

DEFENSIVE
STRATEGIES

MEDICAL DEBT

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DOES THIS PRESENTATION EVEN MATTER?

- CHARITY CARE: doesn't charity care cover medically needy clients? Aren't non-profit hospitals required to provide charity care?
- MEDICAID: doesn't Medicaid take care of these debts for covered clients?
- COLLECTIONS: are medical debt collections even egregious or problematic?
- CREDIT REPORTING: aren't there special protections for medical debts?
- RELEVANT: is anyone actually pursuing litigation against clients for these debts?
- Do I really want to litigate against medical institutions or non-profit hospitals?

CHARITY CARE ISSUES

- ❑ Doesn't charity care cover medically needy clients?
 - ❑ May only cover part of the costs of treatment (may be percentage based)
 - ❑ The costliest part of treatment may be excluded
 - ❑ **Provider or Provider Group exempted from charity care (contractor carveout)**
- ❑ But wait, aren't non-profit hospitals required to provide charity care? (in the ACA *state law developments*)
 - ❑ **Limited** requirements: must develop a policy, must discount the services (not chargemaster), cannot take "extraordinary" collection attempts without screening for charity care (lawsuit)
 - ❑ Not actually required to provide any certain minimum standard

<u>Providers covered by FAP</u>	<u>Providers not covered by FAP</u>
<p><u>St. Vincent's Family Medical Center</u></p> <p><u>St. Vincent's Ambulatory Care Inc.</u> (Ascension Medical Group)</p> <p><u>Emergency Medical Specialists</u></p> <p><u>HNI Medical Services</u></p> <p><u>McClow, Clark, & Berk Radiology Services</u></p> <p><u>St. Vincent's Pathology Associates</u></p> <p><u>OB Hospitalist Group, LLC</u></p> <p><u>Cancer Specialist of North Florida</u></p> <p><u>St. Vincent's Healthcare Consolidated Labs</u></p>	<p><u>Borland-Groover Clinic</u></p> <p><u>Heekin Clinic</u></p> <p><u>North Florida Surgeons</u></p> <p><u>Southeast Orthopedic Specialist</u></p> <p><u>McIver Clinic</u></p> <p><u>Jacksonville Orthopedic Institute</u></p> <p><u>St. Luke's Emergency Care Group</u></p> <p><u>North FL Gastroenterology</u></p> <p><u>Jacksonville Radiology Associates</u></p> <p><u>Fl Anesthesia Associates PA</u></p> <p><u>North FL Anesthesia Consultants</u></p>

MEDICAID COVERAGE

- Doesn't Medicaid cover these debts?
 - Yes, it is illegal for a provider to bill or collect from a Medicaid recipient for all or part of the costs of **covered services**, but it still happens a lot. Fla. Stat. §409.907(3)(j).
 - Provider must advise of cost if not covered
 - Provider may not seek reimbursement if untimely or improperly billed Medicaid (12 mo.)**
 - Failure to properly bill Medicaid may not be noticed until LATE**
 - No bills ever sent
 - Then blindsided with a lawsuit 2 years, 11 months and 364 days later

Have deeper questions on this? [Florida Health Justice Project](#) is a fantastic resource!

PREVALENCE
OF
COLLECTION
(OR LACK
THEREOF)

- ❑ Are medical debt collections even all that egregious or problematic?
 - ❑ Maybe not prevalent now, but **private equity**...
 - ❑ 6x increase in 10 years of private practice buyouts by PE
 - ❑ 30% of for-profit hospitals owned by PE
 - ❑ Revenue Cycle Management firms (aggressive collection tactics, CFPB complaints)
 - ❑ **All it takes is one provider.**
 - ❑ CFPB data
 - ❑ Messaging to your community may be needed

PREVALENCE OF LITIGATION

- ❑ Is anyone actually suing on these debts?
 - ❑ Poll
 - ❑ All it takes is one provider.
 - ❑ Ex: one provider, over 7 years in one county, 2400 cases filed.
 - ❑ For comparison: in 2023, provider filed ~25% of what LVNV filed)

