

Residents Fear Nursing-Home Legal Immunity Amid Crisis

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Family members speak to a nursing-home resident.
Photograph by John Moore/Getty Images

Nursing-home residents' lawyers, families, and advocacy groups are warning that moves by several states to shield the facilities from Covid-19-related litigation could cover up abuse or negligence [in the crisis-hit sector](#) .

Two residents of the Citadel Salisbury in Salisbury, N.C., filed suit against the nursing home and its corporate owners in late April, alleging the facility was

understaffed, asked employees with Covid symptoms to come to work, and allowed Covid-positive and Covid-negative residents to share restrooms.

The Citadel had 154 Covid-19 cases among residents and staff as of May 5, more than any other congregate-living facility in the state, and 17 Covid-linked deaths, according to the North Carolina Department of Health and Human Services. In affidavits filed with the lawsuit, family members said the facility had left them in the dark about the outbreak and residents' health status. One resident's great-nephew and next of kin alleged that he learned of his great-aunt's death only when the funeral home called him to discuss arrangements.

"We were transparent from day one" about Covid cases, says Kim Morrow, chief operating officer of Accordius Health, which operates the facility. The company has worked "with all government authorities to do everything proper," she says. "Any claims in the lawsuit to the contrary, we certainly dispute them."

Days after the lawsuit was filed, the North Carolina legislature passed a law granting health-care providers immunity from liability for care provided during the coronavirus crisis.

The residents still plan to have their day in court. The new law should not immunize the Citadel in this case, which doesn't seek damages but asks the court to ensure that the facility provides proper care, says Steve Gugenheim, a Raleigh, N.C., lawyer representing the residents. But for residents and families who may have personal-injury or wrongful-death claims, he says, the law "has essentially taken away North Carolina citizens' right to seek redress for wrongs." The bill's primary sponsor and the North Carolina governor's office didn't respond to requests for comment.

Such battles may play out across the country in the coming months. About 18 states have granted long-term care facilities some form of immunity from liability related to care provided during the Covid crisis, and industry groups are seeking similar measures nationwide. “We encourage every state to extend sovereign immunity provisions to the long term care providers and other healthcare sectors” providing care during the pandemic, industry group American Health Care Association/National Center for Assisted Living said in a statement. [Long-term care workers](#) and providers, the group said, need that protection “to provide care during this difficult time without fear of reprisal.”

Some families, resident advocates, and plaintiffs’ lawyers see the immunity requests as the latest in a series of measures insulating long-term care providers from accountability when nursing-home care goes badly wrong. The industry has made increasing use of pre-dispute arbitration agreements, in which residents sign away their right to have their claims heard in court—a practice that the Centers for Medicare and Medicaid Services, or CMS, tried to ban in 2016 but reinstated last year after an industry legal challenge.

Nursing home operators have also adopted more complex ownership structures, which came into vogue after a previous wave of nursing-home litigation, to shield assets from potential claims and deter lawsuits, academic research shows. Regulatory accountability has also waned in recent years, resident advocates say, in part because CMS eased back on financial penalties for facilities with longstanding health violations.

With the suspension of routine nursing-home inspections and visits from family members and patient advocates, the immunity measures leave [understaffed, undersupplied](#) facilities to police themselves, critics say. “Roll all that together and give people protection from lawsuits, and it’s a license to do incredible harm,” says Steve Levin, a plaintiffs’ lawyer in Chicago.

More than 830 Covid-linked lawsuits have been filed as of May 5, according to a database maintained by law firm Hunton Andrews Kurth, but fewer than a dozen of those are aimed at long-term care facilities, says Torsten Kracht, a partner at the firm. Nursing-home arbitration agreements may be one factor keeping a lid on those claims, Kracht says, but he expects the number to climb substantially in the coming weeks.

Lawyers are closely watching the new state measures granting immunity. Although the immunity shields are generally retroactive to the start of the Covid emergency and don’t cover willful misconduct or gross negligence, their exact scope varies from state to state, and their full protective power won’t be clear until they’re tested in court, legal experts say. The measures should not protect facilities from liability for negligent conduct that existed before the pandemic and contributed to residents’ harm during the crisis, says Kathleen Hoke, director of the Network for Public Health Law’s eastern region, but “it’s going to take litigation to figure out all these parameters.”

