

COVID Lawsuits Have Arrived: Which Doctors Are at Risk?

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A pregnant patient who had COVID-19 showed up at a hospital with respiratory difficulty caused by her illness. Physicians had to perform an emergency delivery of her near-term baby.



The infant survived, but the woman lost oxygen during the ordeal and suffered hypoxic brain damage. She is now suing an obstetrician, a pulmonologist, and an intensive care unit (ICU) physician for medical malpractice.

The plaintiff contends there was a failure "to adequately recognize and treat her condition," said Peter Kolbert, senior vice president for claim and litigation services for Healthcare Risk Advisors, part of TDC Group, which includes national medical liability insurer, The Doctors Company.

"The physicians involved vehemently disagree and believe they treated her appropriately," Kolbert said. "In fact, we believe their actions were heroic."

In another case, a patient with COVID-19 and multiple comorbidities was admitted to a hospital. Physicians sedated and intubated the patient to maintain her airway. She recovered, but the patient now alleges doctors were negligent because she developed ulcers during her hospital stay. The case occurred during the height of the pandemic. In addition to the hospital, a pulmonologist, an ICU physician, and an acute care physician are named in the suit.

Both of these lawsuits are being defined as COVID claims because at the time, the plaintiffs either had COVID and needed care because of COVID in some way, or because the care that physicians provided was affected by COVID in some way.

In the second case, the patient had COVID and needed treatment. During her recovery, ulcers developed. A significant aspect of this case is that it occurred during the height of the pandemic. Hospitals were overcrowded, the staff was swamped, and resources were limited. One factor may be that physicians were doing the best they could at the time but that the pandemic affected the extent of care they could provide.

Physicians have long worried about the legal consequences of COVID-19 and whether lawsuits might arise from the care that was provided or that was delayed by the pandemic. Now, new data reflect the grim news: COVID claims have arrived. These cases from the claims database of The Doctors Company, a national medical malpractice company, are just two examples of many COVID-related claims that have been levied since the pandemic started.

Currently, there are 162 open COVID-related claims in The Doctors Company database, according to Kolbert. A September 2022 [benchmark report](#) from Aon and the American Society for Health Care Risk Management indicates that 245 claims that pertain to patients with confirmed or suspected COVID-19 have been filed since the pandemic began. The findings in this report stem from an analysis of 95,600 hospital and physician liability claims that occurred between 2012 and 2021.

Of the 245 cases, 89 claims have been closed. The average cost was \$43,000 per claim, said Kanika Vats, a director and actuary for Aon, a global firm that provides risk, reinsurance, and health solutions. Six of the claims cost \$300,000 or more; the highest settlement was for \$700,000.

"Most of the allegations in these claims revolve around delay in treatment or delay in diagnosis," Vats said.

Which Specialties Are Involved in Legal Actions?

Physicians working in acute care settings such as emergency departments and urgent care centers are the primary targets in COVID-related lawsuits involving doctors, say legal analysts. However, other specialties are also being affected. Physicians being sued include some who practiced telemedicine during the pandemic.

In one case, a primary care physician saw a patient via telemedicine because the physical medical office was closed. The patient was evaluated virtually and was sent for bloodwork and an x-ray.

The patient is now suing the primary care physician, alleging that failure to immediately send her to a hospital resulted in [tuberculosis](#) going untreated and that the failure led to a bad outcome. The allegation is that the physician underevaluated the case during the telemedicine visit, Kolbert said.

Drew Graham, an attorney at Hall Booth Smith PC, which is based New York, said that most of the COVID-related liability claims he has seen involve facilities that provide postacute care, such as nursing homes and assisted living facilities. His firm has also seen a small number COVID-related claims against physicians as well.

At least two of the claims involved allegations of improper treatment of COVID during hospitalizations, he said. Another involved a telehealth visit in which the patient claimed the virtual care that was provided was improper and that their condition required an in-person examination. Graham declined to specify the specialties of the physicians sued.

The Medical Professional Liability Association (MPL Association) reports similar trends in COVID-related claims. Long-term facilities and hospitals are the most common focus of COVID-19 claims, followed by emergency medicine, primary care, and ob/gyn medical specialties, according to Kwon Miller, manager of data and analytics for MPL Association, a national trade association for medical liability insurers that operates a large claims database.

Between January 2020 and June 2022, the MPL Association Data Sharing Project recorded 280 COVID-19 events. "Events" refers to notifications, licensing board inquiries, and claims involving COVID. Of these events, 180 were closed with no indemnity payment, and 13 were closed with an average indemnity payment of \$3816, Miller said.

Complaints of delayed care associated with the pandemic are also on the rise. For example, one patient is suing a gastroenterologist for delaying his [colonoscopy](#), alleging the postponement led to a delayed [colon cancer](#) diagnosis and worse prognosis, Kolbert said.

"It was delayed because all elective procedures at the time were being put off," he said. "The patient claims that had they received the scheduled screening, the cancer would have been diagnosed at stage I as opposed to stage III."

Why Isn't Federal Immunity Shielding Physicians?

A pressing question about the growing number of COVID claims is why state and federal immunity isn't preventing such lawsuits.

In 2020, the US Department of Health and Human Services published a declaration under the Public Readiness and [Emergency Preparedness Act \(PREP Act\)](#) that provided liability immunity to healthcare professionals for any activity related to medical countermeasures against COVID-19. The act allows an exception for negligence claims associated with death or serious injury caused by willful misconduct.

At the same time, most states implemented laws or executive orders shielding physicians from liability claims related to the prevention and treatment of COVID-19, unless gross negligence or willful misconduct is proven.

Graham said some COVID-related claims against physicians have included allegations of gross negligence to avoid the application of state immunity, while others combine allegations of deviations from standard of care unrelated to the pandemic.

Some plaintiffs are attempting to skirt the protections by making complaints sound as if they're not related to COVID-19, Kolbert said. That way, they don't have to prove gross negligence or willful misconduct at all.

"The filings at first blush may not tell you it's a COVID case, but it may be a COVID case," he said. "Plaintiffs' attorneys are trying to assert that COVID defenses do not apply and that these cases are 'traditional physician negligence' claims. They're trying to plead around the protections."

The federal and state immunities are likely keeping the volume of COVID claims down overall and are discouraging some complaints from moving forward, attorneys say.

But because some plaintiffs are downplaying or ignoring the COVID association, it's likely that more COVID lawsuits exist than anyone realizes, according to Kolbert.

"I expect there's an underestimation of how many COVID claims are really out there," he said.

What Does the Future Hold for COVID Claims?

Currently, the frequency and the severity of COVID claims are low, Vats said. She believes the cost of such claims will continue to remain at low levels.

"But again, there is a lot of uncertainty," she said. "This year, states have started to roll back their immunity protections, and in a lot of states, there is no cap in awarding [noneconomic] damages. There could well be a scenario where they allege

wrongful death, and in a state with no cap on the pain and suffering component, if juries continue to behave the way they have been behaving, we could see aberration verdicts."

Another lingering issue concerns which court systems have jurisdiction in cases involving COVID-related claims. Because of the nationwide response to the pandemic, Graham thinks it makes sense that federal courts handle the cases, but the plaintiffs' bar has generally been opposed to federal jurisdiction.

"A second issue is the long-term impact of COVID litigation on our providers," he said. "If the protections in place to limit liability are determined to be ineffective, our state and federal leaders must act aggressively and in a bipartisan way to make sure our healthcare providers are protected when we face the next crisis."

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