CREDIT REPORTING

- ❑ Aren't there special protections for medical debts?
Yes, use to your advantage when not properly handled.
- Experian, Transunion and Equifax (Big 3), no credit reporting of:
 - Medical debts with an initial reported balance of **less than \$500** (removed)
 - This first change caused 70% of total medical debt tradelines reported to be removed
 - **Paid** medical debts
 - Unpaid medical debts **less than a year old**
 - Also **veterans** protections: generally (1) non-VA provider when approved by VA and provider billed VA; (2) bills wrongfully charged to veteran by the VA

HOT AND NEW- HB 7089

EFFECTIVE 7/1/2024

“An act relating to transparency in health and human services”

- ❑ Creation of a new medical debt SOL (added to F.S. § **95.11(4)**)
- ❑ Medical debt \$10k personal property exemptions from attachment (creation of F.S. § **222.26**)
- ❑ Waterfall for medical debt collections (creation of F.S. § **395.3011**)(*see next slide*)
- ❑ Transparency of pricing for shoppable services (expansion of F.S. § 395.301)
- ❑ Better timeline for submission of estimate to insurer (fines \$1000 per day)
- ❑ Better EOB deadlines
- ❑ Requirement to disclose if cost-sharing obligation exceeds cash price for uninsured (fines \$500)
- ❑ AHCA enforcement but defenses

BUCKLE UP! F.S. § 95.11(4)

3-YEAR STATUTE OF LIMITATIONS

- *(4) WITHIN THREE YEARS.—An action to collect medical debt for services rendered by a facility licensed under chapter 395, provided that the period of limitations shall run from the date on which the facility refers the medical debt to a third party for collection.*
- Regardless of the cause of action? Medical debt is not a COA.
- “Services rendered **by** a facility”
- Does this include contractors?
- “Run from the date on which the **facility** refers the medical debt to a third party for collection.”
- What constitutes a “third party?”
- Debt buyer only? See new F.S. § 395.3011(1)(a).
- Contracted billing company?
- Can they set their own SOL by just waiting to refer to third party? Or waiting to send notice?

HOT AND NEW- F.S. § 395.3011 EXTRAORDINARY COLLECTION ACTION

ECA cannot be taken to illicit payment:

Before facility has made **reasonable efforts to determine FAP eligibility**, and decide upon FAP application

Before providing **itemized bill** to patient

During **ongoing grievance** process or appeal process

Before insurer's adjudication of claim

For 30 days after **notification that ECA will commence** if no action taken

Must be in writing

Must be sent certified mail or by other traceable delivery

During good faith negotiations or **compliance with payment plan**

Do your due diligence to determine where client is at in this process and/or compliance.

HOT AND NEW- F.S. § 395.3011 EXTRAORDINARY COLLECTION ACTION

- Extraordinary Collection Action by “**licensed facility**”: hospital or ambulatory surgical center (does not include contractors, but isn't the goal transparency?)
- “in relation to obtaining payment of a bill for **care covered under the facility's financial assistance policy [FAP]**” *Get copy of FAP policy, application and facility response.*
- ECAs defined:
 - Selling debt to third party
 - Adverse credit reporting
 - Denying, deferring, or requiring payment before provision of medically necessary care because of prior nonpayment of bill(s) from previous care covered under FAP
 - Actions that require legal or judicial process: liens, foreclosure, attachment, seizure, civil suit, arrest, garnishment

**QUESTIONS/THOUGHTS?
OTHER PITFALLS YOU SEE?
COMMENT IN THE CHAT...**

EARLY INQUIRIES

- Did the client even receive the services?
- Who is suing?
 - Hospital or ambulatory surgical center ("facility")
 - Provider or Provider Group
 - Debt Buyer
- What were the circumstances of the services?
 - Emergency
 - Planned procedure
 - Work or PI Related
- When were the services provided?
- Did the patient have insurance or financial assistance?
 - Medicaid or Private?
 - Charity care?
- What are the theories of liability?
- What are the amounts being claimed owed?

WHO IS THE PLAINTIFF?

- Hospital or ambulatory surgical center
 - Obligation under Fl. Stat. § 395.301(1)(a)(1) to provide information about facility's financial assistance policy, application process, payment plans, discounts, charity care, collections procedures
- Provider
- Debt Buyer
 - FDCPA
 - FCCPA

WHAT WERE THE CIRCUMSTANCES OF THE SERVICES?

