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Covid-Related Nursing Home Lawsuits to 'Skyrocket' With Protections on Shaky Ground

By **Amy Stulick** | May 9, 2022

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While federal protections like the Public Readiness and Emergency Preparedness (PREP) Act provide at least a partial legal shield to nursing homes, an influx of Covid-related lawsuits could be coming down the pipeline.

Litigators are looking to test nursing homes' legal protections as lawsuit filing deadlines for the first few months of the pandemic arrive, attorneys told Skilled Nursing News.

New York law firms in particular are rushing to file, with the state's statute of limitations approaching for claims that occurred during the first wave of Covid.

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Lisa Ann Ruggiero, a partner at Locke Lord's New York and New Jersey offices, said she has seen anywhere from 700 to 800 Covid-related lawsuits filed across the health care industry, including skilled nursing. That's about 20-30 cases per week, she estimated.

"March, April, and May [in 2020], when things were really, really bad and folks were seeing the highest cases, nobody knew what was going on. There was a lot of death during that period. That's what's happening with respect to why we see an uptick right now," Ruggiero said.

The fight thus far has been about where these cases belong, according to Ruggiero. Defense attorneys firmly believe that Congress, via the PREP Act, intended these kinds of cases to play out in federal court.

Lori Rosen Semlies, a partner at national law firm Wilson Elser, said the firm is seeing "hundreds" more filings in the state of New York as well as Illinois, some of which are poised to start litigation while others are still in the early stages.

New York's statute of limitations for wrongful death is two years, according to Semlies, meaning any Covid-related wrongful death cases that originated at the beginning of the pandemic need to be filed in the next month or so.

Alan Schabes, partner at Benesch Friedlander Coplan & Aronoff LLP, told Skilled Nursing News he believes the number of cases are going to "skyrocket" at a time when the sector is already dealing with circumstances outside of providers' control, namely staffing.

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The PREP Act shield

Ruggiero believes federal courts are "very reluctant" to agree to hear Covid-related nursing home cases, citing the PREP Act — instead sending them to state courts.

The act, established by Congress in 2005, provides immunity from liability, with the exception of willful misconduct, from certain legal claims. The protection can be used in state and federal courts, and will continue to be used post-public health emergency (PHE), according to Schabes.

The PREP Act is a statute separate from Covid, and will continue to be applied to such cases even after the PHE has lifted, added Schabes.

Usually, when state and federal law conflict, federal law preempts state law, per the Supremacy Clause of the U.S. Constitution. That's why it's a rarity that nursing home Covid lawsuits claiming protection under the PREP Act are being thrown back to state courts rather than continue in a federal courtroom.

If there isn't a ruling that makes it very clear federal preemption exists in these cases, Schabes said, "it'll just open things up tremendously," referring to a further flood of lawsuits in state courts.

"The issue of preemption is not one that the state courts are going to necessarily be best positioned to handle," said Schabes. "I implore that the people who are defending these cases will file a motion to stay pending a ruling with respect to the PREP Act and whether there's a federal preemption there."

Ultimately, nursing home operators need to prove in court – state or federal – that countermeasures were utilized in combating the virus, meaning implementing reliable Covid tests, how often personal protective equipment (PPE) was used, and oxygen equipment utilization, said Ruggiero.

Just one case in California, *Garcia v. Welltower*, continued in federal court with a decision finding immunity under the federal statute was appropriate, Ruggiero added.

the decision to dismiss the case.

The earliest case to test whether a Covid-related nursing home lawsuit should be heard state or federal court went in the opposite direction – the 3rd U.S. Circuit Court of Appeals found negligence and wrongful-death lawsuits against Andover Subacute & Rehabilitation I & II in New Jersey should proceed in state court.

Other examples at the state level — two decisions in Ohio, and one in Connecticut, North Carolina and Maryland — also enforced immunity at the very start of the case, Ruggiero said, but a lot of judges are reluctant to grant protection under the PREP Act at the start of the case.

