

NY Panel's COVID Nursing Home Case Order Spurs Questions

By **Christopher Potenza and Elizabeth Adymy** (December 9, 2022)

The New York Litigation Coordinating Panel's order to coordinate COVID-19 nursing home cases leaves many questions unanswered, and litigants confused over the scope of the order.

While the intent of the order is to facilitate the consistent, efficient resolution of multiple lawsuits from a variety of venues for all pretrial proceedings for claims against nursing homes, skilled nursing facilities and similar health facilities alleging negligence in response to the COVID-19 pandemic, critical questions remain regarding the parameters of the cases coming under the statewide coordination order.

These issues include how to define the time frame of the COVID-19 pandemic and whether the order encompasses all cases that arose during the pandemic, or only those injury or death claims that are specifically alleged to be related to COVID-19.

In February, a law firm representing the plaintiffs in nine pending actions filed a motion to coordinate cases with New York state's Litigation Coordinating Panel, seeking an order of the panel "directing the pre-trial coordination of [all] actions brought by deceased individuals' estates against nursing homes/health care facilities related to their response to the COVID-19 pandemic to coordinate pretrial proceedings."^[1]

The nine cases making the application were venued across New York state, from Niagara County to Queens County. The plaintiffs were seeking an order of the panel "directing the pre-trial coordination ... of [actions] brought by individuals/estate representatives across the State of New York ... against various nursing homes related to Covid-19 death claims." Defense counsel in all the actions opposed the motion.

The Litigation Coordinating Panel receives and resolves applications for the coordination of litigation that is pending in more than one judicial district of the state. The goal of the panel is coordination of multiple lawsuits from a variety of venues in a single judicial district before a single coordinating justice to facilitate the consistent, efficient resolution of many cases.

More specifically, coordination pursuant to an order of the panel means that the appointed trial court will handle all pretrial proceedings across the spectrum from preanswer motions to dismiss, to the resolution of discovery disputes, to alternative dispute resolution and the adjudication of summary judgment motions.

Cases that are ready for trial are returnable to the counties where they were originally filed at the option of each individual plaintiff or may be tried in the judicial district where the coordinating justice presides unless the parties stipulate otherwise.

On Aug. 4, the panel granted the plaintiffs' application for coordination in COVID-19 nursing home litigation. The defendants moved to reargue and, on Sept. 13, representative plaintiffs and defense counsel participated in argument of the motion to reargue and held a discussion with the panel regarding the parameters of the coordination should the panel



Christopher Potenza



Elizabeth Adymy

adhere to its original decision.

The panel issued its decision on the motion to reargue in its final order of coordination on Oct. 19, adhering to its initial decision granting the application for coordination. The panel's decision, unfortunately, leaves critical and fundamental questions unanswered. Portions of the panel's original and final order of coordination are excerpted below to highlight those questions.

Pursuant to the Aug. 4 order:

Each of these actions assert claims of malfeasance against nursing homes, skilled nursing facilities, and similar health facilities alleging violations of New York's Public Health Law, negligence, gross negligence, and malpractice in defendants' responses to the COVID-19 pandemic.[2]

However, this statement raises the obvious question of how the COVID-19 pandemic is to be defined or understood for the purposes of identifying the cases coming within the panel's order. Is it just the period of time when the governor's emergency order and immunity were in place? Some may argue the pandemic has not even ended yet.

The order also curiously interchanges "plaintiff" with "patient." For instance:

- "[P]laintiffs allege defendants failed to comply with governmental statutes, regulations, and guidance for protecting and caring for their patients."

- "And [plaintiffs] allege defendants' failure to exercise reasonable care in protecting and caring for patients."

The term "patient" is typically reserved for medical malpractice actions, while "resident" is used in nursing home negligence claims. Is there some distinction to be made between cases in which a plaintiff asserts a cause of action sounding in medical malpractice, and those cases where a cause of action for medical malpractice is not alleged?

As justification, the order cites the need to adjudicate common legal issues regarding immunities per New York's Emergency or Disaster Treatment Protection Act, or EDTPA, and the Public Readiness and Emergency Preparedness Act.

