Charity is a Virtue, But Increasingly Not (Increasingly) an Immunity to Liability

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I. Charitable Immunity Among the States

A. History of the Charitable Immunity Doctrine

The doctrine of charitable immunity is an exception to the general rule of tort law that puts liability on the person and organization of the agent responsible for tortious conduct. Instead, the doctrine allows charitable organizations to be protected from the negligent acts of its agents.[1]

1. Original Application of the Doctrine

The concept was originally adopted in England in 1846.[2] Shortly thereafter, in 1876, the US began to the apply the doctrine amongst the courts.[3]

Charitable Immunity was originally premised on the on the idea that charities only held money that was intended for distribution to others, so if a tort plaintiff was to be awarded damages, those funds intended for others would be ripped from their hands and it was jeopardize the organization (often called the trust fund theory).[4] The second premise to the application of the doctrine was that by a person accepting benefits conferred upon him by the charity, he was "waiving" his right to sue for any negligence that would cause him harm.[5] This concept is called the "implied waiver" theory.[6]

2. Shift in the Application of the Charitable Immunity Doctrine

Repudiation of the doctrine based on the concept that new theories were stronger than these initial ideals referenced above began as early as 1866 in England.[7] While the US held on to the

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[1] § 7:17.Respondeat superior—Charitable immunity, 1 Modern Tort Law: Liability and Litigation § 7:17 (2d ed.); § 19:21.History of charitable immunity in common law, 2 Religious Organizations and the Law § 19:21.
[2] Does the Charitable Immunity Doctrine Still Exist?, Don't Panic Foundation (2017).
[3] Id.
[4] Does the Charitable Immunity Doctrine Still Exist?, Don't Panic Foundation (2017); see also Bogert's The Law of Trusts and Trustees § 402 (June 2019 Update) ("However, the courts were urged to grant immunity from tort liability to charitable corporations and trustees for charity on a number of grounds and, until the latter half of the 20th Century, they acceded to these requests for either total or partial immunity in many cases").
[5] Michael Wilsman, *The Doctrine of Charitable Immunity—the Persistent Vigil of Outdated Law*, 4 University of Baltimore L. Rev. 125, 126 (1974).
[6] Id.
[7] Harris v. Young Women's Christian Ass'n of Terre Haute, 250 Ind. 491, 493, 237 N.E.2d 242, 243 (1968).

application of the doctrine through the majority of the states much longer than England did, in 1942, a District of Columbia court opinion sparked a change in mindset, spreading throughout the United States as early as 1950.[8]

The 1942 District of Columbia court case that sparked the US shift, entitled *Present and Directors of Georgetown College v. Hughes*, was written by Judge Rutledge.[9] The opinion rejected the implied waiver and trust fund theories that originally initiated application on the doctrine and instead focus on the inherent unfairness, stating that a charitable enterprise should have no more immunity than any other defendant.[10] In the *Hughes* case, a nurse at Georgetown Hospital was struck by a door that was pushed open by a student nurse, ultimately suffering injuries that permanently disabled her.[11] The ultimate question of the case was whether the hospital, who was a charitable nonprofit organization, could be liable for the negligent acts of its agent, the student nurse.[12] The question was also one that was even more concerning as one of its *own agents*, not a beneficiary of the hospital, was the individual who was permanently disabled as a result of the other agent.[13] While Judge Rutledge went through the pros and cons of acceptance or rejection of the charitable immunity doctrine, he ultimately concluded that the reasons supporting rejection of the doctrine overpowered any benefit to its application.[14] Judge

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[8] Bogert's The Law of Trusts and Trustees § 402 (June 2019 Update) (Internal Citations Omitted); see also Does the Charitable Immunity Doctrine Still Exist?, Don't Panic Foundation (2017) ("Religious and charitable organizations enjoyed immunity from tort liability in most courts in the United States until 1942 when District of Columbia abolished the law").

[9] § 6:43.Generally, 2 American Law of Torts § 6:43; *President & Directors of Georgetown Coll. v. Hughes*, 130 F.2d 810, 812–13 (D.C. Cir. 1942).

[10] Id.; Bogert's The Law of Trusts and Trustees § 402 (June 2019 Update) (Internal Citations Omitted); see also Does the Charitable Immunity Doctrine Still Exist?, Don't Panic Foundation (2017) ("In 1942, a scholarly and thorough consideration of the status of the authorities and the arguments pro and con was made by Judge Rutledge in a case coming before the Court of Appeals for the District of Columbia. He stated that, at that time, it appeared that five states had no decisions on the subject, eleven granted full immunity, four imposed full liability, seven held the charity liable to strangers and paying beneficiaries, thirteen gave relief to strangers but granted immunity as to all beneficiaries of the charity, and two imposed liability to the extent that the charity was protected by insurance").

[11] *President & Directors of Georgetown Coll. v. Hughes*, 130 F.2d 810, 812–13 (D.C. Cir. 1942).

[12] Id.

[13] Id.

[14] Id.

