

Court Allows COVID-19 Negligence Claim to Proceed Against Long-Term Care Facility, by Christopher Tellner, Esq., and Gregory Brown, Esq., The Legal Intelligencer, 10-13-2022

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The case involves the death of a resident at a suburban Philadelphia nursing home during the first wave of the COVID-19 pandemic March-April 2020. The resident's estate alleged that the nursing home was negligent because it did not enforce the implementation of personal protective equipment for staff, did not isolate or properly socially distance the resident from other residents with COVID-19, and did not implement proper infectious disease protocols, leading to the resident's contraction of COVID-19 and death.

The nursing home moved for early dismissal, arguing that the estate's complaint did not state a compensable claim, even if its allegations were considered true. The nursing home contended that it was immune from the estate's action under the PREP Act, or that the PREP Act preempted the estate's claim. The estate also argued that it was immune from liability under the PEMSC order. The court rejected each argument and allowed the case to proceed.

Generally, the federal PREP Act immunizes "covered individuals," including nursing homes, from "any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure" where the Secretary of Health and Human Services (HHS) declares a public health emergency. The PREP Act was activated by the secretary's declaration in March 2020, which explicitly provided immunity for "covered countermeasures," including drugs, devices and products "used to treat, diagnose, cure, prevent or mitigate COVID-19."

The nursing home argued that the PREP Act shielded it from liability from the estate's claim due to an HHS advisory opinion that a facility's decision to not use a covered countermeasure fell within the PREP Act's scope of immunity. The court disagreed, first noting that an HHS advisory opinion is not binding on a federal court. The court then pointed to developed federal caselaw to the effect that the PREP Act's grant of immunity is confined to the liability for use of a covered countermeasure, and does not immunize a health care provider for negligence based on a failure to implement countermeasures. As the estate's complaint contained allegations of negligence due to the omission of COVID-19 precautions, the court concluded that the estate's allegations did not fall within the PREP Act's grant of immunity.

The court also rejected the nursing home's argument that the PREP Act preempted the action under the PREP Act's provision of a federal cause of action based on willful misconduct. The court determined that the estate's complaint did not allege willful misconduct, so preemption was not mandated.

Finally, the court determined that the PEMSC order did not shield the nursing home from liability for the estate's claim. The PEMSC order provided for civil immunity for individuals "engaged in emergency services for the provision of disaster services related to the commonwealth's COVID-19 disaster emergency response" in a number of specifically identified "settings." Among the "settings" is "any nursing facility, personal care home and assisted living facility engaged in emergency services activities." In a matter of first impression, the court rejected the nursing home's argument that it was immune from civil liability pursuant to the provision. The court disagreed on the basis that the PEMSC order explicitly stated that the immunity granted to "individuals" did not apply to "the facilities or entities themselves." As the only defendants to the action were the entities that owned and operated the nursing home, the court permitted the estate's action to proceed.

The court's decision should be viewed in light of the deferential standard granted to early motions to dismiss, which requires a court to assume that the facts alleged in a plaintiff's complaint are true. The defendant nursing home in the case may still defend against the estate's claims of negligence by demonstrating that the estate cannot prove its factual allegations, or by demonstrating that its protocols and actions complied with the standard of care. Still, the court's analysis of the PREP Act and the PEMSC order indicates that a nursing home or similar facility cannot assume it is immune from suit for any COVID-19-based claim. Indeed, the court's opinion indicates that negligence claims based on a failure to protect nursing home residents from the transmission of COVID-19 may proceed despite the limited immunity granted by the PREP Act and PEMSC order. As negligence, not intentional conduct, is customarily the central theory of liability in suits based on a failure to protect a resident from the transmission of COVID-19, many claims will proceed if the court's reasoning is followed. To be prepared for such suits, Pennsylvania nursing homes and long-term care facilities should ensure that their efforts to protect residents from COVID-19 remain properly documented and preserved to enable a successful defense against such claims.

Please contact Christopher J. Tellner or Gregory F. Brown to secure a copy of the district court's ruling in *Testa v. Broomall Operating*, No. CV 21-5148-KSM (E.D. Pa. Aug. 18, 2022). Christopher J. Tellner is a co-managing partner of Kaufman, Dolowich & Voluck's Blue Bell office and co-chair of the firm's health care and managed care practice group. A trial attorney, he concentrates his practice in the fields of insurance coverage, professional liability, defense of general liability matters, and business litigation with an active trial and appellate practice in both federal and state courts. Gregory F. Brown is an associate in the Blue Bell office of the firm. He focuses his practice on professional liability, errors and omissions, insurance coverage, and general liability litigation including defending against complex fraud and qui tam actions.

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