PLUNKETT COONEY

Immunity for COVID-19 Claims Under Michigan Executive Orders: Uncertainty Doesn't Mean Paralysis

September 8, 2020

The uncertainty we all face with COVID-19 is unparalleled in this generation. While we all try and figure out what this continuing pandemic means for our lives, lawyers have been trying to figure out what it means for their practice.

For those of us who represent hospitals, long-term care facilities and other facilities that provide care for large groups of people, one of the biggest questions has been whether the global pandemic will translate into a wave of litigation. Amid all the speculation, perhaps the one thing we can be sure about is that the incoming wave of litigation – whether it amounts to a tidal wave or a gentle swell – is still a long way from cresting.

Many have remarked that a torrent of lawsuits is a matter of time and much has been written about both the inevitability of litigation and the tools available to fight it. On a federal level, there are several pieces of legislation that protect various classes of pandemic responders.

For example, the PREP Act is designed to shield vaccine manufacturers, but may offer protection to both the makers and prescribers of COVID-specific "countermeasures." The Volunteer Protection Act (VPA) protects physicians and others who volunteer for nonprofits in times of emergencies. The CARES Act, primarily an economic stimulus bill, includes language that expands on the VPA immunity slightly and protects health care professionals that volunteer specifically during the COVID-19 emergency response. Literature on these measures has proliferated in recent months as attorneys incorporate new strategies.

But these provisions offer little help to combat what is likely to be one of the most common claims made by families of those who die of COVID-19: that a facility failed to enact adequate policies and procedures to prevent the spread of disease. In Michigan, this concern is underscored by Gov. Gretchen Whitmer's recent veto of Senate Bill 956, an ambitious bill that would stop forcing nursing facilities to accept COVID-19 positive patients for readmission and instead divert them to designated step-down facilities. Facilities of all types are essentially required to manage COVID-19 patients and can't avoid risk by screening.

Michigan has, at least for the three peak months of COVID-19, tried to fill the void and protect the men and women who have continued to put themselves and their families at risk in order to provide essential medical care to those who need it. On March 29, Gov. Whitmer enacted Executive Order 2020-31,

which relaxed many of the licensing and related requirements and provided immunity to those participating in the pandemic response:

Consistent with MCL 30.411(4), any licensed health care professional or designated health care facility that provides medical services in support of this state's response to the COVID-19 pandemic is not liable for an injury sustained by a person by reason of those services, regardless of how or under what circumstances or by what cause those injuries are sustained, unless it is established that such injury or death was caused by the gross negligence, as defined in MCL 30.411(9), of such health care professional or designated health care facility.

This language was reiterated in Executive Order 2020-61 before being rescinded on July 13 by Executive Order 2020-150.

Gov. Whitmer's order incorporates the language from the Emergency Management Act, but expands the scope beyond "[a] person licensed to practice medicine or osteopathic medicine and surgery or a licensed hospital," to include "any licensed health care professional or designated health care facility." The Executive Order also defines a "designated health care facility" with reference to the definition of "health facility or agency" as set forth in the Public Health Code."

If this cross-reference sounds familiar, it is because it should. The Michigan Supreme Court made the same link in *Kuznar v. Raksha* to find that a pharmacy wasn't a licensed health care facility and held that it did not benefit from the protections of Michigan's medical malpractice statutes, including the shorter statute of limitations that was primarily at issue.

While we await clarity on how broad immunity under this statute really is – and whether a plaintiff who contracts COVID-19 because of inadequate disease prevention protocols sustained the injury "by reason of" medical services provided "in support of this state's response to the COVID-19 pandemic" – one more thing is clear: there are several categories of health care providers that do not qualify for *any* immunity under this order.

As it stands, many assisted living facilities, certain homes for the aged, pharmacies, adult foster cares and other facilities will have to defend themselves the old fashioned way: by proving they acted reasonably in light of the information that was available to them at the time. This means that the timeline of what practices were implemented at what point is extremely important. New data has been continuously disseminated from the Centers for Disease Control (CDC), state and local health departments, and corporate headquarters. Being able to definitely establish that measures were implemented timely and appropriately is likely to be job one in defending many of these entities.

Ironically, even for those entities that do receive immunity under Gov. Whitmer's Executive Order, the same advice holds true. Enterprising plaintiff attorneys are likely to characterize any deviation from the CDC or other guidance as willful conduct that is "so reckless as to demonstrate a substantial lack of concern for whether an injury results," in order to avoid the immunity provision in Gov. Whitmer's Executive Orders.

As a result, tracking a facility's own response to the pandemic and the ever-changing guidance is of paramount importance. With that tool, health care facilities can demonstrate that deviations from appropriate protocols are, at worst, momentary lapses – in other words, negligence – rather than institutional decisions not to take protective measures.

Similarly, facilities that don't qualify for immunity can track what they have done and tie it to state-of-the-art recommendations to demonstrate that their conduct was reasonable. This approach avoids uncertainty in the event of later litigation and protects against speculative, inconsistent, and uninformed testimony of facility staff who cannot otherwise be expected to remember when or why new measures began.

Uncertainty is now part of our everyday lives. The litigation landscape for the foreseeable future is cloaked with the same shadow of uncertainty that covers the government prognosticators and medical professionals. We are a long way from answering all of our questions, but we can take some steps to protect against what plaintiff attorneys may bring to bear in future litigation.