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THE RESPONSIBLE THING TO DO ABOUT “RESPONSIBLE PARTY” PROVISIONS IN NURSING HOME AGREEMENTS: A PROPOSAL FOR CHANGE ON THREE FRONTS[†]

Katherine C. Pearson*

Nursing homes routinely seek the signature of a family member on nursing home agreements, calling the signer a “responsible party” or sponsor for the resident. Federal Medicare and Medicaid law provides that participating facilities must “not require a third party guarantee of payment to the facility as a condition of admission . . . to, or continued stay, in the facility.” Nonetheless, if federal benefits prove to be unavailable, courts are holding responsible parties contractually liable for thousands of dollars for the care of their elders. This Article proposes private and public responses to the increasing likelihood that nursing homes will seek collection from family members.

I. INTRODUCTION

When your next family picnic gets a bit dull, consider offering this question to liven up the crowd: “Do you think we ought to have a law that makes us liable for family members who cannot afford nursing homes?” Remember to mention that, on average, nursing homes cost in excess of \$5,000 per month.¹ If that does not generate enough response, you can fuel the debate with a disclosure that a surprising number of states *do* have laws that purport to hold adult children responsible for the support of their indigent

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1. See THE METLIFE MARKET SURVEY OF NURSING HOME & HOME CARE COSTS (Aug. 2003), available at <http://www.metlife.com/Applications/Corporate/WPS/CDA/PageGenerator/0,1674,P2801,00.html> (on file with the University of Michigan Journal of Law Reform) (demonstrating that the national average for a private room is \$5,512 per month, while a semi-private room costs \$4,813 per month); see also Pa. Dep’t of Pub. Welfare, Policy Clarification PMN-10991-440 (June 19, 2003) (according to the Pennsylvania Department of Public Welfare, as of July 1, 2003, Pennsylvania’s average monthly nursing home cost for private care was \$5,559).

parents.² Such statutes, sometimes called “filial responsibility laws” or “family responsibility laws,”³ are controversial and are the subject both of scholarly criticism and inconsistent enforcement efforts. Indeed, writing about the practical, moral and constitutional implications of filial responsibility laws is almost a cottage industry for the growing world of family and elder law scholars.⁴ Such statutes change the common law—and challenge the common assumption of the public—that adult children have *no* legal obligations to support their aging family members.⁵

As a practical matter, the use of state filial responsibility laws as a direct means to compel families to pay for nursing home care is blocked by federal regulations governing Medicaid. Federal law prohibits the states from considering “income and resources of any [applicant’s] relative as available to an [applicant]”⁶ in determining a person’s eligibility for Medicaid. This provision is one of a number of provisions tying Medicaid eligibility to the prospective resident’s inability to pay, without consideration of the resources of adult children or grandchildren. These provisions are representative of a national public policy against forcing an individual’s

2. Shannon Frank Edelstone, *Filial Responsibility: Can the Legal Duty to Support Our Parents Be Effectively Enforced?*, 36 FAM. L.Q. 501, 502 n.8 (2002).

3. See, e.g., *Americana Healthcare Ctr. v. Randall*, 513 N.W.2d 566, 571 (S.D. 1994) (holding son liable for indigent mother’s nursing home care under state responsibility statute); *Presbyterian Med. Ctr. v. Budd*, 832 A.2d 1066, 1076 (Pa. Super. Ct. 2003) (permitting nursing home to assert claim for equitable support and restitution against daughter for cost of mother’s care, based on Pennsylvania statute). Pennsylvania is one of thirty states that have some form of filial responsibility statute on their books. See 62 PA. CONS. STAT. ANN. § 1973 (1996).

4. See, e.g., Ann Britton, *America’s Best Kept Secret: An Adult Child’s Duty to Support Aged Parents*, 26 CAL. W.L. REV. 351 (1990); Catherine Doscher Byrd, *Relative Responsibility Extended: Requirement of Adult Children to Pay for Their Indigent Parent’s Medical Needs*, 22 FAM. L.Q. 87 (1988); Michael Rosenbaum, *Are Family Responsibility Laws Constitutional?*, 1 FAM. L.Q. 55 (1967); Leo J. Tully, *Family Responsibility Laws: An Unwise and Unconstitutional Imposition*, 5 FAM. L.Q. 32 (1971).

5. See generally, Tully, *supra* note 4.

6. 42 C.F.R. § 435.602(a)(1) (2003). Separate rules exist for married couples, including allocation of a portion of the couple’s marital assets, called “resources,” to the institutionalized spouse’s care. However, once the spouse becomes a facility resident, only the resident’s “income” is considered when determining eligibility for Medicaid. In addition, some protections exist to avoid forced “impoverishment” of the “community spouse.” See 42 U.S.C. § 1396r-5 (2000); see also *Wis. Dep’t of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495 (2002) (confirming state’s discretion in handling spousal impoverishment calculations under Medicaid); *Comm’r of Dep’t of Soc. Servs. of N.Y. v. Spellman*, 661 N.Y.S.2d 895, 990 (App. Div. 1997) (permitting recovery by state from community spouse who refused to contribute support for wife’s nursing home care under state’s formula for resource allocation).

extended family to bear the costs of that individual's long-term care.⁷

Nonetheless, nursing homes frequently seek to secure a type of contractual "filial responsibility" and, indeed, to extend this responsibility to anyone who signs the nursing home admission contract on behalf of the incapacitated resident. Despite state and federal laws which attempt to prohibit nursing homes from mandating third-party "guarantee" agreements as a condition of care,⁸ there are financial traps for people who believe they are acting merely as facilitators in the admission process. Where gaps arise in private or public financing of the resident's nursing home stay, courts are holding third-party signers personally liable.⁹ In one notable example, a daughter found herself personally liable for more than the \$75,000 in nursing home costs.¹⁰ As strains on public financing increase, so too do the incentives for nursing homes to create avenues for private responsibility.¹¹

The decision to enter a nursing home is rarely a happy event for the resident or the resident's family. It has long been recognized that one of the best assurances of quality care is not mere money, but the active participation of family members in the resident's ongoing life in the nursing home.¹² However, family members who feel trapped—or tricked—by a nursing home into paying for care involuntarily, are unlikely to feel comfortable about staying active in their elders' lives.¹³ Alternatively, a son or daughter who is

7. See, e.g., 42 U.S.C. § 1395i-3(c)(5)(A)(ii) (2000); *id.* § 1396r(c)(5)(A)(ii) (2000), discussion *infra* Part II.

8. See *id.*

9. See, e.g., *Holloway v. Riley's Oak Hill Manor, Inc.*, No. CA 02-74, 2002 WL 31259803, at *3-4 (Ark. Ct. App. Oct. 9, 2002) (holding son liable under contract terms); *Putnam Nursing & Rehab. Ctr. v. Bowles*, 658 N.Y.S.2d 57, 59 (App. Div. 1997) (holding trustees liable under contract terms); *Southport Manor Convalescent Ctr., Inc. v. Kundrath*, No. CV91-0284958, 1994 WL 621895, at *2 (Conn. Super. Ct. Oct. 28, 1994) (holding son liable under contract terms); *St. Francis Home v. Sharon*, No. 93-0523, 1993 WL 388290, at *1 (Wis. Ct. App. Oct. 5, 1993) (holding son liable under contract terms); *Daughters of Sarah Nursing Home Co. v. Lipkin*, 535 N.Y.S.2d 790, 790 (App. Div. 1988) (holding son liable under contract terms).

10. *Sunrise Healthcare Corp. v. Azarigian*, 821 A.2d 835, 841 (Conn. App. Ct. 2003) (holding daughter liable under contract terms).

11. Nathalie D. Martin & Elizabeth Rourke, *Les Jeux Ne Sont Pas Faits: The Right to Dignified Long-Term Care in the Face of Industry-Wide Financial Failure*, 10 CORNELL J.L. & PUB. POL'Y 129 (2000) (analyzing impact of Balanced Budget Act of 1997 on public funding).

12. See, e.g., CHRIS ADAMEC, *THE UNOFFICIAL GUIDE TO ELDERCARE* (1999); ROBERT F. BORNSTEIN & MARY A. LANGUIRAND, *WHEN SOMEONE YOU LOVE NEEDS NURSING HOME, ASSISTED LIVING, OR IN-HOME CARE: THE COMPLETE GUIDE* (2002).

13. See Michael Farley, Note, *When "I Do" Becomes "I Don't": Eliminating the Divorce Loop-hole to Medicaid Eligibility*, 9 ELDER L.J. 27 (2001) (discussing the possibility of divorce for couples facing long term care costs).

struggling to provide care at home may hesitate to place an elder into appropriate long-term care because of uncertainty about liability for future costs.¹⁴ A sound approach to third-party representation is needed to facilitate high quality care and to maintain the resident's and the family's relationship.

This Article highlights the confusion surrounding the current legal status of third-party signers, usually called "Responsible Parties" in nursing home agreements. The process of admitting someone to a nursing home raises important policy questions about public financing, family responsibility, traditional agency theories, and contract interpretation. This Article demonstrates the importance of providing sound legal advice to residents and their families prior to admission, the need for careful consideration by the courts of collection cases brought against third-party signers, and, ultimately, the need for legislative clarification or reform.¹⁵

II. FEDERAL LAW SETS THRESHOLD STANDARDS

In 1986, the Institute of Medicine¹⁶ completed a comprehensive inquiry into nursing home practices throughout the country and published a report with strong recommendations for changes needed to address serious and chronic problems in nursing home care.¹⁷ In 1987, Congress responded by adopting the Nursing Home Reform Act that affects all nursing homes that participate in Medicare or Medicaid funding.¹⁸ Congress sought to establish threshold standards for residents' safety, privacy, freedom from

14. Joel C. Dobris, *Medicaid Asset Planning By the Elderly: A Policy View of Expectations, Entitlement and Inheritance*, 24 REAL PROP. PROB. & TR. J. 1, 8 (1989).

15. This Article will also demonstrate, without resolving, the potential for a classic, potential "Elder Law" conflict of interest for the lawyer who represents the prospective resident while advising the prospective "responsible party." See, e.g., David M. Rosenfeld, *Whose Decision Is It Anyway? Identifying the Medicaid Planning Client*, 6 ELDER L.J. 383 (1998).

16. The Institute of Medicine (IoM) is a nonprofit organization chartered in 1970 as a component of the National Academy of Sciences. See INSTITUTE OF MEDICINE website, available at <http://www.iom>.

17. COMMITTEE ON NURSING HOME REGULATION, INSTITUTE OF MEDICINE, IMPROVING THE QUALITY OF CARE IN NURSING HOMES (1986) [hereinafter IO M NURSING HOME REPORT]; see also *Estate of Smith v. Heckler*, 747 F.2d 583, 591 (10th Cir. 1984) (granting mandamus relief and finding federal agency had duty to establish and enforce regulations regarding patient care in nursing homes receiving Medicaid money).

