

Oppose Immunity for Long-Term Care Facilities During the COVID-19 Pandemic

The Issue

Nursing Home residents are the Americans who have suffered most from COVID-19.

Although nursing home residents account for less than half a percent of the United States population, over 40% of all COVID-19 fatalities in the United States have been residents of long-term care facilities.¹ Over 76,250 residents of Long-Term Care Facilities have died from COVID-19 since the pandemic began.² In several states, one in ten residents of nursing homes has died from COVID-19.³

Since the onset of the pandemic, the long-term care industry has launched a nationwide campaign to escape accountability for their negligent actions that result in harm or death of long-term care residents during the pandemic. To date, 28 states have provided immunity from civil liability to nursing homes and/or healthcare providers, while three states have passed laws providing immunity from criminal liability.

Now, Congress is considering legislation allowing long-term care facilities to escape accountability for the harm their negligent actions have caused or will cause during the pandemic.

How immunity harms residents of long-term care facilities

Immunity for negligence rewards bad actors. Early data show that there is a correlation between facilities with a history of poor quality of care and infection control procedures and Covid-19 outbreaks, according to The Centers for Medicare & Medicaid Services.⁴ For decades, residents and advocates have seen a steady decline in quality of care as homes are bought up by for-profit corporations and private equity firms, which, through cost-cutting measures, seek to maximize profits from long-term care facilities. In May, the Government Accountability Office issued a report showing that prior to COVID-19, 82% of nursing homes in the were cited for infection prevention and control deficiencies, with half of those homes having persistent problems.⁵ We are now seeing the result that cuts to staff and quality care have on residents of long-term care facilities. We cannot reward facilities that have placed profits over the well-being of residents.

Courts are the last remaining oversight protection for nursing home residents. The usual oversight protections - family/friends, long-term care ombudsman, state licensing and certification agencies, and adult protective services – are largely no longer present in facilities due to bans on visitation. As a result, the legal system is the last remaining avenue for protecting residents and holding nursing homes accountable for substandard care.

Liability for negligent care incentivizes facilities to comply with laws and regulations. By removing liability for negligent care, Congress would be eliminating an effective tool that encourages facilities to comply with state and federal laws and regulations. No accountability for bad actions means more residents will be harmed.

The Coalition for the Protection of Residents of Long-Term Care Facilities

The Coalition for the Protection of Residents of Long-Term Care Facilities is comprised of advocates opposed to weakening protections for residents of long-term care facilities during the COVID-19 pandemic. Coalition members include:

California Advocates for Nursing Home Reform

Center for Independence of Disabled, NY

Center for Medicare Advocacy

Center for Public Representation

Justice in Aging

Law Firm of D.H. Truhowsky

Levin & Perconti

Long Term Care Community Coalition

National Academy of Elder Law Attorneys

National Association of Long-Term Care Ombudsman

National Association of State Long Term Care Ombudsman Programs

The National Consumer Voice for Quality Long-Term Care

National Disability Rights Network

Rivera & Shackelford, P.C.

Service Employees International Union

¹ https://www.kff.org/health-costs/issue-brief/state-data-and-policy-actions-to-address-coronavirus/?utm_source=web&utm_medium=trending&utm_campaign=covid-19

² Id.

³ <https://data.cms.gov/stories/s/bkwz-xpvg>

⁴ <https://www.cms.gov/newsroom/press-releases/trump-administration-unveils-enhanced-enforcement-actions-based-nursing-home-covid-19-data-and>

⁵ <https://www.gao.gov/products/GAO-20-576R>

Other ways in which immunity is harmful

Immunity places workers and communities at risk. Although the nursing home industry disingenuously argues that immunity protects workers, it does not. Long-term care healthcare workers are rarely sued. Facilities are the target of most litigation. In fact, by removing liability and disincentivizing facility compliance with standards of care, workers are more likely to be exposed to hazardous conditions and COVID-19. Workers who are exposed to COVID-19 due to facilities' bad practices will carry the infection out into their communities. Immunity is not about workers, but about protecting facilities from accountability from their negligence.

Immunity perpetuates racial disparities in health care. A recent New York Times article found that nursing homes with a significant portion of minority residents, regardless of their geographic location, were two times more likely to be hit by Covid-19 than nursing homes made up mostly of white residents.⁶ Experts have attributed these stark numbers, in part, to racial inequalities in access to health care.⁷ Consequently, it is people of color who are being harmed the most in long-term care facilities by COVID-19, and it likely will be people of color who are most impacted by executive orders and laws that prevent nursing home residents from holding facilities accountable for their negligent actions. In other words, immunity laws and executive orders perpetuate racial disparities in health care.

Federal immunity laws may jeopardize claims under the Medicaid Act, False Claims Act, disability discrimination laws, and other federal laws. Advocates are gravely concerned that Congress may attempt to bar cases under federal law that seek injunctive relief to protect residents against civil rights violations, discrimination, and violations of the Medicaid Act. Further, whistleblower suits brought against entities for fraud or abuse may be placed in jeopardy.

Immunity is not necessary

Long-term care facilities are already afforded sufficient protections in the courts. The current protections in place for long-term care facilities are enough to protect compliant facilities from civil or criminal liability. The industry has cited shortages of PPE, staff, and sanitation supplies as reasons why facilities need immunity from negligence. However, facilities that made good faith efforts to comply with standard practices and to obtain necessary equipment, but were unable to do so due to shortages, will already be protected from liability in court during the health care emergency. What the industry is really asking is that all facilities, regardless of whether they made good faith efforts to follow accepted practices and obtain tests and equipment, be excused from the harm their negligent acts caused during the pandemic.

What Congress Can Do

- Oppose immunity for civil and criminal liability for substandard care that results in harm or death of nursing home residents.
- Support the HEROES Act (H.R. 6800) which offers additional funding and protections for nursing home residents.
- Support the Nursing Home COVID-19 Protection and Prevention Act (S. 3768) which provides funding and protections that address the crisis in nursing homes.

For more information, please contact Sam Brooks, sbrooks@theconsumervoice.org

⁶ <https://www.nytimes.com/article/coronavirus-nursing-homes-racial-disparity.html>

⁷ <https://www.medicalnewstoday.com/articles/racial-inequalities-in-covid-19-the-impact-on-black-communities#What-explains-the-disparities?-And-how-does-racism-play-into-it?>