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Third Circuit Rejects Federal Jurisdiction Based on Nursing Home's Assertion of PREP Act Immunity: How This Ruling Could Benefit Nursing Homes

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Who Needs to Know

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Why It Matters

This is the first federal circuit court ruling to address federal removal jurisdiction based on PREP Act immunity. Although the nursing home lost its removal argument, the Third Circuit's opinion may benefit nursing homes and others that may assert PREP Act immunity, by limiting future plaintiffs' claims and presenting opportunities for broader immunity.

On October 20, the Third Circuit affirmed a district court's ruling that a nursing home could not assert immunity under the Public Readiness and Emergency Preparedness Act (PREP Act) to remove state law negligence claims to federal court based on alleged failures to follow safety guidelines during the COVID-19 pandemic.[1] With this decision, the Third Circuit became the first federal circuit court to address federal removal jurisdiction based on PREP Act immunity.[2] As the frequency of similar lawsuits against nursing homes and other businesses potentially covered by the PREP Act rises, this decision will likely reverberate and impact the way these cases are brought and defended. Although the Third Circuit ruled *against* the nursing home in this case, the decision could ultimately *benefit* nursing homes and other parties defending these types of cases going forward.

Background and the Third Circuit Decision

In August 2020, Troutman Pepper published an article detailing the underlying litigation, the Prep Act itself, and the district court's decision. In summary, in May 2020, the children of a nursing home resident, who allegedly died as a result of the failure to protect against exposure to COVID-19, filed a class-action lawsuit against the nursing home in New Jersey state court. The complaint asserted various state law claims, including, negligence, wrongful death, and medical malpractice arising from the nursing home's alleged failure to follow federal and state safety guidelines. The nursing home removed the case to federal court, asserting, among other grounds for federal jurisdiction, that PREP Act immunity (which it claimed applied) completely preempted the state law claims. The district court disagreed, and it remanded the case to state court, prompting the nursing home's appeal to the Third Circuit.

The bulk of the appeal focused on the nursing home's complete preemption argument.[3] The nursing home argued that it raised federal preemption as a defense to the state law claims, and its raising of that defense is

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sufficient to confer federal jurisdiction. The Third Circuit disagreed, holding that such federal jurisdiction only followed if the PREP Act provided the "exclusive cause of action" for the asserted claims. And while the PREP Act explicitly creates an exclusive cause of action for "willful misconduct," the complaint alleged only negligence on the part of the nursing home, and the factual allegations did not even imply willful misconduct under the PREP Act's definition.[4] Thus, the Third Circuit affirmed the district court's ruling and remanded the case back to state court.

Key Takeaways for Nursing Homes

Although the nursing home lost its removal argument and now will have to litigate this case in state court, going forward, the Third Circuit's opinion may actually benefit nursing homes and others that may assert PREP Act immunity. Nursing home defendants often choose to remove to federal court over state court if given the option. But even more beneficial than being in federal court, would be facing lesser allegations in the first place. There are several ways that this ruling could benefit nursing homes, including by limiting future plaintiffs' claims and presenting opportunities for broader immunity.

1. Plaintiffs may bring fewer allegations of "willful misconduct."

In analyzing the nursing home's "complete preemption" argument, the Third Circuit held that the PREP Act creates an "exclusive federal cause of action," but only for claims based on "willful misconduct." Even though there were no "willful misconduct" allegations before it, the court strongly suggested that such "willful misconduct" claims would be completely preempted by the PREP Act, and thus may be removed to federal court. This bright line distinction between willfulness and negligence puts plaintiffs between a rock and a hard place. Plaintiffs ordinarily would want to plead every plausible cause of action available to them, especially those involving willful misconduct. This is even more important where a plaintiff anticipates the defendant (like a nursing home) may assert PREP Act immunity since "willful misconduct" is exempted therefrom. By not alleging willful misconduct, plaintiffs also risk that a nursing home will be immune under state-specific immunity provisions.[5] However, based on this ruling, pleading "willful misconduct" may jeopardize the plaintiffs' ability to remain in state court. Faced with the choice between alleging claims of "willful misconduct" and preserving their ability to remain in state court, many plaintiffs may opt for the latter and excise willful claims from their complaint.

