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COVID-19
Legal Measures: An Addendum
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In an addendum to a prior Medical Malpractice column, Thomas A. Moore and Matthew Gaier discuss the recently passed Emergency or Disaster Treatment Protection Act, Public Health Law Article 30-D, which codifies limited immunity for health care professionals and facilities during the pendency of the emergency declaration in place in New York as of March 7, 2020.

Last week we wrote about action that have been taken by the federal and state governments to address the extraordinary need for health care personnel and other resources to combat the COVID-19 pandemic, which will have consequences for people injured by medical negligence related to the crisis.

The measures taken by the state were in an executive order by the governor that contained a provision for limited immunity for injuries sustained directly as a result of an act or omission by medical professionals in the course of providing medical services in support of the state's response to the COVID-19 outbreak. The state has now passed the Emergency or Disaster Treatment Protection Act, Public Health Law Article 30-D, codifying limited immunity for health care professionals and facilities during the pendency of the emergency declaration in place in New York as of March 7, 2020.

The legislation contains a "declaration of purpose," stating that "[i]t is the purpose of this article to promote the public health, safety and welfare of all citizens by broadly protecting the health care facilities and health care professionals in this state from liability that may result from treatment of individuals with COVID-19 under conditions resulting from circumstances associated with the public health emergency." PHL §3080.

There are two immunity provisions in the statute—one for treatment provided by health care professionals and health care facilities, and another for volunteer organizations that make facilities available to support the state's response to the outbreak. The final legislation that passed was the product of discussions among the Executive, the Assembly and the Senate.

The immunity pertaining to medical treatment is contained in PHL §3082[1], which provides:

Notwithstanding any law to the contrary, except as provided in subdivision two of this section, any health care facility or health care professional shall have immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services, if: (a) the health care facility or health care professional is arranging for or providing health care services pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law; (b) the act or omission occurs in the course of arranging for or providing health care services and the treatment of the individual is impacted by the health care facility's or health care professional's decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the state's directives; and (c) the health care facility or health care professional is arranging for or providing health care services in good faith.

Subdivision 2 of the section contains an exception to immunity, along the lines of that seen on Good Samaritan laws, for acts or omissions that are willful, intentional, reckless, or constitute gross negligence. However, acts, omissions or decisions "resulting from a resource or staffing shortage" cannot qualify for the exception.

The legislation defines "health care services" as "services provided by a health care facility or a health care professional, regardless of the location where those services are provided, that relate to: (1) the diagnosis, prevention, or treatment of COVID-19; (2) the assessment or care of an individual with a confirmed or suspected case of COVID-19; or (3) the care of any other individual who presents at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration." PHL §3081[5].

While the definition of health care services is very broad, the immunity conferred under the statute is not. Health care providers are not entitled to immunity for any negligent treatment they may render during the pendency of the emergency declaration merely because they are providing services in response to the outbreak.

Subdivision b of PHL §3082[1] limits the application of immunity to cases where "the act or omission occurs in the course of arranging for or providing health care services and the treatment of the individual is impacted by the health care facility's or health care professional's

decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the state's directives" (italics added). The original draft immunity language suggested by the Executive did not contain the words set forth above in italics.

The addition of the requirement that "the treatment of the individual" must be "impacted by" the health care provider's decisions or activities in response to or resulting from the outbreak, means that a health care provider asserting immunity must demonstrate that the treatment of the patient upon which the claim of malpractice is based was affected by the health care provider's decisions or activities responding to the pandemic.

Most medical care rendered to patients who are not seeking treatment for COVID-19 or its symptoms is unlikely be covered by immunity. For instance, radiologists reviewing mammograms would be hard pressed to establish that a negligent interpretation was impacted by any decisions or activities they undertook in response to the outbreak. The same is true of physicians or surgeons performing procedures unrelated to COVID-19. While there may be circumstances in which medical care rendered for conditions other than COVID-19 will be entitled to immunity, those instances will be significantly circumscribed by the requirement that the subject treatment was impacted by health care provider's decisions or activities in response to the crisis.

The immunity for volunteer organizations is different in nature than that provided to health care facilities and professionals. PHL §3082[3] states that "a volunteer organization shall have immunity from any liability, civil or criminal, for any harm or damages irrespective of the cause of such harm or damage occurring in or at its facility or facilities arising from the state's response and activities under the COVID-19 emergency declaration and in accordance with any applicable COVID-19 emergency rule, unless it is established that such harm or damages were caused by the willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm by the volunteer organization." The term "volunteer organization is defined in PHL §3081[6] as "any organization, company or institution that has made its facility or facilities available to support the state's response and activities under the COVID-19 emergency declaration and in accordance with any applicable COVID-19 emergency rule."

The goal here is obvious. The Legislature did not want any entities to be deterred from loaning their facilities to the state's response efforts by the prospect of the additional liability that could be incurred by making their premises so available. It has no impact on treatment rendered, or persons providing health care services.

The government has taken extraordinary measures in response to an unparalleled health care crisis. While these measures will invariably have negative consequences for some patients, the

extent of that impact will be limited. It can only be hoped that the pandemic and its severe, far-reaching ramifications will soon abate.