

Negligence Law Section

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Government Affairs Update

“Liability in the Time of COVID-19”

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The COVID-19 pandemic has been a public health and economic disaster for Michigan and the entire country. Nearly as bad as the pandemic has been the nonstop raging political battles regarding how best to address this calamity. Do we close businesses? Which ones? Should we wear masks? How do we protect “essential” workers? When should we reopen schools? The fighting over these questions (and others) have made it all but impossible for Americans to tackle this pandemic in a unified manner.

In addition to debates over health and economic policy, the pandemic has spurred additional legislation concerning civil liability in the age of a pandemic. In May, the Michigan Senate passed legislation aimed at providing liability protections for health care facilities and health care professionals for any negligent action during the COVID-19 epidemic. Senate Bill 899, sponsored by Senator Michael MacDonald (R-Macomb Twp.), would – during the time when a state of emergency had been declared in Michigan – grant immunity from liability for any “harm or damages sustained or alleged to have been sustained as a result of any act or omission occurring in the course or arranging for, providing, or making decisions regarding health care services regardless of how or under what circumstances or by what cause those injuries are sustained.”

The bill was introduced on April 29, and it passed through the full Senate merely 8 days later. The House Judiciary Committee held a hearing on the bill the following week, but by that time opposition had grown to the point where members of the House Judiciary Committee were taking a strong second look at the bill. The bill’s proponents, mainly health care organizations, stated that the bill was necessary to protect facilities and staff from litigation that could arise based on a disease that still had so many unknowns. However, the language of the bill was so broad that it could cover injuries that had nothing to do with COVID-19. The bill has yet to come up for a second hearing in the House Committee, and at this point it seems unlikely that it will without significant revisions. As I write this, however, there are rumors that a substitute bill is being prepared that might have a better chance of moving through the House.

As the Legislature prepares to return in late July to wrap up work on the current-year budget, another set of liability bills – impacting far more parts of the economy than just the health care sector – are going to be introduced. Draft bills have been circulated among legislators that would provide major liability protections for employers and business owners who might be sued should an employee or customer become sick with COVID-19.

One of the bills would grant blanket immunity to employers if any of their employees contract COVID-19 as long as both the following were true: 1. The infection occurred during the state of emergency declared in Michigan regarding the virus; and 2. That the employer was in compliance with federal or state public health guidance that was applicable to the place of employment. A second bill would prevent individuals from filing litigation arising from exposure to COVID-19 against a property owner, lessee, manager or operator unless the plaintiff could show by clear and convincing evidence that the harm was caused by a reckless disregard of a substantial and unnecessary risk that an individual would be exposed to COVID-19; or from a deliberate act intended to cause harm. Moreover, a plaintiff would have to show that they had suffered a “minimum injury” in order to pursue a claim. The definition of minimum injury would be symptoms that cause hospitalization of at least 24 hours; a condition that causes an inability to engage in usual and customary daily activities for at least 14 days (not including days spent in quarantine); or death.

These bills will likely be introduced when the Legislature returns to session the week of July 20.

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