



## **CASE UPDATE BULLETIN: COVID-19 LAWSUITS AGAINST CARE FACILITIES**

The impact of COVID-19 on all types of care facilities has been well documented in the press since the start of the pandemic. Healthcare facilities have stood on the front lines of the pandemic, with limited and sometimes conflicting guidance from state and federal agencies concerning measures that must be implemented to protect patients and staff. Individuals around the country have started filing lawsuits against care facilities, primarily alleging wrongful death. This communication seeks to provide specific updates with regard to the issues presented by COVID-19 litigation in the Pennsylvania, New Jersey and New York region – while also offering general guidance for initial steps to be followed when a new loss is received.

### **Update on Legislative Protections: Civil Immunity for Care Facilities**

For any COVID-19 related claim, the first question an insurer must answer is whether the care provider involved can claim civil immunity through a statute, regulation or order.

Currently, there is no Federal legislation that provides protection for care facilities from COVID-19 related lawsuits. The U.S. PREP ACT (“Public Readiness and Emergency Preparedness Act”) is intended to provide protection from suit for manufacturers and distributors of certain approved face masks and other drugs and devices that are judged to be necessary countermeasures to combat the spread of the disease or to treat patients. In the absence of Federal protections from civil action, various states have enacted a variety of measures intended to protect care facilities from at least some types of claims. In determining whether civil immunity may apply to a particular health care facility, it is critical for carriers to closely follow state law enactments.

By April, the legislatures of both New York and New Jersey passed legislation providing civil immunity for health care facilities that are engaged in providing medical treatment related to COVID-19. In New Jersey, the term “health care facilities” is statutorily defined, and includes a significant number of facilities, among them long- term care facilities and residential treatment facilities. Given the broad definition of health care facilities, there is a strong argument to be made that group homes will be covered by the immunity provisions in New Jersey. Similarly, New York’s immunity law specifically encompasses Article 16 facilities, which include residential facilities for those with developmental disabilities, and Article 31 facilities, which include residential facilities for those who are mentally disabled. Both states’ laws provide immunity for those facilities which “act in good faith.” This means that the facilities acted in accordance with the regulations and orders applicable at the time of the conduct. These immunity laws do not protect care facilities if an individual is able to prove that “gross negligence” or “recklessness” was the cause of injury to the individual. It is presently unclear whether these protections will be permanent. There is currently a concerted lobbying effort to repeal the law in New York, where it was included in the state’s budget legislation without the knowledge of some legislators.

Pennsylvania currently only provides civil immunity to individual health care workers through an executive order of the Governor. Facilities are specifically exempted from the order. However, on June 16<sup>th</sup>, a bill was presented in the Pennsylvania Senate that would provide civil immunity from COVID-19 related claims for any person engaged in providing business services, so long as they acted in good faith to abide by the state’s executive orders. This proposed legislation also precludes immunity for acts of gross negligence.

The proposed legislation would seemingly only cover individuals and not businesses or entities. The bill has been referred to the judiciary committee and a vote on the legislation has not yet been taken. Devine Timoney Law Group will continue to monitor the progress of this bill.

### **Recently-Filed Litigation**

As of the third week in June, there have been 29 lawsuits filed in 11 states concerning nursing homes or long-term care facilities. In New Jersey, a class action lawsuit has been filed in Sussex County against a nursing home where over 100 patients died. A lawsuit filed in Suffolk County, New York involves a woman's death at a facility where 39 patients died. Both lawsuits allege gross negligence on the part of the facilities, and in particular, ignorance of warnings provided by the Centers for Medicare and Medicaid Services in early February 2020.

More broadly, there are a significant number of claims filed across the country against businesses where it is alleged that improper or grossly negligent practices, or a failure to act, caused employees or customers to become exposed to COVID-19. Although these cases do not directly involve health care facilities, the development of the law in these cases will have an impact on claims against healthcare facilities as Courts and Judges seek to define: 1) the relevant government guidance that should have been followed by the business involved; and 2) what acts might establish "gross negligence" in the context of a COVID-19 claim.

### **Considerations for Responding to a COVID-19 Claim Against a Care Facility**

Regardless of jurisdiction, the following considerations are important to any care facility in the event of a lawsuit:

1. Immediately conduct an in-depth investigation of any documents or communications that show the facilities' established policies, practices, and procedures for responding to the virus and how those policies, practices and procedures were implemented and communicated to staff and residents.
2. Conduct an in-depth investigation and timeline of any information received by the facility relating to exposures or potential exposures by employees or patients.
3. Establish a list of all potential witnesses relating to both the specific exposures and well as to the practices and procedures implemented by the facility to protect patients and staff from exposure.
4. Take extra measures to ensure that neither the carrier nor the facility inadvertently discloses personal medical information relating to an individual who is not a party to the claim, as such disclosure may itself constitute a violation of privacy law.
5. Consult with counsel to determine whether any protections from civil claims might apply to the facility involved and to check on the status of legislation and regulations in the relevant jurisdiction.
6. Consult with counsel to establish a clear timeline for all state and local orders and enactments that provide specific procedures that the facility was required to follow at the relevant time.

Devine Timoney Law Group will continue to provide updates on litigation with respect to care facilities and group homes as these issues will undoubtedly continue to evolve.