WINSTON & STRAWN LLP

BLOG

PREP Act Update: The Inconsistent Treatment of Preemption in Claims Against Nursing Homes Continues

MARCH 22, 2021

Nursing home operators have generally been unable to remove to federal court negligence claims premised on alleged failure to take proper COVID-19 precautions (*see* prior alerts here and here). A recent decision by the Federal District Court for the Central District of California, however, not only denied plaintiffs' motion to remand, but also held that the Public Readiness and Emergency Preparedness Act (PREP Act) is a complete preemption statute and governs any conduct related to covered countermeasures absent "instances of nonfeasance" such as a "failure to make any decisions whatsoever." *Garcia v. Welltower OpCo Grp. LCC,* No. 8:20 CV-02250, 2021 WL 492581 (C.D. Cal. Feb. 10, 2021) at *7-10. While showing great deference to recent guidance from the HHS Office of General Counsel, the *Garcia* court also noted that plaintiffs' complaint did not allege total inaction by the nursing home, such that it never abandoned its role as "covered person" or "program planner." But other courts have subsequently discounted the *Garcia* decision as an outlier and declined to find that the PREP Act provides complete preemption or covers nursing home operators' failure to take appropriate precautions.

Similar to prior PREP Act litigation, the plaintiffs in *Garcia* filed suit in state court alleging that the nursing home defendants failed to "implement appropriate infection control measures or follow local or public health guidelines in preparing for and preventing COVID-19 spread" and that such failures resulted in the decedent's death. *Id.* at *1-2. After defendants removed the action to federal district court on the basis of diversity and federal question jurisdiction, plaintiffs sought to remand, claiming that no federal jurisdiction existed. Concurrently, defendants filed a motion to dismiss, contending that the PREP Act conferred complete immunity to "covered persons," such as nursing home operators, with respect to anything relating to the administration of a covered countermeasure—even if there was no affirmative use of a covered countermeasure. *Id*. at *7-10.

Unlike previous PREP Act decisions, the district court denied plaintiffs' motion to remand, finding that the January 8, 2021 HHS General Counsel Advisory Opinion (Advisory Opinion) "affirmed that the PREP Act is a complete preemption statute and clarified the scope of the Act relative to the ongoing pandemic." *Id.* at *6-7. The court also rejected plaintiffs' argument that the Advisory Opinion had no legal force and observed that it had the authority to defer to the "administrative agency interpretation of the PREP Act." *Id*. at *6. Accordingly, because the PREP Act "is a complete preemption statute," the court held that "an adequate basis for federal question jurisdiction exists." *Id*. at *9. The court observed that while other courts have found that the PREP Act is not a complete preemption statute, "each of these cases precede[d] [the General Counsel's] more recent guidance. . . ." *Id.* at *6.

The court also found that "[i]mmunity applies for the same reason that the [c]ourt found that the PREP Act conferred federal question jurisdiction," and granted defendants' motion to dismiss. *Id*. at *10. The district court observed that plaintiffs' claims "invoke issues governed by the PREP Act," and furthermore, that the Advisory Opinion foreclosed plaintiffs' arguments that "immunity exists only in a very narrow class of claims involving the use of administration of any covered countermeasure." *Id.* at *10 (internal quotations omitted). The court also noted that under the Advisory Opinion, "only instances of nonfeasance, *i.e.*, 'where defendant's culpability is the result of its failure to make any decisions whatsoever, thereby abandoning its duty to act as a program planner or other covered person[,]' would complete preemption not attach." *Id.* at *7. Here, conversely, the Court found that defendants' actions were "unsuccessful attempts at compliance with federal or state guides – something which the PREP Act, the Declaration, and the January 8, 2021 Advisory Opinion cover." *Id*. at *9.

