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Broad immunity for nursing homes is short-sighted

In a report issued on June 4, the Centers for Medicare and Medicaid Services, which oversees most nursing homes in the United States, estimated that almost 32,000 residents have died of the virus, more than a quarter of all COVID-19 deaths in the country.



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The coronavirus is disproportionately impacting nursing home residents. In a report issued on June 4, the Centers for Medicare and Medicaid Services, which oversees most nursing homes in the United States, estimated that almost 32,000 residents have died of the virus, more than a quarter of all COVID-19 deaths in the country. It's well-known that elderly individuals are at higher risk of contracting and succumbing to the virus, but this number is staggering. It speaks to a complete disregard for human life within a notable segment of the for-profit long-term care industry.

The nursing home industry, along with medical associations and insurance companies, has now jumped in the corporate immunity bandwagon, asking for blanket immunity from liability for any and all COVID-related claims. Not so fast.

The problem predates the current pandemic. A GAO study dated May 20 describes huge deficiencies in infection prevention and control in nursing homes well before COVID-19 and draws a correlation between facilities with deficiencies in 2018-2019 and current COVID-19 outbreaks. In a June 4 letter to the Assembly Health and Long-Term Care Committees, Consumer Attorneys of California (CAOC) wrote, "We believe that COVID-19 outbreaks are tied to poor facility performance, poor management by nursing home owners, and poor enforcement and are not random."

The logic of those advocating for immunity is that businesses are going to be the victims of a litigation free-for-all and that the entire economy will suffer as a result. They also argue that imposing restrictions on companies stifles creativity at a time when it is most needed. Both arguments are flawed.

In a strongly worded May 18 letter to Gov. Gavin Newsom, CAOC and 20 other organizations including the California Labor Federation, the Western Center for Law and Poverty, and California Professional Firefighters, protested efforts by the Civil Justice Association of California and the California Chamber of Commerce to get broad immunity for businesses for actions taken during the COVID-19 pandemic. "[CJAC and CCC] warn that this immunity is needed to combat the 'imminent threat of litigation surrounding these efforts.' This blatant attempt to exploit the current public health crisis facing California is an affront to the very frontline workers keeping this economy functioning."

The fact is that nursing homes and other health care providers already have substantial immunity against liability for actions taken in the course of their work. They enjoy protections that other types of businesses don't. What they should never be given is immunity for willful negligence and reckless disregard for human life.

The coronavirus is novel, and we're learning new things about it every day. It's understandable that few appreciated its severity in the early days or the ease with which it could be transmitted. Health care providers, however, must be held to a different, higher standard. They have specialized knowledge. They've had access to information from the beginning and have had every opportunity to do things the right way. Doctors and nurses are on site in nursing homes. Most hospitals and nursing homes did think ahead, and they responded appropriately to the virus.

In the majority of nursing homes, patients returning from the hospital are isolated. Workers are screened and provided with masks and other protective gear. Patients are not contracting the coronavirus in disproportionate numbers. During the emergency, there should be no liability for ordinary negligence. These facilities are doing their best to protect and care for their patients and shouldn't be subject to lawsuit for unintentional oversights or omissions.

But there can be no pass for deliberate, conscious disregard for human life and safety. When nursing homes fail to meet basic standards of care -- isolating patients, screening and training workers, doing routine cleaning and sanitation, providing PPE -- they must be held accountable. There can be no broad immunities during this emergency. What is more, California Government Code Section 8659 already provides broad immunity to healthcare providers during a declared state of emergency except in cases of willful actions or omissions.

Immunities never help negligent parties get better. They only provide a license to be lazy and not do the right thing. If car manufacturers weren't legally required to install seatbelts and airbags, if they were immune from liability, it's a good bet that they wouldn't spend their money on those safety items. Cars would be far less safe if we left it to the car companies to decide and shielded them from the consequences.

The litigation floodgates are not going to open because of the pandemic. Most nursing homes are doing what they need to do, but the gross offenders, those homes in which significant numbers are contracting the virus and dying, deserve what's coming. They should not be in business if they put profit over the health and safety of their residents and workers. Screening and training workers, providing PPE, increasing the amount and type of cleaning, designating isolation areas for infected patients -- these are all a cost of doing business.

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