Rutledge's reasons for rejection of the doctrine were as follows: 1) allowing immunity would not have any deterrent effect for wrongdoing, 2) the doctrine is unfair to the other organizations that have good motives, 3) it is improper to grant immunity on the technicality of the legal form organized, 4) it is wrong for corporate liability to be substituted to those shareholders or agents beneath them, and 5) immunity improperly casts the burden on the victim.[15]

3. Present Theories on the Charitable Immunity Doctrine Throughout the States

Out of Judge Rutledge's points of reason for rejection of the charitable immunity doctrine, there are two theories which have been the focus of the shift in the doctrine. The first theory focuses on deterrence, and that immunity must be removed in order to deter wrongdoing. As a law review note nicely articulated:

> The public is doubtless interested in the maintenance of a great public charity . . .but it also has an interest in obliging every person and every corporation which undertakes the performance of a duty to perform it carefully, and to that extent, therefore, it has an interest against exempting any such person and any such corporation from liability from its negligences. The court cannot undertake to say that the former interest is so supreme that the latter must be sacrificed to it.[16]

The second policy that has created some momentum is that public policy favors compensation of the victim. Victims need to be compensated by those responsible for the harm, regardless of whom that responsible organization may be.[17]

Together, these policies have been favored so much so that by the end of the 20th century, three quarters of the states abolished or limited the doctrine of charitable immunity.[18] So where does that leave us today?

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[15] Id.
[16] David Wingfield, *The Shirt Life and Long After Life of Charitable Immunity in the Common Law*, 82 LA REVUE DU BARREAU CANADIEN 315, 338 (2008).
[17] See Bishop Thomas J. Paprocki, *As the Pendulum Swings from Charitable Immunity to Bankruptcy*, 48 Journal of Catholic Studies 1 (2009).
[18] Bogert's The Law of Trusts and Trustees § 402 (June 2019 Update).

B. Variances in the Limited Circumstances for Use of Charitable Doctrine Throughout the States

In its current state, no state recognizes full immunity for charities without providing some limit on the immunity. In the states where some form of immunity is allowed, then under general terms, an entity qualifies for charity immunity for acts of negligent when it "(1) was formed for nonprofit purposes; (2) is organized exclusively for religious, charitable or educational purposes; and (3) was promoting such objectives and purposes at the time of the injury to the plaintiff who was then a beneficiary of the charitable works."[19] However, this varies significantly depending on the state. Further, some states place limits on the application of immunity while others place statutory caps on the amount of damages can be awarded against a charitable corporation.

1. Some States Allow Immunity in Limited Ways

Presently, there are nine states that have the common law doctrine of immunity to some degree: Alabama, Arkansas, Georgia, Maine, Maryland, New Jersey, Utah, Virginia and Wyoming. The states with the least restrictive forms of charitable immunity are Arkansas, New Jersey and Virginia.[20]

In *Alabama*, nonprofits are immune, but only with respect to claims from beneficiaries.[21] Thus, if the *Hughes* case would've occurred under Alabama's current law, the injured nurse would have been able to hold the hospital responsible, as she was not a beneficiary but an employee of the organization.

In the case of *Masterson v. Stambuck*, the Arkansas Supreme court adopted eight factors to determine whether a charitable organization is an entity that can receive immunity.[22] These factors are:

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[19] 15 Am. Jur. 2d Charities § 181 (citing Bieker v. Community House of Moorestown, 169 N.J. 167, 777 A.2d 37 (2001)).
[20] Volunteer and Charitable Immunity Statutes, http://www.ctconservation.org/sites/default/files/A.11%20Volunteer%20and%20Charitable%20Immunity%20Statutes.pdf.
[21] Id.; see also § 19:24.State approaches to charitable immunity, 2 Religious Organizations and the Law § 19:24
[22] Jordan Broyles, *A Case to Note Regarding Charitable Immunity*, Arkansas Association of defense Counsel (2016); see also § 19:24 State approaches to charitable immunity, 2 Religious Organizations and the Law § 19:24.

1) Whether the organization's charter limits it to charitable or eleemosynary purposes; 2) Whether the organization's charter contains a "not-for-profit" limitation; 3) Whether the organization's goal is to break even; 4) Whether the organization earned a profit; 5) Whether any of the profit or surplus must be used for charitable or eleemosynary purpose; 6) Whether the organization depends on contributions and donations for its existence; 7) Whether the organization provides its services free of charge to those unable to pay; and 8) Whether the directors and officers receive compensation.[23] Significantly, these factors are not dispositive or exhaustive, but are intended to be illustrative.[24] Thus, if the court finds that a charitable organization fits this test, then this states has one of the least restrictive charitable immunity doctrines still standing.

The state of Georgia also allows for a wide range of immunity, unless the nonprofits fails to exercise ordinary care in selection of retention of compenetrate officer and employees.[25] It also does not allow for the application of the doctrine where the Plaintiff is a paying recipient of services from the nonprofit.[26]

In Maine, there is a limited form of immunity for those organization that derives its funds mainly from public and private charities.[27] This form of immunity can be traced back to the trust from theory for implementation of the doctrine back in the 1800s.

