

1 **MEDICAL DEBT**

DEFENSIVE STRATEGIES

2 **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?

3 **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)
 - Time constraints for applying: 240 days
 - Not actually required to provide any certain minimum standard
 - BUT: don't hesitate to raise requirements in defenses
 - IRS enforcement only, no private right of action (but defenses)
 - Non-compliance: slap on the wrist or no "violation" if disclosed errors or fixed errors
 - Fun 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

4

5 **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.)
 - But...client failure to inform of coverage, failure to pay co-pay or co-insurance could be an issue
 - Balance billing, failure to properly bill Medicaid may not be noticed until LATE
 - No bills ever sent
 - No notice
 - 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!

6 PREVALENCE OF COLLECTION (OR LACK THEREOF)

- Are medical debt collections even all that egregious or problematic?
 - CFPB Annual Report: ~18-35% of American adults with unpaid medical bills; ~15% of consumer complaints about debt collection arise from medical debt collection
 - 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)
- I'm not even seeing these types of cases come through.
 - All it takes is one provider.
 - Messaging to your community may be needed
 - Medical debts may not alarm people as much as a credit card or auto deficiency case.
 - People can be confused as to how/why they are being sued for an emergency treatment from years ago (for example).
 - People might be approaching the lawsuit with the wrong entity (insurance) and being defaulted.

7 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)
 - Offensive opportunities: FCCPA, FCRA, FDCPA
 - Defensive opportunities: debt defense practitioner can jump right in, new protections 7/1/2024
-
-
-

8 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
- CFPB push for total elimination of medical debt credit reporting (2025)
- See also new state developments re: credit reporting
- FCRA- how is the dispute of the above handled?
-

9 **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
-
-

10 **BUCKLE UP! F.S. § 95.11(4)**
3-YEAR STATUTE OF LIMITATIONS

- 1 • (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.
- 2 • "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?

11 **HOT AND NEW- HB 7089**
EFFECTIVE 7/1/2024

- Three Year Statute of Limitations for Medical Debt (added to F.S. § 95.11)
- Price estimation and grievance transparency (expansion of F.S. § 395.301), provider must:
 - Post consumer-friendly pricing on website
 - Provide estimate to patient and their insurer
 - Establish internal policy for patient grievance of charges
 - Similarly, requirements for insurer to provide advanced explanation of benefits (EOB) quickly (F.S. § 627.446) * At a minimum, the advanced explanation of benefits must include detailed coverage and cost-sharing information pursuant to the No Surprises Act*
- Collection (creation of F.S. § 395.3011)(see next slide)
 - Defines "extraordinary collection action"

Limits when ECA can be taken

12 **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, if eligible before a decision is made as to FAP application

Before providing itemized bill to patient

During ongoing grievance process or appeal process

Before billing 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.

13 **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

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

15 **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?

16 **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
-

17 **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)?

18 **WHEN WERE THE SERVICES PROVIDED?**

- Statute of limitations defense *New THREE YEARS*
- But SOL for other claims may apply if claims brought by contractor
- Are there multiple services being lumped together in one amount for complaint?
- Were multiple services rendered over a period of time?
 - Long stay in the hospital
 - Series of operations, imaging, emergency care rendered on different days
- Did insurance coverage/company change over the period of multiple distinct services?

19 **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)

•

20 **WHAT ARE THE THEORIES OF LIABILITY CLAIMED?**

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

21 **VALUE OF SERVICES**

- Question everything!
- Hospital: if its not a specific fixed sum outlined in the contract (i.e. not a blanket statement about standard charges), REASONABLE pricing is implied. *Giacalone v. Helen Ellis Mem'l Hosp. Found., Inc.*, 8 So. 3d 1232, 1235 (Fla. 2nd DCA 2009).
- 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

•

•

22 **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.*

•

•

•

- How much are the patients actually "unjustly enriched" by then? Make the argument.

•

•

•

23 **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
 - Charges for supplies or services that were never provided
 - Hospital already charged the patient for the same item or service that a contractor is now alleging is owed to them
 - Financial assistance not applied when it should have been applied
- Insured Individuals
 - Get an explanation of benefits, compare to bill(s), looking for the above

- Did the provider even attempt to charge insurance?
- In network but charged out of network?
- Remaining co-pays or deductibles charged at chargemaster or discounted rate?

24 **WHAT ARE THE AMOUNTS BEING CLAIMED OWED?**

- Payment
 - Did the patient already pay for all or part of the services?
 - Did the insurer already pay for all services?
 - Did charity care already cover all services? Double dipping providers?
 - Medicaid billing?
 - 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

25 **SHOULD I TAKE THE CASE?**

26 **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.
- 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.
- Debt collection firms may want to avoid fully engaging in litigation:
 - They are used to default judgments and summary dispositions against unrepresented parties based on “personal knowledge” affidavits
 - Discovery: they may not have the supporting evidence needed in the first place, and they know it
 - Depos: expect (and document) delays in setting depo, presenting corporate reps who know nothing (third party billing reps)

27 **JUST TRY!**

- Even mildly aggressive litigation may:
 - Dramatically lower settlement amount vs. billed
 - Walkaways for “uncollectible” defendants
 - Walkaways...just because
- They may not have the goods to prove their case.
- They may neglect to prove an element.
- 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)

28 **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
- Uncommon for prior agreement of pricing, but ask the client
- Dispute of the bill (if presuit, make sure client disputes in writing to obligee)
- 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: provide evidence of the client's disagreement, and move to dismiss this count
-
-

29 **DEFENDING UNJUST ENRICHMENT**

- 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
- Similarly, laches
- Note: Plaintiff can *plead* both unjust enrichment and breach of contract
-

30 **DEFENDING OPEN ACCOUNT**

- 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)
- Existence of a written contract or obligations reduced to writing: Cannot avoid pleading requirements for a claim on contract by simply sending a statement
- Consent to Treatment: is it a contract?, cuts both ways, make it work for your case
- Similar defenses to other theories: accord and satisfaction, laches, estoppel, payment, etc.
- "Failure to attach" will probably not defeat (health disclosure concerns will be raised) but
 - raise issue of *lack of itemization* and
 - *reasonableness of charges*

31 **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)
 - No actual observation of execution and/or presentation of original?
 - Connection between the contract and the transaction

- Third party billing company rep serving as the “witness”
- 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 issues
-

32 **ADD DECLARATORY RELIEF**

33 **THE ALPHABET SOUP**

- FDCPA
- FCCPA
- FCRA

34 **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)
-

35 **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.
-

36 **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 when no legal action or judgment

entered,

- 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

37 **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

38 **CFPB REPORTING**

39 **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
- "Great weight" given to FTC and federal courts' FDCPA interpretations in application of FCCPA (watch for preemption issues)
- Must be a CONSUMER debt
-
-
-

40 **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 know 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)

-
-
-
-

41 CREDIT REPORTING

- Staggering statistics about medical debt-related negative credit reporting
- 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
- Push to eliminate medical debt completely
- Usually collection agency reporting it, not the provider (99.4%)
- Can and should dispute with each CRA that reporting inaccurate, fraudulent, or see above three restrictions
- Extraordinary collection action conditions precedent met?
 -
-

42 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

43 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
-
-

44 MEDICAL DEBT

DEFENSIVE STRATEGIES