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January 15, 2020

Hon. Geoffrey Gratwick, Senate Chair  
Hon. Patricia Hymanson, House Chair  
Joint Standing Committee on Health and Human Services  
Room 209, Cross Office Building  
Augusta, Maine 04333

RE: **LD 1125** – *An Act to Amend MaineCare Reimbursement  
Related to Bad Debt and Bed-hold Days*

Dear Senator Gratwick, Representative Hymanson:

On June 20, 2019, the Governor signed LD 1125 (An Act to Amend MaineCare Reimbursement Related to Bad Debt and Bed-hold Days) into law. This law establishes MaineCare reimbursement for the adult family care services to reimburse for days a resident is absent from a facility due to hospitalization. The Legislature passed the bill, after the Health and Human Services Committee (“Committee”) removed a section from the bill which would have established a non-MaineCare rate of reimbursement to a nursing facility when it incurs a bad debt for patient care for a person who has been determined ineligible for MaineCare and the nursing facility undertook reasonable collection efforts which failed. On June 19, 2019, the Committee sent a letter requesting my assistance in “developing options for pursuing unpaid cost of care from families, guardians and powers of attorney and strategies to increase accountability, including any suggestions for legislation.”

The Committee’s concern is that some vulnerable nursing facility residents, who have been found to be ineligible for MaineCare, are without the financial means to pay for their nursing care services because a guardian or power of attorney misused their financial authority and abused their fiduciary duty. This adversely impacts nursing facilities.

Maine nursing facilities are governed by Maine licensing regulations (10-144 C.M.R. ch. 110) and also federal CMS regulations (42 C.F.R. §§ 483.1 – 483.95). Both Maine and federal regulations provide that a nursing facility may only discharge a resident for nonpayment after reasonable and appropriate notice; even then, a resident may appeal any discharge decision, and may not be discharged while the appeal is pending. 10-144 C.M.R. ch. 110, subchapter 10 §10.Q;

42 CFR § 483.15(c)(1)(i)(E). In addition, federal regulations allow nursing facilities to require a resident's legal representative who has legal access to the resident's income or resources to sign a contract to pay for the resident's nursing facility care out of the resident's financial resources. 42 C.F.R. § 483.15(a)(3). However, the federal regulations expressly provide that the contract cannot hold the resident's legal representative personally liable for the nursing facility's expense. *Id.* Although the Maine licensing regulations also provide for contracts between the nursing facility and the legal representative of the resident, there is no express mention of a contract clause which would require the legal representative to provide for nursing facility payment from the resident's income or resources. 10-144 C.M.R. ch. 110, subchapter 10 §§ 6.A, 6.B and 6.C.

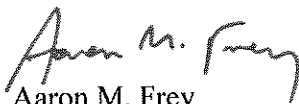
In 2015, the Maine Legislature amended the law regarding nursing home admission contracts, to expressly allow that attorney's fees and the cost of collecting payments may be collected against an agent under a power of attorney who breaches the agent's duties under the Maine Uniform Power of Attorney Act (then 18-A M.R.S. § 5-914, now 18-C M.R.S. § 5-914) or against a conservator appointed under Title 18-A M.R.S. § 5-404 (now 18-C M.R.S. § 5-401) for breach of the conservator's duties. P.L. 2015, ch 247, as codified in 22 M.R.S. § 1826(2)(I). The Department did not amend its regulations after the passage of the bill. The Maine licensing regulation for nursing facilities was last amended in 2001 and is inconsistent with the law as it provides that no contract can provide for the payment of attorneys' fees or any other cost of collecting payments from the resident.

One option the Committee could consider is to require the Maine Department of Health and Human Services amend its nursing facility licensing regulations to: (1) provide for contracts between the nursing facilities and legal representatives to require that such legal representatives who have legal access to a resident's income or resources pay for nursing facility services for the resident from the resident's financial resources, and to provide that the legal representative cannot be held personally liable for the resident's nursing facility's expense; and (2) provide that attorney's fees and costs may be collected against power of attorney agents or conservators who breach their legal duties by not paying nursing facilities from the resident's income or other financial resources. Contracts between the nursing facilities and the legal representatives would give the nursing facilities standing to sue the legal representative directly and to recoup attorney's fees for having done so.

These regulatory changes would provide additional tools to the nursing facilities to improve their collection efforts.

I hope that this is helpful. Please let me know if I can further assist.

Sincerely,

  
Aaron M. Frey  
ATTORNEY GENERAL