



COVID-19

Claims, court decisions and business interruption for senior living

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It is no surprise that long term care and senior living facilities have experienced a disproportionate number of COVID-19 cases and deaths nationwide, and operators were challenged early in the pandemic with plummeting census levels, significant loss of revenue and uncertain and overwhelming allegations of negligence implications.

As claims begin to surface, it is apparent that senior living operators are experiencing claims related to COVID-19 from many fronts. In addition to senior living operators receiving allegations of negligence, operators are now filing claims due to the overwhelming business interruption effect that COVID-19 had on the industry.

As claims are evolving and with WTW experience on the claim negotiations and settlements, federal and state court settlements are beginning to mount. Some settlements are favoring the providers and other liability

claims filed are causing a bit of noise without any real impact. The lack of impact is due to the senior living facilities being considered “program planners” or covered persons under the PREP Act and therefore entitled to complete immunity from any liability.

However, claims continue to evolve, and future PREP act litigation protections remain to be seen. Providers need to carefully document its decision-making process to demonstrate how resources are being allocated during a COVID-19 outbreak.

Documentation should include clear statements regarding the providers’ decision to why certain countermeasures were or were not taken. Providers will need to defend their claims and must be prepared to support the plaintiffs arguments that they have not abandon their duty to act as a program planner or other covered¹ person.

Facts

- We are seeing reports of professional liability claims being reported for many factors associated with COVID-19 such as improper infection control practices, staffing shortages, and failure to monitor.
- Plaintiffs have sought unspecified damages for elder abuse and neglect, wrongful death, and intentional infliction of emotional distress.
- Plaintiffs are alleging that senior living communities failed to follow its own policies and procedures including those related to symptom checking, staff monitoring and screening, visit limitation and maintaining adequate supplies of mask and other personal protective equipment (PPE).
- The Prep Act provides complete preemption when a party attempts to comply with federal guidelines. Only instances of nonfeasance where a defendant's culpability is the result of its failure to make any decisions whatsoever, thereby abandoning its duty to act as a program planner or other covered person. In the situation where a facility has been cited for total² inaction, the facility would not be covered by the PREP Act.
- Nursing homes across the United States are being sued over allegations of negligence and wrongful deaths related to COVID-19.
- In addition to these allegations pertaining to negligence, operators are seeking recoveries from property and environmental coverage for loss of revenue and substantial extra expenses relating to the pandemic.

Questions and answers from our property and casualty specialists:

- What general types of property claims have been made and what has been the frequency and severity of such claims?
 - As to property many insureds suffered a significant financial impact from COVID-19, most notably the senior living communities. Claims were filed for increased costs associated with Personal Protective Equipment (PPE) (such as masks, partitions), increased costs of disinfectant and additional labor costs (as many employees would stay at the facility and not go home on off hours).
 - The University of Pennsylvania³ “Covid Tracker” has identified 2,000 lawsuits filed by insureds for property insurance/business interruption coverage. Of those, only a handful have made it past the summary adjudication status, with only one appellate court so far, (Louisiana) finding in favor of the insured, a restaurant in New Orleans.
- How have property insurers responded to claims?

- Insurers have strongly opposed all COVID-19 claims under property policies where the insured has alleged that COVID-19 constitutes direct physical loss or damage to the insured property. The insured's argument is that COVID-19 adheres to property and therefore damages the property and that COVID-19 closure orders constitute a taking by a civil authority, thus triggering the civil authority and ingress/egress coverages. Insurers have stated that COVID-19 is a virus, just like a common cold and that even if it did “adhere” to property it does not damage the property, as damage requires a change in the molecular composition of property.

- To date, the courts have overwhelmingly favored the insurers' arguments and have dismissed most cases.

