HEALTH LAW

Kali Ruth Helen Schreiner[†]

Robert P. Carpenter [††]

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[†] Ms. Schreiner is an associate attorney with Gale Gale & Hunt, LLC, JD, Syracuse University College of Law, B.S., Syracuse University. Ms. Schreiner did not cry during any court appearance during this Survey Year. Ms. Schreiner would like to thank the staff of the Syracuse Law Review for their work on this article.

[††] Mr. Carpenter is an associate attorney with Gale Gale & Hunt, JD, Syracuse University College of Law, B.S., State University of New York. Mr. Carpenter also did not cry during any court appearance during this Survey Year, but it was close. Mr. Carpenter would like to thank the staff of the Syracuse Law Review for their work on this article.

INTRODUCTION

In this *Survey* Year, New York Courts continued to issue case law addressing the implications of COVID-19. Specifically, this year saw numerous trial court decisions addressing the statutory immunity from civil liability for health care providers codified in the Public Health Law. This Survey year also saw legislation addressing abortion within New York, addressing animal health issues, and significant changes to the Mental Hygiene Law. With respect to regulatory changes, New York promulgated further regulations regarding the sale of marijuana.

I. GENERAL CASE LAW REVIEW

In this Survey year, New York courts continued to publish decisions addressing the COVID-19 pandemic. This section of the article will review decisions issued regarding the intersection of COVID-19 and prisoners, family law matters, and mandatory vaccinations.

A. In The Matter of Athena Y

In this case, an attorney for the child requested permission from a family court to allow two children in foster care, aged 13 and 15, to receive COVID-19 vaccines.[1] The Department, the attorney for the children, and the children's father all supported the request while the children's mother opposed the request.[2] The family court held that the children could receive the vaccine if they consented.[3] The mother appealed the decision.[4]

In beginning its analysis, the Third Department cited to United States Supreme Court precedent establishing that parents have a fundamental right to raise their children as they see fit.[5] The court also noted that parents retain the right to make medical decisions for children placed into foster care, until parental rights are terminated.[6] The court also noted that there are statutorily recognized situations where a minor child may make health decisions without the consent of their parents.[7]

The court then noted that there was no statute in New York allowing minors to receive vaccines without parental consent.[8] However, the court then noted that a provision of the Public Health Law allows an adult who has assumed care for a child to give consent for child immunization.[9] The court also cited precedent holding that family courts have the statutory authority to direct surgery over a parent's

1. *See in re.* Athena Y., 161 N.Y.S.3d 335, 337 (3d Dep't 2021).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.* (citing Troxel v. Granville, 530 U.S. 57, 65–66 (2000)).
6. *See in re. Athena,* 161 N.Y.S.3d at 337 (citing *in re* Matthew V., 68 N.Y.S.3d 796, 802 (Fam. Ct. Kings Cnty. 2017)).
7. *See id.* at 338 (first citing 18 N.Y.C.R.R. § 441.22(7) (2022); then citing N.Y. PUB. HEALTH LAW § 2504(3) (McKinney 2022); then citing N.Y. PUB. HEALTH LAW § 17 (McKinney 2022); and then citing N.Y. PUB. HEALTH LAW § 2305(2) (McKinney 2022)).
8. *See id.*
9. *See id.* (citing PUB. HEALTH § 2504(5)).

objection.[10] The Third Department noted that the court "must carefully balance the potential benefits to be attained against the risks involved in the treatment, as well as the validity of the parent's objections to the treatment."[11] The court held due process concerns generally require a hearing before a court can require the vaccination of a child over parental objection.[12]

The court then concluded that while the family court had given the parties an opportunity to submit position papers on the issue, this did "not constitute a sufficient basis to support these findings."[13] The court then remitted the case back to the family court with instructions to conduct a hearing prior to issuing an order on the issue.[14]

B. J.F. v. D.F.

In this case, divorced parents holding joint custody of a child disagreed on whether to administer a vaccine to their child.[15] The mother wanted to vaccinate their 11-year-old child while the father objected.[16]

In support of his objections, the father—who the court noted was a "professor at one of the area's premier institutions"—argued that the vaccine had not been subjected to long-term trials, there was no mandate requiring children to be vaccinated, and that there were potential long-term side effects to the vaccine.[17] Both parents agreed that the child's pediatrician was in favor of vaccination.[18]

After reading the submissions of both parties, the court requested a conference with the child's pediatrician.[19] The pediatrician then testified in court that she believed that the benefits of the vaccine outweighed the risk but confirmed that the child could experience both short-term and long-term side effects.[20]

Following the testimony from the pediatrician, the court requested that attorney for the child confer with the child and report back

10. *See id.* at 339 (citing in re Sampson, 317 N.Y.S.2d 641, 653 (Fam. Ct. Ulster Cnty. 1970)).

11. *In re Athena*, 161 N.Y.S.3d at 340 (citing *in re Sampson*, 317 N.Y.S.2d at 648–49.)

12. *See id.*

13. *Id.* at 341.

14. *See id.*

15. *See* J.F. v. D.F., 160 N.Y.S.3d 551, 551 (Sup. Ct. Monroe Cnty. 2021).

16. *See id.* at 552.

17. *Id.*

18. *See id.* at 552–53.

19. *See id.* at 553.

20. *See J.F.,* 160 N.Y.S.3d at 553.

on the child's preferences.[21] The attorney for the child reported that the child would prefer to receive the vaccine.[22] The court also noted that the objecting father himself was fully vaccinated.[23]

The court ultimately found it was in the best interest of the child to receive the vaccine.[24] The court then ordered the mother to schedule a vaccine appointment for the child as soon as possible.[25]

C. People v. Keyser

In this case, a prisoner-petitioner filed an application for a writ of habeas corpus, arguing that continued confinement during the pandemic was a violation of his constitutional rights.[26] Respondent opposed the application, submitting an affidavit detailing the preventative protocols adopted by the correctional facility housing the petitioner.[27] The supreme court denied the petitioner's application and the petitioner appealed.[28]

The Third Department affirmed the trial court's decision.[29] In reaching this decision, the court reasoned that the petitioner had failed to meet his initial burden that the correctional facility violated his due process of Eighth Amendment rights.[30] The Appellate Court also noted that the petitioner failed to allege that his incarceration violated his Fifth or Sixth Amendment rights.[31]

D. Siegel v. Snyder

In a recent decision, the Second Department expanded upon an exception to the privileges set forth within Education Law section

21. *See id.*
22. *See id.* at 553–54.
23. *See id.* at 555.
24. *See id.* at 556–57.
25. *J.F.,* 160 N.Y.S.3d at 557.
26. *See* People *ex rel.* Valenzuela v. Keyser, 153 N.Y.S.3d 708, 709 (N.Y. App. Div. 3d Dep't 2021).
27. *See id.*
28. *See id.* (citing People *ex rel.* Carroll v. Keyser, 125 N.Y.S.3d 484, 490 (N.Y. App. Div. 3d Dep't 2020)).
29. *See id.*
30. *See id.* (first citing N.Y. C.P.L.R. 7002(a) (McKinney 2022); then citing N.Y. C.P.L.R. 7010(a) (McKinney 2022); then citing U.S. Const. amend. VIII; then citing U.S. Const. amend. XIV; then citing N.Y. Const. art. I, §§ 5–6; and then citing *Carroll,* 125 N.Y.S.3d at 486–90)).
31. *See Valenzuela*, 153 N.Y.S.3d at 709----10 (citing People *ex rel.* King v. Keyser, 141 N.Y.S.3d 730, 730 (N.Y. App. Div. 3d Dep't 2021)).

