

THE COVID LIABILITY CLAIM

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This article is a summary of the general issues surrounding the COVID 19 professional liability lawsuits that have been filed to date. The number of these lawsuits is estimated nationally at over 700. While a big number, it is still less than the normal annual professional liability claims filed by residents. Among our own clients over the past two years, these COVID claims have been relatively few. It is my opinion that plaintiffs' lawyers may have filed a claim or lawsuit to be on record to preserve the statute of limitations. Many are waiting to see how this exposure unfolds in the Courts.

Early on we were quick to help clients identify and document compliance with the various and evolving CDC and state health regulations required to combat this disease. One of our early observations was that documented compliance with these regulations would be key to defending a COVID claim should they arise.

We were correct. As these claims were filed, **the primary negligence allegations have been a failure to comply with the CDC and state health care regulations and internal infectious disease protocols.** Those senior care companies that did a diligent job documenting their ongoing *interventions* on a timeline, have a jump start on defending this allegation. It was our advice to document even when the client was unable to procure certain PPE supplies for example. We also urged clients to contact their local health authorities proactively and in turn document those interactions and the advice or directions they provided.

An additional issue relating to the defense of this negligence allegation is **how well the community documented the enforcement of their protocols.** Community protocols included procedures around the use of masks, taking and recording the temperatures of each employee before going on shift, proper use of PPE, completing questionnaires before going on shift regarding exposures to COVID, enforcing stay at home or go home policies if the employee had symptoms or was exposed to COVID, continuous cleaning of the building as advised by health authorities etc. In some cases, clients utilized new and developing technologies to meet this cleaning obligation. And finally, the vaccine, its utilization in the senior care environment and how well the community managed and documented this intervention with employees, residents, families and visitors.

The question has been raised on a number of occasions how do you successfully document enforcement or compliance with community protocols? First, **communicate in writing and often** with families, employees and residents about the COVID mitigation protocols and consequences of not doing so. Second, **documenting the training provided** to all stakeholders around the mitigating protocols. Third, **document the actions taken** when a COVID risk was identified, or when non-compliance with protocols was detected. Were staff sent home, were residents quarantined or sent to the hospital? On this last point, documenting when a hospital would not receive a resident, or was not helpful when a resident was sent to them would be an important element in the COVID defense. Additionally, documentation of the advice or guidance provided by the state health authorities, and your follow up and implementation of the same, is an important piece of this puzzle. In the end, these efforts will provide evidence to help overcome negligence allegations that the community failed to comply or do all that it could to mitigate COVID risks in the community and protect residents.

Finally (but not least) relating to the defense, is the requirement **that a plaintiff prove causation**, that the community's negligence **caused the resident to get Covid.** Evidence that the community followed all of the above protocols is a first step to overcome the causation allegation. Second is the need for expert testimony on the medical details behind Covid and what or how it is contracted. It is an accepted fact that senior care residents were in the more susceptible age group with multiple preexisting life challenging conditions and suffered at a much higher rate than those who were younger and without these co-morbidities. The more relevant comorbidities include serious respiratory ailments, compromised immune

conditions, Alzheimer's or Dementia, being overweight, and those residents already on hospice. Proving that Covid per se caused injury or death and that the community allowed COVID to exist against these preexisting conditions is likely a most difficult task. A plaintiff must prove that the community's failure on any of the above mitigating factors "caused" the resident to come down with Covid. We learned later in the Pandemic that even vaccines alone did not keep people from contracting this disease or even giving it to others. COVID was in the atmosphere all around us and aside from the professional recommendations discussed previously, there was very little any business could do to keep it at bay and outside their building.

Defense medical experts will likewise be required to testify that 1) COVID was present in the environment at large, and not caused by or unique to the community; 2) that the community had diligently taken the known precautionary steps to mitigate resident exposure to COVID, and 3) that the age and comorbidities of the resident, more likely than not, were the cause of the death or injury despite the mitigating protocols. I have used the term "mitigating" because there was little if anything one could do to "prevent" COVID from affecting not only the population at large, but especially residents in senior care communities.

What makes this area of litigation most troublesome for the senior care operator is that by the end of 2020 most *professional liability carriers* amended their policies to exclude any claims related to COVID. However, a best practice was and is to file a Covid claim with your carrier anyway. Depending on how the lawsuit or claim is articulated, there may be arguments that the underlying fact patterns may really relate to other comorbidities and issues entitling you to possible coverage.

Many defense counsel have attempted to remove the COVID claims to Federal Court under the 2005 *PERP Act* which provides for immunity from claims involving new medical counter measures in a public health crisis. The problem with this strategy has been the court's interpretation of what constitutes medical counter measures. The courts so far have read this language to apply more to durable medical interventions and not medications, or non-durable goods technology interventions. As a result, most every federal court has denied the Acts application to covid claims and has remanded the claim back to state court. However, the Supreme court may accept a COVID claim related to the applicability of the PERP Act. The question is whether the federal act preempts state law negligence claims. If the Supreme Court were to accept the case and allow coverage under this Act, then most every operator would have immunity to the COVID claim. **The claim to watch here is Glenhaven Health Care v Jackie Saldana.**

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