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[23] Id.
[24] Id. (citing *George*, 337 Ark. at 212, 987 S.W. at 713 (1999)).
[25] Volunteer and Charitable Immunity Statutes, http://www.ctconservation.org/sites/default/files/A.11%20Volunteer%20and%20Charitable%20Immunity%20Statutes.pdf.; see also 13 Ga. Jur. § 8:1 ("A charitable, nonprofit corporation, such as a church, which has no assets other than charitable assets and no liability insurance, may claim charitable immunity from civil suits in tort.[2] Also, an incorporated hospital primarily maintained as a charitable institution,[3] or charitable trust funds,[4] or, as a general rule, any private corporation, primarily maintained as an eleemosynary or charitable institution,[5] is not liable for the negligence of its officers and employees unless it fails to exercise ordinary care in selecting competent officers and employees or in retaining them").
[26] Id.
[27] Volunteer and Charitable Immunity Statutes, http://www.ctconservation.org/sites/default/files/A.11%20Volunteer%20and%20Charitable%20Immunity%20Statutes.pdf; see also § 19:24.State approaches to charitable immunity, 2 Religious Organizations and the Law § 19:24.

Maryland has a unique form of very limited liability where it allows immunity if an organization's assets are held in a trust and the nonprofit has no liability insurance.[28] While this form of immunity also relies on the original trust fund theory, it is interesting in that it discourages an organization from investing in liability insurance.

In New Jersey, nonprofits are immune from negligent acts that cause injury to a beneficiary.[29]

In Utah, "there is a statute that limits the liability of a tax-exempt nonprofit, under certain circumstances, for acts or omissions of a volunteer: A nonprofit organization is not liable for damage or injury that was caused by an intentional or knowing act of the volunteer which constituted illegal, willful or wanton misconduct, unless the nonprofit should have had reasonable notice of the volunteer's fitness to provide services under circumstances that make the organization's use of the volunteer reckless or wanton. A nonprofit organization is also not liable where under the law a business employer would not be liable for an employee."[30]

Similar to other states, Virginia allows immunity to nonprofits for suits by beneficiaries alleging negligence, absent a finding of corporate negligence.[31] However, there is the additional limitation that charities are not immune from the negligence of their agent if they failed to exercise ordinary care in selection or retention of employees.[32]

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[28] Volunteer and Charitable Immunity Statutes, http://www.ctconservation.org/sites/default/files/A.11%20Volunteer%20and%20Charitable%20Immunity%20Statutes.pdf; see also § 19:24.State approaches to charitable immunity, 2 Religious Organizations and the Law § 19:24.

[29] Volunteer and Charitable Immunity Statutes, http://www.ctconservation.org/sites/default/files/A.11%20Volunteer%20and%20Charitable%20Immunity%20Statutes.pdf; see also § 19:24.State approaches to charitable immunity, 2 Religious Organizations and the Law § 19:24; N.J. State. Ann. § 2A:53A-7.

[30] Volunteer and Charitable Immunity Statutes, http://www.ctconservation.org/sites/default/files/A.11%20Volunteer%20and%20Charitable%20Immunity%20Statutes.pdf; see also § 19:24.State approaches to charitable immunity, 2 Religious Organizations and the Law § 19:24; Utah Code Ann. § 78-19-3, Organization liability.

[31] Volunteer and Charitable Immunity Statutes, http://www.ctconservation.org/sites/default/files/A.11%20Volunteer%20and%20Charitable%20Immunity%20Statutes.pdf; § 3:56.Defenses to negligence—Immunities—Charitable immunity, Va. Prac. Tort and Personal Injury Law § 3:56 9 ("Churches have been granted charitable immunity from tort liability in Virginia against members of the congregation and other 'beneficiaries of the church's bounty'").

[32] Id.

Finally, in Wyoming, the charitable immunity defense is available to nonprofits who provide service without charge.[33]

2. Some States Place Statutory Caps on the Damages that be can be awarded when suing a Charity.

The following states limit the liability of nonprofits by capping the amount that may be awarded as damages. These provisions are sometimes described as a form of charitable immunity.

In Colorado, lawsuits against nonprofits are not prohibited, but judgments are limited to the extent of existing insurance coverage.[34]

Massachusetts has one of the most favorable rules for a nonprofit organization in the event of a large torts. There is a tort cap of $20,000 that applies to nonprofits for torts committed in the course of any activity carried on to accomplish directly the charitable purposes of the organization.[35]

In South Carolina, a statutory cap of $200,000 applies to charitable organizations.[36]

Finally, in Texas, "[o]rganizational liability by certain nonhospital charitable organizations is limited to a maximum of $500,000 for each person and $1,000,000 for each single occurrence of bodily injury or death and $100,000 for each single occurrence for injury to or destruction of property."[37]

3. Other Variances of Immunity

While limits to the charitable immunity doctrine or statutory caps are the ways that most states approached the issue in deciding that they wanted some form of the doctrine kept it alive, there are a

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[33]http://www.ctconservation.org/sites/default/files/A.11%20Volunteer%20and%20Charitable%20Immunity%20Statutes.pdf; see also Lutheran Hosps. & Homes Soc. of Am. v. Yepsen, 469 P.2d 409 (Wyo. 1970); Wyo. Stat. § 1-1-125

[34] Colo. Rev. Stat. Ann. § 7-123-105; Volunteer and Charitable Immunity Statutes, http://www.ctconservation.org/sites/default/files/A.11%20Volunteer%20and%20Charitable%20Immunity%20Statutes.pdf.

