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Nursing Homes Face Serious Liability Risks from COVID-19

Nursing homes and affiliated health systems may face an onslaught of lawsuits alleging they failed to properly care for residents during the COVID-19 pandemic. Limited resources and the vulnerability of nursing home residents led to many deaths in nursing homes, and families will question whether those deaths could have been prevented.

Nursing homes are especially susceptible to COVID-19 lawsuits because their residents are particularly vulnerable to the virus, says **Kelli L. Sullivan, JD**, shareholder with Turner Padgett in Columbia, SC. More virus-related deaths means more potential for lawsuits, regardless of how the nursing home performed, she says.

Families will allege the nursing home did not adequately care for the resident once he or she contracted COVID-19. They also will claim the nursing home did not prevent the spread of the virus in the facility, Sullivan says. But she has seen a lawsuit in which the family claims the nursing home did not adequately communicate with families about the presence of the virus.

NURSING HOMES ARE PARTICULARLY VULNERABLE TO COVID-19 LAWSUITS BECAUSE THEIR RESIDENTS ARE ESPECIALLY SUSCEPTIBLE TO THE VIRUS.

“They’re saying the nursing home didn’t communicate and give them the opportunity to bring grandma home. That’s a little bit of a twist on the regular negligence case you might see,” Sullivan says. “I think you also may see some negligence suits in which they claim the facility was short-staffed because of the coronavirus.

They will say ‘You had staff out because of the virus, and so you short-staffed

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EDITORIAL QUESTIONS
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and I fell,' or 'I wasn't turned often enough and I got bedsores,' or 'My medication wasn't given to me in a timely fashion.'"

Sullivan also anticipates workers' compensation lawsuits from employees who were exposed to the virus in nursing homes, and lawsuits from families for refunds of services not provided during the pandemic, such as outings or hair and cosmetic treatments, she says.

An uphill battle is ahead if plaintiffs simply allege the nursing home is responsible for the resident contracting COVID-19 and dying, Sullivan says.

"The standard is what a reasonable facility would do in the same or similar circumstances. We're going to look at the CDC guidelines and show that we did everything suggested there or show why it was not possible to do that," she says. "It's going to be a tough nut for them to crack if they're saying the resident got the virus and died; therefore it's your fault."

Sullivan cautions there is continued danger as states loosen stay-at-home orders and nursing homes are encouraged to allow more visitation. Acting too quickly could prompt lawsuits alleging a resident contracted the virus because the facility exposed residents more than necessary, she says.

"That's where facilities are going to have to be very careful and err

on the side of caution. When it comes to visitors or letting ancillary services back into the facility, I'd urge nursing homes to be very cautious over the next several months as other things start to open up," Sullivan says. "Juries are going to be much more sympathetic to a facility that had something bad happen in the beginning of all this, when we were in thick of it and everyone was still trying to figure it out and cope, vs. a grandma who gets coronavirus in June or July, when you should have known better."

It will be critical for nursing homes to show they followed guidelines specific to their industry from the Centers for Disease Control and Prevention (CDC) and the Centers for Medicare & Medicaid Services (CMS), says **Samuel D. Hodge, Jr., JD**, professor of legal studies in business at Temple University in Philadelphia. Guidelines include assessing the supply of personal protective equipment (PPE) and initiating measures to optimize that supply. Hodge says there is a risk of liability there for nursing homes.

"Because of the shortage of PPE, not all nursing homes had enough equipment, and that is going to be an area of liability based on the CDC saying you have to have that," Hodge says. "Similarly, the CDC says nursing homes must implement

EXECUTIVE SUMMARY

Nursing homes are at risk for liability related to the COVID-19 pandemic. The high number of deaths in nursing homes may prompt lawsuits.

- Some states are immunizing nursing homes against such lawsuits.
- The standard of care during the pandemic will be a key issue.
- Documentation of a nursing home's response and limited resources may determine the outcome of lawsuits.

controls for anyone entering a healthcare facility, regardless of symptoms. If I file a lawsuit, one of the first things I'm going to ask for is rules and regulations a nursing home put in place to minimize transmission of coronavirus. If you don't have those, that is going to be a degree of negligence."

Some States Offer Protection

One of the most hotly disputed issues is whether states should immunize nursing homes and their employees against COVID-19-related claims, says **Erin M. Eiselein**, JD, shareholder with Brownstein Hyatt Farber Schreck in Denver.

"There is a balance between immunizing nursing homes and their employees who are providing the best care they can under awful circumstances, such as not having PPE or access to tests, against removing the risk of liability to ensure the organizations caring for this fragile population remain accountable," she says. "So far, more than a dozen states have laws or orders providing some type of liability for nursing homes and their employees."

Nursing homes should expect increased state public health oversight especially around infection control issues, Eiselein says. In terms of civil liability, she expects to see employees suing employers for creating an unsafe work environment when employees were working without PPE, with colleagues and residents who had not been tested, and in some circumstances with severe staffing shortages.

Workers' compensation laws often provide the sole remedy to employees regarding injuries

occurring on the job, she notes. Whether the dire working conditions created by COVID-19 rise to the level of creating an exception to the exclusivity rule remains to be seen, she says.

