



Complete Immunity for Senior Living COVID Responses

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On February 10, 2021, in a groundbreaking case, a California federal court ruled that measures taken by a senior living community in response to COVID-19 are eligible for complete liability immunity under the PREP Act.

In *Gilbert Garcia et al v. Welltower OpCo Group LLC, Sunrise Senior Living Management, Inc. et al*, Case No. SACV 20-02250JVS(KESx), U.S. District Court, Central District of California, the Court granted defendants' motion to dismiss plaintiffs' claims of elder abuse and neglect, wrongful death and intentional infliction of emotional distress for alleged failure "to implement appropriate infection control measures or follow local or public health guidelines in preparing for and preventing COVID-19 spread" at their assisted living property.

Plaintiffs' criticisms included allegedly deficient supplies of personal protective equipment, inadequate visitation and group dining policies, relaxing mitigation policies after a staff member tested positive for the virus, and generally being "unprepared" for plaintiff's return from urgent care. Plaintiff passed away from the virus. The Court acknowledged that in a motion to dismiss, it "must accept all well-pleaded factual allegations as true," without regard to whether they are supported by any evidence.

Plaintiffs maintained that the PREP Act, the federal statute on which Welltower and Sunrise relied for their claim of immunity, did not apply because it "does not provide immunity to medical providers for negligence claims 'unrelated to vaccine administration and use'" and that the COVID countermeasures covered by the Act do not include "policies, procedures, protocols, or guidelines..."

The Court, relying on two HHS Office of General Counsel (OGC) opinions, disagreed, and determined that Sunrise and Welltower's actions were covered by the PREP Act and afforded complete immunity.

In an August 14, 2020 opinion letter, the OGC confirmed that senior living communities are "covered persons" under the PREP Act because they are "program planners" engaged in administering COVID countermeasures. And in a formal Opinion published on January 8, 2021, the OGC affirmed that the PREP Act is a complete preemption statute and clarified the scope of the Act relative to the ongoing pandemic. OGC Advisory Opinion 21-01. While that Opinion acknowledged that the complete failure to employ any COVID countermeasures is not covered by the Act, it concluded that "decision-making that leads to the non-use of covered countermeasures by certain individuals is in the grist of program planning, and is expressly covered by PREP Act."

The Court recognized that the administrative agency's interpretation of the PREP Act merits deference, and moreover, the Court agreed with the OGC's interpretation.

Although Plaintiffs argued that "[t]here are no policies, procedures, protocols, or guidelines listed by [HHS] as being covered countermeasures, including social distancing, barring outside visitors, or restricting travel," the Court concluded that the language of the OGC advisory opinions contradicts that claim.

The Court observed that Welltower and Sunrise "supervised and administered infection control programs as required by California law," citing California regulations for Residential Care Facilities for the Elderly. It noted that even the Plaintiffs' Complaint referenced "infection control measures and procedures including symptom checking, staff monitoring and screening, and limiting visitation."

The Court concluded that "[t]hese are not instances of nonfeasance, as the Advisory Opinion describes, but rather instances where Welltower and Sunrise acted in ways to 'limit the harm such a pandemic or epidemic might otherwise cause.' 85 Fed. Reg. at 35,101. Therefore, the losses caused related to 'the administration or the use by an individual of a covered countermeasure.'"

While complete failure to implement COVID countermeasures is not protected by the PREP Act, this decision makes it clear that, even if COVID countermeasures -- such as infection control, PPE use, limitations on visitation and gatherings, resident and employee testing, and similar policies and procedures -- are alleged to have been improperly devised and implemented, they nevertheless are afforded complete immunity under the PREP Act.