



## COVID-19 Risk Management for SNFs – Civil Litigation

*This Article is Part 4 of 5 in EVOLVE's series on COVID-19 risk management for SNFs. In this Article of the series, we outline potential civil claims that may arise from the pandemic and strategies for SNFs to begin building their defense arsenal now.*

### ***Two conflicting accounts detail the response of SNFs to the COVID-19 pandemic.***

In previous articles in this series, we discussed how long-term care facilities have been particularly hard hit by the COVID-19 pandemic due to their unique populations and communal living. Indeed, it is rare for a day to go by without another media report on how COVID-19 has “ravaged” nursing homes, leaving our elderly and vulnerable populations infected and deceased. This attention is understandable as 41% of the total COVID-19 deaths in the United States have occurred in long-term care facilities, and in some states, that percentage is even higher.<sup>1</sup> As of September 2020, over 82,000 residents of long-term care facilities have suffered COVID-19 related deaths, and experts have warned that these numbers have the potential to get exponentially worse as we head into the winter flu season.

In the public and in the press, two competing stories have emerged about the long-term care industry's response to COVID-19. The first version of that story reflects what you may be acutely witnessing. That is, nursing facilities were unprepared for a pandemic of this magnitude, just like the rest of the world. But workers on the front lines have been performing heroically and putting their lives on the line to respond. As a result, SNFs have continued to provide quality care and services, all while facing unavoidable shortages of staff and PPE, uncertainty in testing, and a resident population that is struggling from being cut off from activities and visitors.

However, the second version of the story of the pandemic affecting long-term care is much different. That account, one we have seen showcased in certain media and by plaintiffs' attorneys, is that long-term care facilities are failing in their response to COVID-19. Their story focuses on the fact that a large percentage of COVID-19 deaths are occurring in nursing homes, blaming not the nature of congregate settings and vulnerable resident populations, but alleging failures to adequately respond, provide sufficient staff, and protect residents from infection. Instead of relating the heroics of staff who are working overtime and

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<sup>1</sup> These numbers are based upon reporting from the International Long Term Care Policy Network, using data from the Centers for Medicare & Medicaid Services (CMS), Kaiser Family Foundation (KFF), The Atlantic's COVID Tracking Project, and the Johns Hopkins University Coronavirus Resource Center, as of September 20, 2020, available [here](#).

#### ABOUT EVOLVE

*Evolve Legal Solutions LLC (EVOLVE) harnesses the power of technology to provide self-service, subscription-based legal solutions to SNFs. Subscribers to EVOLVE have access to manuals, policies and procedures, training modules, protocols, and other tools. EVOLVE has currently suspended charges for its COVID-19 SNF Legal Hub, containing practical resources on COVID-19 legal and risk management issues.*

finding creative ways for their residents to communicate with loved ones, they identify families who have lost loved ones to COVID-19 without being able to be at their side. They note the significant penalties imposed on SNFs for infection control since the start of the pandemic, argue that SNFs were already struggling with quality care, and blame the SNF for being short-staffed. They question whether SNFs have used the significant CARES Act funds that they have received to engage sufficient staff and provide quality care, or to enrich themselves at the expense of residents.

***SNFs will be facing litigation and need to work now to make their own account of how the pandemic “story” has played out in their buildings.***

These two interpretations of industry response to the pandemic are certainly different. Unfortunately, because families have not been able to visit and witness what has actually been happening in the facility over the past six months, they may be more likely to believe the second account. Thus, those who lose someone to COVID-19 may conclude that it happened because the SNF failed to take sufficient measures to treat or prevent the spread of the disease. Thus, the second, more salacious report may carry the day, particularly if SNFs do not start marshaling their evidence *now* in order to change the narrative and make their story more compelling.

Regardless of the fact that preventing residents from contracting COVID-19 may be nearly impossible, SNFs will nevertheless inevitably face legal claims on behalf of or relating to those who become ill or lose their lives. Personal injury lawyers are already targeting advertising to individuals who have lost loved ones to COVID-19 at a SNF. And we have already seen negligence and wrongful death lawsuits popping up all over the country, alleging that SNFs failed to adequately respond to the pandemic, keep families apprised of conditions at the facility, follow infection control procedures, and more. The stream of COVID-19 lawsuits has already commenced, and we expect it to continue, particularly as more deaths occur.

***While there may be some civil liability protections for SNFs responding to a public health emergency, those protections are uncertain and can be limited.***

In the wake of COVID-19, many states and the federal government have attempted to extend some legal immunity protections that could help mitigate SNFs’ civil liability risks. However, SNFs should not be lulled into a false sense of security by immunity. These protections are generally limited in scope and substance, and they can be challenged. And, of course, the existence of an immunity protection does not prohibit a plaintiff from actually filing a lawsuit – it just provides the SNF a potential defense.

First, because many of the applicable protections have been enacted recently in direct response to COVID-19, the application of immunity will present new and novel questions to courts. This means that there is no guarantee to SNFs that they will even be able to avail themselves of these protections. For example, many of the defenses were enacted retroactively or by executive order, and so they may be challenged as unconstitutional. Protections may also have been drafted in a manner that leaves them open to interpretation, and courts may limit their application to certain time periods, only to health care workers and not facilities, and more. There is still much room for courts to interpret and limit immunity protections.

