

Alert | Litigation



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Florida's New COVID-19 Shield Law

On March 29, 2021, Governor DeSantis signed into law [CS/SB 72](#), a sweeping and powerful new COVID-19-related claim immunity shield. The [Act](#), “Civil Liability for Damages Relating to COVID-19,” provides several powerful protections in a new statute (section 768.38, Florida Statutes) for businesses, educational institutions, governmental entities, and religious institutions, and separately (section 768.381, Florida Statutes) for health care providers. The new law became effective upon the Governor’s signature. Although COVID-19-related claims have been few – less than a dozen known as of the enactment – the new law aims to dissuade those potential claimants who may be waiting in the wings.

The new law provides varying levels of protection, depending on the potential defendant. For a claim against any person, business, or entity other than a health care provider, a plaintiff must plead that the claim “arises from or is related to” COVID-19 “with particularity” – the same language determining the standard required for fraud claims in federal court, where time, place, and manner must be detailed. And a pre-suit protection hurdle mimics medical malpractice law, requiring a doctor’s sworn attestation that within a reasonable degree of medical certainty the plaintiff’s COVID-19-related harm was caused by the defendant.

The court must then take evidence on and determine “as a matter of law” whether the defendant made a “good faith effort to substantially comply with authoritative or controlling government-issued health standards or guidance at the time the cause of action accrued.” If the court determines the defendant did make a good faith effort, the defendant is immune from liability. Interestingly, the legislation does not require a defendant to prove anything to obtain immunity: instead, the burden of proof is on the plaintiff to prove the defendant did not make a good-faith effort to comply. If a plaintiff fails to carry that burden, a

defendant could obtain immunity without ever having provided any evidence at all. If a plaintiff does carry that burden, he or she can proceed to trial but must prove gross negligence, by the “clear and convincing evidence” standard, which is typically considered significantly higher than the “greater weight” standard required for ordinary negligence claims.

The shield provides a one-year statute of limitations, shortening the normal four-year statute of limitations applicable to most tort claims. And it applies retroactively, except to claims already filed before the Act’s effective date.

For claims against health care providers, a separate statute is created to cover claims “which arise[] from” diagnosis and treatment (including experimental treatments, delays or cancellations of procedures, and other cascading effects of COVID-19). A complaint against a health care provider must be pled “with particularity by alleging facts in sufficient detail to support each element of the claim.” No attestation by another health care provider is required. Although the health care provider is not afforded an opportunity to obtain immunity by showing good-faith substantial efforts to comply with governmental directives, the health care provider is, like business entities, absolutely immune from simple negligence, since a plaintiff can only prevail upon proving gross negligence or intentional misconduct. However, a plaintiff need only meet the conventional “greater weight” standard of proof to prove gross negligence against a health care provider – an easier burden than the “clear and convincing” standard protecting business entities and other organizations. Finally, five specific affirmative defenses “that apply to a COVID-19-related claim” are enumerated, all variations of substantial compliance with government-issue health standards – including attempted substantial compliance where compliance was prevented due to standards being “in conflict” or “insufficient time to implement the standards.”

While questions such as how to define “insufficient time” and whether standards were “in conflict” in a material way will be subject to litigation, the procedural hurdles of heightened pleading requirements, pre-suit affidavits, adjusted burdens of proof, and shortened statutes of limitation will likely shorten any potential long tail of COVID-19-related claim litigation.

Passage of COVID-19 liability legislation had been a major priority of Governor DeSantis, Senate President Simpson, and House Speaker Chris Sprowls.

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