

Anticipating COVID-19 Legal Issues Nursing Homes May Face

By Eden Darrell, Mary Novacheck and Jennifer Bullard

(May 7, 2020, 5:40 PM EDT) - There is no doubt that one of the hardest hit populations by COVID-19 is the elderly residing in nursing homes and assisted-living facilities. Nursing facilities are especially vulnerable to coronavirus outbreaks, given the susceptibility of their elderly residents to complications from COVID-19 and because residents often live in close quarters, making social distancing a difficult if not nearly impossible task in some circumstances.

According to recent reports, long-term care residents account for at least one-fifth of all COVID-19-related fatalities nationwide.[1] And in some states, like Colorado, Utah, Oregon, Delaware and Pennsylvania, more than half of COVID-19 deaths are reportedly linked to nursing homes.[2] In New York state alone, officials are reporting that 72 long-term care facilities have had five or more deaths attributed to COVID-19. And more than 25% of the resident population in one nursing facility in Richmond, Virginia, has died because of coronavirus.[3]

As reports of COVID-19 at long-term care facilities continue to rise, so do lawsuits and anticipated lawsuits. Indeed, a wrongful death lawsuit has already been filed against the nursing home that was the site of one of the first reported coronavirus-related deaths.

The daughter of a now-deceased resident of Life Care Centers of America in Kirkland, Washington, filed a lawsuit on April 10, claiming that the facility's actions and inactions before, during and after the coronavirus outbreak led to her mother's death.[4] The complaint alleges that while the facility was aware of and was on "high alert" for COVID-19 beginning in January, it nonetheless failed to timely quarantine residents and staff and it admitted new residents when it should not have.[5] The complaint also claims that the defendant was not holding consistent or effective quality assurance meetings prior to the outbreak, even at a time when COVID-19 was a known risk.[6]

With the current crisis, we are reminded that long-term care facilities often suffer devastating consequences in states of emergency. For example, Hurricane Katrina led to hundreds of nursing home deaths in 2005, including 35 deaths at one facility alone due to flooding.[7]



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To get an idea of some of the types of claims nursing homes may face in the wake of the coronavirus pandemic, and the issues that will surround those claims, we look back at the litigation against nursing homes that arose out of Hurricane Katrina and discuss the similarities and differences in anticipated claims as related to COVID-19.

Hurricane Katrina Wrongful Death and Personal Injury Litigation Against Nursing Facilities

A review of wrongful death and personal injury litigation filed in Louisiana related to Hurricane Katrina reveals several common claims often asserted against nursing homes, including disregard for state and federal warnings, failure to evacuate residents when necessary, failure to notify families of inadequate evacuation plans, and failure to have adequate backup generators to run air conditioning and life-sustaining equipment like ventilators. A common theme underlying many of the plaintiffs' claims was that facilities lacked adequate emergency response plans.

Questions about whether a facility had an effective emergency response plan and whether a facility was negligent in taking action before, during and after the hurricane led to disputes over whether a plaintiff's claims sounded in medical malpractice.

In Louisiana, like in many other states, plaintiffs must first subject medical malpractice claims to a medical review panel before litigation. In determining whether a claim falls under the medical malpractice law, courts look at whether the alleged negligence is related to medical treatment, whether the alleged wrong requires expert medical evidence to evaluate, whether the wrong is treatment related, whether the act or omission involved assessment of a patient's condition, and whether an incident occurred in the context of a physician-patient relationship, among other things.[8]

Largely in the Hurricane Katrina litigation, courts found that claims based on facilities' failures to evacuate and lack of emergency preparedness fell outside of Louisiana's Medical Malpractice Act.