18. See Sen. Charles Grassley, *The Resurrection of Nursing Home Reform: A Historical Account of the Recent Revival of the Quality of Care Standards for Long-Term Care Facilities Established in the Omnibus Reconciliation Act of 1987*, 7 ELDER L.J. 267 (1999).

restraints and individual autonomy.¹⁹ In addition to federal regulation,²⁰ nursing homes are subject to state regulation.²¹

One overarching goal of the federal regulatory scheme is to curb disparate treatment between public and private pay residents of nursing homes.²² Federal law provides that a nursing facility "must establish and maintain identical policies and practices regarding . . . covered services . . . for all individuals regardless of source of payment."²³ However, because Medicare and Medicaid also set limits on the amounts that the government reimburses facilities for the cost of care, nursing homes prefer the higher income often generated by private pay patients.²⁴ In an attempt to protect potential Medicaid residents from manipulation by nursing homes, the Nursing Home Reform Act prohibits facilities from requiring residents to "waive" rights to seek Medicare or Medicaid coverage²⁵ and bars them from seeking promises from residents not to apply for these lower limits of coverage.²⁶ Indeed, nursing

19. 42 U.S.C. § 1395i-3(c)(4) (2000) (regarding resident rights under Medicare); *see also, id.* § 1396r(c)(4) (2000) (containing similar language governing resident rights for nursing homes participating in Medical Assistance, also known as Medicaid).

20. *See* 42 C.F.R. §§ 483.1-483.75 (2002).

21. Federal law permits the states to impose more stringent admission rules aimed at curbing discriminatory treatment of Medicaid residents. 42 U.S.C. § 1395i-3(c)(5)(B)(i) (2000) (specifying that there is no federal preemption of stricter state standards for admissions policies for Medicare); *id.* § 1396r(c)(5)(B)(i) (2000) (specifying that there is no federal preemption of stricter state standards for admissions policies for Medicaid); *see, e.g.*, 28 PA. CODE §§ 201.1-201.31, 201.3 (2000) (showing Pennsylvania regulations use the term "responsible person" to refer to someone who is not an employee of the facility and who "is responsible for making decisions on behalf of the resident."). Curiously, although Pennsylvania regulations incorporate by reference many of the federal resident rights, Pennsylvania has adopted no specific state policy on third-party guarantees or responsible party provisions in nursing home agreements. *See* 28 PA. CODE §§ 201.2(4) (2000) (Requirements), 201.24 (2000) (Admission policy), 201.29 (2000) (Resident rights).

22. Although the Institute of Medicine strongly urged major federal regulatory changes, noting the inconsistency in standards and problems with nursing home care across the nation, the 1986 study was unable to document a clear correlation between sources of payment (public or private) and quality. *See* IOM NURSING HOME REPORT, *supra* note 17, at 193-96. IOM recommended further study of the "complex relationships among costs, charges, reimbursement, and quality." *Id.* at 195.

23. 42 U.S.C. § 1395i-3(c)(4) (2000) (regarding Equal Access to Quality Care for Medicare patients); *id.* § 1396r(c)(4)(A) (2000) (regarding Equal Access to Quality Care for Medicaid patients).

24. IOM NURSING HOME REPORT, *supra* note 17, at 194 ("Because Medicaid rates are as much as 30 percent lower than private rates for comparable residents in some states, there is a clear incentive to try to attract and keep as many private-pay residents as possible."). The rates that Medicaid pays for services within a particular state are set by that state, using federal guidelines. *See* 42 U.S.C.A. § 1396a(a)(30) (2000); 42 C.F.R. §§ 447.200, 447.204 (2002).

25. 42 U.S.C. § 1395i-3(c)(5)(A)(i)(I) (2000) (Medicare); *id.* § 1396r(c)(5)(A)(i)(I) (2000) (Medicaid).

26. 42 U.S.C. § 1395i-3(c)(5)(A)(i)(II) (2000); *id.* § 1396r(c)(5)(A)(i)(II) (2000).

homes are required to advertise and educate residents about how to apply for Medicare and Medicaid coverage.²⁷

For family members and others assisting a resident in the admission to nursing homes, an important provision of federal law expressly prohibits any nursing home certified as eligible for Medicare or Medicaid reimbursement from requiring guarantees as a condition of admission or extended care. In both the Medicare and Medicaid provisions, the key statutory language is set forth at 42 U.S.C. §§ 1395i-3(c)(5)(A)(ii), 1396r(c)(5)(A)(ii) (hereinafter Subsection (A)(ii)) specifying: "With respect to admissions practices, a skilled nursing facility must . . . not require a third party guarantee of payment to the facility as a condition of admission (or expedited admission) to, or continued stay in, the facility."²⁸

This language, standing alone, plainly prohibits facilities from conditioning admission upon a third party's guarantee of the private pay costs—but the question arising in litigation is whether federal law renders third-party payor provisions presumptively unenforceable.²⁹ The interpretation of the statutory restriction on guarantees is affected by additional language in the federal statutes at 42 U.S.C. §§ 1395i-3(c)(5)(B)(ii), 1396r(c)(5)(B)(ii) (hereinafter Subsection (B)(ii)), providing that Medicare and Medicaid qualified facilities may "requir[e] an individual, who has legal access to a resident's income or resources available to pay for care in the facility, to sign a contract (without incurring personal financial liability) to provide payment from the resident's income or resources for such care."³⁰

During admission, the prospective resident may be overwhelmed by physical or mental illness, or by the prospect of being asked to sign a host of documents. Many documents seek the signature of the resident but permit a third party to sign,³¹ and as a

27. 42 U.S.C. § 1395i-3(c)(5)(A)(i)(III) (2000); *id.* § 1396r(c)(5)(A)(i)(III) (2000).

28. 42 U.S.C. § 1395i-3(c)(5)(A)(ii) (2000); *id.* § 1396r(c)(5)(A)(ii) (2000).

29. *See, e.g.,* Slovik v. Prime Healthcare Corp., 838 So. 2d 1054, 1057 n.2 (Ala. Civ. App. 2002) (noting nursing home's concession that it was not trying to collect stepfather's debt from personal representative as a guarantor because Medicaid regulations "prohibited it from requiring [the step-son] to guarantee his stepfather's obligation to them . . .").

30. 42 U.S.C. § 1395i-3(c)(5)(B)(ii) (2000); *id.* § 1396r(c)(5)(B)(ii) (2000); *see also* 42 C.F.R. § 483.12(d)(2) (2002).

31. *See* COMMONWEALTH OF PA. DEP'T OF PUB. WELFARE, ADMISSIONS NOTICE PACKET (2000), available at <http://www.dpw.state.pa.us/omap/provinf/maforms/omapma401.pdf> (on file with the University of Michigan Journal of Law Reform) (mandating an "Admissions Notice Packet," PA Form MA 401 (7-96), currently twenty-plus pages of rights and responsibilities, for all admissions to nursing home in Pennsylvania). The document describes the Commonwealth's "Admission Policy" on the liability of third-party signers only in the negative, vaguely suggesting that as long as the resident is "entitled to medical assistance," (not, however, referring to "Medical Assistance" or "Medicaid," the capitalized words used else-

practical matter nursing homes want the signatures of third parties. Many of these documents use the term "Responsible Party" or "Sponsor" for third-party designations.³² The third party is often acting with, at best, a layperson's understanding of his or her role, while the nursing home expects that person to function in multiple capacities, including the role of health care agent, financial agent, and, if possible, as guarantor of payment.³³ A growing body of case law demonstrates significant consequences for the use of "Responsible Party" or similar language in nursing home agreements.

III. CASE LAW SIGNALS PROBLEMS WITH "RESPONSIBLE PARTY" PROVISIONS

A. Enforceability of Responsible Party Guarantee Provisions

Following passage of the Nursing Home Reform Act, leading advocates of resident rights took the position that contracts that routinely include third-party guarantee provisions are inherently illegal and unenforceable.³⁴ In some instances, nursing homes give lip service to this notion, by denying the allegation they are seeking to make or enforce third-party *guarantee* agreements, even as

where in the document to refer to public benefits programs), no one may be required to guarantee any payments. *Id.* at 4.

32. See Katherine C. Pearson, *Traps for the Unwary in Nursing Home Agreements: Guarantor, Mere Agent or Separate Promisor?*, 74 PA. B. ASS'N Q. 139, 141-42 (2003) (analyzing "Responsible Party" provisions used in Pennsylvania nursing home contracts).

33. The understanding of the role of the "Responsible Party" as a health care agent is noted in some nursing home-related, non-collection cases. See, e.g., *Boyer v. Grandview Manor Care Ctr., Inc.*, 759 S.W.2d 230, 232 (Mo. Ct. App. 1988) ("A responsible party is usually a friend, family member or guardian who looks out for the interests of a resident of the nursing home, making major decisions for them, such as the decision to retain or terminate the services of a resident's physician.").

34. AARP, WHAT YOU SHOULD KNOW ABOUT NURSING HOME ADMISSION CONTRACTS (AARP 2003) ("Using terms such as responsible party or guarantor, which impose personal liability for the cost of the resident's care, is illegal for residents receiving Medicaid and unenforceable for privately paying residents."); see also Eric M. Carlson, *Admission Agreements: Illegal Provisions*, LONG-TERM CARE ADVOC. (MB), § 3.06[2] at 3-40 (2003) (arguing that for "at least three reasons, these 'Responsible Party' provisions are illegal and/or unenforceable"); BET TZEDEK LEGAL SERVS. ET AL., "IF ONLY I HAD KNOWN": MISREPRESENTATIONS BY NURSING HOMES WHICH DEPRIVE RESIDENTS OF LEGAL PROTECTION (1998); Patricia Nemoire, *Illegal Terms in Nursing Home Admission Contracts*, 18 CLEARINGHOUSE REV. 1165 (1985); Charles Sabatino, *Nursing Home Admission: Contracts Undermining Rights the Old-Fashioned Way*, 24 CLEARINGHOUSE REV. 553 (1990).

they seek to hold third parties liable for nursing home costs.³⁵ When faced with the question of whether Subsection (A)(ii)³⁶ of the federal Medicare and Medicaid laws makes third-party guarantee contracts illegal or unenforceable, the courts have either avoided the question all together,³⁷ or, as discussed below, concluded that under federal law third parties may *volunteer* to sign as guarantors of payment to the nursing homes.

In 1992, individual family members, on behalf of themselves and others, filed suit seeking a declaration that a particular California-based nursing home's form agreements containing third-party guarantee language "pressured and deceived family members of 'private pay' patients . . . into cosigning as responsible parties in contravention of both federal and state law."³⁸ Interestingly, during the course of litigating *Podolsky v. First Healthcare Corp.*, the nursing home revised its standard agreements and removed the third-party guarantee language from the standard contract used for Medicaid residents, but also created a separate guarantee contract for use with private pay patients.³⁹ The plaintiffs, relying on the language of Subsection (A)(ii) of the federal Medicare and Medicaid statutes,⁴⁰ continued to litigate the issue of the validity of the third-party guarantee language in the contracts used for private pay patients.⁴¹ At the trial court level, summary judgment was entered in favor of the nursing home based upon a conclusion that "the proposed new guarantee agreement by its terms neither violated or subverted federal or state law and was not deceptive."⁴²

In analyzing the federal provisions precluding nursing homes from "requiring" a third-party guarantee, the intermediate California appellate court accepted the proposition that whatever the proper interpretation of the federal law, the rules applied equally to Medicaid or private pay residents and their

35. See, e.g., *Slovik v. Prime Healthcare Corp.*, 838 So. 2d 1054, 1057 n.2 (Ala. Civ. App. 2002) (noting nursing home's concession that it was not trying to collect stepfather's debt from personal representative as a guarantor because Medicaid regulations "prohibited it from requiring [the step-son] to guarantee his stepfather's obligation to them . . ."); *Wedgewood Care Ctr. Inc. v. McGloin*, No. 2002-82 N C, 2002 WL 31956103, at *1 (N.Y. App. Div. Sept. 20, 2002) (noting that in suit for breach of contract brought against resident's widow, nursing home "expressly set forth that it does not seek to hold defendant liable as a guarantor.").

