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ANALYSIS

Pennsylvania Governor Tom Wolf's Executive Order Extending Immunity to Healthcare Professionals Responding to COVID-19

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EXECUTIVE SUMMARY

On May 6, 2020, Governor Wolf issued an Executive Order [hereinafter "Order"] to "Enhance Protections for Healthcare Professionals." The Order decrees on two general areas:

1. It broadly relaxes or suspends regulatory requirements pertaining to licensure and certification of healthcare professionals and EMS personnel.

2. It grants limited Immunity to individuals licensed or certified to provide healthcare services, regardless of whether they are paid or volunteer, for "emergency services activities" or the "provision of disaster services activities" in response to COVID-19.

This paper explores the practical effect of the Order on claims against healthcare providers.

In summary, although there are a few positive declarations in the Order, it is mostly illusory, with no practical protections for those within the proverbial litigation crosshairs. Currently, traditional medical malpractice defenses remain the strongest protection on anticipated COVID claims.

WHAT CATEGORIES OF HEALTHCARE PROVIDERS ARE COVERED BY THE IMMUNITY?

The Order covers any **individuals** that hold a license, certificate, registration, certification, or who are otherwise authorized to practice a health care profession or occupation in Pennsylvania.

This includes those individuals that work for or within:

- a Hospital;
- an ambulatory surgical facility;
- a nursing home;
- a personal care home;
- a home health care agency; or
- a hospice provider; and
- Other institutional providers.

A broad interpretation would include administrative positions, such as:

- Clinical Consultant
- Nursing Home Administrator
- Director of Nursing/ADON
- Medical Director
- Director of Rehabilitation

The Order specifically excludes the "facilities and entities" at which the individuals work, limiting immunity to the individuals only. Thus, operating entities, management companies, parents, subsidiaries and all other entities in the corporate structure are not directly covered by the immunity.

WHAT IS THE SCOPE OF THE IMMUNITY?

The Order provides immunity from civil liability for any injuries or damages alleged to have been sustained as a result of the individual's actions or omissions while engaged in emergency services activities or disaster services activities, as related to the Commonwealth's COVID-19 disaster emergency response.

Claims that individuals acted with "willful misconduct" or "gross negligence" are not covered by the immunity.

"Willful misconduct" implies intent to violate a standard so as to put another in danger. Gross negligence has been defined as an "extreme departure" from the standard of care, beyond that required to establish ordinary negligence, and is the failure to exercise even "scant care." *Feleccia v. Lackawanna College,* 215 A.3d 3 (2019).

WHAT SERVICES ARE COVERED BY THE IMMUNITY?

The Order is limited to acts or omissions occurring during "emergency services activities" or the "provision of disaster services activities" related to the COVID-19 pandemic.

Section 7102 of the Emergency Management Services Code defines "emergency services" as:

> *"The preparation for and the carrying out of functions, other than functions for which military forces are primarily responsible, to prevent, minimize and provide emergency repair of injury and damage resulting from disasters, together with all other activities necessary or incidental to the preparation for and carrying out of those functions. The functions include, without limitation, [. . .]* ***medical and health services****, [. . .] [and]* ***emergency resources management****[.]" 35 Pa. Code § 7102.*

The definition expressly includes medical and health services, as well as emergency resources management as "functions." Broadly interpreted, in addition to the direct treatment of patients, this Order would extend immunity to administrative services needed for resource management, including adherence to advisories, recommendations, and regulations promulgated by the Pennsylvania Department of Health, CMS, and the CDC in response to COVID-19.

Thus, administrative persons tasked with interpretation, implementation, contingency planning, or any other vital roles toward effectuating a facility's response to the COVID pandemic, would arguably be engaged in "emergency services activities."

Conversely, the phrase "disaster services activity" is not defined in the Order or the Emergency Management Services Code, leaving it broadly open for interpretation.

Exclusions:

The immunity **does not** extend to *"health care professionals rendering non-COVID-19 medical and health treatment or services."*

It remains unstated whether a healthcare professional, engaged in non-COVID care, can claim that the care was affected by resource utilization and other COVID related issues, thereby triggering immunity. Given the language of the Order, we feel it unlikely immunity would be extended in that situation, but the argument exists and should be advanced where applicable.