6527(3) and Public Health Law section 2805-m(2).[32] In *Siegel*, the decedent's estate filed a medical malpractice lawsuit against various defendants related to the care and treatment provided to the patient following a traumatic brain injury.[33] Shortly after plaintiff's death, the defendant hospital held a "Trauma Peer Review Committee" meeting to analyze the decedent's treatment as part of its quality assurance and medical malpractice prevention program.[34] Two of the defendant physicians were present at this meeting.[35] Importantly, the meeting minutes contained several statements that failed to specifically identify the speaker.[36] During the course of litigation plaintiff issued several discovery demands, including a request for all peer-review reports.[37] In response to this request, defendants moved to limit disclosure and for a protective order pursuant to Public Health and Education laws.[38]

In general, New York has a very liberal discovery policy which "broadly mandates full disclosure of all matter material and necessary in the prosecution or defense of an action."[39] However, there are several exceptions carved out of this general rule, including, the quality assurance privileges set forth in the Public Health and Education laws.[40] These laws act as a shield to prevent the disclosure of records related to quality assurance reviews.[41] However, both laws create an exception whereby "a statement made by any person in attendance at such a . . . meeting who is a party to an action or proceeding" is not privileged and must be turned over.[42]

Given the unidentified statements at issue here, plaintiff argued that this privilege did not apply because defendants could not prove

32. *See* Siegel v. Snyder, 161 N.Y.S.3d 159, 163 (N.Y. App. Div. 2d Dep't 2021); N.Y. EDUC. LAW § 6527(3) (McKinney 2022); N.Y. PUB. HEALTH LAW § 2805-m(2) (McKinney 2022).

33. *See Siegel*, 161 N.Y.S.3d at 164.

34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.*

38. *See Siegel*, 161 N.Y.S.3d at 164 (first citing N.Y. C.P.L.R. 3101(b) (McKinney 2022); then citing N.Y. C.P.L.R. 3103 (McKinney 2022); then citing N.Y. EDUC. LAW § 6527(3) (McKinney 2022); and then citing N.Y. PUB. HEALTH LAW § 2805-m (McKinney 2022)).

39. *Id.* at 165 (quoting C.P.L.R. 3101(a) (internal quotations omitted)).

40. *See id.* at 170; Educ. § 6527(3); PUB. HEALTH § 2805-m(2).

41. *See Siegel,* 161 N.Y.S.3d at 170 (first quoting Educ. § 6527(3); and then quoting PUB. HEALTH § 2805-m(2)).

42. *Id.* at 170 (quoting Lamacchia v. Schwartz, 941 N.Y.S.2d 245, 247 (N.Y. App. Div. 2d Dep't 2012); EDUC. § 6527(3); PUB. HEALTH § 2805-m(2)).

that the statements from the meeting were made by a non-party.[43] Following an in-camera review of the meeting minutes, the supreme court found that it was "unable to determine who provided specific statements" during the meeting and therefore held that it could not rule on their admissibility short of knowing who made each of the statements.[44]

On appeal, the Appellate Division, Second Department concurred with the lower court, thereby broadening the scope of what is discoverable.[45] Initially, the court found that defendants had "met their initial burden of demonstrating that the . . . meeting minutes at issue were prepared in accordance with the relevant statutes."[46] However, in a unanimous decision, the court held that defendants failed "to properly identify each speaker" and therefore could not meet their burden of "demonstrating that the statements were not made by a party" and therefore privileged from disclosure.[47] The court explained that holding otherwise would incentivize hospitals to withhold the identification of all individuals in order to circumvent the party-statement exception.[48] While the decision is currently only binding on the Second Department, it may be prudent for hospitals to consider making changes to how they document their quality assurance meetings.

II. A SURVEY OF CIVIL IMMUNITY CASES

The unprecedented COVID-19 pandemic continues to impact both the legal and health care fields. Although COVID-19 is here to stay, some of the drastic measures taken during the height of the pandemic are slowly coming to an end. However, the impact of these emergency provisions are beginning to reach New York courts. A survey of the case law addressing these immunities demonstrates the way in which various courts across the state are approaching the matter.

Briefly, New York implemented the Emergency Disaster Treatment Protection Act (EDTPA) with the enactment of Public Health Law sections 3080–3082 in response to the COVID-19 pandemic as a measure to promote public health, safety, and welfare by "broadly protecting the health care facilities and health care professionals in this

43. *Id.* at 163.

44. *Id.* at 164–65.

45. *See id*. at 163 (first citing Educ. § 6527(3); and then citing PUB. HEALTH § 2805-m(2)).

46. *Siegel,* 161 N.Y.S.3d at 171 (first citing EDUC. § 6527(3); then citing PUB. HEALTH § 2805-m).

47. *Id.*

48. *See id.* at 172.

state from liability that may result from treatment of individuals with COVID-19 under conditions resulting from circumstances associated with" the pandemic.[49]

A. Cases Granting Civil Immunity to Healthcare Defendants

1. Hampton v City of New York

Plaintiff's medical malpractice case arose out of defendant's care and treatment of a suspected left tibial plateau fracture.[50] Defendant moved to dismiss the case pursuant to Public Health Law (PHL) section 3082 which provided immunity from civil and criminal liability.[51] Defendant argued that this occurrence happened on April 22, 2020, and at that time Lincoln Hospital (where plaintiff was initially transported to via ambulance) was prohibited from performing elective surgeries as it was a designated a COVID-19 treatment facility and was required to divert all available resources to the pandemic.[52] During this time, Lincoln Hospital was referring non-emergent patients to Hospital for Special Surgery which was one of the only facilities performing elective orthopedic surgeries in New York City.[53] Furthermore, if Lincoln Hospital had performed plaintiff's surgery, it would have been in violation of the Governor's and Mayor's orders causing the hospital to risk losing its operating certificate.[54] Accordingly, the Supreme Court, Bronx County held that the decisions regarding plaintiff's care and treatment were directly affected by Lincoln Hospital's emergency response to the COVID-19 pandemic because the hospital could not perform plaintiff's surgery without severe consequences.[55] Therefore, the court found that the defendant was immune from civil liability and granted its motion to dismiss.[56]

2. Crampton v Garnet Health

In this case, plaintiff sought to recover for personal injuries sustained while a resident of Montgomery Nursing and Rehabilitation

49. N.Y. PUB. HEALTH LAW § 3080 (McKinney 2022).

50. *See* Hampton v. N.Y.C., No. 28392/2020E, 2021 N.Y. Misc. LEXIS 5913, at *1–2 (Sup. Ct. Bronx Cnty. May 10, 2021).

51. *See id.* at *3–4 (citing PUB. HEALTH § 3080; then citing PUB. HEALTH § 3081; and then citing PUB. HEALTH § 3082.

52. *See id.* at *4–5.

53. *See id.* at *5.

54. *See id.*

55. *See Hampton*, 2021 N.Y. Misc. LEXIS 5913, at *9–10.

56. *See id.* at *10.

Center from May 21, 2020, to July 1, 2020.[57] The Complaint asserts causes of action for violations of PHL 2801(d), negligence, gross negligence, and sexual assault.[58] In response to plaintiff's allegations, defendant moved for dismissal pursuant to PHL 3082.[59] In doing so, defendant produced an affidavit of its Director of Nursing asserting personal knowledge of Montgomery's response efforts to COVID-19 and its impact on the operations of the facility and staff.[60] The affidavit specifically addressed issues related to staffing shortages, limitations on visitors, requirements for full personal protective equipment, and an increase in the hiring and utilization of agency nurses and nursing aids that were still in training.[61]

The Supreme Court, Orange County explained, "[o]nce the defendant health care facility invokes PHL 3082 and demonstrates pursuant to subdivision 1 thereof that the statute applies, then subdivision 2 thereof establishes the substantive law defining the scope of the facility's duty to the plaintiff" and then the burden transfers to the plaintiff to "plead and prove that the harm or damages alleged were caused by an act or omission constituting willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm."[62] Here, the court held that the affidavit proffered by the defendant sufficiently demonstrated how the plaintiff's treatment was impacted by measures adopted in response to COVID-19 directives and in response, the plaintiff's complaint failed to properly plead gross negligence or reckless misconduct.[63] Therefore, the court granted defendant's motion to dismiss.[64]

3. Garcia v. N.Y.C. Health and Hospital Corp.

Plaintiff filed suit for injuries sustained when she fell at the defendant's medical facility.[65] Defendant argued that pursuant to PHL sections 3080–3082, it was immune from liability because the patient was being treated in a special COVID-19 unit under specific care and

57. *See* Crampton v. Garnet Health, 155 N.Y.S.3d 699, 701 (Sup. Ct. Orange Cnty. 2021).

