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Potential Liability of Healthcare Facilities Stemming from COVID-19

Background

Since the onset of COVID-19, healthcare facilities and providers have been subject to a range of litigation stemming from COVID-related deaths and injuries, and additional lawsuits seem likely. To date, there have been two primary categories of civil lawsuits: those brought by patients (or family members of patients) at healthcare facilities, and those brought by employees (or family members of employees) at healthcare facilities. There have also been criminal cases.

Cases Brought by Patients. As to the first category, plaintiffs have brought suits alleging that the healthcare facility or provider is liable for COVID-related illness or death of patients based on, *inter alia*, failure to implement or enforce mask or social distancing requirements, failure to implement sufficient hygiene and/or disinfection routines, failure to follow CDC or WHO guidelines for reducing risk of infection, and failure to implement reasonable policies regarding the employment of sick healthcare providers (*e.g.*, allowing healthcare providers to work while exhibiting symptoms of COVID-19.

For instance, in Virginia, the administrator of an estate brought a wrongful death and survivor action against a nursing home for the COVID-related death of a resident in the facility.[1] There, the plaintiff alleged that the facility was responsible for the decedent's death because, among other things, the facility (i) directed healthcare providers who had direct patient contact to not wear a mask, even when exhibiting symptoms and even after the WHO guidelines advised individuals to wear a mask if coughing or sneezing, and (ii) ordered healthcare workers to come to work even when symptomatic, as long as they did not have a fever.

Relatedly, in Seattle, the administrator of an estate brought a similar action against a nursing care facility (and individual employees there) for the COVID-related death of a resident in the facility.[2] There, the plaintiff alleged that the facility suspected its first case of COVID-19 on February 19, 2020 but did not institute a quarantine until early March and, even when the facility began discouraging visitors due to a spike in illness, it continued to hold events for residents and admit new patients. In addition to wrongful death and survival claims, this suit alleged violations of Washington state statutes (the Abuse of Vulnerable Adults Act and the Consumer Protection Act). The consumer protection claim alleged that the nursing home failed to abide by representations it had made regarding the provision of care and risk-mitigation practices for infectious diseases (such as holding quality-assurance and performance improvement meetings, which are intended to flag disease outbreaks). The plaintiff also alleged a fraud, fraudulent concealment, and/or negligent misrepresentation claim,

[1] *Karen Webb v. Patrick Henry Hospital, Inc.*, Case No. CL2004931M-03 (Va. Cir. Ct. Newport News).

[2] *Soper v. Life Care Centers of America*, No. 20-2-15915-8 SEA (Wa. King Cty. Super. Ct.).

based on the nursing home's alleged concealment of facts relating to the threat to the decedent's health and safety (such as previous deaths resulting from COVID-19 at the facility).

In a California case, a patient, through her daughter as a guardian ad litem, at an assistant living facility brought suit against the facility, its parent company, its CEO, and certified administrator.[3] The patient contracted COVID-19 while a resident at the facility; she alleged that, although she has recovered to some extent, she continues to suffer long-term effects of COVID. The basis for the complaint was the facility's decision to allow a patient to enter the facility on March 19 (four days after all family visitors were barred from entry for the safety of residents). The new patient (referred to as "Patient Zero") had arrived from New York via a commercial plane, and other family members of "Patient Zero" who had flown from London were also permitted to enter the facility. The complaint alleged that there were no documented cases of COVID-19 in the facility prior to Patient Zero's arrival, and that Patient Zero was admitted without any quarantine or testing. In the complaint, the plaintiff emphasized that the harm was "entirely foreseeable" because the facility knew about the risks, and had implemented safety precautions as to existing residents, but ignored them as to the new resident. The complaint also alleged that the facility "intentionally concealed and made misrepresentations to residents and their families regarding their loved one's exposure to the virus, all the while failing to implement proper isolation and screening procedures to protect residents from cross-contamination."[4]

Cases Brought by Healthcare Workers. Another category of cases are those brought by healthcare workers who have been exposed to COVID-19 at work. These plaintiffs have brought claims against their employers for failing to administer sufficient safety protocols, requiring employees to work with insufficient personal protective equipment ("PPE"), failing to adequately notify employees about exposure to COVID-19, and requiring employees to work when feeling sick or exhibiting symptoms.

