



Proceedings

A monthly newsletter from McGraw-Hill Education



May 2020 Volume 11, Issue 10

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Dear Professor,

Welcome to McGraw-Hill Education's May 2020 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 11, Issue 10 of Proceedings incorporates "hot topics" in business law, video suggestions, an ethical dilemma, teaching tips, and a "chapter key" cross-referencing the May 2020 newsletter topics with the various McGraw-Hill Education business law textbooks.

All of the following cases included in this publication address the legal and ethical implications of the COVID-19 pandemic:

1. A request by the Florida Health Care Association for immunity from COVID-19 lawsuits;
2. An executive order issued by New York Governor Andrew Cuomo allowing couples to legally wed via video conference;
3. Orders issued by the Navajo Nation requiring that protective face masks be worn on its reservation, and imposing lockdowns and curfews;
4. Videos related to a) alleged racial discrimination at a McDonald's restaurant in China and b) an emergency room doctor who has temporarily lost custody of her daughter due to coronavirus fears;
5. An "ethical dilemma" related to a class action lawsuit filed against Wells Fargo for allegedly prioritizing large Paycheck Protection Program loan applications in order to generate higher fees for the bank; and
6. "Teaching tips" related to Article 1 ("Got My Blood Boiling?: Florida Nursing Homes Ask Governor for Immunity from Coronavirus Lawsuits") and Article 3 ("Navajo Nation Orders Protective Masks Worn on Reservation") of the newsletter.

I continue to wish you wellness and happiness in these challenging times. It is my hope that when Volume 12, Issue 1 of this newsletter reaches you in August 2020, we will be on the "other side" of the pandemic.

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Of Special Interest

This section of the newsletter covers three (3) topics:

- 1) A request by the Florida Health Care Association for immunity from COVID-19 lawsuits;
- 2) An executive order issued by New York Governor Andrew Cuomo allowing couples to legally wed via video conference; and
- 3) Orders issued by the Navajo Nation requiring that protective face masks be worn on its reservation, and imposing lockdowns and curfews.

Hot Topics in Business Law

Article 1: “‘Got My Blood Boiling’: Florida Nursing Homes Ask Governor for Immunity from Coronavirus Lawsuits”

<https://www.usatoday.com/story/news/health/2020/04/11/coronavirus-florida-nursing-homes-covid-lawsuits-ron-desantis/2977441001/>

According to the article, Florida's largest advocacy group for long-term care providers is requesting protection from lawsuits for health care professionals engaged in responding to the COVID-19 outbreak.

The Florida Health Care Association sent a letter to Governor Ron DeSantis recently requesting "immunity from any liability, civil or criminal" under certain conditions for nursing homes, hospitals and other facilities.

The group is the most recent in a series of health care associations seeking legal immunity amid the pandemic, when hours are long and staffing and equipment are short.

Brian Lee, executive director of Families for Better Care, a nonprofit group advocating for nursing home residents, said the letter was the equivalent of "asking for forgiveness in advance."

"It just got my blood boiling. I was shocked by the temerity of the industry to ask for blanket immunity from lawsuits ... and to do it during the middle of this crisis. It's appalling, and it's a total slap in the face of families," Lee said. "All of their focus should be on saving our families lives, but it shows that, at the end of the day, they care more about their own protections. It's gross."

But the FHCA argues that "in the midst of this unprecedented crisis, (health care professionals) should be able to direct their skills and attention to helping individuals who need them, and not have to worry about being sued for making tough decisions while trying to comply with government directives," spokesperson Kristen Knapp said.

Florida is reporting more than 18,000 confirmed coronavirus cases in the state.

The state's Agency for Health Care Administration said recently that the industry's letter had been received and will be reviewed. "The state is evaluating all options to assist health care workers and facilities on the front lines of the response to COVID-19, although there has been no final decision on this particular request," communications director Katie Strickland said.



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A recent analysis of federal inspection data found that a majority of U.S. nursing homes (75%) have been cited for failing to properly monitor and control infections in the past three years – a higher proportion than previously known.

The Life Care Center of Kirkland in Washington state, which U.S. authorities believe to be the site of the first outbreak in a long-term facility, received a five-star overall rating by federal regulators but previously had been criticized for its infection control procedures, according to the investigation.

Recently, a woman whose mother died of the coronavirus at the Kirkland facility filed a wrongful death lawsuit against the facility's parent company, Life Care Centers of America.

A large number of coronavirus lawsuits have also targeted colleges, cruise lines and other businesses.

Discussion Questions

1. What is legal immunity?

Legal immunity is simply freedom from legal liability. As the article indicates, the Florida Health Care Association is seeking freedom from both civil and criminal liability for health care services rendered during the Covid-19 pandemic.

2. As the article indicates, Brian Lee, executive director of Families for Better Care, a nonprofit group advocating for nursing home residents, claims that the Florida Health Care Association's request is the equivalent of "asking for forgiveness in advance." Said Mr. Lee:

"It just got my blood boiling. I was shocked by the temerity of the industry to ask for blanket immunity from lawsuits ... and to do it during the middle of this crisis. It's appalling, and it's a total slap in the face of families," Lee said. "All of their focus should be on saving our families lives, but it shows that, at the end of the day, they care more about their own protections. It's gross."

