# COVID-19 Immunity Litigation Update

*By Kara M. Eyre, Esq.*
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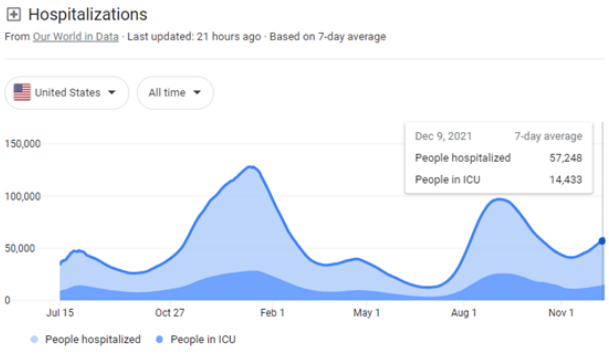
**Hurwitz & Fine, P.C. has extensive experience defending malpractice claims against health care professionals and practice groups, rehabilitation centers, long term and short term adult care facilities. We vigorously protect and defend physicians, clinicians, dentists, nurses and other health care providers in the full range of litigated matters.**

## The Pandemic

Healthcare providers have endured an unprecedented surge of patients afflicted with COVID-19, while continuing to care for patients with other medical conditions necessitating inpatient care.

After almost two years, America has felt the effects across all regions and demographics. As of December 2021:

- 796,000 Americans have died of COVID-19
- 49,748 new cases in the U.S. over the last 30 days




### Healthcare Providers Absorb the Surge of COVID-19 Patients + Anxiety Over Litigation Ensues

As more patients are admitted into medical facilities with COVID-19, hospitals, nursing homes, and other long-term care facilities have employed varied strategies in an attempt to meet patient needs, in accordance with federal and state guidelines.

The federal government and many state governments have eased licensing, credentialing, and point-of-care restrictions in order to increase the number of available providers and stretch the utilization of often-scarce resources.

**Actions in New York to Expand Health Care Resources**

Expanded Health Care Workforce + Telemedicine Encouraged in N.Y.

After its initial expiration, Kathy Hochul signed a N.Y. Executive Order to alleviate potential staffing shortages in hospitals and other facilities by significantly expanding the eligible healthcare workforce and allows additional healthcare workers to administer COVID-19 testing and vaccinations.

- Allows out of state and foreign health care workers including, RNs, LPNs, NPs, PAs, midwives, clinical nurse specialists, licensed master social workers, and licensed clinical social workers to practice in New York.
- Waives re-registration fees, creating an expedited re-registration process, and eliminating barriers to re-enter the workforce for retirees.
- Allows practitioners to work or volunteer in other facilities.
- Allows physician visits in nursing homes to be done using telemedicine.
- Removes barriers for EMTs and Advanced EMTs to practice and assist in additional settings, allows basic EMTs to vaccinate and test for COVID-19, extending all EMS providers' certification period by one year, modifies certification requirements, and permits out of state providers to operate in the New York State EMS System.
- Allows New York State-licensed providers without current registrations to practice without penalty for lack of registration.

Solutions to expand healthcare staffing and resources increases capacity, however, also carries increased concerns about opportunistic plaintiffs' attorneys who may attempt to leverage these measures as evidence of sub-standard care. Even in the very early days of the pandemic, amidst vast uncertainty, as early as March of 2020, Plaintiffs' attorneys began filing personal injury lawsuits against healthcare providers related to COVID-19. Health care providers and facilities are left to shoulder the heaviest burden posed by Covid-19: caring for infected patients in America, while simultaneously risking legal exposure.