58. *See id.* (citing N.Y. PUB. HEALTH LAW § 2081-d (McKinney 2022)).

59. *See id.* at 702 (citing PUB. HEALTH LAW § 3082).

60. *See id.* at 704.

61. *See id.* at 704–05.

62. *Crampton*, 155 N.Y.S.3d at 710 (citing PUB. HEALTH LAW § 3082(2)) (internal quotations omitted).

63. *See id.* at 711.

64. *See id.*

65. Garcia v. N.Y.C. Health and Hosp. Corp., No. 159046/2020, 2022 N.Y. Slip Op. 32115(U) at *1 (Sup. Ct. N.Y. Cnty. July 6, 2022).

guidelines for treatment and isolation.[66] Defendant submitted affidavits from a physician and nurse attesting that plaintiff's treatment was affected and impacted by the hospital's response to COVID-19.[67] In granting the defendant's motion to dismiss, the court held that plaintiff's claims arose from the alleged failures to supervise, monitor, and respond, all of which implicate resource or staffing shortages.[68] Furthermore, the court continued, plaintiff was treated at defendant hospital during the height of this pandemic.[69] Therefore, defendant was immune from civil liability because it "was unable to help plaintiff promptly due to the need to help other COVID-19 patients with more immediate and critical needs due to a shortage of available staff."[70]

4. Saltanovich v. Sea View Hospital Rehabilitation Center

This was an action to recover damages arising from defendant's care and treatment of the decedent's COVID-19 infection and other related illnesses.[71] Defendant moved to dismiss the action pursuant to PHL sections 3080–3082, arguing that it was immune from liability.[72] The court held that the repeal of Article 30-D was not retroactive, and defendant was immune from liability.[73] In so holding, the court noted that a review of the plaintiff's medical records in conjunction with plaintiff's testimony conclusively established that all decisions with respect to the care and treatment rendered from March 2020 through April 2020 were directly impacted by the nursing home's response to the pandemic.[74]

B. Cases Denying Civil Immunity to Healthcare Defendants

1. Townsend v. Penus

In *Townsend*, defendants made a motion to dismiss based on their entitlement to the qualified immunity set forth within PHL sections

66. *See id.* at *1–2.
67. *See id.* at *2.
68. *See id.* at *4.
69. *See id.*
70. *Garcia*, 2022 N.Y. Slip Op. 32115(U) at *4.
71. *See* Saltanovich v. Sea View Hosp. Rehab. Ctr., No. 151312/2021, 2022 NYLJ LEXIS 513, at *1–2 (Sup. Ct. Richmond Cnty. 2022).
72. *See id.* at *2 (citing N.Y. C.P.L.R. 3211(a)(7) (McKinney 2022)).
73. *See id.* at *36.
74. *See id.* at *40.

3080 and 3082.[75] Here, the Complaint alleged that defendants provided negligent medical care on May 2, 2020.[76] In arguing their entitlement to immunity, defendants made a broad assertion that the claims were barred because "they rendered care to numerous patients affected by the coronavirus pandemic."[77] Defendants also submitted plaintiff's medical records and several affidavits in support of their immunity argument, but the court found that the records failed to identify any specific instance in which the pandemic or defendants' response to the pandemic had any impact on the plaintiff's treatment or care.[78] Furthermore, the affidavits failed to directly address that the care rendered to the plaintiff, and not just the care that the facility rendered in general, was in anyway impacted by the pandemic response.[79]

In denying defendants' motion, the court explained that "it is not merely a hospital's or health provider's care to persons affected by the coronavirus pandemic . . . that entitles it to the immunity sought here, but that the care rendered to the person making the claim is affected, in some way, by the hospital's or provider's response to the pandemic."[80]

2. Spearance v. Snyder

In *Spearance*, plaintiff received medical care and treatment from defendants between November 4, 2015, and sometime in 2020, alleging that between 2018 and 2020, the defendants failed to diagnose her basal cell carcinoma.[81] Defendants sought partial dismissal of the Complaint pursuant to Executive Order 202.10 which was codified in PHL sections 3080–3082.[82] As part of their motion, defendants asserted that the claims pertaining to care from April 2020 to July 2020 should be dismissed because of the immunities found within PHL sections 3080–3082.[83]

As in *Townsend*, the court determined that defendants had not met their high burden because they failed to proffer evidence

75. *See* Townsend v. Penus, No. 800321/2021E, 2021 N.Y. Slip Op. 32375(U) at *1 (Sup. Ct. Bronx Cnty., 2021) (citing N.Y. PUB. HEALTH LAW §§ 3080–3082 (McKinney 2022)).

76. *See id.*

77. *Id.* at *2.

78. *See id.* at *3.

79. *See id.*

80. *Townsend*, 2021 N.Y. Slip Op. 32375(U) at *3.

81. *See* Spearance v. Snyder, 156 N.Y.S.3d 809, 809 (Sup. Ct. Onondaga Cnty. 2021).

82. *See id.* at 809–10.

83. *See id.* at 810.

demonstrating that plaintiff's treatment was impacted by the defendant's response to the pandemic.[84] A mere statement from the defendant was not sufficient to support their contentions, especially given the fact that only some of plaintiff's treatment fell within the applicable timeframe.[85] The court held that "Defendants' actions cannot be viewed in a vacuum" and the relevant sections of the PHL would not prevent it from reviewing the plaintiff's case in its entirety.[86] Here, the court explained, defendants had been treating plaintiff pre-pandemic on the "mistaken belief" that she was suffering from an infection, and they continued to treat her on that basis after the pandemic began.[87] As the treatment was ongoing, and defendants had failed to show that the plaintiff's treatment changed specifically because of their response to the pandemic, their motion was denied in its entirety.[88]

3. Robertson v Humboldt House Rehabilitation & Nursing Center

Defendant made a motion to dismiss the complaint on the grounds that it was entitled to the civil immunities granted by PHL 3082(1) for care and treatment rendered to the plaintiff between March 23, 2020, and April 19, 2020.[89] In denying defendant's motion, the court held that PHL 3082(1) does not "conclusively establish that the Plaintiff's . . . care was adversely impacted by the facility's response to COVID-19 and that it was acting in good faith."[90] Instead, the burden is on the defendant asserting these immunities to establish, through evidentiary submissions, that defendant's care of the plaintiff was impacted by their response to COVID-19.[91]

4. Pena v Gupta

In this medical malpractice action, plaintiff alleged that defendants failed to timely diagnose and treat her breast cancer between

84. *See id.* at 812.

85. *See id.*

86. *Spearance*, 156 N.Y.S.3d at 812.

87. *Id.*

88. *See id.*

89. *See* Robertson v. Humboldt House Rehab. & Nursing Ctr., 2022 NY Sup. Ct. Erie Cnty., No. 805232/2021 at ¶ 1 (the court denied the defendant's motion to dismiss the plaintiff's complaint because the defendant's motion to invoke immunity granted by Public Health Law § 3082(1) does not conclusively establish that the plaintiff's decedent's care was adversely impacted by the facility's response to COVID-19 and that it was acting in good faith).

90. *Id.* at ¶ 5.

91. *See id.*

February 8, 2020 and July 2020.[92] According to defendants, they were not providing in person care between March 17, 2020 and July 7, 2020 because of the ongoing pandemic.[93] Instead, defendants were limiting in person care to patients at St. Barnabas Hospital who were acutely ill.[94]

As part of their motion, defendants argued that they were subject to the immunity provisions of the EDTPA codified in PHL 3080–3082 because the routine care rendered to plaintiff during the relevant time was affected by the COVID-19 pandemic as they could not treat or see the patient in person.[95] However, as part of her opposition, plaintiff argued that she made numerous calls to the defendant's office during this time but was never able to get an appointment in person or via telemedicine.[96]

In denying the defendant's motion, the court held that the key issue with respect to PHL section 3082(1)(b) is, "whether the treatment was 'affected' by the pandemic so as to warrant immunity from liability."[97] In applying these facts, the court determined that simply because the defendant's ability to see patients in person was curtailed, it was not clear that this "affected" the treatment of this plaintiff such that her condition could not be properly diagnosed and treated either by returning calls, making a referral to another provider or arranging telemedicine services which were available.[98] Furthermore, when the plaintiff was seen at her in person appointment in July 2020, it is alleged that defendant's determined her exam was normal and failed to diagnose her with cancer at that time.[99]

5. Matos v Chiong

In *Matos*, defendants made a motion to renew on the theory that they were entitled to qualified immunity under PHL sections 3080 and 3082.[100] Their subsequent motion was also denied because the defendants' evidence failed to demonstrate that "the 'treatment of the [plaintiff was] impacted by the health care facility's or health care

92. *See* Pena v. Gupta, No. 802448/21E, 2021 N.Y. Misc. LEXIS 7841, at *1 (Sup. Ct. Bronx Cnty. Oct. 20, 2021).