For example, in California, healthcare workers or family members of healthcare workers brought suit against HCA Healthcare, a hospital it operates, and individual defendants managing the hospital, alleging that they were responsible for recklessly facilitating the spread of COVID-19. Specifically, the complaint alleged that the defendants forced employees to work without adequate personal protective equipment; required employees to work despite having COVID-19 symptoms; pressured employees not to take precautionary measures against COVID-19 exposure, such as sanitization, if they hindered efficiency; ignored worker complaints about lack of PPE; had inadequate contact tracing, and pressured workers to ignore workplace-safety measures.[5]

Criminal Cases. In addition to civil cases, there has been at least one criminal case as well. On September 24, 2020 state prosecutors in Massachusetts brought criminal charges against two

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[3] *Clack v. Silverado Senior Living Inc. et al.*, No. 20STCV47881 (Ca. Super. Ct. L.A. Cty).

[4] A number of other lawsuits have been filed alleging similar facts. For instance, the Life Care Center of Farmington, a nursing home in Farmington, New Mexico, is reportedly facing 24 wrongful death lawsuits from the estates of residents who contracted COVID-19 at the center. *See* One Farmington nursing home records 48 COVID deaths, Albuquerque Journal, Dec. 25, 2020, *available at* https://www.abqjournal.com/1530108/at-one-farmington-nursing-home-48-covid-deaths.html.

[5] *SEIU, et al. v. HCA Healthcare, et. al*, No. RIC2003273 ((Ca. Super. Ct. Riverside. Cty).

former leaders of a veterans' home (Holyoke Soldiers' Home) for criminal neglect in connection with a COVID outbreak that led to the death of 76 veterans.[6] The defendants were the superintendent and medical director of the facility, and each was indicted on two separate criminal neglect charges: (i) a caretaker who "wantonly or recklessly" commits or permits bodily injury to an elderly or disabled person, and (ii) abuse, neglect or mistreatment of an older or disabled person. Prosecutors are focused on a series of errors in protecting residents, as outlined by a 174-page report issued by investigators before criminal charges were filed. Among the more notable errors was the facility's decision, due to staffing shortages, to combine groups of dementia patients. Specifically, COVID-positive and seemingly symptomatic patients (though not testing positive) were placed 6 to a room (the room was meant for 4 people) and 9 asymptomatic patients were placed within a few feet of each other in a dining room next to the rooms with the infected patients. One employee told investigators the decision to combine the wards in this way and then group people without regard to their COVID status was "the most insane thing I ever saw in my entire life." Another said it "felt like it was moving the concentration camp, we were moving these unknowing veterans off to die."[7]

This is the first known criminal case against a nursing home facility relating to COVID-19 in the United States, though there is some indication that the Massachusetts AG's office is also investigating other long term care facilities and some legal pundits expect other, similar cases elsewhere—particularly with facilities that saw higher-than-average infection or fatality rates.[8]

What Claims Could Be Brought?

The specific claims available depend on the facts of the case and may vary from state to state, but a number of claims are possible:

- **Negligence (including wrongful death and survival actions)**. State laws allow plaintiffs to recover when the negligent or careless action of another person breaches a duty owed to the plaintiff and causes injury to the plaintiff. When the defendant's negligence results in death, states allow the decedent's representative to recover through wrongful death or survival actions. For example, the plaintiffs in *Clack*, *Soper*, and *HCA Healthcare* brought negligence claims under California law, and the plaintiff in the *Webb* case in Virginia brought wrongful death and survival claims—each alleging that the negligence of the defendants caused their COVID-related injuries.

- **Intentional or negligent infliction of emotional distress.** States allow recovery for emotional harm in additional to physical injuries For instance, one of the plaintiffs in the *HCA Healthcare* lawsuit alleged that the defendant's conduct caused serious emotional

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[6] *Mass. v. Bennett Walsh and David Clinton.*

[7] "Two Charged in Coronavirus Outbreak at Veterans' Home That Left 76 Dead," New York Times, September 25, 2020, *available at* https://www.nytimes.com/2020/09/25/us/veterans-home-holyoke-covid.html.