Critically assess Mr. Lee's quote.

This is a subjective assessment, so student responses will likely vary.

3. Do you favor or disfavor legal immunity for health care providers during the Covid-19 crisis? Why or why not?

This is an opinion question, so student responses will likely vary.

Article 2: "New Yorkers Can Now Legally Get Married Via Zoom"



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https://www.huffpost.com/entry/wedding-new-york-zoom-legal_n_5e9d08b4c5b6ea335d5df1d9

According to the article, New York Governor Andrew Cuomo recently issued an executive order allowing New Yorkers to obtain a marriage license remotely and permitting clerks to perform ceremonies via video conference, a practice that is usually banned under existing laws.

“There is now no excuse when the question comes up for marriage,” Cuomo joked during a recent press briefing. “You can do it by Zoom. Yes or no.”

“The Executive Order will temporarily suspend a provision of law that requires in-person visits,” said a press release from the governor’s office.

Many marriage bureaus have temporarily closed as a result of the coronavirus outbreak. In New York, the epicenter of the United States outbreak, stay-at-home measures have been extended until at least May 15, and it could be many months before social distancing measures are lifted to allow gatherings for events such as weddings.

So-called Zoom weddings are already taking off around the world as friends and families dial in via video conferencing tools to watch couples tie the knot, but typically these ceremonies are not legally binding. Some couples either obtain marriage licenses beforehand or put the official ceremony on hold until after the pandemic. Cuomo’s executive order allows couples in the Empire State to get hitched — officially — while keeping their social distance.

Similar measures have been introduced elsewhere. In Colorado, couples are now allowed to apply online for marriage licenses. And in Ohio’s Cuyahoga County, couples with special circumstances (such as suffering from serious illness, health insurance issues or if working in health care), can obtain their marriage license via video call.

Discussion Questions

1. What is an executive order? What is the legal effect of an executive order?

Executive orders may be issued by either the president of the United States (a federal executive order) or a state governor (a state executive order). At the federal level, the legal basis for executive orders derives from Article 2 of the U.S. Constitution, which gives the president broad executive authority to use his discretion to determine how to enforce the law or otherwise manage the resources and personnel of the executive branch. The ability to make such orders is also based on express or implied acts of the U.S. Congress that delegate to the president some degree of discretionary power.

Executive orders are subject to judicial review and may be overturned if the orders lack legislative or constitutional support. Executive orders have significant influence over the internal affairs of government, deciding how and to what degree legislation will be enforced, dealing with emergencies, waging wars, and fine-tuning policy choices in the implementation of statutes. Once issued, executive orders remain in force



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until they are canceled, revoked, adjudicated unlawful, or expire on their own terms. At any time, the president may revoke, modify, or make exceptions to any executive order, whether the order was made by the current president or a predecessor.

At the state level, governors have similar authority to issue executive orders applicable to their jurisdictions.

2. Were you surprised to learn that weddings via video conferencing are generally illegal? Explain your response.

This is an opinion question, so student responses may vary. In your author's opinion, the legal system is not the quickest segment of our society to embrace technology. It may come as a surprise to some students that the use of such technology to sanction matrimony is not already widely accepted.

3. In your reasoned opinion, should weddings via video conferencing be legal, and should that legality continue beyond the social distancing necessities of the Covid-19 outbreak? Explain your response.

These are opinion questions, so student responses may vary. In your author's opinion, the law should embrace technology; wedding via video conferencing should be legal, and that legality should be permanent.

Article 3: "Navajo Nation Orders Protective Masks Worn on Reservation"

https://abcnews.go.com/Health/wireStory/navajo-nation-orders-masks-worn-public-reservation-70227580?cid=clicksource_4380645_10_heads_posts_headlines_hed

According to the article, the Navajo Nation is ordering all people on the tribe's vast reservation to wear protective masks when out in public to help fight the spread of the coronavirus.

The Navajo Department of Health issued the emergency health order for the reservation, which includes parts of Arizona, New Mexico and Utah.

The Navajo Nation has been hit harder by the coronavirus than any other Native American tribe. The tribe and the Navajo Area Indian Health Service said the number of positive coronavirus tests reached 1,197 as of April 18. The average age of the 44 people whose deaths are attributed to COVID-19 is 66.

Navajo Nation President Jonathan Nez said all residents should either buy or make masks to comply with the order.

Nez said in a statement announcing the order that tribal officials would consider even more aggressive requirements to curb the coronavirus.

"Some individuals think we're using scare tactics or extreme measures, but we are losing lives here on the Navajo Nation, and I'm going to do everything I can to help save lives," Nez said.



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For most people, the coronavirus causes mild or moderate symptoms, such as fever and cough that clear up in two to three weeks. For some, especially older adults and people with existing health problems, it can cause more severe illness, including pneumonia, and death. The vast majority of people recover.

