The background of the entire page is a microscopic view of COVID-19 virus particles. The top half features a dark blue background with a red rectangular area on the right side. The bottom half is a solid blue background. The virus particles are depicted as spherical structures with numerous protruding spikes, characteristic of coronaviruses. The top section shows a mix of blue and red virus particles, while the bottom section is dominated by blue virus particles of various sizes.

COVID-19 Claims Administrative Playbook

MEDICAL MALPRACTICE & SENIOR CARE

MEDICAL MALPRACTICE & SENIOR CARE COVID-19 RELATED CLAIMS PLAYBOOK

Introduction

Wilson Elser is pleased to present this COVID-19-related medical malpractice and senior care playbook, which is designed to assist claims professionals in navigating the previously uncharted waters of COVID-19 claims handling and litigation. This playbook is not a substitute for legal counsel, and should not be construed as the rendering of legal advice. It is for informational purposes only. Also note that this playbook is not designed to be a complete claims-handling manual; we have not attempted to address every risk-management and claims-handling issue and procedure that could arise. Many of those issues would be the same as in the handling of other claims related to medical malpractice and senior care. Rather, we have focused on issues that we anticipate will arise during the handling of a COVID-19 claim that will be unique to these types of claims, and we have provided suggestions and guidance. Likewise, we have assumed that the coverage determination has already been completed and do not seek to address that here. We believe that this will be the most effective and efficient way for the experienced claims professional to gear up for the new challenges presented by the unfortunate pandemic. We hope that you find the playbook helpful, and assure you that we will continue to be here for you as this area of practice evolves and new and unforeseen challenges emerge.

The playbook is divided into five steps, or phases, for handling COVID-19 medical malpractice / senior care claims. Although these phases roughly follow the progression of a claim, they are not strictly temporal; there will be times that the phases overlap or certain activities from one phase should be done earlier or later in the overall process.

The steps are:

STEP 1.	Preliminary Investigation & Evaluation
STEP 2.	Risk Transfer
STEP 3.	Early Resolution
STEP 4.	Claim & Litigation Management
STEP 5.	Claim Resolution

STEP 1.

Preliminary Investigation & Evaluation

Step 1 Overview: Step 1 encompasses claim intake and acknowledgment. During this step, the claims professional should contact the insured to discuss the claim and begin document collection and investigation. Initial information should be reviewed and the professional should make an initial assessment and set reserves.

SPECIFIC ACTIVITIES:

Determine whether there are any applicable legislation, Executive Orders and/or regulations in the relevant jurisdiction governing COVID-19 (e.g., health care provider liability immunity, extensions or modifications of statutes of limitations for filing a medical malpractice/ senior claim lawsuit).

- ❑ Identify State Law: See our [Medical Malpractice & COVID-19 Comparative Law Survey](#) for a comparison by state, including the District of Columbia, of any regulations enacted to protect health care workers from liability, modify licensing requirements for health care providers and facilities, and/or extend the statute of limitations.
- ❑ Was liability immunity available during the time period covering the claim at issue?
- ❑ Which health care provider and facility are protected?
- ❑ Does the protection cover health care provider treatment of both COVID-19 and non-COVID-19 patients?
- ❑ Does liability immunity apply to the act or omission giving rise to the lawsuit?
- ❑ Is there an exception to liability immunity such as gross negligence, wanton or willful misconduct, reckless conduct, intentional conduct?
- ❑ Was claimant's treatment impacted by the health care provider's or facility's measures taken in response to COVID-19?
- ❑ Did you consider Pre-Answer Motion to Dismiss based on legislation, Executive Orders or regulations providing liability immunity to health care providers?
 - Also consider traditional defenses such as lack of capacity to sue and lack of personal jurisdiction.
 - Also consider removal to federal court based upon application of federal law, diversity or other bases for subject-matter jurisdiction.

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Note: Consider engaging outside counsel to research whether there is legislation on the books in the particular jurisdiction that predates the COVID-19 pandemic but was enacted pursuant to a prior public health situation (e.g., Good Samaritan Laws, UEVHPA) that may be applicable and may expand or mitigate liability and exposure relative to the insured by way of statutory presumptions, burdens of proof, immunities, etc.

Documents: Ask insured for key documents and essential claim details.

- ❑ Policies and procedures maintained by the health care provider (including COVID-19 protocol/ guidelines, testing of staff and patients, reporting of positive staff and patient cases to health authorities).
- ❑ Documents, communications and/or directives (including orders) from national, state, local and/or civil authorities that tie the claim or incident to COVID-19 (e.g., Executive Orders, Board of Health, Environmental, Regulatory).
- ❑ Quality Assurance file, documentation and records (including preventing/ identifying/ reporting/ investigating/ controlling infections).
- ❑ Any other internal communications that may relate to COVID-19.
- ❑ Reports regarding COVID-19 and the insured; e.g., infected employees, infected visitors or vendors, contaminated property, government reports or directives.
- ❑ Insured guidelines, manuals and protocols regarding COVID-19 and the workplace.
- ❑ Protocols and policy changes implemented in response to COVID-19.
- ❑ Logs, checklists and reports relative to insured's performance (or non-performance) of implemented guidelines and protocols.
- ❑ Similar claims, demands and lawsuits arising from or related to COVID-19 against insured.
- ❑ Similar claims, demands and lawsuits involving claimant arising from or related to COVID-19.
- ❑ Any other document or information the insured believes may be relevant to its defense of COVID-19 claim.
- ❑ Ask insured to identify decision makers and employees with the most knowledge of liability, exposures and risk-management issues pertaining to COVID-19.