- What types of professional liability / general liability claims are surfacing in senior living communities?
 - Numerous cases have been filed across the country against senior living communities for COVID-19-related deaths and injuries of both residents and staff. Allegations generally focus on infection control issues and/or reduced staffing over the COVID-19 pandemic and attribute liability for injuries or deaths that occurred during COVID-19 to those factors.
- Have there been any reports of class action lawsuits due to COVID-19?
 - While most cases appear to be proceeding independently, there are some firms seeking class action certification. For example, NJ.com⁴ reported that a New Jersey nursing home operator is facing a class action lawsuit from family members where nine residents allegedly died from COVID-19 and 89 were infected.
- How are professional liability/general liability insurers responding to these suits?
 - While insurers without specific COVID-19 or communicable disease exclusions are defending policyholders, the central professional liability/general liability coverage dispute is often how insurers will treat multiple related claims (i.e., what they will “batch” and consider related). As there is no ‘standard’ batch language in the marketplace; batch clauses have great variation in both their terms, their application, and their interpretation. Indeed, the same language can be interpreted and applied differently by separate insurers.
 - Batching terminology within the policy typically uses

language like related incidents or related claims (or both) and can be found in limits of liability conditions, definitions and/or endorsements.

- The mechanism for batching claims (determining how incidents/claims are or can be related) is also highly variant. Insurers use different (and usually undefined) terminology, such as “logically related,” or “causally-related” or sometimes the ‘relatability’ mechanism is unspecified (potentially allowing for broader interpretations). This variance allows for a spectrum of interpretations about what types of incidents/ claims can be related:
 - All claims at each individual facility, or by outbreak waves at each facility
 - All claims during a certain period
 - All COVID-19 claims, wherever or whenever they happen
 - Batch provisions can sometimes contain time elements like incident or claim reporting windows (time periods for noticing related incidents or claims) and language which specifies that one policy limit is available and which policy year is applicable.

Ongoing risk control and mitigation techniques to prevent COVID-19 and infectious disease outbreak claims

1. Follow CDC guidelines and state regulations to the very last detail.
2. Document in detail regarding how CDC and or state guidelines are being followed and how steps are being taken to protect patients and/or residents and stop infection.
3. Reconcile your community’s infection control policies to your outcomes.
4. Secure staff competency check list for PPE usage and all education provided to your associates on infection prevention and control.
5. Conduct audits to determine if your policies and procedures were followed and look for opportunities to train your associates, residents and family members.
6. Educate family members to community’s infection

control program and expectation to adherence to policies.

7. Create a COVID-19 and or pandemic task force that meets regularly to discuss all issues pertaining to the infectious outbreaks and protection from it.
8. Make sure all associates are updated on emergency plans should an outbreak of the virus or any outbreak of infectious disease occur at the community.
9. Promptly review and share any risk-control or educational materials provided by the carrier.
10. Communicate regularly with staff, residents and resident family members so they feel included and aware of everything the community is doing to mitigate risk.
11. Ensure that housekeeping staff are trained on hospital-level cleaning and disinfection supplies and utilizing correct disinfectant agents.
12. Ensure a quick response and validate containment in the event of an outbreak.

Getting the best results for senior living clients

As the senior living industry is still battling the COVID-19 pandemic, staying informed of the changing market conditions and how the insurance market is adapting is essential to ensure new exposures are covered and renewals are successfully placed.

Senior living clients should begin talking to their brokers well in advance of renewals to communicate what is happening in the marketplace, discuss specific exposures and identify any financial issues as early as possible and regularly consult with their broker and carrier partners to obtain updated market information and understand how it relates to their organization’s circumstances.

Therefore, it is more important than ever for your broker to have a comprehensive and complete submission to get the best consideration from an underwriter. Submissions that are deficient with information or received in piecemeal will quickly go to the bottom of the pile or simply be declined.

Although the pandemic may be winding down or

considered the new normal, look to your broker to keep your organization advised of any market changes, renewal challenges and regulatory proposals that may impact your senior living business.

¹https://www.sheppardhealthlaw.com/2021/03/articles/coronavirus/senior-living-communities-cdca-court/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration

²https://www.sheppardhealthlaw.com/2021/03/articles/coronavirus/senior-living-communities-cdca-court/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration

³<https://coronavirus.upenn.edu/content/dashboard>

⁴<https://www.nj.com/essex/2022/04/nj-nursing-home-where-9-died-of-covid-faces-class-action-lawsuits-from-families.html>

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