[8] Baker & Hostetler LLP, "The First of Many Expected COVID-19 Criminal Cases Against Nursing Home Operators," *available at* https://www.lexology.com/library/detail.aspx?g=a6e9ef62-567d-4587-b840-791de4d9986a.

distress. Claims for intentional infliction of emotional distress may also be possible, although such claims require proof of a higher standard of culpability.

- **Public nuisance**. State laws also allow recovery where a defendant creates a public nuisance.[9] Typically, plaintiffs must demonstrate special damages in order to recover (*i.e.*, an injury separate and distinct from the injury suffered by the public generally). As an example, the plaintiffs in the *HCA Healthcare* lawsuit in California brought a public nuisance claim alleging the defendants created a public health emergency by failing to take sufficient measures to curb the spread of COVID-19.

- **Unfair business practices or unfair employment practices.** States also allow recovery for injuries suffered as a result of unfair business or employment practices. The plaintiffs in the *HCA Healthcare* lawsuit in California brought a claim under California statutes prohibiting unfair and unlawful business practices alleging, *inter alia*, that the defendants' practices of pressuring employees with symptoms to return to work, directing employees to ignore safety precautions, and failing to provide adequate PPE comprised unfair and unlawful business practices. Similarly, the plaintiff in the *Soper* action in Seattle against Life Care alleged that the defendants' failure to abide by representations they made regarding the provision of healthcare services and risk-mitigation practices (*e.g.*, that they would utilize best practices to identify, mitigate the risk of, and respond to infectious diseases) comprised unfair or deceptive acts that violated the Washington Consumer Protection Act.

- **Elder abuse and neglect**. Many states have specifically enacted laws protecting elderly citizens and/or that set specific standards for residential care facilities that house the elderly. Potential plaintiffs are likely to bring suit alleging violations of these statutes or regulations where applicable, in lawsuits against nursing home facilities. As an example, the plaintiff in the *Clack* action in California brought claims alleging elder abuse and neglect, based on the defendant's failure to comply with duties imposed by state law. Similarly, the plaintiff in *Soper* alleged a violation of the Abuse of Vulnerable Adults Act, a state statute.

- **Fraud or fraudulent misrepresentation.** Plaintiffs may also bring claims alleging fraud or fraudulent misrepresentation (*e.g.*, concealing information about COVID outbreaks from patients/residents). The plaintiff in the *Soper* action against Life Care brought a fraud claim, alleging that the Defendants concealed, suppressed, and failed to disclose material facts relating to the COVID-19 outbreak at the Life Care Center.

- **Criminal charges**. As noted above, state prosecutors in Massachusetts have brought criminal neglect charges essentially alleging that the defendants' conduct at a veteran's

[9] As an example, under New York law, "[a] public nuisance 'consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons.'" *Wheeler v. Lebanon Valley Auto Racing Corp.*, 303 A.D.2d 791, 792 (2003).

home facility caused the deaths of at least 76 residents. Other states have announced investigations of nursing homes or other healthcare facilities that have had a large number of COVID-related deaths (*e.g.*, New Jersey, Connecticut).[10] DOJ has also requested data from states relating to deaths in nursing homes (from states that issued orders requiring nursing homes to admit patients irrespective of COVID-19 status), and DOJ said it may open investigations.[11]

What are the Possible Legal Defenses?

A defendant facing a lawsuit related to COVID-19 injuries may be able to raise a number of defenses, depending on the specific facts of the case. Some possible defenses include:

- **No causation.** A defendant may be able to argue that other intervening events caused the injury and/or that the plaintiff cannot demonstrate that the hospital or healthcare facility's actions were the "but-for" cause of the plaintiff's injury. Especially since the coronavirus is highly contagious and cannot be physically seen, a patient with COVID-19 may have difficulty proving it was the defendant's conduct that caused the infection.

- **Assumption of risk by plaintiff.** A defendant could argue that the plaintiff was aware of the risk and assumed the risk (*e.g.*, that a healthcare provider was aware that coming to work or going to hospital would cause exposure to the virus).

- **Contributory negligence.** When applicable, a defendant could argue that the plaintiff refused to wear a mask or abide by social-distance precautions and thus was partially (or entirely) responsible for his or her injuries.