36. 42 U.S.C. § 1395i-3(c)(5)(A)(i)(II) (2000); *id.* § 1396r(c)(5)(A)(i)(II) (2000).

37. See *infra* Part III.B.

38. *Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89, 94 (Ct. App. 1996).

39. *Id.*

40. *Id.* at 96 (noting plaintiffs' reliance on 42 U.S.C. § 1395i-3(c)(5)(A)(ii) (2000) and 42 U.S.C. § 1396r(c)(5)(A)(ii) (2000)).

41. *Podolsky*, 58 Cal. Rptr. 2d at 96.

42. *Id.* at 95.

representatives.⁴³ However, contrary to the position of the plaintiffs and national advocates, the court found that "solicitation of otherwise voluntary third party guarantors" does not violate or subvert federal law.⁴⁴ Thus, the court drew a distinction between voluntary and non-voluntary guarantee commitments:

Neither federal nor [California] state law prohibits nursing homes from voluntarily obtaining the signature of a willing responsible party or third party guarantor when admitting nursing home residents. Instead, the applicable statutes make it unlawful to require third party guarantees as a condition of admission or continued residence in such facilities. . . . Had Congress intended to forbid third party guarantees under any circumstances, we presume it would have said so. State law, meanwhile, expressly states that the signature of third party guarantors may be obtained.⁴⁵

The court noted that the California nursing home's revised agreements contained recitations that execution of the guarantee was not "required."⁴⁶ Although rejecting the plaintiffs' position that the guarantee contracts were inherently illegal and unenforceable, the court nonetheless reversed the summary judgment in favor of the nursing home, finding that factual issues existed as to whether or not the facility's approaches to soliciting signatures on the new guarantee contracts were "deceptive."⁴⁷ The court credited testimony that seems consistent with accounts of admissions processes widely reported throughout the country:

Appellants' declarations, from several persons who admitted family members to various FHC nursing homes over a three-year period, portray an admissions process in which a stack of documents was hurriedly presented with little or no explanation. Family members were simply directed where to sign, by "X" or check marks which had already been added by the FHC employee handling the admissions process. In one case, the son of a newly-admitted resident was expressly told that

43. *Id.* at 96.

44. *Id.* at 97.

45. *Id.* (citation omitted).

46. *Podolsky*, 58 Cal. Rptr. 2d at 97.

47. *Id.*

his signature as a responsible person was required. In all cases, the term was never explained.⁴⁸

The appellate court remanded for further proceedings under California's Unfair Competition Act, which granted the courts authority to enter orders necessary to prevent future deceptive or unfair business practices.⁴⁹

The *Podolsky* decision is important because it recognizes that absent regulatory supervision, nursing homes have little incentive to provide clear information to the representatives of prospective residents about the alternatives to signing a guarantee.⁵⁰ The court makes it clear that mere recitations in a document about the voluntariness of the third party's signature are not enough to assure compliance with the public policy set forth in Subsection (A) (ii) of the Medicare and Medicaid provisions, which is to prevent nursing homes from manipulating families into signing guarantees of private payment.⁵¹ Even where the contract presented to the third party includes express warnings, "the issue is whether that solicitation is deceptive or not."⁵²

Thus, a factual issue is often created by the context in which admissions documents, containing any form of promissory language, are submitted to and signed by third parties. Even though the California court in *Podolsky* declined to validate the frequently stated position of advocates that third-party guarantee contracts are inherently illegal and unenforceable under federal law,⁵³ and even though other courts have similarly declined to read the federal statutes broadly,⁵⁴ the decision serves as persuasive precedent

48. *Id.* at 101-02; *see also* *Holloway v. Riley's Oak Hill Manor, Inc.*, No. CA 02-74, 2002 WL 31259803, at *1 (Ark. Ct. App. Oct. 9, 2002), discussion *infra* Part III.B; *cf.* *Corley v. Rosewood Care Ctr., Inc. of Peoria*, 142 F.3d 1041, 1050 (7th Cir. 1998) (discussing allegations that nursing home made representations to prospective residents and families about scope of care, as evidence relevant to RICO suit).

49. *Podolsky*, 58 Cal. Rptr. 2d at 104.

50. *Id.* at 104, (noting the court's power under state law to enter orders necessary to prevent future deceptive practices and recommending "[t]he court and the parties might also consider allowing the solicitation of third party guarantees no sooner than one day after the admission agreement is signed to clearly separate the admission documents from the third party guarantee agreement").

51. *Id.* at 97; *see also* 42 C.F.R. § 435.602(a)(1) (2003); *supra* text accompanying note 6.

52. *Podolsky*, 58 Cal. Rptr. 2d at 97.

53. *Id.* at 96.

54. *See, e.g.,* *SWA, Inc. v. Straka*, No. 82103, 2003 WL 21434637, at *3 (Ohio Ct. App. June 19, 2003) (noting that federal and state law prohibit nursing homes from requiring a guarantee as a condition of admission but a signed guarantee may be enforceable in the absence of representations that the facility required a guarantor).

for courts to examine critically the voluntariness of third-party signatures on admission contracts.⁵⁵

B. Interpretation of Responsible Party Promises

Two recent cases suggest another analytical approach to "Responsible Party" provisions in nursing home contracts, and demonstrate the courts' divided response to the problem of defining the roles played by third parties during nursing home care.⁵⁶ The opinions are thoughtfully written, but these opinions, and a surprising number of recent decisions interpreting responsible party obligations, are unofficially reported, thus suggesting some hesitancy on the part of courts in reaching the bottom line on liability for third-party signers of nursing home agreements.

In *Holloway v. Riley's Oak Hill Manor, Inc.*, an Arkansas intermediate appellate court affirmed a trial court's ruling that the adult son was contractually bound to pay for his elderly mother's nursing home care, during recovery from a broken hip, by signing his name on the line for "responsible party" in two admissions documents that provided, "The patient and/or responsible party agrees to pay a daily rate of [blank] and the Nursing home will accept this agreement in full consideration for care and services rendered."⁵⁷ By contrast, in *Special Care Nursing Services Inc. v. Fox*, a Massachusetts appellate court ruled that the adult granddaughter who signed on the line for "Client/Responsible Party" was not contractually bound for the uninsured cost of her grandmother's nursing home care, despite the provision of the document that stated, "I agree to assume responsibility for and guarantee the payment of any and all sums that become due [to the extent not

55. See, e.g., REBECCA J. BENSON, CHECK YOUR RIGHTS AT THE DOOR: CONSUMER PROTECTION VIOLATIONS IN MASSACHUSETTS NURSING HOME ADMISSION AGREEMENTS (1997) (citing one recent study of nursing home agreements in Massachusetts, concluding that "87 percent of the agreements improperly seek the signature of a 'voluntary responsible party,' despite the fact such an agreement would provide no benefit to the resident, family member or friend"); Katherine C. Pearson, *Cooperate or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and a Proposal for Change*, 65 TENN. L. REV. 835, 860 (1998) (analyzing so-called "voluntary" decisions made by parents in investigations by child protective services).

56. See *Holloway v. Riley's Oak Hill Manor, Inc.*, No. CA 02-74, 2002 WL 31259803 (Ark. Ct. App. Oct. 9, 2002); *Special Care Nursing Servs., Inc. v. Fox*, No. 9460, 1998 WL 61902 (Mass. App. Ct. Feb. 9, 1998).

57. 2002 WL 31259803 at *1.

paid by insurance, Medicare or Medicaid].”⁵⁸ In neither case did it appear the elder person signed or was able to sign the admission documents. Applications for payment under Medicaid or insurance sources appeared to have been made in both cases, but were denied for reasons undisclosed in the opinions.⁵⁹

Despite the opposite outcomes, the approaches of the two courts were similar in that they appeared to view the issue as primarily one of simple contract interpretation, without regard to the federal statutory restriction on guarantees. On a superficial level, the two cases can be distinguished. In the Massachusetts case, the granddaughter wrote “granddaughter (co-guardian)” on a line below her signature, in a box that permitted her to identify her “relationship” to the client.⁶⁰ The court concluded that disclosure of her “representative” capacity and the fact that she had been appointed by a court to serve as her grandmother’s guardian prevented the “Service Agreement” from being interpreted as her personal guarantee of payment.⁶¹ In the Arkansas case, there was no written limitation on the son’s role in signing the agreement, making it easy for the court to conclude that “Holloway [the son] breached an enforceable contract.”⁶² More important, perhaps, there was no preprinted line for him to clarify his role in signing, thus virtually assuring that the preprinted characterization as “responsible party” would control.⁶³

In contrast to the California case⁶⁴ discussed *supra* Part III.A., the Arkansas court held the son liable on the contract language and gave no legal significance to the son’s testimony that he had signed the agreements only after his mother was admitted to the nursing home, and only because he was told he had to sign them to keep his mother there, with no alternatives given.⁶⁵ The court, or perhaps counsel while arguing the case, did not appear to recognize fully the implications of evidence suggesting the facility insisted on

58. 1998 WL 61902 at *1.

59. See *Holloway*, 2002 WL 31259803 at *1 (noting that “Mr. Holloway was never able to obtain any Medicaid assistance with regard to services provided by Riley’s”); *Special Care Nursing Servs., Inc.*, 1998 WL 61902 at *2 (noting the contract provided the resident, or her estate, would pay the charges to the extent that “insurance or government benefits” did not pay).

60. *Special Care Nursing Servs., Inc.*, 1998 WL 61902 at *1.

61. *Id.* at *1 (“[N]otwithstanding Special Care’s inclusion of the words ‘assume responsibility for and guarantee the payment’ in paragraph 4, the contract is plainly one for services and not one of guaranty.”).

62. *Holloway*, 2002 WL 31259803 at *3.

63. *Id.* at *1.

64. *Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89 (Ct. App. 1996).

65. *Holloway*, 2002 WL 31259803 at *3.

a third party's promise, thus creating a de facto mandatory guarantee that violates federal law.⁶⁶

In other cases, the courts have struggled with the implications of the contractual language, particularly where more distant family members have taken the lead to assist the resident. For example, courts have appeared reluctant to hold a niece or a stepson liable,⁶⁷ while showing little sympathy for affluent—and possibly manipulative—immediate family members.⁶⁸ While one court refused to hear parole evidence, concluding that the "clear and unambiguous" meaning of the son's role as "responsible party" created joint and several liability for his father's care,⁶⁹ another court applied the "doctrine of equitable estoppel" to preclude a nursing home's recovery from an estate where there were repeated reassurances made to family members that the older person's care was covered by Medicare.⁷⁰ Citing the federal regulatory scheme, other courts have refused to base their decisions solely on the contract language, and in at least one case the court imposed a burden on the nursing home to prove that the person signing a payment promise as a "Responsible Party" was doing so as a volunteer.⁷¹

66. See 42 U.S.C. § 1395i-3(c)(F)(A)(ii) (2000) ("[A] skilled nursing facility must . . . not require a third party guarantee of payment to the facility as a condition of . . . continued stay in, the facility."); *id.* § 1396r(c)(5)(A)(ii) (2000); see also discussion *supra* Part III.A; Podolsky v. First Healthcare Corp., 58 Cal. Rptr. 2d 89 (1996).

