

Coppersmith Briefs

The “Good Samaritan” Executive Order: Declaration of Good Faith Immunity for Providers Supporting the Emergency Response

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On April 9, 2020, Arizona’s Governor issued a “Good Samaritan” Executive Order granting broad immunity to practitioners and hospitals engaged in fighting the virus. The Order justified the actions by declaring “a compelling need to maximize participation of medical providers and healthcare facilities in treating COVID-19 patients,” acknowledging health professionals’ concerns about the uncertainties of caring for patients where there is no established treatment, and where beds, supplies and equipment may be in short supply. With all this in mind, the Executive Order states that more assurances of liability protection for providers are needed.

Executive Order 2020-27¹ provides a broad swath of immunity for liability for licensed health care providers and institutions that provide medical services in support of the public health emergency for Covid-19. There are 5 separate immunity provisions, addressing individual health professionals, emergency medical care technicians, healthcare institutions, including modular treatment facilities whether or not licensed, and health professionals registered with the ESAR-VHPS program. Specifically:

HEALTH PROFESSIONALS: IMMUNITY FOR MEDICAL SERVICES

This section applies to licensed health care professionals – specifically MDs, DOs, nurses, pharmacists, PAs, and respiratory care professionals – licensed in Arizona or registered as volunteers through the Arizona ESAR-VHP program. (ESAR-VHP is the Arizona emergency System for the Advance Registration of Volunteer Health Professionals and may or may not be licensed in Arizona.)

Any of these categories of professionals are presumed to have acted in good faith and are declared to be immune from civil liability based on medical services they provide as part of the state of emergency.

¹ <https://azgovernor.gov/executive-orders>
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There is an exception for gross negligence or reckless or willful misconduct, such as providing medical services under the influence of alcohol or drugs.

EMERGENCY MEDICAL CARE TECHNICIANS:
IMMUNITY FOR EMERGENCY SERVICES

This section applies to emergency medical care technicians – an omnibus term that includes health workers licensed/certified by the Arizona Department of Health Services (ADHS) as emergency medical technicians, advanced emergency medical technicians, emergency medical technician I-99s or paramedics.²

All of these professionals are presumed to have acted in good faith and are declared to be immune from civil liability for their conduct in the course of providing emergency medical care services as part of the state of emergency.

Again, there is an exception for gross negligence or reckless or willful misconduct, such as providing medical services under the influence of alcohol or drugs.

INDIVIDUAL AND INSTITUTIONAL PROVIDERS:
IMMUNITY FOR TRIAGE DECISIONS

This section applies to:

- Health care professionals,
- Emergency medical care technicians
- Healthcare institutions (including but not limited to hospitals); and
- Entities operating modular field treatment centers or other sites, whether licensed or not, which ADHS has designated for temporary use in support of the emergency response.

This section declares all of these categories to be immune from civil liability for triage decisions made in the course of providing medical services, based on good faith reliance on mandatory or voluntary state-approved protocols under the public health emergency declaration. The scope of this section certainly includes the crisis standards of care (CSC) developed by the State Disaster Medical Advisory Committee (SDMAC) and approved by the Health Emergency Operating Center (HEOC), which is managed by ADHS.

² A.R.S. § 36-220(15).
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For reasons unknown, this section does not include a presumption of good faith. Once again, there is an exception for gross negligence or reckless or willful misconduct, such as providing medical services under the influence of alcohol or drugs.

INSTITUTIONAL PROVIDERS: IMMUNITY FOR PROVIDING HEALTH CARE SERVICES

Finally, this section applies to health care institutions, including but not limited to hospitals, and entities operating modular field treatment facilities or other sites whether or not licensed, which ADHS has designated for temporary use in support of the emergency response.

This section declares these entities to be immune from civil liability for acts or omissions undertaken in good faith by one or more of an entity's agents, officer, employees, representatives or volunteers while providing health care services in support of the emergency response.

Again, this section does not include a presumption of good faith, and does not provide immunity when there is gross negligence or reckless or willful misconduct, such as providing medical services under the influence of alcohol or drugs.

ENFORCEMENT OF THE IMMUNITY PROVISIONS

As detailed below, each of the provisions confers immunity on individuals and entities for specified actions undertaken in good faith. However, "gross negligence or reckless behavior or willful misconduct" are expressly exempted from immunity. The EO says that rendering medical services while under the influence of alcohol or drugs is an example of gross negligent or reckless behavior/willful misconduct.

