

# **Is Nursing Home COVID Litigation on the Rise?**

## **COVID Hit Nursing Homes Hit Hard**

At least 160,000 nursing home residents and workers have died from the COVID19 virus. To date, nursing home-related deaths have accounted for more than 40% of the overall deaths in the United States. In the early period of the pandemic, many state and federal statutes were passed to provide greater civil liability for COVID-19 related death and injuries. Proponents for these statutes argued that liability protections were necessary to protect nursing facilities from claims due to circumstances beyond their control, such as PPP, medication, and staffing shortages.

## **Standard Negligence vs Gross Negligence**

Current provisions provide immunity for standard negligence if they can demonstrate good faith attempts to follow CDC guidelines for COVID care. Guidelines for hand washing, proper usage of PPE, and demonstrations for disinfection protocols will all limit claims. While the provisions limit many COVID-related claims, they do not extend to claims for gross negligence or fraud. Gross negligence claims typically go beyond facilities not following the standard of care and must prove that facilities were reckless in the residents' medical care or sought to intentionally harm. For example, if a facility without a no-visitor policy to limit virus spread could be considered to be acting well outside the standard of care, given accepted CDC guidance on the issue. Facilities that did not follow state-specific social distancing standards, or at least demonstrate attempts to social distance could also be open for negligence beyond the standard of care.

## **Standard Negligence Still Applies**

COVID protections also cannot be extended to non-COVID-related negligence claims, even though facilities were faced with COVID-specific challenges. For

example, families of patients that developed deep pressure ulcers from lack of movement and turning may continue to bring cases forward as this was a breach of the medical standard of care for bedbound patients. The same standards also apply to basic hygiene and nutrition standards, irrespective of a patient's COVID status. Facilities may also be subject to regional comparisons. For example, if a nursing facility had a 90% COVID infection rate while a neighboring facility had a 20% positivity rate, claims relating to gross negligence leading to outbreaks may also be considered.

### **Future Claims May Rise**

As we start to finally see the beginnings of a post-pandemic life and return to normalcy, questions whether we will see a dramatic increase in COVID-related claims remain. One had, federal and state protections will limit claims related to death or harm from medication or supply shortages. On the other hand, overall nursing facility claims may rise, as staffing shortages and increased protections may have increased the rates of neglect, as facilities may have felt shielded from liability. These competing issues should provide an interesting mix of claims in the months and years following the pandemic.

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