Consumer Financial Protection Bureau

1700 G Street NW, Washington, D.C. 20552

Circular 2022-05

September 8, 2022

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Debt collection and consumer reporting practices involving invalid nursing home debts

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Question presented

Can debt collection and consumer reporting practices relating to nursing home debts that are invalid under the Nursing Home Reform Act violate the Fair Debt Collection Practices Act (FDCPA) and Fair Credit Reporting Act (FCRA)?

Response

Yes. Under the Nursing Home Reform Act, a nursing facility may not condition a resident's admission or continued stay on receiving a guarantee of payment from a third party, such as a relative or friend. Contractual provisions that violate that prohibition are illegal and unenforceable. As detailed in this *Circular*, certain practices related to the collection of nursing home debts that are invalid under the Nursing Home Reform Act and its implementing regulation violate the FDCPA and FCRA.

Background on the Nursing Home Reform Act

Enacted in 1987, the Nursing Home Reform Act establishes a comprehensive set of requirements that protect the health, safety, welfare, and rights of residents of nursing facilities

that participate in Medicaid and Medicare.[1] The Centers for Medicare & Medicaid Services ("CMS") and the Department of Health and Human Services ("HHS") have issued rules implementing the Nursing Home Reform Act.[2] State agencies are responsible for surveying nursing facilities for compliance with the Nursing Home Reform Act's requirements concerning admissions agreements, and HHS and CMS are responsible for the enforcement of those requirements.[3]

Among other protections, the Nursing Home Reform Act and its implementing regulation prohibit a nursing facility that participates in Medicaid or Medicare from requesting or requiring a third-party guarantee of payment as a condition of admission, expedited admission, or continued stay in the facility.[4] As HHS has explained, this prohibition prevents a nursing facility "from requiring a person other than the resident to assume personal responsibility for any cost of the resident's care."[5] The prohibition applies to all residents and prospective residents of a nursing facility, regardless of whether they are eligible for Medicare or Medicaid.[6] The Nursing Home Reform Act further provides that a nursing facility may require a resident's representative who has legal access to a resident's available income or resources to sign a contract to provide the facility payment from the resident's income or resources, so long as the representative does not incur personal financial liability.[7]

Through these provisions, Congress sought to prohibit nursing facilities "from requiring a person, such as a relative, to accept responsibility for the charges incurred by a resident, unless that person is authorized by law to disburse the income or assets of the resident."[8] A nursing facility's admissions agreement may not contain terms that conflict with the Nursing Home Reform Act and its implementing regulation,[9] and courts have recognized that contract terms

[1] *See* Pub. L. No. 100-203, tit. IV, subtit. C, 101 Stat. 1330 (1987). The Nursing Home Reform Act imposes requirements for nursing facilities that participate in Medicaid, *see* 42 U.S.C. 1396r, and for skilled nursing facilities that participate in Medicare, *see* 42 U.S.C. 1395i-3. For simplicity, and because the distinction is not relevant to the Bureau's analysis, this *Circular* refers to both nursing facilities and skilled nursing facilities as "nursing facilities."

[2] *See* 42 CFR 483.1 *et seq*.

[3] *See* 42 U.S.C. 1395i-3(f)(1), (g)(1)(A), (h); 42 U.S.C. 1396r(f)(1), (g)(1)(A), (h).

[4] 42 U.S.C. 1395i-3(c)(5)(A)(ii), 1396r(c)(5)(A)(ii); 42 CFR 483.1(b), 483.15(a)(3).

[5] 56 FR 48826, 48841 (Sept. 26, 1991).

[6] *See id.*; *see also* Centers for Medicare & Medicaid Services, State Operations Manual, Appendix PP, Guidance to § 483.15(a)(3) (Nov. 22, 2017), *available at* https://www.cms.gov/files/document/appendix-pp-guidance-surveyor-long-term-care-facilities.pdf.

[7] 42 U.S.C. 1395i-3(c)(5)(B)(ii), 1396r(c)(5)(B)(ii); *see also* 42 CFR 483.15(a)(3).

[8] 56 FR 48826, 48841 (Sept. 26, 1991).

