



MEMORANDUM

FROM: **The VBPNP COVID-19 Litigation Team**

RE: Enactment of A10840/S08835, which prospectively removes many of the protections of the EDTPA COVID-19 healthcare immunity

The New York State Senate and New York State Assembly passed legislation that severely reduces the scope of New York's Emergency or Disaster Treatment Protection Act ("EDTPA"). On August 3, 2020, Governor Cuomo signed the legislation into law.

Most significantly, the proposed legislation:

- Eliminates immunity for care not **directly** related to COVID-19 treatment,
- Eliminates immunity for lack of staffing and resources, and
- Eliminates immunity for healthcare actions for the prevention of COVID-19 or arranging for healthcare for COVID-19.

These changes are **prospective**, not retroactive. In other words, the immunities created in the EDTPA on March 6, 2020 continue in full until August 3, 2020. Starting on August 4, 2020, the narrower EDTPA will cover substantively care only directly related to **COVID-19**.

LEGISLATIVE BREAKDOWN

Crucially, the Senate Bill, §3 explicitly provides that there is no retroactive effect on immunity:

§3. This act shall take effect immediately and shall apply to claims for harm or damages if the act or omission that causes such harm or damage occurred on or after such effective date; provided however this act shall not apply to any act or omission occurring after the expiration of the COVID-19 emergency declaration.

The Senate Bill sets forth the following “purpose” for the amendment:

To **limit** immunity granted in the 2020-21 Adopted budget to health care professionals that are providing diagnosis and treatment of COVID-19 directly to confirmed and suspected COVID-19 patients.

The Senate Bill provides an explicit “justification.” *It is important to note that “this Bill is only a first step;” that “[the Senate] must take further action”; that “multiple joint hearings will be held.”*

JUSTIFICATION: Part GGG of the 2020-21 Adopted Budget ELFA Bill enacted the "Emergency or Disaster Treatment Protection Act" that provides liability protections for health care facilities and medical professionals that treat, or arrange for treatment of COVID-19 patients, and any other individual who sought health care services during the COVID-19 emergency declaration. This limited protection, as created by Part GGG, applies if the healthcare facility or healthcare professional complies with all other applicable law and directives and the treatment of the individual is impacted by the facility or healthcare professional's response to COVID-19. The protection does not cover gross negligence, intentional criminal or reckless misconduct, or intentional infliction of emotional distress. This Bill seeks **to further narrow the scope** of these liability protections to apply only when a health care facility or medical professional is providing direct care related to the diagnosis or treatment of COVID-19 and the care is impacted by COVID-19. This Bill attempts to move forward from the uncertainty that faced the State from the impact of COVID-19 in late March. ***This Bill is only a first step***, however, and we ***must*** take further action to hold to account any malfeasance that occurred during the height of the COVID-19 crisis. We must continue to make adjustments to the State's response to the COVID-19 outbreak to make our healthcare system more resilient and responsive to the needs of our residents in this, and future, public health crises. To that end, the Legislature will hold **multiple joint hearings** on the subject, including an examination of the fatalities in residential health care facilities and the impact of COVID-19 on hospitals. The Legislature must use what we learn in these hearings to take further action.

The Senate provided the following “summary of provisions”:

Section 1 of the Bill amends the definition of "health care services" that are eligible for immunity from liability by **removing "prevention"** of COVID-19 from the definition of health care services; clarifying that the immunity applies to the assessment or care of an individual as it relates to COVID-19; and **removes the care of any other individual** who presents at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration from the definition of "health care services."

Section two of the Bill **removes from immunity**, protections when a healthcare facility or healthcare professional is **"arranging for" healthcare services**.

Section three of the Bill makes the effective date immediate.

SENATE AND HOUSE BILLS COMPARED TO ORIGINAL EDTPA

We provide the specific language of the statute below. The language/sections deleted from the original EDTPA are in **yellow**; newly added sections are capitalized in **black**.

