



Client Alert

Nursing Homes (and Others) May Need to Provide Immediate Notice of Covid-19 Deaths or Risk Losing Insurance Coverage

Nursing homes and other care facilities face a [potential deluge of lawsuits](#) for wrongful death and injury caused by Covid-19. These facilities need to consider immediately providing a Notice of Circumstance to their insurance carriers. The matter is urgent because insurance companies are introducing express Covid-19 exclusions at renewal. Absent a Notice of Circumstances, providers risk losing coverage for these potentially bankrupting claims.

Background

Covid-19 has decimated residents of nursing homes and other care facilities across the country. According to CMS, [tens of thousands](#) of nursing home residents have died from Covid-19 (more than 4,000 in [New York alone](#)).

Attorneys already are [actively seeking plaintiffs](#), and modern marketing methods suggest the possibility that many lawsuits will be filed. While some States have enacted so-called "[immunity laws](#)", those laws are limited in scope. [In New York](#), for example, a provider is not shielded from allegations of inadequate staffing that preceded the pandemic; from gross negligence or willful misconduct in responding to the pandemic; or from activities it undertook prior to the State's declaration of emergency in March 2020.

Some legislators are [moving to repeal](#) the immunity laws. But in any event, attorneys already are crafting lawsuits that [plead around](#) the immunity laws. For many facilities, insurance proceeds will be necessary simply to defend these lawsuits, much less to pay the costs of settlement or judgements.

Insurers May Attempt to Avoid Coverage

Claims for bodily injury or death resulting from inadequate care typically are covered under providers' professional liability coverage. These coverages typically are "claims-made;" coverage is available not in the policy year in which death occurred, but in the policy year in which the claim is asserted.

Insurers may seek to avoid these claims. Covid-19 impacted an already [troubled nursing home insurance market](#). Some carriers already have left the market, and those who remain report unprofitable operations. Under claims-made policies, insurers can try to eliminate or limit their exposure to Covid-19 wrongful death suits by offering lower policy limits (or pricing higher limits so as to make them unaffordable). Insurers [also may add](#) virus exclusions to their professional liability policies. Insurers might also request Covid-19 related information on their reapplication forms and



exclude from coverage all claims based on such disclosed information (such as a death that has not yet resulted in a claim by the family). Providers who disclosed the information would then expressly be excluded; those who did not might be excluded due to their failure to disclose.

Notice of Circumstance Can Lock in Coverage

Affected providers might therefore seek to lock in coverage under their current policies. Claims-made policies typically include a little-known provision for providing a “Notice of Circumstance.” A sample Notice of Circumstance provision is set out in the endnotes.ⁱ

An appropriately executed Notice of Circumstance triggers coverage in the policy year in which notice is provided, even if a lawsuit is not filed until a later year. It may have the concomitant effect of barring coverage in future policy years: policies typically exclude coverage for circumstances that were the subject of a prior Notice of Circumstance. A determination to file a Notice of Circumstance therefore should reflect considered judgment that the policyholder is better off under the terms of the current policy than it likely would be under any future policy.

A Notice of Circumstances must be crafted carefully to ensure coverage. [Courts](#) have strictly enforced technical requirements of a Notice of Circumstance. These requirements frequently include that the notice be in writing, and that the insured describe the acts, dates and persons involved, as in the sample below. [Courts have held](#) that simply identifying the business or incident from which a claim may arise is insufficient notice.

Notice therefore should be deliberate and comprehensive, to ensure that the insurer may not later claim that the prior notice did not encompass the circumstances giving rise to the lawsuit. It should clearly say that it is intended to invoke the Notice-of-Circumstance provision. The Notice should also invite the insurer to identify any additional information it might need to make the Notice effective. [Courts](#) have held that an insurer who then fails to identify missing information cannot later complain that the Notice was insufficient. The Notice may potentially be discoverable by the plaintiff in the underlying lawsuit. It therefore must be carefully crafted to disclose enough to meet the policyholder’s contractual obligation but not so much as to potentially prejudice the defense.

Conclusion

Nursing homes and other providers should consider immediately providing notice to their insurers of potential claims for Covid-19 death and injury, or they risk losing coverage for these claims.

ⁱ “You have the option of notifying us of potential claims that may lead to a covered claim against you. In order to do so, you must give written notice to us as soon as possible and within the policy period, and the notice must, to the greatest extent possible, identify the details of the potential claim, including identifying the potential claimant(s), the likely basis for liability, the likely demand for relief, and any additional information about the potential claim we may reasonably request. The benefit to you of notifying us of a potential claim is that if an actual claim arises from the same circumstances as the properly notified potential claim, then we will treat that claim as if it had first been made against you on the date you properly notified us of it as a potential claim, even if that claim is first made against you after the policy period has expired.”