93. *See id.*

94. *See id.*

95. *See id.* at *2.

96. *See id.* at *3.

97. *Pena*, 2021 N.Y. Misc. LEXIS 7841, at *4.

98. *See id.* at *5.

99. *See id.* at *6.

100. *See* Matos v. Chiong, No. 30027/2020, 2021 N.Y. Slip Op. 32047(U) at 1.

professional's decisions or activities in response to or as a result of COVID-19 outbreak and in support of state's directives.'"[101]

Both of the defendants' affidavits failed to directly address how the care rendered to the plaintiff "was in any way impacted by the pandemic or the moving defendants' response thereto."[102] While the defense attempted to provide a more detailed affidavit from defendant Chiong in support of its motion for leave to renew, the court held that it could not consider the additional evidence because defendants failed to provide a reasonable excuse for their failure to do so in the first instance.[103] As part of its decision, the court also explained that "the statute does not qualify how treatment must be affected – whether positively, negatively, or otherwise – it merely requires that treatment be impacted."[104]

In conclusion, it appears that most courts are placing a high burden on defendants to demonstrate that they are eligible for the immunities set forth within PHL 3080–3082. Not only are courts requiring sufficient evidence, that evidence must specifically identify how the plaintiff's care was impacted due to defendant's response to the coronavirus pandemic. It is simply not enough to show that the defendant had a change in policy or a change in staffing, but that those changes were the proximate cause for the care at issue in the plaintiff's case. While these decisions are fairly new, we anticipate further litigation and possible appeals in the near future.

III. STATUTORY CHANGES IN ABORTION

The recent United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*[105] has spurred proposed legislation in New York. The following section will outline the current statutory framework for abortion in New York along with recently proposed amendments.

A. New York State's Current Abortion Statutory Framework

New York State has codified a right to abortion in the Public Health Law.[106] The statute begins by stating that every person "who

101. *Id.* (quoting N.Y. PUB. HEALTH LAW § 3082(1)(b) (McKinney 2020) (repealed 2021)).

102. *Id.*

103. *Id.* at 3 (quoting Henry v. Peguero, 900 N.Y.S.2d 49, 51 (N.Y. App. Div. 1st Dep't 2010)).

104. *Id.* at 1.

105. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (U.S. 2022).

106. *See* N.Y. PUB. HEALTH LAW § 2599-aa (McKinney 2022).

becomes pregnant has the fundamental right to choose to carry the pregnancy to term, to give birth to a child, or to have an abortion, pursuant to this article."[107]

New York currently allows a licensed healthcare provider to perform an abortion in certain enumerated circumstances.[108] Specifically, a health provider can perform an abortion when: "[1] the patient is within twenty-four weeks from the commencement of the pregnancy, [2] there is an absence of fetal viability, or [3] the abortion is necessary to protect the patient's life or health."[109]

B. Recent Statutory Changes

1. SB 9079B

Senate Bill 9079B was signed into law by Governor Hochul on June 13, 2022 and addressed professional misconduct proceedings for healthcare providers performing abortions.[110] Specifically, the legislation enacted modifications to New York Education Law and New York Public Health Law.[111]

To begin, the statute made modifications to New York Education Law section 6531-b. New York Education Law section 6531-b begins by defining reproductive health services as including: (1) abortion as defined in New York Public Health Law 2599-bb, (2) emergency contraception as defined in Public Health Law 2805-p, and (3) medical, surgical, counseling or referral services relating to human reproductive services.[112]

From there, the statute declares that a healthcare practitioner providing reproductive health services to a patient who resides in a state where the performance of such human reproductive services are illegal shall not be automatically subject to any professional misconduct proceedings.[113]

In a similar vein, the legislation prohibited the Board of Professional Misconduct or the Office of Professional Medical Conduct from charging a licensee solely on the basis of providing reproductive health services to a patient who resides in a state where the subject

107. PUB. HEALTH § 2599-aa(2).
108. *See* PUB. HEALTH § 2599-bb(1).
109. *Id.*
110. *See* N.Y. Senate Bill No. 9079B, 245th Sess. (2022).
111. *See id.*
112. *See* N.Y. EDUC. LAW § 6531-b(1)(a)(i) –(iii) (McKinney 2022).
113. *See* EDUC. § 6531-b(2).

reproductive health services are illegal.[114] The statute also specifically states that "[t]he licensee shall otherwise abide by all other applicable professional requirements."[115]

Finally, the legislation addressed how to evaluate prior disciplinary history for providers seeking permission to practice in New York.[116] Specifically, the legislation, codified at New York Education Law section 6505-d, states that an applicant cannot be denied a license in New York based on prior discipline from another jurisdiction if the prior discipline was based solely on performing reproductive health services as defined in New York Public Health Law 2599-bb.[117]

2. SB S9080D—Regarding Medical Malpractice Coverage

On June 13, 2022, Governor Hochul signed Senate Bill S9080D, making amendments to the New York Insurance Law.[118] The legislation was codified at New York Insurance Law section 3436-a and prohibited insurance companies issuing medical malpractice insurance from taking any adverse action against any provider who performs reproductive health care services to a patient who is from outside New York State.[119] The legislation also indicates that medical malpractice insurance policies are required to cover providers who prescribe abortion medications to out-of-state patients via telehealth.[120]

The statute defined "adverse action" as including: (1) refusing to renew or execute a contract with a provider, (2) making a report to a private or governmental entity about any of the provider's practices that may violate abortion laws in other states, and (3) increasing charges or any other unfavorable changes to the terms of coverage.[121]

3. SB 9077-A

On June 13, 2022, Governor Hochul signed SB 9077-A making amendments to the New York Criminal Procedure Law (CPL) and New York Civil Practice Law and Rules (CPLR), effective immediately.[122] To begin, the legislation stated that extradition demands from

114. *See* N.Y. PUB. HEALTH LAW § 230(9-c)(a) (McKinney 2022).
115. PUB. HEALTH § 230(9-c)(b).
116. *See* N.Y. Senate Bill No. 9079B, 245th Sess. (2022).
117. *See* EDUC. LAW § 6505-d.
118. *See* N.Y. Senate Bill No. 9080D, 245th Sess. (2022).
119. *See* N.Y. INS. LAW § 3436-a(1) (McKinney 2022).
120. *See id.*
121. *See* INS. § 3436-a(2).
122. *See* Act of June 13, 2022, 2022 McKinney's Sess. Laws of N.Y., ch. 219, at S. 9077-A.

other states will not be recognized unless the demanding State: (1) alleges that the accused provider was present in the demanding state at the time of the commission of the alleged crime, and (2) that the accused then fled from the state.[123]

The legislation also prohibits police officers from arresting anyone performing or assisting in the performance of an abortion within the state, or in procuring an abortion in the state, if the abortion is performed in accordance with New York Public Health Law Article 25-a.[124] Law enforcement is also prohibited from cooperating with out of state agencies or departments regarding a lawful abortion performed in New York State.[125] However, law enforcement is allowed to investigate any criminal activity in New York State which may involve the performance of an abortion so long as no information relating to a medical procedure is shared with out-of-state agencies.[126] Finally, the legislation indicated that no amendments to the New York Executive Law shall be construed as prohibiting compliance with a valid, court issued subpoena.[127]

The legislation also incorporated amendments to the CPLR. Specifically, the legislation added language to the CPLR prohibiting any court or county clerk from issuing a subpoena in connection with an out-of-state proceeding relating to an abortion service or procedure legally performed in New York State.[128] However, subpoenas may be issued if the out-of-state proceeding: (1) sounds in tort, contract, or based on statute, (2) is actionable under the laws of New York, and (3) was brought by the patient who received reproductive healthcare or the patient's legal representative.[129] A similar revision was made to CPLR section 3102(e).[130]

4. SB 9039-A—Cause of Action for Interference

On June 13, 2022, Governor Hochul also signed SB 9039-A into law, creating a new cause of action regarding interference with reproductive health services.[131] The cause of action is codified at New York

123. *See* N.Y. CRIM. PROC. LAW § 570.17 (McKinney 2022).
124. *See* N.Y. C.P.L.R. 140.10(3-a) (McKinney 2022).
125. *See* N.Y. EXEC. LAW § 837-w (McKinney 2022).
126. *See id.*
127. *See id.*
128. *See* N.Y. C.P.L.R. 3119(g) (McKinney 2022).
129. *See id.*
130. *See* N.Y. C.P.L.R. 3102(e) (McKinney 2022).
131. *See* Act of June 13, 2022, 2022 McKinney's Sess. Laws. of N.Y., ch. 218, at S. 9039-A (codified at N.Y. CIV. RIGHTS LAW § 70-b (McKinney 2022)).