In some cases, industry requests for immunity are so broadly worded that they could offer cover for serious abuse and neglect, resident advocates say. In early April, nursing-home trade groups California Association of Health Facilities and LeadingAge

California, along with other health-care industry groups in the state, sent a letter to Gov. Gavin Newsom asking for immunity “from any administrative sanction or criminal or civil liability or claim for any injury, death, or loss alleged to have resulted from any act, omission, or decision” related to providing services, absent proof of willful misconduct. Given such immunity, facilities “wouldn’t be responsible for fraud, abuse, or reckless behavior,” says Patricia McGinnis, executive director of California Advocates for Nursing Home Reform.

“We are seeking baseline protection from the expected surge in litigation from those who will engage in the second-guessing of caregivers who are trying to do their best under impossible circumstances,” Deborah Pacyna, a spokeswoman for the California Association of Health Facilities, said in a statement.

The industry says the immunity measures are necessary in part because Covid-related litigation would drain time and money that facilities would otherwise devote to providing proper care. “If providers are diverting resources to paying lawyers and defending cases, many of which should never have been brought, it’s a disservice to the entire profession. They can’t put dollars toward care staff,” says Barbara Duffy, a Seattle lawyer and member of AHCA/NCAL’s legal committee.

For many nursing-home residents, however, judges and juries are already off limits. In response to some sizable jury verdicts, long-term care providers “over the years have made increased efforts to settle claims by arbitration, mediation, or alternative forms of dispute resolution,” says Kanika Vats, a director and actuary at [Aon](#). Facilities can’t make binding pre-dispute arbitration agreements a condition of admission or continued care. But many residents and family members unwittingly sign the agreements when they’re buried in stacks of admission papers, resident advocates say. Arbitrators’ decisions are often kept confidential, leaving no public record of residents’ claims, and typically can’t be appealed.

Arbitration “is an evil sister of immunity clauses,” says Jim Chalat, a plaintiffs’ attorney in Denver, adding that arbitrators may favor industry clients who give them repeat business. Arbitration awards are generally lower than jury verdicts, Aon studies have found. Health-care arbitration providers contacted by *Barron’s* didn’t respond to requests for comment.

As litigation increased in the late 1990s and early 2000s, some nursing-home operators sought shelter from residents’ claims by selling facilities to smaller entities that had little in the way of assets or liability insurance coverage, according to a 2017 study by researchers at the University of Rochester and Purdue University. Most states don’t require nursing homes to have liability insurance, according to the American Association for Justice. “If you have a nursing home with limited assets and no insurance, it certainly reduces the incentives to sue,” says James Brickley, a professor at the University of Rochester’s Simon Business School and co-author of the study.

A 2019 Aon report, which was partly funded by the nursing-home industry, shows that the frequency of claims against long-term care providers has been essentially stagnant since 2014, hovering around one claim per 100 occupied beds. Looking at claims that

resulted in payouts to claimants, the study found that the average payout was less than \$160,000 in 2018, down about 8% from 2014.

Even for plaintiffs who successfully sue nursing homes, justice can seem elusive. Liz Kuzma, 61, a retiree in Pinellas Park, Fla., sued the nursing home where her father suffered a fatal fall in 2012. Her father generally required two staff members to lift him safely, she says, but when one nursing aide was attempting to change her father alone, he fell to the floor and broke bones in his face and neck, according to Kuzma's complaint. He died the next day from "complications of blunt trauma," the complaint said. After a four-year battle, Kuzma says, she received a settlement. But she's still upset that the facility retained a four-star rating on Medicare.gov's [Nursing Home Compare tool](#) for years after the incident. "People should be able to know what happened to my dad," she says.

As for the recent measures granting facilities Covid-related immunity, "I think it is a crime," Kuzma says, particularly at a time when nursing-home residents are dying alone, unable to see their families. "I hope somebody blows this up like a bomb," she says. "People need to know what's going on."

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