



Leroy v. Hume (2d Cir.)

Topics Covered: COVID-19, Abusive Litigation Against Physicians

Issue

The issue in this case is whether and to what extent the Public Readiness and Emergency Preparedness Act (the “PREP Act”) bars claims of negligence stemming from care provided during the Covid-19 pandemic.

AMA Interest

The AMA supports efforts to curb lawsuit abuse against physicians.

Case Summary

Passed in 2005, the PREP Act authorizes the Secretary of Health and Human Services (HHS) to issue a declaration determining that “a disease or other health condition or other threat to health constitutes a public health emergency.” With certain exceptions, the PREP Act prohibits liability for “all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure.”

If immunity applies, the injured persons or their survivors may seek compensation from the Countermeasures Injury Compensation Program—a regulatory program that provides reimbursement for some losses associated with the use of covered countermeasures. An exception to PREP Act immunity arises for injuries occurring through willful misconduct.

On March 10, 2020, the HHS Secretary declared the Covid-19 pandemic a public health emergency. On January 8, 2021, the HHS General Counsel issued an advisory opinion to the effect that, with narrow exceptions, the PREP Act “completely preempts” negligence claims against health care providers based on failure to institute proper Covid-19 preventative procedures. Complete preemption means that state laws that would otherwise apply to a particular class of claims are without force for those claims. It also means that if those claims are brought in a state court, they can be transferred (or “removed”) to a federal court for adjudication.

The instant case involves a wrongful death claim brought against physicians and their affiliated hospitals for medical malpractice in the treatment of Covid-19. The complaint alleges that the defendants failed to timely test, diagnose, and treat the deceased for Covid-19 in early 2020, resulting in a pulmonary embolism and death.

The case was filed in a New York state court, and the defendants then removed it to the federal Eastern District of New York. There, the defendants asserted that the PREP Act barred the plaintiff’s claims. The district court in New York rejected the defendants’ arguments and remanded the case to state court for further proceedings.

The defendants are now appealing to the Second Circuit.

Litigation Center Involvement

The Litigation Center and the Medical Society of the State of New York joined an *amicus* brief supporting the defendants in their appeal.

Second Circuit Court of Appeals Brief