67. See, e.g., *Daughters of Sarah Nursing Home Co., Inc. v. Frisch*, 565 N.Y.S.2d 532, 533 (N.Y. App. Div. 1991) (finding that factual issues regarding niece's awareness of key terms of contract at time of signing precluded summary judgment); *Slovik v. Prime Healthcare Corp.*, 838 So. 2d 1054, 1058 (Ala. Civ. App. 2002) (noting that evidence of documents signed by step-son as personal representative did not support conclusion there was contractual obligation to pay for step-father's nursing home care).

68. See, e.g., *Southport Manor Convalescent Ctr., Inc. v. Kundrath*, No. CV91-0284958, 1994 WL 621895, at *5 (Conn. Super. Ct. Oct. 28, 1994) (noting the son, "a highly educated businessman, refused to cooperate with [the nursing home]" and holding the son, who had signed as "responsible party" and "guarantor," liable for more than \$30,000 in his mother's unpaid nursing home costs, plus attorneys fees); *Leonard Nursing Home, Inc. v. Kay*, No. 45-1-2002-1242, 2003 WL 1571579, at *3 (N.Y. Sup. Ct. Mar. 13, 2003) (holding son-in-law, acting pursuant to power of attorney, liable for \$158,278 in nursing home care costs, concluding "[d]efendant undoubtedly impoverished [the resident] for personal financial gain").

69. *St. Francis Home v. Sharon*, No. 93-0523, 1993 WL 388290, at *1 (Wis. Ct. App. Oct. 5, 1993); see also *Daughters of Sarah Nursing Home Co., Inc. v. Lipkin*, 535 N.Y.S.2d 790, 790 (N.Y. App. Div. 1988) (holding son liable for unambiguous promise to pay as "responsible party").

70. *In re Estate of Spencer*, No. M2001-02187-COA-R3-CV, 2002 WL 31662349, at *2 (Tenn. Ct. App. Nov. 26, 2002) (noting that the nursing home dealt with Medicare on practically a daily basis and would be expected to have much more knowledge of the rules and regulations).

71. *Manor of Lake City, Inc. v. Hinners*, 576 N.W.2d 592 (Iowa 1998); see also *Beach Manor v. Dolsak*, No. 44462, 1982 WL 5963, at *2 (Ohio Ct. App. Oct. 21, 1982) (finding

In most of these cases, it appears the family member signed a form document on behalf of an incapacitated older family member, without planning on becoming the guarantor for that person's nursing home care.⁷² Many admissions documents have language which is at best confusing and at worst misleading.⁷³ As the court in *Podolsky v. First Healthcare Corp.* noted, "admission of a close family member to a nursing home . . . is often an emotionally-charged, stress-laden event."⁷⁴ Even if the older person has done some financial planning, it is the rare instance where a family as a whole preplans for long-term care.⁷⁵ Spouses are often in the dark—or in denial—about resources available to pay for nursing home care. Few children, much less grandchildren and other members of the extended family, have any understanding of the elder parent's plans or finances until well after the moment of long term care crisis arrives. Most admissions to nursing homes have no involvement by attorneys, despite the growing specialty of Elder Law to provide legal assistance in this arena.⁷⁶ Most admissions agreements are signed by family members in practical—if not legally recognized—duress.⁷⁷ And as most Elder Law practitioners know, even the clients who come to them for legal advice often do so only moments before—or after—the weekend's emergency that identifies the need for long-term care.⁷⁸

summary judgment improper because of issues of fact regarding signer's understanding of admission agreement).

72. See cases cited *supra* notes 67–71.

73. E.g. Benson, *supra* note 55, at i (citing one study of forty-five nursing home agreements used in Massachusetts, the reviewers concluded that "all . . . agreements examined . . . contained certain provisions that the facilities knew or should have known to be invalid or likely to confuse or deceive residents and their family members . . ."); see also Pearson, *supra* note 32, at 141–42 (analyzing "Responsible Party" provisions in Pennsylvania nursing home contracts).

74. 58 Cal. Rptr. 2d at 101.

75. Martin & Rourke, *supra* note 11, at 154 ("Americans have an unusually unhealthy attitude toward death and old age, which may lead to our ambivalence and indecision about long-term care.").

76. As one experienced practitioner observes, "A nursing home admissions contract constitutes a major financial commitment and has a profound effect on the resident's personal rights, yet many families do not seek an attorney's review before signing. . . . [T]he contract review can provide a context in which to review with the family questions about financial (and possible Medicaid) planning, will, advance directives for health care decisions, and the personal rights of the person about to become a nursing home resident." Lawrence H. McGaughey, *Reviewing a Nursing Home Admissions Contract*, 68 N.Y. St. B. J. 34 (Aug. 1996).

77. See, e.g., *Podolsky*, 58 Cal. Rptr. 2d at 101 ("The declarations of appellants and their supporting witnesses depict close family members in times of great personal turmoil trying to find a suitable facility to care for an elderly parent, or as in one instance, of an elderly parent forced to find a nursing home to care for a critically-ill middle-aged child.").

78. See *id.* at 92–94 (describing numerous instances where nursing home admissions were made under time pressures created by hospital discharge decisions).

When signing admission documents, family members may assume, wrongly in some instances, that the elder person's access to Medicare, insurance, social security or retirement fund payments will be adequate to cover the cost of nursing home care.⁷⁹ While Medicaid continues to provide the bulk of the financing for long-term care for those without adequate income and resources, gaps can occur in the availability of the resident's private means or public funds.⁸⁰ One subtle question underlies the disparate court rulings on liability of "Responsible Parties." Who should be expected to bear the risk of "loss" if public benefits or the resident's assets are not forthcoming or available for the cost of nursing home care?⁸¹

*C. Implications of Contractual Promises to
Use Resident's Assets to Pay Facility*

In the *Holloway*⁸² and *Fox*⁸³ cases discussed above, the decisions turned on whether there was an enforceable, contractual promise to pay as a principal or guarantor on the contract. In another recent case, the issue considered was slightly different. In *Sunrise Healthcare Corp. v. Azarigian*, an intermediate appellate court in Connecticut considered whether a third party signer was personally liable for breach of contract by failing to comply with a specific promise to use the resident's resources to pay the nursing home.⁸⁴ The court concluded that a daughter, signing as "Responsible

79. Nathalie D. Martin, *Funding Long-Term Care: Some Risk-Spreaders Create More Risks Than They Cure*, 16 J. CONTEMP. HEALTH L. & POL'Y 355, 356 (2000) ("Medicare does not cover most home-health care or nursing home stays, and unfortunately, most seniors do not know this.").

80. See, e.g., *supra* notes 56, 67–71. Compare *Dempsey v. Dep't of Pub. Welfare*, 756 A.2d 90, 95 (Pa. Commw. Ct. 2000) (holding money transferred by husband into irrevocable annuities disqualified wife for Medicaid), with *Ahern v. Thomas*, 733 A.2d 756, 771 (Conn. 1999) (holding money placed by resident into irrevocable trust did not cause disqualification for Medicaid).

81. Martin, *supra* note 79, at 386 ("The simple reality is that long-term care is incredibly expensive, whether it is paid for privately or publicly. Both of the currently available options for spreading the risk of these costs, long-term care insurance and continuing-care contracts, create their own financial risks. It is time to take steps to improve these options, as well as create additional ways to spread the risk of long-term care.").

82. *Holloway v. Riley's Oak Hill Manor, Inc.*, No. CA 02-74, 2002 WL 31259803 (Ark. Ct. App. Oct. 9, 2002).

83. *Special Care Nursing Servs., Inc. v. Fox*, No. 9460, 1998 WL 61902 (Mass. App. Ct. Feb. 9, 1998).

84. *Sunrise Healthcare Corp. v. Azarigian*, 821 A.2d 835, 837 (Conn. App. Ct. 2003).

Party,” was personally liable for more than \$75,000 in nursing home expenses when her mother did not qualify for Medicaid.⁸⁵

The court observed that under the contract, the daughter had promised to preserve her mother’s assets for nursing home care.⁸⁶ The daughter acknowledged the separate promise, but asserted that federal Medicaid law made the promise unenforceable against her personally, citing the language of Subsection (A)(ii)⁸⁷ as support for the proposition that the statute created an absolute bar on personal liability for agents.⁸⁸ The Connecticut appellate court rejected this interpretation.⁸⁹ The court viewed the contract as initially pledging no assets of the daughter, thus complying with federal law.⁹⁰ Rather, the daughter’s liability arose only from her failure to keep a separate contractual promise to use her mother’s assets for the nursing facility’s care,⁹¹ a promise the court viewed as permitted by Subsection (B)(ii).⁹²

While the holding of the court in *Azarigian* makes an important distinction between prohibited mandatory guarantees and valid promises to use the resident’s assets to pay for care, a close look at the facts also raises concern about the court’s conclusion that the daughter was in breach of the separate promise. The daughter, Vicki Azarigian, held a power of attorney for her mother, dated February 1994.⁹³ She signed the nursing home contract for her mother as “responsible party” and her capacity as power of attorney was known to the nursing home from the beginning.⁹⁴ The daughter paid for the nursing home from private sources through the end of December 1996.⁹⁵ In addition she hired a private com-

85. *Id.* at 842.

86. *Id.* at 840 (“If the responsible party has control of or access to the resident’s income and/or assets, the responsible party agrees that these funds shall be used for the resident’s welfare, including but not limited to making prompt payment in accordance . . . with the terms of this agreement.”).

87. 42 U.S.C. § 1396r(c)(5)(A)(ii) (2000) (“With respect to admissions practices, a skilled nursing facility must . . . not require a third party guarantee of payment to the facility as a condition of admission (or expedited admission) to, or continued stay in, the facility.”).

88. *Azarigian*, 821 A.2d at 838.

89. *Id.* at 840.

90. *Id.*

91. *Id.* at 840 (“The defendant’s potential liability under the contract for an unauthorized use of [her mother’s] assets is analogous to a trustee’s liability for unauthorized use of trust property.”).

92. *Id.* at 839 (“[Statutory] prohibition of third party guarantees does not, however, prevent ‘an individual, who has legal access to a resident’s income or resources available to pay for care in the facility, to sign a contract (without incurring personal financial liability) to provide payment from the resident’s income or resources for such care.’” (quoting 42 U.S.C. § 1396r(c)(5)(B)(ii) (2000))).

93. *Id.* at 837.

94. *Id.*

95. *Id.*

panion for her mother at the nursing home, at a cost of \$31,760.⁹⁶ Such steps are typical of a "spend down," using the mother's income and assets to pay for her care until they are exhausted.⁹⁷ Shortly after admission, the daughter also made gift transfers from her mother's accounts totaling \$49,691.25, apparently as part of an estate plan that pre-existed the admission.⁹⁸ Where transfers or gifts are made from the resident's assets, the statute mandates a period of ineligibility; a standard planning step is to await the end of an ineligibility period before making an application for Medicaid.⁹⁹

In March 1997, the daughter applied for Medicaid on her mother's behalf. Medicaid benefits, once granted, would normally be retroactive to three months prior to the date of application.¹⁰⁰ More than a year after the mother's death, in March of 1999, the state denied Medicaid, citing disqualifying "transfers" from the mother's accounts "between November 1994 and January 1996."¹⁰¹ (The two-year delay in the administrative denial was not explained in the opinion.) It turned out that in addition to the expenditures made by the daughter, which the parties agreed did not alone disqualify her mother for Medicaid, the resident's husband had used \$285,000 to fund a trust in August 1995.¹⁰² The opinion does not discuss whether the daughter was aware of the trust, or its implications, when she signed her mother's admission contract.