Public Health Law §3081(5)(c)

Section 1. Subdivision 5 of Section 3081 of the Public Health Law, as added by Section 1 of Part GGG of Chapter 56 of the Laws of 2020, is amended to read as follows:

5. The term "health care services" means services provided by a health care facility or a health care professional, regardless of the location where those services are provided, that relate to:

- a) the diagnosis **[,or prevention]** or treatment of COVID-19, or,
- b) the assessment or care of an individual **[with] AS IT RELATES TO COVID-10, WHEN SUCH INDIVIDUAL HAS** a confirmed or suspected case of COVID-19,
[; or, (c) the care of any other individual who presents at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration.]

Public Health Law §3082

§ 2. Subdivision 1 of Section 3082 of the Public Health Law, as added by Section 1 of Part GGG of Chapter 56 of the Laws of 2020, is amended to read as follows:

1. Notwithstanding any law to the contrary, except as provided in Subdivision two of this Section, any health care facility or health care professional shall have immunity from any liability, civil or criminal, 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, if: the health care facility or health care professional is *[arranging for or]* providing health care services **IN ACCORDANCE WITH APPLICABLE LAW, OR WHERE APPROPRIATE** pursuant to a COVID-19 emergency rule *[or otherwise in accordance with applicable law];*

a) the health care facility or health care professional is *[arranging for or]* providing health care services **IN ACCORDANCE WITH APPLICABLE LAW, OR WHERE APPROPRIATE** pursuant to a COVID-19 emergency rule *[or otherwise in accordance with applicable law];*

(b) the act or omission occurs in the course of *[arranging for or]* providing health care services and the treatment of the individual is impacted by the health care facility's or health care professional's decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the State's directives; and

(c) the health care facility or health care professional is *[arranging for or]* providing health care services in good faith.

ISSUE PRESENTED

- (1) *Is the newly narrow EDTPA unconstitutional where the **prospective** removal of immunity negatively impacts past obligations?*
- (2) *If there is an amendment the EDTPA that repeals the immunity protections **retroactively**, going back to the start of the pandemic, would such an amendment be constitutional?*

CONCLUSION

Newly passed legislation providing prospective removal of immunity: Depending on the retroactive impact on the rights and liabilities of the affected parties, prospective legislation may be unconstitutional under the U.S. Constitution's Contracts and Takings Clauses.

Proposed repeal of the EDTPA: Since the immunity granted by the EDTPA is a vested right protected by both the federal and New York Constitutions, it is likely that any abrogation of this right by subsequent legislation would be rendered unconstitutional on due process grounds.

DISCUSSION

I RETROACTIVE LEGISLATION

A. Federal Law

There are few principles of our law more ancient, and none more respected, than the canon which holds that laws are enacted for the future. A legislative pronouncement may not operate on acts which predate its passage.” *S. E. Chicago Comm'n v. Dep't of Hous. & Urban Dev.*, 488 F.2d 1119, 1122–23 (7th Cir. 1973).

“[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the ‘principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.” *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994).

This anti-retroactivity principle finds expression in several provisions of the federal Constitution. The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation. Article I, § 10, cl. 1, prohibits States from passing an additional type of retroactive legislation, *i.e.*, laws “impairing the Obligation of Contracts.” The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a “public use” and upon payment of “just compensation.” Finally, and most applicable herein, the Due Process Clause protects the interests in fair notice and repose that may be compromised by retroactive legislation.

In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), Justice Kennedy, in a concurring opinion, wisely reasoned: “[i]f retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership. Consequently, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity. Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations now can destroy them. Both stability of investment and confidence in the constitutional system, then, are secured by due process restrictions against severe retroactive legislation.” *Id.* at pp. 548–549 (invalidating federal law that retroactively imposed substantial financial obligations on coal mining companies for health care of retired workers as an unconstitutional taking under Fifth Amendment).

In determining whether legislation should be applied retroactively, the first step is ascertaining whether there is clear legislative intent for retroactive application. If so, the query then turns to whether applying the law retroactively violates due process under the applicable state or federal Constitution.

