

Intensive Care

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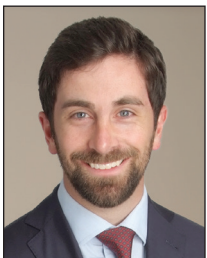
Operating Nursing Homes: Is the Worst Behind Us?



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The coronavirus crisis is not over.¹ COVID-19 brought disease, increased costs and death to nursing homes, which provide care and housing for many elderly, disabled and most vulnerable. Two years into the pandemic, more than \$20 billion in federal funding² and a loosening of regulatory compliance³ have delayed much of the nursing home care industry turnaround. In 2022, the federal funds spigot will close and regulatory enforcement will expand, which will bring an increase in turnaround engagements and filings. This article examines the key challenges faced by those participating in the financial restructurings happening within the nursing home industry.

By November 2021, we believed that the pandemic was waning, but the omicron variant arrived. In January 2022, the omicron-fueled number of new cases had increased to more than 750,000 daily,⁴ average daily hospitalizations were at 158,000, and deaths averaged 1,800 per day. In early March 2022, the seven-day daily average of new cases had dropped to 44,000, average daily hospitalizations were at 40,000, the daily deaths' average was 1,500, and more than 960,000 have died from COVID-19.⁵

The total number of U.S. nursing home resident and staff deaths now exceeds 185,000.⁶ Before the COVID-19 vaccine, with less than 4 percent of the U.S. population vaccinated, nursing home residents and staff made up 35 percent of the deaths. Vaccination of residents nationwide reduced the cases and death, yet omicron and the need for boosters⁷ meant that nursing homes were still in the eye of the pandemic storm.⁸ On Jan. 14,

2022, *The Hill* reported that “long-term care facilities’ coronavirus cases have skyrocketed over three weeks due to the omicron variant.⁹ Nursing home staff cases went from 5,919 on Dec. 19 to 57,243 on Jan. 9.”¹⁰

Tragically, one report has found that the “case rate among residents with an additional primary or booster rate remains over 10 times lower than among other groups.”¹¹ In February 2022, *The Atlantic* reported that even with a booster cutting risks dramatically, age “continues to be the driver of COVID’s brutal math with Omicron.... In 2022 so far, three-quarters of COVID deaths in America have been in people 65 and older, 93 percent in people 50 and older.”¹²

Professionals involved in skilled nursing cases and consulting engagements will find an industry with over two years of financial losses that have identified three key *potential or real threats to the nursing home industry*. First, the skilled-nursing arena is a highly regulated and litigious industry, and pre-COVID, many providers failed to meet mandated resident care and safety standards.¹³ The second threat is a worker shortage in a vaccine-mandated industry. Third, many new clients and debtors are overleveraged.

First Threat

The first threat is litigation resulting from claims made as to exposure to or contraction of COVID-19. As summarized herein, there are both state and federal efforts to provide immunity to nursing home operators and other health care providers.

A review in the *ABA Journal* reported that as of Sept. 1, 2020, “more than a dozen states (including Georgia, Louisiana, North Carolina, Oklahoma, Utah and Wyoming) have passed protective legislation of their own. Many more states have similar protective legislation.”¹⁴ In addition, Westlaw Resource offers a “50-state survey of state liability shield laws that give businesses immunity

1 Jerry Seelig, David Hoffman & Louis J. Cisz, III, “Painful Impact of COVID-19 on the Troubled Skilled-Nursing Industry,” XXXIX *ABI Journal* 9, 28, 64-65, September 2020, available at abi.org/abi-journal (unless otherwise specified, all links in this article were last visited on Feb. 25, 2022).

2 Nancy Ochieng, Jeannie Fuglesten Biniak, MaryBeth Musumeci & Tricia Neuman, “Funding for Health Care Providers During the Pandemic: An Update,” Kaiser Family Found. (Jan. 27, 2022), pp. 3-4.

3 David Stevenson & Audrey Chang, “Nursing Home Oversight During the COVID-19 Pandemic,” *Journal of the Am. Geriatrics Soc’y* (Feb. 12, 2021).

4 Daily updates on U.S. and global COVID-19 data have been reported by the *New York Times*, available at [nytimes.com/interactive/2021/us/covid-cases.html](https://www.nytimes.com/interactive/2021/us/covid-cases.html).

