Senate Bill 72 May Be Effective "Vaccine" Against COVID-19-Related Claims

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For the last year, health care providers around the world have been at the forefront of a public health emergency due to the spread of COVID-19. Doctors, nurses, and other health care workers at hospitals, health care facilities and nursing homes have been risking their lives on a daily basis to treat those patients infected with COVID-19.

They fear for their lives. They fear for their patients. They fear for their patients' lives. But, thanks to the enactment of Senate Bill 72, they will not have to fear getting sued and being hauled into a courtroom to defend their selfless actions for treating COVID-19 patients during these unprecedented times.

On March 29, 2021, Governor DeSantis signed a COVID-19 Liability Protection Bill, which became effective immediately upon becoming a law. The law protects businesses, governments and healthcare providers from COVID-19 lawsuits if they make a good effort to follow guidelines to prevent the spread of COVID-19.

In doing so, the Governor declared one of the reasons behind the sweeping legislation was that, "as the pandemic continues and recovery begins, health care providers must be able to remain focused on serving the health care needs of their respective communities and not on the potential for unfounded lawsuits."

The Bill created section 768.38, Florida Statutes, titled "Liability Protections for COVID-19-related claims." That section applies generally to certain business entities, educational institutions, governmental entities, and religious institutions. Although it mentions health care providers in section 768.38, the Bill also created section 768.381, Florida Statutes, to specifically apply to COVID-19-related claims against health care providers.

Under section 768.381(d), a "COVID-19-related claim" means a civil liability claim against a health care provider, which arises from the:

- Diagnosis or treatment of, or failure to diagnose or treat, a person for COVID-19;
- Provision of a novel or experimental COVID-19 treatment;
- Transmission of COVID-19;
- Delay or cancellation of a surgery or a delay or cancellation of a medical procedure, a test, or an appointment based on a health care provider's interpretation or application of

government-issued health standards or authoritative guidance specifically relating to the COVID-19 emergency;

- An act or omission with respect to an emergency medical condition as defined in s. 395.002, and which act or omission was the result of a lack of resources directly caused by the COVID-19 pandemic; or

- The provision of treatment to a patient diagnosed with COVID-19 whose injuries were directly related to an exacerbation of the patient's preexisting conditions by COVID-19.

Notably, a COVID-19-related claim does not include a claim alleging that an act or omission by a health care provider caused a person to contract COVID-19 or a derivative claim to such claim unless the person was a resident of a nursing home or assisted living facility, or patient of the health care provider, or a person seeking care or treatment from the health care provider.

The law requires pleading with particularity as to the claims, alleging facts in sufficient detail to support each element of the claim. However, unlike claims filed against non-health care providers under section 768.38, an affidavit of a physician is not required as part of the pleading. Failure to plead with particularity will result in dismissal.

As for the burden of proof, the plaintiff will be required to prove the claim by the greater weight of the evidence that the health care provider was grossly negligent or engaged in intentional misconduct. This standard effectively eliminates a plaintiff's ability to pursue an ordinary medical negligence claim against health care providers arising out of a COVID-19-related claim.

For health care providers, there are enumerated defenses that may apply to relieve them for any liability for a COVID-19-related claim. Those affirmative defenses include, but are not limited to:

(a) Substantial compliance with government-issued health standards specifically relating to COVID-19 or other relevant standards, including standards relating to the preservation or prioritization of supplies, materials, or equipment;

(b) Substantial compliance with government-issued health standards specific to infectious diseases in the absence of standards specifically applicable to COVID-19;

(c) Substantial compliance with government-issued health standards relating to COVID-19 or other relevant standards was not possible due to the widespread shortages of necessary supplies, materials, equipment, or personnel;

(d) Substantial compliance with any applicable government-issued health standards relating to COVID-19 or other relevant standards if the applicable standards were in conflict; or

(e) Substantial compliance with government-issued health standards relating to COVID-19 or other relevant standards was not possible because there was insufficient time to implement the standards.

While normally there is a two-year statute of limitations for medical negligence cases and claims against nursing homes and assisted living facilities, this Act halved the time period for commencing a lawsuit arising out of the transmission, diagnosis, or treatment of COVID-19. Such claims must be commenced within 1 year after the later of the date of death due to COVID-19, hospitalization related to COVID-19, or the first diagnosis of COVID-19 which forms the basis of the action. Likewise, claims arising out of a delayed or canceled procedure must also be commenced within 1 year after the cause of action accrued.

Those with claims before March 29, 2021, are not precluded from filing a lawsuit. A cause of action for a COVID-19-related claim that accrued before the effective date must be commenced within 1 year after the effective date.

The Act was not meant to create a new cause of action. It also will be applied retroactively and prospectively. This means the law will apply to claims that may have accrued prior to the effective date, and to those claims that will accrue in the future. However, the Act does not apply to pending lawsuits. Other sources of immunity, such as the PREP Act and special agreements with CMS and AHCA, may exist to those claims filed prior to the enactment of the new statutes.

This new law may provide the protection needed to allow health care providers to continue to remain focused on serving the health care needs of their communities. It may also put health care providers' minds at ease while treating patients. Instead of having to focus on the potential for unfounded lawsuits for simply doing their jobs, they do not have to fear being served with a frivolous lawsuit.

For those health care providers that are faced with a claim or lawsuit involving COVID-19, the journey to the courtroom might be short-lived. These new burdens placed on the plaintiff to plead and prove his or her COVID-19-related claim with particularity as well as prove gross negligence or intentional misconduct may halt the claims before they go too far.

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