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At the Crossroads: Legal Considerations Where Government Investigations Overlap with Tort Risk in Long Term Care

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In roughly the seventh week after a majority of states and the federal government issued emergency declarations or "lock down" executive orders, the true impact of COVID-19 is only beginning to be fully transparent. In long term care facilities, such as skilled nursing facilities (SNFs) and assisted living facilities (ALFs), the collection and close proximity of some of the most at-risk and vulnerable patients to a sickness that is still not fully understood has felt some of the gravest impact. News reports from across the country leave little doubt as to the disproportionate effect this industry, its patrons and their families have felt. See e.g., [Coronavirus crosses grim milestone of 10,000 deaths in US nursing homes](#); [Covid-19 is ravaging nursing homes. Government records show why](#); [The Crisis Raging Inside America's Nursing Homes](#).

While long term care facilities depend heavily on government reimbursement, which has traditionally been low, they have been working hard to react to these new threats that impact the nation, while continuing to provide around-the-clock care to patients with greater health care needs than most of the population.

Despite even the best compliance measures, the legal issues presented by simultaneous, or parallel, legal actions, plaintiffs' lawyers, qui tam relators, and federal and state enforcement agencies are anything but "business as usual" from a legal perspective. Owners and investors, normally protected by corporate structure, may face exposure. Risks and costs normally covered by insurance may be excluded. Success starts with preparation and disciplined business practices and ends with a solid legal strategy and response plan.

While these issues in isolation are not new legal issues, the prevalence and likelihood of parallel government investigation with private tort suits in large numbers makes legal planning essential for survival. Many of these legal issues have different answers based on jurisdiction, and will require detailed legal research, on a state by state and federal basis. However, identifying and preparing for some of the unique issues will position a facility to survive the current legal crossroads.

The "Unique" Legal Issues Faced in the Current Environment of Parallel Actions

1. **The Order of Proceedings and Actions:** The most fundamental challenge in dealing with parallel actions is determining who to respond to first or what action will proceed first. The flaw in the question is that it suggests that facilities have control or that everything won't happen at the same time. There are strategies for successfully managing this challenge. In general, law enforcement and administrative investigations go first as they are focused, at least in part, on the health and safety of residents. Requests for preliminary injunctions or temporary restraining orders also get high priority in the courts. Negotiations with the various authorities and possible stays of civil actions, deferred prosecution agreements, and statute of limitations extensions are available tools to help manage this process.
2. **Interviews, Testimony and Depositions:** Government agencies and investigators will often seek cooperation from entities immediately upon an investigation or inquiry. There may be requests for

interviews and potentially even informal interviews during a site audit. The government may also seek testimony before a grand jury or other subpoena. If a civil action has commenced, parties may seek depositions of employees, contractors and even owners. The first consideration must be that all of the information provided in one forum may be discoverable in another forum. Absent affirmative steps such as a protective order, the government may obtain deposition transcripts from other matters; and the plaintiff's counsel may get information provided to the government. The timing of these can be difficult as enforcement agencies will want this cooperation before you have had an opportunity to consider the related documentation.

3. **The Quality Assurance Privilege:** This is one of the more difficult issues in a parallel proceeding as this privilege differs greatly from jurisdiction to jurisdiction. In some cases, it only applies to admissibility, in some jurisdictions it does not apply to law enforcement investigations, and some jurisdictions apply it much more broadly. There are risks of accidental waiver and risks of contempt for asserting privilege where not appropriate. Remedial tools in the court system may offer some protection such as protective orders, but this requires detailed research. At a minimum, good business hygiene and record keeping is critical to success in ensuring these records are adequately marked and segregated.
4. **The Remedial Measures Privilege:** The fact that the remedial measures privilege may apply will not prevent law enforcement from considering it in deciding questions such as *mens rea* or even interpreting corrective action as a form of obstruction of justice, if the action could be perceived as an effort to hide, alter or disguise evidence that the government is seeking to collect.
5. **Discovery or Subpoena Production Provided in Parallel Actions:** Assume every other party will get their hands on it. The government will likely get every piece of information exchanged in a private civil suit. Whether a private party will get what is provided to the government will be based on the Public Information Act laws of the particular jurisdiction, but in most cases they will be able to get the information, subject to some redactions, at the completion of the government investigation. This is a nuanced question that requires careful planning.
6. **Individual Liability:** While tort suits focus on corporate liability and claims covered by liability insurance, the government has made clear on numerous occasions that statutes such as the False Claims Act and criminal statutes should and will be considered to assess liability against individuals. There is not "corporate shield" to these statutes. Important questions to assess early in parallel litigation is whether any individuals need separate counsel and whether privilege can be maintained in discussions with the individuals through a joint defense agreement. Is there a risk that senior employees could cooperate with the government to avoid criminal liability or even to serve as a whistleblower? An early evaluation of risk under the Responsible Corporate Official Doctrine must be considered in addressing representation issues. These questions must be carefully considered as early as possible in the process.
7. **Invocation of the Fifth Amendment:** Individuals facing questions from the government or law enforcement may choose to invoke the Fifth Amendment to avoid criminal exposure. But can that be used against them for civil liability? Can it affect the civil liability of the entity? What if they invoke the Fifth Amendment in questioning with the government but answer the same question in a civil deposition for a tort case? There may also be acts of production, or discovery responses such as requests for admission or interrogatories, which may implicate the Fifth Amendment and should be considered in the course of discovery. The Fifth Amendment is a foundational right, but is also easily waived, with potentially dire consequences.