- **Reasonable reliance on or compliance with applicable regulations.** A defendant could argue that its conduct was reasonable because it relied reasonably on guidelines issued by the Centers for Disease Control and Prevention or the World Health Organization, or guidelines issued by state or local governments.

- **Statute of Limitations.** Although the statute of limitations for torts typically range for at least a few years, a proposed federal statute would limit the statute of limitations period to one year from the date of exposure to the virus. Depending on when the injury was

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[10] *See, e.g.*, "Misconduct Reporting Form," New Jersey COVID-19 Information Hub, *available at* https://covid19.nj.gov/forms/ltc ("On April 16, 2020, New Jersey Attorney General Gurbir S. Grewal announced that the Office of the Attorney General had opened a statewide investigation into the high number of deaths at New Jersey's long-term care facilities and nursing homes (LTCs) during the COVID-19 pandemic. The investigation will determine whether any individuals or entities broke the law and should face civil or criminal penalties for their actions (or lack thereof) during the outbreak."); "How Nursing Homes Can Defend COVID-19 Criminal Charges," Law360, Oct. 13, 2020, *available at* https://www.law360.com/articles/1317969/how-nursing-homes-can-defend-covid-19-criminal-charges.

[11] "Department of Justice Requesting Data from Governors of States that Issued COVID-19 Orders that May Have Resulted in Deaths of Elderly Nursing Home Residents," Department of Justice, Aug. 26, 2020, *available at* https://www.justice.gov/opa/pr/department-justice-requesting-data-governors-states-issued-covid-19-orders-may-have-resulted.

suffered and depending on whether the statute is enacted (which appears increasingly unlikely), some plaintiffs may find their claims time-barred.

- **No intent to deceive.** For fraud claims (which require proof of an intent to deceive or mislead), the defendant may be able to argue that there is no evidence of such intentional conduct.

- **Abrogation by workers' compensation laws.** Many states have enacted workers' compensation laws that allow employees injured during the workplace to recover under a separate workers' compensation scheme; these laws typically make workers' compensation the exclusive remedy for workplace injuries absent a showing of gross negligence or wanton or willful misconduct. Thus, for cases brought by employees against their employers for COVID-related injuries, workers' compensation laws may abrogate traditional common law tort actions.[12]

- **Immunity under state or federal legislation.** As discussed further in Section IV, numerous states have enacted legislation providing broad immunity for healthcare providers treating COVID-19 patients absent egregious circumstances, such as gross negligence.

Do Any Federal or State Statutes Provide Immunity Against COVID-Related Legal Claims?

Both federal and state governments have responded to the potential onslaught of COVID-related litigation by enacting legislation or at least proposing legislation. While a comprehensive federal immunity statute has not been passed (and seems increasingly unlikely), numerous states have passed COVID-immunity laws.

State Immunity Statutes. Many states have enacted statutes that limit liability of healthcare providers for deaths relating to COVID-19. Those statutes remain critical in the absence of more comprehensive federal immunity. These state laws vary in terms of who they cover, the scope of claims they protect against, and how long the immunity lasts. As a general matter, however, they provide for civil immunity except in cases of gross negligence or intentional conduct.

Examples of the varying approaches states have taken are listed below:[13]

- **California.** California did not enact a separate law, but Governor Newsom declared a state of emergency on March 4, 2020. Based on this emergency proclamation, under

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[12] *See, e.g.*, "COVID Wrongful Death Suits Test Employer Liability to Families," Bloomberg Law, June 25, 2020, *available at* https://news.bloomberglaw.com/safety/covid-wrongful-death-suits-test-employer-liability-to-families.

[13] A comprehensive database of state action on COVID-19 is maintained by the National Conference of State Legislatures. *See* "State Action on Coronavirus (COVID-19), *available at* https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx.

California Government Code § 8659, hospitals and doctors are immune from liability except for willful conduct.

