

“Coronavirus: Inevitable Future Litigation Involving the Healthcare Industry,” (March 2020).

Articles

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If it remains true in the post-coronavirus world that “past is prologue,” once we emerge from the global crisis created by the virus, one thing is certain: litigation will soon follow. The precise types of claims that direct healthcare providers, hospitals, or your insureds may face, may be less certain and will vary by your individual circumstances and the creativity of opposing counsel, but they will surely come. Here, we examine some likely areas of future conflict and offer some suggestions to try and mitigate against current and future risks.

The Standard of Care

In virtually every state, the standard of care requires a healthcare provider to act as a reasonably prudent healthcare provider would under the same or similar circumstances. But

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what happens when the rules are being rewritten daily and there is no standard?

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For instance:

- Are sanitization or triage protocols any different when triaging and treating potential coronavirus patients in a makeshift medical tent set up in a hospital parking lot?
- What is the standard for admitting a patient or sending someone home when there are no coronavirus tests available?
- And what happens if one of those individuals experiences an adverse outcome?

There are no easy answers to these and questions like them. Unfortunately, they will likely be litigated for years to come in the face of future lawsuits. Yet, as described below, there are ways to mitigate now against these risks.

Consumer Protection Lawsuits

One less obvious—but already growing area of the law in healthcare liability cases— includes alleged violations of consumer protection statutes. These laws, widely referred to as “Consumer Protection Acts,” were generally enacted to prevent deceptive trade practices in the sale of goods and services. In recent years, however, the plaintiffs’ bar has increasingly tried to use these statutes in healthcare liability cases because they often allow for the recovery of attorneys’ fees and sometimes enhanced damages.

Many states also provide for private rights of action together with government enforcement actions. Thus, the plaintiffs’ bar and states’ attorneys general could conceivably claim that a hospital, physician’s office (or any other company in any other industry for that matter) did not adequately disclose an exposure to the novel coronavirus or the rates of infection at a given facility and it did so in order to increase revenues (an easy claim to make after the fact). This alleged failure to

disclose would then lead to the argument that: 1) it was the hospital's responsibility and duty to disclose; 2) they were the only ones who could disclose; and 3) because they didn't disclose, hundreds of thousands of plaintiffs got sick or had worse outcomes. In other words, lack of transparency related to exposures involving the coronavirus could result in individual or class action lawsuits and government investigations.

Does HIPAA Privacy Apply During a Global Pandemic?

In short, the answer is yes. But if the President and Secretary of Health and Human Services declare a national/public health emergency (both of which already happened), the Secretary may waive sanctions and penalties against a covered hospital that does not comply with certain HIPAA provisions, including but not limited to:

- Obtaining consent to speak with family members or friends involved in the patient's care;
- The requirement to distribute a notice of privacy practices; and
- The patient's right to request privacy restrictions.

Regardless of the activation of an emergency waiver, HIPAA also permits disclosures for treatment purposes, certain disclosures to disaster relief organizations, and in some instances to other individuals who may have been exposed to the disease.

Other Potential Litigation Issues

There are any number of additional types of issues that could lead to future litigation, including (but not limited to):

- At least one class action lawsuit has already been filed alleging that Purell (the maker of hand sanitizer) exaggerates its product's powers to prevent illness. It is possible, if not likely, that similar suits will follow against hospitals and

healthcare providers due to alleged failures to warn patients of these same issues.

- Some patients or family members will likely claim that they became sick or sicker as a result of contact with healthcare providers. Lawsuits may involve claims that healthcare providers took inadequate protective measures to prevent against the spread of illness.
- Failure to protect the safety or health of employees and failing to take steps to control the spread of the coronavirus in hospitals and office settings.

What Can You Do To Mitigate Your Risk?

The current environment is as fluid as it comes. Thus, it is important to stay abreast of current directives, rules, and changes in the law. In addition, consider these steps to attempt to mitigate your future risk of litigation over the novel coronavirus:

- Be transparent and up front with any reporting requirements.
- Provide adequate and detailed documentation for each patient encounter to be able to defend the care you provide in the event of future litigation.
- Update your policies and procedures to address the ever-changing landscape to avoid claims that what you had in place were insufficient.
- Stay up to date on the latest Joint Commission, OSHA, and other industry and regulatory guidance regarding treating patients during the pandemic.
- Stay up to date on the various emergency measures Congress continues to pass and the various declarations, proclamations, and guidance from the executive branch and consider how these may affect treatment and future liability,

including the FDA's Policy for Diagnostic Testing for Coronavirus Disease issued on March 16, 2020.

- Update your triage protocols and ensure that the updated protocols are in line with EMTALA regulations in the event your facility faces a resource shortage and cannot adequately treat every patient.
- Consider the impact of the PREP Act (enacted in 2005), which provides immunity from tort liability claims (except willful misconduct) to individuals or organizations involved in the manufacture, distribution, or dispensing of medical countermeasures once the Secretary of the Department of Health and Human Services issues a Declaration, like the one published March 17, 2020 (but effective February 4, 2020).
- Limit media access, where possible, to avoid any potential HIPAA violations or bad publicity that could be used against you in the future.

For more information, contact WTO partners [Joel Neckers](#) or [Joe Farchione](#).