

NEW YORK NURSING HOME RESOURCE CENTER

The Family Guide to a Nursing Home Lawsuit

How a case against a New York nursing home works, from the first phone call to the final check: your rights, the deadlines, the court process, and what your family can expect

The claims New York law allows, and who can bring them

Deadlines, arbitration clauses and preserving the evidence

The lawsuit step by step, illustrated

Settlement, court approval, liens and trial

Checklists, questions to ask a lawyer and a glossary

Free. Please read it, print it, and share it with any family facing harm to a loved one in a nursing home.

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BEFORE YOU START

How to use this guide

When a parent, spouse or grandparent is harmed in a nursing home, families are left with hard questions. What happened? Who is responsible? Is a lawsuit possible, and what would it mean for us?



Photo: Rhoda Baer, National Cancer Institute, public domain

This guide explains, in plain language, how a nursing home lawsuit works in New York: the rights the law gives residents, who may bring a case, the deadlines, what happens in court, how cases end, and how the money is handled. It is written for families, not lawyers. Where a rule comes from a statute, regulation or court decision, the source is given so you or your lawyer can check it.

Three things worth knowing now

1. **The deadlines are short, and some are very short.** Most claims must be filed within two to three years. If the facility is run by a county or city, a notice of claim may be due in 90 days.
2. **If the resident has died, only the estate can sue.** Someone must first be appointed by the Surrogate's Court. That step takes time, and the clock keeps running while it happens.
3. **Records disappear.** Staffing records, video, and the notes that never make it into the chart can be lost or overwritten. Requesting records and sending a preservation letter early protects the case.

> A NOTE ON WHAT THIS IS
>
> This guide is general information about New York law. It is not legal advice and does not create an attorney-client relationship. Every case turns on its own facts, and the law changes. Speak with a lawyer about your family's situation, and confirm any deadline with that lawyer.

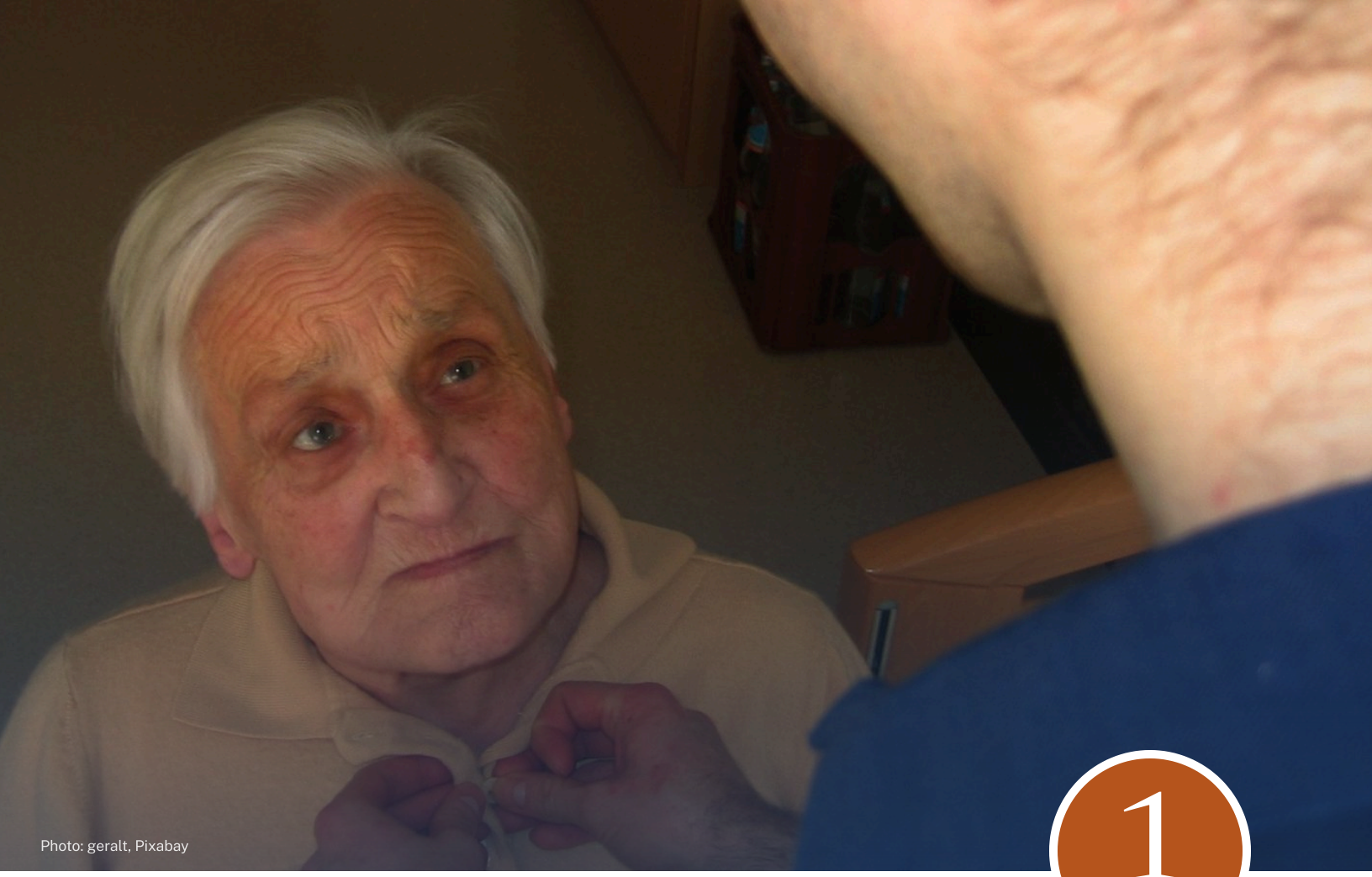


Photo: geralt, Pixabay

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PART 1

Before a case is filed

When to call a lawyer, the claims New York allows, who has the right to bring them, the deadlines, and the steps that protect a case before anything is filed.

1 When to talk to a lawyer

2 The claims New York allows

3 Who can bring the case

4 The deadlines

5 The admission agreement and arbitration

6 Preserving the evidence

7 Choosing a lawyer and the fee agreement

CHAPTER 1 · THE FIRST STEP

When to talk to a lawyer

Most families who call a lawyer are not sure they have a case. That is normal. A first conversation is usually free, and it is the best way to learn whether the facts and the records support a claim.