[35] Volunteer and Charitable Immunity Statutes, http://www.ctconservation.org/sites/default/files/A.11%20Volunteer%20and%20Charitable%20Immunity%20Statutes.pdf; Mass. Gen. Laws Ann. ch. 231, § 85K.

[36] 18 S.C. Jur. Hospitals § 24.

[37] Texas Charitable Immunity and Liability Act, Chapter 84, Texas Civil Practice and Remedies Code; Volunteer and Charitable Immunity Statutes, http://www.ctconservation.org/sites/default/files/A.11%20Volunteer%20and%20Charitable%20Immunity%20Statutes.pdf.

variety of other laws that concern the doctrine. For example, under Tennessee law, charity owned property is protected from recovery by a tort claimant, so long is that property is used "solely for charitable purposes.[38]

On another note, other states have good Samaritan laws, which limit the liability of a person providing emergency medical aid or assistance.[39] Further, there are a few odd immunities like in Massachusetts, where the state provides immunity for charitable sport and sailing programs.[40]

4. Immunity for Volunteers of Charitable Organizations

While immunity for charitable organizations varies significantly depending on the states, since 1997, the federal Volunteer Protection Act has offered to protection to the *volunteers* of charitable organizations.[41] The statute preempts any conflicting state law, but there are four requirements that need to be met in order to enable its application: 1) the volunteer is acting within the scope of his or her responsibilities, 2) the volunteer is properly licensed, certified or authorized by the state to practice, 3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct or conscious indifference to the rights/safety of the person injured, and 4) the harm was not caused while the volunteer was operating a motor vehicle or other vehicle for which a license or insurance is required.[42] Importantly, this protection only applies to volunteers. This could include directors, officers, etc., but the stipulation is that volunteer must not receive compensation in excess of $500.[43] Further, there are only two types of organizations that qualify, which are organizations defined under

[38] Immunity of Not? Charitable Tort Liability Limits in Modern Times, Wagenmaker & Oberly, LLC (December 15, 2017); see also CITE: § 5:16.Assignment of fault—To those protected by charitable immunity, 17 Tenn. Prac. Tennessee Law of Comparative Fault § 5:16 (2018 ed.) ("any judgment entered against a charitable institution cannot be collected from the property of a charitable trust").
[39] Volunteer and Charitable Immunity Statutes, http://www.ctconservation.org/sites/default/files/A.11%20Volunteer%20and%20Charitable%20Immunity%20Statutes.pdf.
[40] Immunity of Not? Charitable Tort Liability Limits in Modern Times, Wagenmaker & Oberly, LLC (December 15, 2017).
[41] Liability Exposure for Volunteers, Daniel Meier, Benesch Friedlander Coplan & Aronoff LLP (February 2015).
[42] Id.; 42 U.S.C. § 14503.
[43] Id.

the Internal Revenue Code 501(a) and any nonprofit organized for public benefit primarily for charitable, civic, educational, religious, welfare or health purposes.[44] The organizations must also not practice any action that constitutes a hate crime.[45] Notably, the Volunteer Protection Act does apply as a limitation of liability in crimes of violence, international terrorism, acts that constitute hate crimes, civil rights violations, or if the volunteer was under the influence of alcohol or any drug at the time of the misconduct.[46]

While this act serves as the bottom line for protection of volunteer, the states can choose to enact more inclusive laws that covers volunteers or others beyond this base line.

5. Immunity with Regard to Indiana, Ohio, and Kentucky

While many states have different forms of a limited charitable immunity, it is important to note that many Midwest states like Indiana, Ohio, and Kentucky have completely abolished the application of the charitable immunity doctrine.

In Indiana, the court took it upon itself to abolish the doctrine in 1968.[47] In abolishing the doctrine, the court ultimately determined that since it was a court-made rule to begin with, the court could abolish it without waiting for legislative intervention.[48] This decision was made in the case of *Harris v. Young Women's Christian Association of Terre Haute*.[49] In that case, a member of Terre Haute Bible tripped and fell Young Women's Christian Association of Terre's reception hall, rented out by her Bible Center. When it came to the question of whether the charitable association could be held liable for damages resulting from the fall, the court ultimately abolished the doctrine on the reasoning that: 1) it is unfair to hold the negligent employee liable and not the corporation, as the corporation is

[44] Id.
[45] Id.
[46] Id.
[47] 5 Ind. Law Encyc. Charities § 15 (citing Harris v. Young Women's Christian Ass'n of Terre Haute, 250 Ind. 491, 237 N.E.2d 242 (1968)).
[48] Id.
[49] Harris v. Young Women's Christian Ass'n of Terre Haute, 250 Ind. 491, 237 N.E.2d 242 (1968).

more likely to withstand a judgment against it, 2) the court did not find stare decision important in this case, and 3) the court did not find the argument that the legislature should remove the doctrine as important, as it was a judicially created rule in the first place.[50]