In *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994), the issue before the Supreme Court was whether amendments to Title VII of the Civil Rights Act of 1964, which significantly expanded the monetary relief available to plaintiffs, applied to pending litigation. Prior to 1991, the primary monetary relief available under Title VII was back pay for lost wages, recoverable only if unlawful discrimination had a concrete effect on the plaintiff’s employment. The 1991 amendments to the Act provided compensatory and punitive damages, as well as the recovery of monetary damages in the absence of a concrete effect on employment.

The *Landgraf* court found that the compensatory damages provision – “quintessentially backward looking” – had a retroactive effect because, in cases where money damages were previously unrecoverable, it would “**attach an important new legal burden**” and could “**be seen as creating a new cause of action.**” *Id.* at 282–283. The amended punitive damages provision of Title VII was also clearly retroactive since it reflected a punishment for past acts. *Id.* at 281. Notably, as relevant herein, the Court held that the “extent of a party’s liability, in the civil context ... is an important legal consequence” in determining retroactivity. *Id.* at 283–284. Indeed, the presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing **new burdens on persons after the fact**. *Id.* at 270. Without reaching the constitutionality of these amendments, the court ruled that since there was no clear evidence of congressional intent that they should apply to cases arising before their enactment, they could not be applied retroactively.

B. New York Law

Consistent with the foregoing, under New York law, “[a] statute generally will not be applied retroactively where it would deprive one of a substantial right, or affect antecedent rights.” N.Y. Stat. Law § 53 (McKinney). Laws should not be given retroactive effect where they would impose unexpected liability and, as in the federal context, there is a presumption against retroactivity in New York. *People ex rel. D.W. Griffith, Inc., v. Loughman*, 249 N.Y. 369 (1928).

The Court of Appeals recently addressed this issue in *Regina Metro. Co., LLC v. New York State Div. of Hous. & Cmty. Renewal*, No. 1, 2020 WL 1557900, at *13 (N.Y. Apr. 2, 2020). In that case, the court found that the retroactive application of overcharge calculation amendments in the Housing Stability and Tenant Protection Act violated due process protections in the State and Federal Constitutions since it increased the scope of liability for past wrongs.

In reaching this decision, the Court discussed how, generally, a statute is presumed to apply only prospectively and retroactive legislation is viewed with “great suspicion”. *Id.* citing *Matter of Chrysler Props. v. Morris*, 23 N.Y.2d 515, 521 (1969). In discussing *Landgraf*, the Court recognized that this “deeply rooted” presumption against retroactivity is based on “[e]lementary considerations of fairness [that] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.” As the Supreme Court has cautioned, careful consideration of retroactive statutes is warranted because “[t]he Legislature’s unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration” and “[i]ts responsiveness to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.” *Id.*, citing *Landgraf*, 511 U.S. at 265-66.

In light of these concerns, the Court stated that it takes a “clear expression of the legislative purpose ... to justify a retroactive application of a statute,” which assures that the legislature “has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits” *Id.* (citations omitted).

Although legislative direction concerning the scope of a statute carries a presumption of constitutionality, to comport with the requirements of due process, retroactive application of a newly enacted provision must be supported by “a legitimate legislative purpose furthered by rational means.” The party challenging the constitutionality of retroactive legislation bears the burden of showing the “absence of a rational basis justifying retroactive application of the statute.” The *Regina* Court cautioned that because retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, “in order to comport with due process, there must be a ‘persuasive reason’ for the ‘potentially harsh’ impacts of retroactivity.” *Id.* (citations omitted).

Applying these principles to the amendments to the Housing Stability and Tenant Protection Act at issue in that case, the Court held that the Act’s overcharge calculation and treble damages provisions, if applied retroactively, would **impact the owner’s substantive rights** and expand a tenant’s total overcharge recovery well beyond what was provided under the prior law. Therefore, the Court concluded, retroactive application of these amendments did not comport with due process under the U.S. or New York Constitution. *See* U.S. Const. Amend. 14; McKinney’s Const. Art. 1, § 6; N.Y. CPLR § 213-a.