Residents of the Navajo Nation, including non-tribal members, are under a daily nighttime curfew. Lockdowns for the next two weekends will prevent them from leaving their homes, except in the case of an emergency, from dusk Friday until early Monday.

Drive-thru restaurants were ordered closed over the weekend, and people who sell hay, wood, food or other goods from the roadside cannot operate. Gas stations and grocery stores will be open but for limited hours and must regulate the number of people inside.

Navajo police are enforcing the curfews and lockdowns by issuing citations that can carry a fine of up to \$1,000 and 30 days in jail. Essential workers are not subject to the restrictions.

Discussion Questions

1. As the article indicates, the Navajo Nation is ordering all people on the tribe's reservation to wear protective masks when out in public to help fight the spread of the coronavirus. It is also ordering a nighttime curfew, and limited weekend lockdowns. Why are these orders coming from the Navajo Nation, as opposed to the states of Arizona, New Mexico, and Utah and/or the federal government?

The orders are coming from the Navajo Nation, as opposed to the states of Arizona, New Mexico, and Utah and/or the federal government, because the Navajo Nation has tribal sovereignty. Please see the answer to Article 3, Discussion Question Number 2 below for a definition and description of tribal sovereignty.

2. Discuss tribal sovereignty. From what legal source(s) does tribal sovereignty originate?

Tribal sovereignty in the United States is the inherent authority of indigenous tribes to govern themselves within the borders of the U.S. It is the freedom of Native American tribes to self-govern.

For additional discussion of the concept of tribal sovereignty, cases oft-cited with respect to tribal sovereignty, and congressional acts that have modified the nation-to-nation relationship between the federal government and Indian tribes, please see the article "An Issue of Sovereignty" included in Teaching Tip 2 of this newsletter.

3. As the article indicates, Navajo police are enforcing the Navajo Nation's curfews and lockdowns by issuing citations that can carry a fine of up to \$1,000 and 30 days in jail. In your reasoned opinion, is it appropriate for the Navajo Nation to criminalize non-compliance with the curfews and lockdowns? Why or why not?

This is an opinion question, so student responses may vary; however, it is quite common for a government authority to criminalize non-compliance with imposed curfews and lockdowns. In your author's opinion, the potential fine and imprisonment are appropriate under the circumstances. A crime is a wrong against society,



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and for any person who refuses to comply with a directive that is reasonably necessary to keep society safe, that person should be subject to the enforcement authority of the government.



Video Suggestions

Video 1: “McDonald’s Issues Apology after China Restaurant Bans Black People”

https://www.usatoday.com/story/money/business/2020/04/14/mcdonalds-apologizes-after-china-restaurant-bans-black-people/2991341001/?utm_source=taboola&utm_medium=exchange&utm_content=money

Note: To access the video, please click on the Twitter link included at the above-referenced internet address.

Note: In addition to the video, please see the following article included at the above-referenced internet address:

“McDonald’s Issues Apology after China Restaurant Bans Black People”

According to the article, McDonald's has come under scrutiny after one branch in China posted a sign prohibiting black people from entering its premises.

The sign, which was posted in a McDonald's in the city of Guangzhou and went viral on social media, was removed and the restaurant temporarily shut down, a representative from McDonald's said in a statement.

"We've been informed that from now on black people are not allowed to enter the restaurant," the sign read. "Please understand the inconvenience caused." The message on the sign, the statement said, is "not representative of our inclusive values." McDonald's also said the branch's employees and managers will undergo "values" training.

Amid the coronavirus pandemic, black people in Guangzhou — including black Americans — have been subject to mandatory tests and quarantine even if they had no known travel history, as well as reports of discrimination in hotels, restaurants and other public spaces, various media sources report.

The U.S. Consulate General in China has advised that African Americans “avoid the Guangzhou metropolitan area until further notice.”

Reportedly, five Nigerians have tested positive for coronavirus in the city, which has the largest population of African migrants in all of Asia.

Discussion Questions



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1. After conducting some brief online research, discuss whether McDonald's restaurants in China are owned by McDonald's or whether they are instead owned independently by franchisees.

Based on your author's research, McDonald's has adopted the franchise model with respect to its operations in China. Please see the following internet address to learn more about the company's decision to adopt the franchise model in China:

<https://qz.com/881378/mcdonalds-mcd-is-handing-fast-food-power-in-china-to-franchisees/>

2. Based on your research in response to Video 1, Discussion Question Number 1 above, give your opinion as to whether McDonald's itself is responsible for what occurred at the McDonald's restaurant in Guangzhou, China.

This is an opinion question, so student responses will likely vary. In your author's opinion, if McDonald's has ceded control of its restaurants to franchisees, the company would most likely not be legally responsible for what occurred at the McDonald's restaurant in Guangzhou, China. Furthermore, although your author is not a legal expert in Chinese law, I would imagine that the civil rights protections afforded to Chinese citizens are not comparable to the Civil Rights Act of 1964 and other non-discrimination laws recognized in the United States.