"Plaintiffs' lawyers undoubtedly are busy preparing lawsuits on behalf of residents and their family members against nursing homes for abusive and neglectful practices during COVID-19. To succeed on such a claim, the plaintiff will have to demonstrate the nursing home fell below the applicable standard of care," she says. "We do not yet know what standard of care will be applied to care given during this pandemic, but you can be sure that attorneys for the nursing homes will be arguing that the standard of care should be significantly lower than it would have been pre-pandemic."

Eiselein also anticipates an increase in whistleblower cases under the federal False Claims Act. Amid the chaos of the pandemic and the rapidly changing laws, nursing homes that have failed to ensure accurate oversight of eligibility and billing practices could find themselves facing significant liability for fraudulent behavior, she says.

"Beware of disgruntled or terminated employees with an axe to grind against the company," she says. "Even if they ultimately do not succeed on liability, these cases are time-consuming and expensive to defend."

Understand Changing Laws

Nursing homes should be vigilant about staying abreast of the ever-changing law and guidance surrounding caring for their residents and protecting their employees,

Eiselein says. Many industry trade organizations are leading the efforts to compile the overwhelming amount of information and share the relevant portions with their members, she notes.

Real-time documentation of challenges and solutions will help demonstrate the organization acted in good faith to do the best it could under the circumstances, she says. If the organization could not obtain PPE, document the steps taken to secure PPE and precautions taken in the interim. If the organization was forced by the state to accept a resident who had not been tested for COVID-19 and did not have access to tests, make detailed notes of everything done to isolate the patient and keep the other residents and staff safe, Eiselein explains.

"Make sure there are robust policies and procedures in place regarding residents, family members, and employees," she says. "Think about health questionnaires, temperature screening, testing, continued use of telehealth, protective equipment, physical separation, continued limits on group activities, and the like."

CMS Rules Apply

Although most nursing homes already put CMS-mandated infection control protocols in place before the nationwide spread of COVID-19, nursing homes remain under constant pressure to implement the rapidly evolving and increasingly detailed protocols issued by the CDC and CMS, notes **Barbara R. Schabert**, JD, attorney with Kaufman Dolowich Voluck in Fort Lauderdale, FL.

Recently, CMS issued updated rules and standards for health

inspectors who are inspecting thousands of CMS-participating facilities. CMS directives focus on monitoring a nursing home's pandemic plan with an emphasis on the effectiveness of the facility's infection control policies and procedures.

These stricter inspection standards already have led to civil monetary penalties for nursing homes' failure to comply with infection control protocols, she says. Additionally, certain nursing homes have faced losing their Medicaid certification based on a lack of pandemic control efforts.

"First and foremost, nursing homes should maintain complete documentation as to all infection control policies and procedures, staff training on such procedures, efforts to adhere to such procedures, and records as to the necessary updates to such procedures," Schabert says. "In addition, nursing homes should document their implementation of, and efforts to comply with, all updated CDC and CMS guidelines and regulations. Overall, the nursing home should maintain sufficient documentation demonstrating the nursing homes' efforts in protecting staff and residents from COVID-19."

Such documentation should include:

- Policies and procedures followed for investigating, controlling, and preventing the spread of COVID-19;
- Infection control precautions such as hand hygiene, disinfection, and isolation of sick residents;
- Staff education on infection control protocols;
- Monitoring staff compliance with infection control protocols;
- Identifying signs of infection in residents and staff and related isolation protocols;

- Notifying state and local health departments, as well as CMS, of the extent of COVID-19 cases within the facilities.

States Offer Immunity

The high potential for COVID-19-related lawsuits has led numerous states to call for executive orders or legislation to provide immunity for healthcare facilities, including nursing homes, Schabert says. Currently, 15 states have enacted laws or issued executive orders providing nursing homes protections from lawsuits arising from the crisis.

In Florida, the governor is reviewing a request for immunity from liability under certain conditions for nursing homes submitted by the Florida Healthcare Association, Schabert says.

"In response to such immunity orders, resident advocates have voiced concerns and raised challenges as to the effectiveness such orders will have in eliminating causes of action. However, movants for the immunity orders illustrate the ways in which such orders acknowledge the conditions nursing homes have been forced to navigate during COVID-19, including staff shortages and a lack of personal protective equipment," she explains. "Generally, the currently issued immunity orders grant immunity to nursing homes providing care during the COVID-19 pandemic, in good faith, during the COVID-19 state of emergency. The immunity orders also do not appear to provide immunity to nursing homes for acts or omissions occurring prior to the COVID-19 pandemic."

The immunity orders would apply to negligence actions but would not provide immunity for cases of

gross negligence, extreme neglect, or willful misconduct, Schabert says.

"Ultimately, the COVID-19 pandemic has created a unique setting for an inevitable increase in civil lawsuits related to deaths and alleged healthcare failures of nursing homes during the pandemic despite any such immunity orders. Nursing homes will likely see COVID-19-related lawsuits that involve wrongful death and negligence," she says. "However, given the unprecedented and extraordinary nature of these expected pandemic-related lawsuits, it should be expected that the debated issues will involve the standard of care and what establishes negligence during a pandemic."

The courts likely will examine the updated guidelines, protocols, and regulations of nursing homes issued by federal, state, and local agencies in response to COVID-19. In anticipation of the forthcoming pandemic lawsuits the nursing home industry is facing, Schabert says it is imperative that facilities apply all feasible precautions — and document them well — to limit any potential liability exposure. ■

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