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## SIGH OF RELIEF FOR NC BUSINESS AND HEALTH CARE COMMUNITIES AS FIRST LAWSUIT CHALLENGING COVID-19 CLAIMS IS DISMISSED—LEGISLATION CONFIRMED BY GENERAL ASSEMBLY

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By Christopher G. Smith and Robert Desmond

March 10, 2021, marked the one-year anniversary of Governor Cooper's COVID-19 emergency declaration in Executive Order No. 116. Last year the General Assembly passed a civil immunity statute for our health care heroes. To ensure that they continue to receive the broad protections needed to safely and effectively provide health care in these trying times and to ensure the protections remain in place as long as intended, the General Assembly unanimously passed an amendment confirming that our health care providers and facilities are protected for the entire course of the emergency as declared by the Governor.

**This Client Alert explains the General Assembly's confirmation in HB 196 of the period of time during which our health care heroes have civil immunity from COVID-19-related claims. The careful attention by the General Assembly is warranted, as the legislation undoubtedly will be subject to court challenge, and this Client Alert also explains the first successful defense of a court challenge to the immunity.**

### The Immunity's Sunset Provision

As described in a previous [alert](#), on May 2, 2020, the North Carolina General Assembly enacted the COVID-19 Recovery Act, which Governor Cooper signed two days later, calling it "critical." Among other things, the COVID-19 Recovery Act includes a temporary statute that provides immunity from civil liability for health care providers and facilities from claims arising from the rendering of health care services during the COVID-19 emergency.<sup>[1]</sup> The immunity is temporary, tied to the time that the Governor's emergency declaration remains in effect, and does not provide immunity where there is gross negligence or willful misconduct.

The legislation provides that health care providers and facilities "shall have immunity from any civil liability for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services."<sup>[2]</sup> The General Assembly's stated purpose in passing the immunity was "to promote the public health, safety, and welfare of all citizens by broadly protecting the health care facilities and health care providers in this State from liability that may result from treatment of individuals during the COVID-19 public health emergency."<sup>[3]</sup>

As noted, the immunity is temporary and Section 3D.7.(b) of the legislation, as originally written, stated:

**SECTION 3D.7.(b)** This section is effective when it becomes law and applies to acts or omissions occurring during the time of Executive Order No. 116 issued on March 10, 2020, by Governor Roy A. Cooper, and any subsequent time period during which a state of emergency is declared to be in effect

during calendar year 2020 by the Governor in response to COVID-19.

As vaccinations increasingly are made available to North Carolinians and the number of daily COVID-19 cases appears to be decreasing,<sup>[4]</sup> attention has turned to this sunset provision. While the General Assembly's original intent, noted by the subsequent confirmation, was for the immunity to continue in effect until the expiration of Executive Order No. 116, the sunset provision potentially was subject to a more narrow and incorrect interpretation that it was effective only "during calendar year 2020."

To guard against an incorrect reading of the provision, the General Assembly unanimously passed an amendment clarifying that the immunity would remain in effect during the pendency of Executive Order No. 116 or any other time period during which a state of emergency was declared in response to COVID-19.

**SECTION 2.13.(a)** of HB 196 provides:

Section 3D.7(b) of S.L. 2020-3 reads as rewritten:

**SECTION 3D.7.(b)** This section is effective when it becomes law and applies to acts or omissions occurring during either the pendency of Executive Order No. 116 issued on March 10, 2020, by Governor Roy A. Cooper, or during any subsequent time period during which a state of emergency is declared to be in effect by the Governor, in any year, in response to COVID-19.

And for good measure, to ensure there could be no contrary argument, the General Assembly confirmed that this is exactly what it originally intended by adding this explanation:

**SECTION 2.13.(b)** The clarifications in this section are consistent with the intent and purpose of this section as originally enacted in S.L. 2020-3.

The General Assembly's confirmation in HB 196 provides welcome reassurance to eligible health care organizations that they will continue to receive the broad protection afforded by the civil immunity provision beyond 2020. HB 196 was presented to the Governor on March 4, 2021, and it became effective law when he signed it last week, on Thursday, March 11, 2021.

## The First Lawsuit Challenging the Immunity Already was Filed

The General Assembly's careful work is warranted because litigation challenges will follow. A challenge to the immunity already is being litigated. A lawsuit named *Howze* involves a skilled nursing facility in Durham County.<sup>[5]</sup> The lawsuit was the first nationally to challenge COVID-19 immunity legislation, and it has received both **statewide** and **national** media coverage. The lawsuit sought to bring negligence claims despite the immunity legislation. A Superior Court Judge in Durham County dismissed the lawsuit last month. The case is noteworthy because the plaintiff's lawyers argued that, because health care must be provided in "good faith," the immunity only can apply when good faith is proved in each instance. That interpretation would essentially eliminate the immunity requiring health care providers to go to court anytime a claim is made and for the health care provider to prove that she was acting in good faith, something that ordinarily and naturally is presumed when health care providers are performing their duties. The Court's February 12, 2021 Order granting the motion to dismiss can be found [here](#). The Order dismissing the case has been appealed.

The North Carolina Chamber Legal Institute recently published an **update** on the statewide significance of the immunity legislation and the first challenge posed to it by the *Howze* matter. There is a great deal at stake, and *Howze*, and other challenges that inevitably will follow, need to be watched closely by the business community, and, as the Chamber Legal Institute suggests in its update, should be managed in a coordinated fashion.

If you have any questions related to this Alert, please feel free to reach out to the authors, Chris Smith or Robert Desmond, both of whom are part of the team representing the health care providers in the *Howze* matter. Additionally, please visit and bookmark our firm's **Coronavirus (COVID-19) Business Resource Center**, which is continuously updated with useful materials and resources related to COVID-19. This tool has been made available to ensure that our clients and the broader business community stay informed on key issues that may impact their operations and to navigate the related business and legal issues during these challenging times.

Special thanks to contributing author, **Derek Sutton**.

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[1] See N.C. Gen. Stat. § 90-21.133. "Health care provider," "Health care facility," and "Health care services" are defined in the legislation. See N.C. Gen. Stat. § 90-21.132.

[2] N.C. Gen. Stat. § 90-21.133(a), explained in our previous **alert**.

[3] N.C. Gen. Stat. § 90-21.131.

[4] See North Carolina Department of Health and Human Services COVID-19 Dashboard, <https://covid19.ncdhhs.gov/dashboard/cases>.

[5] *Howze v. Treyburn Rehabilitation Ctr., LLC et al.* (Durham County, 20 CVS 2972).

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