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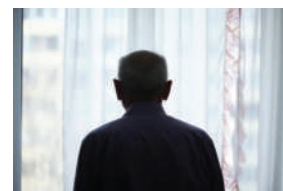
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Nursing Homes and Responsible Party Litigation—Subverting the Prohibition Against Requiring Third-Party Guarantees

Is it Time for the Legislature to Fix the Statute?

By Donald F. Browne Jr.

A nursing home is not required to accept every applicant. Whether to accept a new resident is an individual business decision. A resident without the financial resources to privately pay the nursing home will eventually need to apply for Medicaid. When the resident is approved, Medicaid sets a date of eligibility. The nursing home knows that if a resident owes them for three months or less when approved for Medicaid, the nursing home can still expect to be paid for all of the resident's care. Through retroactive eligibility, Medicaid will pay if the applicant is deemed otherwise eligible during the three-month period prior to the date of eligibility.¹ However, for the nursing home, accepting a resident that will need Medicaid includes an inherent risk that ultimately, Medicaid might not pay for all of the care provided to the resident.

Nursing Homes are Prohibited from Requiring a Third-Party Guarantee

Nursing homes in New Jersey are governed by the Federal Nursing Home Reform Act and New Jersey's Nursing Home Act (NHA).² The NHA was passed in 1976. In 1997, the Legislature added to the NHA by passing N.J.S.A. 30:13-3.1(a)(2) ("3PG Statute"). The 3PG Statute prohibits nursing homes from requiring that a resident's family member or friend guarantee payment.³ The 3PG Statute is essentially a mirror image of the federal statute prohibiting third-party guarantees of payment.⁴ Both statutes do contain an exception—if an agent has legal access to

a resident's income or resources, the nursing home may require the agent to sign a contract agreeing to pay the facility from the resident's income or resources, without the agent incurring personal financial liability.⁵

Despite laws prohibiting third-party guarantees, a recent NPR article highlighted a disturbing trend where nursing homes were increasingly filing suit against the family and friends of its residents.⁶ These lawsuits are known as responsible party cases. In a responsible party case, the nursing home alleges that the resident's family or friends are personally obligated to satisfy the bill that the resident is not able to pay. The author of the NPR article, Noam Levey, a senior correspondent for Kaiser Health News, contends that "the lawsuits illuminate a dark corner of America's larger medical debt crisis."⁷

Signing the Admission Agreement

Many nursing home residents have designated a family member or friend as their agent under a durable power of attorney. The process of finding a nursing home is often stressful and confusing for the agent. Admission to a nursing home often follows an unplanned hospitalization, usually after a fall or other serious medical event.

During their first visit to the nursing

home, the agent is often asked to sign an array of complicated admission documents on behalf of the resident. The agent often describes feeling pressured by the nursing home staff to sign the documents at that time. The primary document setting forth the contract between the nursing home and resident is the admission agreement. Without thoroughly reviewing the admission agreement and speaking to a lawyer, most agents are not able to comprehend all of its terms. Regrettably, the agent usually just decides to sign the documents at that time. The agent often describes relying on the assumption that that they were only signing on behalf of the resident, and not in any type of individual capacity.

What is a Responsible Party?

If the agent assumes that they were only signing the admission agreement on behalf of the resident, it can later prove costly. The admission agreement will identify the resident and the nursing home as parties to the contract. The admission agreement will also contain a clause designating the resident's agent as the "responsible party." It will contain contractual terms and representations that only apply to the responsible party. The admission agreement will not provide for any type of legal consideration for the responsible party. If a lawsuit is ever filed against the responsible party, they are often dismayed to learn that assisting the resident by signing the admission agreement has become the basis for litigation seeking to recover their personal assets.

The admission agreement may contain preprinted representations about the resident's finances. One common representation is that the responsible party represents that the resident has not made any gifts in the last five years. The responsible party rarely possesses the



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personal knowledge needed to confirm whether such a representation was accurate. Often, the responsible party does not even realize the significance of this type of representation in the admission agreement.