Civil Rights Law section 70-b.[132] The cause of action applies to: (1) lawfully provided medical care including reproductive and endocrine health care, (2) and all medical, surgical, counseling, or referral services relating to human reproduction, including services pertaining to pregnancy, contraception, or pregnancy termination.[133]

The statute indicates that a claim arises when a person establishes: (1) they exercised or attempted to exercise, or facilitated or attempted to facilitate a protected right under the laws of New York, and (2) the exercise or attempt resulted in litigation or criminal charges brought against the person in any court in the United States or the territories of the United States.[134] The statute expressly allows compensatory damages, and the recovery of attorneys' fees, including expert fees.[135] Additionally, a claimant may recover punitive damages if they can establish that the underlying action against them was commenced with the purpose of "harassing, intimidating, punishing, or otherwise maliciously inhibiting the exercise" of a protected right."[136]

The cause of action needs to be commenced within six years from the date of violation.[137] Any cause of action needs to be brought in the New York State Supreme Court.[138]

IV. ANIMAL HEALTH LEGISLATION

New York State enacted multiple laws regarding the health and safety of animals in the past year. The following is a summary of some relevant legislation.

A. SB 4254—Insurance Changes

On October 30, 2021, Governor Hochul signed Senate Bill 4254 into law, amending the New York Insurance Law.[139] Per the amendment, insurers issuing homeowners' insurance are prohibited from: (1) refusing to issue, (2) refusing to renew, (3) cancelling, or (4) increasing the charges for a policy, due solely to the homeowner owning any dog of any specific breed or a mixture of breeds.[140] However, an

132. *See* N.Y. CIV. RIGHTS LAW § 70-b (McKinney 2022).
133. *See* CIV. RIGHTS § 70-b(6).
134. *See* CIV. RIGHTS § 70-b(1).
135. *See* CIV. RIGHTS § 70-b(3)(a).
136. CIV. RIGHTS § 70-b(3)(b).
137. N.Y. CIV. RIGHTS LAW § 70-b(4) (McKinney 2022).
138. *See* CIV. RIGHTS §70-b(7).
139. Act of Oct. 30, 2021, 2021 McKinney's Sess. Law News of N.Y., ch. 545, S. 4254 (codified at N.Y. Ins. Law § 3421 (McKinney 2022)).
140. *See* N.Y. INS. LAW § 3421-(1) (McKinney 2022).

insurance company may take such action if a dog breed or mixture of breeds is designated as dangerous pursuant to New York Agriculture and Markets Law.[141]

B. SB S5023A—Reporting Animal Cruelty

On October 30, 2021, Governor Hochul signed SB S5023A into law, making amendments to the New York Education Law.[142] The amendment requires a veterinarian to report suspected incidents of animal cruelty to an agent authorized to investigate incidents of animal cruelty when the veterinarian reasonably suspects that a companion animal's injury was due to a violation of law.[143] The identity of the reporting veterinarian is only available to the agent or officer investigating the report.[144] Similarly, a veterinarian is allowed, but not expressly required, to disclose records when they reasonably believe that disclosure of records is necessary to protect the welfare of a companion animal, a person, or the public.[145]

C. SB 1442—Treatment of Racehorses

On December 1, 2021, Governor Hochul signed legislation affecting the treatment of retired racehorses.[146] The legislation created a new provision of the Agriculture and Markets Law which prohibits the slaughter of racehorses.[147] The statute also prohibits any one from buying or selling any racehorse with the intent of having the racehorse slaughtered.[148] The statute also protects any "race horse breeding stock," which is defined as "any mare or stallion used, or intended to ever be used, to produce a foal that is intended to be used as a racehorse . . ."[149]

An initial violation of the newly created statute is classified as a misdemeanor and may be punishable with a monetary fine up to

141. *See* INS. § 3421(2).

142. *See* Act of Oct. 30, 2021, 2021 McKinney's Sess. Law News of N.Y., ch. 546, S. 5023-A (codified at N.Y. EDUC. LAW § 6714 (McKinney 2022)).

143. *See* N.Y. EDUC. LAW § 6714(2)(a) (McKinney 2022). See N.Y. AGRIC. & MKTS. LAW §§ 351, 353, 353-a (McKinney 2022) for definitions of acts constituting animal cruelty. See AGRIC. & MKTS. §§ 371, 373 for definitions and powers of agents authorized to investigate incidents of animal cruelty.

144. *See* EDUC. LAW § 6714.

145. *See* EDUC. § 6714(2)(b).

146. *See* Act of Dec. 1, 2021, 2021 McKinney's Sess. Law News of N.Y., ch. 645, S. 1442-B (codified at N.Y. AGRIC. & MKTS LAW § 382 (McKinney 2022)).

147. *See* N.Y. AGRIC. & MKTS LAW § 382 (McKinney 2022).

148. *See* AGRIC. & MKTS. § 382(2).

149. AGRIC. & MKTS. § 382(3)(b).

$1,000.00 per horse for a violation by an individual, or $2,500.00 for a violation by a corporate entity.[150] Subsequent violations may be punishable with fines of $2,000.00 per violation for individuals and $5,000.00 per violation by corporate entities.[151] Violations can also impact licenses issued by the New York State Gaming Commission.[152] Fines collected under this provision will be remitted to a fund aiming to provide care to retired racehorses.[153]

The new statute will apply to anyone owning a horse which raced in New York after January 1, 2022, and to anyone who owns a horse which was used for breeding in New York after January 1, 2022.[154] Liability for violations will fall on the last person or entity in the chain of ownership for a racehorse.[155] Buyers and sellers are also required to report any transfer of ownership of a racehorse.[156]

The legislation also requires microchipping of horses as a prerequisite to being eligible for racing in New York.[157]

D. Proposed Legislation SB S1130

In the past year, the New York State Senate and Assembly have both passed versions of SB 1130, relating to the sale of dogs, cats, and rabbits.[158] As of the writing of this article, Governor Hochul had not signed the proposed legislation. The proposed legislation would make amendments to the New York General Business Law and Agriculture and Markets Law.[159] The proposed language would define "retail pet shops" as any "for-profit place of business that sells or offers for sale animals to be kept as household pets, pet food, or supplies."[160] Breeders who sell directly to consumers are not included in the definition of retail pet shops.[161]

The proposed legislation would prohibit retail pet shops from selling, leasing, or otherwise transferring ownership rights for any

150. *See* AGRIC. & MKTS. § 382(4)(a).
151. *See id.*
152. *See* N.Y. AGRIC. & MKTS. LAW § 382(4)(b) (McKinney 2022).
153. *See* AGRIC. & MKTS. § 382(5)(a).
154. *See* AGRIC. & MKTS. § 382(6).
155. *See* AGRIC. & MKTS. § 382(7).
156. *See id.*
157. *See* N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 225 (McKinney 2022).
158. *See* N.Y. Senate Bill No. 1130, 244th Sess. (2021).
159. *See id.*
160. *Id.*
161. *See id.*

dog, cat, or rabbit.[162] The legislation would allow retail pet shops to showcase dogs, cats, or rabbits available for adoption through the following organizations: (1) any duly incorporated society for the prevention of animal cruelty, (2) any duly incorporated humane society, (3) any duly incorporated animal protective agency, or (4) any other duly incorporated animal adoption or animal rescue organization.[163]