2. Plaintiffs may soften their factual allegations supporting negligence claims.

Even if a plaintiff chooses not to assert claims for "willful misconduct," this ruling may still impact the factual allegations they make to support negligence or other state law claims. That is because the Third Circuit's decision makes clear that in analyzing removal jurisdiction, the court will look at what claims the plaintiff *could* have brought based on the facts alleged in the complaint, and it may be sufficient to convey federal jurisdiction for a plaintiff to even "allege or imply that the nursing homes acted 'intentionally to achieve a wrongful purpose'" or "knowingly without legal or factual justification." From a practical perspective, this means that even where plaintiffs choose not to assert claims based on "willful misconduct," they must still not plead facts that suggest or imply willfulness or intentional harm. Even though those types of facts are not legally necessary to prove a negligence claim, plaintiffs will often allege them and/or adduce them at trial as part of their case, and any restriction on their ability to do so may well benefit nursing home defendants. While the court did not provide specific parameters of what allegations fall within the scope of willful misconduct, the specter of a claim being preempted and removed to

federal court may be sufficient to lead plaintiffs to plead less forceful and salacious allegations.

3. Nursing homes may be able to force plaintiffs to affirmatively disclaim the existence of any willful misconduct.

Notwithstanding this decision, nursing home defendants may still attempt to remove state law claims to federal court even in the absence of willful misconduct. For one, this decision will not be binding outside of the Third Circuit unless or until other circuit courts adopt it. But more importantly, where a complaint possibly alleges or implies willful or intentional conduct on the part of a nursing home, in the course of a removal proceeding, the plaintiff may be forced to clarify that it makes no such allegations by affirmatively disclaiming, in motions, briefs, or at oral argument, the existence of any willful or intentional misconduct. If a plaintiff does so and is successful in resisting removal, those statements may estop the plaintiff from later arguing that PREP Act immunity does not apply. Disclaiming willfulness or intent in this manner could prove fatal if the state court later determines that the nursing home does, in fact, qualify for PREP Act immunity. Without the ability to allege "willful misconduct," a plaintiff's only recourse would be through the PREP Act's compensation fund, and it would have no viable claims against the nursing home.

4. In applying PREP Act immunity, rulings from different state courts may create broader immunity arguments for nursing homes.

As noted above, many plaintiffs may choose not to plead willful misconduct to avoid removal to federal court. But by doing so, these plaintiffs will open the door for nursing homes to argue, at the state court level, immunity from suit under the PREP Act. As a result, state courts nationwide will likely be the ones to interpret and apply the elements of PREP Act immunity in these cases — *e.g.,* whether nursing homes are "covered persons," and whether the allegations implicate "covered countermeasures." In addition, those same state courts may need to interpret their own immunity statutes (which many states have enacted) to determine whether nursing homes are immune from suit. If state courts make these determinations (as opposed to federal courts), it is likely there will be less uniformity in rulings on both an interstate and intrastate level. That type of patchwork of differing and inconsistent rulings may make it harder for nursing homes to operate their businesses by giving them less predictability in terms of what conduct will and will not be covered. However, nursing homes or other entities, whose assertions of PREP Act immunity could go either way, may find that the inconsistency of decisions creates more gray area for them to argue that immunity should apply. In addition to potentially convincing courts to apply immunity, this may provide defendants with leverage for more favorable settlement terms.

When confronted with state law claims, nursing homes and other health care providers should not rely exclusively on the PREP Act as an immunity or removal mechanism. There are many other federal and state statutes and executive orders that may provide certain levels of immunity or defenses to claims relating to the COVID-19 pandemic. Troutman Pepper has closely tracked and monitored these developments for nursing homes and other health care providers. We have developed a tracking tool that follows operational guidance, immunity provisions, and whistleblower laws in 17 jurisdictions. Moreover, we have a dedicated team of attorneys focused on advising health care entities through the COVID-19 crisis and its aftermath.

[1] *Estate of Maglioli v. Andover Subacute Rehab.*, No. 20-2833 (3d Cir. Oct. 20, 2021).

[2] Similar issues are currently pending before the Second, Fifth, Sixth, Ninth, Eleventh and D.C. circuits.

[3] It is important to note the difference between traditional preemption and "complete preemption," the latter of which is a jurisdictional doctrine that transforms state law claims into federal claims, where a federal statute is so broad that it wholly displaces any state law claims relating to the same subject matter. Where complete preemption applies, it provides a basis for removing those preempted state law claims to federal court. *See Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8 (2003).

[4] Though the plaintiffs asserted allegations of "grossly reckless, willful, and wanton" conduct in their request for punitive damages, the court found these insufficient to transform their claims to willful misconduct.

[5] Many states have passed their own immunity provisions, either by statute or executive order, protecting health care providers from ordinary negligence during the COVID-19 pandemic. Like the PREP Act, the majority of these provisions exempt intentional conduct. *See* https://covid19.troutman.com/trackers-carefacility.php.

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