

Negligence Law Section

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Government Affairs Update

“COVID-19 Continues to Dominate Legislative Process”

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As of this writing, the Legislature is wrapping up the last few days of the 2019-2020 Legislative session. It has been a year dominated by a pandemic, and the Legislature has spent much of its energy on addressing the deadly COVID-19 outbreak. Amongst the legislation that provided relief for front-line workers and people who lost their jobs due to the pandemic were several bills that sought to protect employers against civil liability claims related to COVID-19.

Last spring, the Legislature sent Senate Bill 899 to the Governor’s desk. This bill would have granted broad-based immunity from liability to health care providers for harm or damages sustained due to the provision of health care during the pandemic. Health providers had already been granted limited liability per the executive orders that declared a state of emergency. SB 899, however, greatly expanded these limitations so that they applied to all medical services – not just those to treat COVID-19. It also would have granted health care providers immunity for damages stemming from staffing shortages. Governor Whitmer vetoed SB 899.

The Michigan Legislature responded by passing legislation that mirrored the immunity granted in Governor Whitmer’s executive orders. House Bill 6159 granted limited liability for damages arising from health care services provided in support of the state’s response to COVID-19 between March 29, 2020 and July 14, 2020. This is similar to liability limitations for any health care provided during a state of emergency. However, most states of emergency only last a few days or weeks. It is unusual for one to last for several months. Because the language in HB 6159 largely mirrored liability protections already granted in the executive orders, Governor Whitmer signed it into law as PA 240 of 2020.

Not long after HB 6159 became law, another attempt was made at expanding the liability limitations it granted. Senate Bill 1185 was introduced seeking to expand the types of health care facilities that had been included in HB 6159 so that long-term care facilities and psychiatric hospitals would also be granted immunity. Moreover, the bill sought to extend the time period in which the liability limitations would exist to encompass March 29, 2020 to July 13, 2020 and also October 30, 2020 to February 13, 2021 (I have yet to hear an explanation for why those dates were chosen). SB 1185 was recently passed by both chambers and sent to the Governor on

mostly party-line votes. The Negligence Law Section has taken a position opposing SB 1185 and we are urging Governor Whitmer to veto it.

In addition to health provider immunity bills, the Michigan business community has also pushed for liability limitations for Michigan businesses operating during the pandemic. A package of bills aimed at protecting businesses against COVID-19 related lawsuits was the top priority of the Michigan Chamber of Commerce last summer. House Bills 6030, 6031, 6032 and 6101 would have granted broad based immunity to any business against COVID-19 claims, provided that the business had “substantial compliance” with regulations or directives from federal or state government that was applicable at the time of exposure. The bills also created a damage threshold, requiring that a patient be hospitalized for at least 24 hours, or that they had lost their ability to engage in usual and customary daily activities for at least 14 days.

As detailed in my last column, the Negligence Law Section strongly opposed these bills and we provided testimony to both the House and Senate committees. Governor Whitmer indicated her intent to veto the bills practically from the day they were introduced. However, when the Michigan Supreme Court ruled that the law Governor Whitmer had been using to renew her emergency orders was unconstitutional, the Legislature gained significant leverage on a number of issues unrelated to immunity legislation.

Specifically, House and Senate leaders tied the COVID-19 business immunity package to an extension of unemployment benefits – something Governor Whitmer was intent on passing. Governor Whitmer opened negotiations on a broad package that would include unemployment extensions and some form of business immunity. In the end, several important changes were made to the business immunity package before they went to the Governor’s desk. These include:

- The damage threshold was removed;
- In order to receive immunity from liability, businesses would have to comply with ALL federal, state and local statutes, rules, regulations, executive orders and agency orders related to COVID-19 that were in effect at the time of the exposure that led to damages (language was added that stated a de minimus deviation from strict compliance of a COVID-19 rule that was unrelated to the exposure would not nullify the liability protections).

While the Negligence Law Section maintained its opposition to these bills even with those changes, the amendments were generally seen as a large improvement on the bills compared to how they were introduced. Governor Whitmer signed these bills into law as Public Acts 236-239 of 2020.

Looking ahead to 2021, we can only hope that we will not see another year like this last one for some time. A new group of State Representatives will be sworn into the Michigan House, and we will have two vacancies in the Michigan Senate as Senator Peter MacGregor and Senator Pete Lucido were both elected to local offices. An interesting fact - with the departure of Senator Lucido, the Michigan Senate will be without an attorney member for possibly the first time in its history (definitely since 1935, when the State Bar was founded).

Wishing all a joyous holiday season and a happy New Year!

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