

Nursing Homes Are Hot Spots in the Crisis. But Don't Try Suing Them.

By Amy Julia Harris, Kim Barker and Jesse McKinley

In New York, 5,300 nursing home residents have died of Covid-19. The nursing home lobby pressed for a provision that makes it hard for their families to sue.





Family members visiting Vera Scheer, 94, at a Long Island nursing home. Credit... Stephen Speranza for The New York Times

In the chaotic days of late March, as it became clear that New York was facing a catastrophic outbreak of the coronavirus, aides to Gov. Andrew M. Cuomo quietly inserted a provision on Page 347 of New York's final, voluminous budget bill.

Many lawmakers were unaware of the language when they approved the budget a few days later. But it provided unusual legal protections for an influential industry that has been devastated by the crisis: nursing home operators.

The measure, lobbied for by industry representatives, shielded nursing homes from many lawsuits over their failure to protect residents from death or sickness caused by the coronavirus.

Now, weeks later, more than [5,300](#) residents of nursing homes in New York are believed to have died from the outbreak, and their relatives are finding that because of the provision, they may not be able to pursue legal action against the homes' operators over allegations of neglect.

Several state lawmakers, besieged by complaints that poor staffing and shoddy conditions allowed the virus to spread out of control in the homes, said they were blindsided by the provision. At least one called for it to be repealed.

Mr. Cuomo's aides said nursing homes were not singled out for protection, noting that the provision also shields hospitals and other health care facilities. As New York anticipated a surge of patients, officials wanted other facilities, including nursing homes, to take in Covid-19 patients and expand bed capacity, they said. Their goal was to protect health care workers from litigation during an emergency.

“This legislation is not intended to shield any bad-acting facilities during this tragic time, but rather to ensure facilities could continue to function in the face of potential shortages and other evolving challenges the pandemic presented,” said Dani Lever, a spokeswoman for Mr. Cuomo.

As the coronavirus has ravaged nursing homes, killing more than [29,100 residents and staff members](#) as of Wednesday, lobbyists across the country have pushed for immunity from lawsuits over how the homes have responded to the crisis.

New York is one of at least 15 states that have granted some form of legal protection to nursing homes and other health care facilities since the beginning of the pandemic. This immunity does not cover willful or criminal misconduct or gross negligence. But it would most likely cover harm that arose from a shortage in staffing or protective equipment.

The nursing home industry’s push for immunity comes as [businesses nationwide](#) lobby the Trump administration and Congress to protect American companies from a range of potential lawsuits, including those from customers or employees who contract the virus and accuse the business of being the source of the infection.

Nursing home operators said they were not to blame for the terrible losses caused by the outbreak, emphasizing that they faced a formidable challenge that taxed them in ways they could not have foreseen. Many homes said they struggled to obtain testing kits for coronavirus and basic protective gear like gowns and N95 masks, leaving them powerless to stop the contagion.

“People need to know that they’re not going to be sued as a result of going to work,” said Jim Clyne, chief executive of [LeadingAge New York](#), a group that represents nonprofit nursing homes and that lobbied for New York’s law. “Providers need to feel safe to take care of people.”

But in recent weeks, reports of horrific scenes within nursing homes have emerged: severe staffing shortages as workers became sick, terrified residents pleading to the outside world for help, the [bodies of dead residents](#) piling up in makeshift morgues.

Some homes run by for-profit companies had been previously cited by regulators for poor infectious-disease control and chronic understaffing. Families said they had difficulties [prying even basic information](#) from the facilities — like how many residents had died or had been infected with Covid-19.

Family members of those who died said they were dismayed that they might not be able to sue the homes for neglect. Vivian Rivera-Zayas said a Long Island, N.Y., nursing home waited until her mother, who had tested positive for Covid-19, was gasping for breath with a collapsed lung before transferring her to a hospital next door. Her mother died two days later.

Image

Ana Martinez, left, and her daughter, Vivian Rivera-Zayas

“They can’t just shrug their shoulders and say, ‘It’s a pandemic,’” said Ms. Rivera-Zayas, who plans to sue the nursing home. “There has to be accountability.”

Advocates for nursing home residents said there were three longstanding safeguards against bad homes: family members who frequently visit; regular inspections by government regulators; and, as a last resort, lawsuits that can hold negligent homes accountable. But families can no longer visit. Regulators have largely stopped inspecting.

“All of the systems there to protect people are gone,” said Toby Edelman, a senior policy attorney at the Center for Medicare Advocacy. “To me, the combination — rules are waived, protections are waived, nobody is going in to check. And now immunity? That is a lethal combination.”

Image



Andover Subacute and Rehabilitation Center II, in New Jersey, was the site of an outbreak of fatal coronavirus infection among residents. Credit...Gregg Vigliotti for The New York Times

Nursing homes are pressing for legal protections in other states, including Florida, Pennsylvania and California.

