

# The Complications of Medical Malpractice and the Pandemic

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Since the first appearance of COVID-19 in the U.S., American healthcare providers have been working tirelessly to address every aspect of the pandemic. The public saw daily how frontline workers were making sacrifices day in and day out to keep as many people healthy as possible. But while the media focused on this heroic work, behind the scenes, COVID was prompting significant changes to malpractice laws and regulations at the state and federal levels.

Providers should be aware of both what has happened and of the changes we could see in coming months and years.

## **Early Pandemic**

Medical malpractice insurers have been keeping a close eye on the pandemic because global health events such as this have the potential to expose both insureds and insurers alike to staggering liabilities. Thankfully, in New York state, the Governor and the legislature moved swiftly to enact emergency measures that shielded healthcare professionals from the worst liabilities. Had they not done so, the pandemic had the potential to lead to the proposal of new, more stringent regulations and policies, which in turn could have resulted in increased premiums.

New York state was hit incredibly hard with COVID cases right from the start, with the first confirmed case on March 1, 2020. The legislature and the governor produced the Emergency Disaster Treatment Protection Act (EDTPA), which extended broad immunity to healthcare providers and facilities.

Around the state, hospitals overrun with COVID patients had to bring in nurses from out-of-state, bring healthcare providers out of retirement, build temporary facilities to provide COVID care, and enlist doctors, nurses, PAs and others to provide services out of title—meaning outside their usual purview of care.

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The EDTPA granted them immunity from liability in the diagnosis and treatment of COVID patients, as well as non-COVID patients whose treatment was impacted by a facility's response to the pandemic. Before we knew precisely how to care for COVID patients, many frontline healthcare providers had reasonable concerns that experimental treatments could not only expose them to the disease, but lawsuits as well. The EDTPA helped alleviate those fears.

Medical malpractice attorney Tom Benvenuto, JD, of Benvenuto & Slattery says this was a critical decision that empowered healthcare providers to make every effort to save patients without fear of legal action: "The immunity the EDTPA provided to New York healthcare professionals was essential to the state's response and handling of the pandemic because it enabled physicians to pursue necessary measures to care for patients that may have otherwise been construed as extraordinary under otherwise normal circumstances," he said.

The federal government issued its own legislation on protections for frontline workers, facilities, and even PPE equipment. The Public Readiness and Emergency Preparedness (PREP) Act provides liability immunity related to the manufacture, testing, development and, importantly for medical providers, the use of medical countermeasures against pandemics (among other public health emergencies).

Essentially, the government extended liability protection to medical equipment and PPE manufacturers. With this protection in place, manufacturers such as GM, Ford, Fitbit, and Proctor & Gamble were able to quickly launch production lines or repurpose existing ones to make medical equipment like respirators, ventilators, face shields and masks.

The PREP Act also covered healthcare facilities that were using these countermeasures. For example, in the event of a PPE shortage—which we saw across the country due to a global shortage—a facility may invoke the immunity from liability if a patient claimed that they contracted COVID at that facility while the facility was re-allocating what PPE they had available to them.

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### **In The Trenches**

Amid the pandemic, medical malpractice insurers and the attorneys working with them began planning for a potential tidal wave of COVID-related lawsuits given the potential for morbidity that the diagnosis carried for a significant portion of the population. This would have put a tremendous strain on insurers across the country.

However, the industry has thus far seen relatively few cases. In fact, medical malpractice lawsuit filings were down during the pandemic. This was due, in part, to many states implementing a hiatus on filing lawsuits when lockdown restrictions began. Because there are statutes of limitations on filing cases, there may be more COVID-based lawsuit filings when those statutes approach their expiration dates. Plaintiffs may file cases to buy time in the hopes that there is some change in how the courts interpret and apply the immunities. However, in many cases, this situation is still more than a year away.

### **Returning to Normal**

In August of 2020, when New York's infection rate was under 1%, the legislature reduced the scope of the EDTPA to cover only COVID patients, eliminating those tangentially impacted by a facility's COVID care for others. Furthermore, the statute was repealed, thereby ending the immunity for providers treating COVID after April 6, 2021. New York state has returned to "business as usual" for malpractice regulations.

While it has been amended several times, the Federal PREP act is still in place today, and malpractice insurers, courts, and healthcare professionals are paying close attention to any potential legal aftershocks here.

According to Benvenuto, the industry must keep a close watch on how Federal courts will approach challenges to PREP act immunities that may be filed: "While the immunities appear to be ironclad, and cases would likely be dismissed by the Court in light of same, any suit that survives an initial motion to dismiss could provide plaintiffs in each state a playbook to filing and maintaining a similar case."

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In the end, the COVID pandemic did not bring about a sea change in medical malpractice regulations or policies. States expanded immunities where and when they had to, and when conditions improved enough to remove those exemptions, it appears most states have gone back to what worked before. Fortunately, this means premiums for insureds have not seen a “COVID spike,” but it remains to be seen if this will hold in the future—especially if the Delta variant or another resurgence proves lasting, or if a new pandemic emerges.