

Real Life? Real Answers.  
**HYNUM LAW**

**Collections for Facilities:  
 UDAAP, CFPB and Other Acronyms that Must  
 Become Part of Your Culture of Compliance**

**PHCA**  
 PROFESSIONAL HEALTH CARE ASSOCIATION

PRESENTED BY MICHAEL A. HYNUM, ESQ.,  
 PRESIDENT OF HYNUM LAW

**SESSION OBJECTIVES**

- To learn the basics of consumer protection agencies and laws and how they are relevant to Nursing Facilities
- Learn the scope and reach of consumer protection agencies and laws as well as the potential penalties for non compliance
- Learn how to bolster policies, procedures, and educate staff in order to enhance compliance efforts and minimize risk for possible violations

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**COLLECTION INDUSTRY IN  
 GENERAL**

- Collections versus Cash flow
- Timeline of collections
  - As the time from the original debt increases the chance of collecting that debt and/or the amount of the debt collected goes down

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## CONSUMER DEBT / COMMERCIAL DEBT

- **Consumer debt** collection involves collection activities between a business, which is the creditor, and a consumer, who is the debtor

Consumer means an individual or an agent, trustee, or representative acting on behalf of an individual (12 USC 5481)

Consumer Debt means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to a judgment

**Commercial debt** collection involves debt payment from one business to another

It is assumed that businesses are sophisticated enough to comprehend their own rights thus, commercial debt collection is much less controlled.

**Healthcare debt is considered consumer debt**



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## 1<sup>ST</sup> PARTY V 3<sup>RD</sup> PARTY

- 1<sup>st</sup> party collections are those done internally within the company
  - Internal policies and procedures for collection
  - Dunning letters 30, 60, 90 days
  - Collection Calls
- 3<sup>rd</sup> party collections are through other entities such as a collection agency or legal counsel



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## THE BASICS: WHAT ARE CONSUMER PROTECTION LAWS?

- Consumer Protection is a group of laws, organizations, commissions, and agencies designed to ensure the rights of consumers
- The laws are designed to prevent businesses that engage in fraud or specified unfair practices from gaining an advantage over competitors.
- They may also provide additional protection for those most vulnerable in society



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## DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

- Dodd-Frank was signed into federal law in July 2010
- Origins in part to the financial crisis or "Great Recession" between 2007-2010
- Most significant changes to financial regulation since the Great Depression



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## DODD-FRANK

- Under the Act, all covered persons or service providers are legally required to refrain from committing unfair, deceptive, or abusive acts or practices (UDAAPs)
  - UDAAPs apply to 1<sup>st</sup> party creditors (meaning Nursing Facilities)
- The problem becomes defining the boundaries between this and other similar regulations
- Critiques range from the Act being too weak, unable to adequately curtail another financial crisis, to being over encompassing, going too far to restrict institutions



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## CFPB

- Consumer Financial Protection Bureau
  - Signed into law in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act
  - Government agency responsible for consumer protection in the financial sector



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### CFPB

- Investigates businesses who conduct wrongdoing as well as perceived wrong doing.
- First studies businesses and industry approaches, reports, conducts hearings, conferences. Then enforcement actions.
- Pays close attention to consumer confusion
- CFPB targets companies that it feels facilitates the exploitation of consumers



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### CFPB

- Likely to make implementation of federal rules governing healthcare/ medical debt collection a priority due to consumer demand
  - CFPB feels that medical debt is being collected via credit reporting
  - Half of overdue debt on credit reports is medical debt
  - 2/3 reports in total contain medical debt
  - Over 15 consumers have medical debt on their report
- More restrictions on the collection of medical debt

What do tightened regulations of CFPB mean to the healthcare industry?



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### UDAAP

- Unfair, Deceptive, Abusive Acts or Practices
  - Under the Dodd-Frank Act, all covered persons or service providers are legally required to refrain from committing unfair, deceptive, or abusive acts or practices in violation of the Act



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## UDAAP

- Unfair practice
  - An act or practice is unfair when:
    - (1) It causes or is likely to cause substantial injury to consumers;
    - (2) The injury is not reasonably avoidable by consumers; and (3) The injury is not outweighed by countervailing benefits to consumers or to competition.

• Dodd-Frank Act §§ 1031, 1036, 12 U.S.C. §§ 5531, 5536.



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## UDAAP

- Deceptive
  - An act or practice is deceptive when:
    - (1) The act or practice misleads or is likely to mislead the consumer;
    - (2) The consumer's interpretation is reasonable under the circumstances; and
    - (3) The misleading act or practice is material.