3. Discuss whether McDonald's response to the controversy (described in the article) was, in your reasoned opinion, adequate or inadequate.

As the article indicates, the offensive sign was removed, the restaurant was temporarily closed, McDonald's will require the branch's employees and managers to undergo "values" training, and McDonald's has issued a statement indicating that what occurred is "not representative of our inclusive values." In terms of whether McDonald's response to the controversy has been adequate or inadequate, this is a case that will most likely not be tried in a court of law, but instead in the "court" of public opinion.

Video 2: "An ER Doctor Loses Custody of Daughter Because of Coronavirus Fears"

<https://www.cnn.com/2020/04/13/us/custody-coronavirus-er-doctor-trnd/index.html>

Note: In addition to the video, please see the following article included at the above-referenced internet address:

"An ER Doctor Loses Custody of Daughter Because of Coronavirus Fears"

According to the article, an emergency room doctor in Miami has temporarily lost custody of her 4-year-old daughter while she treats patients during the coronavirus pandemic.

Dr. Theresa Greene said that she was appealing the emergency order that granted her ex-husband full custody of their daughter.



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"I think it's not fair, it's cruel to ask me to choose between my child and the oath I took as a physician," Greene said. "I won't abandon my team at work or the patients who will increasingly look to me to save their lives in the coming weeks, but it's torture."

Greene and her ex-husband have been divorced for almost two years and have split time with their daughter evenly.

Recently, Circuit Court Judge Bernard Shapiro ruled that the child should stay with her father, Eric Greene, to limit the risk of exposure to coronavirus.

"The Court does not enter this Order lightly but given the pandemic in Florida and the recent increase in confirmed COVID-19 cases, the Court finds in order to insulate and protect the best interests and health of the minor child, this Order must be entered on a temporary basis," the judge wrote in the court ruling.

Theresa Greene said that she felt the order discriminated against her as a divorced parent.

"If I was married, I'd be given the opportunity to go home to my child, no one could tell me I shouldn't do that," she said.

Theresa Greene said she has been able to wear full personal protective equipment (PPE) while treating patients and that she has done everything she can to avoid contracting the disease. She said her daughter generally stays with her ex-husband when she works.

"Yes, it is severe and there is danger, and we're being very careful," she said. "We use everything we can. I've actually worn equipment above and beyond to protect myself and my child."

In a statement, Eric Greene's attorney Paul Leinoff said that "Mr. Greene and I have the upmost respect for Dr. Greene's commitment to her critical work during this pandemic."

"We recognize and genuinely appreciate the sacrifices that she and all healthcare workers are all currently making to save lives and prevent further illness in Florida and around the world. The Greenes' temporary timesharing dispute was presented before the Court based upon the specific facts of this individual family and a decision was reached based upon the best interests and safety of a minor child, limited to the temporary circumstances presented by COVID-19.

"The Court's ruling was not intended to serve as a blanket rule, nor should it. Pursuant to Mr. Greene's request and as ordered by the Court, Dr. Greene is to be provided future make-up timesharing for each day missed during this challenging time and daily video communication with the child. We will continue to pursue ways to resolve this delicate situation and believe that a result can be achieved safely and fairly," Leinoff wrote. Theresa Greene said that her daughter does not understand what is going on, but she knows that her mom is sad.

"I want her when she grows up to be proud of me by abiding to the oath that I took when I went into medicine, but I also know that she needs me now," she said.



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Theresa Greene said she does not know when she will get to see her daughter again, because there is no way to know when the pandemic will be over.

Discussion Questions

1. Legally, what determines which parent(s) will have child custody upon separation and divorce?

This is a decision for a family law judge to make, as occurred in the subject case. In making her decision, the family law judge is bound by the overriding standard in any child custody case, and that is what is in the “best interests” of the child.

2. As the article indicates, Dr. Theresa Greene, the child’s mother, claims that the order discriminates against her as a divorced parent. Said Dr. Greene: "If I was married, I'd be given the opportunity to go home to my child, no one could tell me I shouldn't do that."

Comment on whether Dr. Greene’s assertion is a valid legal argument.

In your author’s opinion, this is not a valid legal argument. There is no federal or state law that treats “divorced parents” as a protected class. One must also consider the fact that Dr. Greene’s husband, Eric Greene, is also a divorced parent, so there is no “differentiation of classes” that serves as the basis of discrimination law.

3. In your reasoned opinion, did Circuit Court Judge Bernard Shapiro rule correctly in granting full, temporary custody to Mr. Eric Greene, the child’s father? Why or why not?

This is an opinion question, so student opinions will likely vary. In your author’s opinion, no matter how heartbreaking this case may be, the judge did not abuse his discretion or commit an error of law in granting full, temporary custody to the child’s father. The judge was tasked with the responsibility of making the difficult decision regarding custody, and he did just that. Additionally, as mentioned in the article, Judge Bernard Shapiro’s order will allow Dr. Greene to be provided with future make-up timesharing for each day missed during the pandemic, and daily video communication with the child.