At the epicenter of the outbreak, New York decided early to protect staff members at health care facilities, including nursing homes, from lawsuits. Mr. Cuomo issued an [executive order](#) on March 23 that shielded the workers — but not facilities — from most lawsuits related to their handling of coronavirus cases.

At the same time, the state [required nursing homes](#) to take Covid-19 patients from hospitals and also [loosened record-keeping requirements](#) for patient care, which would be crucial to any lawsuit. Almost a month later, Mr. Cuomo clarified at a press conference that nursing homes had to accept Covid-19 patients — but only if they could do so safely.

Image

"I miss you! Why can't you come inside?" Laurel Witting, 74, asked her son Greg Guinard during a Mother's Day visit at the Grand Rehabilitation and Nursing at South Point on Long Island. Credit...Chang W. Lee/The New York Times

Lobbyists wanted Mr. Cuomo to do more. The Greater New York Hospital Association, an influential lobbying group for hospitals (some of which also run nursing homes), [drafted legislation](#) calling for hospitals, as well as workers, to be shielded from most civil and criminal liability during the pandemic.

LeadingAge New York, one of several nursing home lobbying groups in the state, also asked the Cuomo administration to include nursing homes in the immunity protections.

"If the worker has immunity, the next thing you'd do is sue the provider, so you need to extend the liability to the facility as well," Mr. Clyne said.

The legal provision on immunity was stuck in the middle of a seemingly unrelated piece of legislation — concerning education, labor and family assistance — in an omnibus bill typically referred to as "the big ugly."

On April 2, the [Legislature](#) approved the budget, which included the immunity provisions shielding hospitals and nursing homes from lawsuits over Covid-19 care, as long as the facilities were acting in good faith. The immunity does not protect the homes from intentional criminal misconduct or gross negligence.

Several lawmakers said they did not know about the immunity provisions and worried they went too far.

"It's very troubling," said Richard N. Gottfried, the chairman of the Assembly's health committee, who voted for the budget bill but said he did not have a chance to thoroughly review the immunity provisions. "There's a very long history of abuse and neglect of nursing home residents. And to add to that a reduction in the ability of patients and family members to seek relief in the courts is very scary."

Ron Kim, a Democratic assemblyman from Queens, a borough that has been particularly hard-hit by nursing home deaths, said he was deeply concerned by the protections, which he learned about from The Times. He [introduced a bill](#) Monday that would strike the immunity provisions altogether.

Image

Sapphire Center for Rehabilitation and Nursing of Central Queens, in Flushing, has been hard-hit in the outbreak. Credit...Hilary Swift for The New York Times

"For us to change the liability standard without any discussion is borderline criminal," said Mr. Kim, who voted against the budget for other reasons. "It's ridiculous. Why would anyone comply with rules if they felt like they couldn't be touched?"

The spokeswoman for Mr. Cuomo's office said lawmakers had ample opportunity to weigh in on the provisions and denied that outside lobbyists influenced the immunity decision.

"This bill was not done in the dark, and elected officials cannot be blindsided by language in a bill, unless they don't read it," Ms. Lever said.

Realizing the extent of the crisis, Mr. Cuomo announced that the state attorney general would investigate homes over their handling of coronavirus cases. And last weekend, Mr. Cuomo [issued an executive order](#) that hospital patients had to test negative for Covid before being discharged to nursing homes, rolling back an earlier directive.

Ms. Rivera-Zayas, whose mother contracted Covid in Our Lady of Consolation Nursing & Rehabilitative Care Center, a Long Island nursing home, said she wants answers. She said she felt the home failed to provide her mother with proper medical care until it was too late.

She spent her first Mother's Day without her mother, protesting in front of the home with other families who lost loved ones. At least 39 other residents with Covid-19 died.

Image

Vivian Rivera-Zayas, right, protested on Mother's Day in front of the Long Island nursing home where her mother contracted Covid-19.

Being barred from suing, she said, would be a final indignity. "Cuomo may have tied our hands," she said.

A spokeswoman for Catholic Health Services, which runs the Our Lady of Consolation home, said the facility "takes great care of each and every patient."

"We are vigilant in monitoring staff and residents for any Covid-19 symptoms and immediately take appropriate steps, if symptoms should appear," said Chris Hendricks, the spokeswoman.

Brett Leitner, a New York lawyer who over the years has brought hundreds of cases against nursing homes for abuse and neglect, said he had received more than 100 calls from families who have lost loved ones to Covid-19 in nursing homes.

While he is still taking on clients for future cases, he said the immunity law would make it harder to hold negligent homes accountable.

"It will be an uphill battle," he said.

Michael Rothfeld, John Leland, J. David Goodman and Nick Corasaniti contributed reporting. Susan Beachy contributed research.