• Dodd-Frank Act § 1031(d), 12 U.S.C. § 5531(d)



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## UDAAP

- Abusive Act
  - An act or practice is abusive when
    - (1) Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
    - (2) Takes unreasonable advantage of –
      - (A) a consumer's lack of understanding of the material risks, costs, or conditions of the product or service;
      - (B) a consumer's inability to protect his or her interests in selecting or using a consumer financial product or service; or
      - (C) a consumer's reasonable reliance on a covered person to act in his or her interests.



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## UDAAP

- Examples of UDAAPs
  - Collecting or assessing a debt and/or any additional amounts in connection with a debt (including interest, fees, and charges) not expressly authorized by the agreement creating the debt or permitted by law.
  - Failing to post payments timely or properly or to credit a consumer's account with payments that the consumer submitted on time and then charging late fees to that consumer.
  - Taking possession of property without the legal right to do so.
  - Revealing the consumer's debt, without the consumer's consent, to the consumer's employer and/or co-workers.
  - Falsely representing the character, amount, or legal status of the debt.



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## UDAAP

- Misrepresenting that a debt collection communication is from an attorney.
- Misrepresenting that a communication is from a government source or that the source of the communication is affiliated with the government.
- Misrepresenting whether information about a payment or nonpayment would be furnished to a credit reporting agency.
- Misrepresenting to consumers that their debts would be waived or forgiven if they accepted a settlement offer, when the company does not, in fact, forgive or waive the debt.
- Threatening any action that is not intended or the covered person or service provider does not have the authorization to pursue, including false threats of lawsuits, arrest, prosecution, or imprisonment for non-payment of a debt.



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## UDAAP

- Penalties handed out by CFPB include restitution and Civil Monetary Penalties (CMPs)
- Penalties on a ranging scale pending on the severity of the violation
- Total penalties imposed are in the billions with single violators/violations exceeding millions



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## FDCPA

- **Fair Debt Collection Practices Act**
  - Purpose is to eliminate abusive practices in the collection of consumer debts, to promote fair debt collection, and to provide consumers with an avenue for disputing and obtaining validation of debt information in order to ensure the information's accuracy.
  - The Act creates guidelines under which debt collectors may conduct business, defines rights of consumers involved with debt collectors, and prescribes penalties and remedies for violations of the Act.



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## FDCPA

- Who does the FDCPA apply to?
  - The FDCPA defines a debt collector as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."
  - FDCPA applies only to third party debt collectors—not internal collections for an "original creditor"—some states, entities, and proposed acts seek to regulate original creditors.
  - The FDCPA's definitions of "consumers" and "debt" specifically restricts the coverage of the act to personal, family or household transactions. Thus, debts owed by businesses (or by individuals for business purposes) are not subject to the FDCPA.

Nursing home debt is subject to the FDCPA- Eades v. Kennedy, PC



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## FDCPA

- **Restrictions**
  - **Hours for phone contact:** contacting consumers by telephone outside of the hours of 8:00 a.m. to 9:00 p.m. local time is prohibited
  - **Failure to cease communication upon request**
  - **Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously** with intent to annoy, abuse, or harass any person at the called number.
  - **Communicating with consumers at their place of employment** after having been advised that this is unacceptable or prohibited by the employer
  - **Contacting consumer known to be represented by an attorney**
  - **Communicating with consumer after request for validation has been made**
  - **Misrepresentation or deceit:** misrepresenting the debt or using deception to collect the debt, including a debt collector's misrepresentation that he or she is an attorney or law enforcement officer



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## FDCPA

- **Restrictions**
  - Publishing the consumer's name or address on a "bad debt" list
  - Seeking unjustified amounts, which would include demanding any amounts not permitted under an applicable contract or as provided under applicable law
  - Threatening arrest or legal action that is either not permitted or not actually contemplated
  - Abusive or profane language used in the course of communication related to the debt
  - Communication with third parties: revealing or discussing the nature of debts with third parties (*other than the consumer's spouse or attorney*)
  - Contact by embarrassing media, such as communicating with a consumer regarding a debt by post card, or using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of mail or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business
  - Reporting false information on a consumer's credit report or threatening to do so in the process of collection



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## FDCPA

- **Requirements for collectors**
  - Identify themselves and notify the consumer, in every communication, that the communication is from a debt collector, and in the initial communication that any information obtained will be used to effect collection of the debt
  - Give the name and address of the original creditor
  - Notify the consumer of their right to dispute the debt, in part or in full, with the debt collector. The 30-day "§1692g" notice is required to be sent by debt collectors within five days of the initial communication with the consumer.
  - Provide verification of the debt upon request
  - File a lawsuit in a proper venue if a debt collector chooses to file a lawsuit, it may only be in a place where the consumer lives or signed the contract



