracting parties
  - Fiduciaries
  - Transferors
  - “Passive” beneficiaries of gifts/transfers (“knowledge”)
  - Family members under “filial” support laws

- Federal Medicare/Medicaid Law: rarely seen as barrier to third-party or family liability, as long as no overt “guarantee” required

- Nursing Homes: organized, lobbying efforts to adopt new state laws

- *Experienced* elder law attorneys: may be more ... not less ... important?