

House Bill 25

Catastrophic Health Emergencies – Health Care Providers - Definition and Immunity (Maryland Health Care Heroes Protection Act)

Before the House Judiciary Committee

POSITION: Support

The University of Maryland Medical System supports House Bill 25, dubbed the **Maryland Health Care Heroes Protection Act**, which seeks to clarify, extend and safeguard the protections currently afforded to healthcare providers caring for Maryland’s citizens in the face of a catastrophic health care emergency. The Maryland Health Care Heroes Protection Act is necessary to affirm to our health care providers that the sacrifices they are making and the challenging work they are doing will not leave them exposed to lawsuits arising out of conditions under which these “heroes” have no control.

I. The Maryland Health Care Heroes Protection Act Seeks to Clarify that the Current Statutory Immunities Apply to Treatment of All Patients; Not Just COVID + Patients.

As a result of the COVID-19 pandemic, Maryland’s health care providers have been asked to render care under ever-changing and challenging conditions. These changing and challenging conditions have affected the care rendered to both COVID + and non-COVID patients. The Maryland Health Care Heroes Protection Act is necessary to validate and strengthen the protections currently available under MD Code Annotated Public Safety Article §14-3A-06 and MD Code Annotated Health General § 18-907. This is especially imperative in light of Secretary Neall’s Amended Directive and Order No. MDH 2020-12-01-01 which states that the protections contained in these articles do not apply to a health care provider or facility performing “non-COVID related procedures or appointments”.¹

(a) Suspension of Non-Urgent Procedures and Appointments

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¹ It will be of much legal discussion and argument whether the Maryland Department of Health can determine how expansive or restrictive the protections afforded by MD Code Annotated Public Safety Article §14-3A-06 MD Code and Annotated Health General § 18-907 are. Needless to say the Maryland Association of Justice will contend Order No. MDH 2020-12-01-01 removes any immunity related to care rendered to non-COVID patients during a catastrophic health emergency while those defending our health care providers will advocate that the Secretary of Health is not empowered to dictate the breadth or narrowness of the immunity provisions.

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On March 16, 2020 all hospitals, licensed health care facilities and ambulatory surgical centers were directed to cease all elective and non-urgent medical procedures effective at 5 p.m., Tuesday, March 24, 2020.² That order affected all patients, not just COVID-19 + patients. As a result of this Order, our health care providers, using their medical judgment, determined which procedures could be delayed (i.e., were elective or not urgent) and for how long. As a result of these delays, patients may argue that their conditions worsened, possibly to the point of disability or death. Patients whose procedures were delayed but were not COVID +, can sue any health care provider who determined that the procedure was not urgent and these health care providers arguably will NOT have the defense of immunity. Thus, the case will proceed through lengthy litigation and possibly result in an adverse judgment against the provider. If this same patient had a diagnosis of COVID-19, the provider would have the affirmative defense of immunity and the lawsuit would not go forward.³ This disparity of protection under a circumstance in which the provider was following an Order of the Secretary of Health defies reason and logic. The Health Care Heroes Protection Act is necessary to correct this immense and illogical gap in protection.

(b) Limited Resources: Staff/Beds/Materials

The Maryland legislature, in passing MD Code Annotated Public Safety Article §14-3A-06 and MD Code Annotated Health General § 18-907 recognized that a catastrophic health emergency will substantially impact usual health care operations. As Maryland is experiencing a spike in the number of COVID-19 hospitalizations, hospitals across the State are acting urgently to build up capacity with more beds, more equipment, and more skilled caregivers. However, it is possible that should the number of cases of hospitalization continue to increase, capacity will exceed the resources necessary to care for the increased number of patients, placing health care providers in the untenable position of deciding who gets what care in addition to modifying the way care is rendered. Providers making such decisions related to COVID + patients will be immune for their decision making; providers making the same decisions for non-COVID patients will not. Although we thankfully have not yet reached this precipice, health care providers are very concerned that should we, they will unfairly be exposed to litigation, especially as it pertains to the care and treatment of non-COVID patients.