Harms that often lead to a case

Bedsores

Stage 3, Stage 4 or unstageable pressure injuries, especially ones that develop after admission

Falls

Falls causing fractures or head injuries, particularly repeat falls or falls without proper supervision

Dehydration and weight loss

Malnutrition, dehydration, and failure to monitor intake or weight

Infection and sepsis

Untreated urinary infections, infected wounds, and delays in sending a resident to the hospital

Medication errors

Wrong drugs or doses, missed medications, or improper sedation

Elopement and choking

Residents who wander out unsupervised, and choking on food the care plan prohibited

Abuse by staff or other residents, and a death that followed any of these harms, are also reasons to call.

What to bring to the first meeting

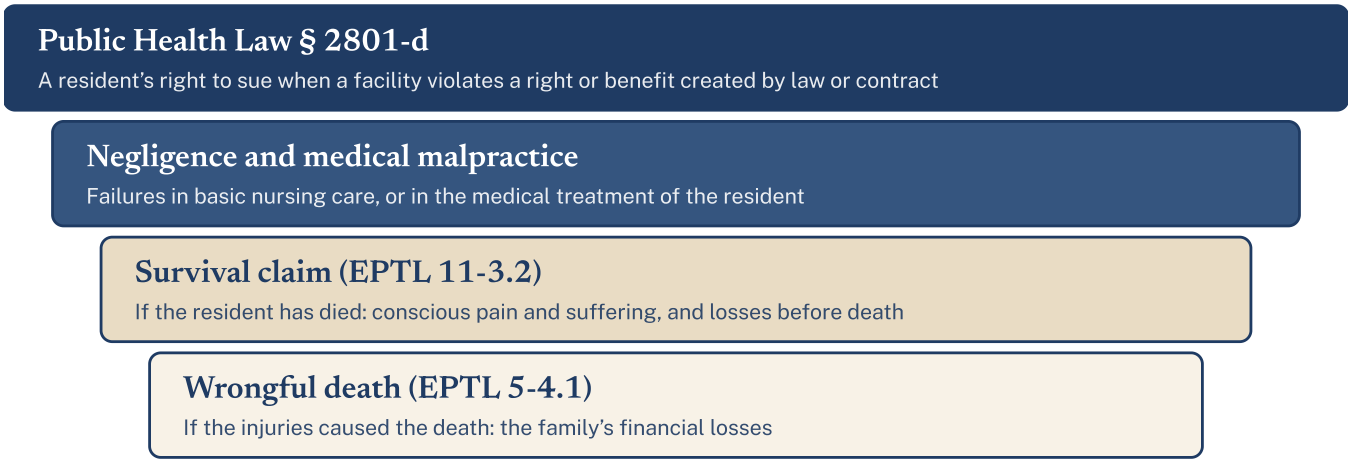
- [ ] The resident's name, date of birth and dates at the facility
- [ ] Hospital discharge papers and any records you already have
- [ ] Photographs of injuries, with dates
- [ ] Your notes, emails and texts with the facility
- [ ] The admission agreement and any arbitration agreement
- [ ] Any health care proxy, power of attorney or guardianship papers
- [ ] If the resident has died: the death certificate and any will
- [ ] Names of other family members and who was the main contact

YOU DO NOT NEED TO HAVE EVERYTHING

A lawyer can request the records. What matters most at the start is a timeline: when your loved one entered the facility, when you first noticed a problem, and when they went to the hospital.

The claims New York allows

A New York nursing home case usually combines several legal claims. Each has its own rules, its own deadline and its own kinds of damages. Most cases include more than one.



Public Health Law § 2801-d: the residents' rights statute

New York gives nursing home residents a special right to sue a facility that deprives them of any right or benefit created for their well-being by contract or by state or federal law, including the detailed federal care standards in 42 C.F.R. Part 483 and New York's own regulations in 10 NYCRR Part 415. The facility can avoid liability only by proving that it exercised all care reasonably necessary to prevent and limit the harm.

The statute also sets a minimum damages amount, permits punitive damages where the violation was willful or in reckless disregard of the resident's rights, and allows the court to award attorneys' fees. Damages under § 2801-d are not counted against a resident's Medicaid eligibility.

N.Y. PUB. HEALTH LAW §§ 2801-D, 2803-C

Negligence and medical malpractice

A claim can also be brought for negligence: failures of ordinary nursing care, such as not turning a resident, not supervising a resident at risk of falls, or not giving food and fluids. Where the harm came from medical judgment, such as a doctor's diagnosis or treatment decision, the claim is medical malpractice. The difference matters, because malpractice claims have a shorter deadline, require a certificate of merit, and carry a different fee schedule.

When the resident has died

If a resident dies, two separate claims belong to the estate:

EPTL § 11-3.2

The survival claim

The claims the resident could have brought had they lived, including conscious pain and suffering before death. Any recovery becomes part of the estate.

EPTL § 5-4.1

The wrongful death claim

The family's financial losses caused by the death, such as funeral expenses and lost support or services. The recovery goes to the family members the statute names, not to the estate's creditors.

The kinds of damages

Damages	What they compensate	Claim
Pain and suffering	Physical pain, fear, and loss of enjoyment of life the resident consciously experienced	Injury and survival claims
Medical expenses	Hospital, surgery and treatment costs caused by the injury	Injury and survival claims
Statutory minimum	A floor set by the statute, based on the facility's daily rate for each day the injury existed	§ 2801-d
Punitive damages	Punishment for willful or reckless violations of residents' rights	§ 2801-d
Funeral expenses and financial loss	The family's pecuniary losses caused by the death	Wrongful death
Attorneys' fees	The court may award fees in its discretion	§ 2801-d

WHAT NEW YORK LAW DOES NOT YET ALLOW

New York wrongful death damages are limited to financial loss. The family's grief and loss of companionship are not compensated under current law. The proposed Grieving Families Act would change that, but the Governor vetoed versions of it four times between 2023 and 2025, and as of this edition it has not become law.