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Evaluate claim and defenses.

- Evaluation of claim and/or causes of action:
 - Determine the date of the alleged act of negligence or omission or malpractice.
 - What is the claimed act or omission? For example:
 - Does the claim relate to a failure to properly diagnose or treat a COVID-19 patient?
 - Is plaintiff claiming deficient or negligent treatment of a non-COVID-19 patient during the public health emergency?
 - Did the health care provider implement timely and appropriate measures to protect against the spread of COVID-19 to patients?
 - Is there a claim for loss of sepulcher?
 - Determine whether the claimed act or omission is causally connected to the claimed injury. For example:
 - Was the patient timely and appropriately tested and worked up for COVID-19?
 - Was appropriate treatment, based on what was known at the time it was rendered, timely given?
 - Was the treatment of a non-COVID-19 patient adversely impacted by the health care provider's response to the treatment of COVID-19 patients?
 - Did the unavailability of personal protective equipment (PPE) contribute to or result in a patient becoming infected with COVID-19?
 - Are there allegations of gross negligence or willful misconduct by the health care provider, and if so, do these allegations potentially negate otherwise applicable immunity, limited liability or other defenses?
 - Consider the extent of alleged damages and the potential for a comparative fault defense.

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STEP 2.

Risk Transfer

Step 2 Overview: During this phase the claims professional and insurer should assess opportunities for transferring all or part of the risk to other parties or insurers. Appropriate tenders should be made and defense counsel should be instructed to pursue legal action to enforce tender rights when necessary.

SPECIFIC ACTIVITIES:

Risk transfer activities should proceed as is customary in medical malpractice/ senior care cases, including identification of other parties who may have contributed to the claimed injury and the tendering of defense and indemnification to such parties and their carriers as may be appropriate.

- Identify potential sources of shared liability, including:
 - Additionally named parties on the claim
 - Is there a basis for cross-complaint?
 - Potential “Joint Employers” of claimant with insured, including independent contracting physicians or nursing agencies
 - Potential indemnity agreements between insured and third parties
 - Other applicable insurance policies for the insured, including CGL, D&O and workers’ compensation
 - Other applicable insurance of third parties, including policies where insured is named as an additional insureds
 - Private health care providers or groups who contract with the hospital or senior care facility; look to shift liability to these separately insured providers whose conduct is at issue.

- To the extent other sources are discovered, consider:
 - Potential for tolling or joint defense agreements
 - Potential for tendering defense.

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STEP 3.

Early Resolution

Step 3 Overview: This step involves determining the claims settlement value, formulating a settlement strategy and entering into negotiations. Mediation and arbitration should be considered.

SPECIFIC ACTIVITIES:

- Early resolution should proceed as customary in medical malpractice cases. In light of the new and rapidly evolving nature of COVID-19 claims, it is important that defense counsel immediately reach out to plaintiff's counsel to elicit information and detail regarding claimant's theory of liability, as well as the usual information regarding alleged injuries, damages and a settlement demand. Claims should be handled and disposed of efficiently, with a view to making sure that defense costs are not excessive and disproportionate to the ultimate exposure and settlement value.
- Careful consideration should be given to the answers determined to the questions raised in Steps 1 and 2, which may indicate that a particular emphasis should be placed on early resolution. Factors that may militate in favor of early resolution include:
 - The absence of any applicable liability immunity or traditional defenses such as lack of capacity to bring suit and lack of personal jurisdiction.
 - Investigation raises questions of fact as to whether the health care provider implemented appropriate policies, procedures and protocols for the treatment, prevention, identification, reporting, investigation and control of infections.
 - Investigation raises questions of fact as to whether the health care provider complied with its own policies, procedures and protocols.
 - Investigation raises questions of fact as to whether insured followed CDC or other applicable regulation or protocols for treating, preventing, identifying, reporting, investigating and controlling infections.
 - Insured's records or governmental findings indicate that there was a history of:
 - Deficient or improper use of PPE
 - Failure to report positive COVID-19 cases of patients and staff to authorities
 - Similar COVID-19 claims against the insured.
- This section may be updated as the insurance industry obtains more data and claims experience.

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STEP 4.