5 The *Washington Post’s* “Coronavirus Section” is updated daily and includes links to its pandemic coverage, available at [washingtonpost.com/coronavirus](https://www.washingtonpost.com/coronavirus). Mr. Seelig’s firm also publishes an e-newsletter called *Revitalize*, which offers a summary of data and reporting on long term and health care issues.

6 “Nearly One-Third of U.S. Coronavirus Deaths Are Linked to Nursing Homes,” *New York Times* (updated June 1, 2021).

7 Mihir Zaveri, “Once Again, Nursing Homes Are Under Scrutiny,” *New York Times* (Dec. 28, 2021).

8 Aliza Aufrechtig & Amy Schoenfeld Walker, “Who Had COVID-19 Vaccine Breakthrough Cases?,” *New York Times* (Oct. 28, 2021); “Coronavirus in the U.S.: Latest Map and Case Count,” *New York Times* (link *supra* n.4).

9 Lexi Lonas, “Long-Term Care Facilities’ Coronavirus Cases Skyrocketed in Three Weeks Due to Omicron,” *The Hill* (Jan. 14, 2022).

10 “Report: Nursing Homes See Spike in New Covid Cases,” Am. Health Care Ass’n/Nat’l Ctr. for Assisted Living (Jan. 12, 2022).

11 “Nursing Home COVID-19 Vaccination Data Dashboard,” Ctrs. for Disease Control and Prevention, available at [cdc.gov/nhsn/covid19/rtc-vaccination-dashboard.html](https://www.cdc.gov/nhsn/covid19/rtc-vaccination-dashboard.html).

12 Sarah Zhang, “The COVID Strategy America Hasn’t Really Tried,” *The Atlantic* (Feb. 14, 2022).

13 Letter to the Committee on Finance, United States Senate, Infection Control Deficiency, U.S. Gov’t Accountability Office (May 20, 2020), available at [gao.gov/assets/gao-20-576r.pdf](https://www.gao.gov/assets/gao-20-576r.pdf).

14 Paul Dowdell, “Immunity from Liability in the Age of COVID-19: A New Reality for Trial Lawyers?,” Am. Bar Ass’n (July 31, 2020).

from civil liability for claims of personal injury, loss, or death from customers, patrons, visitors, or other third parties related to exposure to or contraction of” COVID-19.¹⁵

Enacted in 2015, the federal Public Readiness and Emergency Preparedness Act (PREP Act)¹⁶ offers sweeping immunity for state and federal legal liability. In the PREP Act, Congress made the judgment that “in the context of a public health emergency, immunizing certain persons and entities from liability was necessary to ensure that potentially life-saving countermeasures will be efficiently developed, deployed and administered.” The Congressional Research Service “reviews the structure of the PREP Act and the [Department of Health and Human Services] Declaration to explain the scope of this liability immunity as it applies to COVID-19 countermeasures, [and] explains and offers COVID-19 pandemic amendments to the Prep Act.”

*Garcia v. Welltower OpCo Grp. LLC*¹⁷ provides a significant ruling for the senior-living and post-acute industry, as it establishes that the PREP Act provides broad immunity from civil liability when a facility employs countermeasures to prevent the spread of the virus. Furthermore, the decision indicates that the countermeasures implemented by such facilities do not need to be flawless to be covered by the immunities conveyed in the PREP Act.

Taken together, these state legislative efforts do, in some instances, protect nursing home operators and other health care providers from significant exposure. However, it is the PREP Act that provides the strongest protection. Litigation or attempts at it have just begun, and be it an administrative law hearing, or state or federal court, the law remains unsettled.¹⁸

Second Threat

The beta, delta and omicron variants revealed the second threat: The nursing home industry is dependent on low-wage workers with few job rewards and limited advancement. Furthermore, workers¹⁹ with the lowest wages are the most resistant to getting vaccinated.²⁰

On Jan. 7, 2022, the *Washington Post* reported that “the departure of 420,000 employees over the past two years has narrowed the bottleneck at nursing homes and other long-term care facilities.”²¹ On Jan. 24, 2022, the same publication quoted Harvard Medical School long-term care expert David Grabowski, who found that the “long-standing issue of underinvesting and undervaluing this workforce is coming back to bite us.”²²

A September 2021 survey of its members by the American Health Association and National Center for