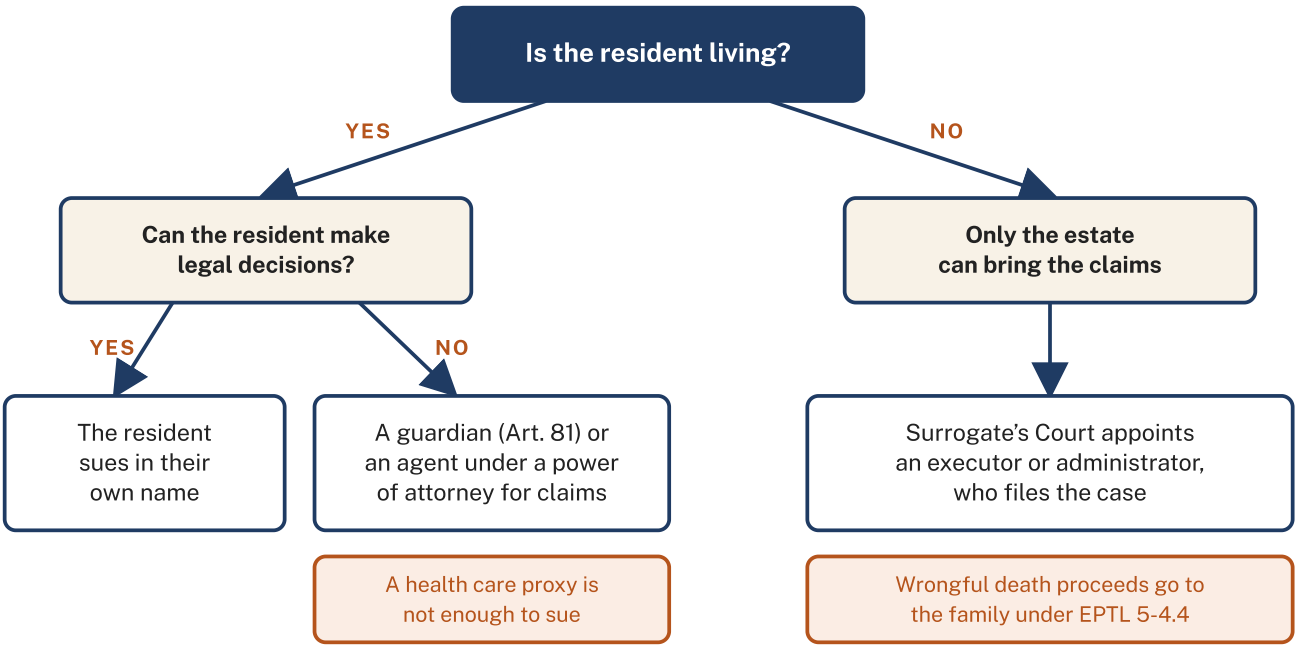
> "Unavoidable" is not a label a facility can simply apply. It must be supported by the record.

In pressure injury and fall cases, facilities often argue that the harm was unavoidable because of the resident's condition. Federal rules allow that defense only where the facility assessed the resident, put the right care in place, monitored it, and revised it when needed. See our free *Family Guide to Bedsores*.

CHAPTER 3 · STANDING

Who can bring the case

The right to sue belongs to the resident. Family members, even close ones, cannot sue in their own names for the resident's injuries. Who acts depends on whether the resident is living and able to make decisions.



When the resident is living

A resident who can make legal decisions brings the case in their own name, with family support. If the resident cannot, the case is brought by a court-appointed guardian under Article 81 of the Mental Hygiene Law, or by an agent under a statutory power of attorney that includes authority over claims and litigation.

A health care proxy is not enough. It authorizes medical decisions, not lawsuits.

MENTAL HYG. LAW ART. 81; GEN. OBLIG. LAW § 5-1502H; PUB. HEALTH LAW ART. 29-C

When the resident has died

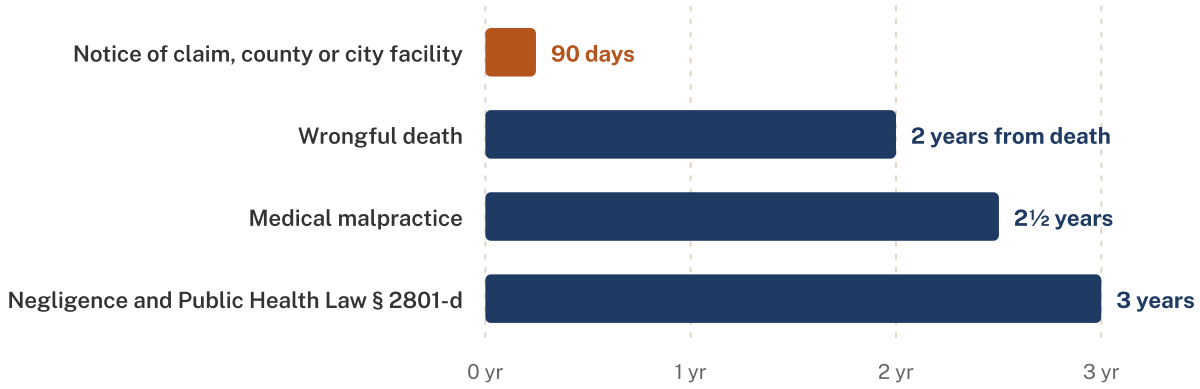
Only a personal representative of the estate, an executor named in a will or an administrator appointed by the Surrogate's Court, can bring the survival and wrongful death claims. The court can issue letters that are limited to pursuing the lawsuit, and the court must later approve any settlement. Our free *Family Guide to Surrogate's Court* explains the process step by step.

If a resident dies while their own case is pending, the case is paused until the estate's representative is substituted in.

EPTL §§ 5-4.1, 5-4.4, 11-3.2; SCPA § 702; CPLR 1015, 1021

The deadlines

A claim filed even one day late can be lost forever. These are the general deadlines. Which one applies, and when it starts, depends on the facts.



General limitation periods, measured from the injury, or for wrongful death from the date of death.

Claim	General deadline	Source
Negligence and Public Health Law § 2801-d	Three years from the injury	CPLR 214
Medical malpractice	Two and a half years, with some exceptions	CPLR 214-a
Wrongful death	Two years from the date of death	EPTL 5-4.1
County, city or other public nursing home	Notice of claim within **90 days**; lawsuit generally within one year and 90 days	Gen. Mun. Law §§ 50-e, 50-i
State-operated facility	Special Court of Claims notice and filing rules	Ct. Cl. Act § 10
Veterans Affairs facility	Written administrative claim to the agency, generally within two years	28 U.S.C. § 2401(b)

Things that can change a deadline

- A resident who lacks capacity may get additional time in some situations (CPLR 208), but families should never rely on it without advice.
- Care given during the COVID-19 emergency in 2020 and early 2021 may be affected by a temporary immunity law. It was later repealed, but appellate courts have held that the repeal does not apply retroactively.