Unfortunately, this could be considered part of the “price” health care workers pay every day in terms of their “front-line” service in fighting the pandemic.



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Ethical Dilemma

Of Special Interest

This section of the newsletter addresses a class action lawsuit filed against Wells Fargo for allegedly prioritizing large Paycheck Protection Program loan applications in order to generate higher fees for the bank.

“Lawsuit Alleges Wells Fargo Unfairly Shuffled Paycheck Protection Program Applications”

<https://www.usatoday.com/story/money/2020/04/19/wells-fargo-lawsuit-small-business-ppp-loans/5162801002/>

According to the article, a California-based company filed a class-action lawsuit against Wells Fargo citing unfair actions against some small businesses seeking government-sponsored coronavirus relief under the Paycheck Protection Program.

In March, the United States Treasury Department announced the \$349 billion forgivable loan plan for small businesses that helps them pay employees during the ongoing COVID-19 crisis.

The fund ran out of money on April 17.

The lawsuit filed on behalf of small business owners recently alleges that Wells Fargo unfairly prioritized businesses seeking large loan amounts, while the government's small business agency has said that PPP loan applications would be processed on a first-come, first-served basis.

The move by Wells Fargo meant that the bank would receive millions more dollars in processing fees, according to the lawsuit.

"Making matters worse, Wells Fargo concealed from the public that it was reshuffling the PPP applications it received and prioritizing the applications that would make the bank the most money," the lawsuit filed in California alleged.

Wells Fargo has said that fees generated through the program will be distributed as charitable grants to nonprofits that support small businesses.

The filing against Wells Fargo is one in a series of lawsuits lodged against big banks on behalf of small businesses recently. Wells Fargo denied the media's request for comment on the lawsuit.

The big bank said on April 5 that it was committed to serving small businesses with fewer than 50 employees under the PPP, which is intended to incentivize American small businesses to avoid laying off workers by offering up to \$10 million in forgivable loans. "While all businesses have been impacted by this crisis, small businesses with fewer than 50 employees and nonprofits often have fewer resources," Wells Fargo CEO Charlie



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Scharf said in a press release earlier this month. "Therefore, we are focusing our efforts under the Paycheck Protection Program on these groups."

The plaintiff alleges that evidence of Wells Fargo's foul play lies in data released by the U.S. Small Business Association. The SBA report outlines the PPP loans that were processed and indicates when the transactions occurred.

The plaintiffs call into question a comparison between loans processed at the start of the program – April 3 to April 13 – versus loans processed just before the program ran out of money between April 13 and April 16.

"In the last three days of the PPP—banks processed loan applications for \$150,000 and under at twice the rate of larger loans," the lawsuit said.

This would allegedly suggest that banks front-loaded applications for the largest loans, otherwise "the percentage change of applications submitted in the last three days of the program would be consistent among all application types," the plaintiffs said.

The lawsuit comes just days after the sweeping business rescue program ran out of money on April 17, less than two weeks after launching, as businesses raced toward a lifeline to avoid collapsing under the financial issues caused by the pandemic.

Before running dry, the program approved more than 1.6 million applications for employers.

Discussion Questions

1. Describe the Paycheck Protection Program.

As the article indicates, in March 2020, the United States Treasury Department announced a \$349 billion forgivable loan plan for small businesses that helps them pay employees during the ongoing COVID-19 crisis. This is known as the Paycheck Protection Program (PPP). The PPP is part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act signed into law on March 27, 2020. This over \$2 trillion economic relief package provides financial assistance for American workers, families, small businesses, and state, local, and tribal governments. It also seeks to preserve jobs for American industries.

The PPP funds were completely exhausted on April 17, and as this newsletter is being prepared, the U.S. Congress is expected to inject another \$300 billion into the program.

2. What is the alleged legal violation in this case?

As the article indicates, the subject lawsuit alleges that Wells Fargo unfairly prioritized businesses seeking large loan amounts, while the government's small business agency directed that PPP loan applications be



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processed on a “first-come, first-served” basis. According to the lawsuit, the move by Wells Fargo meant that the bank would receive millions more dollars in processing fees. Finally, the lawsuit states that “(m)aking matters worse, Wells Fargo concealed from the public that it was reshuffling the PPP applications it received and prioritizing the applications that would make the bank the most money.”

3. As the article indicates, Wells Fargo has said that its fees generated through the program will be distributed as charitable grants to nonprofits that support small businesses. In your reasoned opinion, is this enough to remedy the alleged wrongdoing in this case, or is the class action lawsuit more appropriate? Explain your response.