Second, even if immunity survives these initial challenges, it is not a complete protection against liability for a SNF. While we use the shorthand phrase “immunity,” the fact is that these protections do not make

a SNF completely immune from liability. Rather, immunity simply changes the standard of care that SNFs need to meet in order to avoid liability. While SNFs may not be held responsible for mere negligence, they can generally still be liable for “reckless” and “willful” conduct. Depending on the egregiousness of the circumstances and how the story is told, the plaintiff may be able to demonstrate that the SNF failed to meet even this standard of care.

Lastly, SNFs should keep in mind that immunity provisions do not prevent plaintiffs and attorneys from filing claims and forcing providers to incur the expense and defend litigation in the first place. While we hope that immunity can stem a significant number of suits from being brought, SNFs would be naïve to think that they are protected from even the filing of lawsuits simply because an immunity statute has been enacted. Thus, the fundamental lesson for SNFs here is that they need to prepare for lawsuits, regardless of the presence of immunity.

### **Proactive Risk Management Strategies – Civil Litigation**

Smart SNFs will engage in risk management activities and begin shaping their narrative *before* litigation commences. SNFs may want to consider the following as risk mitigation strategies relating to potential civil liability:

☐ **Create a COVID-19 timeline and organized documentation folder.**

The single most important thing SNFs can do is to make sure every measure they take in response to COVID-19 is well-documented and organized. Just as we stressed the importance of documentation with respect to survey risk management, the same principle applies with respect to mitigating strategies for litigation. SNFs may only receive “credit” from a judge or jury for their response to COVID-19 if they have written documentation confirming and supporting their actions and policies.

Thus, consider preparing and maintaining a detailed timeline of events *now*, while memories are still fresh, that includes all significant policy decisions, admission decisions, staffing decisions, attempts to procure personal protective equipment, communications with and directions from government authorities, and other decisions and efforts in response to COVID-19. This documentation will be crucial for defense in litigation to demonstrate that actions were not negligent, reckless, or intentionally malicious.

☐ **Establish open and effective lines of communication.**

Generally speaking, residents and families who have good feelings about a SNF are going to be less likely to sue, even in the event of a negative outcome. Many of the complaints that we have seen in news reports and in the lawsuits already filed relate to a lack of communication by the SNF. Family members have been angered by the SNF’s failure to update them as to their loved one’s condition, provide information about COVID-19 present in the facility, and more. We believe that transparency and communication will go a long way in creating positive feelings about the facility among residents and families. Since staffing may be tight, consider how to use technology to your advantage to share updates with families.

☐ **Engage in thoughtful public relations.**

Along the same lines, implement proactive public relations strategies to garner goodwill among residents, families, staff, and the general public. Public relations efforts can also be used to help the public form a more realistic opinion about the challenges facing SNFs in attempting to limit the spread of COVID-19. For example, consider options such as:

- Write opinion editorials to local newspapers about the challenges facing SNFs and your particular facility;
- Send press releases to appropriate publications about staff members who have gone above and beyond in responding to COVID-19;
- Use social media to promote positive stories about staff members and residents relating to the pandemic, *e.g.*, graduations from the COVID unit, special activities, etc.; and
- Post “honk for heroes” signs outside the facility.

☐ **Review and update admission material.**

Review admission agreements for provisions that could conflict with quarantine rules or other measures necessary to respond to COVID-19. If necessary, revise admission agreement forms going forward to expressly acknowledge and permit the use of such measures when needed. Also, consider communications at admission to alert incoming residents and their families about the potential for COVID-19 spread in the facility, restrictions on visitation, and other potential changes due to COVID-19 so that they can make informed decisions about admission.

☐ **Implement arbitration agreements.**

Consider the use of arbitration agreements, which could help streamline disputes and avoid more drawn out and expensive litigation in court. Arbitration agreements without certain terms and protections may not withstand challenge, so SNFs should work with their attorneys in drafting any arbitration agreements.

☐ **Implement waiver agreements.**

Request that residents or their representatives sign waiver agreements expressly recognizing the health risks posed by COVID-19 as appropriate, such as upon admission. Again, because of the potential legal significance of such documents, SNFs should work with their attorneys in drafting waiver agreements.

☐ **Don't forget HIPAA.**

Because of the significant impact that COVID-19 has had on the entire population, interest in those who have contracted the virus is high. Staff may simply forget that HIPAA protections still apply in the context of COVID-19. To remind them of this and to limit liability for privacy violations, include privacy and confidentiality issues as part of training on COVID-19. In addition, for staff members who are working remotely, ensure that adequate security protections are in place to secure the privacy and confidentiality of any electronic protected health information.

□ **Revisit survey risk management strategies.**

Many of the same strategies we discussed in Article 2 of this series relating to survey risk management will also help SNFs to position themselves in a civil litigation context. For example, consider the following:

- Self-assess and document compliance with infection control requirements using available guidance.
- Create and document a COVID-19 surveillance system to identify infections and limit spread within the facility.
- Create and document a visitation plan that adheres to applicable guidelines.
- Implement and document appropriate PPE protocols and stockpiles.
- Create and document plans for cohorting and isolating residents.
- Create and document an effective plan for contingency staffing.
- Practice social distancing and limit activities in accordance with guidance.
- Increase education and document education and related staff communications.

While these strategies of course cannot completely shield SNFs from facing lawsuits as a result of COVID-19, a well-prepared SNF should fare better at defending such litigation.

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