For example, in *LaFonta v. Hotard Coaches Inc.*, a Louisiana appellate court held that the plaintiffs' claims that the nursing home failed to have an effective emergency preparedness plan, failed to safely evacuate the resident decedent, and failed to timely notify the decedent's family of the lack of effective evacuation plan were not "treatment related" claims and therefore, were not subject to medical malpractice requirements.[9]

Similarly, in *Mineo v. Lloyds London*, the Louisiana appellate court held that the plaintiffs' claims that a nursing home was negligent in failing to evacuate the decedent were not subject to medical malpractice requirements because no medical evidence was necessary to determine that a failure to evacuate could have dire consequences.[10]

And in *Montalbano v. Buffman Inc.*, a Louisiana appellate court held that a nursing home's decision not to evacuate was "an administrative decision" not covered under Louisiana's medical malpractice act.[11] Notably, the court explained that although nurses and other medical staff were told to assess the condition of patients before the hurricane, the actual decision to evacuate did not involve assessing the condition of each individual resident.[12]

Another interesting issue addressed in the Katrina litigation was the role of government action or inaction.

In *Robinette v. Lafon Nursing Facility of the Holy Family*, which dealt with a wrongful death claim including allegations that the defendant nursing home failed to evacuate residents, the defendant sought to include the U.S. Army Corps of Engineers, the Federal Emergency Management Agency, the state of Louisiana, and the city of New Orleans as at-fault nonparties on the verdict form.[13]

In seeking the inclusion of these nonparty governmental entities, the defendant argued that "had there not been a catastrophic failure of the hurricane protection system negligently designed, constructed, and maintained by the Corps, none of the flooding at Lafon would have occurred." [14] Additionally, the defendant asserted that "absent a complete breakdown of the emergency response from local, state, and federal governmental authorities" the facility's residents would have received adequate assistance in the aftermath of the storm.[15]

The appellate court in *Lafon* upheld the trial court's decision to leave the governmental entities off the verdict form.

With respect to the Corps, the appellate court explained that its conduct was not the cause-in-fact of the decedent's death because the decedent died of heat stroke due to the defendant's "refusal to follow its own Evacuation Plan," and because of the inadequacy of the defendant's emergency backup generator.[16]

With respect to FEMA, the state of Louisiana and the city of New Orleans, the court held that because of immunity granted under Louisiana's Homeland Security and Emergency Assistance and Disaster Act and principles of sovereign immunity, a jury could not have apportioned fault to the entities anyway.[17]

Pending and Potential Personal Injury Litigation Against Long-Term Care Facilities Arising Out of COVID-19

Although the number and types of claims arising from COVID-19 remains to be seen, especially as some states grant immunity from coronavirus-related lawsuits,[18] defendants can expect plaintiffs will attempt to assert claims similar to those made following Hurricane Katrina. These may include allegations regarding lack of pandemic preparedness plans, lack of adequate personal protective equipment and other supplies, and negligent decisions at critical times — including decisions about when and how long to quarantine patients and staff.

Also similar to allegations made in the Katrina litigation, family members may argue that they should have been notified about COVID-19 concerns and problems so they could remove residents from facilities before outbreaks. Indeed, the plaintiff in the pending litigation against Life Care Centers in Kirkland, Washington, has alleged similar failures by the defendant.[19] Plaintiffs may also plead gross negligence or intentional conduct by facilities and staff in an attempt to skirt immunity laws where applicable.

Like the plaintiffs in the Katrina litigation, plaintiffs filing suits against nursing homes will attempt to plead around medical malpractice claims to avoid statutory caps, malpractice requirements, and standard of care burdens where applicable. Defendants should consider how COVID-19 claims — regardless of their characterization by plaintiffs — may be governed by medical malpractice requirements, considering that many of their claims will likely be premised ultimately on medical decisions and care for patients during a pandemic.

While there are similarities between the emergency situation created by Hurricane Katrina and the current crisis, the COVID-19 pandemic is obviously vastly different in many ways, not the least of which includes the complex medical decisions and circumstances that must be considered as medical knowledge grows about a novel virus and guidance from state and federal authorities continuously evolves, making the claims more appropriate for medical malpractice statutory requirements and standard of care burdens.