> **DO NOT WAIT**
>
> The safest course is to speak with a lawyer as soon as possible. If the resident has died, ask about the Surrogate's Court appointment right away, because the wrongful death clock is already running.

CHAPTER 5 · PAPERWORK

The admission agreement and arbitration

Many New York facilities ask families to sign an arbitration agreement with the admission papers. If it is valid, a dispute is decided by a private arbitrator instead of a judge and jury.

What the federal rules require

Facilities that accept Medicare or Medicaid must follow federal rules for these agreements:



Not a condition of admission

A facility cannot require a resident to sign an arbitration agreement to be admitted or to keep receiving care



30 days to cancel

The agreement must allow the resident or representative to rescind it within 30 calendar days of signing



No gag on complaints

It cannot stop anyone from contacting state surveyors, the Ombudsman or other officials

42 C.F.R. § 483.70 (BINDING ARBITRATION AGREEMENTS)

The agreement must also be explained in a form and language the resident or representative understands, provide for a neutral arbitrator and a convenient location, and be acknowledged in writing.

What to check

- ☐ Was an arbitration agreement signed at all? It is often a separate document in the admission packet.
- ☐ Who signed it, and did that person have legal authority to give up the resident's right to a jury?
- ☐ When was it signed, and was the 30-day right to cancel explained?
- ☐ Does it comply with the federal requirements above?

Guarantees of payment

A facility also may not require a family member to personally guarantee payment as a condition of admission. A family member who signs as the resident's representative is not, by doing so, agreeing to pay from their own funds.

42 C.F.R. § 483.15(A)(3)

KEEP EVERY PAGE

Give your lawyer the complete admission packet. Whether an arbitration agreement can be enforced is often decided early in the case, and it can change where and how the case is heard.

CHAPTER 6 · EVIDENCE

Preserving the evidence

The strongest nursing home cases are built from the facility's own records. Some of those records are kept for years. Others are overwritten in weeks.

Request the chart

A resident or a representative with legal authority can inspect the records within 24 hours, excluding weekends and holidays, and get copies within two working days. New York caps copying charges at 75 cents a page. After a death, the estate's representative usually makes the request.

42 C.F.R. § 483.10(G)(2); N.Y. PUB. HEALTH LAW § 18

Records that are not in the chart

Staffing records

Schedules, assignment sheets, time cards and the federal staffing data each facility reports

Internal reports

Incident and accident reports, 24-hour reports, and the facility's own investigation

Video and devices

Hallway and entrance video, call-bell logs, and electronic records metadata

Policies

The facility's written policies on falls, skin care, nutrition and staffing

State inspection reports

Department of Health survey findings and complaint investigations, which are public

Communications

Emails and texts between staff, and with the family

A preservation letter

A lawyer can send the facility a letter demanding that it preserve these materials. Once a facility is on notice of a likely claim, destroying relevant evidence can lead a court to impose penalties, including instructing the jury that it may assume the missing evidence would have hurt the facility.

What the family should keep

- [ ] Photographs, with dates, and the phone they were taken on
- [ ] Your notes, calendar entries, emails, texts and voicemails
- [ ] Names of staff, roommates and visitors who saw what happened
- [ ] Hospital records and discharge papers

CHAPTER 7 · REPRESENTATION

Choosing a lawyer and the fee agreement

Nursing home cases are specialized. They turn on regulations, nursing standards, medical causation and the facility's records. Look for a lawyer who handles these cases regularly.

How fees work

Most nursing home lawyers work on a **contingency fee**: the fee is a percentage of the recovery, and there is no fee if there is no recovery. New York court rules require a written retainer agreement, and the lawyer must file statements with the Office of Court Administration when the case is retained and when it closes. Every client is entitled to the Statement of Client's Rights.

In personal injury cases, the fee is generally limited by court rule to one-third of the net recovery, after case expenses. Where a claim is for medical malpractice, a sliding scale set by statute applies:

Portion of the net recovery	Maximum fee
First $250,000	30%
Next $250,000	25%
Next $500,000	20%
Next $250,000	15%
Over $1,250,000	10%

JUDICIARY LAW § 474-A; 22 NYCRR PART 1215; 22 NYCRR § 1210.1; DEPARTMENT RULES, E.G., 22 NYCRR § 691.20

Case expenses

Medical records, expert reviews, deposition transcripts and court fees can be significant. Most firms advance these costs and are reimbursed from the recovery. Ask how expenses are handled if the case does not succeed.

Questions to ask before you hire a lawyer

1. How many nursing home cases have you handled, and how many have gone to trial?
2. Who will handle my case day to day, and how will you keep us updated?
3. What claims do you see, and what are the weaknesses?
4. What is the deadline, and what must happen first?
5. How are the fee and expenses calculated? May I see the retainer before signing?



New York County Courthouse, 60 Centre Street. Photo: Mike Peel (www.mikepeel.net), CC BY-SA 4.0, cropped

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PART 2

The lawsuit, step by step

What happens after a case is filed: the papers, the exchange of records, depositions, experts, motions, and how long it all takes.

8 The road of a case

9 Filing the lawsuit

10 Discovery

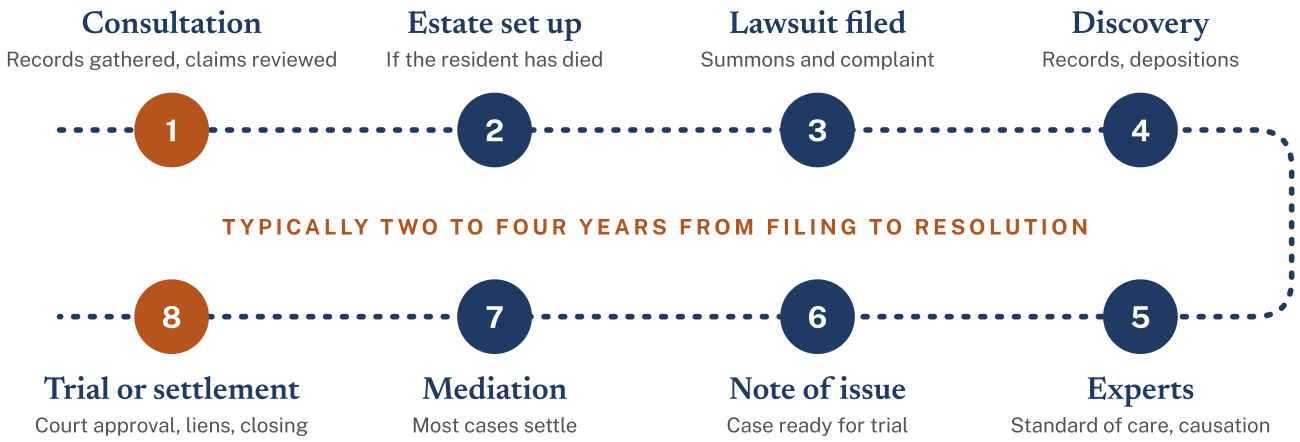
11 Depositions

12 Experts, motions and the timeline

CHAPTER 8 · OVERVIEW

The road of a case

Every case is different, but most New York nursing home lawsuits follow the same path. This map shows the main milestones. The chapters that follow explain each one.