See also James Square Assocs. LP v. Mullen, 21 N.Y.3d 233, 240 (2013) (2009 Amendments to the New York Empire Zones Program did not comply with Due Process Clause of the Fifth Amendment); *Duell v. Condon*, 84 N.Y.2d 773, 783 (1995) (“[w]hen a statute creates a new right of action, it is presumed that the Legislature intended the statute to be applied prospectively only

unless a contrary intent clearly appears.”); *See also Saltser & Weinsier v. McGoldrick*, 295 N.Y. 499, 509 (1946) (“legislation which impairs vested rights is unconstitutional.”).

Thus, it is likely that any amendment to the EDTPA, which attempts to repeal the immunity provisions therein and apply same retroactively to the start of the COVID-19 pandemic, would be adjudged to be unconstitutional on due process grounds.

C. Other Jurisdictions

In New Jersey, despite a clear intent that a statute is intended to apply retroactively, courts will not apply it retroactively if it is unconstitutional or if the application would result in “manifest injustice.” The doctrine of manifest injustice is designed to prevent unfair results that do not necessarily violate any constitutional provision. While this inquiry is informed by considerations of constitutional due process, it is not necessarily determined by those issues. Rather, this analysis “look[s] to matters of unfairness and inequity” in determining whether to apply the doctrine to avoid the retroactive application of a statute. In evaluating these factors, courts weigh “the public interest in the retroactive application of the statute against the affected party’s reliance on previous law, and the consequences of that reliance.” *Oberhand v. Dir., Div. of Taxation*, 193 N.J. 558, 571 (2008).

See also Myers v. Philip Morris Companies, Inc., 28 Cal. 4th 828, 840–41 (Cal. 2002) (California statute, which eliminated immunity for tobacco companies from liability for personal injuries during 10-year time period, did not apply retroactively because it could subject those companies to liability for past conduct that was lawful during immunity period, and such retroactive application was impermissible unless there was an express intent of the Legislature to do so); *In re Smith*, 110 B.R. 597, 599 (Bankr. M.D. Fla. 1990) (since new statute created new rights and interfered with vested rights, it should not be given retrospective application); *Givens v. Anchor Packing, Inc.*, 237 Neb. 565, 569, 466 N.W.2d 771, 773–74 (1991) (immunity granted by complete statutory bar is vested right protected by Nebraska Constitution and therefore, cannot be impaired by subsequent legislative act.)

II PROSPECTIVE LEGISLATION

In addition to the constitutional concerns outlined above, there may be situations where prospective legislation negatively impacts past obligations that render such legislation unconstitutional.

A. Contract Clause of U.S. Constitution

Article I, § 10, cl. 1 of the U.S. Constitution, the Contract Clause, states: “[n]o State shall ... pass any Law impairing the Obligation of Contracts...” Although this clause does not work an absolute prohibition on the rights of States to impair contractual obligations, the State’s right to do so is limited to proper exercises of its police power. The Contract Clause prohibits laws impairing contracts, regardless of whether a state is a party to the contract, or the contract is between private parties. *Minn. Gas Co. v. Pub. Serv. Comm’n*, 523 F.2d 581, 585 (8th Cir.1975), citing *City of El Paso v. Simmons*, 379 U.S. 497, 506–09 (1965).

In *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977), the Supreme Court discussed state impairment with both public and private contracts. As to the latter, the Court determined that “the Contract Clause does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effects.” *Id.* at 17. Nonetheless, “laws intended to regulate existing contractual relationships must serve a legitimate public purpose.” *Id.* at 22. The Court explained: “[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption. As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.” *Id.* at 22–23.

The extent to which the Contracts Clause may limit State power is determined by a three-part test: “(1) whether the contractual impairment is in fact *substantial*; if so, (2) whether the law serves a significant public purpose, such as remedying a general social or economic problem; and, if such a public purpose is demonstrated, (3) whether the means chosen to accomplish this purpose are reasonable and appropriate.” *Sanitation and Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 993 (2d Cir.1997) (citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411–13, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983)).