Claim & Litigation Management

Step 4 Overview: As is customary, during this step the claims professional or insurer retains counsel and provides them with claim information and investigation results. The professional also should provide litigation management guidelines and work with counsel to develop a litigation plan and budget. The process is continued by working with counsel toward an early assessment of the impact of the information received, periodically reviewing the plan and budget, exploring opportunities for early resolution and making sure counsel prioritizes the discovery necessary to move the case toward the preferred resolution.

SPECIFIC ACTIVITIES:

- ❑ Request that defense counsel conduct witness interviews in compliance with appropriate policies, procedures and protocols for the treatment, prevention, identification, reporting, investigation and control of infections.
- ❑ Instruct defense counsel to make a pre-answer motion to dismiss based on immunity.
 - Make the motion while ensuring error and issue preservation for possible appellate review.
 - Consider removal to federal court based on the issue of “federal question.” Consider EMTALA (anti-dumping statute). Once removed, move on two bases: (1) immunity under the PREP Act and (2) lack of subject-matter jurisdiction due to an available administrative remedy via the fund set up through the PREP Act. The subject-matter jurisdiction challenge should help preclude discovery given the court’s tenuous jurisdiction to allow for it while the motion is pending.
- ❑ If the motion is denied.

Motions may be denied (A) because the court determines that the claim does not fall under the protection of one of the statutes or (B) because there is not enough information for the court to determine whether the fact pattern falls within the protection.

A. Answer: Raise the following affirmative defenses: federal preemption, the subject-matter jurisdiction challenge, and the immunity defense under the PREP Act or state immunity law.

B. Discovery/Investigation: Focused on collecting data to establish that the deliverance of care to the claimant was impacted directly or indirectly by the response to the pandemic.

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- ▣ If the motion is denied (continued).
 - Determine the date that the alleged act or omission of negligence or malpractice arose.
 - Collect data about the number of patients who presented to the location for treatment on that date.
 - Collect protocols and policy changes implemented in response.
 - Did staff shortages contribute to the alleged injury?
 - Was the unavailability of equipment due to the COVID-19 crisis?
 - Did the treatment at issue arise out of telemedicine?

STEP 5.

Claim Resolution

Step 5 Overview: This step encompasses executing the litigation plan in pursuit of the preferred resolution. Upon resolution, the appropriate settlement papers should be procured, and should contain the usual releases, waivers and indemnification.

SPECIFIC ACTIVITIES:

- ▣ Claims resolution should proceed as customary in medical malpractice/senior care cases, including obtaining proper stipulations of discontinuance, releases and confidentiality clauses. As of July 2020, no specific COVID-19 considerations have been identified.

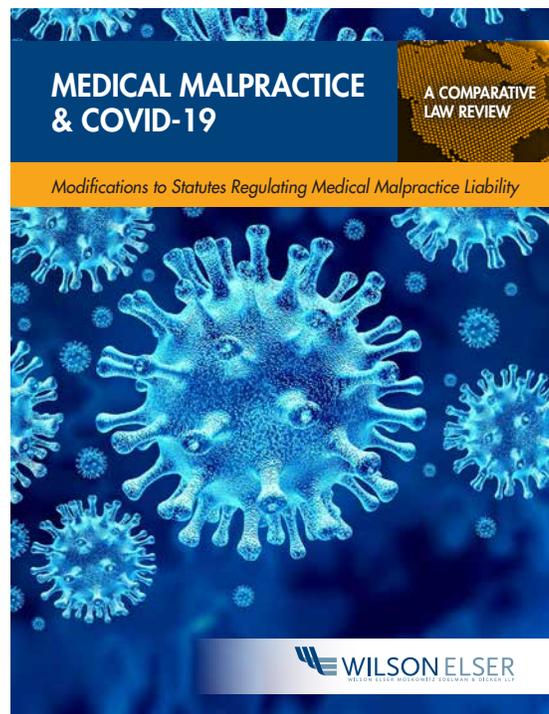
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Appendix

Medical Malpractice & COVID-19: Modifications to Statutes Regulating Medical Malpractice Liability

This comparative law survey provides a comparison by state, including the District of Columbia, of any regulations enacted to protect health care workers from liability, modify licensing requirements for health care providers and facilities, and/or extend the statute of limitations as states grapple with the social health impact of the COVID-19 pandemic.

[Click Here](#) for a copy of the **Medical Malpractice & COVID-19 - A Comparative Law Review**.



Have Questions? [Contact Our Team](#) >

YOUR TEAM – CONTACT US WITH QUESTIONS

Medical malpractice insurance claims issues and their financial and reputational implications will persist long after the COVID-19 pandemic subsides. **Wilson Elser is ready to help you and your insureds prepare now for the unprecedented times ahead.** Drawing on vast related experience, we know how to build consensus among key stakeholders and craft defense strategies that can withstand aggressive litigation. Our attorneys already are working with several insurers to develop their COVID-19 claims response teams and with a wide variety of insureds to prepare winning defenses.

Feel free to contact the Wilson Elser attorneys listed below to begin a dialogue and determine how we can assist you.



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