Plaintiffs in the Hurricane Katrina litigation often argued that facilities ignored mandatory orders to evacuate when the dangers from the hurricane were obvious, thus eliminating any medical professional judgment and bringing the claims outside of medical malpractice. But during the COVID-19 pandemic, facilities have received mixed and sometimes limited guidance from federal, state, and local governments. And initially, many facilities were told only to screen visitors for fever and other symptoms — not to prohibit all nonessential visitors.[20] Moreover, as late as February or early March, many facilities had no reason to know that asymptomatic residents were already among them.

Like in the Hurricane Katrina litigation, the role of third parties may be a critical issue in COVID-19 litigation. The lack of available medical and protective equipment, changing guidance from government officials, and lack of available emergency responders may be important factors.

Nursing and other facilities should consider early in any litigation the extent to which other entities bear responsibility and craft their defenses and defense strategies appropriately, especially if those entities may have immunity that is not available to the facility itself. Regardless of whether a governmental entity can appear on the verdict form, the constantly changing and oftentimes inconsistent information provided by various governmental entities — including the Centers for Disease Control and Prevention — will be important in explaining the difficulties faced by long-term care facilities during a pandemic.

Demonstrating that a facility responded reasonably in light of rapidly developing guidance from the government, evolving medical research and knowledge, and a shortage of personal protective equipment, will be key to defending claims.

Conclusion

Unfortunately, the coronavirus may be around for the foreseeable future. This will present unprecedented challenges for long-term care facilities as they are faced with decisions about whether to take on new residents, to allow visitation by loved ones, and what to do when there is a reported outbreak at a facility, among other things.

Facilities should do everything they can to ensure that their policies, programs and communications regarding COVID-19 are current and being regularly updated to minimize the risk of litigation going forward. Immunity laws may also provide protection, but where a facility is unable to avoid litigation, it should consider lessons from the past in crafting its defenses.

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[1] Allison Pecorin et al., Coronavirus Crosses Grim Milestone of 10,000 Deaths in US Nursing Homes, ABC News (Apr. 24, 2020, 1:05 AM), <https://abcnews.go.com/Health/coronavirus-crosses-grim-milestone-10000-deaths-us-nursing/story?id=70321822>.

[2] Priya Chidambaram, State Reporting of Cases and Deaths Due to COVID-19 in Long-Term Care Facilities, KFF.org (Apr. 23, 2020), <https://www.kff.org/medicaid/issue-brief/state-reporting-of-cases-and-deaths-due-to-covid-19-in-long-term-care-facilities/>.

[3] Sarah Rankin & Bernard Condon, Deaths Hit 45 at Virginia Care Home Called 'Virus's Dream', AP News (Apr. 14, 2020), <https://apnews.com/884df0d688681382d6f548318e682f45>.

[4] See Compl., de los Angeles v. Life Care Centers of America, et al., (Apr. 10, 2020, Superior Ct. of King Cty., Wash.).

[5] Id. at Introduction & ¶¶ 10, 17–20.

[6] Id. ¶¶ 13–16.

[7] Rachel Martin, Nursing Home Owners Indicted in Post-Katrina Deaths, NPR (Sept. 21, 2006, 4:00 PM EST), <https://www.npr.org/templates/story/story.php?storyId=6119325>.

[8] See Coleman v. Deno, 813 So.2d 303, 315–16 (La. 2002).

[9] 969 So.2d 686 (La. Ct. App. 2007).

[10] 997 So.2d 187 (La. Ct. App. 2008).

[11] 90 So.3d 503, 506 (La. Ct. App. 2012).

[12] Id. at 510.

[13] 223 So.3d 68, 73 (La. Ct. App. 2017).

[14] Id.

[15] Id.

[16] Id. at 81.

[17] Id. at 81–82.

[18] See, e.g., Y. Peter Kang, 6 States With COVID-19 Medical Immunity, and 2 Without, Law360 (Apr. 17, 2020, 11:07 PM EST), <https://www.law360.com/articles/1264964/6-states-with-covid-19-medical-immunity-and-2-without>.

[19] See Compl. ¶¶ 18–24, *supra* note 3.

[20] See, e.g., <https://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/COVID-19%20Long%20Term%20Care%20Visitation%20Guidance.pdf>.