With respect to the first element, the Second Circuit has explained: “the primary consideration in determining whether the impairment is substantial is the extent to which ***reasonable expectations under the contract have been disrupted***.” *Sanitation and Recycling Indus.*, 107 F.3d at 993. This approach is consistent with the Supreme Court’s reasoning that “the severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of ***private contracts***. Contracts enable individuals to order their personal and business affairs.... Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.” *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978). Thus, ***impairments that go to the heart of the contract***, that affect terms upon which the parties have reasonably relied, or that significantly alter the duties of the parties under the contract are substantial. *Id.*

Regarding the second element: “[t]he requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.” *Energy Reserves*, 459 U.S. at 412. To demonstrate such a legitimate purpose, the legislation “should be aimed at remedying an important ‘general social or economic problem.’” (*Sanitation & Recycling Indus.*, 107 F.3d at 993), and the purpose of the legislation cannot “be simply the financial benefit of the sovereign” or “for the mere advantage of particular individuals.” *Buffalo Teachers Fed’n v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006); *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 449 (1934).¹

¹ Generally, legislation which impairs the obligations of *private* contracts is tested under the contract clause by reference to a rational-basis test; that is, whether the legislation is a “reasonable” means to a “legitimate public purpose”. “As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.” *Ass’n of Surrogates & Supreme Court Reporters Within City of New York v. State of N.Y.*, 940 F.2d 766, 771 (2d Cir. 1991). (Citations omitted). The inquiry turns on whether the legislation resulting in the impairment serves a valid public purpose.

As to the final element, to withstand challenge under the Contracts Clause, legislation that substantially impairs contractual rights must employ means that are reasonable and necessary to meet the stated legitimate public purpose of the legislation. *See Buffalo Teachers*, 464 F.3d at 369. Courts will look to whether a more moderate course was available in place of a drastic impairment.

Thus, as relevant herein, if amendments to the EDTPA can be shown: 1.) to substantially impair pre-amendment contractual obligations by disrupting reasonable expectations that go to the heart of a contract; 2.) to benefit special interests as opposed to serving a legitimate public purpose; and 3.) to fail to employ a more moderate and available course of action to achieve the legitimate purpose of the legislation, these amendments may be found to be violative of the Contracts Clause of the U.S. Constitution.

B. Takings Clause of U.S. Constitution

Legislation may also be challenged under the Takings Clause of the Constitution if it “imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and if the extent of that liability is substantially disproportionate to the parties' experience.” *E. Enterprises v. Apfel*, 524 U.S. 498, 528-29 (1998).

The Takings Clause of the Fifth Amendment provides: “nor shall private property be taken for public use, without just compensation.” The aim of the Clause is to prevent the government “from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *E. Enterprises*, 524 U.S. at 522.

The Supreme Court has acknowledged that government regulation often “curtails some potential for the use or economic exploitation of private property,” and “not every destruction or injury to property by governmental action has been held to be a ‘taking’ in the constitutional sense.” *Id.* at 523 (citations omitted). Thus, evaluating constitutionality involves an examination of the “justice and fairness” of the governmental action. That inquiry does not lend itself to any set formula and is often fact intensive. The key factors to consider are: “the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action.” *Id.* at 523-24.

The issue before the Court in *E. Enterprises v. Apfel* was the constitutionality of the Coal Act, which required a former coal operator to fund health benefits for retired miners who had worked for the operator before it left the coal industry.

The Court held: “Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties. Congress also may impose retroactive liability to some degree, particularly where it is ‘confined to short and limited periods required by the practicalities of producing national legislation.’” *Id.* at 528 (citation omitted). The Court recognized, however, that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience. *Id.*

In ruling that the Coal Act amounted to an unconstitutional taking in violation of the Takings Clause, the Court applied three factors to its analysis: 1.) economic impact and whether a considerable financial burden has resulted from the legislation; 2.) whether the legislation attached new legal consequences to rights acquired and obligations assumed before its enactment, thus having retroactive effect; and 3.) whether the legislation singles out a limited class of parties and thus, implicates fundamental principles of unfairness. As applied to the circumstances herein, if amendments to EDTPA can be shown to violate these principles, they may equate to a unconstitutional taking in violation of the Takings Clause.

