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THE ADMISSION PROCESS AND THE COLLECTION CONNECTION

By: ROBERT L. FREY, ESQ.

For long-term care facilities, the collection of outstanding debts can be a trying and difficult process. Often, the resident at issue receives Medical Assistance and has limited resources, so a sizeable debt will be difficult to collect. Moreover, debts may often accrue through no fault of the resident, but rather as a result of the malfeasance of the resident's Power of Attorney or responsible party, who may fail to meet their obligations to the resident, or worse, misappropriate the resident's funds. Compounding the problem is that in many ways, Medical Assistance and other laws seem to place obstacles in the path of a provider pursuing collection of a valid debt, especially when the provider is seeking to recover from the Power of Attorney or responsible party who has misappropriated assets. For example, the Nursing Home Reform Act expressly prohibits any nursing home participating in Medicare or Medicaid from requiring guarantees of payment as a condition of admission.

The initial question that should be asked is: How can the facility maximize its ability to collect an outstanding debt? Once an unpaid account begins to grow, a provider's most effective collection tools are due diligence and persistence. However, other steps may be taken so that the provider will be in a better strategic position in order to collect a debt. The best time to take steps to enhance the provider's ability to collect is before the debt ever accrues – during the admission process. Providers should view their Admission Application and their Admission Agreement as valuable tools to assist in the collection of a delinquent account.

The starting point in this process should be with the Admission Application. The implementation of an Admission Application Policy requiring the disclosure and verification of an applicant's income and resources is the most effective means to ensure that the extent of the prospective resident's resources and assets have not been misrepresented. The Admission Application should ask whether there have been any transfers of property or funds within the 36-month period prior to admission. This will assist in determining whether there may be any eligibility problems.

The Admission Application should also contain a provision that conveys that the facility is relying on the representations being made by the applicant or legal representative, that the representations are material, and that the applicant or legal representative agrees to reimburse the facility for any and all damages incurred by the facility as a result of its reliance. It is also recommended practice to have the applicant or legal representative sign the Application. During the application process, the facility should obtain as much information as possible about both the applicant and the legal representative, such as Social Security number, driver's license number, and address.

Next, facilities should review their Admission Agreements to determine whether they provide sufficient assistance in the collection of outstanding debts. As providers are well aware, an Admission Agreement serves the dual purpose of setting forth the services to be provided to the resident, as well as securing a contractual obligation to pay for those services. A well-drafted Admission Agreement can be crucial in collecting a delinquent account. The importance of having an "attorneys' fees and costs of collection" clause in an Agreement cannot be overstated, as generally such fees and costs are not recoverable from the offending party without express provisions so providing.

It is a common practice to seek the signature of a responsible party on the Admission Agreement, so that contractual obligations are enforceable against the responsible party. Recently, this practice has been called into question by some attorneys and commentators. These elder law advocates have argued that the obligations of a responsible party are not enforceable, since they are "buried" in a large Admission Agreement that the responsible party may not have a meaningful opportunity to review prior to admission. While the obligations of a responsible party should always

(See *COLLECTION CONNECTION*, p.2)


NEW YORK ATTORNEY GENERAL'S OFFICE INVESTIGATING PENNSYLVANIA FACILITIES

By: STEVEN M. MONTRESOR, ESQ.

Following the conviction of a Pennsylvania nursing home owner after a criminal trial in Albany, New York, the New York Attorney General has begun to issue letters to Pennsylvania facilities that have received reimbursement from the New York Medicaid Program for services provided to certain residents.

New York State regulations governing the reimbursement of out-of-state nursing homes indicate that if the host state's per diem rate does not cover the costs of certain ancillary services, including therapy services, the facility may seek a supplemental payment for providing those services to New York beneficiaries. In the criminal case, the nursing home had represented to the New York Bureau of Long Term Care Reimbursement that the Pennsylvania Medical Assistance per diem rate did not include payment for physical, occupational and speech therapy services. By making this claim, the facility was entitled to an add-on to its payment rate for services provided to its New York beneficiaries. The Attorney General argued, and the court agreed, that the Pennsylvania Medical Assistance per diem did in fact cover the therapy services in question. Thus, the facility's claim for an add-on payment from New York was found to be fraudulent, since those services were already provided for in the Pennsylvania payment rate. Compounding the issue for the facility was that for many years in question, it was alleged and presumably found by the court that the facility did not actually provide the services for which it received extra reimbursement.

It appears that the New York Attorney General has now concluded that since the costs of physical, occupational and speech therapy are encompassed by the Pennsylvania rate, no Pennsylvania facility may seek supplemental reimbursement from New York for these services. The New York Attorney General is now examining rate requests submitted by Pennsylvania nursing homes. To the extent a provider has indicated that therapy or other ancillary services are not covered by the Pennsylvania Medical Assistance Program, the Attorney General has indicated that providers are under an immediate obligation to correct previously submitted information. The letter may also contain detailed and voluminous document requests, including requests for cost reports, payroll journals, organizational charts, Board of Directors listings and minutes, financial records, payroll records, medical records, contracts, operating and payroll cancelled checks or stubs, tax returns, and survey information, among other things, in some instances from as early as 1996.