Several courts have subsequently refused to follow the *Garcia* court's reasoning, and consistent with prior decisions, have remanded cases against nursing home operators back to state court. For instance, in *Dupervil v. All. Health Operations, LCC*, the District Court for the Eastern District of New York "respectfully disagree[d]" with the *Garcia* opinion and concluded that the "Advisory Opinion is unpersuasive and not entitled to any deference." No. 2:20-CV-4042-PK-CPK, 2021 WL 355137, at *10, n.2 (E.D.N.Y. Feb. 2, 2021). The court found that while the Secretary's Declaration under the PREP Act "must be construed in accordance with the Advisory Opinions of the Office of the General Counsel," the Advisory Opinion does expressly state that it "does not have the force or effect of law." *Id.* at *10. Moreover, the court held that the nursing home defendants' failure to take certain steps to prevent COVID-19 "cannot be said to be administering—or even prioritizing or purposefully allocating—a drug, biological product, or device to an individual within the meaning of the PREP Act such that Plaintiffs' claims are completely preempted." *Id*. at *12. Accordingly, the court found remand of plaintiff's case appropriate.

Likewise, in an intra-court split, the District Court for the Central District of California in *Est. of Voncile R. McCalebb, et al. v. AG Lynwood, LLC, et al.*, found "the PREP Act does not create original federal jurisdiction over a covered claim for negligence or recklessness." No. 2:20-CV-09746-SB-PVC, 2021 WL 911951, at *4 (C.D. Cal. Mar. 1, 2021). While acknowledging the *Garcia* court's holding, the court observed that the Advisory Opinion did not establish that the PREP Act provides complete preemption and found that "this conclusory assertion does not explain how an administrative remedy can be transformed into a federal cause of action as necessary to supply original jurisdiction" and "is also contrary to Ninth Circuit law." *Id.* at *4, n.5 (citing *Moore-Thomas v. Alaska Airlines, Inc*., 553 F.3d 1241, 1245-46 (9th Cir. 2009)). The court also held that only "*purposeful* decision[s]" regarding non-administration of covered countermeasures fell under the purview of the PREP Act and conversely, "cases of general neglect," such as those alleged by plaintiffs, "fall outside the protection of the PREP Act." *Id*. at *5 (emphasis in original). Because federal subject matter jurisdiction was lacking, the court therefore remanded plaintiff's case.

Similarly, the District Court for the District of Oregon in *Est. of Jones through Brown v. St. Jude Operating Co*., held that "*Garcia* is not persuasive authority and is an outlier in light of the weight of authority holding that" the PREP Act is not a complete preemption statute. No. 3:20-CV-01088-SB, 2021 WL 900672, at *7 (D. Or. Feb. 16, 2021), *report and recommendation adopted sub nom.* No. 3:20-CV-1088-SB, 2021 WL 886217 (D. Or. Mar. 8, 2021). The court noted that the *Garcia* decision did not cite any authority supporting complete preemption other than the Advisory Opinion, and "the [Advisory Opinion] is not persuasive in part because it cites no legal authority to support complete preemption here." *Id*. Given that the court found that it did "not have original subject matter jurisdiction over this action," plaintiffs' motion to remand was granted. *Id.* at *8.

While the *Garcia* decision remains an outlier to date, it does establish that nursing home defendants may be able to successfully remove and defeat "failure to act" negligence claims via the PREP Act. The level of deference accorded to the Advisory Opinion—and whether any subsequent PREP Act Declarations expressly incorporate the Advisory Opinion—will likely be determinative factors for successful removal and dismissal of similar claims going forward.

For any questions regarding the PREP Act or PREP Act litigation, please contact Sandra Edwards, Rand Brothers, Yarden Kakon, or your Winston relationship attorney.

View all of our COVID-19 perspectives here. Contact a member of our COVID-19 Legal Task Force here.

6 Min Read

Authors

Sandra Edwards

Rand Brothers

Related Locations

San Francisco | Washington, DC

Related Topics

COVID-19 | Preemption

Related Capabilities

Product Liability & Mass Torts | Litigation/Trials | Medical Devices | Health Care

Related Regions

North America

Related Professionals

Sandra Edwards

Rand Brothers

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.