C. Recent Court of Appeals Analysis

The Court of Appeals decision in *Am. Econ. Ins. Co. v. State*, 30 N.Y.3d 136 (2017) is instructive regarding the extent to which amendments to the EDTPA, which may impair existing contractual obligations, are constitutional. In that case, plaintiffs, workers' compensation insurance carriers, challenged the legislature's 2013 amendment to Workers' Compensation Law § 25-a, which closed the Special Fund for Reopened Cases (the Fund) to new applications after January 1, 2014.

The Fund was established to ensure that injured workers with closed cases that unexpectedly reopened after many years would continue to receive necessary benefits, even if the insurance carrier had become insolvent. The Fund was financed through annual assessments, which carriers were permitted to pass on to their insureds. Over the years, the funds costs had increased dramatically and in 2013, the legislature decided to close the Fund to new applications, in an effort to save New York businesses “hundreds of millions of dollars in assessments per year” and prevent windfalls for carriers.

However, the plaintiff carriers contended that before the closure of the Fund, premiums charged did not include any costs carriers would incur on claims that would qualify for assignment to the Fund, and that their loss reserves did not account for any liability they might incur on reopened cases that would qualify for administration by the Fund, ***thereby creating a retrospective cost impact***. Plaintiffs contended that this retroactive impact violated the Contract Clause of the Federal Constitution and the Takings and Due Process Clauses of the Federal and State Constitutions.

The Court of Appeals disagreed, holding: “even assuming arguendo that the amendment has retroactive impact to the extent it imposes unfunded liability costs upon plaintiffs under policies finalized before the amendment's effective date, we conclude that ***this retroactive impact is constitutionally permissible***.” Notably, the court stated: “[a]bsent a violation” of a specific constitutional provision, “the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope.” Moreover, “[i]t is well settled that acts of the Legislature are entitled to a strong presumption of constitutionality.” Plaintiffs bear the ultimate burden of overcoming that presumption by demonstrating the amendment's constitutional invalidity beyond a reasonable doubt. *Id.* at 149.

1. Contracts Clause Analysis

With respect to the Contracts Clause, the Court concluded that the legislative amendment and closure of the Fund did not impair the contractual relationship between plaintiffs and their insureds and there was no contract between the plaintiffs and the Fund. Although plaintiffs asserted that closure of the Fund altered the scope of their coverage under the policies, the Court disagreed, ruling that the amendment *merely altered the allocation of costs of liability* by removing an avenue for carriers to transfer reopened cases to the Fund, and then to pass assessments for the costs of those cases onto their insureds. It did not affect their legal liability for reopened cases, which always existed. At most, the court stated, plaintiffs' contracts with their insureds had become less profitable and "decreased profitability of plaintiffs' contracts—due to the fact that the premiums plaintiffs charged in previous policy years did not account for this subsequent statutory change—does not constitute an impairment of their contracts with their insureds because it *does not alter any term of those contractual provisions*." *Id.* at 154. Thus, since plaintiffs failed to demonstrate the requisite contractual impairment, the Court did not reach the issue of whether the legislation was justified by a legitimate public purpose.

2. Takings Clause Analysis

Plaintiffs also contended that the legislative amendments were violative of the Takings Clause of the Fifth Amendment of the U.S. Constitution, which provides that "private property shall not be taken for public use, without just compensation. The New York Constitution similarly provides that "[p]rivate property shall not be taken for public use without just compensation" (N.Y. Const. art. I, § 7[a]). The threshold step in any Takings Clause analysis is to determine *whether a vested property interest has been identified*. The mere obligation to pay money, without identification of a vested property interest, cannot constitute a taking, and the Court ruled that plaintiffs could not identify any vested property interest impaired by the legislative amendment, and therefore their takings claim must fail. *Id.* at 156.