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**As of December 2021, hundreds of personal injury lawsuits related to COVID-19 have been filed against healthcare providers, workers, and facilities.**

**March 24, 2021 – HHS Secretary Alexandar Azar Letter to State Governors Regarding Liability Immunity for Health Care Workers & Facilities**

*"For health care professionals to feel comfortable serving in expanded capacities on the frontlines of the COVID-19 emergency, it is imperative that they feel shielded from medical tort liability."*

*"States should issue guidance summarizing the statutory scope of protections offered under their laws and the process necessary to attach those protections to a health professional's service."*

*"It is particularly important for states to issue guidance publicly, outlining the available liability protections during the COVID-19 emergency" [and] "I do not want state variations in liability protections to confuse or deter health professionals in this COVID-19 emergency. I ask that your office quickly develop a list of the relevant state liability protections and waivers for health professionals during a national or state emergency."*

## NEW YORK'S LIABILITY IMMUNITY STATUTE – THE EDTPA

### April 3, 2020 – New York EDTPA

Less than 2 weeks after Secretary Azar's statement, on April 3, 2020, New York passed **Emergency Disaster Treatment Protection Act (the "EDTPA")** providing liability immunity to healthcare providers for care rendered during the pandemic.

Covered claims accruing as of March 7, 2020.

- Article 30-D of the Public Health Law, §3082 sets forth that except for intentional or willful misconduct, gross negligence, reckless misconduct, or intentional infliction of harm, *"any health care facility or health care professional shall have immunity from any liability*, civil or criminal, for any harm or damage alleged to have been sustained as a result of an act or omission in *the course of arranging for or providing healthcare services"* during the COVID-19 pandemic.

  <u>Health Care Services – Broadly Defined Under Original EDTPA Immunity as Claims Directly and Indirectly Impacted by COVID-19</u>

  Included services both directly and indirectly related to COVID-19.

  - The provider is arranging for or providing health care services at a healthcare facility, or arranging for providing health care services pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law;
  - The alleged act or omission occurred in the course of arranging for or providing treatment, and was 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
  - The provider arranged or provided health care services in good faith.

  If all of the above elements are met, then the provider or health care facility is entitled to civil and/or criminal immunity unless a claimant establishes that the actions were grossly negligent.

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**August 3, 2020 Amendment to EDTPA Immunity**

The August 3, 2020 Amended EDTPA narrowed the scope of the EDTPA's liability protections to apply only when a healthcare facility or medical professional is providing care directly related to the diagnosis or treatment of COVID-19 and the care is impacted by Covid-19.

The Amended EDTPA:

- Limited "health care services" eligible for immunity to services related to the diagnosis or treatment of COVID-19 only;
- Clarified that qualifying "health care services" must be related to the assessment or care of the COVID-19 condition; and
- Eliminated from defined "health care services" care provided to individuals for conditions other than COVID-19.

The August 3, 2020 Amended EDTPA thus eliminated the broad immunity originally offered to health care providers during the pandemic.

**April 7, 2021 – Repeal of EDTPA Immunity**

On April 7, 2021, Governor Cuomo repealed the EDTPA completely eliminating the liability immunity protections offered during the height of the pandemic.

Even as COVID-19 infections and hospitalizations have increased due to the omicron variant in late 2021, the immunity statute has not been revived by Gov. Hochul.

## EDTPA Immunity Periods

| | | |
|---|---|---|
| Broad immunity for claims directly and indirectly related to COVID-19. | → | Applies to claims accrued between March 7, 2020 and August 2, 2020. |
| Immunity for claims directly related to COVID-19 only. | → | Applies to claims accrued between August 3, 2020 and April 6, 2021 |

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## THE FEDERAL RESPONSE – The "PREP" ACT

### The PREP Act

The Federal Public Readiness and Emergency Preparedness Act – The "PREP" Act was originally enacted on December 30, 2005 and allows the Director of Health and Human Services to effectuate a coordinated response during a public health crisis.

Liabiltiy Immunity Under the PREP Act:

Upon the declaration of a public health crisis by the HHS Secretary -

> "Subject to the other provisions of this section, **a covered person shall be immune from suit and liability** under Federal and State law with respect to all **claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use** by an individual **of a covered countermeasure** if a declaration under subsection (b) has been issued with respect to such countermeasure."