- **New York.** New York enacted legislation that gives broad immunity to healthcare facilities except for conduct "constituting willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm by the health care facility or health care professional providing health care services, provided, however, that acts, omissions or decisions resulting from a resource or staffing shortage shall not be considered to be willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm." More recently, New York enacted a second law rolling back some of the broad protections its April 2020 laws provided. Now, immunity only applies to cases involving COVID-19 treatment, whereas previously it applied to medical care not directly related to COVID-19 so long as the case was impacted by the pandemic.[14]

- **Massachusetts.** Massachusetts legislators passed bill S. 2640, which was signed into law in April 2020. This statute provides liability protection for health care workers and facilities, except in cases of gross negligence, recklessness, or conduct with an intent to harm or discriminate.[15]

- **Kentucky.** Kentucky passed Senate Bill 150 in March 2020, which provides immunity from civil liability for negligence claims for health care providers who render care in good faith to a COVID-19 patient and acts "as an ordinary, reasonable, and prudent health care provider would have acted under the same or similar circumstances."

- **Georgia**. Georgia signed Senate Bill 359 into law in August 2020, which similarly provides broad civil immunity for claims related to the spread of COVID-19, except in limited situations involving gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm.[16]

- **Iowa.** Iowa enacted Senate bill 2338 in June 2020, which provides immunity broadly for causing or contributing to death or injury relating to COVID-19 as a result of the health care provider's acts or omissions providing health care, except for "recklessness or willful misconduct."

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[14] "New York Eliminates Some Liability Protections for Health Care Facilities and Professionals Relating to the COVID-19 Emergency," Seyfarth, Aug. 11, 2020, *available at* https://www.seyfarth.com/news-insights/new-york-eliminates-some-liability-protections-for-health-care-facilities-and-professionals-relating-to-the-covid-19-emergency.html.

[15] "Massachusetts Grants COVID-19 Healthcare Works Immunity from Civil Liability," Expert Institute, May 29, 2020, *available at* https://www.expertinstitute.com/resources/insights/massachusetts-grants-covid-19-healthcare-workers-immunity-from-civil-liability/.

[16] "Georgia Enacts COVID-19 Legal Immunity for Healthcare Providers, Businesses," JacksonLewis, Aug. 10, 2020, *available at* https://www.jacksonlewis.com/publication/georgia-enacts-covid-19-legal-immunity-healthcare-providers-businesses.

- **Mississippi**. Mississippi enacted Senate bill 3049 in July 2020, which provides immunity for acts or omissions while providing health care services related to COVID-19, unless the plaintiff can show by clear and convincing evidence that the defendant acted with actual malice or willful, intentional misconduct.[17]

- **Virginia**. Virginia HB 5059 was signed into law by Governor Northam on October 13, 2020. The law is retroactive to March 12 and states that assisted living facilities, hospices, adult day care centers and home care organizations cannot be held liable for COVID-related injury or death when a "lack of resources" due to COVID-19 render the provider "unable to provide the level or manner of care that otherwise would have been required."[18] Acts of either gross negligence or willful misconduct fall outside the scope of immunity provided by the law.

Some of these statutes also include "safe harbors" based on reasonable compliance with applicable guidance. For instance, the Iowa legislation includes a section that provides a person shall not be liable for civil damages arising out of injuries from COVID-19 "if the act or omission alleged to violate a duty of care was in substantial compliance or was consistent with any federal or state statute, regulation, order, or public health guidance related to COVID-19 that was applicable to the person or activity at issue at the time of the alleged exposure or potential exposure."

The upshot of these statutes is to remove negligence liability for defendants who may have caused injuries related to COVID-19. In states that have enacted such statutes, it would be difficult to bring a case against a healthcare facility absent egregious circumstances. Notably, the scope of each state's laws (or executive order) varies, and at times the laws leave clear ambiguity. For instance, Massachusetts offers immunity to treatment provided "in accordance with otherwise applicable law." In Kentucky, providers are immune from liability only if they have acted, "as an ordinary, reasonable, and prudent health care provider would have acted under the same or similar circumstances." And the Virginia law is limited on its face to situations where the alleged injury was caused by a "lack of resources."