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## FDCPA

- **Enforcement** The FTC originally had the authority to administratively enforce the FDCPA, however, under the reforms of the 2010 Dodd-Frank Act, the FDCPA is enforced primarily by the newly created Consumer Financial Protection Bureau
- **Penalties**
  - Consumers may file a lawsuit in a state or federal court to collect damages (actual, statutory, attorney's fees, and court costs) from third-party debt collectors.
  - The FDCPA is a strict liability law, which means that a consumer need not prove actual damages in order to claim statutory damages of up to \$1,000 for EACH violation, plus reasonable attorney fees if a debt collector is proven to have violated the FDCPA.
  - The collector may, however, escape penalty if it shows that the violation (or violations) was unintentional and the result of a "bona fide error" that occurred despite procedures designed to avoid the error at issue.



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## PENNSYLVANIA FDCPA

- In addition to the Federal Statute, Pennsylvania has its own version under 73 P.S. Section 2270.4
- Similar to FDCPA
- Can violate both the FDCPA and Pennsylvania version with the same transgression



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## RECAP

- **What does the future bring?**
  - While the FDCPA does not apply to 3<sup>rd</sup> party creditors, UDAAPs apply to all creditors and covered persons.
  - What are the trends and how far will the law expand?
    - Lobbyists seek to further regulations, push the envelope to apply 3<sup>rd</sup> party rules to 2<sup>nd</sup> parties.
  - What is Congress going to do?
  - And what should the industry be doing?



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## PENNSYLVANIA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW

- Pennsylvania state law similar to FDCPA that specifies 21 violations. Examples include:
  - II- Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services
  - VIII- Disparaging the goods, services or business of another by false or misleading representation of fact
  - XI- Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;
  - XXI- The "catch all"- Engaging in any other fraudulent or deceptive conduct which creates the likelihood of confusion or misunderstanding



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## PENNSYLVANIA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW

- Penalties
  - Private actions for actual damages or \$100 whichever is greater; court may award treble damages but not less than \$100 (Tit. 73 §201-9.2);
  - Civil penalty up to \$1,000, up to \$3,000 if victim is 60 or older (Tit. 73 §201-8);
  - Suspend right to do business (Tit. 73 §201-9);
  - Injunction, costs and attorney's fees;
  - Any additional relief as deemed necessary or proper (Tit. 73 §201-9.2)



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## TCPA

- Telephone Consumer Protection Act
  - Passed in 1991 and codified under 47 U.S.C. 227
  - Act restricts telephone solicitations (i.e., telemarketing and the use of automated telephone equipment.
  - The Telephone Consumer Protection Act (TCPA) regulates telemarketing calls, auto-dialed calls, prerecorded calls, text messages, and unsolicited faxes.
  - It also is the authority to create the National Do-Not-Call List. The Federal Communications Commission ("FCC") is empowered to issue rules and regulations implementing the TCPA.



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## TCPA

- Prohibits solicitors from calling residences before 8 a.m. or after 9 p.m., local time
- Requires solicitors maintain a company-specific "do-not-call" (DNC) list of consumers who asked not to be called; the DNC request must be honored for 5 years
- Requires solicitors honor the National Do Not call Registry
- Requires solicitors provide their name, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which that person or entity may be contacted
- Prohibits solicitations to residences that use an artificial voice or a recording
- Prohibits autodialed calls that engage two or more lines of a multi-line business
- Prohibits unsolicited advertising faxes



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### TCPA

- Autodialed or prerecorded collection calls to wireless numbers are made with the consumer's "prior express consent" if the consumer has given the cell phone number to the creditor for use in normal business communications, such as in a credit application.
- What is prior express consent?
- What if my landline number was transferred to a wireless phone?



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### TCPA

- Violations
  - In the event of a violation of the TCPA, a subscriber may
    - (1) sue for up to \$500 for each violation or recover actual monetary loss, whichever is greater,
    - (2) seek an injunction, or
    - (3) both
  - In the event of a willful violation of the TCPA, a subscriber may sue for up to three time the damages, i.e. \$1,500, for each violation.



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### FCRA

- Fair Credit Reporting Act
  - Federal law that regulates how consumer reporting agencies use your information
  - 15 USC § 1681 et seq.
  - Designed to promote the accuracy, fairness, and privacy of information in the files of consumer reporting agencies.