Whether the resident made any gifts is crucial because a Medicaid applicant is prohibited from gifting any assets during the five-year period before the date that their application is filed. Any gifting by the resident made during the five-year look back period will usually result in an ineligibility period. An ineligibility period is a penalty calculated by Medicaid that is expressed as a certain number of days. The ineligibility period starts on the first day of eligibility. Medicaid will not start paying for the resident's care until the ineligibility period is over. Imposition of an ineligibility period often means that the nursing home will not get paid for some of the care provided to the resident.

The admission agreement will also contain contractual obligations for the responsible party. One example is a requirement that the responsible party must claw back any gifts that the resident made during the look back period. Another example is a requirement that the responsible party apply for Medicaid on the resident's behalf. The Medicaid application process is difficult. It can take many months. It includes obtaining at least five years of financial records, as well as corresponding with a Medicaid caseworker. Many times, the caseworker will request that the responsible party provide explanations about some of the financial transactions made by the resident during the look back period. Often, the responsible party does not possess the personal knowledge to provide the explanations. An inability to explain legitimate transactions can also lead to an ineligibility period, and the situation where the nursing home might not get paid for all of the care provided to the resident.

Responsible Party Litigation

Some nursing homes treat the ability to file a responsible party case against the resident's agent as an insurance policy for the times when Medicaid imposes an ineligibility period. If the ineligibility period is because of past gifting by the resident, the responsible party case will allege breach of contract against the responsible party for falsely representing in the admission agreement that the resident had not made any gifts in the last five years. If the Medicaid application process takes longer than expected and resident's assets are exhausted before the process is complete, the responsible party case will allege negligence against the responsible party for their inability to get approval from Medicaid sooner.

In responsible party cases, the nursing homes calculate damages as the amount not paid by Medicaid. The remedy sought by the nursing homes is the same amount that they would claim if it was legal for them to require a third-party guarantee. Which begs the question, are responsible party cases just a veiled attempt to subvert the prohibition against nursing homes requiring third-party guarantees?

In responsible party cases, the nursing homes seek to obtain the personal assets of the responsible party. Their responsible party strategy is bolstered by the fact that whether or not the claims have merit, a portion of responsible party cases will result in a default judgment against the responsible party. Which begs a similar question, are responsible party cases just a veiled attempt to subvert the prohibition against nursing homes seeking to recover from a responsible party's personal assets?

Manahawkin Convalescent v. O'Neill

In 25 years since its passage, only one published case in New Jersey addresses the 3PG Statute. In *Manahawkin Conva-*

lescent v. O'Neill, the New Jersey Supreme Court considered whether a collection action filed by a nursing home against the daughter of one of its residents violated the 3PG Statute.⁸

Admission Agreement and Collection Action

In 2007, Elise Hopkins was admitted to Manahawkin Convalescent Center (Manahawkin). Hopkins' daughter Frances O'Neill was her agent under a durable power of attorney. O'Neill signed the admission agreement, which designated her as responsible party. O'Neill did not sign the private pay guarantor portion of the admission agreement. The admission documents also contained a Resident's Bill of Rights (RBR), which is relevant to this discussion because it includes language parroting the prohibitions contained in the 3PG Statute.

Following Hopkins' death in 2008, O'Neill was appointed executrix. In March 2009, O'Neill received a threatening letter from Manahawkin's collection department stating that she, as the responsible party, had "the obligation to pay any debts owed by [Hopkins] to the facility."⁹ Manahawkin's collection letter warned O'Neill that her failure to contact Manahawkin to arrange payment "will leave us no choice but to proceed with legal action against you as the responsible party," and that Manahawkin would sue O'Neill "for the monies due with [accrued] interest plus court costs and legal fees."¹⁰ The collection letter further added that O'Neill would be "reported to the credit rating agencies," and that the letter was the only notice that she would receive "prior to the commencement of legal proceedings."¹¹

Eight days after mailing the collection letter, Manahawkin filed a responsible party case against O'Neill in the Special Civil Part of the Law Division. Manahawkin's complaint named O'Neill as the

sole defendant and sought payment of Hopkins' unpaid balance of \$878.20. Despite what appeared to be attempts by Manahawkin to induce O'Neill to pay Hopkins' unpaid balance with her personal assets, Manahawkin argued that it only intended to demand that O'Neill use any assets of Hopkins' estate under her control to satisfy Hopkins' account balance.¹² This begs the question, if the debt was owed by Hopkins' estate, why was the estate was not named as the defendant?