[9] 42 CFR 483.10(g)(18)(v).

that conflict with the Nursing Home Reform Act and its implementing regulation are unenforceable.[10]

Some states have adopted state law analogues of the Nursing Home Reform Act that prohibit nursing facilities from requiring third-party guarantees, and admissions agreements can also be unenforceable if they violate those state law prohibitions.[11]

Violations of the FDCPA and FCRA

While the CFPB does not enforce compliance with the Nursing Home Reform Act and is generally not responsible for overseeing the activities of nursing facilities, the CFPB is responsible for issuing rules regarding and enforcing compliance with the FDCPA and FCRA.[12] The FDCPA and FCRA can also be enforced by other federal government agencies and states,[13] and through private actions brought by consumers.[14] The CFPB is issuing this *Circular* to emphasize that certain practices involving the collection of nursing home debts can violate the FDCPA and FCRA.[15]

Nursing facilities and their third-party debt collectors at times seek to collect residents' debts from relatives and other third parties when the resident cannot afford to pay. The nursing facilities reportedly collect unpaid balances, often after the resident's discharge or death, directly from third parties. If the third party refuses to pay the arrears, some nursing facilities

[10] *See, e.g.*, *Manor of Lake City, Inc. v. Hinners*, 548 N.W.2d 573, 576 (Iowa 1996); *Village at the Greene v. Smith*, 2020-Ohio-4088, ¶ 25 (Ohio Ct. App. 2020); *Knight v. John Knox Manor, Inc.*, 92 So. 3d 111, 120 (Ala. Civ. App. 2012).

[11] *See, e.g.*, Ala. Admin. Code r. 560-X-10-.02(9); 410 Ind. Admin. Code 16.2-3.1-16(b); *see also* D.C. Mun. Regs. tit. 22, § B3200.1 (incorporating requirements of federal regulations implementing Nursing Home Reform Act).

[12] *See, e.g.*, 12 U.S.C. 5481(12)(F), (H), 5512(b), 5514(c); 15 U.S.C. 1681s(b)(1)(H), (e) (FCRA); 15 U.S.C. 1692*l*(b)(6), (d) (FDCPA).

[13] 15 U.S.C. 1681s (FCRA); 15 U.S.C. 1692*l* (FDCPA). States can directly bring actions under FCRA, *see* 12 U.S.C. 1681s(c), and can also bring actions under the Consumer Financial Protection Act (CFPA) against "covered persons" and "service providers" based upon violations of federal consumer financial laws, including the FDCPA and FCRA, *see* Authority of States to Enforce the Consumer Financial Protection Act of 2010, 87 FR 31940 (May 26, 2022).

[14] 15 U.S.C. 1681n, 1681*o* (FCRA); 15 U.S.C. 1692k (FDCPA).

[15] The Bureau notes that practices involving the collection of invalid nursing home debts may violate other laws not discussed in this *Circular*. For example, the collection of invalid nursing home debt may violate state law analogues of the FDCPA and state laws prohibiting unfair, deceptive, or abusive acts or practices. In addition, to the extent that persons collecting nursing home debts are "covered persons" or "service providers" under the CFPA, *see* 12 U.S.C. 5481(6), (15)(A)(i), (iv), (x), (26), the collection of invalid nursing home debts would typically violate the CFPA's prohibition on engaging in any unfair, deceptive, or abusive act or practice. 12 U.S.C. 5531(a), 5536(a)(1)(B); *see also CFPB v. CashCall, Inc.*, 35 F.4th 734, 746 (9th Cir. 2022) (affirming ruling that defendant "engaged in a deceptive practice by collecting payments on loans that were invalid"). Furthermore, actions taken with respect to nursing home debts may violate other provisions of the FDCPA and FCRA not specifically addressed in this *Circular*.

hire debt collectors to demand payment, report the debt to consumer reporting companies as the third party's personal debt, and sue the third party in court.

An amount that is owed or allegedly owed for nursing facility services is a "debt" under the FDCPA because it arises out of a consumer transaction.[16] When a nursing facility claims that a resident's bill has not been paid, it may engage a third-party debt collector subject to the FDCPA and Regulation F to collect the resident's debt,[17] including when the facility claims that a third party is personally financially responsible for the debt. Among other things, the FDCPA and Regulation F prohibit the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt."[18] That prohibition includes, for example, using a false representation of the "character, amount, or legal status of any debt"; a "threat to take any action that cannot legally be taken or that is not intended to be taken"; and "any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer."[19]

The prohibition on misrepresentations includes misrepresenting that a consumer must pay a debt that arises from a contract provision that is illegal and unenforceable under federal or state law. Thus, a debt collector, including a law firm in litigation,[20] that represents that a third party must personally pay a nursing facility resident's debt may violate the prohibition on misrepresentations where the debt is invalid under the Nursing Home Reform Act, its implementing regulation, or one of its state law analogues.[21]

The CFPB is also aware that debt collectors sometimes claim that a third party, such as a relative of the resident, is personally liable for the resident's debt because the third party engaged in financial wrongdoing in relation to the resident's resources. In some cases, debt collectors make such allegations in debt collection lawsuits without having any factual basis for the allegations,

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[16] *See* 15 U.S.C. 1692a(5) (defining "debt" as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment"); *see also Eades v. Kennedy, PC Law Offices*, 799 F.3d 161, 170 (2d Cir. 2015).