This is an opinion question, so student responses may vary. In your author’s opinion, Wells Fargo’s pledge to distribute its fees generated through the program as charitable grants to nonprofits that support small businesses is not enough to remedy the alleged wrongdoing in this case. Perhaps this should be considered as a mitigating factor to lower the class action verdict amount, but one must also keep in mind an aggravating circumstance; namely, that Wells Fargo has been in legal trouble recently regarding its “fake accounts” scandal. See the following internet address for reference:

<https://www.forbes.com/sites/jackkelly/2020/02/24/wells-fargo-forced-to-pay-3-billion-for-the-banks-fake-account-scandal/#5f68a0f342d2>



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Of Special Interest

This section of the newsletter will assist you in addressing Article 1 ("Got My Blood Boiling": Florida Nursing Homes Ask Governor for Immunity from Coronavirus Lawsuits") and Article 3 ("Navajo Nation Orders Protective Masks Worn on Reservation") of the newsletter.

Teaching Tips

Teaching Tip 1 (Related to Article 1 — “Got My Blood Boiling’: Florida Nursing Homes Ask Governor for Immunity from Coronavirus Lawsuits”): “6 States with Covid-19 Medical Immunity, and 2 Without”

<https://www.law360.com/articles/1264964/6-states-with-covid-19-medical-immunity-and-2-without>

For an excellent summary of the current status of Covid-19-related medical immunity in certain states, please refer to the following article:

“6 States with Covid-19 Medical Immunity, and 2 Without”

According to the article, since the COVID-19 outbreak exploded in the United States last month, state governors and lawmakers have been moving quickly to enact emergency executive orders and legislation shielding health care providers from civil liability given the shortage of ventilators and front-line medical professionals in the hardest-hit areas.

While the CARES Act, the \$2 trillion stimulus package the president signed into law last month, protects volunteer health care workers from liability in the absence of reckless conduct or gross negligence, state lawmakers have taken further steps to immunize health care providers so they can give much-needed treatment without the fear of getting sued.

"If a provider is saying, 'I can't provide care because I'm afraid of being sued,' that's a problem," said Delphine O'Rourke, a Duane Morris LLP partner specializing in health care regulatory matters.

O'Rourke said lawmakers such as those in hard-hit New Jersey have moved quickly to draft and pass legislation because of the challenging circumstances health care providers face, including the lack of life-saving ventilators and other medical equipment and supplies.

"Physicians are very concerned that the shortage and the need to have ventilator triage policies," where a doctor has to make a judgment call on which patients get a ventilator, "are creating significant increased risk of exposure to litigation," she said.

Here is a compilation of what some states have done to protect health care providers from liability. Not all states with immunity laws or executive orders are included.



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New York

The Empire State on April 2 passed the Emergency Disaster Treatment Protection Act, which grants broad immunity to hospitals, nursing homes, physicians and nurses and other health care providers.

The bill not only immunizes health care providers for the treatment of coronavirus patients but provides a legal haven for any medical care given by a provider impacted by the COVID-19 outbreak. New York has suffered the most deaths in the United States, with more than 12,100 as of April 17, according to the state's health department website.

The new law does not bar claims for willful, reckless or criminal misconduct or gross negligence but makes clear that any bad decisions stemming from staffing shortages or a lack of resources can't be considered to be in that category. The law will remain in effect for the duration of the state's public health crisis.

The law was passed as part of New York's budget bill and followed an executive order Governor Andrew Cuomo issued March 23, which granted temporary immunity to health care providers working in support of the state's COVID-19 efforts, including retired and out-of-state health care professionals.

New Jersey

Governor Phil Murphy on April 14 signed legislation that guards health care professionals and facilities from civil and criminal liability in connection with their treatment of COVID-19 patients.

Under the new law, which is retroactive to March 9, medical workers cannot be held liable for patient injuries or deaths that were sustained due to their actions or inactions in support of the state's coronavirus public health emergency. The virus had killed more than 3,800 people in the Garden State as of April 17, according to state figures.

State lawmakers voted remotely April 13 to overwhelmingly approve S.B. 2333. One of the bill's sponsors, Senate Minority Leader Tom Kean Jr., R-Union, said in a statement that many of the challenges facing the facilities and workers, "including shortages of life-saving ventilators, are not the result of negligence but of a massive surge in need and limited national supply."

"When our region has been hit as hard by the coronavirus as anywhere in the world, we must recognize that our health care facilities, doctors, and nurses are doing the best they can with what they have," Kean added. "They deserve the assurance that they will not be punished for trying to save lives under these unbelievably difficult circumstances."

The law also immunizes health care providers for good-faith treatment provided via telehealth, as well as treatment rendered outside of a physician's specialty. It also provides temporary certification of emergency medical technicians with expired licenses or active paramedics from out of state.

Michigan



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Governor Gretchen Whitmer issued an executive order March 29 easing regulations for certain health care professionals in order to get them on the front lines more quickly and reinforced a state disaster relief law, which gives broad immunity to health care providers during emergencies.

Executive Order 2020-30 states that under the authority of Michigan's Emergency Management Act, health care professionals and facilities working in support of the state's COVID-19 response will not be held liable for a person's injuries or death, "regardless of how or under what circumstances or by what cause those injuries are sustained." Cases of gross negligence are not covered, according to the order.

"Michigan's dedicated health care professionals continue putting their lives on the line every day during this unprecedented crisis, and we must do everything we can to empower them to do their jobs," Whitmer said in a statement.