However, New York's Appellate Division, Fourth Department, in *Ruth v. Elderwood at Amherst*,^[3] decided in October that the statute repealing the EDTPA and its immunities is to be prospectively applied, meaning that the repeal took effect starting on the date the repeal statute was enacted, and did not negate retroactively the previous time period that immunity was in place.

That decision is binding on all trial courts until such time as the Court of Appeals or, if applicable, another department, holds to the contrary. It would seem, therefore, that this rationale by the panel is inconsistent with the existing state of the law.

The order further declares the need to address "[c]ommon claims involving insurance coverage for claims arising from defendants' practices and protocols during the emergency

period of the COVID-19 pandemic."

First and foremost, does this mean that insurance coverage disputes fall under the purview of coordination? Further, explicit reference is made to the emergency period that is not contained elsewhere.

Thus, critical questions remain regarding the parameters of the cases coming under the statewide coordination order. Are insurance coverage claims the only cases mandated for statewide coordination that are limited to the time frame determined by the governor's declarations instituting and ending the emergency period — March 7, 2020, through June 25, 2021?

The Oct. 19 final order of coordination^[4] essentially mirrors the original decision granting pretrial coordination, with much of the same inconsistencies and vagaries as the prior order. The most notable addition however is that the panel added injuries to the parameters of what is covered under its order of coordination. This was done despite the fact that the original request for coordination was to include just those claims in which there was an alleged COVID-19-related death.

The order states that the "Panel noted that Plaintiffs in these many actions assert similar claims of malfeasance against nursing homes and similar health care facilities during the COVID-19 pandemic, leading to plaintiffs' injuries or deaths." This leads to the further question as to whether non-COVID-19 injuries or deaths alleged to have occurred during the COVID-19 pandemic are under the purview of the order of coordination.

In attempting to clarify some of the questions raised by the prior order,

The Panel orders with more particularity coordination of all cases against nursing homes, as defined in PHL 2801(2), and residential health care facilities as defined in PHL 2801(3), alleging they failed to comply with governmental statutes, regulations, and guidance and/or failed to exercise reasonable care in protecting and caring for the patients during the COVID-19 pandemic resulting in injury or death.

The panel here limits the facilities subject to the order of coordination to nursing homes and residential health care facilities, as defined in Article 28 of the Public Health Law.

Again, however, the questions arise whether "all [these] cases" includes all injury and death claims even if they are not COVID-19-related, and without any reference to the emergency period, what is the timeline established to govern the cases to be coordinated under the panel's order?

The final order further directs that cases will be coordinated in one county of coordination in each of New York's four judicial departments: First Department in New York County; Second Department in Nassau County; Third Department in Albany County; and Fourth Department in Erie County.

However, the justification that "such venueing will allow pretrial coordination to reflect regional conditions through the COVID-19 pandemic" is doubly problematic. First, it returns us to the question of the panel's meaning as to the period of time the conduct at issue must have taken place — through the COVID-19 pandemic — in order to be encompassed within the scope of the panel's order.

Furthermore, regional conditions are not defined by appellate division lines. For instance,

regional conditions in metro Buffalo could be very different from regional conditions in rural areas and small towns within the same judicial department.

At this time there are still many unanswered questions as to the scope of the panel's final order of coordination. It is hoped that these questions can be answered sooner rather than later in order to avoid inconsistent applications of the order in the coordinating courts and minimize the potential for confusion moving forward.

V. Christopher Potenza is a member and leader of the products liability and medical device team at Hurwitz Fine PC.

Elizabeth G. Adymy is special counsel at the firm.

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[1] NYSCEF File No.: LCP 0001/2022; Doc. No. 1; sub nom Robertson v Humboldt House Rehabilitation & Nursing Center, Erie Co. Index No. 805232/2021.

[2] NYSCEF Doc. No. 69. https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=109aCA/Y_PLUS_ILSIJazwaDutQ==.

[3] <https://www.hurwitzfine.com/blog/fourth-department-unanimously-rejects-retroactive-application-of-edtpa-repeal>.

[4] NYSCEF Doc. No. 99. <https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=Duuskrfgq3kYbv6TGxTEjA==>.