

U.S.

Hospitals, Nursing Homes Seek More Liability Shields

Health-care providers lobby for greater state and federal protection against lawsuits amid coronavirus pandemic



At least 75 residents died from the coronavirus at Andover Subacute's two facilities, one of New Jersey's largest nursing home sites.

PHOTO: STEFAN JEREMIAH/REUTERS

By [Anna Wilde Mathews](#) and [Jacob Gershman](#)

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Hospitals and nursing homes are pushing for more protection against patient lawsuits amid the coronavirus pandemic, aiming to add to shields that have already been enacted by more than 30 states.

Still, plaintiffs in several states with liability protections in place are moving forward with suits. At least three attorneys general in states with legal shields—Pennsylvania, New Jersey and New York—are investigating nursing homes' treatment of residents after thousands of deaths in their facilities.

At least 24 states have recently taken action, through laws or executive orders or both, to protect health-care providers—typically including doctors, hospitals and often nursing homes as well, according to a survey by law firm Baker, Donelson, Bearman, Caldwell & Berkowitz, which often defends health-care providers in litigation. An additional 10 states had previously passed such immunity laws, which were automatically activated when a state of emergency was declared.

The scope of the shields varies widely. Some only apply to patients with Covid-19, the illness caused by the new coronavirus, while others include all care that may have been affected by the pandemic. The state actions typically carve out exceptions for behavior that is considered particularly egregious, often defined as “gross negligence” or “willful misconduct.”

“The devil is in the details,” said Buckner Wellford, an attorney at Baker Donelson, who said the scope of the various immunity statutes would likely be defined as suits progress. Still, he said, most of the states that have enacted liability shields provide substantial protections for health-care defendants.

Nursing-home owners, hospitals and doctors, among others, are lobbying Congress to enact national liability protections. Patients and providers can move across states, which have a patchwork of liability laws, said Tom Nickels, executive vice president of the American Hospital Association, adding that uniformity would provide “a level playing field.”



Groups representing nursing homes, hospitals, doctors and insurers are pressing California Gov. Gavin Newsom to expand liability protections.

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One factor driving the push is that some states ordered hospitals to delay medical care and public officials urged hospitals to do so. As patients waited, some saw their conditions worsen, and they and their families may later challenge decisions to postpone care, said Janis Orlowski, chief health-care officer for the Association of American Medical Colleges.

Meanwhile, resources became scarce where hospitals saw coronavirus cases surge, Dr. Orlowski said. “Because everyone pitched in and because everyone was doing what we thought was best at the time, we are looking for immunity for liability from unforeseen consequences of those decisions,” Dr. Orlowski said.

In California, which has liability protections that kick in when an emergency is declared, nursing homes and others such as physician assistants aren’t covered. The nursing-home industry, hospital groups, doctors and insurers are pushing for an order from Gov. Gavin Newsom that would expand the shield.

“It’s an impossible and unprecedented situation we’re finding ourselves in,” said Deborah Pacyna, a spokeswoman for the California Association of Health Facilities, which represents nursing homes. Thousands of nursing-home residents around the country have become ill and died, with more than 1,400 coronavirus-related deaths in California facilities so far.

On the other side, consumer groups have argued that expanded immunity is unnecessary and would protect behavior that harms patients. “It would be devastating” for nursing-home residents, who are already cut off from visits and some

regulatory oversight during the pandemic, said Mike Dark, a staff attorney at California Advocates for Nursing Home Reform.

A spokesman for Mr. Newsom didn't respond to a request for comment.

Even in states that have enacted liability protections, some plaintiffs' attorneys are filing suits against nursing homes and others.

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In May, Illinois Gov. J.B. Pritzker signed an executive order making health-care facilities immune from civil liability for injuries or deaths in the course of protecting against Covid-19 and treating those infected.

Plaintiffs' lawyers in Chicago suing a hard-hit nursing home in Geneva, Ill., say the governor's order didn't deter

them from bringing a negligence case. They say they found an opening in the fine print, specifying that a facility such as a nursing home is shielded from lawsuits only when rendering care consistent with public health guidance in support of Illinois's emergency effort.

The lawyers say Bria of Geneva nursing home, where more than 20 residents died from the virus, undermined the state's response by ignoring health guidelines. The suit alleges that the nursing home failed to isolate and identify asymptomatic residents or ensure adequate supplies of masks and other protective equipment.

"The intent of the governor wasn't to extend immunity in situations like this, but undoubtedly a nursing home like this will attempt to use the governor's executive order as a shield," said Peter Flowers, a Chicago trial lawyer representing the plaintiffs in the Illinois case.

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A Bria Health Services spokeswoman said that the unpredictable nature of the coronavirus compelled the state to provide legal immunity and that the company is committed to its residents' care. "Because testing wasn't immediately accessible, the high number of asymptomatic carriers among residents and staff created a silent enemy impossible to detect and difficult to defeat," she said.

Lawyers suing a nursing facility in New Jersey say they are confident they can get around the state's shield. The immunity granted by Gov. Phil Murphy in an executive order wasn't intended to protect failures to prevent viral spread, said Dan Marchese, a personal-injury attorney representing residents of Andover Subacute and Rehabilitation Centers in Andover, N.J.

“The treatment for Covid-19 is the immunity, not the prevention of it,” said Mr. Marchese, who has teamed up with a larger plaintiffs’ firm to handle the litigation. At least 75 residents died from the virus at Andover Subacute’s two facilities, one of the state’s largest nursing home sites, with more than 500 residents, prompting the governor to ask for an investigation. The chief executive of the company that owns the facilities said Andover Subacute’s administrators and nurses have worked relentlessly to contain the virus and safeguard residents and staff, declining to comment on the litigation.

—*Melanie Evans and Jim Oberman contributed to this article.*

Write to Anna Wilde Mathews at anna.mathews@wsj.com and Jacob Gershman at jacob.gershman@wsj.com

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