"Some courts have said, 'It's too early for me to say, I don't want to deny this plaintiff their day in court just yet because there are questions of fact here and I can't decide it at this early stage in the litigation," said Ruggiero, referring to PREP Act protection. "That's not really always the way it's supposed to be. Immunity is supposed to be decided often upfront, because that's the whole point of immunity."

For operators, that means legal fees and time in court before they even know if they're granted protection under the PREP Act. It's a far cry from promised immunity at the beginning of the pandemic, she said.

"Memories have indeed faded," noted Ruggiero. "You can see it with the lawsuits that are being filed. You can see it with judges' reluctance to provide immunity at the start of the case. You can see it in commentary that's out there in the public. You could see it with legislators, repealing statutes that originally had given immunity."

Immunity repeals in New York

New York has been "very unique" with its state immunity at different points of the pandemic, Ruggiero said. At first, the state enacted a very broad state immunity statute for all players in the health care industry, only to walk back protections later in the pandemic.

Broad immunity was enacted in April and made retroactive to March 7 to line up with the state's PHE, Semlies said. A crucial

dealing with failure to properly diagnose and treat Covid patients was also repealed, according to Semlies.

"Some plaintiffs are taking the argument that the repeal was retroactive to March 7. The defense bar naturally is taking the position that that doesn't make any sense. Why would the court repeal it and say, 'We're just kidding, you no longer have that immunity?'" said Semlies. "It was taken away for future cases after April 2021."

The repeal was not meant to be retroactive, according to discussion on the Assembly floor, but plaintiff attorneys are already arguing the repeal was retroactive from the beginning of the pandemic, Ruggiero added.

"Folks voted on that repeal, with the understanding that the repeal would not be retroactive, and there would be some immunities remaining," maintained Ruggiero.

As such protections continue to be removed at the state level and beyond, that will precipitate a "flood" of additional litigation, added Schabes.

Staffing minimums and potential lawsuits

While attorneys are already seeing inadequate staffing as part of existing Covid lawsuits, Ruggiero and Semlies expect minimum staffing ratios to embolden plaintiffs' attorneys and their clients.

Minimums were implemented in states like New York and New Jersey within the last year, and a federal staffing minimum ratio could be just one year away. CMS is conducting a study to see what the federal standard should be, and plans to propose a ratio in early 2023.

"I think this regulation will invite more [litigation] because it's black and white, about the number of nursing hours. You'll hear from the nursing home industry ... that regulation is creating an impossible scenario for them when there is a staffing crisis in the country," said Semlies.

She said it's too early to tell if more litigation is on the way in New York due to the staffing ratio. The state's requirement, originally due to start in January, was pushed to April by Gov. Kathy Hochul.

to be investigated, but many, many plaintiffs' attorneys have instinctively asserted that claim with every nursing home case that they've ever brought."

New York had implemented protections in its state Covid immunity statute against using inadequate staffing as a basis for lawsuits tied to the virus, Ruggiero said.

That won't stop plaintiffs from arguing that understaffing was an issue prior to the pandemic, she added, but linking Covid lawsuits to staffing poses a "complete and absolute bar," given that statutory protection.

"[Judges] recognize that people couldn't get folks to work. You didn't have doctors, you didn't have health care providers," Ruggiero said, referring to the start of the pandemic.

Still, the outlook may not be bright when it comes to nursing home litigation related to labor shortfalls.

Nursing homes don't have a significant amount of immunity when it comes to staffing-related lawsuits, Schabes said, whether that's tied to existing Covid-related lawsuits or as separate claims only tied to staffing.

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Amy Stulick

A Buffalo transplant living in LA, Amy has worked as a business journalist for more than two years and has been in the profession for seven-plus. She is an avid (sometimes poolside) science fiction reader, nature lover and roller derby novice.

Contact: astulick@agingmedia.com, 312-967-0762

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