96. *Id.*

97. Omar N. Ahmad, *Medicaid Eligibility Rules for the Elderly Long-Term Care Applicant*, 20 J. LEGAL MED. 251, 253 (1999) (describing spend-down process during pre-Medicaid application period).

98. *Azarigian*, 821 A.2d at 837 n.2.

99. Ahmad, *supra* note 97, at 262 (describing effect of transfers, creating periods of ineligibility for Medicaid). The ability to make certain gifts or transfers for less than market value is a standard Medicaid planning process, although it is sometimes controversial. See Allan D. Bogutz & Marshall B. Kapp, *Debate 15: Should Older Persons Be able to Give Assets to Family Members without Affecting Medicaid Eligibility?*, in *CONTROVERSIAL ISSUES IN AGING* 160-72 (Andrew E. Scharlach & Lenard W. Kaye eds., 1997); see also VINCENT J. RUSSO & MARVIN RACHLIN, *NEW YORK ELDER LAW PRACTICE* § 8:36, at 645 (West Group 2003) (discussing practical and ethical concerns arising from Medicaid planning that exist for both the family and the elder law practitioner and noting that "[i]t is not the function of the elder law attorney to discourage private payment. It is the function of the attorney to explain what government benefits, such as Medicare and Medicaid, are available and how to obtain them").

100. *Azarigian*, 821 A.2d at 837 n.2.

101. *Id.* at 837.

102. *Id.* at 837 n.3 ("The parties agree that, if the revocable trust had not been attributed to [the mother], she would have been eligible for Title XIX assistance."). The resident's husband died in January 1996, close to the time of his wife's admission to the nursing home. By the time the administrative denial was issued, both the father and the mother had died, thus suggesting that "undoing" the trust was impossible. See *id.* at 837-38.

The *Azarigian* case demonstrates an important point about the potential liability of someone who signs the admission agreement while serving as the resident's agent. Nursing homes need to be paid in order to care for incapacitated persons. For practical reasons, facilities need the cooperation of an agent to secure payment from the resident's private funds or, when appropriate, to apply for public funding under Medicare or Medicaid.¹⁰³ The agent has a significant role to play that requires financial savvy. Such practical concerns are acknowledged in federal law, which expressly permits qualified facilities to require "an individual, who has legal access to a resident's income or resources available to pay for care in the facility, to sign a contract (without incurring personal financial liability) to provide payment from the resident's income or resources for such care."¹⁰⁴ Under the court's analysis in the *Azarigian* case, the parenthetical prohibition on the signer's personal liability is treated as a reference to the prohibition on *mandatory* guarantee contracts; it is not permitted to function as an anomalous loophole for exploitation by agents.¹⁰⁵

The *Azarigian* case is also troubling because rather than holding the daughter liable for the portion of assets that she transferred as "gifts," and that arguably were not used to care for the mother, the court held the daughter personally liable for the entire sum she "transferred," including the cost of the assistant hired to care for her mother.¹⁰⁶ Further, despite references to the daughter's "misconduct," the court does not fully address the apparent good

103. See, e.g., *Beverly Healthcare-Murrysville v. Dep't of Pub. Welfare*, 828 A.2d 491, 496 (Pa. Commw. 2003) (holding nursing facility did not have standing to appeal denial of Medicaid for former resident, where daughter, as designated agent, failed to pursue appeal).

104. 42 U.S.C. § 1395i-3(c)(5)(B)(ii) (2000); *id.* § 1396r(c)(5)(B)(ii) (2000); see also 42 C.F.R. § 483.12(d)(2) (2002).

105. See *Azarigian*, 821 A.2d at 840. The court notes that the agent's liability arises because of her handling of her mother's assets "and only to the extent that [the mother's] assets would cover outstanding payments owed to the plaintiff. Because plaintiff seeks to recover moneys that belonged at all times to [the mother] rather than to the defendant, the defendant's liability depends on a showing of her misuse of [her mother's] assets in violation of the contract." *Id.*

106. *Id.* However, the court does appear to limit the daughter's liability to the amount of money she transferred from her mother's assets:

The defendant [daughter] is liable only for her handling of [her mother's] assets and only to the extent that [her mother's] assets would cover outstanding payments owed to the [nursing home.] Because the [nursing home] seeks to recover moneys that belonged at all times to [the mother] rather than to the defendant, the defendant's liability depends on a showing of her misuse of [her mother's] assets in violation of the contract.

faith of the daughter in handling the mother's resources. The daughter's transfers, standing alone, would not have disqualified the mother for Medicaid. The court did not discuss whether the daughter knew or should have known of the pre-admission trust created by the resident's husband who appears to have been the daughter's stepfather.

Although the court in *Azarigian* purports to hold the daughter liable only for breach of her contractual promise to use the mother's assets for nursing home care, the court comes close to holding the daughter liable as a guarantor of payment. The daughter is forced to bear the risk that Medicaid would not be available, even though her actions alone did not disqualify the resident for eligibility.¹⁰⁷

IV. THIRD-PARTY SIGNERS AS AGENTS OF THE RESIDENT

In analyzing the potential roles played by third parties in facilitating nursing home admissions for the elderly, it is helpful to look at the law of agency.¹⁰⁸ Ordinarily, third parties signing admissions agreements on behalf of elderly residents do so as agents; they act with the consent of the resident, as principal, to make arrangements for care.¹⁰⁹ The authority of agents to act may be

107. Was the Connecticut court making a clear distinction between liability as a contractual guarantor of payment versus liability for breaching a separate contractual promise to use the resident's assets to pay for nursing home care? A test of the *Azarigian* court's holding would be created by facts that show ineligibility for Medicaid even though the "responsible party" made no post-admission transfers of the institutionalized person's funds. The court hearing such a case would be faced with the question of whether to hold the third-party liable only because he or she signed the contract as a "responsible party." Recently, in an unpublished opinion, a Connecticut court declined to impose liability on a daughter who signed as "signature title party acting for resident (Conservator of Estate or Power of Attorney . . .)" but who did not put her name on the available line for "responsible party." *Gladeview Health Care Ctr. v. Grande*, No. 566195, 2003 WL 22040626, at *1 (Conn. Super. Ct. Aug. 7, 2003) (distinguishing *Sunrise Healthcare Corp. v. Azarigian*, 821 A.2d 835 (Conn. App. Ct. 2003)).

108. See WARREN A. SEAVEY, *AGENCY* 2 (1964) (noting the potential difficulty in using brief terms such as agent and principal, "[i]n Agency, key words have been used by the courts and text writers in so many different senses that it is especially important to state the meaning assigned here"); see also *RESTATEMENT (SECOND) OF AGENCY* § 1 cmt. b (1958) (defining agent and principal).

109. See WILLIAM GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* 34 (3d ed. 2001) ("Agency is a consensual relationship. The relationship is created only when one person manifests an intention that another shall act in his behalf and the other person consents to represent him. The relationship is most often thought of as being contractual though it is not necessary that the relationship arise out of contract."); see also *RESTATEMENT (SECOND)*

actual¹¹⁰ or apparent.¹¹¹ Although the relationship is “often thought of as being contractual . . . it is not necessary that the relationship arise out of contract.”¹¹² A separate important issue, not directly addressed here, is whether, and under what circumstances, third parties *should* be allowed to make admissions decisions.¹¹³ For purposes of this discussion, it will be assumed that the *resident* is not contesting the admissions decision.

Ordinarily, an agent acting for a “fully disclosed principal” is not viewed as a party to the contract.¹¹⁴ Outside of the Medicaid context, contracts signed by one person, requiring service for another, may raise a legitimate question of whether the signer is acting as a mere agent.¹¹⁵ Thus, traditional agency law puts the burden on the signer to prove his agency.¹¹⁶ On this point, courts frequently look

OF AGENCY §§ 1(1), 15, 16 (1958) (discussing the manifestation of consent between agent and principal).

110. GREGORY, *supra* note 109, at 35 (“Actual authority may be express or implied. Express authority of an agent to act for his principal is manifested fully and specifically to the agent. Implied authority may be incidental to a clearly expressed grant of authority or it may be inferred, perhaps out of necessity or from the customs of a business, as attaching to a recognized grant of authority.”); *see also* RESTATEMENT (SECOND) OF AGENCY § 7 (1958) (“Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal’s manifestations of consent to him.”).

111. GREGORY, *supra* note 109, at 35–36. Apparent authority is also “sometimes called ostensible authority.” *Id.* Other applicable theories of agency law may include “estoppel, inherent agency power and emergency authority.” *Id.* RESTATEMENT (SECOND) OF AGENCY §§ 8, 27 (1958) (discussing agent’s apparent authority).

112. GREGORY, *supra* note 109, at 34 (pointing out that the statute of frauds may require a writing with the authority to transfer real property, which is a major example of this limitation); RESTATEMENT (SECOND) OF AGENCY §§ 1(1), 15, 16 (1958).

113. As one observer notes following his qualitative research project, “[w]hen *any* willing and available family member or friend can be located, facilities typically accept that person as surrogate decision-maker for the resident. Often there is no specific inquiry into the source of that person’s formal authority.” Marshall B. Kapp, *The ‘Voluntary’ Status of Nursing Facility Admissions: Legal, Practical and Public Policy Implications*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 10 (1998).

114. GREGORY, *supra* note 109, at 202–03 (“Whether or not an agent who makes a contract for his principal thereby becomes a party to that contract depends upon the nature of the particular agency relation out of which the contract arises. If both the existence and the identity of the agent’s principal are fully disclosed to the other party, the agent does not become a party to any contract which he negotiates. Of course, it is otherwise if the parties agree that the agent is to be a party.”); *see also* RESTATEMENT (SECOND) OF AGENCY § 4(1) (1958) (“If, at the time of a transaction conducted by an agent, the other party thereto has notice that the agent is acting for a principal and of the principal’s identity, the principal is a disclosed principal.”).

115. *See, e.g., St. Luke’s Nursing Home, Inc. v. Rebeiro*, No. 1499, 2003 WL 22048194, at *2 (Mass. App. Div. Aug. 26, 2003) (noting that it is difficult to apply “straight agency principles” to analysis of the role of third-party signers of nursing home agreements).

116. RESTATEMENT (SECOND) OF AGENCY § 4(1) (1958); *see also, id.* § 320 cmts. a, b (1958) (“Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract.”).

to see whether the principal's identity was fully disclosed.¹¹⁷ However, in nursing homes participating in Medicare and Medicaid, the principal is always "disclosed" for it is the resident who has a statutory right to seek federal payment sources, and the facility is not permitted to seek a waiver of that right.¹¹⁸ Thus, decisions that turn on whether the agent's limited role was disclosed are missing the point of the federal law.¹¹⁹ In essence, the Nursing Home Reform Act should be seen as creating a presumption—a presumption that the third-party signers are agents of the fully disclosed principal (the resident), and are *not* agreeing to pay for the resident's nursing home care out of their own pockets by the mere act of signing an admissions agreement.

