Articles + Publications | March 14, 2022

Ninth Circuit Deviates From Third Circuit: Declines Removal Jurisdiction Based on PREP Act Even With Presence of Willful Misconduct Claims

WRITTEN BY

Avrohom C. Einhorn | Callan G. Stein | Daniel G. Gordon

Who Needs to Know

Skilled nursing facility and nursing home operators.

Why It Matters

The Ninth Circuit became the second federal circuit court to address federal removal jurisdiction based on the Public Readiness and Emergency Preparedness Act (PREP Act). Although the Ninth Circuit also declined removal jurisdiction and remanded the case back to state court, its decision covers a broader range of circumstances than the Third Circuit's prior decision to do the same. This decision serves as further confirmation of how federal courts appear to interpret PREP Act removal and preemption arguments, while providing more guidance to nursing homes on how they can possibly use such decisions to their advantage when facing litigation that implicates the PREP Act, particularly PREP Act immunity.

On February 22, the Ninth Circuit affirmed a district court ruling that a nursing home could not use the Public Readiness and Emergency Preparedness Act (PREP Act) to remove state-law claims to federal court, relating to the death of a resident allegedly caused by COVID-19.[1] This decision follows a recent Third Circuit decision that similarly rejected removal jurisdiction based on the PREP Act. However, unlike the Third Circuit, the Ninth Circuit ruled that even claims of willful misconduct are not removable to federal court under the PREP Act. One significant result of this ruling, especially if followed by other circuits, is that nursing homes may not see a significant reduction in the number of willful misconduct claims as was hoped following the Third Circuit's decision.

Background and the Ninth Circuit Decision

In August 2020, Troutman Pepper published an article on the New Jersey District Court's initial decision, rejecting the use of the PREP Act to remove a case from state to federal court. In November 2021, after that decision was appealed, Troutman Pepper published another article, outlining the Third Circuit's opinion affirming the District Court ruling and discussing the potential benefits the ruling could have for nursing homes going forward.

The underlying facts of the Ninth Circuit opinion parallel those of the Third Circuit case, except for the presence of a willful misconduct claim. In June 2020, relatives of a nursing home resident who allegedly died from COVID-19 sued the nursing home in California state court. They asserted claims for custodial negligence, elder abuse, wrongful death, and willful misconduct. The nursing home removed the case to federal court, arguing that the PREP Act provided exclusive federal jurisdiction because it completely preempted the state-law claims.[2] The

©2025 Troutman Pepper Locke

district court rejected the nursing home's arguments and remanded the case to state court. The nursing home appealed to the Ninth Circuit.

Like the Third Circuit, the Ninth Circuit held that the PREP Act: (1) does not completely preempt ordinary state-law claims; and (2) provides an exclusive federal cause of action, but only for claims of willful misconduct. However, unlike the plaintiffs in the Third Circuit case, the plaintiffs in the Ninth Circuit case did, in fact, plead a claim for willful misconduct against the nursing home. Nevertheless, the Ninth Circuit still affirmed the district court's ruling remanding the case to state court.

Unlike the Third Circuit's strong suggestion otherwise, the Ninth Circuit held that a single allegation of willful misconduct does not provide a federal court with exclusive jurisdiction of the case. The court explained that the possibility of the PREP Act preempting one claim does not mean that the statute "entirely supplements" all of the other state-law causes of action. However, the court strongly suggested that a standalone claim for willful misconduct would be preempted, provided that the factual allegations satisfied the elements of the PREP Act's cause of action.

Key Takeaways for Nursing Homes

We previously highlighted the potential benefits that the Third Circuit decision could have for nursing homes, particularly if other circuits followed its reasoning. We noted, for example, that plaintiffs may bring fewer allegations of willful misconduct against nursing homes, or that they may soften the factual allegations supporting their negligence claims to avoid the possibility of the case being removed to federal court. We also noted that under the Third Circuit's reasoning, nursing homes may be able to force plaintiffs to affirmatively disclaim the existence of willful misconduct, again to avoid the possibility of removal.

The Ninth Circuit's decision cuts against these potential benefits to nursing homes by holding that claims of willful misconduct — even when pled — are still not removable to federal court. As a result, under the Ninth Circuit's reasoning, plaintiffs can still plead allegations of willful misconduct without risking the possibility that their case will be removed to federal court. Put another way, in California and other states within the Ninth Circuit, plaintiffs need not be concerned with the possibility of nursing homes removing cases based solely on the inclusion of allegations of willful misconduct in the complaint. The same would be true in any other jurisdictions that opt to follow the Ninth, rather than Third, Circuit interpretation of the PREP Act.

However, all is not lost. Currently, there are similar removal questions pending before the Second, Fifth, Sixth, Eleventh, and D.C. circuits. Until these circuits issue their decisions, plaintiffs in these jurisdictions are stuck with the conflicting Third and Ninth circuit decisions. Some of these plaintiffs may not be willing to take the chance that these federal courts will side with the Ninth Circuit, and therefore, may be unwilling to bring claims for willful misconduct.

Troutman Pepper has a designated team that is closely tracking and monitoring any decisions related to the PREP Act, both as an immunity provision and a removal mechanism. We also follow other federal and state statutes and executive orders that provide certain levels of immunity or defenses to claims relating to the COVID-19 pandemic. We have assembled a dedicated team focused on advising health care entities through the COVID-19 crisis and its aftermath.

©2025 Troutman Pepper Locke

[1] *Saldana et al. v. Glenhaven Healthcare LLC et al.*, No. 20-56194 (9th Cir. Feb. 22, 2022).

[2] The nursing home also argued there is federal jurisdiction based on federal officer removal and the presence of an imbedded federal question. The district court rejected these arguments as well, and the Ninth Circuit affirmed.

RELATED INDUSTRIES + PRACTICES

- Health Care + Life Sciences