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## COVID-19 HEALTH CARE UPDATE

### Health Care Provider Liability During a Pandemic

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Given the unprecedented health crisis, local hospitals are continuing to see a “surge” of COVID-19 patients leading to mounting obstacles for individual health care providers as they work around the clock to provide appropriate patient care. The complexities of treating this new disease under the most trying of times raise many liability questions for health care providers on the front line of this pandemic. Fortunately, the Louisiana Medical Malpractice Act already imposes a statutory cap on a qualified health care provider’s financial exposure for professional negligence. As explained below, Louisiana law further insulates health care providers from civil liability when medical treatment is provided during emergent circumstances.



The Louisiana Health Emergency Powers Act, La. R.S. 29:760, *et. seq.* (“LHEPA”), allows the governor to declare a state of public health emergency if he or she determines, after consultation with public health authorities, that an occurrence or imminent threat of an illness is believed to be caused by the appearance of a novel infectious disease that poses a high probability of a large number of deaths, serious or long-term disabilities and/or wide-spread exposure to a an infectious agent that poses significant risk of substantial harm to a large number of people.[1] Under normal circumstances, Louisiana law places civil liability on a health care provider when they fail to exercise reasonable care and skill, along with their best judgment, in treating a patient’s condition.[2] However, LHEPA provides that, during a state of public health emergency “any health care providers shall not be found civilly liable for causing the death of, or, injury to, any person or damage to any property except in the event of **gross negligence** or **willful misconduct**.”[3]

Gross negligence is not defined anywhere in LHEPA. The Louisiana Supreme Court, however, has noted that gross negligence:

“ ... has been defined as the ‘want of even slight care and diligence’ and the ‘want of that diligence which even careless men are accustomed to exercise.’ Gross negligence has also been termed the “entire absence of care” and the “utter disregard of the of prudence (sic), amounting to complete neglect of the rights of others.” Additionally, gross negligence has been described as an “extreme departure from ordinary care or the want of even scant care.” “There is often no clear distinction between such [willful, wanton, or reckless] conduct and ‘gross’ negligence, and the two have tended to merge and take on the same meaning.”[4]

There is only one reported case concerning the gross negligence standard under LHEPA. In *Lejeune v. Steck*, the trial court found that the Plaintiff failed to prove that a spine surgeon leaving a foreign body (i.e. sponge) in his patient during a surgical procedure in the aftermath of Hurricane Katrina rose to the level of gross negligence or willful misconduct.[5] The patient’s claims were dismissed entirely prior to trial and the ruling was affirmed on appeal.[6]

On March 11, 2020, pursuant to the power conferred to him under LHEPA, Governor Edwards issued Proclamation Number 25 JBE 2020, entitled “Public Health Emergency - COVID 19.” The Proclamation, citing statistics from multiple world health agencies, declares that the Coronavirus is a new respiratory disease that may be spread amongst the population by various means of exposure, therefore posing a high probability of widespread exposure and a significant risk of substantial future harm to a large number of Louisiana citizens. Due to this imminent threat, the Governor’s Order was signed into law on March 11, 2020 and remains in effect until at April 9, 2020. During this period of time and pursuant to the civil immunity provided by LHEPA, health care providers treating patients for suspected or confirmed cases of Coronavirus will not be found civilly liable for a patient’s poor outcome, unless evidence shows their treatment decisions were grossly negligent or that they engaged in willful misconduct. Even if evidence demonstrates gross negligence, qualified health care providers are still protected by the statutory limits of liability under the Louisiana Medical Malpractice Act.

LHEPA may also arguably provide civil immunity to any individual health care provider for any type of medical care during the duration of the public health emergency (i.e. not limit the immunity to only treatment for patients suspect of or infected with Coronavirus). The statute plainly states that “any health care providers shall not be found civilly liable for causing the death of, or, injury to, any person or damage to any property” and the only exception given is in the event of “gross negligence or willful misconduct.” While there is not a lot of judicial interpretation of this statute, in the case cited above, *Lejeune v. Steck*, the Court did state that LHEPA “...does not provide for a limited set of health care providers, nor does it limit its application to only those medical personnel rendering emergency assistance voluntarily due to the emergency in the area.”[7] Based on the plain language of LHEPA and the *Lejeune* decision, a strong argument can be made that this civil immunity applies across the board to all medical providers treating patients for any reason during the duration of this public health emergency.

There are other provisions in Louisiana law that could provide some relief to health care providers, but the circumstances are more limited. For instance, Louisiana’s Good Samaritan Law, La. R.S. 37:1731, provides, in pertinent part, that health care providers (physicians, mid-levels, nurses, etc.) who in good faith (1) gratuitously renders emergency care or services at the scene of an emergency or (2) responds to a life threatening situation in a hospital or medical facility when their job duties

did not require them to respond to such emergency shall not be liable for any civil damages as a result of their negligence in rendering such care or failure to act to provide or arrange for further medical treatment, unless the damage or injury was caused by **willful or wanton misconduct** or **gross negligence**.<sup>[8]</sup> To be sure, this statute offers greater protections than normal to a health care provider who comes to the aid of a distressed patient outside of the hospital setting or a health care provider who responds to a patient facing an emergency in a hospital room or the ICU when it is otherwise outside of their job duties. The limitations of liability in Louisiana’s Good Samaritan Law for in-patient emergency treatment, however, do not apply to any health care providers who were the attending or consulting providers prior to decline in the patient’s condition which invoked the need for an emergent response.<sup>[9]</sup> That hole in Louisiana’s Good Samaritan statute does potentially expose some providers who may in good faith respond to an emergency situation, but it is arguably closed by the language in LHEPA which includes “any health care providers” treating patients during a public emergency.

In sum, the Louisiana legislature, through LHEPA and the Good Samaritan Law, has gone to great lengths to protect individual health providers who selflessly treat patients during a public health emergency. Indeed, as explained by the Louisiana Supreme Court, absent evidence of an “extreme departure of ordinary care,” a patient’s medical malpractice claim against these health care providers that arises out of treatment during a government-recognized public emergency faces an uphill battle in our courts. Nevertheless, questions still remain as to the scope and extent of these protections to health care providers in certain situations. It is important as ever for individual providers to thoroughly document all steps taken during these emergent circumstances to provide care to patients suffering from COVID-19 or any other medical condition.

The Taylor Porter [Health Care Practice Group](#) continues to monitor the fluid and increasing obstacles confronting the health care system amidst COVID-19, and its unprecedented burden on providers. We will continue to alert you of these updates and post any news and legal developments to our [Coronavirus Legal Blog and Resources](#) section of our website.

*About [Adam Thames](#): Adam Thames is a Partner at Taylor Porter and a member of the Firm’s Healthcare Practice Team. He devotes a significant portion of his practice to representing physicians, hospitals, dialysis clinics, nurses, and other healthcare providers in medical malpractice and other professional liability claims. Adam also has extensive experience litigating class action, products liability, personal injury, and insurance defense claims. He is ranked by his peers among the Louisiana Super Lawyers’ “Rising Stars.”*

#### **ARTICLE FOOTNOTES**

[1] See La. R.S. 29:766(A) and La. R.S. 29:762(12)

[2] La. R.S. 9:2794.

[3] La. R.S. 29:771(B)(2)(c).

[4] Rabalais v. Nash, 06–0999 (La.3/9/07), 952 So.2d 653, 658

[5] 13-1017 (La. App. 5 Cir. 5/21/14); 138 So.3d 1280.

[6] Id. at 1285.

[7] Id. at 1283.

[8] La. R.S. 37:1731(A)(1)-(2)(a).

[9] La. R.S. 37:1731(2)(b).