Where a document exists, such as a Power of Attorney, the agent's authority is normally spelled out.¹²⁰ In some instances, statutory law may impose specific duties on an agent acting under a power of attorney.¹²¹ If a guardianship or other court-appointment exists, the agent's duties may be specified by the terms of the appointment or governed by statute.¹²² Ordinarily, the agents and court appointed representatives are seen as having a fiduciary obligation to their principals.¹²³ While fiduciary obligations at common law are imprecisely defined, most analyses start with the proposition that the agent is under a duty to act solely and

117. See *id.* § 4(1).

118. See 42 U.S.C. § 1395i(3)(c)(5)(A)(i)(I) (2000) (Medicare); *id.* § 1396r(c)(5)(A)(i)(I) (2000) (Medicaid); see also *supra* text accompanying note 25.

119. See, e.g., *Holloway v. Riley's Oak Hill Manor, Inc.*, No. CA 02-74, 2002 WL 31259803 (Ark. Ct. App. Oct. 9, 2002); see discussion *supra* Part III.B.

120. See, e.g., Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 1-5 (2001) (examining history and use of powers of attorney).

121. David M. English, *The UPC and the New Durable Powers*, 27 REAL PROP. PROB. & TR. J. 333, 337 (1992) (describing statutes affecting powers of attorney); see also UNIF. DURABLE POWER OF ATTORNEY ACT, §§ 5-501 to 5-505, 8 U.L.A. 131 (Supp. 2003).

122. See UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT, §§ 101-504, 8A U.L.A. 310-428 (2003).

123. See Boxx, *supra* note 120, at 2 ("Analysis of the durable power of attorney can also shed light on the broader question that has been open for centuries and is still vigorously debated: what is the nature of a fiduciary?"); UNIF. DURABLE POWER OF ATTORNEY ACT, *supra* note 121, § 5-503 (discussing relationship between a fiduciary and an attorney in fact); see also SEAVEY, *supra* note 108, § 3C ("A fiduciary is a person whose function it is to act for the benefit of another with regard to matters within his undertaking. . . . The duties of loyalty are substantially the same for all fiduciaries, varying only in intensity."); GREGORY, *supra* note 109, at 140 (citing the definition of fiduciary as someone who "occupies a position of peculiar confidence towards another. . . ." (quoting *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 512 (Tex. 1942))).

entirely for the benefit of the principal.¹²⁴ An agent can be held liable for misuse of his principal's assets,¹²⁵ can be forced to make an accounting to the principal,¹²⁶ and the agent must carry out the terms of the principal's contracts (such as making payments pursuant to the nursing home admission agreement) or be liable to the principal for damages arising from the failure to act.¹²⁷ Under traditional agency theory, however, the failure of an agent to honor the fiduciary duty to the principal does not give the contracting third party a cause of action against the agent.¹²⁸

Subsection (B)(ii) of the Medicare and Medicaid laws permits the nursing home to ask a legally recognized agent to sign a contract promising to use the principal's assets to pay for nursing home care.¹²⁹ A potential conflict is created by such a clause in the admissions agreement. Under traditional agency theory, the agent must honor the principal's directions, or in the absence of specific directions, act in a manner consistent with the fiduciary obligation to act solely for the benefit of the principal.¹³⁰ Thus, in *Azarigian*, the daughter as agent for her mother appeared to be acting pursuant to her mother's directions in making gifts in ac-

124. See, e.g., UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT, *supra* note 122, § 314(a) ("A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian. A guardian at all times shall act in the ward's best interest and exercise reasonable care, diligence, and prudence."); *Susser v. Saari* (*In re Susser*), 657 N.W.2d 147, 150 (Mich. Ct. App. 2002) (noting that an agent, acting under a power of attorney, is generally accepted to be operating in a fiduciary relationship with the principal); *Schock v. Nash*, 732 A.2d 217, 225 (Del. 1999) (noting that an attorney in fact has a fiduciary duty to act in the best interest of the principal unless the principal consents to the agent's "engaging in an interested transaction after full disclosure"); see also RESTATEMENT (SECOND) OF AGENCY § 39 (1958) ("Unless otherwise agreed, authority to act as agent includes only authority to act for the benefit of the principal."); 20 PA. CONS. STAT. ANN. § 5601(e) (imposing express fiduciary obligation on agent acting under power of attorney, thus supplementing common law).

125. RESTATEMENT (SECOND) OF AGENCY § 402(1) (1958) (discussing an agent's liability for misuse of principal's property); see also GREGORY, *supra* note 109, at 146 (describing liability for conversion of property).

126. GREGORY, *supra* note 109, at 149.

127. *Id.* at 145-46.

128. *Id.* at 202-03 ("If both the existence and the identity of the agent's principal are fully disclosed to the other party, the agent does not become a party to any contract which he negotiates."); see also RESTATEMENT (SECOND) OF AGENCY § 4(1) (1958); *St. Luke's Nursing Home, Inc. v. Rebeiro*, No. 1499, 2003 WL 22048194, at *3 (Mass. App. Div. Aug. 26, 2003) (contrasting legal theory that agent of disclosed principal is not liable with evidence that shows agent expressly agreed to personal liability for nursing home payments).

129. 42 U.S.C. § 1395i-3(c)(5)(B)(ii) (2000); *id.* § 1396r(c)(5)(B)(ii) (2000); see also 42 C.F.R. § 483.12(d)(2) (2002).

130. See RESTATEMENT (SECOND) OF AGENCY § 13 cmt. a (1958).

cordance with a pre-existing estate plan.¹³¹ Her payment for an attendant was to benefit the principal.¹³² It was the admissions agreement, in accordance with Subsection (B)(ii), that created a priority list for the agent—to pay the nursing home *first*.¹³³ Under the Azarigian court's analysis of contractual promises to pay from the resident's assets, even a third party who clearly signs only as agent, and who works hard to satisfy his or her duties as the agent for the institutionalized principal, faces the risk of substantial personal liability.

V. WHY PERMIT—MUCH LESS REQUIRE—A "RESPONSIBLE PARTY" IN NURSING HOME AGREEMENTS?

A. *The Difficulty of Medicaid Applications and the Good (or Bad) Faith of Agents*

In 1986, the Institute of Medicine described the nursing home industry as a two-tiered industry, made up of "a preferential one for those who can pay their way and a second, more restricted one, for those whose stays are paid by Medicaid."¹³⁴ In reality, the industry has at least three tiers. One relatively small tier is made up of purely private nursing homes, those who do not participate in Medicaid; from day one the residents and their family members know that any stay there must be privately financed.¹³⁵ In those contexts, the ability to request, or indeed mandate, guarantees is not affected by the Nursing Home Reform Act.¹³⁶ At the other end of the spectrum are facilities that often function as a place of last

131. *Sunrise Healthcare Corp. v. Azarigian*, 821 A.2d 835, 841 (Conn. App. Ct. 2003) (rejecting daughter's argument that "she cannot be held liable under the contract because she was acting as [mother's] agent").

132. *Id.*

133. *See id.* at 842 ("[T]he defendant assumed the obligations of the 'responsible party' as set forth under the contract. These obligations extend well beyond the defendant's role as [her mother's] power of attorney. . . . We conclude . . . that the defendant, in carrying out her obligations under the contract, was not acting exclusively as [her mother's] power of attorney.").

134. IOM NURSING HOME REPORT, *supra* note 17, at 6.

135. There are approximately 17,000 Medicare and Medicaid-certified nursing homes in the United States; statistics are not, however, maintained by federal authorities for the number of purely private pay facilities. *See* NURSING HOME OVERVIEW, available at <http://www.medicare.gov/nursing/overview> (on file with the University of Michigan Journal of Law Reform); NATIONAL CENTER FOR HEALTH STATISTICS, at <http://www.cdc.gov/nchs>.

136. *See* 42 U.S.C. § 1396r(a) (2000) (defining nursing facilities eligible for certification or qualification to participate in Medicaid).

resort, sometimes called "county homes," where the applicant's income is minimal, and assets, if any existed, have long since been exhausted; in such circumstances, from day one, everyone knows that payment for care will be dependent on public financing.¹³⁷ The vast majority of nursing facilities are Medicare and Medicaid "certified" (also referred to as "qualified"), and comprise a "middle" tier, where payment comes from a combination of private and public sources.¹³⁸

Attorneys and others report that the availability of an open space in the middle tier of nursing homes is often dependent on the resident or the resident's family being able to show sufficient private resources to pay the private pay rate for a given number of months.¹³⁹ Medicaid beds are mysteriously "unavailable," while the ability to pay at private pay rates assures admission. Thus, despite the Nursing Home Reform Act's attempt to prevent manipulation of families in the form of "guarantees" or waivers of the right to seek Medicaid,¹⁴⁰ a very real form of preferential treatment is practiced, affecting those of modest financial resources. Such sharp business practices violate the spirit of the Act when viewed as a whole.¹⁴¹ However, both as individuals and as a nation, we continue to be conflicted about whether care for our elderly should be a public or private duty. Thus, such practices appear to be outgrowths of interpreting the federal laws as prohibiting *mandatory*

137. THOMAS D. BEGLEY, JR. & JO-ANNE HERINA JEFFREYS, *REPRESENTING THE ELDERLY CLIENT* (Aspen) § 3.08 (1999 & Supp. 2003) (describing types of nursing homes, services and financing alternatives).

138. *Id.*

139. BEGLEY & JEFFREYS, *supra* note 137, § 4.04[B][1] ("Many nursing homes certified for Medicaid insist that the resident pay on a private-pay basis for a period of time before becoming eligible for Medicaid. While the duration of stay element violates federal law, the nursing home's refusal to admit a resident on a 'Medicaid on admission' basis appears to be within the law. The practical affect [sic] of this anomaly is that nursing homes are able to insist that families pay on a 'private pay' basis for a period of time."); RUSSO & RACHLIN, *supra* note 99, § 12:4, at 777 (noting the "willingness to pay the cost of up to three (3) months of care in advance can often make the difference between the acceptance or rejection of the individual").

140. 42 C.F.R. § 483.12(d)(3) (2002); *see also supra* text accompanying notes 25–27.

141. *See* RUSSO & RACHLIN, *supra* note 99, § 12:9, at 786 ("As a practical matter, . . . since many nursing homes require three months payment as a condition of acceptance of the individual, any payment violates the law whether it is called voluntary or not. This creates a serious dilemma for many families who seek a nursing home placement, but find no bed available unless they pay the security deposition."); *see, e.g.*, 42 U.S.C. § 1396r(c)(5)(A)(i)(I) (2000) (prohibiting facilities from requiring residents to waive Medicaid); *id.* § 1396r(c)(5)(A)(i)(II) (2000) (prohibiting facilities from requiring residents to promise not to apply for lower limits of coverage); *id.* § 1396r(c)(5)(A)(i)(III) (2000) (prohibiting facilities from requiring third-party guarantee of payment as a condition of admission, expedited admission, or continued stay in facility); *see also* discussion *supra* Part II; BEGLEY & JEFFREYS, *supra* note 137.

payment guarantees, while permitting so-called *voluntary* promises to pay.