Michigan had as of April 17 the third most coronavirus-related deaths in the nation, with 2,227, according to state statistics.

Massachusetts

Governor Charlie Baker is widely expected to approve a bill he himself introduced that would grant broad legal immunity to the state's doctors, nurses and hospitals as they battle the COVID-19 pandemic.

Baker announced April 8 that the proposed legislation would protect health care professionals, including physicians, nurses and emergency medical technicians, from civil liability "when the care that they provide is impacted by the COVID-19 emergency." The bill also provides liability protection for certain health care facilities such as nursing homes, assisted living facilities and community health centers.

The state legislature voted April 17 to approve the bill and sent it to Baker for his signature, according to legislative records.

Massachusetts had as of April 17 the nation's fourth most coronavirus-related deaths, at 1,404, according to state figures.

Illinois

Governor J.B. Pritzker issued an executive order April 1 granting civil liability immunity to health care providers providing medical treatment in support of the COVID-19 outbreak, absent gross negligence or willful misconduct.

Executive Order 2020-19 covers a health care professional's or facility's decision to cancel or postpone elective surgeries and non-emergent procedures. In addition to hospitals, medical facilities protected under the order include nursing homes, surgery and dialysis centers and government-funded health clinics. More than 1,100 people in Illinois had died due to coronavirus as of Friday, according to state statistics.



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Like New York, the new Illinois law protects health care providers even if they are not treating coronavirus patients, so long as a patient's injury or death occurred when a provider was "engaged in the course of rendering assistance to the state by providing health care services in response to the COVID-19 outbreak."

In addition, the order shields health care facilities from liability in connection with decisions they made to preserve personal protective equipment.

In late March, a Chicago nurse filed a lawsuit against Northwestern Memorial Hospital claiming she was fired for warning colleagues that the surgical masks the hospital provided nurses were inadequate to protect against the virus, as opposed to the more effective N95 masks. On April 2, a hospital security guard in suburban Chicago filed suit claiming he was constructively fired from his job for wearing a mask while working.

Connecticut

On March 10, Governor Ned Lamont issued an emergency order granting immunity to health care providers and facilities providing good-faith medical services in support of the state's COVID-19 response.

The order covers any actions related to a lack of resources attributable to the pandemic and effectively relaxes the standard of care in situations impacted by the outbreak. Not covered are acts of "crime, fraud, gross negligence and willful misconduct," according to the order.

Health care professionals who are licensed in any U.S. state are covered under the order, as are any retired medical workers with inactive licenses who are authorized by the state health department to provide care, according to the order. In addition to hospitals, health clinics, nursing homes and field hospitals are also shielded by the emergency order during the duration of Connecticut's health care emergency.

The state had tallied 971 COVID-19 deaths as of April 16, according to state figures.

Pennsylvania

Health care industry lobbying groups are urging Governor Tom Wolf to issue an executive order granting immunity to health care providers impacted by the coronavirus pandemic after efforts to get a related law on the books fizzled in the state legislature without a vote. The state's COVID-19 death toll stood at 756 as of April 17, according to state figures.

The Pennsylvania Health Care Association sent a letter April 8 to Wolf asking him to follow the leads of New York and New Jersey to issue an order protecting health care providers.

"Staff are putting themselves at risk every single day. They should not have to worry about the threat of lawsuits as they care for their residents," the group said in the letter.

Meanwhile, the Pennsylvania Medical Society is asking its 16,000 physician members to contact the governor on the issue.



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"Good Samaritan laws currently provide legal protections for doctors, nurses, and physicians assistants who help those injured in a roadside accident, hurricane, or other medical emergency," the group said in a statement. "The same theory should apply to medical professionals during the COVID-19 pandemic."

Earlier this month, the Pennsylvania House of Representatives rejected a bill that would have conferred immunity to health care providers and manufacturers who retool factories to make products such as personal protective equipment and medical equipment, according to news reports. The bill was not put to a floor vote after lawmakers on both sides of the aisle expressed concerns that it was too broad, news reports said.

Florida

As in Pennsylvania, advocates for the Sunshine State's health care industry are asking Governor Ron DeSantis to issue an executive order to provide legal cover for health care providers in a state with a high number of nursing home patients. Florida has reported 686 coronavirus deaths as of April 17.

The Florida Health Care Association, a group representing a majority of the state's nearly 700 nursing homes, sent a letter to the governor earlier this month requesting civil and criminal immunity for any health care treatment impacted by the pandemic in the absence of gross negligence or recklessness.

"We believe it is imperative that health care facilities and health care professionals are protected from liability that may result from treating individuals with COVID-19 under the conditions associated with this public health emergency," the group said in the April 3 letter.

