



### THE TAKEAWAY FROM CFPB & CMS' SEPTEMBER 8, 2022 "NOTIFICATION LETTER"

It seems like every Skilled Nursing Facility (SNF) reacted differently to The Consumer Financial Protection Bureau ("CFPB") and the Centers for Medicare & Medicaid Services' ("CMS") joint "Notification Letter". Some SNFs simply shrugged it off, thinking that it was pure puffery on the Feds part while others, and I believe rightfully so, read the "Notification Letter" not once but twice (or even thrice) and walked away with the conclusion that the Federal government is seeking to change the Federal and State Courts' interpretation of the Nursing Home Reform Act ("NHRA").

For those readers who are currently not "in the know", the September 8, 2022 "Notification Letter" revisited the NHRA's prohibition against SNFs requesting or requiring that a third party personally guarantee payment to the facility as a condition of a resident's admission, expedited admission or continued stay in the facility. The Letter goes on to state that "Contract terms that conflict with the NHRA are unlawful, and alleged debts resulting from such unlawful contract terms are invalid and unenforceable" and "When a nursing facility claims that a non-resident is personally financially responsible for a resident's bill and engages a third-party debt collector to collect the debt, the debt collector may violate the Federal Fair Debt Collections Practices ACT ("FDCPA") by attempting to collect debts that are invalid under the NHRA".

It's important to note that there is significant New York State case law that upholds Nursing Home Admission Agreements with provisions holding a third party responsible for damages in the event of a breach. While of course, the supremacy clause of the United States Constitution provides that federal law takes precedence over state law, to date there is no such federal case law that can be relied upon to supersede a state court's interpretation of these contract provisions. The foregoing, however, begs the question: Do the Feds truly intend to file an enforcement proceeding to make that case law? It would seem so.

As we all know, a "Notification Letter" or a "You are hereby on Notice" letter is a threat. The threat levied by the Feds in their Letter is enforcement actions by both state agencies and by CMS against those SNFs who are believed to have violated the NHRA via their inclusion of invalid provisions in their Admission Agreement holding a third party financially responsible for a resident's bill. But that's not all. While the Letter goes on to state that debt collectors may be subject to enforcement actions by the CFPB, federal and state government agencies and private consumers for alleged FDCPA violations, it fails to point out that the SNF itself is often times a named Respondent in these actions along with their debt collectors. Although the fines imposed for violating the FDCPA are de minimis (i.e. a few thousand dollars), a Respondent who is found guilty will be obligated to pay the Petitioner's attorney's fees which can easily exceed \$100,000 and opposing parties attorney's fees are rarely, if ever, covered by the SNF's insurance carrier. Unfortunately, all of the above point to dire consequences should the Feds seek to move forward with their threats.

In short, CFPB and CMS' September 8, 2022 "Notification Letter" should not be taken lightly but more clarification from the Feds is required to ensure an SNFs' compliance moving forward. For now, SNFs need to update their Admission Agreements to ensure that the language employed in no way runs afoul of the NHRA. Additionally, all SNFS need to work harder (and smarter) to avoid accruing balances by simply being more proactive. Examples include, but are not limited to, the timely initiation of Article 81 guardianship proceedings, the timely filing of Medicaid applications even when no cooperation is being received from the resident or the resident's Power of Attorney, searches of public records for indication of gifts made within the five year look back and of course, the timely referral of your problem cases to Cona Elder Law before a balance has accrued that can only be recovered via collections, versus third party payor sources. The experienced and skilled attorneys at Cona Elder Law can assist you in ensuring your facility's Admission Agreement is comprehensive, up-to-date and compliant as well as assisting your SNF in instituting best practices scenarios for your Admissions and Finance teams.



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