Providers receiving these letters should consult with their counsel immediately. Those providers, as well as any nursing facility receiving reimbursement from the New York Medicaid Program, should immediately review their practices to confirm compliance with applicable laws and regulations. 

(COLLECTION CONNECTION, continued from p.1)

be explained to that individual and the responsible party's attention directed to the pertinent contractual provisions, facilities may wish to consider implementing two separate agreements – an Admission Agreement for the resident and a separate Responsible Party Agreement.

The Responsible Party Agreement should make the responsible party personally liable for the misappropriation of the resident's funds and assets. The responsible party Agreement should require the cooperation of the Responsible Party in providing the necessary information for the County Assistance Office to determine eligibility for Medical Assistance. The Agreement should also contain a contractual right to recover any damages incurred for breach of this obligation written in such a manner so as not to be construed as a third-party guarantee.

In light of restrictions against third-party guarantees, and the scant Pennsylvania decisional law on these issues, a nursing facility must exercise caution when seeking the signature of a responsible party to an agreement. To accomplish this goal of compliance, as well as preparing the best case possible for pursuing contractual obligations, nursing facilities that desire the signature of a responsible party should have their Admission Agreements and policies reviewed by legal counsel. With the proper counseling and drafting of these policies and Agreements, a nursing facility can secure a measure of guarantee that a signing responsible party will be held accountable, while complying with applicable law.

As an example of the way Pennsylvania courts are viewing the duties and obligations of third party liability for payment of a resident's obligations, the Superior Court, in *Presbyterian Medial Center v. Budd*,

heard a case involving the collection of a resident's outstanding balance from the resident's daughter, who was also the resident's Power of Attorney. In that case, the resident did not qualify for Medical Assistance. The resident's daughter, Ms. Budd, after promising to spend down her mother's assets to qualify for Medical Assistance, instead transferred the assets to herself through the Power of Attorney.

One of the theories advanced by the provider, and the only one accepted by the court, was the idea of "filial support" based upon the Pennsylvania law of support of indigent relatives. The court agreed with the provider in that Ms. Budd owed a duty to her mother to provide support, since her mother was rendered indigent by Ms. Budd's withdrawal of the funds from her mother's account. The court reasoned that the nursing home provided an indigent parent with shelter, sustenance, and care, thereby creating an interest to bring a support action against Ms. Budd. The court concluded that the provider had a valid cause of action against Ms. Budd for the bills of her indigent mother. Essentially, the court created a limited cause of action for payment of medical expenditures for services performed by a facility, where relatives of the patient have exhausted the patient's assets on non-medical expenditures, rather than spending down the assets on outstanding medical bills.

Although limited in its application, the *Budd* case is a positive step towards securing some form of enforcement against certain family members who squander the assets of the nursing facility resident. More importantly, however, a complete and comprehensive legal review of the admission policies and agreements will go a long way in securing payment obligations, within applicable Medicare and Medicaid restrictions.

HIDDEN COSTS IN CELL PHONES?


By: ANGELA L. THOMAS, Esq

In this age of technology, it seems that everyone uses cellular telephones. For employers in a service industry, cell phones are an incredibly useful tool; they allow employees to multi-task and provide faster service to customers. However, employers are beginning to experience some negative consequences stemming from their employees' use of cell phones.

Plaintiffs have begun to file suit against companies when their employees cause an automobile accident while using a cell phone. Such lawsuits have been filed in states throughout the country, including Pennsylvania. In these cases, the court rulings indicate that employers who require or permit employees to use cell phones to conduct company business while driving may be liable to persons who are injured when the employees cause an auto accident. Courts are now allowing such cases to proceed to trial, finding that a jury will have to decide if the employees were acting within the scope of their employment and conducting employer business when the accident occurred.

In a Pennsylvania case, a stockbroker was using his personal cell phone while driving to a non-business related dinner on a Saturday evening, when he struck and killed a person driving a motorcycle. The driver was trying to call a client at the time of the accident. The motorcyclist's family sued Smith Barney, claiming that the company had a policy that encouraged its employees to do business in their cars at any time of the day. After trying to have the case dismissed, Smith Barney settled the case for a reported \$500,000.

Claims against businesses are not limited to claims by third parties. Employees have also brought workers compensation claims against employers if the employees are injured while operating cell phones in the course and scope of employment.

In light of these developments, a well-crafted cellular telephone policy becomes important to establishing an employer's defense in such cases. Employers should consider putting such policies into effect if they do not already have them. For some employers, a total ban on cell phone use may not match business needs, but an employer can still draft a policy to limit its exposure to the greatest extent possible. 