In Ohio, the Ohio Supreme court similarly abolished the doctrine of charitable immunity in the case of *Albritton v. Neighborhood Centers Ass'n for Child Development*.[51] In that case, a child was injured while participating in a daycare program run by the nonprofit organization. Under those facts, the court abolished the doctrine, finding that a charitable organization is subject to liability in tort to the same extent as individuals and corporations.[52] However, since that holding, Ohio has recognized and amplified the protection for charitable volunteers that surpasses the Federal Volunteer protection act.[53]

Finally, Kentucky similarly completed abolished the charitable immunity doctrine as early as 1961.[54]

II. Charitable Immunity with regard to Current National Issues

A. The Effects of Immunity on the LGBTQ Community

1. Bostock v. Clayton County

In the case of *Bostock v. Clayton County*, the Supreme Court just ruled that the LGBTQ are now a class that is protected from discrimination in the federal level.[55] While this is an important decision for the Supreme Court and could appear to impact discrimination lawsuits with regard to religious

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[50] Id. at 244.
[51] § 69:86.Charities, Baldwin's Oh. Prac. Tort L. § 69:86 (2d ed.); 39 Ohio Jur. 3d Employment Relations § 382 Liability of charitable and religious organizations.
[52] Id.
[53] § 9:40.Charitable immunity, Baldwin's Oh. Prac. Tort L. § 9:40 (2d ed.) ("A form of charitable immunity is recognized under Ohio law in Revised Code § 2305.38. This statute absolves charitable volunteers, in supervisory and nonsupervisory capacities, from tort liability for injury, death, or loss to person or property, unless the actions of the volunteer were, in general, done with knowledge or intent or exemplified willful and wanton misconduct. A charitable organization, however, 'is subject to liability in tort to the same extent as individuals and corporations'").
[54] § 15:15.Charitable immunity, Ky. L. of Damages § 15:15; see also § 10:47.Defenses—Charitable Immunity, 13 Ky. Prac. Tort Law § 10:47 (2019 ed.).
[55] Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731 (2020).

immunities, it is important to also look at the 2012 and 2020 cases that were also before the Supreme Court.

2. Religious Institution Exception

First, in the case of *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC,* the Supreme Court ruled that religious organizations enjoy "ministerial exception" rooted in First Amendment that shields them from antidiscrimination lawsuits by ordained employees who are terminated, even if on the basis of protected class under Title VII.[56] Then, in the 2020 case of *Our Lady of Guadalupe School v. Morrisey-Berru*, the Supreme Court expanded the ministerial exception recognized in *Hosanna-Tabor* and held that there is no rigid formula for application of ministerial exception to employees of religious institution.[57] Rather, what is important in applying ministerial exception is what the employee does. When an employee is tasked with furthering the religious mission of the institution, the ministerial exception applies regardless of employee's title, training, etc.[58]

These holdings, taken together, seem to articulate that even with the LGBTQ community being a protected class, there is this special "ministerial exception" that forms its own immunity as to protect it from lawsuit of that type. Time will only tell if this specified type of immunity continues.

B. COVID-19 and Immunity

As everyone is fully aware, the coronavirus has changed the present standing of the world today, but it has also created various types of immunity that also effect charitable organizations.

[56] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012).
[57] Our Lady of Guadalupe Sch. v. Morrissey-Berru; 140 S. Ct. 2049 (2020).
[58] Id.

1. States Granting Health Care Providers and Facilities Immunity

At this time, there are thirty-three states that offer some level of immunity to healthcare providers during the pandemic.[59] It may come to one's surprise many of these protections were in place before COVID-19 in the event of a state health emergency.[60] Since the COVID-19 pandemic, however, twenty-three states have taken specific action, through either legislation or executive orders, to provide immunity to health care providers during the pandemic.[61]

While the specific conditions of this specialized immunity vary from state to state, Illinois, for example, has issued the following order, as summarized below:

> Executive Order 2020-19, authorized by the Illinois Emergency Management Agency Act, covers "health care facilities" that are licensed, certified, or state agency-approved hospitals, state-operated developmental centers, licensed community-integrated facilities, or mental health centers, among others. The Executive Order includes in the definition of "health care facilities" any government-operated site providing health care services established for the purpose of responding to the COVID-19 outbreak, so that new emergency hospitals are expected to be covered as well. It also extends immunity to health care providers and health care volunteers, covering licensed or certified health care or emergency medical services workers, as well as volunteers or medical or nursing students. The Executive Order provides that all health care facilities and health care professionals will be immune from civil liability for any injury or death allegedly caused "in the course of rendering assistance to the State by providing health

[59] COVID-19 Health Care Provider Immunity Update, Baker Ober Health Law (May 16, 2020), https://www.jdsupra.com/legalnews/covid-19-health-care-provider-immunity-19417/ ("The 33 states that currently offer some level of immunity with respect to care provided during the pandemic are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, and Wisconsin").