WHERE CASES ARE HEARD

New York Supreme Court

Despite its name, Supreme Court is New York's main trial court, with a courthouse in every county. Cases are filed electronically through the court's NYSCEF system, and most are handled by a single assigned judge.

YOUR PART IN IT

Fewer appearances than you think

Most of the work happens between the lawyers. Families are usually needed for a few key moments: gathering information early, a deposition, mediation, and trial if the case goes that far.



Foley Square, Manhattan. Photo: Beyond My Ken, CC BY-SA 4.0, cropped

Which court, which county

A case is usually filed in the county where the resident, the estate's representative, or the facility's operator is located. The choice of county can affect how quickly a case moves and who sits on the jury, so it is a strategic decision for your lawyer.

CPLR 503

If the facility is run by the State, the case goes to the Court of Claims, which has no jury. If it is a Veterans Affairs facility, it goes to federal court.

CHAPTER 9 · FILING

Filing the lawsuit

A lawsuit begins when the lawyer files a summons and complaint with the court. The complaint tells the story of what happened and identifies the legal claims.

1. **Investigation and records review.** Before filing, the lawyer reviews the chart and hospital records and often consults a nurse or physician to confirm that the claims have merit.
2. **Certificate of merit.** For malpractice claims, the lawyer must certify that a physician has reviewed the case and that there is a reasonable basis for it.
   CPLR 3012-A
3. **The summons and complaint.** Filed on NYSCEF. The facility must then be formally served, generally within 120 days.
   CPLR 304, 306-B
4. **The answer.** The facility, through lawyers usually provided by its insurer, files an answer denying the claims and raising defenses.
5. **Early motions.** The facility may ask the court to send the case to arbitration, or to dismiss some claims. These are decided before the case moves forward.

Who is named

The defendant is usually the licensed operator of the nursing home, which is often a limited liability company with a different name from the one on the sign. Depending on the facts, related management companies, owners, staffing agencies, physicians or the hospital may also be named. Identifying the right parties is an important early task.

The bill of particulars

The facility will ask for a bill of particulars: a more detailed statement of the injuries, the failures alleged, and the damages claimed. A careful, specific bill shapes the rest of the case.

CPLR 3041–3044

> INSURANCE AND THE FACILITY'S LAWYERS
>
> Nursing homes are usually defended by lawyers chosen by their insurance company. Do not discuss the case with the facility's staff, administrators or insurers once a claim is being considered. Refer any calls to your lawyer.

CHAPTER 10 · DISCOVERY

Discovery: getting the facts

Discovery is the stage when each side must share its information. In a nursing home case it is usually the longest part of the lawsuit, and the most important.

The preliminary conference

Soon after the case begins, the court holds a preliminary conference and issues a scheduling order setting deadlines for records, depositions and experts.

22 NYCRR § 202.12

What the family's lawyer asks the facility for

- ☐ The complete chart, including electronic audit trails
- ☐ Minimum Data Set (MDS) assessments and care plans
- ☐ Turning, skin check and ADL flow sheets
- ☐ Medication and treatment records
- ☐ Staffing schedules, assignment sheets and time records
- ☐ Federal staffing data and census reports
- ☐ Incident and accident reports
- ☐ Policies and procedures
- ☐ Training and personnel files of key staff
- ☐ State survey reports and plans of correction
- ☐ Video, call-bell and door alarm data
- ☐ Communications with the family and physicians

What the facility asks the family for

The facility's lawyers will ask for authorizations to obtain the resident's medical records from other providers, insurance and Medicare information, and for the family's photographs and notes. Expect questions about the resident's health before admission.

What is protected

New York law protects certain internal quality assurance materials from disclosure, to encourage facilities to review their own mistakes. Ordinary business records, including many incident reports and the chart itself, are generally not protected. Disputes over what must be produced are decided by the judge.

PUB. HEALTH LAW § 2805-M; EDUC. LAW § 6527

> Gaps in the records matter. A turning schedule with missing entries, or staffing that fell short of the care plan, can tell the story as clearly as any witness.

CHAPTER 11 · TESTIMONY

Depositions

A deposition, called an examination before trial in New York, is sworn testimony given in a conference room or by video, with a court reporter. Both sides take depositions.



The Court of Appeals hears argument. Photo: Tracy Collins, CC BY-SA 2.0, cropped

Who is questioned

The family's lawyer usually questions the aides and nurses who cared for the resident, the director of nursing, the administrator, and sometimes the medical director. Their answers are compared with the records.

The facility's lawyer usually questions the resident if able, and one or two family members, most often the person who visited most and the estate's representative.

If you are deposed

Do

- Meet with your lawyer beforehand to prepare
- Review your notes, photographs and the timeline
- Listen to each question and pause before answering
- Answer only the question asked, truthfully
- Say "I don't know" or "I don't remember" when that is the truth
- Ask for a break when you need one

Don't

- Guess or estimate unless asked to
- Volunteer information or argue with the lawyer
- Bring documents your lawyer has not reviewed
- Exaggerate; small inaccuracies can be used to attack credibility
- Post about the case or the deposition on social media

Depositions of family members usually take a few hours. Your lawyer will be beside you, may object to improper questions, and can ask questions at the end to clarify your answers.

CPLR 3106–3117; 22 NYCRR PART 221

Experts, motions and the timeline

Experts

Nursing home cases almost always need experts: a nurse or nursing administrator to explain the standard of care, and a physician to explain how the failures caused the injuries or death. Experts review the records and testimony and may testify at trial. Each side must disclose its trial experts and the substance of their opinions before trial.

