Federal Court Dismisses Case Against Assisted Living Community Under PREP Act Immunity

Lori C. Ferguson
Hanson Bridgett LLP

On February 10, 2021, a California federal court ruled in *Garcia v. Welltower OpCo Group LLC*[1], that an assisted living community was immune from suit for claims of wrongful death, elder abuse and neglect, and intentional infliction of emotional distress under the Public Readiness and Emergency Preparedness Act (PREP Act).[2] While this is just one case making its way through the courts on these issues and is not binding precedent, the decision provides a thoughtful analysis of the application of the PREP Act that may be persuasive to other courts.

Allegations of Insufficient COVID Protections and Application of the PREP Act

In *Garcia*, the family of a resident who contracted COVID-19 at the community and then died from the virus alleged that the community failed "to implement appropriate infection control measures or follow[] local or public health guidelines in preparing for and preventing COVID-19 spread." The claims included allegations that the assisted living facility had insufficient supplies of personal protective equipment, implemented inadequate visitation and group dining policies, inappropriately relaxed mitigation policies after a staff member tested positive for the virus, and was generally "unprepared" for the resident's return from urgent care.

Before the court were two motions: (1) the plaintiffs' request that the court send the case back to state court (motion to remand) and (2) the defendants' request that the court dismiss all claims based on their affirmative defense of immunity under the PREP Act (motion to dismiss). The resolution of both motions hinged on the court's application and interpretation of the PREP Act.

Under the PREP Act, when the Secretary of the Department of Health and Human Services issues a declaration determining that a disease or other health condition constitutes a public health emergency, as the Secretary has done with respect to COVID-19, the PREP Act renders "a covered person . . . immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, or resulting from the administration to or the use by an individual of a covered countermeasure . . . ."[3] When the PREP Act applies, the only way for a plaintiff to overcome immunity is to file a case in the U.S. District Court for the District of Columbia and to prove that death or serious physical injury was proximately caused by willful misconduct.[4]

When the PREP Act applies, it provides "sweeping immunity."[5] Key questions in any case where the PREP Act is invoked are: (1) whether the defendant is a "covered person" under the Act and (2) whether the claim is one to which the immunity applies, namely, "any claim for loss that has

[1] *Garcia v. Welltower OpCo Group LLC*, No. SACV 20-02250JVS(KESx), 2021 WL 492581 (C.D. Ca. Feb. 10, 2021).
[2] 42 U.S.C. §§ 247d-6d, 247d-6e.
[3] 42 U.S.C. § 247d-6d(a)(1).
[4] 42 U.SC. § 247d-6d(d)(1).
[5] *Garcia*, 2021 WL 492581 at *3.

a causal relationship with the administration to or use by an individual of a covered countermeasure, including a causal relationship with the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, or use of such countermeasure."[6] In *Garcia*, the court answered "yes" to both questions, and, therefore, refused to remand the case to state court and instead ***found the defendants immune from suit under the PREP Act and dismissed the case***.

In reaching its decision, the court made several significant findings.

The PREP Act Provides Complete Preemption

First, the court ruled that the PREP Act provides for ***complete*** preemption of state law claims. That means that plaintiffs cannot avoid federal court jurisdiction and preemption by artfully pleading their case as one based solely on state law.

In reaching this decision, the court considered guidance set forth in the Office of the General Counsel (OGC) Advisory Opinion 21-01 from January 8, 2021. The court acknowledged that other courts that have addressed the question of preemption have ruled differently, but noted that those rulings preceded or failed to acknowledge the recent OGC guidance.

The *Garcia* court explained its agreement with the OGC's interpretation of the PREP Act and its conclusion that courts that have not found complete preemption take too limited a view concerning use or non-use of a covered countermeasure, emphasizing that the plain language of the PREP Act extends immunity to anything "*relating to*" the administration of a covered countermeasure. In other words, although the PREP Act would not cover allegations of total inaction, allegations, such as those in the Garcia case, of insufficient action, delayed action, or inappropriate action, are preempted.

COVID-related Claims Against Assisted Living Facilities Fall Within the PREP Act

Second, the court ruled that the assisted living defendants' alleged conduct fell within the scope of the PREP Act.

In reaching this decision, the court first found that both defendants, Welltower and Sunrise Senor Living Management, Inc., are "***covered persons***" under the Act because they are "***program planners***." The Act defines "program planners" as those who "supervised or administered a program with respect to the administration, dispensing, distribution, provision, or use of a security countermeasure or a qualified pandemic or epidemic product, including a person who has established requirements, provided policy guidance, or supplied technical or scientific advice or assistance or provides a facility to administer or use a covered countermeasure . . . ."[7] The court rejected the plaintiffs' argument that the PREP Act's coverage only applies to vaccine manufacturers or those who provide medical services. On the contrary, again looking to recent OGC guidance, the court held that the Act's coverage is much broader and applies to assisted living facilities, like the *Garcia* defendants, that supervised and administered infection control programs required by California law, citing California regulations for residential care facilities for the elderly.

The court then found that the plaintiffs' injuries arose out of, related to, or resulted from the administration to or the use of a "***covered countermeasure***." Under the Act, "covered

[6] 42 U.S.C. § 247d-6d(a)(2)(B).
[7] 42 U.S.C. § 247d-6d.

countermeasures" include a drug, biological product, or device that is a "qualified pandemic or epidemic product" or "security countermeasure," or is authorized for emergency use.[8] The court held that the plaintiffs' allegations pertaining to infection control measures, such as symptom checking, staff monitoring and screening, and limiting visitation and the use and misuse of PPE were allegations relating to covered countermeasures.

The court rejected the argument that the particular allegations of failure to use covered countermeasures in this case removed the allegations from the PREP Act's coverage. Rather, the court held that the allegations related to momentary lapses, and, taken as true, reveal possible unsuccessful attempts at compliance with federal or state guidelines, not a total failure to act.

What's Next

It remains to be seen whether plaintiffs will appeal this decision or how it and other similar cases may come out after appeal. In the meantime, under this court's decision, the PREP Act provides complete preemption, applies to assisted living facilities, and provides complete immunity with respect to claims of improper or insufficient use or implementation of COVID countermeasures.

[8] *Garcia*, 2021 WL 492581 at *3 (citing 42 U.S.C. § 247d-6d(a)(2)(B)).