[60] Id. ("The ten states with existing legislation that offers some form of protection from liability during general public health emergencies are California, Colorado, Delaware, Idaho, Indiana, Louisiana, Maryland, Montana, New Hampshire, and Ohio. . . Other states, including Maine, Minnesota, Oregon, South Carolina, Tennessee, and Wyoming, also have existing legislation that shields providers from liability during states of emergency; however, for these states, the legislation is not self-effectuating, as they require additional state action before the protections apply").

[61] Id. ("The 23 states that have taken specific action to provide immunity protections to health care providers and facilities as a result of the COVID-19 pandemic are Alabama, Arizona, Arkansas, Connecticut, Georgia, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Mississippi, Nevada, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, and Wisconsin . . . Two additional two states, Alaska and Hawaii, and the District of Columbia have issued executive orders or enacted legislation to shield providers from liability; however, these actions are not self-effectuating, as they require additional action before the protections apply. Because these provisions require an additional step to be taken before immunities apply, they are not counted in the total number of states noted herein that have taken recent specific action to provide liability protections. As of the date of this publication, it does not appear that any actions have been taken in Alaska, the District of Columbia, or Hawaii that would trigger the implementation of liability protections").

> care services in response to the COVID-19 outbreak," specifying that this liability does not apply to injuries caused by gross negligence or willful misconduct. It also establishes a slightly more relaxed standard for volunteers, providing health care volunteers immunity from civil liability for any injury or death allegedly "caused while rendering assistance to the State by providing services, assistance, or support in response to the COVID-19 outbreak" unless the injury or death was caused by willful misconduct.[62]

Notably, of these specialized orders, sixteen of the states specifically mention "good faith" as a requirement for immunity to apply.[63] Thus, it is presumed that many lawsuits will arise out of these unclear orders.

2. Immunity for Long Term Care Providers

Similar to immunity for health care providers, there are also approximately twenty-four states that have developed some form of immunity for long term care providers, like nursing homes, with regard to COVID-19.[64] These immunity protections are typically done through executive orders. For example, Michigan's order is summarized as follows:

> As discussed previously, Executive Order 2020-30 grants nursing homes and homes for the aged that provide medical services in support of the state's COVID-19 response immunity from liability for "an injury sustained by a person by reason of those services regardless of how or under what circumstances or by what cause those injuries are sustained . . . " This immunity does not extend to acts that constitute willful or gross negligence.[65]

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[62] Sandra Edwards, John Drosic, and Sarah Krajewski, States Providing Liability Immunity to Health Care Providers in the Face Of COVID-19, Winston & Strawn, LLP, (June 15, 2020), https://www.winston.com/en/product-liability-and-mass-torts-digest/states-providing-liability-immunity-to-health-care-providers-in-the-face-of-covid-19.html.

[63] COVID-19 Health Care Provider Immunity Update, Baker Ober Health Law (May 16, 2020), https://www.jdsupra.com/legalnews/covid-19-health-care-provider-immunity-19417/ ("The 16 states that specifically mention "good faith" as a requirement for the immunity shield to apply are Arizona, Connecticut, Hawaii, Idaho, Iowa, Kentucky, Maryland, Massachusetts, Missouri, Montana, New Jersey, New York, North Carolina, Utah, Wisconsin, and Wyoming").

[64] COVID-19 Health Care Provider Immunity Update, Baker Ober Health Law (May 16, 2020), https://www.jdsupra.com/legalnews/covid-19-health-care-provider-immunity-19417/ ("As of this date, the 24 states providing some form of immunity to long term care providers and/or facilities are Alabama, Arizona, Connecticut, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Nevada, New Jersey, New York, North Carolina, Oklahoma, Rhode Island, Utah, Vermont, Virginia and Wisconsin"); see also COVID-19: States Protect Long-Term Care Facilities from Liability, The National Law Review, (May 1, 2020), https://www.natlawreview.com/article/covid-19-states-protect-long-term-care-facilities-liability.

[65] COVID-19: States Protect Long-Term Care Facilities from Liability, The National Law Review, (May 1, 2020), https://www.natlawreview.com/article/covid-19-states-protect-long-term-care-facilities-liability.

3. Federal Acts Relative to COVID-19 Immunity

In the midst of the pandemic, the Federal government has also stepped in an implemented the federal CARES act.[66] Much like the Volunteer Protection Act described above for volunteers of charitable organizations, this act provides immunity to volunteer healthcare professionals who provide care during the COVID-19 pandemic.[67] To qualify for this immunity, the healthcare professional must be providing care within the scope of their practice and not receive compensation for the care provided, which must relate to COVID-19.[68]

4. Business Immunity Starting to Emerge Amidst the Pandemic

Beyond the healthcare realm, a few states have now gone so far as to enact business immunity for lawsuits relating to COVID-19.[69] As of right now, these protections cover "essential business" like grocery store, take-out food, and utilities, but they can also expand further depending on the state.[70] While each states bill is vastly different, Wyoming, as an example of a very broad immunity, protects any person or business entity who acts in good faith in responding to the COVID-19 health emergency and follows the instructions of state, city, town, or county health officials is immune from any liability arising from complying with those instructions.[71]

5. COVID-19 Immunity with Regard to Indiana, Ohio, and Kentucky

With regard to the types of immunities described above, below is the most recent state of immunity for Indiana, Ohio, and Kentucky.