Teaching Tip 2 (Related to Article 3 — “Navajo Nation Orders Protective Masks Worn on Reservation”): “An Issue of Sovereignty”

<https://www.ncsl.org/research/state-tribal-institute/an-issue-of-sovereignty.aspx>

For a brief summary of the concept of tribal sovereignty, cases oft-cited with respect to tribal sovereignty, and congressional acts that have modified the nation-to-nation relationship between the federal government and Indian tribes, please see the following article:

“An Issue of Sovereignty”

According to the article, tribal sovereignty refers to the right of American Indians and Alaska Natives to govern themselves. The U.S. Constitution recognizes Indian tribes as distinct governments and they have, with a few exceptions, the same powers as federal and state governments to regulate their internal affairs. Sovereignty for tribes includes the right to establish their own form of government, determine membership requirements, enact legislation and establish law enforcement and court systems.

Three historic court cases are often cited with respect to tribal sovereignty:



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- 1) *Johnson v. McIntosh (1823)* — This case addressed the legality of a tribal land grant made to private individuals and provided that tribes' rights to sovereignty were impaired by colonization but not disregarded, and that only the federal government has the right to negotiate for American Indian land.
- 2) *Cherokee Nation v. Georgia (1831)* — The Cherokee Nation filed a lawsuit against the state of Georgia which requested relief from state jurisdiction on their land. The decision described Indian tribes as "domestic dependent nations" and maintained that the federal-tribal relationship "resembles that of a ward to his guardian."
- 3) *Worcester v. Georgia (1832)* — This case involved the application of Georgia state law within the Cherokee Nation. The decision was made that tribes do not lose their sovereign powers by becoming subject to the power of the United States. It also maintained that only the United States Congress has overriding power over Indian affairs and that state laws do not apply in Indian Country.

Over the years, several acts of the United States Congress have modified the nation-to-nation relationship between the federal government and Indian tribes:

- 1) Passed in 1953, Public Law 280 provides for five states, including Minnesota (except for the Red Lake reservation), to assume general criminal and some civil jurisdiction over Indian reservations within the state. Tribes retain limited criminal and general civil jurisdiction. In recent years, some PL 280 states and tribes have worked together to return some or all of this authority to back to tribes.
- 2) Passed in 1978 the Indian Child Welfare Act (ICWA) establishes procedures state agencies and courts must follow in handling Indian child custody matters. Creates dual jurisdiction between states and tribes that defers heavily to tribal governments.
- 3) The 1988 Indian Gaming Regulatory Act (IGRA) requires that, should a tribe decide to participate in casino gaming, the state can negotiate in good faith with the tribe to develop a gaming compact setting forth games, limits and other terms.

The United States Constitution gives authority in Indian affairs to the federal government, not to the state governments. Just as the U.S. deals with states as governments, it also deals with Indian tribes as governments, not as special interest groups, individuals or some other type of non-governmental entity. Some states have explicitly recognized the governmental status of Indian tribes through various state recognition processes.



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Chapter Key for McGraw-Hill Education Business Law Texts:

	Hot Topics	Video Suggestions	Ethical Dilemma	Teaching Tips
Barnes et al., Law for Business	Chapters 4 and 7	Chapter 26	Chapter 3	Chapters 4 and 7
Bennett-Alexander & Hartman, Employment Law for Business	N/A	N/A	N/A	N/A
Kubasek et al., Dynamic Business Law	Chapters 5 and 9	Chapter 35	Chapter 2	Chapters 5 and 9
Kubasek et al., Dynamic Business Law: The Essentials	Chapters 5 and 7	Chapter 21	Chapter 2	Chapters 5 and 7
Liuzzo, et al., Essentials of Business Law	Chapters 4 and 5	Chapter 12	Chapter 2	Chapters 4 and 5
Langvardt et al., Business Law: The Ethical, Global, and E-Commerce Environment	Chapters 3 and 7	N/A	Chapter 4	Chapters 3 and 7
McAdams et al., Law, Business & Society	Chapters 5 and 7	Chapter 9	Chapter 2	Chapters 5 and 7
Melvin, et al., Business Law and Strategy				
Melvin, et al., The Legal Environment of Business: A Managerial Approach	Chapters 2 and 9	Chapter 13	Chapter 5	Chapters 2 and 9
Pagnattaro et al., The Legal and Regulatory Environment of Business	Chapters 6 and 10	Chapters 12 and 16	Chapter 2	Chapters 6 and 10
Sukys, Business Law with UCC Applications	Chapters 2 and 6	Chapters 25 and 26	Chapter 1	Chapters 2 and 6



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This Newsletter Supports the Following Business Law Texts:

- Barnes et al., Law for Business, *NEW 14th edition now available!* ©2021 (1260354660)
- Bennett-Alexander et al., Employment Law for Business, 9th Edition ©2019 (1259722333)
- Kubasek et al., Dynamic Business Law, 5th Edition ©2020 (1260354687)
- Kubasek et al., Dynamic Business Law: The Essentials, *NEW 5th edition now available!* ©2021 (1260354717)
- Liuzzo, Essentials of Business Law, 10th Edition ©2019 (1259917134)
- Langvardt, et al., Business Law: The Ethical, Global, and E-Commerce Environment, 17th Edition ©2019 (1259917118)
- McAdams et al., Law, Business & Society, 12th Edition ©2018 (1259721884)
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