LONG-TERM CARE COMPLIANCE COMPENDIUM

Presented by

LATSHA DAVIS YOHE
& MCKENNA, P.C.
ATTORNEYS AT LAW

Tuesday, May 11, 2004
Sherwood Oaks, Cranberry Township

Thursday, May 20, 2004
Holiday Inn Harrisburg East, Harrisburg

Friday, May 21, 2004
Sheraton Great Valley Hotel, Frazer

UP TO 5.5 HOURS OF NHA CREDITS

For more info., contact Jeannie Barnes (717) 761-1880 or jbarnes@ldylaw.com

INSIDE THE FIRM

Latsha Davis Yohe & McKenna P.C. was selected to file an Amicus Curiae brief on behalf of both PANPHA and PHCA in the matter of *Presbyterian Medical Center of Oakmont v. Department of Public Welfare*. The *Oakmont* case involves the ability of the Board of Claims to hear provider payment disputes filed against the Department of Public Welfare. The principal briefs have been filed, and the case remains pending as of the date of this writing.

LATSHA DAVIS YOHE & MCKENNA, P.C. is pleased to announce that the following Associates have joined the firm:

ROBERT L. FREY, JR.



Robert Louis Frey, Jr., a graduate of Saint Vincent College (Bachelor of Arts, highest honors), and of Widener University School of Law – Harrisburg, concentrates his practice on corporate and business law, estate planning, litigation and health care law. Before joining the firm, Mr. Frey served as a law clerk to the Honorable Daniel L. Howsare, P.J. in the Common Pleas Court of Bedford County, maintained a general law practice, and was a partner at a law firm in Johnstown, Pennsylvania where he handled civil defense litigation for numerous insurance companies.


RACHEL M. WILLIAMS



Rachel M. Williams, an Associate in the firm's Malvern office, graduated from the University of Maryland in 2000, with her Bachelor of Science in Chemical Engineering, and received her Juris Doctorate from the Villanova University School of Law in 2003. Ms. Williams concentrates her practice in the areas of environmental litigation, charter school law, special education law, unemployment compensation law and workers' compensation law.

DAYNA E. MANCUSO



Dayna E. Mancuso, who received her undergraduate degree from Penn State University (B.S.) and received her Juris Doctorate from Widener University School of Law, is an Associate in the firm's Harrisburg office. Ms. Mancuso's practice area is health care law, including admission agreements, survey and enforcement, and compliance issues. While at Widener, Ms. Mancuso co-authored an article published in New York University's Environmental Law Journal titled, "It's All About *What* You Know: The Specific Intent Standard Should Govern 'Knowing' Violations of the Clean Water Act," 2001. 



Reminder...

Latsha Davis Yohe & McKenna's

Long-Term Care

Compliance Compendium

May 11, 20 & 21, 2004

UP TO 5.5 HOURS OF NHA CREDITS

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SEMINARS

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Pennsylvania Association of Township Supervisors	April 20, 2004	"Costly Employment Mistakes and How to Fix Them"	Glenn R. Davis, Esq. & Angela L. Thomas, Esq.
Pennsylvania Mortgage Bankers Association	April 21, 2004 Pittsburgh, PA	"Protecting Your Company's Assets"	Glenn R. Davis, Esq. & Angela L. Thomas, Esq.
Pennsylvania Mortgage Bankers Association	April 26, 2004 Philadelphia, PA	"Protecting Your Company's Assets"	Glenn R. Davis, Esq. & Angela L. Thomas, Esq.
PA Financial Industry Human Resource Association	April 30, 2004	"COBRA Update"	Angela L. Thomas, Esq.
Mid-Atlantic LifeSpan 2004 Annual Conference	May 5, 2004	"Year in Review: Recent Employment/Labor Law Developments"	Glenn R. Davis, Esq. & Angela L. Thomas, Esq.
Ohio Health Care Association ("OHCA")	May 5, 2004	"HIPAA Security Rule"	David C. Marshall, Esq.
LifeSpan 2004 Annual Conference	May 7, 2004	"Political Campaigns and Lobbying Activities: Gearing Up for 2004 Elections"	Douglas C. Yohe, Esq.
Pennsylvania Association of Community Bankers	May 20, 2004	"Disciplinary Actions and Legal Pitfalls"	Kimber L. Latsha, Esq.
LDY&M	May 25, 2004 Norristown, PA	2004 Employment Law Seminar	Glenn R. Davis, Esq. & Angela L. Thomas, Esq.
NJANPHA 2004 Annual Meeting	June 4, 2004	"HIPAA Security Rule"	David C. Marshall, Esq.
LDY&M	June 8, 2004 Greensburg, PA	2004 Employment Law Seminar	Glenn R. Davis, Esq. & Angela L. Thomas, Esq.
PANPHA 2004 Annual Conference	June 16, 2004	"Political Campaigns and Lobbying Activities: Gearing Up for 2004 Elections"	Douglas C. Yohe, Esq.
PANPHA 2004 Annual Conference	June 16, 2004	"Corporate Governance Issues for the 21st Century"	Kimber L. Latsha, Esq. & Douglas C. Yohe, Esq.
PANPHA 2004 Annual Conference	June 16, 2004	"Ensuring Compliance With the HIPAA Final Security Rule"	David C. Marshall, Esq.
AAHSA Annual Conference	October 25-28, 2004	"Corporate Governance for Not-for-Profit Long-Term Care Organizations"	Kimber L. Latsha, Esq.