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[66] CITE: Guidance Concerning Liability for Healthcare Providers and Facilities, Indiana State Department of Health (April 3, 2020), https://www.coronavirus.in.gov/files/Liability%20Guidance%204.3.20.pdf.
[67] Id.
[68] Id.
[69] Caroly Casey, J.D., 5 States Grant Business Immunity from Liability for COVID-19 Claims, Expert Institute, (June 30, 2020), https://www.expertinstitute.com/resources/insights/5-states-grant-businesses-immunity-from-liability-for-covid-19-claims/.
[70] Id. ("These states include: Louisiana, North Carolina, Oklahoma, Utah, and Wyoming. Notably, Arizona is considering a similar bill and Kansas has vetoed a bill").
[71] Wyo. Stat. Ann. § 35-4-114.

Indiana has immunity in placed due to existing legislation for emergency disasters.[72] When this type of emergency disaster exists, as it does in the COVID-19 pandemic, "[f]acilities and individuals providing healthcare services in response to a declared disaster emergency, such as the one declared because of COVID-19, may not be held civilly liable for care provided in response to that emergency event unless the care resulted from gross negligence or willful misconduct."[73] Notably, under this context, "'[h]ealthcare services' is defined broadly for the purpose of this immunity and includes references to services provided by licensed providers, care related to hospitalization, and 'any other services or goods furnished for the purpose of preventing, alleviating, curing, or healing human illness, physical disability, or injury.'"[74]

While Ohio has some form of existing legislation relating to emergency situations,[75] there are also two pending before the legislative branches meant to limit potential liability:

> Substitute Senate Bill 308 (SB308) grants a qualified civil immunity for health care providers and certain defined "service providers", which would include most for profit and not-for-profit businesses, in the context of disasters, provides health care providers with immunity from professional disciplinary action, and makes these immunity provisions retroactive to the date a disaster is declared. SB308 was passed by the Senate and is pending in the House.
> …
> Amended Substitute House Bill 606 (HB606) makes temporary changes related to qualified civil immunity for health care and emergency services provided during a government-declared disaster or emergency and for exposure to or transmission or contraction of certain coronaviruses. HB606 also creates a rebuttable presumption that certain defined employees who contracted COVID-19 did so in the course of and arising out of their employment, thereby transferring the burden of proof to employers to disprove the workers' compensation entitlement. The coverage is retroactive to

[72] Guidance Concerning Liability for Healthcare Providers and Facilities, Indiana State Department of Health (April 3, 2020), https://www.coronavirus.in.gov/files/Liability%20Guidance%204.3.20.pdf.

[73] Id.
[74] Id.
[75] COVID-19 Health Care Provider Immunity Update, Baker Ober Health Law (May 16, 2020), https://www.jdsupra.com/legalnews/covid-19-health-care-provider-immunity-19417/.

> March 9 and continues through December 31, 2020. HB606 was passed by the House and is pending in the Senate Judiciary Committee.[76]

Interestingly, Kentucky has enacted a bill presumedly enacted to limit liability to healthcare providers in these hectic times; however, the bill does not seem to provide much limitation on liability at all:

> In Kentucky on March 30, 2020, Governor Beshear signed Senate Bill 150 into law to allow for quick response by the healthcare providers by protecting them from liability related to health care decisions for COVID-19 patients. During the State of Emergency, SB150 offers healthcare providers the following civil defense:
> 5(b) A health care provider who in good faith renders care or treatment of a COVID-19 patient during the state of emergency shall have a defense to civil liability for ordinary negligence for any personal injury resulting from said care or treatment, or from any act or failure to act in providing or arranging further medical treatment, **if the health care provider acts as an ordinary, reasonable, and prudent health care provider would have acted under the same or similar circumstances.** The aforesaid defense under this paragraph shall include a health care provider who:
> 1. Prescribes or dispenses medicines for off-label use to attempt to combat the COVID-19 virus in accordance with the federal Right to Try Act, United States Public 26 Law 115-176, and KRS 217.5401 to 217.5408; 27
> 2. Provides health care services, upon the request of health care facilities or public health entities, that are outside of the provider's professional scope of practice; or
> 3. Utilizes equipment or supplies outside of the product's normal use for medical practice and the provision of health care services.
> Kentucky SB150 does not define "health care provider" but is expected to cover individuals employed in nursing homes. Further, it appears the liability only extends to the care provided to COVID-19 patients.[77]

States are all over the spectrum when it comes to immunity. Some of the limitation may be helpful to healthcare providers and their insurers, but it will not come without some lengthy lawsuits along the way.

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[76] Pending Ohio Legislation Provides Immunity from COVID-19 Claims and Presumptions of Employee Injury from COVID-19, Vorys Sater Seymour and Pease LLP, (June 8, 2020), https://www.lexology.com/library/detail.aspx?g=d9d2b01c-a039-49fa-8500-99a230078137.

[77] Maria Granaudo Gesty, Esquire, States Respond to COVID-19 to Protect Healthcare Workers, https://burnswhite.com/states-respond-to-covid-19-to-protect-healthcare-workers/.