E. Proposed Legislation—SB 4839-B

Both chambers of the New York Legislature have also passed versions of SB 4839-B.[164] As of the writing of this Article, Governor Hochul had not signed the legislation into law. The proposed legislation would add new sections to the General Business Law addressing animal tested cosmetics.[165]

The proposed legislation defines "animal testing" as any "internal or external application of a cosmetic, either in its final form or any ingredient thereof, to the skin, eyes, or other body part of a live non-human vertebrate."[166] The proposed legislation would prohibit a manufacturer from importing or selling any cosmetic that the manufacturer knew or reasonably should have known involved the use of animal testing.[167] However, the legislation would not apply to animal testing that is required by federal or state law if, (1) the underlying cosmetic or ingredient is in wide use and cannot be replaced by another ingredient, (2) a specific human health problem is substantiated, justifying animal testing, and (3) there is no alternative to animal testing.[168]

V. GRIEVING FAMILIES ACT

In June 2022, Senate Bill S74A, also known as the Grieving Families Act, passed both the senate and the assembly and as of the writing of this article, is currently before Governor Kathy Hochul.[169] If signed by Governor Hochul, the bill would immediately become law. The Act would amend provisions of the State's Estates, Powers and Trusts Law (EPTL) which many feel is outdated and disproportionately impacts children, seniors, women, and people of color.[170]

162. *See id.*
163. *See* N.Y. Senate Bill No. 1130, 244th Sess. (2021).
164. *See* N.Y. Senate Bill No. 4839-B, 244th Sess. (2021).
165. *See id.*
166. *Id.*
167. *See id.*
168. *See id.*
169. *See* N.Y. Senate Bill No. 74A, 244th Sess. (2021).
170. *See id.*

Arguably, the most significant impact of the bill is that it amends EPTL section 5-4.3 to allow grieving families to recover compensation for their emotional anguish.[171] This is a drastic shift from the existing framework which limits recovery to pecuniary injuries such as funeral and medical expenses incurred by the deceased prior to death.[172] As amended, section 2 of the proposed bill permits recovery of:

> (i) [R]easonable funeral expenses of the decedent paid by the persons for whose benefit the action is brought, or for the payment of which any persons for whose benefit the action is brought is responsible, (ii) reasonable expenses for medical care incident to the injury causing death . . . (iii) grief or anguish caused by the decedent's death, and for any disorder caused by such grief or anguish, (iv) loss of love, society, protection, comfort, companionship, and consortium resulting from the decedent's death, (v) pecuniary injuries resulting from the decedent's death . . . and (vi) loss of nurture, guidance, counsel, advice, training, and education resulting from the decedent's death.[173]

While this is not an exhaustive list of all the possibilities for recovery, it certainly outlines the framework for a drastic expansion of recoverable damages.

In conjunction with the expansion of recoverable damages, the Act permits recovery by "close family members" which may include, but are not limited to, a spouse, domestic partner, issue, parents, grandparents, step-parents, and siblings.[174] Currently, under EPTL section 5-4.4, recovery is limited to the distributees of the estate.[175] While this amendment serves as an attempt to bring the law up to date by recognizing the various configurations of a modern-day family unit, it also opens the door to additional litigation addressing what constitutes a "close family member."[176]

Section 1 of the Act also extends the current two-year statute of limitations to three years and six months from the date of fatality,

171. *See id.*

172. *See* N.Y. EST. POWERS & TRUSTS LAW § 5-4.3 (McKinney 2022).

173. N.Y. Senate Bill No.74A, 244th Sess. (2021).

174. *See id.*

175. *See* N.Y. E.P.T.L. § 5-4.3

176. *See* N.Y. Senate Bill No. 74A, 244th Sess. (2021); Hannah Smith, *N.Y. Grieving Families Act Could Impact Auto and General Liability*, PropertyCasualty360 (Jul. 21, 2022 12:05 AM), https://www.propertycasualty360.com/2022/07/21/new-york-legislature-passes-grieving-families-act-414-224969/?slreturn=20220725103638.

while section 4 changes the definition of distributees to "persons for whose benefit the action is brought" and section 5 permits the changes to take effect immediately and applies retroactively to all pending actions.[177]

While this is an attempt to rectify the disparities and purportedly inhumane language of the current law, the changes may also burden the state's economy.[178] Specifically, citing to an actuarial analysis by Milliman, some believe that the bill would increase medical professional liability costs by nearly forty percent and has the potential to impact other insurance industries as well.[179] Regardless, if the bill is signed into law, defendants and insurers alike should anticipate a significant increase in both wrongful death lawsuits and damage awards.

VI. UPDATES TO MENTAL HYGIENE LAW

On July 26, 2022, Governor Hochul, signed S7107.b, which created a new article within the Mental Hygiene Law.[180] The goal of the legislation was to allow persons with disabilities more autonomy through the use of "supported decision-making agreements" rather than guardianships.[181]

The legislation framework begins with the presumption that every person has the capacity to enter into a supported decision agreement, unless the person has a court appointed guardian whose granted authority conflicts with a proposed supported-decision agreement.[182] The presumption can also be rebutted through clear and convincing evidence.[183] The statute specifically states that a diagnosed developmental disability or other condition does not constitute evidence of incapacity, nor does the manner in which an individual communicates with others.[184]

177. N.Y. Senate Bill No. 74A, 244th Sess. (2021).

178. *See id.*; Andrew G. Simpson, *New York Waits to See If Bill to Expand Wrongful Death Damages Becomes Law*, Ins. J., (Jul. 7, 2022), https://www.insurancejournal.com/news/east/2022/07/07/675013.htm.

179. Simpson, *supra* note 178.

180. *See* N.Y. Senate Bill No. 7107.b, 244th Sess. (2021).

181. N.Y. MENTAL HYG. LAW § 82.01 (McKinney 2022). A Supported Decision-Making Agreement is defined as "an agreement a decision-maker enters into with one or more supporters under this section that describes how the decision-maker uses supported decision-making to make their own decisions." *See* MENTAL HYG. § 82.01(2)(j).

182. *See* MENTAL HYG. § 82.03(a).

183. *See id.*

184. *See* MENTAL HYG. §§ 82.03(c)–82.03(d).

The statute states that a decision-maker, through a supported decision-making agreement, may authorize another adult to provide support to them while making a decision, including: (1) gathering information, (2) interpreting information, (3) weighing options, (4) considering the consequences of making a decision, (5) participating in conversations with third-parties if the decision-maker is present, and (6) providing support while implementing a decision.[185] The statute also states that individuals entering into an agreement retain their right to make decisions independently and to access to their personal information.[186] The decision-maker also retains the right to ask for help in making a decision from anyone not specifically mentioned in the agreement.[187] Notably, the existence of a supported decision-making agreement may be used as evidence that a less restrictive alternative to guardianship is in place.[188] By entering into a supported decision-making agreement, a person does not waive the right to any services that they would be entitled to otherwise, and the person does not waive any evidentiary privileges.[189]

The statute also articulates duties and responsibilities for a supporter.[190] A supporter is required to, amongst others, respect the decision-maker's right to make a decision, act honestly, act within the scope of the agreement, avoid conflict of interests, and notify the decision-maker in writing about an intent to resign.[191] A supporter is prohibited from: making a decision for the decision-maker, exerting undue influence, physically coercing the decision-maker, using any information acquired as a supporter for purposes other than for assisting the decision-maker, amongst other prohibitions.[192] A supporter is not permitted to sign legal documents on behalf of the decision-maker.[193]

185. *See* N.Y. MENTAL HYG. LAW § 82.04(a) (McKinney 2022).

186. *See* MENTAL HYG. §§ 82.04(b)–82.04(c).

187. *See* MENTAL HYG. § 82.04(d).

188. *See* MENTAL HYG. § 82.04(e).

