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Irma Could Trigger Uptick In Nursing Home Claims

By **Y. Peter Kang**

Law360, Los Angeles (October 4, 2017, 5:55 PM EDT) -- Spurred in part by a high-profile case in which 12 Florida nursing home residents died in the aftermath of Hurricane Irma, an uptick in claims made against such health care providers can be expected, according to experts, who also noted that plaintiffs attorneys face headwinds in proving that storm-related disruptions caused patient injuries.

Hurricane Irma made landfall in Florida on Sept. 10 and knocked out power at the Rehabilitation Center at Hollywood Hills. Eight patients died on Sept. 13, and an additional four patients in the days that followed. About a half-dozen suits filed by the patients' relatives allege the nursing home failed to have a backup energy source to power the air conditioning system and keep the facility at a safe temperature in the event of a power outage. The nursing home allowed residents to suffer for three days before calling 911, according to **the complaints**.

The case has received a torrent of attention from the media, lawmakers and Gov. Rick Scott, who said in a Sept. 25 statement it was an "absolute shame" the Broward County nursing home didn't do more to help its residents.

"This nursing home is directly across the street from a hospital, making their failure to evacuate or call 911 in a timely manner completely inexplicable and inexcusable," said Scott, who spearheaded an emergency order requiring nursing homes to have backup generators.

Kirsten K. Ullman of Ullman Bursa Law, an attorney for the home, told Law360 her client had emergency plans in place that were followed.

"Our nursing home and assisted living clients worked tirelessly to safeguard the residents at their facilities," she said.

With nursing home negligence in the spotlight, plaintiffs attorneys in Florida told Law360 they are currently screening potential cases related to the hurricane while defense attorneys said they were hearing of families reaching out to counsel to pursue potential nursing home negligence claims. One defense attorney said the government actions and media attention will likely spur claims made against nursing homes.

"I don't think there's any doubt about that," said Dale Paleschic of Luks Santaniello Petrillo & Jones LLC in Tallahassee. "[The Hollywood case has] raised public awareness, and any time you do that, it can drive claims."

Florida law contains protections for nursing home residents ensuring certain rights, including the right of dignity and a right to a safe environment. It's the latter provision that plaintiffs attorneys will be homing in on, according to Paleschic.

"Obviously, what we've seen with respect to the hurricanes, that may extend to how much of a safe environment can be provided from weather-related events," he said. "Do they have adequate storm protection, including storm shutters? Do they have enough generators?"

Sean Domnick, a personal injury plaintiffs attorney with Domnick Cunningham & Whalen, said his firm is currently evaluating a handful of claims related to Hurricane Irma. The lawyer said he expected a rise in both nursing home negligence claims and medical malpractice litigation.

"You're going to see a lot of things because the homes were not prepared staffing-wise," he said. "Falls, pressure sores, broken hips, broken bones. For certain facilities with not enough staffing, you'll have residents who walked out, called elopement, and getting themselves harmed. It runs the gamut; anything that happens in a nursing home is going to be exacerbated when they don't have systems and staffing in place to deal with this emergency situation."

Domnick said an increase in medical malpractice litigation would arise from patients who missed appointments due to the storm that were not rescheduled by their doctors, which may lead to claims over lost chance of a better medical outcome.

The Palm Beach Gardens-based lawyer said he took on such a case following Hurricane Andrew in 1992, in which a doctor's office failed to reschedule a woman's annual mammogram and allegedly allowed the woman's breast cancer a one-year head start before it was diagnosed a year later. Domnick said the case was eventually settled.

But the Hollywood nursing home case aside, it may prove difficult for plaintiffs to prove causation, or that the alleged negligence stemming from the hurricane caused any given patient's injuries, according to Ben Newman, an Orlando-based Wilson Elser Moskowitz Edelman & Dicker LLP attorney who handles medical malpractice defense.

"The connecting of the dots between what happened in the storm and someone having an alleged injury or death because of the storm would require a lot of specific evidence to demonstrate the connection," he said. "There would have to be some connection to loss of certain services or disruption of services that were being provided to the patient that created a cascade of events that ultimately led to an injury or death."

Newman said the governmental and media scrutiny would no doubt lead to "enterprising attorneys" looking to pursue claims related to the storm but expressed skepticism that such claims would prove fruitful.

Nursing home patients, Newman said, are elderly with likely pre-existing medical conditions, so it would require "compelling proof" that a disruption of services had a true cause-and-effect relationship with their injuries. As for patients who missed annual screenings or other appointments, he said medical offices were shuttered for only about a week, and patients bear some of the responsibility in rescheduling.

"I don't foresee that many, if any, will make their way into the court system," he said. "I'm skeptical that there will be merit to these types of cases."

One plaintiffs attorney noted that the vast majority of nursing homes in Florida have mandatory arbitration agreements in place that will keep such claims out of the public eye.

"If you don't see lawsuits in court, that doesn't mean there weren't claims made, but the parties may be bound by private arbitration that is not in the public record," said Colling Gilbert Wright & Carter's Melvin Wright, who specializes in nursing home negligence. "It's very rare when I don't see an arbitration clause, and that's been true in excess of a decade."

With the Hollywood case, however, Wright noted that the case would be tough to defend against given the deaths of a dozen residents. He suspects that the defense will argue that the staff members followed their emergency plan and responded as quickly as they could, given the circumstances, while the patients' families will contend that the deaths were preventable.

"I would expect the plaintiffs attorneys to say the proof is in the pudding — nobody at the hospital across the street died from overheating because they had an adequate generator," he said. "The nursing home will have a difficult time defending what occurred. Based on the news reports, I would be surprised if they would be able to successfully defend that case. I would expect the case to settle or go to verdict."

But if Superstorm Sandy, which struck New York and New Jersey five years ago, can serve as a guide, the home may be able to mount a compelling defense if it can prove it followed its emergency

plan, according to Caroline Berdzik of Goldberg Segalla in Princeton, New Jersey.

"If you are able to demonstrate you did the best under the circumstances, under your emergency plan, that your communications plan was appropriate and staff was trained, you are going to have some viable defenses," she said.

However, the attorney noted that headline-grabbing cases such as the one that stemmed from the Hollywood nursing home can often invite lawsuits.

"Nursing home cases in general are on the rise, and when you read stories like this, it may encourage families to bring litigation, even if they aren't related to the hurricane," Berdzik said. "I think you're going to see quite a few more lawsuits by family members of residents."

--Editing by Christine Chun and Robert Rudinger.

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