III. How Conflicts of Law Questions Can be Beneficial in the Varying Laws of the States with regard to Immunity

Conflicts of law is the process of choosing what state's law apply, regardless of the forum that the lawsuit is brought in. Thus, when it comes to nonprofits and their insurers and how charitable immunity can effect a lawsuit, careful attention in this area can completely change the direction of the lawsuit in a way that favors these organizations.[78]

A. State Approaches to Conflicts Questions

Dealing with the question of what state law should be applied is a very complicated and fact-intensive issue, and these questions have many different approaches to how they are handled. To elaborate, there could be a question of charitable immunity where there is an argument to be made that state A's law should apply, but there is also an argument to be made that state B's law should apply. Depending on the forum where the lawsuit was brought, State A could have one approach to resolving this issue, while State B would have a different approach.[79] Each of these approaches could different in the ultimate result of whether State A's or State B's law applies. When it comes to a specific lawsuit, each lawsuit will have a different strategy in handling these issues, but it is important to note how different states could look at those issues to see if another state's law should be applicable, which could ultimately bring with it a form of immunity.

1. Place Where Tort Occurred

The most traditional approach to these conflicts of law questions is called the *lex loci delicti* rule.[80] Under this rule, the state law that governs is the law of the place of the injury, or the place where the tort occurred.[81] In the context of charitable immunity, this approach has been found to apply and

[78] Immunity of Not? Charitable Tort Liability Limits in Modern Times, Wagenmaker & Oberly, LLC (December 15, 2017).
[79] 7 Personal Injury--Actions, Defenses, Damages § 26.07 (2020).
[80] Id.
[81] Id.

not a violation of public policy.[82] The basis for this is that charitable institution must follow the law of the state where the tort occurred as to avoid invoking a different state's law to immunize itself from liability.[83] This approach leaves no space for other arguments, but it has been abandoned by most jurisdictions.[84]

2. "Significant Contacts" Approach

The second approach is termed the "significant contacts" approach. This approach looks at the contacts (i.e. domicile of the Plaintiff, domicile of the Defendant, place of contract, place of injury, or another other arguable contact) of the various jurisdictions and makes a determination of what state has the most significant contacts.[85] This "interest weighing" approach has been applied to several tort conflict cases with respect to the charitable immunity defense.[86]

3. Restatement (Second) of Conflict of Laws

The final common approach appears in the Second Restatement Conflicts of Law section and has been adopted by many states.[87] This approach is similar to the "significant contacts" approach, but it lists out four specific contacts to be considering in determining the applicable law: a) the place where the injury occurred, b) the place where the conduct causing the injury occurred, c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and d) the place where the relationship, if any, between the parties is centered.[88] The Second Restatement then advises that:

> [C]onduct and injury occurred will not by reason of these contacts alone be the state that is primarily concerned with the issue of charitable immunity . . . The local law of this state will, however, be applied unless some other state has a greater interest in the determination of the particular issue. If the plaintiff is domiciled in the state where the defendant corporation has its principal place of business, it would seem that, usually

[82] Id.
[83] Id.
[84] Id.
[85] 7 Personal Injury--Actions, Defenses, Damages § 26.07 (2020).
[86] Id.
[87] Id.
[88] Id.

> at least, this state would have the greatest interest in the issue of charitable immunity and that its local law should be applied.[89]

Each state has adopted one of these approaches, or a variation of in, it is determining whether to apply its own law or that of another states. This adoption of the approach alone can have a significant impact on the outcome of the case, especially with regard to the very different laws regarding charitable immunity.

B. Impact on General Immunity

As stated above, conflicts of law questions can have a major impact on the outcome of the case, as it can be the sole determining factor as to whether charitable immunity applies or not. Thus, it is important to have a generalized understanding of the states that have some form of the charitable immunity doctrine still in existence and understand if a lawsuit has any contacts with those states. For example, if there is a slip and fall case where a church member fell and suffered a potential for $100,000 in medical expenses, where the lawsuit was brought in Ohio but the member was from Massachusetts and slipped at a remote campus of the church that is actually in Ohio, it would be important to see if Massachusetts law would apply, especially in light of knowing that Massachusetts has a $20,000 cap on damages against charitable organizations.

C. Impact of COVID Immunity

It is clear that states are going in many different directions when it comes to limited liability for healthcare providers, long term care facilities, and others in the midst of the COVID-19 pandemic, but it important to acknowledge how these different state laws will significantly impact many new conflicts of laws questions arising out of COVID-19 related lawsuits. This is especially going to be a question in each lawsuit due to the unclear transfer of COVID-19 to other individuals and the spread from state to state. For example, one must be prepared and ready to consider conflicts of law where

[89] Id.

an individual travels across state lines to receive care relating to COVID-19, and one state has a immunity executive order in place and the other does not.

IV. Conclusion

Immunity laws around the country are not consistent, and especially in today's world dealing with the COVID-19 pandemic, various forms of immunity are changing every day. It is important to understand the basic concepts in this area because it could highly impact lawsuits that an insurer deals with on a daily basis.