Assisted Living found that nearly every U.S. nursing home is facing a staffing shortage. More than 70 percent of respondents said that they lack qualified candidates, have turned to the far more costly temporary staffing agencies, their staffs are working overtime, and they have added shifts.²³ The AARP and California Advocates for Nursing Home Reform (CANHR) add that labor shortages “were a chronic issue in nursing homes because of relatively low pay, difficult working conditions, and limited benefits for staff.... Many of these facilities, particularly the 70 percent that are for-profit entities, have been underfunded for years.”²⁴

In 2022, vaccine denial among nursing home staff has been far greater than the residents they serve,²⁵ with unvaccinated-worker cases surging in the first week of January 2022 to 50,000 new worker cases and 70 new worker deaths.²⁶ The U.S. Supreme Court upholding mandates for health care facilities staff will save lives in and out of health care and skilled-nursing settings. However, with every health care setting and better-paying jobs demanding a vaccine, the Court’s decision overruling the more-than-100-employee workplace mandate may drive a nursing home or at-home aide to get a job stocking retail shelves instead.

Third Threat

The third threat is the rising cost of capital in an industry where private investors own approximately 70 percent of the nursing homes.²⁷ A recent study of a 200-facility nursing home chain found that for-profit homes “had low registered nurse and total nurse staffing levels and regulatory violations with below-average ratings, and they had high COVID-19 infection rates during the pandemic.”²⁸ With less revenue and greater costs, the industry will suffer at a time that the Federal Reserve is set to start increasing the federal funds rate.

A 2019 report on skilled-nursing facilities found that the median operating margin was in the negative, with roughly half of U.S. skilled-nursing facilities operating at a loss. Recent projections estimate 2021 margins of negative 4.8 percent.²⁹ These margins are further threatened by New York, Massachusetts and New Jersey setting rules that nursing homes must spend no less than 70 percent of their total revenue on resident care, with New York demanding that at least 40 percent of that direct-care spending must pay for staff members involved in hands-on care.³⁰

15 “State Liability Shield Laws for Businesses Charts: COVID-19 Immunity: Overview,” West Law.

16 “The PREP Act and COVID-19: Limiting Liability for Medical Countermeasures,” Cong. Research Serv. (Jan. 13, 2022).

17 2021 U.S. Dist. LEXIS 25738 at *1-26 (C.D. Cal. 2021).

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19 Maggie Fox, “Nursing Home Staff Who Are Closest to Patients Are Least Likely to Be Vaccinated, Study Finds,” CNN (July 29, 2021).

20 Reed Abelson, “At U.S. Nursing Homes, Aides Were the Least Likely Workers to Be Vaccinated, a Study Shows,” *New York Times* (Sept. 16, 2021).

21 Lenny Bernstein & Andrew Van Dam, “Nursing Home Staff Shortages Are Worsening Problems at Overwhelmed Hospitals,” *Washington Post* (Dec. 18, 2021).

22 Rebecca Tan, “Low-Wage Workers Prop Up the Nursing Home Industry. They’re Quitting in Doves,” *Washington Post* (Jan. 22, 2022).

23 “Survey: Nearly Every U.S. Nursing Home and Assisted Living Community Is Facing a Workforce Crisis,” Am. Health Care Ass’n/Nat’l Ctr. for Assisted Living.

24 “Nursing Homes Can’t Find Workers: How that Affects Care,” *Healthline*.

25 Rihit Chatterjee, “The Nursing Home Staffing Crisis Right Now Is Like Nothing We’ve Seen Before,” NPR (Jan. 20, 2022). Priya Chidambaram & Rachel Garfield, “Nursing Homes Experienced Steeper Increase in COVID-19 Cases and Deaths in August 2021 than the Rest of the Country,” Kaiser Family Found. (Oct. 1, 2021).

26 Rihit Chatterjee, “What Nursing Homes Have Been Like with the Spread of Omicron,” NPR (Jan. 13, 2022).

27 Nina A. Kohn, “Nursing Homes, COVID-19 and the Consequences of Regulatory Failure,” *Georgetown Law Journal* (April 2021); Matthew Goldstein, Jessica Silver-Greenberg & Robert Gebeloff, “Push for Profits Left Nursing Homes Struggling to Provide Care,” *New York Times* (May 7, 2020). See also Seelig, Hoffman & Cisz, *supra* n.1.

28 David E. Kingsley & Charlene Harrington, “Financial and Quality Metrics of a Large, Publicly Traded U.S. Nursing Home Chain in the Age of COVID-19,” *Int’l J. of Health Servs.* (2022).