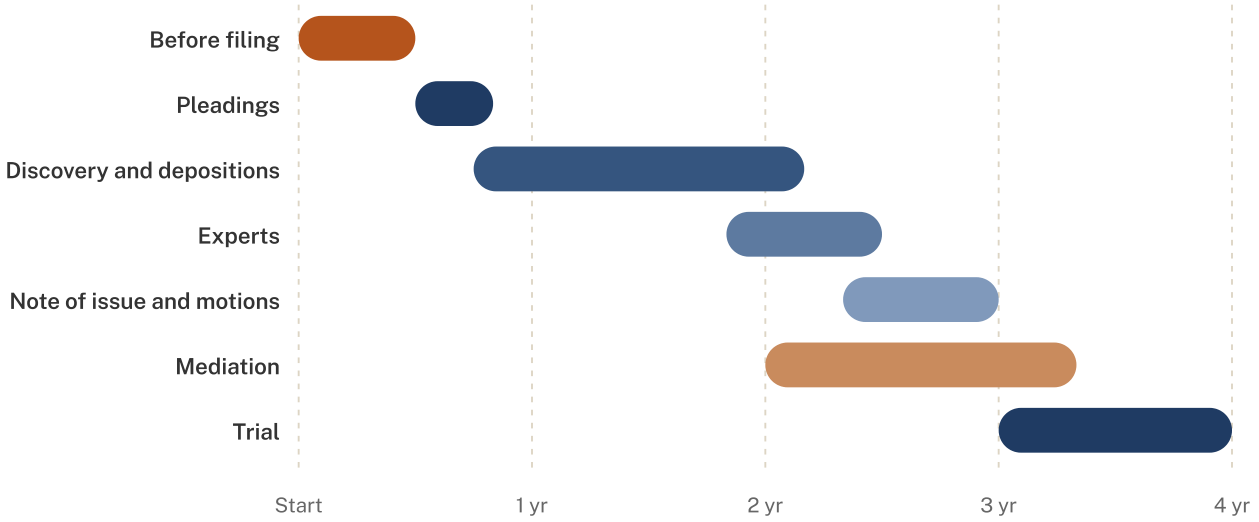
CPLR 3101(D)(1)(I)

Note of issue and summary judgment

When discovery is complete, the family's lawyer files a note of issue, placing the case on the trial calendar. Either side may then ask the judge for summary judgment, a decision without a trial, generally within 120 days. The party asking must first show that there are no factual disputes requiring a trial; if it does, the other side must come forward with evidence, such as an expert's affirmation, that shows a real dispute.

CPLR 3212; ZUCKERMAN V. CITY OF NEW YORK, 49 N.Y.2D 557 (1980); BRILL V. CITY OF NEW YORK, 2 N.Y.3D 648 (2004)

A realistic timeline



An illustrative timeline. The stages overlap, and the length depends on the county, the court's calendar and the complexity of the case.

Delays commonly come from disputes over records, scheduling depositions of staff who have left the facility, appointing an estate representative, and motions. Most cases resolve at some point along this timeline without a trial.



Court of Appeals Hall, Albany. Photo: Beyond My Ken, CC BY-SA 4.0, cropped

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PART 3

How cases resolve

Mediation and settlement, the court approvals settlements often need, how Medicare and Medicaid are repaid, and what happens if a case goes to trial and appeal.

13 Mediation and settlement

14 Court approval and the estate

15 Liens: paying back Medicare and Medicaid

16 Trial and appeal

CHAPTER 13 · RESOLUTION

Mediation and settlement

Most nursing home cases settle. Settlement can happen at any time, but it often follows depositions and expert review, when both sides understand the strengths and weaknesses of the case.

Mediation

In mediation, a neutral mediator, often a retired judge, meets with both sides to help them reach an agreement. It is confidential and voluntary: nobody can be forced to settle. Families usually attend, in person or by video, and have the chance to be heard.

How a case is valued

There is no formula. Lawyers and insurers consider:



The injuries

Their severity and duration, and the pain and suffering involved



The evidence

How clearly the records and witnesses show the failures



The resident

Age, health before the injury, and the impact on daily life



The venue

Where the case would be tried and how juries there tend to decide



The defenses

Arguments about causation, preexisting conditions, and avoidability



Insurance

The facility's coverage and the potential for punitive damages

The settlement agreement

A settlement is documented in a written release. Read it with your lawyer before signing. Common terms include who is released, whether the amount is confidential, how liens will be resolved, and when payment will be made.

> **YOUR DECISION**
>
> Whether to settle, and for how much, is the client's decision, not the lawyer's. A good lawyer will give you a candid recommendation and explain the risks of going forward and of accepting.

Court approval and the estate

Many nursing home settlements cannot be finalized until a court approves them. The approval protects residents who cannot protect themselves and the family members entitled to share.

A living resident who lacks capacity

If a guardian or other representative is acting for the resident, the settlement must be approved by the court in a compromise proceeding. The court reviews the amount, the fee and expenses, and how the money will be held and used for the resident.

CPLR 1207–1208

An estate

When the resident has died, the settlement must be approved by the Surrogate's Court or the Supreme Court, and the amount must be divided between the two claims:

SURVIVAL CLAIM

Becomes part of the estate

Distributed under the will or intestacy law, after the estate's debts and expenses. It may be reachable by estate creditors, including Medicaid estate recovery.

WRONGFUL DEATH CLAIM

Goes to the family

Distributed to the family members the statute names, in proportion to their financial loss. It is not an estate asset and is generally protected from estate creditors.

EPTL §§ 5-4.4, 5-4.6, 11-3.2

How the settlement is divided between the two claims has real consequences for who receives the money, which creditors can reach it, and the taxes that may apply. The court decides, based on the evidence, after notice to the family members involved.