DOES THE ORDER PROVIDED ANY IMMUNITY PROTECTIONS FOR OPERATORS AND OTHER RELATED ENTITIES?

On its face, the answer would appear to be "no." The Order designates only "individuals" for classification as Commonwealth "agents." It also explicitly excludes "facilities" from the immunity, stating "[t]he aforementioned classifications of individuals ***(and not the facilities or entities themselves)*** shall be immune from civil liability.

However, the question arises as to whether the immunity, through other legal mechanisms, can be extended to bar certain claims against operators and entities.

Broadly stated, there are two types of malpractice claims that can be asserted against healthcare entities – Direct (Corporate) Liability and Indirect (Vicarious) Liability.

1. **Corporate Liability**
   Corporate liability is based upon the premise that a healthcare operator, or other related entity, has a direct duty to the patient. Corporate liability was first recognized in *Thompson v. Nason Hospital (1991)* and then clarified/redefined in *Scampone v Grane Healthcare*. We have addressed this theory of liability, its application and limitations, in other materials and so we will not restate them here. Suffice to say, corporate liability is the primary vehicle for asserting claims of "under budgeting," "understaffing," and similar themes of "profits over people." Unfortunately, the Order provides no immunity from these claims.

2. **Vicarious Liability**
   Vicarious liability is not based upon independent acts of the operating entity, but rather imputed liability based on the conduct of an agent or employee. In the medical malpractice context, healthcare operators can be held vicariously liable for negligent acts or omissions of its staff (physicians, nurses, aides, etc.). This is commonly referred to as *"Respondeat Superior."* The reason for imputing liability is the relationship between the staff member and the operator. Before corporate liability was recognized as a viable theory, vicarious liability was the only legal theory against a healthcare operator. It still remains the primary avenue for asserting liability against a medical facility or other corporate entities.

   Since individual providers are granted immunity under the Order, the question becomes whether the operators likewise enjoy immunity against claims of vicarious liability. Framed another way, "[C]an a healthcare operator be liable for the negligence of its staff, if the staff cannot be liable under the Order?" Alas, a legal incongruity seems to answer the question "yes."

Vicarious liability was created in response to a "specific need in the law of torts: how to fully compensate an injury caused by the act of a single tortfeasor." *Mamalis v. Atlas Van Lines, Inc.,* 560 A.2d 1380, 1383-84 (Pa. 1989). By necessity, a claim of vicarious liability is inseparable from the claim against the agent. Absent an independent act of negligence by the operator, "termination of the claim against the agent extinguishes the derivative claim against the principal." *Id.* Thus, if a claim against an individual healthcare worker were barred under the Order, then the vicarious claim should likewise be barred.

However, immunity is treated differently under Pennsylvania law. The Pennsylvania Supreme Court has held that an immunity granted to an agent (as opposed to the "release" of an agent) is not automatically extended to the agent's principal.

In *Regester v. County of Chester,* 797 A.2d 898 (Pa. 2002), the Pennsylvania Supreme Court addressed the question of whether statutory immunity granted to EMS personnel extended to their employers. The Court held that because the immunity statute did not expressly include organizations and facilities, it evinced "an intent on the part of the Legislature to confer immunity upon enumerated emergency medical services personnel, but not upon their corporate, institutional, or organization principals."

In deciding *Regester,* the Supreme Court relied upon the earlier case of *Wicks v. Milzoco Builders, Inc.,* 393 A.2d 300 (Pa. 1978). In *Wicks*, Plaintiffs brought suit against Monroe Township and three of Monroe Township's supervisors for damages sustained when runoff problems due to construction of nearby homes allegedly caused damage to Plaintiff's homes. Notably, Plaintiffs' claims against Monroe Township were based solely on Respondeat Superior (vicarious liability). The trial court held that the Supervisors were "high public officials," absolutely immune from civil liability for actions taken within the scope of their authority. Therefore, Monroe Township could not be sued on a theory of Respondeat Superior when its servants were all immune from liability for the acts alleged. The Commonwealth Court disagreed and reversed, which the Pennsylvania Supreme Court affirmed. In a footnote, the Court cited to the Restatement (Second) of Agency § 217, which asserts that a principal may not raise the immunity of an agent as a defense to a claim based on Respondeat Superior. *Wicks*, 393 A.2d at 301 n.2.