The terms "good faith," "gross negligence," "reckless behavior" and "willful misconduct" are not defined in the EO. Arizona courts have dealt with these terms for many years, though, and have provided some guidance, at least, in published court opinions. As detailed here, the bottom line is that the professional's or institutions actions must be reasonable *under the circumstances*.

GOOD FAITH

To begin with, good faith immunity is a form of qualified immunity like that granted to public officials. The construction of the immunity provision in the EO, in fact, is quite similar to the immunity standard for public officials, in that good faith is presumed and is for the most part tied to protocols. To overcome the presumption, one challenging the qualified immunity for public officials' actions must demonstrate a public official acted

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outside the perimeter of the officials required or discretionary functions, or that the official acted with malice, in that the official knew their actions were wrong or recklessly disregarded the action's impact.³

Importantly, for public officials, the reasonableness of the conduct is measured by an objective standard. That is, if a reasonable person, with the information available at the time, formed a reasonable belief that the action was appropriate, that action was in good faith. Put differently, to establish that an official did not act in good faith, a plaintiff must demonstrate such a substantial departure from acceptable professional judgment, standards or practice under the circumstances, that the person responsible actually did not based the decision on such a judgment.⁴

While we cannot know now whether a court will use the objective standard applied to public officials to determine good faith, with think it make sense to do so. Professionals caring for patients during the emergency are doing so in accordance with the governor's instructions and in accordance with emergency protocols established or approved by ADHS. Using this standard, the presumption of good faith should be exceptionally hard to overcome and, assuming the immunity provision itself is found to be legally valid, provides good protection for practitioners and institutions.

As to the immunity provision itself, the Executive Order did not provide a legal analysis of the overall enforceability of the immunity, and that is beyond the scope of this brief. As usual in such situations, challenges to the Order can be expected. The circumstances could not be more favorable to deference to the chief executive's emergency provisions, however.

GROSS NEGLIGENCE

Gross negligence and reckless conduct usually are defined together as evidencing conscious disregard of a substantial risk, amounting to a gross deviation from the standard of conduct of a reasonable person. It is sometimes described as outrageous conduct, possibly undertaken with a bad motive. It is the kind of conduct that would justify punitive damages.⁵

WILLFUL MISCONDUCT

This kind of conduct comes with a simpler definition: it is intentional, wrongful misconduct.⁶

³ See, e.g., *Chamberlain v. Mathis*, 151 Ariz. 551, 729 P.2d 905 (1986).

⁴ *Id.*

⁵ See, e.g., *In Re William G.*, 192 Ariz. 208, 936 P. 2d 287 (App. 1997).

⁶ See, e.g., *Smith v. Chapman*, 115 Ariz. 211, 564 P. 2d 900 (1977).

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OTHER LIABILITY PROTECTIONS ALREADY IN LAW

The broad immunity provisions in the Executive Order cover medical services these professionals provide to prepare for, prevent, respond to, and mitigate the spread of COVID-19. Certain protections already exist in law and provide an underpinning to the Order.

First, the Order itself refers to Arizona's Good Samaritan laws, which protect providers, emergency medical technicians and emergency workers who act in good faith in emergency situations, for the purpose of encouraging such activities.⁷

In addition, the Order's application to professionals ESAR-VHP program is a second layer of protection: Arizona law already provides qualified immunity for emergency workers.⁸

Finally, Arizona law provides much more limited protections for the provision of emergency care, requiring a heightened standard of proof in medical malpractice cases ("clear and convincing evidence") for providers giving care in compliance with EMTALA and in disaster situations.⁹

Karen Owens' practice focuses on health care administrative, regulatory, operations, and litigation matters. She regularly represents health care systems, hospitals, clinics, and other institutions in matters of quality management, medical staff peer review, practitioner credentialing, hospital and medical staff structure, and confidentiality. She also counsels hospitals and health care entities about Medicare certification, state licensure, EMTALA compliance, and many other regulatory matters touching clinical operations.

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⁷ The Executive Order cites A.R.S. § 32-1471, which provides qualified immunity to any health care provider and others as well for rendering emergency care at a public gathering or at the scene of an emergency occurrence gratuitously and in good faith, unless gross negligence is involved.

⁸ A.R.S. § 26-314.

⁹ A.R.S. § 12-572.

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