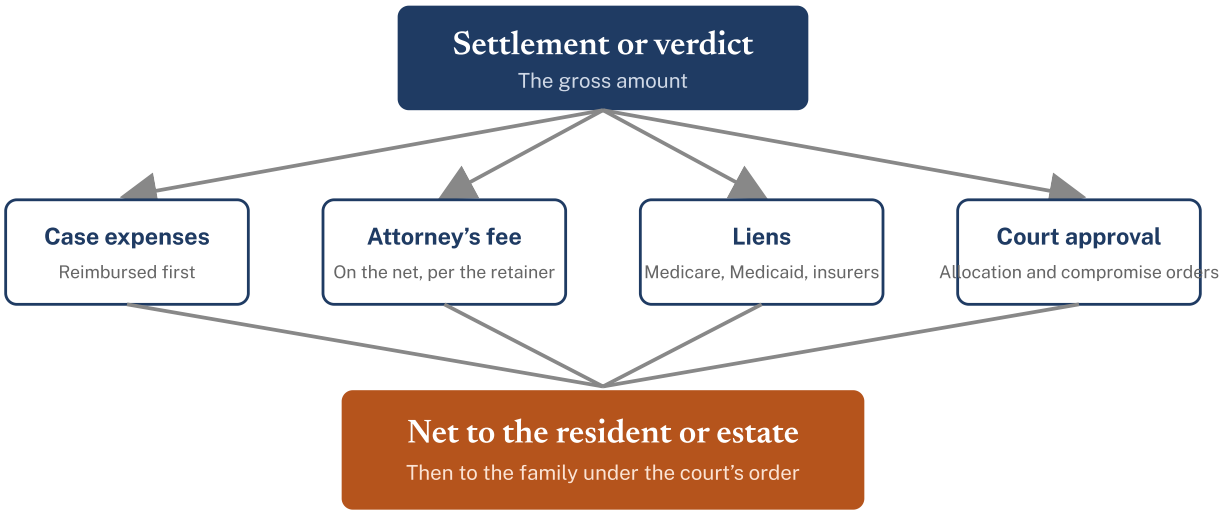
Taxes

Compensatory damages for physical injuries are generally not taxable income under federal law. Punitive damages and interest generally are. Ask a tax adviser about your situation.

26 U.S.C. § 104(A)(2)

Liens: paying back Medicare and Medicaid

If Medicare, Medicaid or a private insurer paid for treatment of the injuries, it may have a right to be repaid from the recovery. These claims are called liens, and they must be resolved before the money is distributed.



How a recovery is typically distributed. The order and amounts depend on the retainer, the liens and any court order.

MEDICARE

Must be repaid

Federal law makes Medicare a secondary payer. The lawyer reports the case to Medicare, obtains a list of the payments Medicare made for injury-related care, disputes unrelated charges, and repays the final amount. Medicare's demand is reduced to account for the cost of obtaining the recovery.

42 U.S.C. § 1395Y(B)(2)

MEDICAID

Limited to medical costs

Medicaid can recover its payments only from the part of a settlement that represents medical expenses, not from pain and suffering. The U.S. Supreme Court has confirmed these limits in a series of decisions.

SOC. SERV. LAW § 104-B; ARKANSAS DEP'T OF HEALTH & HUMAN SERVS. V. AHLBORN, 547 U.S. 268 (2006); GALLARDO V. MARSTILLER, 596 U.S. 420 (2022)

Medicaid estate recovery

Separately, New York can seek repayment of Medicaid benefits from the estate of a deceased recipient who was 55 or older, or who was permanently institutionalized. Wrongful death proceeds go to the family, not the estate, and are generally not reachable. Survival proceeds are part of the estate and may be.

SOC. SERV. LAW § 369

WHY LIEN WORK MATTERS

Careful lien resolution can make a meaningful difference in what a family receives. Ask your lawyer to explain each lien, how it was negotiated, and how it appears on the closing statement.

CHAPTER 16 · TRIAL

Trial and appeal



Historic Nassau County Courthouse, Garden City. Photo: DanTD, CC BY-SA 3.0, cropped

A small share of cases go to trial. When they do, a jury of ordinary citizens hears the evidence and decides whether the facility is responsible and, if so, the amount of damages.

What happens at trial

1. **Jury selection.** The lawyers question potential jurors and select six, plus alternates. In New York civil cases, five of six jurors must agree on a verdict.
2. **Opening statements.** Each side previews its evidence.
3. **The family's case.** Records, staff testimony, family witnesses and experts.
4. **The facility's case.** Its staff and experts respond.
5. **Closing arguments and the judge's instructions.**
6. **The verdict.** The jury answers written questions on responsibility and damages.

CPLR 4104, 4113

Trials of nursing home cases usually last one to three weeks. Family members who will testify meet with the lawyers beforehand to prepare.

After the verdict

The losing side may ask the trial judge to set aside the verdict or to adjust the damages. Either side may appeal to the Appellate Division, which reviews the trial record for legal errors and can reduce or increase damages that deviate materially from reasonable compensation. Some cases go further, to the Court of Appeals in Albany.

CPLR 4404, 5501(C)

> THE TRADE-OFF
>
> Trial carries real risk for both sides: the jury may award more or less than a settlement offer, or nothing at all, and appeals add time. That uncertainty is why most cases settle.



Photo: Rhoda Baer, National Cancer Institute, public domain

PART 4

Your family's role

Practical guidance while a case is pending, answers to the questions families ask most often, checklists, and a glossary of the terms you will hear.

17 Living with a case

18 Frequently asked questions

19 Checklists and glossary

CHAPTER 17 · DAY TO DAY

Living with a case

If your loved one still lives at the facility

Many families worry about retaliation. Residents have the right to voice grievances without reprisal, and a facility cannot discharge a resident because a family complained or sued. Transfers and discharges are permitted only for limited reasons, usually with 30 days' written notice and a right to appeal.

42 C.F.R. §§ 483.10(J), 483.15(C)

Keep visiting, keep notes, and keep reporting concerns to the facility and, when needed, to the Department of Health at 1-888-201-4563 or the Long Term Care Ombudsman Program at 1-855-582-6769. A lawsuit does not change the facility's duty to provide good care. If moving your loved one is the right choice, your lawyer can help make sure the records follow.

Do

- Keep all records, photographs and notes in one place
- Tell your lawyer about new injuries, hospitalizations or calls from the facility
- Keep track of out-of-pocket expenses, including funeral costs
- Tell your lawyer if you move or change phone numbers
- Ask questions whenever something is unclear

Don't

- Post about the case, the facility or the injuries on social media
- Give recorded statements to the facility or its insurer
- Sign anything from the facility about the incident without advice
- Throw away cards, letters, bills or clothing related to the injury
- Discuss the case with facility staff

Taking care of yourselves

A lawsuit can bring back painful memories, and the process is slow. It is normal to feel frustrated or angry. Lean on each other, keep your lawyer informed about what you need, and consider support from a counselor, clergy or a caregiver support group. Your lawyer should give you regular updates; you are entitled to them.