One consequence of this practice is the inability to predict accurately whether and when someone will qualify for Medicaid until after the bills have already begun to accrue. As many have described, the regulatory framework and paperwork associated with application for Medicaid assistance with long-term care is often burdensome, chaotic and difficult.¹⁴² Denials of applications can occur for highly technical reasons, such as failure to "verify" resources, even if the possibility of certain resources would have no effect on eligibility.¹⁴³ Case law and practical experience further demonstrate that despite federal guidelines requiring the states to process applications for Medicaid in a timely manner, there is enormous variability, both within states and from state to state, in the total time it takes for final determinations, particularly if appeals are involved.¹⁴⁴ If a denial is issued, the time period to appeal is quite short, and subsequent applications must sometimes be made, creating potential gaps in coverage even for the "eligible."¹⁴⁵ As a result of such variables in the Medicaid application process, very real financial traps exist for those who sign nursing home agreements while trusting the superficial reassurances that the third-party signers face no personal liability for the care.

142. *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981) (describing the statutory scheme for Medicare and Medicaid benefits as one of the "most intricate ever drafted by Congress"). See also Ahmad, *supra* note 97, at 279 (noting that the "unceasing attempts by Congress to further refine the [Medicaid] program have, in fact, hampered understanding of the law instead of clarifying it . . ."); Dobris, *supra* note 14.

143. See BEGLEY & JEFFREYS, *supra* note 137, § 10.03[B] ("Medicaid benefits may be denied for the following reasons: improper transfer of resources; excess resources; improper spend down; invalid trust; unacceptable annuity; or failure to be in need of nursing home care.").

144. See 42 C.F.R. § 435.911 (2002) (specifying 90 days as the outside time limit for applications based on disability and 45 days for all other application bases, but providing exceptions where the "agency cannot reach a decision because the applicant or an examining physician delays or fails to take a required action"); see, e.g., *Sunrise Healthcare Corp. v. Azarigian*, 821 A.2d 835, 837 (Conn. App. Ct. 2003) (demonstrating twenty-four months between application and decision); see also PA. DEP'T. OF THE AUDITOR GEN., PERFORMANCE AUDIT OF PENNSYLVANIA'S MEDICAL ASSISTANCE LONG-TERM CARE AS PROVIDED IN NURSING FACILITIES, ch. 6 at 2, Table 1 (1997) (summarizing 495 responses to 1996 survey of Pennsylvania nursing homes indicating that 69.88% of Medical Assistance applications required more than 90 days for final decision).

145. See BEGLEY & JEFFREYS, *supra* note 137, § 10.03 (discussing application, denial, and fair hearings that may be necessary because of disputes over interpretations of the facts, available resources, or calculation of the community spouse's minimum monthly maintenance needs allowance); see, e.g., *Azarigian*, 821 A.2d at 837 (describing application for Medicaid made in March 1997 that was not denied until March 1999).

The slowness of the Medicaid application process can give greedy agents with bad motives the opportunity to misuse the principal's assets.¹⁴⁶ Certainly, such agents should not be permitted to avoid liability for their elder's care, and the contractual promise permitted by Subsection (B)(ii) is an effort to curb such abuse.¹⁴⁷ However, some agents become caught in the Medicaid maze without harboring bad intentions and despite attempts to qualify residents in a timely fashion for Medicaid.¹⁴⁸ Unfortunately, in the *Azarigian* case, the court rejected the daughter's assertion of her good faith efforts as a defense and found that she failed to comply with her obligations under the nursing home contract, without clearly addressing her knowledge, or lack thereof, of the husband's pre-admission transfers that triggered the disqualification for Medicaid.¹⁴⁹ Although a showing of the agent's good faith permits the agent to discharge his or her debt in bankruptcy,¹⁵⁰ few family members will be likely to step forward to serve as agents if that becomes the dominant solution to problems with ambiguity and surprise in nursing home contracts.

*B. Some State Agencies Are Recognizing the Need for Better
Definition of Roles for Third-Party Signers*

The request by nursing homes and other health care facilities for persons to sign as the "Responsible Party" for a resident or patient is a practice that predates the Nursing Home Reform Act.¹⁵¹

146. See, e.g., *Presbyterian Medical Ctr. v. Budd*, 832 A.2d 1066, 1076 (Pa. Super. Ct. 2003) (finding that nursing home did not have cause of action for breach of contract against daughter who did not sign nursing home agreement, but permitting nursing home to go forward with a claim for equitable support and restitution under Pennsylvania's filial responsibility statute, 62 PA. CONS. STAT. ANN. § 1973 (1996), where daughter is alleged to have transferred more than \$100,000 in mother's assets to her own accounts).

147. See 42 U.S.C. § 1395i-3(c)(5)(B)(ii) (2000); *id.* § 1396r(c)(5)(B)(ii) (2000); see also 42 C.F.R. § 483.12(d)(2) (2002).

148. See *Azarigian*, 821 A.2d at 837.

149. *Id.* at 841-42.

150. See, e.g., *Lexington Health Care Ctr. of Elmhurst, Inc. v. Clarke (In re McDade)*, 282 B.R. 650, 652 (Bankr. N.D. Ill. 2002) (finding daughter's obligation to pay for father's nursing home, arising out of her signature as "Responsible Party" on the nursing home agreement, to be a debt dischargeable in bankruptcy, in the absence of evidence of fraud or a fiduciary obligation running to the nursing home); *Lexington Health Care Ctr. of Chicago Ridge, Inc. v. Kraye (In re Kraye)*, Nos. 98 B 02693, 98 A 00941, 1998 WL 775654, at *3 (Bankr. N.D. Ill. Nov. 6, 1998) (finding son's signature as "Responsible Party" on father's admission agreement did not create fiduciary obligation or otherwise prevent discharge of debt for fraud).

151. See, e.g., *Sturman v. Socha*, 463 A.2d 527, 532 (Conn. 1983) (holding that son, who was appointed conservator for his incapacitated father's estate, was nonetheless personally

The practice has long been fraught with problems.¹⁵² As demonstrated in the cases discussed in this Article, the phrase "Responsible Party" is susceptible of alternative, inconsistent meanings. Contract terms such as "representative" or "sponsor" are equally vague, especially in the absence of statutes or regulations defining their meaning. As it stands now, the terms are likely to be viewed by family members as synonyms for "agent." For facilities bent on ensuring payment sources, little incentive exists to make it obvious to the signer that he or she is undertaking a voluntary and knowing acceptance of responsibility for payment. It is apparent from the case law summarized above that despite the existing federal statutes barring mandatory guarantee agreements, family members are signing agreements without intending to become the private source of payment, and yet are later asked to pay for long term care.

One option for resolving the ambiguity of responsible party contracts is for all facilities eligible to participate in Medicare or Medicaid financing to eliminate vague party references or phrases—and the vague payment implications—entirely. State agencies are beginning to address this issue through review of contracts currently used by nursing homes. For example, New York recently entered into a stipulated settlement requiring a group of nursing homes within its state to drop offending language and practices.¹⁵³ Following a study of skilled nursing facilities in the Boston area, an ad hoc working group prepared a report on nursing home admissions agreements for the Gerontology Institute at the University of Massachusetts. Based on findings that the existing agreements were likely to confuse or deceive residents and family members, the Massachusetts group proposed a model nursing

liable for nursing home costs where he signed the nursing home agreement as "Responsible Party" without identifying his limited role); *St. Ann's Home for the Aged v. Daniels*, 420 N.E.2d 478, 480–81 (Ill. App. Ct. 1981) (holding granddaughter liable for nursing home costs because she signed as "Responsible Party" while assisting grandmother in transition to nursing home, and holding son liable based on finding that son, who was away on a business trip during the transition, appointed doctor as agent for making care arrangements for his mother); *Beach Manor v. Dolsak*, No. 44462, 1982 WL 5963, at *2 (Ohio Ct. App. Oct. 21, 1982) (finding that issues of fact prevented summary judgment on liability for breach where friend signed nursing home contract while serving as court-appointed legal guardian).

152. See cases cited *supra* note 155.

153. See *NY State Attorney General's Office Gets Nursing Homes to Revise Policies*, ROCHESTER DAILY RECORD, Mar. 18, 2003, at 1.

home agreement with standardized definitions for responsible parties and similar third person signers.¹⁵⁴

Indeed, at least one state has eliminated the use of Responsible Party language or similar ambiguous phrases in admission agreements through state regulations.¹⁵⁵ In Maryland, the Department of Health and Mental Hygiene has approved two model contracts for use in nursing facilities, and regulations mandate that "a nursing facility shall include within its contract, at a minimum, all of the provisions of the model contract."¹⁵⁶ Where the resident has capacity to sign, one model contract permits the resident to list alternative "anticipated" payment sources, including Medicare, Medicaid, other third-party insurance, or the resident's own funds; an alternative also exists for the resident to identify "another person who has voluntarily agreed to pay with their own funds."¹⁵⁷

A separate model contract is approved in Maryland for use by a "Resident's Agent."¹⁵⁸ The agent contract is to be used if the agent has "access to (use, management, or control of) the income, funds and/or assets of [the Resident]" and is "willing to act on behalf of the Resident."¹⁵⁹ The contract attempts to create alternatives for the agent by distinguishing the agent's role as handler of the resident's funds, from any voluntary role as primary obligor for the nursing home costs. The contract specifies that the agent "cannot be required to pay for the Resident's care *from [his or her] own funds*, unless [he or she] knowingly and voluntarily agree to pay for the cost of the Resident's care with [his or her] own funds."¹⁶⁰ The signature line expressly refers to the signer as "agent" and asks the agent to specify whether he or she is acting as a court-appointed guardian, a power of attorney, a family member, or "other individual with access to (use, management, or control of) the income, funds and/or assets of the Resident."¹⁶¹ A separate,

154. JOHN J. FORD & REBECCA BENSON, ESTATE PLANNING FOR THE AGING OR INCAPACITATED CLIENT IN MASSACHUSETTS: PROTECTING LEGAL RIGHTS, PRESERVING RESOURCES, AND PROVIDING HEALTH CARE Pt. IV, ch. 26, § 26.1 (Mass. Cont. Legal Educ., Inc. 2002), available at Westlaw, EPAIII MA-CLE S-26-1 (copy of proposed model agreement on file with the University of Michigan Journal of Law Reform); see also Benson, *supra* note 55.

155. MD. REGS. CODE tit. 10, § 10.07.09.06 (2003).

156. *Id.* § 10.07.09.06(B) (2003).

157. Model Resident Admission Contract, approved by Maryland Department of Health and Mental Hygiene 2-3 (copy on file with the University of Michigan Journal of Law Reform).

158. Model Resident's Agent Financial Agreement, approved by Maryland Department of Health and Mental Hygiene (copy on file with the University of Michigan Journal of Law Reform).

159. *Id.* at 1.

160. *Id.* at 2.

161. *Id.* at 18.

eight-page questionnaire is an exhibit to the Agreement, seeking the agent's acknowledgment of his or her understanding of various rights, duties and limitations on liability when signing as an agent.¹⁶² The explanations provided in the exhibit are intimidating, thus encouraging caution on the part of the agent in signing the agreement, although as the *Podolsky* case makes clear, the contexts in which the documents are presented to the families are as important as the superficial language of the documents.¹⁶³

The authority of the states to impose controls on nursing homes—beyond that contained in the Nursing Home Reform Act—is expressly provided by federal law.¹⁶⁴ In *Podolsky*, the court recognized that contract provisions reciting the "voluntariness" of anyone signing as a third party may be inadequate protection.¹⁶⁵ In that case the court used the state's unfair trade practices law in an attempt to force changes in the nursing home admissions process, beyond merely changing the language of the documents.¹⁶⁶ The admission of a loved one for nursing home care is not a negotiation among equals, and the need for regulatory control is clear.¹⁶⁷ The Nursing Home Reform Act represents a statement of national policy precluding facilities from insisting on third-party promises to pay. Time has demonstrated that additional protections are required to put teeth into that national policy.