189. *See* MENTAL HYG. §§ 82.04(h)–82.04(i).

190. *See* N.Y. MENTAL HYG. LAW § 82.05 (McKinney 2022). A "supporter" is defined as "an adult who has voluntarily entered into a supported decision-making agreement with a decision-maker, agreeing to assist the decision-maker in making their own decision as prescribed by the supported decision-making agreement." MENTAL HYG. § 82.02(k).

191. *See* MENTAL HYG. § 82.05(a).

192. *See* MENTAL HYG. § 82.05(b).

193. *See* MENTAL HYG. § 82.05(d).

With respect to revocation, a decision-maker may revoke an agreement, in part or in its entirety, by notifying the supports verbally or in writing.[194]

In contemplation of a situation where a decision-maker would select an employee of an agency from which the decision-maker receives services, the Office for People with Developmental Disabilities is authorized to issue regulations governing conflicts of interest.[195] An adult is deemed ineligible to act as a supporter if: (1) a court issues a protective order against the adult in favor of the decision-maker, or (2) the local department of social services has found that the adult has committed abuse, neglect, financial exploitation or physical coercion against the decision-maker.[196]

Regarding the form of a supported decision-making agreement, the statute requires an agreement to: (1) be in writing, (2) be dated, (3) designate the decision-maker and the supporter(s), (4) list the categories of decisions covered by the agreement, (5) list the kinds of support authorized, (6) contain an attestation clause for the supporter to sign, (7) contain statement indicating that the decision-maker may amend or revoke the agreement at any time, (8) be signed by all supporters, and (9) be executed by the decision-maker in the presence of at least two adult witnesses who are not supporters.[197]

Per the statute, a medical provider is immune from claims of lack of informed consent if they proceed with treatment based on consent obtained with a supported decision-making agreement.[198]

VII. LEGISLATION ADDRESSING OPIOID ADDICTION

New York has continued to pass legislation which attempts to address Opioid addiction. The following is a summary of opioid-related legislation passed during this *Survey* year.

A. NY SB 911—Possession of Opioid Antagonists

New York has enacted changes to how the Criminal Procedure Law addresses the possession of opioid antagonists. Specifically, recently passed legislation prohibits the admission of evidence regarding a person's possession of any opioid antagonist at any trial, hearing

194. *See* N.Y. MENTAL HYG. LAW § 82.07(a) (McKinney 2022).
195. *See* MENTAL HYG. § 82.08(a).
196. *See* MENTAL HYG. § 82.08(b).
197. *See* MENTAL HYG. § 82.10(b).
198. *See* MENTAL HYG. § 82.12(c).

or other prosecution hearing.[199] The Criminal Procedure Law defines "opioid antagonist" as a "drug approved by the FDA that, when administered, negates or neutralizes in whole or in part the pharmacological effects of an opioid in the body and shall be limited to naloxone and other medications approved by the department of health for such purpose."[200]

The legislation also amended the language contained in the CPLR. Specifically, possession of opioid antagonists cannot be received into evidence in proceedings under the Real Property Law for the purpose of establishing that the building or premises is being used for illegal purposes.[201]

B. NY SB 2523—Decriminalization of Possession of Hypodermic Needles

The New York Penal Law had historically criminalized the possession of a hypodermic instrument as a class A misdemeanor.[202] Effective October 6, 2021, New York repealed the provision of the Penal Law criminalizing the possession of hypodermic instruments.[203] Similar changes were made to the New York General Business Law to exclude hypodermic needles from the definition of "drug-related paraphernalia."[204]

The legislation also encompassed amendments to the Public Health Law. Specifically, certain provisions of the Public Health Law were amended to eliminate limits on the number of hypodermic needles a person may possess.[205] The Public Health Law was also revised to eliminate requirements that a person obtain hypodermic instruments pursuant to a prescription.[206] The legislation authorizes the Health Commissioner to promulgate regulations addressing standards for advertising the sale of hypodermic instruments to the public.[207]

199. *See* N.Y. C.P.L. § 60.49(1) (McKinney 2022).

200. C.P.L. § 60.49(2).

201. *See* N.Y. C.P.L.R. 4519-a (McKinney 2022).

202. *See* N.Y. PENAL LAW § 220.45 (McKinney 2012) (repealed in 2021). Previous iterations of this Penal Law provisions created carve outs for needles obtained through mechanisms outlined in the Public Health Law. *Id.*

203. *See* PENAL LAW § 220.45 (repealed in 2021).

204. *See* N.Y. GEN. BUS. LAW § 850(2)(b) (McKinney 2022).

205. *See* N.Y. PUB. HEALTH LAW § 3381(1)(c) (McKinney 2022).

206. *See id.*

207. *See* PUB. HEALTH § 3381(f).

C. SB 1795—Medication Assisted Treatment Programs for Prison Inmates

During this Survey year, New York enacted legislation which created a program to enable medication assisted treatments for prison inmates.[208] The statute defines "medication assisted treatment" as "treatment of chemical dependence or abuse and concomitant conditions with medications requiring a prescription or order from an authorized prescribing professional."[209] Per the statute, the program is to include all types of medication assisted treatments for substance abuse disorders, so long as the treatment is approved by the FDA.[210] In order to enroll in the program, an inmate first undergoes a medical screening to establish that they are suffering from a substance abuse disorder.[211]

Upon a finding of a substance abuse disorder, the inmate may enroll in the program.[212] An inmate participating in the program will then work with a provider to establish an individualized treatment plan, including the need for counseling, and type, dosage, and duration of a medication regimen.[213] The program will also include strategies to help an inmate maintain recovery after prison release and help participating inmates enroll in Medicaid following release.[214]

Upon release from prison, participating inmates will be given a one-week supply of any necessary medications.[215] The statute also envisions creating mechanisms for a relapsing parolee to receive substance abuse treatment rather than arrest and re-incarceration.[216]

No inmate may be denied access to the program because of positive drug test during program intake and may not be subject to disciplinary infraction for a positive drug screen.[217] An inmate may not be denied access to the program based on having received a disciplinary infraction while incarcerated.[218]

208. *See* N.Y. Senate Bill No. 1795, 224th Sess. (2021).
209. N.Y. CORRECT. LAW § 626(1) (McKinney 2022).
210. *See* CORRECT. § 626(2)(a).
211. *See id.*
212. *See id.*
213. *See id.*
214. CORR. LAW § 626(2)(b)(i).
215. *See* N.Y. CORRECT. LAW § 626(2)(b)(ii) (McKinney 2022).
216. *See id.* § 626(2)(c).
217. *See id.* § 626(4).
218. *See* N.Y. MENTAL HYG. LAW § 19.18-c(3)(e) (McKinney 2022).

The program will cover treatment for: (1) alcohol withdrawal, (2) benzodiazepine withdrawal, (3) heroin withdrawal, and (4) opioid withdrawal management, amongst others.[219]

VIII. REGULATORY CHANGES

A. Updates to Laws and Regulations Regarding Cannabis Usage in New York

The last *Survey* article discussed the newly enacted Cannabis Law.[220] During this Survey Year, New York has enacted additional legislation and regulations regarding marijuana usage in New York.

1. Conditional Adult-Use Cultivator License

On February 22, 2022, Governor Hochul signed S8084A, creating a "Conditional Adult-Use Cultivator License."[221] Codified at New York Cannabis Law section 68-c, any cultivator seeking to obtain an Adult-Use Cultivator License must: (1) hold a valid industrial hemp grower authorization from the Department of Agricultural and Markets, (2) have grown and harvested hemp for at least two of the previous four years, and (3) hold at least a fifty-one percent ownership interest in the entity seeking the license.[222]

A licensee is authorized to grow cannabis in an outdoor setting or in a greenhouse.[223] The licensee may cultivate up to 43,560 square feet in an outdoor setting or 25,000 square feet in a greenhouse.[224] If using both an outdoor space and a greenhouse, the greenhouse is limited to 20,000 square feet and total cultivation area is capped at 30,000 square feet.[225] Additionally, the cultivator is limited to cultivating cannabis in the county the cultivator was previously authorized to grow hemp, or an in adjacent county.[226]

A licensee will be temporarily allowed to "minimally process and distribute cannabis" without the usually required processor or

219. *See* MENTAL HYG. § 19.18-c(2)(a).

