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*This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.*

## New Transfer of Assets and Applied Income Law Provides Boost for Nursing Home Debt Collection

Starting on October 1, 2013, nursing homes will benefit from two new options for tackling bad debts. The two options are set forth in Sections 128-130 of Public Act No. 13-234 ("the Act"), the omnibus law implementing the state's human services budget for fiscal years 2014 and 2015. The Act authorizes nursing homes to bring civil actions targeting two troubling and increasingly common nursing home bad debt scenarios:

- A nursing home resident applies for Medicaid, is subject to a penalty period due to a willful transfer of assets and then fails to pay the nursing home for care provided during the penalty period.
- A Medicaid resident, or someone with control over the resident's applied income, willfully fails to pay applied income to the nursing home.

The Act recognizes that residents often are not solely to blame in these situations and therefore allows nursing homes to sue others involved in asset transfers or failure to pay applied income, including individuals who may not have signed the admission agreement on behalf of the resident:

- In the case of asset transfers, the Act authorizes nursing homes to sue individuals who willfully transfer assets resulting in a penalty period, as well as those who receive the transferred assets with knowledge of the purpose behind the transfer.

- For applied income debts, it permits nursing homes to sue a resident, or an individual authorized under the law to control a resident's applied income, when either party willfully fails to pay or withholds applied income as long as the nursing home provides written notice to the resident or to an individual controlling his or her assets. The written notice must state the amount of applied income that must be paid, inform the recipient of his or her obligation to pay applied income to the facility and warn the recipient that failure to pay could result in a lawsuit.

The two new litigation options grew out of a multiyear effort by LeadingAge Connecticut to convince the General Assembly to address the need to assist nursing homes facing bed debts under the two scenarios. Although the elder law bar and legal services advocates initially opposed the legislation, the Co-Chairs of the General Assembly's Human Services Committee, Senator Gayle Slossberg and Representative Cathy Abercrombie, led a successful mediation process resulting in compromise language that received the support of all parties.

The Act targets truly egregious situations involving willful transfers of assets and willful failure to pay applied income. As such, it may not be an appropriate option for all bad debt situations. Nevertheless, it gives nursing homes a boost in their efforts to effectively manage and pursue bad debts.

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This Advisory first provides a detailed summary of the new provisions. It then lists the steps that we recommend you take to incorporate the two new litigation options into your facility's debt management process and to comply with the applied income notice requirement.

**DETAILED SUMMARY**

The following summary describes the two new litigation options available to nursing homes for collecting bad debts. Nursing homes may begin using these options starting on October 1, 2013.

**New Transfer of Assets Cause of Action**

The Act provides that any transfer or assignment of assets that results in a penalty period creates a debt due and owing to a nursing home for the unpaid cost of care provided during the penalty period to a resident who has been subjected to a penalty period.

- The nursing home may sue to recover the debt for such unpaid care costs against the asset transferor or transferee, so long as (1) the recovery does not exceed the fair market value of the asset at the time of transfer; and (2) the asset transfer that triggered the penalty took place no earlier than two years before the date of the resident's Medicaid application.
- This section of the Act does not affect other rights or remedies of the parties. As a result, a nursing home is not required to assert this new statutory cause of action to collect a resident's debt. Indeed, the remedies under the Act may not be appropriate in all cases. In addition, the

nursing home is not required to use this remedy exclusively. The nursing home may allege claims authorized by statute or common law (such as breach of contract) in addition to a claim under the Act.

- The court may award actual damages, court costs and reasonable attorneys' fees to a nursing home if the court determines, based upon clear and convincing evidence, that the defendant incurred a debt to the facility by (1) willfully transferring assets; (2) receiving assets with knowledge of the purpose of the transfer; or (3) making a material misrepresentation or omission concerning the assets. If the defendant successfully defends the suit, he or she will be awarded reasonable attorneys' fees and court costs.
- Any court, including a Probate Court, may order that the assets be held in a constructive trust to ensure that the nursing home is paid.
- A nursing home may not bring a claim under this new cause of action against a conservator who made transfers on behalf of a resident with Probate Court approval.

**New Applied Income Notice Requirement and Cause of Action**

In addition to creating a new cause of action relating to debts owed during Medicaid penalty periods, the Act authorizes a separate cause of action for failure to pay applied income and sets forth a new applied income notice requirement.

- The Act defines "applied income" as "the income of a Medicaid recipient that is required, after exhaustion of all appeals, to be paid to a nursing home facility for the cost of care and services." The definition notes that the amount of applied income may be adjusted because of the Medicaid recipient's community spouse minimum monthly needs allowance or because of other provisions in state or federal law.
- Under the Act, a nursing home must provide notice, in writing, to each Medicaid recipient, and any person authorized by law to be in control of the recipient's applied income ("Applied Income Notice"). The Applied Income Notice must indicate (1) the amount of applied income due; (2) the recipient's legal obligation to pay the applied income to the nursing home; and (3) that failure to pay the applied income to the nursing home not later than ninety days from receipt of the notice may result in a civil action. *Note: This requirement applies regardless of whether a facility plans to bring a claim to collect applied income. Starting on October 1, 2013, nursing homes must provide this notice to all Medicaid recipients residing in their facilities.*

- The Applied Income Notice requirement resulted from the process of negotiation and compromise. While it adds yet another regulatory obligation for nursing homes, it aims to benefit them in two respects:

**Deterrence:** The Applied Income Notice will hopefully deter some residents and

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responsible parties from shirking their obligations by highlighting the legal obligation and risk of a lawsuit; and

**Speedier resolution/enhanced ability to make case at trial:** The Applied Income Notice will make it easier for the facility to prove that the defendant is liable and therefore make it easier to settle the case, or if that is not possible, to prevail at trial.