- What was their mental state when the services were rendered?
- Was this a **planned procedure** in which services, coverage, and maybe even prices were coordinated? i.e. Labor and delivery, operations
- Did the client get a **written estimate in advance**? Did they pre-pay a deductible?
- Did the client have a **choice in provider**?
- Was an in-network provider demanded?
- Did the client ask to be sent to a specific hospital (i.e. during an ambulance ride)?

WHEN WERE THE SERVICES PROVIDED?

- **Statute of limitations defense *New THREE YEARS***
- **But SOL for other claims may apply if claims brought by contractor**
- Distinguish multiple services being lumped together in one amount
- SOL for each of multiple services rendered
 - Long stay in the hospital
 - Series of operations, imaging, emergency care rendered on different days
- Insurance coverage change over multiple services?

DID THE PATIENT HAVE INSURANCE?

- Has the debt **already been paid** by insurance?
- Medicare or Medicaid?
- VA-authorized community care?
- Does the patient have an **Explanation of Benefits** for the services?
- Did the client pay a copayment and/or satisfy their deductible?
- **Charity Care?** *not insurance* but may have covered the debt (see FAP letter)

WHAT ARE THE THEORIES OF LIABILITY CLAIMED?

- Account Stated
- Open Account
- Unjust Enrichment
- Breach of contract

VALUE OF SERVICES

- Question everything!
- Hospital: if its not a specific fixed sum outlined in the contract, **REASONABLE** pricing is implied. *Giacalone v. Helen Ellis Mem'l Hosp. Found., Inc.*, 8 So. 3d 1232, 1235 (Fla. 2nd DCA 2009).
- NEW: Did co-pays/cost-share **exceed cash price**?
- Hospital: Florida courts have held that the following factors should be considered when determining whether rates were reasonable: (1) an analysis of the relevant **market** for hospital services, including **rates charged by similar hospitals**; (2) the usual and customary rate the hospital **charges and receives** for its services; and (3) the hospital's **internal cost structure**. *Colomar v. Mercy Hospital, Inc.*, 461 F.Supp.2d 1265 (S.D.Fla.2006)
- *Dispute as to the reasonableness of amounts or the actual amounts gets you past summary disposition/judgment*

WHAT ARE THE AMOUNTS BEING CLAIMED OWED?

- The ugly truth: the poorest are charged the highest prices for care (chargemaster). Medicare/Medicaid rates may be under the actual cost of services. Health insurers get their negotiated discounted prices. Hospitals and providers mark up their prices to account for these discounts. *The result is that uninsured are charged the highest rates.*

Date	Patient	SSN	DOB	Provider	Code/Modifier	Description	Billed	Expected	Amount	Balance
2021/03/22	[REDACTED]	[REDACTED]	[REDACTED]	DAVID KOEHLER	33208/	PACEMAKER INSERTION	2440.00	1510.00	2440.00	

- **How much are the patients actually “unjustly enriched” by then?** Make the argument.

WHAT ARE THE AMOUNTS BEING CLAIMED OWED?

- Itemization! You have to dig in on discovery to get this information. Go beyond the statement.
 - **Double** charges (same facility, or provider and facility)
 - Charges for supplies or services that were **never provided**
 - Financial assistance or insurance discounts not applied
 - Insured Individuals
 - Compare **explanation of benefits** to statements
 - In network but charged out of network?
 - Remaining co-pays or deductibles charged at chargemaster rate?

WHAT ARE THE AMOUNTS BEING CLAIMED OWED?

- Payment
 - Patient
 - Insurer
 - Charity care
 - Medicaid
 - Interesting fact: IRS Report - 44% of tax-exempt hospitals admitted to double counting as "bad debt" and "uncompensated care" for purposes of reporting community benefits expenditures

SHOULD I TAKE THE CASE?

JUST TRY! DON'T OVERCOMPLICATE IT.

- Don't discount the **fundamentals**:
 - foundation,
 - hearsay,
 - admissibility of documents,
 - rules of evidence
- Add some **humanity**: it may be the little thing that pushes the judge in your direction.
- Set some depositions!
- Getting lucky: failure to prepare their case, sending coverage counsel that knows nothing, failure to prepare their witness or present a witness, and failure to know the law.