Federal COVID-19 Immunity Statute. The status of federal immunity protections for healthcare providers from COVID-19-related legal claims remains in flux. Senate Republicans introduced the SAFE TO WORK ACT (the "Act") in July 2020, which would create a very broad liability shield for nearly all types of employers from COVID-19 related claims, including very broad protections for health care facilities and professions.[19] Specifically, the proposed legislation provides that "no health care provider shall be liable in a coronavirus-related medical liability action unless the plaintiff can prove by clear and convincing evidence—(1) gross negligence or willful misconduct by the health care provider; and (2) that the alleged harm, damage, breach, or tort resulting in the personal injury was directly caused by the alleged gross negligence or willful misconduct." The Act also specifically states that "acts, omissions, or decisions resulting from a resource or staffing shortage shall

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[17] Mississippi Enacts Broad Civil Immunity Protections for COVID-19 Emergency, Butler Snow, July 9, 2020, *available at* https://www.butlersnow.com/2020/07/mississippi-enacts-broad-civil-immunity-protections-for-covid-19-emergency/.

[18] Va. Ann. Stat. § 8.01-225.03.

[19] S. 4317, 116th Cong. § 142 (2020).

not be considered willful misconduct or gross negligence."[20] Notably, the immunity would be applicable in *any* legal proceeding, whether in state or federal court, and the Act would supersede and preempt any state law that provided lesser protections.[21]

Although Senate Republicans had indicated immunity protections for *all* employers must be included with any new COVID-19 stimulus package, Senate Democrats—who now control the Senate—had indicated that they will not pass a bill with broad immunity protections. Thus, it seems unlikely that such a bill will be enacted.[22]

PREP Act. A 2005 federal law, the Public Readiness and Emergency Preparedness Act (the "PREP Act"), enacted in the wake of an avian influenza outbreak, provides limited but noteworthy immunity as well. The PREP Act authorizes the Secretary of the Department of Health and Human Services ("HHS"), upon a finding of a public health emergency or the credible threat of one, to issue a declaration providing limited immunity from legal claims relating to the use of specifically enumerated "countermeasures."[23] The immunity does not extend to death or serious physical injury caused by willful misconduct. The Secretary issued a COVID-19 PREP Act Declaration on March 10, 2020, retroactive to February 4, 2020 and extending through October 1, 2024.

Covered countermeasures under the Declaration include any "antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID–19, or the transmission of SARS-CoV–2 or a virus mutating therefrom, or any device used in the administration of any such product, and all components and constituent materials of any such product." PREP Act immunity extends to "qualified persons" that prescribe, administer, or dispense covered countermeasures.[24] Qualified persons include licensed health care professionals and individuals authorized under state law to prescribe, administer, or dispense covered countermeasures, as well as their agents.[25]

Meaning of Gross Negligence or Willful Negligence. Most of the various state level laws or executive orders providing COVID-related immunity for healthcare facilities relate to only simple negligence, not gross or willful negligence.

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[20] *Id.*

[21] *Id.* at § 141.

[22] "Dems' Senate Win Sinks Insurers' Virus Liability Shield Hopes," Law360, Jan. 13, 2021, *available at* https://www.law360.com/articles/1323870/dems-senate-win-sinks-insurers-virus-liability-shield-hopes.

[23] "COVID-19 and PREP Act Immunity," National Law Review, Aug. 5, 2020, *available at* https://www.natlawreview.com/article/covid-19-and-prep-act-immunity

[24] "The PREP Act and COVID-10: Limiting Liability for Medical Countermeasures," Congressional Research Service, Dec. 21, 2020, *available at* https://crsreports.congress.gov/product/pdf/LSB/LSB10443#:~:text=On%20March%2010%2C%202020%2C%20the,and%20use%E2%80%9D%20of%20chttps://crsreports.congress.gov/product/pdf/LSB/LSB10443#:~:text=On%20March%2010%2C%202020%2C%20the,and%20use%E2%80%9D%20of%20covered%20countermeasuresovered%20countermeasures.

