Patience Required: New Federal Court Opinion on the Application of COVID-19 Immunities

Amundsen Davis Health Care Alert
April 12, 2021

We are all aware of the Illinois Immunity Orders put in place to provide protections for health care providers related to care and treatment of patients during the COVID-19 pandemic. A recent federal court opinion suggests that defendants will have to do some work for the potential immunities to apply. Though this case was in federal court and involved a long term care campus, the analysis provides some insight in to how plaintiffs may attempt to side-step state immunity orders against any type of provider.

The basic facts in *Londa Claybon v. SSC Westchester Health and Rehabilitation Center*, 20 CV 04507, do not appear to be disputed. The decedent contracted and later died from a COVID-19 infection that was diagnosed while she was a resident at Westchester (WHRC). Plaintiff filed a claim in federal court alleging that the defendant violated the Illinois Nursing Home Care Act (NHCA, the Act), when staff known to be positive for COVID-19, were allegedly directed to report for duty, and the campus failed to use/have proper PPE and follow Centers for Medicare & Medicaid Services (CMS) guidance for infection control. Count II alleged willful and wanton conduct.

Defense counsel filed a motion to dismiss on the basis that the facility was "rendering assistance to the state" during the COVID-19 pandemic at the time of the events, and was therefore protected by the immunity provided for in Governor Pritzker's disaster proclamations and executive orders (EO).

Judge Thomas Durkin did not rule on whether any of the specific allegations constituted negligence. Rather, Durkin opined that the issue of whether the campus "actually assisted the State … is a factual question that cannot be resolved at this stage of the proceedings." Durkin relied upon case law which holds that well-pleaded allegations are accepted as true on a motion to dismiss. Durkin held that plaintiff pled facts which if true, supported allegations of negligence. This, combined with some vague language in the motion to dismiss, resulted in "questions of fact" and made the motion effectively premature.

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The defendant also filed an "in the alternative" motion to strike the willful and wanton counts taking the position that such claims were not available under the Act. Durkin held that based on the plain language of the NHCA ("willful withholding of adequate medical care"), such claims are available under the NHCA. In Durkin's opinion, the allegations at this stage were enough to state a claim and denied the motion to strike.

Interestingly, Durkin acknowledged that his ruling might result in costly, burdensome discovery but, in what appeared to be a cautionary statement to the plaintiff, the court referenced Federal Rule 26(b)(1) (the equivalent of Illinois Rule 201(b)(1)), which limits the scope of discovery to that which is relevant and proportional.

While this Order at first-blush may seem like a blow to potential immunity protections, a few issues must be noted. First, the order and opinion of a federal court judge are not binding on state court claims, although they could be used as part of a persuasive argument. In addition, defendants have known that release from these claims pursuant to Illinois Immunities may, depending on the facts of the case, be more suited to a motion for summary judgment than a motion to dismiss. It is also unknown if consideration was given to the Public Readiness and Emergency Preparedness (PREP) Act immunities.

The analysis in Judge Durkin's order suggests that providers would be well advised to maintain the evidence which shows that they met the "rendering assistance" requirements.