Affirmative Claims Alleging Violation of the NHA

O'Neill filed a responsive pleading which contained counterclaims alleging Manahawkin violated two consumer statutes.¹³ Both of O'Neill's counterclaims were tethered to her ability to establish that Manahawkin violated the NHA. O'Neill's claims were premised upon three alleged violations of the 3PG Statute. First, O'Neill contended Manahawkin tried to require her to spend her personal funds to pay her mother's bills in violation of the terms of the admission agreement. Second, O'Neill asserted that Manahawkin's collection letter constituted an attempt to coerce her into using her own assets to pay the facility's final bill. Third, O'Neill contended that Manahawkin's complaint sought a remedy against O'Neill in her individual capacity, rather than in her fiduciary role as executrix of Hopkins' estate.¹⁴

Law Division

The matter was transferred from Special Civil to the Law Division. In September 2009, Manahawkin voluntarily dismissed its complaint with prejudice. The court considered O'Neill's counterclaims which were tethered to her ability to establish that Manahawkin violated the NHA. The court concluded that Manahawkin did not violate the NHA and

granted summary judgment dismissing O'Neill's claims. The appellate division affirmed. The New Jersey Supreme Court granted certiorari.¹⁵

Supreme Court

As far back as 2013, when *Manahawkin* was argued before the Court, it was well known that responsible party cases are often unfair to the defendant. Legal Services of New Jersey (LSNJ) highlighted this practice in an amicus curiae brief filed with the Court. LSNJ alleged that in an effort to circumvent the NHA, nursing homes routinely create third-party liability for costs incurred by residents covered by Medicaid by designating responsible parties in admission agreements, and pursuing those parties personally for residents' unpaid bills.¹⁶

O'Neill argued that by its plain language, the admission agreement violated the NHA. O'Neill cited a provision in the admission agreement that authorized Manahawkin to place a lien on the property of the resident and responsible party if the nursing home bill was unpaid.¹⁷ The Court reviewed the admission agreement and noted that Manahawkin should have explained to O'Neill the specific obligations that may be imposed upon a responsible party, consistent with the NHA, and the remedies available to Manahawkin in the event of a default of those obligations.¹⁸ The Court noted that the relevant NHA provision was summarized in the RBR, and Manahawkin should have incorporated similar language into the admission agreement.¹⁹ The Court further noted that the admission agreement would have better served both parties had it specifically addressed the status of a responsible party who acts on behalf of a resident in a Medicaid certified nursing home.²⁰

O'Neill also argued that Manahawkin's collection letter and lawsuit violated the 3PG Statute. The Court

noted that Manahawkin's collection letter and complaint failed to clearly articulate the nursing home's legal rights.²¹ The Court noted that the collection letter only provided a partial explanation of Manahawkin's potential cause of action against O'Neill.²² The Court noted that Manahawkin did not explain to O'Neill that it only "intended to demand nothing more than that Hopkins' account balance be paid by O'Neill in her fiduciary capacity, using the assets of Hopkins' estate under her control."²³

The Court was likewise critical of Manahawkin's complaint, which was prepared by a non-lawyer. The Court noted that Manahawkin's cause of action was not defined in sufficient detail in the complaint and was not properly pled.²⁴ The Court noted that Manahawkin's complaint should have made clear that its claim for Hopkins' account balance was either asserted against O'Neill in her fiduciary capacity as executrix, or against O'Neill individually based solely upon her contractual obligation to arrange for the payment of Hopkins' bills.²⁵ Instead, making no distinction between O'Neill's potential liability as a fiduciary and her potential personal liability for Hopkins' bills, Manahawkin named O'Neill as the defendant.²⁶ The Court reminded that Manahawkin's decision to use the services of a non-lawyer to draft its collection documents did not obviate the need for those documents to properly identify the defendant and to define the legal right that the nursing home sought to vindicate.²⁷

Manahawkin claimed that its collection efforts were only intended to collect any assets of Hopkins' estate over which O'Neill exercised control.²⁸ This assertion conflicts with Manahawkin's threat to report O'Neill to the credit rating agencies. This assertion likewise conflicts with Manahawkin naming O'Neill as the

sole defendant in the complaint, without any designation that the claims were only against her in a fiduciary capacity. If Manahawkin’s claim about its intent was true, Hopkins’ estate would have been named as the defendant, and the executrix, O’Neill, would have been served with the complaint. O’Neill would have defended that lawsuit on behalf of the estate, without any basis to file a counterclaim against Manahawkin.