In the present situation, the Order explicitly excludes facilities and entities, suggesting a clear intent that immunity does not extend to operators. Further, even if the intent were unclear, existing law suggests that immunity would not be extended.

This is not to suggest that the argument on extending immunity should be wholly abandoned. For instance, there are nuanced arguments that can be raised based on the MCARE Act. However, it will be a challenge to use of the Order for this purpose.

HOW CAN THE ORDER BE USED BY THE OPERATING ENTITIES?

Despite the limitations outlined above, there is some language in the Order that may be helpful on corporate liability claims.

The Preamble of the Order notes various directives issued by the Governor during the pandemic. For instance, one of the directives to the Department of Health is described as follows:

> **A suspension of the staffing requirements for nursing homes under 28 Pa. Code §211.12(i) (which requires a minimum staffing requirements of 2.7 ppd), *"in order to allow nursing care facilities to operate to the best of their ability given the likelihood of staffing shortages."***

The actual directive requires that the facility undertake steps to justify being below the mandatory per patient day ("PPD") ratio. However, as a broader proposition, the recognition of staffing issues caused by the pandemic can be used to undermine traditional arguments of understaffing based on budgeting (and its corollary, undersupply), including those claims unrelated to the COVID virus (falls, wounds, etc.).

ARE THERE OTHER POTENTIAL ISSUES WITH ENFORCEMENT OF THE ORDER?

The Order raises potential constitutional issues. Article IV, § 2 of the Pennsylvania Constitution sets forth the executive powers of the Governor. While this section does not expressly reference executive orders, it does broadly require that the Governor "take care that the laws be faithfully executed."

The legislature conveyed general powers to the Governor under the Emergency Management Services Code, 35 Pa. Code § 7301. Per §7301(a), the Governor is responsible for "meeting the dangers to this Commonwealth and people presented by disasters." In order to do so, per § 7301(b), "the Governor may issue, amend and rescind executive orders, proclamations and regulations which shall have the force and effect of law."

This paper will not delve into the intricacies of constitutional law. Rather, it is enough to point out that designating all private healthcare workers involved in COVID-19 as "agents" of the Commonwealth seems to exceed the legislative intent of the statute and to usurp traditional definitions of agency. While there are various forms of agency, generally speaking, the relationship "results from (1) manifestation of consent of one person to another that (2) the other shall act on his behalf and subject to his control, and (3) consent by the other to so act." *Marrone v. Green*, 2009 WL 605899 (E.D. Pa. 2009) (quoting *In re D.L.H.,* 967 A.2d 971 (Pa. Super. 2009) (internal quotations omitted).

Given that the elements of control and consent are key to establishing agency, it would appear those elements would need to be loosely interpreted to establish agency under the Order.

CONCLUSION

Viewed with a cynical eye, the Order seems intent on maximizing publicity while minimizing practical effect. Although front line healthcare workers are afforded limited immunity, they are unlikely to be the focus of any COVID-19 litigation, as they are routinely portrayed as heroes in the fight against the pandemic. Suing doctors and nurses on the "front line" would be akin to suing first responders for actions taken during the 9/11 attacks. There may be a basis, but the optics and public reaction would be toxic.

Left conspicuously open is the ability to sue the real targets of any such litigation – the operators and related entities.

Further, there are potential legal challenges to the Order itself. If those challenges are successful, it would allow the Governor to claim that the effort was made, even if it was ultimately unsuccessful.

Therefore, unless the Pennsylvania legislature passes comprehensive immunity legislation (that is signed into law by the Governor), the defense of COVID-19 related claims will still depend heavily upon traditional defenses.

FOR QUESTIONS AND ADDITIONAL INFORMATION, PLEASE CONTACT:

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