- The nursing home may bring a civil action to recover the applied income against a Medicaid recipient, or a person with legal access to the recipient's applied income who acted with intent to (1) deprive the recipient of the income; or (2) appropriated the applied income; for himself, herself or for a third person.
- If the Medicaid recipient asserts that the applied income is needed to increase the minimum monthly needs allowance for his or her community spouse, the nursing home may not sue until the recipient, the spouse or the legal representative of either has exhausted all appeals.
- The Act states that this new cause of action is in addition to all other remedies authorized by statute and common law. As in the case of the new transfer of assets cause of action, a nursing home is not required to avail itself of this new statutory cause of action to collect a resident's applied income debt. In addition, the nursing home is not required to use this remedy exclusively. The nursing home may allege claims authorized by statute or common law (such as breach of contract) in addition to a claim under the Act.

- If the court determines, based upon clear and convincing evidence, that the defendant willfully failed to pay or withheld the applied income for longer than ninety days after receiving the written notice from the nursing home, then the court may award the amount of the applied income owed, reasonable attorneys' fees and court costs to the nursing home. If the defendant successfully defends the suit, he or she will be awarded court costs and reasonable attorneys' fees.
- This section does not apply to a conservator who transfers income or principal with Probate Court approval.
- The nursing home may not sue until thirty days after it gives written notice of the suit to any person who received the required Applied Income Notice. If the person did not receive the Applied Income Notice, the nursing home must wait to sue for ninety-one days after providing the resident notice of the suit and the Applied Income Notice.

#### Requirement to Provide Filings to the Attorney General and the Department of Social Services

The Act requires a nursing home to send copies of any complaints, judgments or decrees to the AG and DSS.

#### RECOMMENDED ACTION STEPS:

- ☐ Educate your billing and collections staff, consultants and legal counsel about the new law.
- ☐ Develop the Applied Income Notice. Please [click here](#) to view a sample notice

that you can adapt for this purpose. If you would like a word version of the Applied Income Notice emailed to you, please contact Jennifer Paquin at 203.498.4358 or [jpaquin@wiggin.com](mailto:jpaquin@wiggin.com). Make sure that the resident, or individual with legal authorization to control the resident's applied income, signs the form to acknowledge and document receipt.

- ☐ Distribute the Applied Income Notice on or before October 1, 2013 to each Medicaid resident and to each individual with legal authorization to control the resident's applied income.
- ☐ Establish a procedure or system to ensure that, after October 1, 2013, the Applied Income Notice will be given to each resident who becomes eligible for Medicaid and to each individual with legal authorization to control the resident's applied income.
- ☐ Retain all original signed Applied Income Notices. This is critical for two reasons: (1) to verify compliance with the Applied Income Notice requirement; and (2) because the original signed notice is essential evidence to support any legal claim against a resident or person with control over the resident's applied income.
- ☐ Establish procedures to ensure that the following steps are taken before bringing any claim for failure to pay applied income under the Act:
  - Verify that the Applied Income Notice was given to each person that you intend to sue.

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- Once you verify that the Applied Income Notice was given to each person you intend to sue, provide each person who received the Applied Income Notice with a written notice that you intend to sue and wait thirty (30) days to initiate the lawsuit.
  - If the Applied Income Notice was not given to any individual that you plan to sue, provide the Applied Income Notice to that individual with notice that you intend to bring a lawsuit. Wait for ninety (90) days before filing the lawsuit.
- ❑ Make sure that you or your lawyer sends copies of any civil complaints brought under either the transfer of assets cause of action or the applied income cause of action, as well as any judgments or decrees in those cases, to the Attorney General's Office and to the Department of Social Services.
- ❑ Since monthly applied income amounts can change from time to time, we have included a sentence in the sample Applied Income Notice informing the Notice recipient that the amount may change. The Act does not require that a facility issue a new Applied Income Notice each time the monthly applied income amount changes, and so you are not required to issue a new notice in these circumstances. Of course, you can issue a new Applied Income Notice in these cases, but having to issue the Notice each time applied income amounts change could become operationally burdensome. Moreover, if you establish this procedure and do not follow it, then you may have trouble proving that you are entitled to unpaid amounts if you have to litigate a claim. As an alternative approach, you could make sure that (1) your Applied Income Notice contains the sentence we have included in the sample Notice indicating that monthly applied income amounts may change; and (2) you have documentation in the file to show that the resident and any person with legal authority to control the resident's income were notified of any changes in applied income (e.g. copy of new invoice sent or Department of Social Services notice of change in amount of applied income).

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