[25] *Id.*

The Virginia statute exemplifies this potential issue well, explicitly stating that it does *not* apply in such cases. While the Virginia statute does not define the various levels of negligence, its Supreme Court has defined "simple negligence" as the "failure to use the degree of care that an ordinarily prudent person would exercise under similar circumstances to avoid injury to another,"[26] and by contrast, defined "gross negligence" as "a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person. This requires a degree of negligence that would shock fair-minded persons, although demonstrating something less than willful recklessness."[27] Another Virginia Supreme Court opinion described gross negligence as "disregarding prudence to the level that safety of others is completely neglected."[28]

"The third level of negligent conduct is willful and wanton negligence. This conduct is defined as 'acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another.'"[29]

The Virginia Supreme Court's *Cowan v. Hospice Support Care, Inc.* case offers helpful examples in the context of a somewhat analogous immunity provided for charitable organizations (also covering simple negligence, but not gross or willful negligence). As set forth in that case, simple negligence might include a situation where "[e]mployees or volunteers, in carrying out their duties, may fail to understand or to adequately follow instructions of a supervisor, may exercise poor judgment, or may have a lapse in attention to an assigned task."[30] On the other hand, gross negligence and willful negligence "are characterized by conduct that represents an unusual and marked departure from the routine performance of a charity's activities."[31]

Other relevant states have similar definitions of gross negligence and willful misconduct. For instance, in New York, gross negligence "must smack of intentional wrongdoing or evince a reckless indifference to the rights of others."[32] "Stated differently, a party is grossly negligent when it fails 'to exercise even slight care' or 'slight diligence.'"[33]

One personal injury lawyer, commenting on the range of conduct that may constitute gross negligence, noted it would likely need to be on the order of "the doctor came in drunk . . . something

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[26] *Cowan v. Hospice Support Care, Inc.*, 603 S.E.2d 916, 918 (Va. 2004).

[27] *Id.*

[28] *Wilby v. Gostel*, 578 S.E.2d 796, 801 (Va. 2003).

[29] *Cowan v. Hospice Support Care, Inc.*, 603 at 918. (quoting *Etherton v. Doe*, 268 Va. 209, 213–14, 597 S.E.2d 87, 90 (2004).

[30] *Id.* at 919.

[31] *Id.*

[32] *See Ryan v. IM Kapco, Inc.*, 930 N.Y.S.2d 627, 629 (N.Y. App. Div. 2d Dept. 2011) (internal quotations omitted).

[33] *Id.*

really, really outrageous."[34] In his view, more typical instances of medical malpractice or negligence during the pandemic—like a doctor prescribing a drug that is not officially designated as a COVID-19 treatment—were essentially "nonstarters."[35]

However, it should be noted that not all states share the same onerous standard for gross negligence. Massachusetts law, for example, provides that gross negligence is of "substantially and appreciably higher [] magnitude than ordinary negligence . . . [and] a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence."[36] Importantly, "when the injury likely to ensue from a failure to do that which ought to be done is a fatal or very serious one, what otherwise would be a lack of ordinary care may be found to be gross negligence."[37]

For example, in one Massachusetts case , an appeals court upheld a jury's finding that a doctor acted with gross negligence when he used a "tacker" (similar to a staple gun) while performing a hernia repair surgery, even though the manufacturer's warnings stated it should not be used to insert tacks in the vicinity of the pericardium (a liquid sack surrounding the heart) or when the available depth for the tack is less than 6.7mm. The depth in this case was less than that, though the depth for most people would exceed this threshold, so a tack punctured the pericardium, and the patient died a few days later. In upholding the jury's verdict, the appeals court noted there was a basis for its finding that the doctor voluntarily incurred the obvious risk of using the tacker so close to the patient's heart, in a situation where the failure to do so could be fatal.[38]

The distinction in terms of how a particular jurisdiction defines gross negligence can therefore be critical in determining the true scope of COVID-related immunity statutes. That said, given that there is no clearly well-established standard of care in terms of treating COVID patients—particularly in the early going of the pandemic—nearly all claims arguably fall within the range of those barred by the relevant immunity statutes.

A case involving the potential liability of a nursing home operator after Hurricane Katrina provides a useful analogy. After Hurricane Katrina, prosecutors in Louisiana brought a criminal case for negligent homicide (approximately 35 counts) against a husband and wife who owned a nursing home and had failed to evacuate their facility as the hurricane approached. The couple apparently even turned down offers for assistance to evacuate the facility. The prosecution needed to show, essentially, gross negligence to obtain convictions on the charges. The jury acquitted the couple of all charges in under five hours. Jurors interviewed after the trial found it very important that many different people had made mistakes during the emergency, and yet the prosecution focused solely on

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[34] "Hospitals are Virtually Untouchable in Light of COVID-19 Immunity Bills, but Some Cases May Stand," Expert Institute, Aug. 31, 2020, *available at* https://www.expertinstitute.com/resources/insights/hospitals-are-virtually-untouchable-in-light-of-covid-19-immunity-bills-but-some-cases-may-stand/.