CHAPTER 18 · QUESTIONS

Frequently asked questions

Will suing the nursing home cost us anything up front?

Usually not. Most nursing home lawyers work on a contingency fee and advance case expenses, which are repaid from any recovery. Read the retainer agreement for the details.

Is a lawsuit worth it if our loved one was elderly or very ill?

Age and illness affect damages, but they do not excuse neglect. New York's residents' rights statute exists precisely to protect frail residents.

Our mother signed an arbitration agreement. Do we still have a case?

Probably, but it may be heard by an arbitrator instead of a jury. Whether the agreement is valid and enforceable depends on who signed it, when, and whether it meets federal requirements.

Can we sue if the resident is still alive?

Yes. The resident brings the case, or a guardian or authorized agent acts for them. A lawsuit does not require the resident to leave the facility.

How long will the case take?

Often two to four years from filing, sometimes less if the case settles early, and longer if it goes to trial and appeal.

Will we have to go to court?

Most families attend a deposition and mediation. Court appearances are uncommon unless the case goes to trial.

Who receives the money if our father has died?

It depends on how the recovery is divided. Wrongful death proceeds go to the family members the statute names; survival proceeds pass through the estate.

Will a settlement affect Medicaid?

Damages under Public Health Law § 2801-d are not counted for Medicaid eligibility, but other proceeds may be. Liens and estate recovery must also be addressed. Ask your lawyer to plan for this before the case resolves.

Can the facility's owners be held responsible?

Sometimes. The licensed operator is the usual defendant, but related management companies and others may share responsibility depending on the facts.

What if the State already investigated and found nothing?

A state survey does not decide a lawsuit. Inspectors review limited samples on limited dates; a lawsuit allows full access to the records and sworn testimony.

CHAPTER 19 · TEAR-OUT CHECKLIST

Documents to gather and keep

Print this page and check off each item as you find it. Give copies, not originals, to your lawyer unless asked.

About the resident

- ☐ Full legal name, date of birth, Medicare and insurance cards (copies)
- ☐ Health care proxy, power of attorney, guardianship papers
- ☐ Will, and any trust documents
- ☐ Death certificate, if applicable
- ☐ List of doctors, hospitals and pharmacies

From the nursing home

- ☐ Complete admission packet, including any arbitration agreement
- ☐ Care plan meeting notes and invitations
- ☐ Letters, bills and statements
- ☐ Discharge or transfer notices
- ☐ Any incident notice the family received

Hospitals and providers

- ☐ Emergency room and hospital discharge papers
- ☐ Wound care, surgery and rehabilitation records
- ☐ Bills, explanations of benefits and Medicare summary notices

Your own records

- ☐ Photographs and videos, with dates
- ☐ Visit logs, diaries and calendars
- ☐ Emails, texts and voicemails with the facility
- ☐ Names and contact information of witnesses
- ☐ Complaints filed with the Department of Health or the Ombudsman, and any responses
- ☐ Receipts for out-of-pocket and funeral expenses

ALSO IN THIS SERIES

The Family Guide to Bedsores · *The Family Guide to Surrogate's Court* · *What a New York Nursing Home Must Report, and How Fast* · Regional guides to choosing a nursing home. All free at rightsforvictims.com.

Glossary

Affirmation
A sworn written statement, often by an expert, used in motions

Answer
The facility's written response to the complaint

Arbitration
A private process in which an arbitrator, not a jury, decides the case

Bill of particulars
A detailed statement of the claims, injuries and damages

Certificate of merit
A lawyer's certification, after consulting a physician, that a malpractice claim has a reasonable basis

Complaint
The document that starts the lawsuit and states the claims

Compromise order
A court order approving a settlement for a person who cannot act for themselves, or for an estate

Contingency fee
A fee paid as a percentage of the recovery, and only if there is one

Deposition (EBT)
Sworn questioning of a witness before trial

Discovery
The exchange of records and information between the sides

Distributee
A family member entitled to inherit under New York law

Letters
The Surrogate's Court document authorizing an executor or administrator to act

Lien
A right to be repaid from the recovery, such as Medicare's

MDS
Minimum Data Set: the federally required resident assessment

Mediation
A confidential negotiation led by a neutral mediator

Note of issue
The filing that places a case on the trial calendar

NYSCEF
New York's electronic court filing system

Preservation letter
A demand that a party keep evidence relevant to a claim

Punitive damages
Damages to punish willful or reckless misconduct

Spoliation
The loss or destruction of evidence, which a court may penalize

Summary judgment
A decision on some or all claims without a trial

Survival claim
The resident's own claims, brought by the estate after death

Wrongful death claim
The family's claim for financial losses caused by a death

ABOUT THIS GUIDE

The New York Nursing Home Resource Center

rightsforvictims.com is a free resource for New York families: ratings, inspection results and federal penalties for every nursing home in the State, regional guides to choosing a facility, and family guides like this one.

This guide is sponsored by **Leitner Warywoda PLLC**, New York trial lawyers who represent nursing home residents and families in cases of neglect, abuse, pressure injuries, falls and wrongful death.

QUESTIONS ABOUT A NURSING HOME CASE?

Leitner Warywoda PLLC · 44 Elm Street, Suite 19, Huntington, NY 11743
(631) 240-4390 · nylawinjury.com
Free consultation. No fee unless there is a recovery.

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Sources. N.Y. Public Health Law §§ 18, 2801-d, 2803-c, 2805-m; CPLR 208, 214, 214-a, 304, 306-b, 503, 1015, 1021, 1207–1208, 3012-a, 3041–3044, 3101(d), 3106–3117, 3212, 4104, 4113, 4404, 5501(c); EPTL 5-4.1, 5-4.4, 5-4.6, 11-3.2; SCPA 702; Mental Hygiene Law art. 81; General Obligations Law § 5-1502H; General Municipal Law §§ 50-e, 50-i; Court of Claims Act § 10; Judiciary Law § 474-a; Social Services Law §§ 104-b, 369; Education Law § 6527; 22 NYCRR Parts 202, 221, 1210, 1215, 691; 42 C.F.R. Part 483; 42 U.S.C. § 1395y(b); 28 U.S.C. § 2401(b); 26 U.S.C. § 104(a)(2); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980); Brill v. City of New York, 2 N.Y.3d 648 (2004); Arkansas Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268 (2006); Gallardo v. Marstiller, 596 U.S. 420 (2022).

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