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## FCRA

- You must be told if information in your file has been used against you.
  - Anyone who uses a credit report or another type of consumer report to deny your application for credit, insurance, or employment – or to take another adverse action against you – must tell you, and must give you the name, address, and phone number of the agency that provided the information.
- You have the right to know what is in your file.
  - You may request and obtain all the information about you in the files of a consumer reporting agency
- You have the right to ask for a credit score
- You have the right to dispute incomplete or inaccurate information



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## FCRA

- Consumer reporting agencies must correct or delete inaccurate, incomplete, or unverifiable information
- Consumer reporting agencies may not report outdated negative information
- Access to your file is limited
- You must give your consent for reports to be provided to employers
- You may seek damages from violators



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## RECAP AND TAKEAWAYS

- Be aware of the regulations governing debt collection
- Ensure that your facility's policies and corporate compliance program reflect collection regulations
- Educate your staff to allowable collection practices
- Audit to ensure that compliance is achieved



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## BEST PRACTICES FOR HANDLING COLLECTIONS

- Admissions
- Admission Agreement
- Medical Assistance
- Collection letters/calls/ log
- Legal action
- Discharge
- Bad Debt



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## ADMISSIONS

- Admissions, admissions, admissions!
  - First line of defense, mitigate debt before it occurs
  - Filing beds v potential of debt
- Financial intake sheet
- Have family contacts should resident not be able to assist with financials
- **Up front discussions with family regarding funding for care**
- Proper handling of the Admission Agreement

A little work on the front end can save you  
a world of work on the back end!



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## ADMISSION AGREEMENT

- Be aware of the terms and provisions within the admission agreement
- Make the resident and or the responsible person aware of the terms within
  - Specifically payment provisions, and resident income/ resident liability payments for MA residents
- Have annual reviews of the admission agreement to ensure compliance and efficiency



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## MEDICAL ASSISTANCE

- Primary funding for many facilities and residents
- Important to file an application if in doubt
- Important to stay on top of pending cases
- Ensure that verification of assets can be achieved
  - Responsible person
  - 3<sup>rd</sup> party provider to verify
  - Family attorney to assist
  - Authorization to facility to gather materials
  - Facility's counsel to assist
  - Guardianship



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## MEDICAL ASSISTANCE

- The DO NOTS
  - Do not allow the matter to go unattended
    - The CAO is only permitted to grant retroactive benefits 3 months prior to the application date. If the application is not timely filed a great amount of reimbursement may be lost
    - Once there is a family member assisting or even an attorney do not assume that everything is in order. The family may have their own agenda. If benefits are denied the risk of loss is great. It is beneficial for the facility to allocate time in seeing MAPs through
  - Do not assume the case is progressing
    - Check up periodically with all parties involved
  - Do not become distant with the CAO



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## MEDICAL ASSISTANCE

- The DOs
  - Know your deadlines
    - If you miss an appeal or a stipulation your effective date may be lost, causing significant balances
  - Do not be afraid to file a bare bones application to preserve the effective date
    - But only do this when absolutely necessary
  - Contact a third party or legal counsel to assist in the process



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## INTERNAL COLLECTIONS

- Within the confines of the laws discussed, self help with:
  - Internal policies and procedures for collection
  - Proper staffing to deal with collections
  - Dunning letters 30, 60, 90 days
  - Collection Calls



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## THIRD PARTY COLLECTIONS

- Know when to seek additional assistance to collect debt, and which debt is worth pursuing
- Although collection agencies and attorneys come at a cost, the benefits may far exceed the costs



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## DISCHARGE

- While often a last resort in financial cases, discharge is an option to help mitigate debt under state and federal law
- It puts the resident as well as their responsible parties on notice
- Permitted if the resident fails to pay their bill after reasonable notice, however safe discharge is required



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## BAD DEBT

- Know when to get out
- Some matters are uncollectible due to financial circumstances, lack of potential defendants, death, etc.
- In some cases a write off may provide more benefit to the facility than pursuit of a "paper judgment"
  - Know your tax advantages



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## RECAP

- Be aware of the laws and regulations
- Train and educate staff as to prevent violations
- Develop policies and procedures to bolster best practices
- Audit and review periodically



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## THANKYOU!!

Questions ?  
Please contact:

Michael A. Hynum, Esq.

2608 North 3<sup>rd</sup> Street  
Harrisburg, PA 17110  
Phone [717] 774-1357  
Fax [717] 774-6788

Website: [www.hynumlaw.com](http://www.hynumlaw.com)

Email: [mike.hynum@hynumpc.com](mailto:mike.hynum@hynumpc.com)



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