VI. ABOLISH "RESPONSIBLE PARTY" LANGUAGE IN NURSING HOME AGREEMENTS: A THREE-PART APPROACH

As it stands now, the continued use of "Responsible Party" language to identify third-party signers is confusing, potentially misleading to signers, inconsistent with the goal of federal law

162. *Id.* exhib.1

163. *Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89, 101-04 (Ct. App. 1996).

164. *See* 42 U.S.C. § 1395i-3(c)(5)(B)(i) (2000) and *id.* § 1396r(c)(5)(B)(i) (2000) (specifying that there is no federal preemption of stricter state standards for admissions policies).

165. *Podolsky*, 58 Cal. Rptr. 2d at 101-04.

166. *Id.* at 97 n.8 ("Because the federal statutes at issue do not include a preemption clause and do not appear to occupy the field of nursing home regulation, application of the California Unfair Competition Act to enjoy unfair marketing practices is proper."). *See generally* 61 CAL. JUR. 3D *Unfair Competition* § 7 (2003) (describing unfair competition as "a broad and flexible doctrine").

167. *See* Charles A. Lattanzi, *Nursing Home Contracts: Is it Time for Bad Faith To Come Out of Retirement?*, 6 J.L. & HEALTH 61, 64 (1991-92) (observing that health care contracts are frequently adhesion contracts where parties cannot bargain over terms).

(even if not expressly forbidden), and is unevenly enforced. To facilitate a clear relationship between facilities, families and residents that encourages families to remain active in their elder's lives without fear of costly surprises, a more "responsible," three-pronged response to the "Responsible Party" confusion is warranted.

A. The Role of the Attorney

As demonstrated here, a review of nursing home collection cases suggests that family members and their lawyers need to exercise caution when presented with a nursing home admission agreement that asks for a signature of a "responsible party." The cautious lawyer may consider the following points when advising prospective agents who are unable or unwilling to guarantee payment:

- When possible and appropriate, only the resident should sign the agreement;¹⁶⁸
- To test whether or not such provisions truly are *mandatory*, and therefore improper, the third-party signer should seek to strike out any provisions in the contract that purport to impose an obligation as a "responsible party" much less as an actual "guarantor";¹⁶⁹
- When third-party signatures are provided, the signing party should clearly specify in writing, on the admissions agreement, that he or she is signing in the limited role as "agent for" or "guardian for" the named resident;¹⁷⁰ and

168. Having only the resident sign the admission agreement does not insulate agents acting under a Power of Attorney or a guardianship from personal liability to the principal for failing to use the resident's income or assets for the benefit of the resident. See e.g., 20 PA. CONS. STAT. ANN. § 5601(e) (2003) (imposing fiduciary duty on agents under power of attorney, including obligation to exercise powers for benefit of principal).

169. See McGaughey, *supra* note 76, at 35 (stating there is often a real, or perceived, absence of bargaining power for the families, "[e]ntry into the home is dependent on whether or not the home chooses to admit the prospective resident").

170. In some jurisdictions, the agent must clearly state not only the agent's role but also the name of the principal to escape personal liability. See *Faith Manor v. Armer*, No. 1-90-115, 1991 WL 259567, at *2 (Ohio Ct. App. Dec. 9, 1991) (noting that it "has long been held that an agent is personally liable on contracts executed in her own name, even if she describes herself as an agent . . . To escape liability, the agent must indicate the name of the principal for whom she acts"). One experienced practitioner suggests that in New York a

- The third-party signer should be cautioned that despite language in the nursing home agreement that purports to limit liability to the resident's income and assets, and despite signing as mere "agent," the signing party faces potential claims for personal liability for post-admission actions taken by the signer if those actions can be characterized as a failure to preserve and use the resident's income or assets for the nursing home. This liability is different and separate from any liability or non-liability as a primary obligor or guarantor, regardless of the interpretation given by courts to federal laws prohibiting mandatory guarantees.

As Medicaid continues to tighten the belt on eligibility for long term care, nursing home contracts are increasingly likely to become the focal point for determining how care and financing issues will be handled.¹⁷¹ Thus, it is important for experienced Elder Law attorneys to assist the family members, not only in the nursing home contracting process, but also in helping agents maneuver through the maze of forms and timing issues associated with Medicaid qualification for the resident, thus avoiding eligibility gaps to begin with. The nursing homes, the residents and the families jointly benefit from *sound* Medicaid planning.

B. The Role of the Courts

Under present practices, where nursing homes frequently use contracts with vague labels for third-party signers, there is often a critical point in any collection suit when the nursing home seeks summary judgment to enforce the "clear" obligation of the third party to pay for nursing home care if other sources are

third party who does not have access to the resident's funds should sign, "[the resident's name], by: [third party's name], as representative" in order to dovetail with New York state regulations that define "designated representative" as someone to receive information and participate in care decisions, as opposed to a "sponsor," defined in the regulations as someone who is wholly or in part responsible for the costs of care. McGaughey, *supra* note 76, at 35.

171. For example, nursing home contracts that require binding arbitration for resolution of certain disputes are now being used. See, e.g., *Phillips v. Crofton Manor Inn*, No. B 156570, 2003 WL 21101478, at *3 (Cal. Ct. App. May 15, 2003) (discussing enforcement of binding arbitration clause against family and "Resident's Representative" in claim arising out of Alzheimer patient's escape from care).

unavailable. Rather than treat the issue as one of simplistic contract interpretation, courts need to be willing to inquire into factual issues, including the circumstances that resulted in a third party signing the nursing home contract for care.¹⁷²

Where collection suits are filed against third-party signers, courts need to be willing to recognize that nursing home admissions agreements are not created by parties bargaining on equal footing; rather they are usually contracts of adhesion signed by parties under enormous stress, under circumstances ripe for manipulation by the nursing homes of the families as a whole. However inartfully expressed, the federal statutes and regulations do embody a federal public policy against families being forced to serve as guarantors; at a minimum, federal law should be treated as establishing a presumption against a third-party assuming an obligation for payment, thus putting the burden on the nursing homes to show fair practices attendant to the admission process.

C. The Roles of Federal and State Agencies

In an ideal federal system, the federal Medicare and Medicaid statutes would be amended to specify more clearly that third-parties signing nursing home admission agreements will be *presumed* to be acting as mere agents for the resident, and not as obligors or promisors of payment out of the signers' own funds. To the extent that anyone wants to "volunteer" to pay for another's care at a Medicare or Medicaid qualified facility, a *separate* voluntary payment contract would be available for signing with a bold-faced, express warning: "This contract makes the signer personally liable for the costs specified herein and you are encouraged to speak with an attorney or personal financial advisor before signing. You are not required to sign this document. Federal law prohibits the facility from asking that third parties sign this contract as a condition of admission or retention of the resident in this facility."

172. See, e.g., *Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89, 101-04 (Ct. App. 1996); see discussion *supra* Part III.A; *Daughters of Sarah Nursing Home Co., Inc. v. Frisch*, 565 N.Y.S.2d 532 (N.Y. App. Div. 1991); see *supra* text accompanying note 67; *Manor of Lake City, Inc. v. Hinnners*, 576 N.W.2d 592 (Iowa 1998); see *supra* text accompanying note 71. The difficulty of summary judgment has been recognized in other contexts, where key issues arise out of representations allegedly made by nursing home personnel to residents and their families. See, e.g., *Corley v. Rosewood Care Ctr., Inc. of Peoria*, 142 F.3d 1041, 1049 (7th Cir. 1998) (reversing summary judgment in RICO case, to permit greater scope of discovery related to representations about scope of care made by nursing home to families).

Perhaps more important, the nursing home inspection process created by federal law should include reviews of admissions contracts and reports on the numbers of contracts to pay that are signed by third-parties.¹⁷³ If a high percentage of contracts are being signed at a particular facility, inquiry into the admissions process would be warranted. In an age when families and residents are spread throughout the country, a reliable national definition of third-party liability is needed.

The current system is not ideal. Federal legislators and regulators are consumed with the issue of cost containment in long term care, not with fairness to individual families. As one observer notes, "[v]igorous government enforcement of its own rules regarding third party liability for a resident's nursing home costs conflicts with the government's compelling desire to drive down its Medicaid expenses."¹⁷⁴ The states, however, must cope with the individual and class action suits that are inevitable responses to inadequately enforced federal standards. The best hope for families is that states will respond to the pressure of the growing number of individuals and families who are potentially affected by ambiguous contract terms and practices in the nursing home industries within their own borders. The precedent exists in Maryland for states to create model nursing home contracts or to mandate use of approved language, and in doing so to provide an opportunity for all sectors affected by admissions issues to have input in the pre-approval process.

At a minimum, states should:

- establish definitions for third-party signers, clearly differentiating persons serving as agents for health care decisions from the few who are willing to become promisors, and mandate that only such definitions be used for contracts;
- consider the adoption of *four* approved, model nursing home agreements: one for signatures by RESIDENTS only; one for signature by those who are participating only as SURROGATE HEALTH CARE

173. See 42 C.F.R. §§ 488.100, 488.105 (2002), for the existing framework for survey team reviews.

174. McGaughey, *supra* note 76, at 35 n.9 (noting further that federal law does not require survey teams, as part of their obligation to enforce nursing home resident rights, to review admissions contracts or enforce third-party payment restrictions).

DECISION MAKERS; one for signature by AGENTS who have legal authority to handle the resident's funds, thereby becoming contractually obligated to use those funds for the resident's care, as permitted by Subsection (B) (ii); and one for persons, regardless of their agency status, who wish to become VOLUNTARY OBLIGORS OR PROMISORS of payment for the nursing home care.

VII. CONCLUSION

Filial responsibility laws—and filial responsibility obligations created by contract—are often attempts to impose legal obligations where moral obligations normally suffice. There is little reason to have sympathy for a “bad apple” who signs a nursing home agreement as a responsible party and then willfully ignores the obligation to use the resident's private funds for the resident's care. Active criminal conduct may be involved.¹⁷⁵ But bad apples (and the money) are rarely around for the nursing home to sue once gaps in payment sources come to light. The worrisome suits are those where a family member has agreed to serve as the agent, has stood by the resident during the difficult days in long term care, and has struggled to manage the resident's finances, only to wind up facing an enormous, unplanned personal debt. As a practical matter, few community spouses, much less children, grandchildren, nieces, or neighbors, can afford to volunteer for such an open-ended and costly contingent liability—and federal Medicare and Medicaid law should be recognized as establishing the policy that they cannot be *forced* to volunteer.

175. In one noteworthy case, a husband and wife were convicted of theft and conversion of more than \$600,000 in assets, taken from their hundred-year-old great aunt. The tools for the crimes were powers of attorney executed by the aunt, who was, fortunately, able to testify at trial. Matt Miller, *Couple Found Guilty of Theft From Relative*, PATRIOT-NEWS, Sept. 20, 2003, at B1, available at 2003 WL 3218137.