8. **Investor Risk:** Large investments in the care of residents may be a good defense for tort liability and even to individual criminal exposure, but large payouts of dividends to investors may lead to a legal claim by the government that a facility was systematically underfunded, "causing" adverse outcomes and false claims. This may lead their investigators to an investor's doorstep. These types of issues can be addressed proactively and may require separate legal representation.
9. **Relevance of Government Surveys and Results:** These are like a long term care provider's resume to the government. While they may or may not be admissible in a private civil suit, depending on the jurisdiction and details contained in the survey, they will be directly considered by the government in exercising its discretion on appropriate enforcement steps, including decisions on licensure and exclusion. How to best use or account for past survey results must be considered from the outset.
10. **Bankruptcy Protection:** When the number of civil suits and investigations seems to be overwhelming, businesses may seek relief by filing for bankruptcy. However, a long term care provider needs a focused understanding that bankruptcy may further complicate matters for an entity due to the required disclosures in bankruptcy, and a limit on what is and isn't subject to relief and protection based on the different nature of the parallel actions.

How to Prepare in Advance

Setting aside the possibility of a legislative solution with respect to protection of this industry and its future, the current situation calls for a careful approach with regard to responding to both tort cases and government inquiries on a scale not previously encountered.

To highlight some of the key preparation and risk management practices, seek advice on the following risk management activities and how they should be documented.

11. The COVID-19 Response Team
12. The COVID-19 Response Plan
13. Screening Procedures
14. Visitor Policy
15. Physician Notification
16. Family Communication
17. Daily Staffing and Screening
18. Mortuary Planning
19. Reviewing and Updating the Overall Compliance Plan
20. Compliance Training

A Holistic Response is Key

Responding to parallel investigations in a piecemeal fashion is not advisable. A successful response strategy involves a coordinated team effort from lawyers across different specialties and experiences. When a long term care facility is facing parallel enforcement and civil lawsuits as described above, an ideal team addresses the following substantive areas:

Tort/Medical Malpractice Defense Experience: A member with experience in prevention and defense of tort and medical malpractice cases in long term care is key in the coordination of risk management and lawsuit defense. Such a team member should have specialized knowledge of the types of claims anticipated in lawsuits related to COVID-19.

Government Enforcement and Investigations Experience: As there is a potential for government investigation, inquiry and liability, any good team will include a member with experience handling government enforcement and investigations (GEI). Critical here is the ability to recognize when there is potential criminal exposure or False Claims Act exposure for both the entity and the individuals.

Industry Experience: The issues and claims related to COVID-19 require an industry understanding that is unique. A lawyer who primarily handles transportation related tort liability or a GEI lawyer who primarily handles violent crime will face a steep learning curve to the nuances of the long term care industry.

Regulatory Expertise: Without question, the inquiries for both a tort case and any government inquiry will require an in-depth knowledge of the related regulatory provisions, both at the federal and state level. This is usually found as part of a health law practice at a law firm – and is highly specialized.

E-Discovery: A team must include current knowledge of e-discovery practices and systems. Government inquiries have strict "specs" or specifications that any production of documents must adhere to. Review platforms and preservation efforts require a precision that can make or break a case.

Project Management Skills/Tools: Just assembling a response team is really only half the battle. Integrated project management approaches and technologies are critical to ensure that the team is managed efficiently. For example, an effective team utilizes cutting-edge web-based technology for managing documents, tasks and interactions which can achieve considerable cost savings and efficiencies for clients.

Conclusion

No industry will come under greater scrutiny in the coming months and year than the long term care industry. People will want answers if their loved ones died from the virus while in a facility. Federal and state governments will want answers as nursing homes are largely funded through Medicare, Medicaid and other government programs, and because they are responsible for regulating and overseeing nursing homes. Good practices, proper planning and a coordinated response are essential in dealing with the complicated issues of parallel actions.

If you have any questions, please contact one of the authors and visit the [Coronavirus \(COVID-19\): What You Need to Know information page](#) on our website.