

# THE PANDEMIC AFTERSHOCK: SENIOR LIVING LITIGATION IN THE WAKE OF COVID-19



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## Senior Living

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Earlier this year, the New York Times published an article<sup>1</sup> detailing a \$53 million settlement agreed to between an east coast state and the families of the residents who lived in two state-run senior living facilities during the initial COVID-19 outbreak in spring 2020. At the time, the settlement was the first of its kind nationwide for COVID-19 litigation. What made the settlement so high, besides a large number of claimants? The issue of gross negligence. In this case, staff were allegedly told not to wear masks prior to April 2020 to avoid scaring residents, and were banned from taking masks out of facility supplies. Plaintiffs alleged COVID-19 positive residents were congregating with healthy residents without protective equipment. While the settlement may have been the first of its kind, there are similar lawsuits pending nationwide against private and public nursing homes. Plaintiff's lawyers are now using the size and scope of the settlement as an outline for structuring future cases and multi-party settlements.

### **State and Federal COVID-19 Immunity**

Across the country, most states have enacted an immunity statute to protect healthcare providers who continued operations throughout the pandemic. In the weeks and months to come, this legislation will be tested to see just how much protection it provides to those caring for the sick and vulnerable during arguably one of the most challenging and unforeseen times in recent American history. Cases are currently pending at the state court level on the issue of immunity under state-enacted COVID-19 legislation and executive orders entered by state governors. As these decisions roll out, we could see a wave of new COVID-19 litigation, or a slowing of litigation, depending on the outcome.

Given the uncertainty of how COVID-19 immunity will play out in the legal system, many defendants are opting to settle cases rather than roll the dice at prolonged litigation where immunity could be challenged. Alternatively, many plaintiff's lawyers are structuring

lawsuits to plead everything but COVID-19, in hopes to circumvent immunity defenses. Defense counsel have utilized the PREP Act<sup>2</sup> as an initial defense in COVID-19 litigation. Typically, a case is filed in state court and subsequently removed to federal court on the basis of the PREP Act. Though unfavorable to the defense of these cases, federal courts have most often remanded motions to dismiss under the PREP Act back down to the state court. Early challenges to litigation through the PREP Act have not been favorable for the defense bar. Most circuit courts have dismissed the appeals and remanded the cases back to state courts for lack of subject matter jurisdiction. One thing is clear: this will be a slow and drawn out litigation process in the court system. Those challenging immunity orders and seeking reimbursement for wrongful death or personal injury due to COVID-19 will face years of back and forth litigation before ever seeing a resolution.

### **COVID-19 by the Numbers**

According to the CMS Nursing Home COVID-19 Public File, which includes data reported to the CDC's National Healthcare Safety Network Long-Term Care Facility COVID-19 Module, there are 1,267,458 reported cases of COVID-19 from senior living residents in the United States, with 158,468 resident deaths from COVID-19. While 87.1% of residents have completed primary vaccination per facility, only 48.9% of residents are up to date with the current vaccine protocol per facility.<sup>3</sup>

### **COVID-19 Litigation Across the United States**

While our focus is the senior living industry, litigation related to the COVID-19 Pandemic has hit virtually all industries. As of September 30, 2022, 17,126 complaints have been filed in the United States related to COVID-19. California ranks the highest with 3,094 filings, with New York, Florida and New Jersey following behind. While filings across the country peaked in April 2020 and March 2021, they have subsequently tapered off into the third quarter of 2022.<sup>4</sup>

<sup>1</sup>Tully, Tracey. Families of Veterans Who Died of COVID Win \$53 Million Legal Settlement. (Jan. 7, 2022), <https://www.nytimes.com/2022/01/07/nyregion/nj-nursing-home-covid-settlement.html>.

<sup>2</sup>The PREP Act allows the Secretary of the US Department of Health and Human Services to issue a declaration that extends liability protections to entities and individuals who manufacture, distribute, or administer covered medical countermeasures against a public health threat or emergency. In March 2020 the Secretary issued a declaration that extended protection to COVID related products and those who administer COVID 19 countermeasures, such as senior living facilities and other medical providers. U.S. Department of Health & Human Services, COVID-19 PREP Act Declaration: What is a PREP Act Declaration? (Sept. 21, 2021), <https://www.phe.gov/Preparedness/legal/prepact/Pages/PREPact-NinethAmendment.aspx>.

<sup>3</sup>Centers for Medicare & Medicaid Services. COVID-19 Nursing Home Data, <https://data.cms.gov/covid-19/covid-19-nursing-home-data> (last visited Oct. 2, 2022).

<sup>4</sup>Hunton Andrews Kurth. COVID-19 Complaint Tracker, <https://www.huntonak.com/en/covid-19-tracker.html> (last visited Oct. 9, 2022).



Of the more than 17,000 filings, Health and Medical filings rank ninth among the type of filings with 541 total cases. Of those Health and Medical filings, 362 are wrongful death cases, 55 malpractice cases, 12 relate to the right to visit a patient in a nursing home, and the remainder is categorized as “other.”<sup>5</sup>

**Defense Best Practices**

Most COVID-19 claims fall into one of three categories: resident contracted COVID-19, non-COVID-19 resident had care that was negatively impacted by COVID-19, or wrongful death/personal injury claims. Defense lawyers work to defend these cases on the basis of state or federal immunity orders, showing compliance with regulatory requirements, highlighting compliance with the applicable standard of care, and breaking the causal connection between the alleged breach and any damages suffered. Knowing what we do now about transmission, it is difficult to pinpoint the exact time and place of virus contraction, especially when residents are moved between hospital and facility.

We anticipate continuing to see the battle over immunity play out in the coming months. On the federal level, looking at the applicability of the PREP Act, and at the state level, the invocation of executive orders and COVID-19 immunity legislation. Immunity would not apply should a plaintiff prove gross negligence, willful, wanton or reckless conduct. Absent a showing of such egregious conduct, most state immunity orders provide for protection from liability for a business, health care provider or other covered entity for damages arising from an act or omission related to the transmission of COVID-19 during the ongoing state of emergency.

Now more than two years into the COVID-19 Pandemic, we find ourselves surrounded by much uncertainty as the legal process continues to unfold. Working with strong defensive partners can help senior living facilities ensure they are prepared to defend potential litigation. Staying current on CDC guidance, keeping families informed, and maintaining proper facility documentation can all assist in the defensive process. The same healthcare providers who we lauded, rightfully so, with praise as our nations heroes, wait with anticipation to see if their once supporters become their biggest critics in the court room.

<sup>5</sup>Id.



## About the Author

**Erin** joined Gallagher in October 2013. She is the Director of Claims/Litigation for the Senior Living practice group. Erin graduated from the University of Florida with a B.S.B.A. in Finance and a Minor in Entrepreneurship. She went on to graduate from Wake Forest University School of Law. Erin is licensed to practice law in Alabama.

During her time at Gallagher, Erin has held various roles throughout the Claims Department. She works with our insureds to investigate claims, ascertain the extent of liability, and determine best course of resolution with outside counsel. As Director of Claims, Erin manages personnel and claim files, as well as informs insureds of industry specific changes and best practices.

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