### Other Important Aspects of the PREP Act:

- Provides a federal administrative "no-fault" monetary fund for claims relating to the use or administration of countermeasures that are otherwise barred under the Act.
- Provides an exclusive federal forum in the D.C. District Court for "willful misconduct claims." Willful misconduct is excluded from PREP Act immunity and claims for willful misconduct must be brought in D.C. District Court.

## Preconditions for PREP Act Immunity

In order for PREP Act immunity to apply:

1. The individual or entity must be a "covered person"
2. The legal claim must be for a "loss"
3. The "loss" must have a "causal relationship" with the administration or use of a "covered countermeasure"

## What is a Covered Countermeasure?

A covered countermeasure is a drug, biological product or device that is a qualified pandemic or epidemic product or a security countermeasure or is authorized for emergency use under the Federal Food, Drug, and Cosmetic Act.

Covered countermeasures include any antiviral, any other drug, any biologic, any diagnostic, any device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19 or its transmission, or any device used in the administration of any such product.

Covered Countermeasures include . . .

- Pfizer, Moderna, J&J vaccines
- Molnupiravir, the antivrial pill recently recommended by the FDA
- Respiratory protection devices, PPD, ventilators

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## COVID-19 LITIGATION

Despite PREP Act and EDTPA Immunity, courts have been reluctant to apply immunity and dismiss lawsuits against health care providers and institutions, at least at the early phases of litigation.

Federal Courts
Reluctant to view the PREP Act as a statute that completely pre-empts state laws and confers exclusive jurisdiction to the federal courts. Federal courts are reluctant to open themselves to a potential influx of personal injury cases.

State Courts - New York
Despite immunity statutes, state court trial judges have been largely wary of forclosing opportunities of recovery to injured plaintiffs. Even if ultimately defendants succeed in the application of New York's liability statutes, the success rate has initially been low for motions made on the pleadings.

## NEW YORK STATE COVID-19 CASES – APPLICATION OF EDTPA

NEW YORK STATE COVID-19 CASES – *DISMISSAL DENIED*

***Matos v. Chiong***, Bronx County, May 27, 2021

- Complaint: Makes no mention of COVID-19, and alleges Plaintiff rendered inadequate care during the EDTPA immunity period (2/28/20 – 3/18/20).
- Defendants' Motion: Defendants moved to dismiss asserting EDTPA immunity.
- Result: Motion denied with a strict construction of immunity applicability. **Defendants failed to conclusively establish that treatment of Plaintiff was impacted by the health care facility's response to the COVID-19 outbreak.**

Other Motions to Dismiss Asserting EDTPA Immunity Denied on Similar Grounds

- ***Townsend v. Penus***, Bronx County, June 1, 2021
- ***Arrington v. Prachi et al.***, Queens County, August 9, 2021
- ***Spearance v. Snyder***, Onondaga County, October 4, 2021

NEW YORK STATE COVID-19 CASES – *DISMISSAL GRANTED*

***Crampton v. Ganet Health et al.***, Orange County, 9/13/21

- Complaint: Plaintiff was a resident at nursing home during immunity period and suffered various injuries including pressure ulcers, fungal dermatitis, and sexual assault.
- Defendants' Motion: Defendants moved to dismiss asserting EDTPA immunity, and submitted detailed affidavit from nursing director articulating many of the changes in patient care delivery that were made in good faith to absorb COVID-19 pandemic.
- Result: Motion granted, with the Court adopting a lower bar to EDTPA immunity than that expressed in *Matos*, finding that Defendant made a "minimal showing" that the Plaintiff's treatment was impacted by COVID-19 measures and established a "basic linkage" between the COVID-19 response and Plaintiff's treatment.

Other Motions to Dismiss Asserting EDTPA Granted

- ***Hampton v. City of N.Y. et al.***, Bronx County, April 22, 2020
- ***Ruth v. Elderwood et al.***, Erie County, August 5, 2021

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## FEDERAL APPLICATION OF PREP ACT & STATE-BASED IMMUNITY STATUTES

Despite a seemingly broad, and clear, preemption clause in the PREP Act, there have been over 100 cases where Defendants have failed to secure removal of COVID-19 related personal injury claims, and these cases have been remanded back to their respective state courts.