220. *See generally* Robert Carpenter, Kali Schriener, & Carly Dziekan, *2021–2022 Survey of New York Law: Health Law*, 72 SYRACUSE L. REV. 819 (2022).

221. *See* N.Y. Senate Bill No. 8084, 244th Sess. (2021).

222. *See* N.Y. CANNABIS LAW § 68-c(2)(a-c) (McKinney 2022).

223. *See* CANNABIS § 68-c(3) (stating that cultivation in a greenhouse can only use up to twenty artificial licenses).

224. *See id.*

225. *See id.*

226. *See* CANNABIS § 68-c(5).

distributor licenses until June 1, 2023.[227] After June 1, 2023, processor and distributor licenses will be required.[228]

Applicants for an Adult-Use Cultivator License are required to complete an environmental sustainability program and a social mentorship program.[229] The applicant must also agree to enter into a "labor peace agreement" with a labor organization that is engaged in representing the applicant's employees.[230]

The New York State Office of Cannabis Management has indicated that an applicant for an Conditional Adult-Use Cultivator license must be a "Justice Involved Individual."[231] Per the Office of Cannabis Management, a Justice Involved Person is someone who: (1) has been convicted of a marijuana related offense in New York State before March 31, 2021, (2) had a parent, child, spouse, guardian, or dependent who was convicted of a marijuana related offense in New York State before March 31, 2021, or (3) was dependent on someone who was convicted of a marijuana related offense in New York State before March 31, 2021.[232]

2. Revisions to Regulations Regarding Home Cultivation of Medical Cannabis

The Office of Cannabis Management promulgated proposed regulations addressing home cultivation of medical cannabis, and the comment period on the proposed regulations closed on July 25, 2022. Under the regulations, certified patients twenty-one years old or older may cultivate cannabis for personal use.[233] The cannabis must be grown on the person's private residence.[234] Each certified patient will be limited to three mature cannabis plants and three immature cannabis plants.[235]

227. N.Y. CANNABIS LAW § 68-c(6) (McKinney 2022).

228. *See id.*

229. *See* CANNABIS § 68-c(7).

230. *See id.*

231. *See* N.Y. STATE OFF. OF CANNABIS MGMT, CONDITIONAL ADULT-USE RETAIL DISPENSARY (CAURD) FREQUENTLY ASKED QUESTIONS 2–3 (2022) (available at https://cannabis.ny.gov/system/files/documents/2022/09/caurd-faq-9.12.22_0.pdf).

232. *See* 9 N.Y.C.R.R. § 116.4(a)(2) (2022).

233. *See* 9 N.Y.C.R.R. § 115.2(a). Designated caregivers for patients with physical or cognitive impairments may also grow cannabis. *See id.* § 115.2(b).

234. *See* 9 N.Y.C.R.R. § 115.2(c).

235. *See* 9 N.Y.C.R.R. § 115.2(d).

Under the regulations, certified patients or their caregivers are not allowed to sell or barter away any cannabis grown at their residence.[236] Certified patients will be limited to possessing no more than five pounds of home-cultivated cannabis.[237]

The regulations also prohibit landlords from refusing to lease to persons growing medical cannabis on their property unless the landlord would lose a benefit under federal law or regulation.[238]

3. Revisions to Hemp Regulations

The Office of Cannabis Management also promulgated regulations addressing hemp during the *Survey* year.[239] For context, New York regulations define "hemp" as any Cannabis product with a THC concentration not exceeding 0.3 percent.[240] The regulations redefine a "cannabinoid hemp farm processor" as a processor which is licensed by the New York State Department of Agriculture and Markets, and is permitted to manufacture cannabinoid hemp flower products.[241] The regulation states that a cannabinoid hemp farm processor cannot: (1) produce more than 1,000 pounds of dried hemp each year, (2) purchase or sell hemp or hemp extract which were not produced from hemp grown on his or her farm, or (3) perform extraction on hemp grown on his or her farm.[242]

4. Proposed Packaging and Labelling Regulations

The Office of Cannabis Management has also promulgated proposed rules regarding packaging and labelling of Cannabis products.[243] The proposed regulations would require retail cannabis products to: (1) be child resistant, (2) be tamper-evident, (3) fully enclose the product, and (4) not impart any toxic substance onto the cannabis product.[244]

The regulations also aim to promote austere packaging of cannabis products. Specifically, the regulations prohibit packaging from: (1) containing more than one brand name and one brand logo, (2)

236. *See* 9 N.Y.C.R.R. § 115.2(f).
237. *See* 9 N.Y.C.R.R. § 115.2(g) (2022).
238. *See* 9 N.Y.C.R.R. § 115.2(m).
239. *See* 9 N.Y.C.R.R. § 114.1 (2022).
240. 9 N.Y.C.R.R. § 114.1(q).
241. *See* 9 N.Y.C.R.R. § 114.1(f).
242. *See* 9 N.Y.C.R.R. § 114.1(f) (2022).
243. *See* 44 N.Y. Reg. 4 (June 15, 2022) (to be codified at 9 N.Y.C.R.R. § 128).
244. *See* 44 N.Y. Reg. 4 (June 15, 2022) (to be codified at 9 N.Y.C.R.R. § 128.2(a)).

containing any pictures, images or graphics, other than those required by the Office of Cannabis Management, (3) emitting any scents or sounds, or (4) contain any feature that can alter the package's appearance through technology.[245] Packaging is also prohibited from being "made attractive to individuals under twenty-one."[246] Specifically, packaging is prohibited from using any cartoons, cartoonish fonts, bright neon colors, or any type of symbols, phrases, games, or other items that are commonly used to market products to children.[247] Further, packaging may not use single-use plastics, unless the package contains at least twenty-five percent post-consumer recycled content.[248] The regulations also promote sustainable packaging practices, including re-using packaging after appropriate sanitation efforts.[249]

The regulations also requires packaging to list various THC and CBD measurements for the contained products.[250] The packaging must also contain one of three universal symbols, which indicate that the product contains THC and can only be purchased by someone at least twenty-one years old.[251] The packaging must also contain assorted warnings, including: (1) a statement indicating that the product should be kept away from children and pets, (2) a statement warning against use while pregnant or nursing, (3) the national poison control center telephone number, and (4) a warning that effects of orally ingested products may be delayed by up to four hours, amongst others.[252]

Other packaging regulations include prohibitions against using the word "organic" or use of misleading or false statements making health claims.[253]

245. *See* 44 N.Y. Reg. 4 (June 15, 2022) (to be codified at 9 N.Y.C.R.R. § 128.3(a)).

246. 44 N.Y. Reg. 4 (June 15, 2022) (to be codified at 9 N.Y.C.R.R. § 128.3(a)(5)).

247. *See* 44 N.Y. Reg. 4 (June 15, 2022) (to be codified at 9 N.Y.C.R.R. § 128.1(b)).

248. *See* 44 N.Y. Reg. 4 (June 15, 2022) (to be codified at 9 N.Y.C.R.R. § 128.3(a)(6)).

249. *See* 44 N.Y. Reg. 4 (June 15, 2022) (to be codified at 9 N.Y.C.R.R. § 128.4(b)).

250. *See* 44 N.Y. Reg. 4 (June 15, 2022) (to be codified at 9 N.Y.C.R.R. § 128.5(a)).

251. *See* 44 N.Y. Reg. 4 (June 15, 2022) (to be codified at 9 N.Y.C.R.R. § 128.2(b)(7)).

252. *See* 44 N.Y. Reg. 4 (June 15, 2022) (to be codified at 9 N.Y.C.R.R. § 128.5(f)).

253. *See* 44 N.Y. Reg. 4 (June 15, 2022) (to be codified at 9 N.Y.C.R.R. § 128.6(a)).

CONCLUSION

Looking ahead, it will be interesting to see how the Appellate Courts handle motions regarding civil immunities for COVID-19 care. Beyond changes spurred by COVID-19, we anticipate further regulation addressing the recent legalization of marijuana. It will also be interesting to see the implementation of legislation and regulation addressing abortion access, animal rights, and the use of Supported Decision Making Agreement.