JUST TRY!

- Potential:
 - Dramatically lower settlement amount vs. billed
 - Walkaways for “uncollectible” defendants
 - Walkaways...just because
- They may not have the goods to prove their case.
- The more you dig, you might find nuggets that put systemic issues on your radar.
- Exemplar affidavit
- Witness does not have personal knowledge (voir dire the witness)

DEFENDING ACCOUNT STATED

- Elements
 - Pf. and Def. made a previous transaction that created a financial liability
 - **Def. AGREES that the balance due is correct**
 - Def. promised (expressly or implicitly) to pay the balance
 - The balance remains unpaid
- *Mere presentation of a claim and its retention without objection cannot of itself create a liability*
- **Statement never sent and received, can't be an agreement**
- 4-year SOL, (must be raised in answer or MTD)
- BUT...if small claims, defensive pleadings are not necessary: evidence of the client's disagreement, MTD

DEFENDING UNJUST ENRICHMENT

- Challenge the value/cost of services
- Not exhaustive, just some ideas
- Accord and satisfaction: disputed amounts, patient already paid settlement amount for less than claimed to satisfy the obligation
- Statute of limitations
- Estoppel: patient had insurance, Pf. had actual or constructive notice, Pf. failed to inform patient of potentially uncovered services, services would have been covered, Pf. failed to/improperly billed insurance, patient harmed by reliance on Pf. words or actions
- Note: Plaintiff can *plead* both unjust enrichment and breach of contract

DEFENDING OPEN ACCOUNT

- Uncommon: awkward fit for **single** medical service and patient did not know **who was providing the services**
- “In **commercial transactions**, an “open account” should refer to an **unsettled debt**, arising from items of work or labor, goods sold and other open transactions **not reduced to writing**, the sole record of which is usually the account books of the owner of the demand. ***It should not include express contracts or other obligations that have been reduced to writing.*** *H & H Design Builders, Inc. v. Travelers' Indem. Co.*, 639 So. 2d 697, 700 (Fla. 5th DCA1994)
- “Failure to attach” will probably not carry the day, but
 - raise issue of *lack of itemization* and
 - *reasonableness of charges*
- Consent to Treatment: is it a contract?, cuts both ways, make it work for your case

DEFENDING BREACH OF CONTRACT

- Consent to Treatment: cuts both ways, make it work for your case: ***it's not a contract***
- 5-year SOL
- Watch for issues of foundation for Consent into evidence (contractor not a party to the consent to treatment)
- Usual breach of K defenses but assent of patient could be fertile ground
- Who signed? Who is being sued for breach? Third party POA or relative liability for debt of patient? Circumstances may support unconscionability. (Nursing homes)
- Duress, capacity depending on patient's mental state when they signed
- Language comprehension

ADD DECLARATORY RELIEF



THE ALPHABET SOUP

- FDCPA
- FCCPA
- FCRA

FAIR DEBT COLLECTION PRACTICES ACT: “DEBT COLLECTOR”

- **Threshold question: Are they a “debt collector”?** 15 U.S.C. § 1692a(6) (don't mess this up)
 - Person using interstate commerce or mails
 - Principal purpose collecting debts, or regularly collects/attempts to collect debts
 - Or person collecting own debt but using façade of third person collector
 - Or principal purpose is enforcement of security interests
- But also TEN statutory exclusions
- Usually with medical debt: third-party debt collection agency or attorney, debt buyer
- Third-party billing, “back office” services, claims services may not be “debt collectors” (depends on whether the account in default upon receipt of account)

FAIR DEBT COLLECTION PRACTICES ACT: VIOLATIVE CONDUCT COMMON IN MEDICAL DEBT COLLECTION

- 15 U.S.C. §§ 1692b-1692j
- Harassing communications: imagine it and it can happen, but here are a few:
 - Threats, obscenities
 - Excessive contact, especially if already asked to cease communications
 - Middle of the night calls
 - Contacting third parties (except for location information)
 - Contacting parties represented by counsel
- Suing or threatening to sue on time-barred debts or debts not owed
- Attempting to collect on debts covered by workers compensation, insurance, etc.