***Maglioli* v. Alliance Holdings, LLC et al.**, 16 F. 4th 393 (3rd Cir. 2021).
October 21, 2021: **Defendant Nursing Home attempted to remove COVID-19 related personal injury claim to federal court based upon the PREP Act. The District Court remanded the case back to New Jersey state court and the Third Circuit affirmed.** The Third Circuit remanded the case back to New Jersey state court and held that similar COVID-19 personal injury claims are not subject to federal jurisdiction.

*There are currently Appeals of PREP Act remand orders in the 2nd, 3rd, 5th, 6th, 9th, 11th, and D.C. Circuit Courts of Appeal. It is likely, although yet-to-be-seen, whether this decision guides other similar pending appeals.*

**Facts**: The facts of *Magioli* are typical of the largest portion of COVID-19 cases that defendants are attempting to remove from state to federal court, that is, cases filed against nursing homes or similar entities for claims that a plaintiff (or decedent) contracted COVID-19 while in the facility. Defendants seek removal on various grounds related to the liability protections of the PREP Act. In this case, the estates of four residents of two New Jersey nursing homes who contracted COVID-19 and died sued for alleged negligent management of the COVID-19 pandemic.

Defendants sought removal arguing that the federal district court had jurisdiction because (1) defendants can remove under the Federal Officer Removal Statute, (2) the PREP Act completely preempts state law claims, (3) the state law claims are uniquely federal in nature.

Holding: Suits related to COVID-19 deaths must be litigated in State court. The Third Circuit expressly held that whether PREP Act Immunity ultimately applies is to be decided by state trial courts.

The Third Circuit decision was based upon three main findings:

1. **Nursing homes cannot remove to federal court pursuant to the Federal Officer Statute**. One of the requirements to remove to federal court under the Federal Officer statute is that the Plaintiff's claims must be based upon the defendant acting under the U.S., its agencies, or its officers. Even though nursing homes must comply with massive regulatory regimes such as the Centers for Medicare and Medicaid Services, the *Maglioli* Court held that mere compliance falls short of acting under the U.S. or its agencies.
2. **The PREP Act does not completely preempt state law**. Despite the fact that the HHS Secretary issued guidance advising that the "PREP Act makes clear that there is complete preemption of state law," the *Maglioli* Court declined to defer to this guidance and held that the PREP Act does not confer exclusive jurisdiction to federal courts.
3. ***Grable* jurisdiction is not available to nursing homes**. The *Maglioli* Court rejected the position that federal jurisdiction was appropriate because the case raised "significant federal issues" (so-called Grable jurisdiction). The Court opined that because the PREP Act is a defense, it is a premature consideration upon a motion to dismiss where the well-pleaded complaint rule applies.

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## FUTURE OUTLOOK

Despite state and federal courts reluctance to afford immunities to health care institutions in the context of personal injury actions related to COVID-19, some defendants have had success obtaining dismissal.

The *Magioli* holding was based purely on jurisdictional grounds, and expressly stated that it was not ruling on whether or not PREP Act immunities applied substantively. This issue is for state courts to determine on remand.

It is possible that these questions will ultimately go before the U.S. Supreme Court, as there is a pending appeal in the 9th Circuit where the District Court retained jurisdiction, creating a potential circuit split.

The *Magioli* Court held that claims involving "willful misconduct" allegations are completely preempted, affording opportunity for removal for Complaints involving such allegations.

There is opportunity for dismissal under the EDTPA in situations where providers can clearly articulate how care was impacted by COVID-19 measures.

For application of EDTPA, health care institutions should make their good faith efforts to provide adequate care during extenuating circumstances upon motion practice.

There is also opportunity for dismissal based upon the EDTPA later in litigation once discovery has yielded additional facts about the specifics of the care at issue, and expert affidavits may be useful in establishing this.