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MEMORANDUM

TO: Vincent A. Culotta, Jr., M.D.
Executive Director, Louisiana State Board of Medical Examiners

FROM: Jeff Landry 
Attorney General, Louisiana Department of Justice

RE: Potential Immunity for Doctors Who May Prescribe Hydroxychloroquine
and Zithromax for The Treatment of COVID19

DATE: April 7, 2020

1. *Whether Doctors Prescribing Hydroxychloroquine And Zithormax To Patients In Louisiana Are Entitled To Immunity.*

The question has been asked whether doctors prescribing Hydroxychloroquine and Zithormax to patients in Louisiana are entitled to immunity. Should any doctor prescribe Hydroxychloroquine and Zithormax to patients in Louisiana in connection with the current COVID-19 epidemic and in accordance with the FDA's clinical approval, the doctor's actions may fall within one or more Louisiana immunity statute that currently exist. Specifically, La. R.S. 29:771(B)(2)(c) provides immunity for health care providers acting during a public health care emergency for civil claims concerning the death of or injury to a person or damage to property, *except* in the event of gross negligence or willful misconduct. If the doctor is a state-qualified health care provider, that doctor may also be entitled to state immunity. See, La. R.S. 29:771(B)(1). However, these immunities would only apply to state law claims, such as medical malpractice, products liability and general negligence claims; state law cannot create an immunity to defeat potential federal law claims, such as a federal constitutional claim of medical deliberate indifference. As always, the facts and circumstances surrounding an incident must be considered. A health care provider should be immune from a claim for civil liability during a state of public health emergency, provided that the provider does not act grossly negligent or does not engage in willful misconduct.

2. *Whether the Recent Executive Order By Governor Andrew Cuomo Provides Greater Immunity for Health Care Providers in New York.*

The question has been asked whether Governor Andrew Cuomo’s recent executive order provides greater immunity for health care providers in New York. On March 23, 2020, Governor Andrew Cuomo issued Executive Order No. 202-10, setting forth temporary suspension and modification of New York laws related to COVID-19 treatment. One specific portion of that executive order provides that

“all physicians, physician assistants, specialist assistants, nurse practitioners, licensed registered professional nurses and licensed practical nurses shall be immune from civil liability for any injury or death alleged to have been sustained directly as a result of an act or omission by such medical professional in the course of providing medical services in support of the State’s response to the COVID-19 outbreak, unless it is established that such injury or death was caused by the gross negligence of such medical professional.” (Emphasis supplied.)

This language is similar to that found in La. R.S. 29:771(B) and even includes a similar exception for grossly negligent conduct. The language in the New York executive order does not appear to give any greater immunity than is currently provided under Louisiana law. In some ways, the New York executive order is more limited. First, it applies only to actions against six categories of health care providers – physicians, physician assistants, specialist assistants, nurse practitioners, licensed registered professional nurses, and licensed practical nurses. Secondly, immunity is available only if the medical professional was “in the course of providing medical services in support of the State’s response to the COVID-19 outbreak”. Third, the immunity provision does not extend to actions for property damages.

Further, any changes to the current immunity statutes, either through an executive order or through a statute, in an attempt to apply expand immunities retroactively will likely be declared unconstitutional, just as done in post-Katrina and post-Rita cases. See, *Burmaster v. Plaquemines Parish Government*, (La. 5/21/2008), 982 So.2d 795, and *Johno v. Doe*, (La. 12/6/2016), 218 So.3d 1004.