[35] *Id.*

[36] *Parsons v. Ameri*, 142 N.E.3d 628, 638 (Mass. App. 2020), review denied, 150 N.E.3d 1117 (Mass. 2020) (internal quotations omitted).

[37] *Id.*

[38] *Id.* at 638.

these people—they were the only people criminally prosecuted in the state. Also important to the jurors was that they believed the defendants actually cared a great deal about their residents and were doing what they thought was right. "A lot of mistakes were made, but they should not be blamed on just two people," reasoned juror Kim Maxwell, a 46-year-old secretary. "How could you punish these two people for doing what they thought was right?"[39]

The jurors' reference to the defendants having done what they thought was right has some relevance to a case involving COVID-liability, where one is dealing with something new, under emergency conditions. There is no clear standard of care in a situation like that, particularly during the early months of the pandemic.

What Can Healthcare Facilities Do Now to Minimize Their Risk?

Healthcare facilities and providers can take steps to mitigate the possibility of facing civil or criminal actions and to bolster their defenses should such a lawsuit arise.

- **Follow CDC/WHO Guidance and Any Guidance Issued by Federal, State, and Local Authorities.** Healthcare providers should carefully track and follow the guidance issued by health organizations, such as the CDC or WHO, as well as any guidance or orders issued by state or local authorities. Following this guidance will likely not only reduce the impact of COVID-19 but will also likely allow a potential defendant to raise a defense against any action alleging negligent or intentional misconduct.

- **Document Efforts to Comply**. It is critical to document efforts to comply with applicable guidance—*e.g.*, by issuing written policies and then documenting efforts to comply with those policies. This will further demonstrate the reasonableness of the healthcare provider's response to any COVID-19 outbreak and minimize the risk of any legal liability. Documentation should include efforts to prevent a COVID-19 outbreak, a COVID response plan, COVID-19 screening/testing procedures for both staff (including healthcare workers) and patients, visitor policies, notification policies for a patient's entire healthcare team (including primary care physician), communication with patient families and staff (including healthcare workers), and efforts to maintain sufficient supplies and staffing. Documentation should include efforts to monitor and implement changing COVID-19 guidance as well, and it should make clear which government guidance it relates to, as that guidance has shifted over time and the standards of care that may apply in a lawsuit may shift accordingly too.

- **Analyze State-Specific Statutes to Identify State-Specific Defenses and any Safe Harbors.** Healthcare providers should specifically analyze the state laws of any states where they operate, to determine if any state-specific defenses exist and whether any safe harbors have been enacted to immunize a provider from liability, and if so, to what extent.

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[39] "Nursing home owners Sal and Mabel Mangano: Not guilty!" McKnight's Long-Term Care News, Oct. 1, 2007, *available at* https://www.mcknights.com/news/nursing-home-owners-sal-and-mabel-mangano-not-guilty/#:~:text=After%20a%20three%2Dweek%20trial,their%20uncompromising%20verdict%3A%20not%20guilty; *see also* "Katrina nursing home owners acquitted," NBC News, Sep. 7, 2007, *available at* https://www.nbcnews.com/id/wbna20649744.

- **Consult with counsel.** As noted, several states have begun efforts to investigate potential healthcare facility liability for COVID-19 outbreaks. If such an investigation is ongoing, or if there is reason to believe a civil lawsuit may be forthcoming, it is critical to consult legal counsel as soon as possible. In the face of a criminal inquiry or investigation, legal counsel can help navigate the Fifth Amendment concerns regarding self-incrimination. On the civil side, counsel can more effectively navigate document preservation issues and prepare legal defenses the more quickly they are retained.

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If you have any questions about the issues addressed in this Client Alert, or if you would like a copy of any of the materials we reference, please do not hesitate to contact us:

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