29 Danielle Brown, “‘Much Worse Than Expected’: Nursing Home Margins Projected to Hit Negative 4.8%,” *McKnight’s Long-Term Care News* (March 3, 2022), available at mcknights.com/news/nursing-home-margins-projected-to-hit-negative-4-8.

30 Susan Jaffe & Kaiser Health News, “Three States Limit Nursing Home Profits in Bid to Improve Care,” *Fortune* (Oct. 25, 2021).

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On March 1, 2022, the White House joined this effort when they “rolled out a comprehensive set of intended nursing home reforms,” which includes a “crackdown on bad actors.” Proposed federal rules will set minimum staffing requirements and take aim at private-equity ownership of nursing homes.³¹

Nursing home operators are stuck between rising costs and unchanging government reimbursement rates, yet a profound irony exists with cash flow down, merger and acquisition transactions up and lending returning to pre-COVID levels.³² Even with bad margins, high labor costs and a reduced census, investment firms, banks and equity funds continue to favor the industry.³³

The return of investment and lending offers *greater leverage, albeit this is a short-term solution*. In addition, more than two years of COVID-19 illnesses and deaths have led families and hospitals to decide that a family member and/or patient does not belong in a nursing home.³⁴ Past and pending stimulus programs³⁵ and the March 1, 2022, White House Nursing Home Reform Package³⁶ are forged out of President Joe Biden’s commitment “to expand services for seniors so families can get help from well-trained, well-paid professionals to help them take care of their parents at home — to cook a meal for them, to get their groceries for them, to help them get around, to help them live in their

own home with the dignity they deserve to be afforded.”³⁷ As summarized in a leading trade publication, “[s]killed-nursing operators are trying to adjust to how the COVID-19 pandemic changed the care continuum, with patients now embarking on different pathways after hospital stays. Not only are more patients going directly to home health, but long-term acute-care hospitals and inpatient rehabilitation facilities also have started to play more prominent roles.”³⁸

Conclusion

A significant number of Americans agree with President Biden that nursing homes do not provide their loved ones with “the dignity they deserve to be afforded.”³⁹ Consumers of nursing home services will not forget the failures that led to 200,000 deaths. However, for so many family, friends and community members, post-hospital skilled care, long-term care, mental illness, dementia and chronic disease cannot be managed at home. Many more are at a level of acuity that is not best treated at a hospital, inpatient rehabilitation facility and long-term acute-care hospital, and will therefore be best treated in a nursing home.

Significant demand for nursing home care is very much alive, and that is why we write not to eulogize the death of the nursing home industry, but rather to caution those who will do the industry’s restructuring about its significant litigation, staffing and access-to-capital challenges. What also remains is that when the COVID-19 pandemic becomes “endemic” and the funding spigot is turned off, those living and working in nursing homes deserve far better treatment, so we must all do more than merely restructure.⁴⁰ **abi**

31 “White House Unveils Major Nursing Home Reform Package, Targets Private Equity Ownership,” *Skilled Nursing News* (March 1, 2022), available at skillednursingnews.com/2022/02/white-house-unveils-major-nursing-home-reform-package-targets-private-equity-ownership; “Fact Sheet: Protecting Seniors and People with Disabilities by Improving Safety and Quality of Care in the Nation’s Nursing Homes,” White House (Feb. 28, 2022), available at www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-protecting-seniors-and-people-with-disabilities-by-improving-safety-and-quality-of-care-in-the-nations-nursing-homes.

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33 “Are Senior Living Investments Recession Proof?,” Lloyd Jones LLC (Oct. 29, 2021); Julie Ferguson, “The Senior Living Sector Is Poised for Growth,” NAIOP (Fall 2021).

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35 Eric Bradner & Sarah Mucha, “Biden Unveils ‘Caregiving Economy’ Plan for Expanded Child Care and Home Care,” CNN (July 21, 2020).

36 Op cite at fn.33.

37 Abelson, *supra* n.18.

38 Alex Zorn, “Skilled Nursing Operators Are Trying to Adjust to How the COVID-19 Pandemic Changed the Care Continuum, with Patients Now Embarking on Different Pathways After Hospital Stays,” *Skilled Nursing News* (Feb. 15, 2022).

39 Abelson, *supra* n.18.

40 David Hoffman & Jerry Seelig, “Nursing Homes Still Deserve Better, a Year Into the Pandemic,” *Philadelphia Inquirer* (Feb. 22, 2021).

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