[17] 15 U.S.C. 1692a(6) (defining "debt collector"); 12 CFR 1006.2(i) (same).

[18] 15 U.S.C. 1692e; 12 CFR 1006.18(a).

[19] 15 U.S.C. 1692e(2), (5), (10); *accord* 12 CFR 1006.18(b)(2)(i), (c)(1), (d).

[20] Attorneys who regularly engage in collecting consumer debts, including through litigation, are "debt collectors" under the FDCPA. *See Heintz v. Jenkins*, 514 U.S. 291 (1995).

[21] Some nursing facilities may claim that family members are responsible for residents' costs under state filial support or necessaries statutes. *See* Katherine C. Pearson, *Filial Support Laws in the Modern Era: Domestic and International Comparison of Enforcement Practices for Laws Requiring Adult Children to Support Indigent Parents*, 20 Elder L.J. 269 (2013), https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1034&context=fac_works. This *Circular* does not address such claims made under state law.

and the allegations prove to be false. A debt collector may violate the FDCPA's prohibition on misrepresentations by making a false, baseless allegation in a lawsuit that a third party engaged in financial wrongdoing as a means to hold them personally liable for a resident's debts.[22]

The FCRA and its implementing Regulation V impose obligations on consumer reporting companies and on debt collectors who furnish information to consumer reporting companies, including obligations relating to the accuracy of information in consumer reports. For example, a furnisher must "establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the information relating to consumers that it furnishes to a consumer reporting agency."[23] Furnishers must also investigate consumer disputes concerning the accuracy of the information furnished,[24] and are prohibited from furnishing inaccurate information to any consumer reporting company after receiving notice from a consumer that particular information is inaccurate.[25] In addition, consumer reporting companies "shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates"[26] and must investigate consumer disputes.[27]

It is inaccurate to report that a consumer owes a debt when the debt is based on an illegal contract term. Thus, a debt collector who furnishes information about nursing home debts, or a consumer reporting company that includes such information in a consumer report, may violate FCRA and Regulation V if those debts are invalid and unenforceable under the Nursing Home Reform Act, its implementing regulation, or one of its state law analogues. A furnisher or consumer reporting company also violates FCRA or Regulation V if it fails to meet its dispute obligations with respect to information related to such debts.

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[22] Attorneys collecting debts on behalf of nursing facilities may also independently violate the FDCPA's prohibition on misrepresentations if their law firm alleges that a third party owes the debt in pleadings or other communications that the firm's attorneys were not "meaningfully involved" in preparing. *Nielsen v. Dickerson*, 307 F.3d 623, 635 (7th Cir. 2002); *see also Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300-07 (2d Cir. 2003); *CFPB v. Frederick J. Hanna & Assocs.*, 114 F. Supp. 3d 1342, 1362-69 (N.D. Ga. 2015).

[23] 12 CFR 1022.42(a).

[24] 15 U.S.C. 1681s-2(a)(8), (b); 12 CFR 1022.43(a).

[25] 15 U.S.C. 1681s-2(a)(1)(B). The consumer must send the notice to the address specified by the furnisher for such notices. *Id.* If the furnisher has not specified such an address, then the furnisher is subject to FCRA's general prohibition against "furnish[ing] any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate." 15 U.S.C. 1681s-2(a)(1)(A).

[26] 15 U.S.C. 1681e(b).

[27] 15 U.S.C. 1681i.

About *Consumer Financial Protection Circulars*

Consumer Financial Protection Circulars are issued to all parties with authority to enforce federal consumer financial law. The Consumer Financial Protection Bureau (CFPB) is the principal federal regulator responsible for administering federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other "enumerated consumer laws," 12 U.S.C. 5481(12). However, these laws are also enforced by state attorneys general and state regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.*, 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with $10 billion or less in assets). Some federal consumer financial laws are also enforceable by other federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4). *Consumer Financial Protection Circulars* are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See*, *e.g.*, 12 U.S.C. 5552(b) (consultation with CFPB by state attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.