Contract Language v. Manahawkin’s Actions—What Controls?

Instead of focusing on whether Manahawkin’s collection related actions violated the 3PG Statute, the Court focused on the plain language of the admission agreement. The Court ruled that Manahawkin did not violate the NHA.²⁹ The Court concluded that the terms of the admission agreement did not require O’Neill to “commit[...her personal assets to pay for the resident’s care.”³⁰ The Court noted that the RBR provided to O’Neill explained that a third party is only obligated to pay for care from the resident’s assets.³¹ Last, the Court repeated that Manahawkin had asserted that its collection efforts were limited only to Hopkins’ assets over which O’Neill exercised control. The Court held that Manahawkin sought relief based on a contract that was expressly permitted by the 3PG Statute because the statute authorizes a nursing home to require a third party to agree to provide payment from the resident’s personal funds without incurring personal liability.³²

The Court never specifically addressed why its criticisms of Manahawkin’s collection letter and complaint did not equate to an attempt to obtain O’Neill’s personal assets in violation of the NHA. If O’Neill had not filed a responsive pleading, Manahawkin would have obtained a default judgment against her personal assets. It is likewise not clear

why the filing of a lawsuit where O’Neill was the sole defendant did not violate of the 3PG Statute.

Time to Consider a Change?

Manahawkin ended with the following caveat, “[w]e urge counsel for this important industry, serving elderly and disabled residents and their families, to ensure that nursing home contracts are prepared—and collection practices conducted—in a manner that fosters a clear understanding of each party’s rights and remedies as it complies with the law.”³³ As highlighted in the NPR article, in the time since *Manahawkin* was decided, it appears that the nursing home industry has failed to adopt contracts and collection practices that foster a clear understanding of each party’s rights and remedies. Conversely, some in the nursing home industry have refined a legal strategy designed to avoid the 3PG Statute, while still seeking to recover the personal assets of the resident’s family member or friend.

When it was passed in 1997, the 3PG Statute appeared to be an attempt by the Legislature to protect the family and friends of nursing home residents from an unfair business practice. Today, the 3PG Statute does not protect these individuals. Without the ability to hold a nursing home accountable, a responsible party who successfully defends a responsible party case will still be required to spend significant time and money defending a claim that should be illegal. The time has come for the Legislature to take a second look at whether the 3PG Statute should be strengthened to provide additional protections for the family and friends of nursing home residents. ■

Endnotes

1. N.J.A.C. 10:71-2.16.
2. Federal Nursing Home Reform Act,

- 42 C.F.R. §§ 483.1-483.480; and New Jersey’s Nursing Home Act, N.J.S.A. 30:13-1 to -17.
3. N.J.S.A. 30:13-3.1(a)(2).
4. Compare N.J.S.A. 30:13-3.1(a)(2) and 42 U.S.C. § 1395i-3(c)(5)(A)(ii).
5. *Id.*
6. Nursing homes are suing friends and family to collect on patients’ bills, Noam Levey, July 28, 2022, npr.org/sections/health-shots/2022/07/28/1113134049/nursing-homes-are-suing-friends-and-family-to-collect-on-patients-bills.
7. *Id.*
8. *Manahawkin Convalescent v. O’Neill*, 217 N.J. 99 (2014).
9. *Id.* at 109.
10. *Id.*
11. *Id.*
12. *Id.* at 126.
13. Consumer Fraud Act, N.J.S.A. 56:8-1 to -20; and the Truth-in-Consumer Contract, Warranty, and Notice Act, N.J.S.A. 56:12-14 to -18.
14. *Manahawkin* at 117-118.
15. 212 N.J. 431 (2012).
16. *Id.* at 114.
17. *Id.* at 113.
18. *Id.* at 126.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 120.
25. *Id.*
26. *Id.*
27. *Id.* at 127.
28. *Id.* at 117-118.
29. *Id.* at 120.
30. *Id.* at 119.
31. *Id.*
32. *Id.* at 120.
33. *Id.* at 127.