The court reasoned: "[a]s a general matter, the government does not 'take' contract rights pertaining to a contract between two private parties simply by engaging in lawful action that affects the value of one of the parties' contract rights." *Id.*, citing *Palmyra Pac. Seafoods, L.L.C. v. United States*, 561 F.3d 1361, 1365 (Fed Cir.2009). Notably, the court held: "*[o]ne cannot claim a vested property interest in continuing to receive a statutory benefit unless statutory language clearly granting a vested right ... is present*." *Id.* at 156-57. "Plaintiffs must identify a vested property interest and then demonstrate how the legislative amendment adversely impacts that property interest." Since the insureds and not the carriers paid into the Fund, the closing of same could not be considered an unconstitutional taking. Compare *Alliance of Am. Insurers v. Chu*, 77 N.Y.2d 573 (1991) (plaintiff insurers found to have vested property interest in income produced by security fund to which they were statutorily obligated to contribute; statutory language itself granted insurers vested property interest and legislature could not thereafter eliminate plaintiffs' rights with respect to contributions already made).²

² The Court also concluded that the legislation did not constitute a substantive due process violation, finding that any retroactive impact was justified by a rational legislative purpose. *Id.* at 157-58.

In sum, any analysis of the constitutionality of legislation impacting the EDTPA will be fact specific, involving the obligations and potential vested interests impacted thereunder. However, it appears that current disfavours the likelihood of success of any action against prospective amendment of the EDTPA.

III PROPOSED FEDERAL LEGISLATION

As part of the \$1 trillion COVID-19 relief package being considered by Congress, Republican lawmakers introduced a bill, the “Safe to Work Act”, that would create a liability shield for businesses and health care providers related to COVID-19 infections and death. This bill would require plaintiffs to prove both gross negligence and a failure to comply with public health guidelines in order to recover for alleged injuries.

Under the proposal, all coronavirus-related personal injury and medical malpractice suits will fall under the jurisdiction of federal courts and, while suits can be filed in state courts, the defendants will have the right to remove any COVID-19 injury case to federal court. The bill would also require plaintiffs to not only establish that a defendant was grossly negligent or engaged in willful misconduct, but also that the defendant failed to make "reasonable efforts" to comply with applicable public health guidelines. In addition, all such cases would be subject to limitations on noneconomic damages such as pain and suffering.

With respect to the latter, if enacted, the law would bar noneconomic damages, such as pain and suffering, unless a plaintiff can prove a defendant committed willful misconduct. The bill defines willful misconduct as an act taken intentionally to achieve a wrongful purpose or the disregard of a known or obvious risk "that is so great as to make it highly probable that the harm will outweigh the benefit." In addition, punitive damages would only be available in cases of willful misconduct and cannot exceed the amount of compensatory damages. Lastly, the bill also mandates a one-year statute of limitations, requiring suit to be filed one year from the date of "actual, alleged, feared or potential for exposure".

Other requirements include:

- Immunity is retroactive to December 1, 2019 and will remain in effect until either October 1, 2024, or the end of the national public health crisis as declared by the U.S. Department of Health and Human Services, whichever is later.
- If a coronavirus-related suit is filed in or removed to federal court, a plaintiff must provide an opinion from a medical expert essentially vouching for an injured party's claim.
- Plaintiffs are required to provide a list of the places they went and people they met in the 14-day period prior to experiencing symptoms, as well as any persons who visited their residence during that period.
- Overall awards can be reduced to account for payments made by collateral sources such as insurance companies and government reimbursements.
- In cases where there are multiple defendants, defendants will only be responsible for a proportionate share of damages, and it will be up to juries to determine the percentage of fault for each defendant.
- The bill includes a "loser pays" provision that allows prevailing defendants to seek compensatory and punitive damages if a claim outlined in a demand letter turns out to be meritless.

We will be monitoring this legislation, as well as all other state and federal legislation impacting liability and immunities related to COVID-19 claims.