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² Subsequent to that Order, as the number of COVID-19 hospitalizations decreased, hospitals were ordered to put into place metrics by which they would determine when elective and non-urgent procedures were to cease.

³ Immunity would apply unless the provider was not acting in good faith.

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Hospitals have already experienced modifications in their hospital operations as a result of their COVID-19 response: the utilization of tele-medicine has increased significantly; placing patients in protective isolation for hours to days while awaiting COVID testing results; monitoring patients who are a safety risk via video camera as opposed to being physically present; changes in documentation practices and other more administrative tasks as staffing is impacted due to staff exposure and the required quarantining that follows. These are just a few of the many changes that have been implemented that impact ALL patients, not just COVID+ patients. The Maryland Health Care Heroes Protection Act will ensure protection for all health care providers who may be sued as a result of the modifications to hospital operations resulting from this catastrophic health emergency, not just those treating COVID+ patients.

II. The Maryland Health Care Heroes Protection Act Seeks to Expand Protection to Members of the Health Care Team Who are Not Health Care Providers as Currently Defined.

The Maryland Statutes affording immunity in a catastrophic health emergency confer this immunity to a “health care provider”. Health care provider is defined as a health care practitioner in one statute (MD Health General § 18-901(g)) and “any individual who is licensed, certified, or otherwise authorized under the Health Occupations Article to provide health care services” (MD Health General § 19-114 (e)) in another.

There are several members of the health care team who would not be considered “health care providers’ under the above referenced Maryland statutes. Examples include: environmental services team members (formerly referred to as housekeeping); supply chain team members; bed management team members and information technology⁴ team members. It is anticipated that litigation around negligent exposure to COVID-19 would include the team members responsible for cleaning and dis-infecting a patient’s room or equipment (environmental services). Likewise, should a patient suffer harm due to a failure to transfer a patient to an appropriate level of care during a period of limited bed availability (bed management) or due to a failure to have adequate levels of equipment or supplies, e.g. personal protective equipment (supply chain), the team members responsible for these areas would not have immunity for performing their tasks in good faith. The Maryland Health Care Heroes Protection Act seeks to expand the immunity currently available to include these vital health care team members.

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⁴ In order to facilitate vaccination of our patients and the community we have created multiple “builds” and work flows within our electronic medical record. Immunity would not flow to any of the information technology team members should these work flows and “builds” become the subject of litigation.

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III. The Maryland Health Care Heroes Protection Act Seeks to Safeguard the Protections Available to Our Health Care Heroes

The Maryland Healthcare Heroes Protection Act seeks to safeguard the immunity Protections for our health care providers and team by (1) extending the protections 180 days after the end of the catastrophic health emergency and (2) making the clarifications and extensions contained in the Act retroactive to the beginning of the catastrophic health emergency. Both of these safeguards are necessary and reasonable.

No one can predict what criteria will be utilized to declare the health emergency over. Disruptions to the work force and supply chains likely will persist long after the emergency has been deemed concluded. Extending the protections of the Maryland Health Care Heroes Protection Act 180 days after the health emergency has ended is necessary because it allows hospitals a reasonable amount of time to pivot back to their non-emergency operating procedures in a controlled manner while continuing to treat COVID-19+ and non COVID patient populations.

The Maryland Health Care Heroes Protection Act, unless applied retroactively, will render no protection for the healthcare providers who have courageously cared for the citizens of Maryland for the past 10 months since the health emergency was declared. As stated above, health care providers arguably do not have the protection of MD Code Annotated Public Safety Article §14-3A-06 and MD Code Annotated Health General § 18-907 when they treat any non-COVID patient. It is imperative that they be afforded this protection. Likewise many team members not included in the definition of health care provider have diligently performed their duties since the beginning of the pandemic. They deserve immunity for their work but will receive none unless the provisions in the bill are retroactive to the beginning of the health emergency.

For the foregoing reasons, the University of Maryland Medical System urges a favorable vote on House Bill 25.

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