FDCPA VIOLATIVE CONDUCT

CONTINUED

- Deception
 - Original creditor pretending to be a debt collector to intimidate
 - Overstating the amount of the debt that is owed
 - False statements of potential consequences of nonpayment: imminent lawsuit when no intention of suing (think \$20 balance), threats of garnishment or liens
 - Misrepresentation of legal status of debt
 - Credit reporting: failing to report disputed character of debt to CRAs, false threats of credit reporting
- FDCPA Notices and Validation Requests
 - Missing notice components: identity, validations rights, disclosure of debt collector status
 - **Misleading notice components: directing to insurer for dispute**
 - Failing to advise of validation rights, failing to verify debt/respond to validation request

WHY ASSERT FDCPA CLAIMS?



- **Stop abusive practices in medical debt collection, full stop.**
- <https://library.nclc.org/article/widespread-fdcpa-violations-collection-medical-debt>
- [CFPB, Fair Debt Collection Practices Act Annual Report](#) (Nov. 2023);
- [CFPB Circular 2022-05](#): Debt Collection and Consumer Reporting Practices Involving Invalid Nursing Home Debts, 87 Fed. Reg. 57,375 (Sept. 20, 2022);
- [CFPB, Bulletin 2022-01](#), Medical Debt Collection and Consumer Reporting Requirements in Connection with the No Surprises Act, 87 Fed. Reg. 3025 (Jan. 20, 2022).
- But also:
 - Actual damages plus \$1k statutory damages
 - Costs and attorney's fees
 - Federal court may be preferred

CFPB REPORTING

Consumers can submit complaints about financial products or services by visiting the [CFPB's website](#) or by calling (855) 411-CFPB (2372).

- **Might spook the debt collector or add pressure that stops the collection activity altogether**
- **Can be filed even during litigation**
- Reporting gets information to agencies to help facilitate: supervision, enforcement, and general monitoring of the consumer financial services
- Goes to searchable database that you might find to be a useful tool
- Must be submitted by the client, i.e. they have to create their own account
- You can assist in the drafting or sit down with the client to do it
- Quick process

FLORIDA CONSUMER COLLECTIONS PRACTICES ACT

- **If not a “debt collector” under the FDCPA, consider an FCCPA claim (FDCPA analog)**
- Florida Statutes § § 559.55 - 559.785, focus on Florida Statutes § 559.72
- Nineteen prohibited practices in collecting a consumer debt
- Note on statute of limitations: must be commenced within 2 years of alleged violation
- Punitive damages and injunctive relief available

FCCPA PROHIBITED PRACTICES, JUST A FEW EXAMPLES

- Communicate (or threaten) to employer when no final judgement, no express permission to contact employer, or written acknowledgment of the debt after placed for collection
- Disclosing to non-family third party information affecting reputation when there is no legitimate business need for it, or it is false
- Disclose known disputed debt without disclosing that it is disputed (dispute requirements apply)
- Abusive or harassing communications
- Fake judicial, legal, or government communication
- Publish or threaten to publish name on a "deadbeat" list
- Contacting known represented party (in relation to the debt)

CREDIT REPORTING

- Usually collection agency reporting it, not the provider (99.4%)
- Can and should dispute with each CRA that reports inaccurate, fraudulent, or under \$500, paid, or under a year
- NEW: Extraordinary collection action conditions precedent met?

FAIR CREDIT REPORTING ACT

- 15 U.S.C. § 1681 *et al*
- Disclosure in a credit report
- Inaccurately reported
- Disputed status not reported
- Dispute not properly investigated by CRA or furnisher
- Re-aging of an obsolete debt (beyond 7 years from default), debt buyer must use original creditors date of default

FAIR CREDIT REPORTING ACT

- Claims against provider of information and/or against the CRA itself
- Counterclaims or stand-alone suit against furnisher or CRA
- Restrictions on medical and health information reporting (without specific consumer consent for the purpose for which used)
 - Employment
 - Credit or insurance
- **Okay to disclose solely transactional details, but not specific provider or nature of services**
- Prohibition applies also to obtaining and using medical information for credit eligibility determination
- Redisclosure prohibited
- Okay to disclose to affiliates



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