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Healthcare Alert

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SCOTUS rejects nursing home PREP Act immunity case

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The interpretation, application, and scope of the immunity provided by the PREP Act in COVID-19 cases will continue to vary by state.



What's the Impact?

- / Federal courts have declined to exercise jurisdiction over non-“willful misconduct” state law claims, alleging injuries directly related to pandemic countermeasures, but disagree as to whether “willful misconduct” claims are completely preempted
- / For defendants relying on PREP Act immunity protections, federal court decisions leave room for varying interpretations of the application and scope of the immunity among state courts

The [Public Readiness and Emergency Preparedness \(PREP\) Act](#) is an important tool in the ongoing fight against pandemics and other public health emergencies. Its primary feature is to substantially limit liability for those on the front lines responding to public health crises, including nursing homes and other healthcare providers. Specified covered persons enjoy absolute immunity from suit and liability for covered injuries claimed to be directly related to the use of certain “countermeasures” employed to combat a declared public health emergency. The statute provides only one exception to immunity for a claim of willful misconduct, which must be

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brought before a three-judge panel in federal district court. All other claims must be brought through a federally administered victim's compensation fund.

The extent and reliability of the PREP Act's immunity protections have been called into question as federal courts throughout the country consider whether the PREP Act preempts certain or all state law claims, with varying results. On November 21, 2022, the U.S. Supreme Court denied certiorari of the Ninth Circuit Court of Appeals opinion issued in [Saldana v. Glenhaven Healthcare LLC](#), which found that there was no federal jurisdiction over state-law claims in which the defendant nursing home raised an immunity defense under the PREP Act. The denial of certiorari means that the interpretation, application, and scope of the immunity provided by the PREP Act will continue to vary by state.

Background

Ricardo Saldana was a resident of Glenhaven Healthcare nursing home until April 13, 2020, when he allegedly passed away from COVID-19. In May 2020, relatives of Mr. Saldana filed a civil action against Glenhaven Healthcare, LLC (Glenhaven) in California state court, alleging state-law causes of action, including elder abuse, willful misconduct, custodial negligence, and wrongful death.

Glenhaven removed the case to the United State District Court for the Central District of California in June 2020. The Saldanas filed a motion to remand the case. Glenhaven opposed remand by arguing, among other things, complete federal preemption on the basis of its asserted defense under the PREP Act. The U.S. District Court found that it did not have subject matter jurisdiction over the Saldanas' claims and remanded the case back to state court. Glenhaven appealed the U.S. District Court decision to the United States Court of Appeals for the Ninth Circuit.

In an opinion dated February 22, 2022, the Ninth Circuit affirmed the lower court ruling. Glenhaven filed a petition for certiorari to the United States Supreme Court, which was denied on November 21, 2022.

The Ninth Circuit's decision

On appeal, Glenhaven cited multiple grounds for removal, including the doctrine of complete preemption and the embedded federal question doctrine. The Ninth Circuit decision hinged on the finding that the PREP Act was not intended to fully preempt all state-law claims and, therefore, its application as a federal defense did not support a basis for removal.

"Passed by Congress in 2005, the PREP Act provides that 'a covered person shall be immune from suit and liability under Federal and State Law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure.'" There is one exception to this statutory immunity, the PREP Act provides "an exclusive Federal cause of action against a covered person for death or serious physical injury proximately caused by willful misconduct."

The application of the PREP Act has been tested frequently since March 2020, when in response to the COVID-19 pandemic, the Department of Health and Human Services (HHS) Secretary issued a declaration under the PREP Act “to provide liability immunity for activities related to medical countermeasures.”

In this case, the Saldanas’ claims were raised under California law, and the complaint did not appear to invoke a matter of federal law on its face. Even when no federal law question is apparent on the face of the complaint, the embedded federal question doctrine applies when the determination of a federal issue is integral to the resolution of a state law claim. In addressing Glenhaven’s embedded federal question argument, the court declined to find it applicable and noted that “Glenhaven seeks to raise a federal defense under the PREP Act, but a federal defense is not a sufficient basis to find embedded federal question jurisdiction.” Thus, jurisdiction could not be conferred simply because Glenhaven invoked a defense under the PREP Act.

Absent another basis for jurisdiction, the federal court may obtain jurisdiction over a claim under the complete preemption doctrine if the federal law completely preempts state law relief. The Ninth Circuit observed that complete preemption is rare and only confers exclusive federal jurisdiction “where Congress intended the scope of a federal law to be so broad as to replace *any* state-law claim.”

Notably, Glenhaven’s complete preemption argument hinged on declarations by the HHS Secretary and Office of General Counsel, concluding that the PREP Act is a complete preemption statute. Relying on [Dandino, Inc. v. U.S. Dep’t of Transp.](#), the Appeals Court declined to exercise *Chevron* deference as to HHS’s own opinions on federal court jurisdiction. Instead, it applied a two-part test found in [City of Oakland v. BP PLC](#) to support its conclusion that Congress did not intend for the PREP Act to fully displace non-willful misconduct claims arising from the public health emergency and provide substitute statutory causes of action for such claims.

Here, even though the PREP Act provides for an exclusive federal cause of action for willful misconduct, the court found that the “specifically defined” federal cause of action was too limited to find complete preemption. Moreover, the court concluded that the victim compensation fund for non-willful misconduct claims was also insufficient to show preemption because it was not formally “an exclusive federal cause of action.”

The court went on to consider Glenhaven’s important alternative argument that, at a minimum, the PREP Act completely preempted any claim for willful misconduct. This argument was crucial because, had federal-question jurisdiction been established for this claim, supplemental jurisdiction could have been asserted over the remaining claims. The court refused to find complete preemption even as to the willful-misconduct claim because determining preemption would require evaluating “[w]hether any of the conduct alleged in the complaint fits the statute’s definitions” of willful misconduct, and, thus, the PREP Act does not “entirely supplant[] state law causes of action” as to any claim.

Finding that no basis for federal jurisdiction applied to this matter, the Ninth Circuit affirmed the decision to remand the decision on the merits of the PREP Act defense to California state court, leaving that court to determine the application and scope of PREP Act immunity. As of the date of this alert, a decision on the merits in this matter has not been issued.

Other circuit decisions

The Ninth Circuit decision is consistent with other jurisdictions that have similarly held that the PREP Act does not completely preempt all state law claims. However, the Ninth Circuit's decision differs from the Third Circuit's on the question of preemption for a state-law claim of willful misconduct. This issue is of crucial importance to litigants because if one cause of action is preempted by the PREP Act, thus conveying jurisdiction on a federal court, that opens the door for supplemental jurisdiction over other state law claims.

The Third Circuit in [Maglioli v. Alliance HC holdings, LLC](#) considered similar facts as those at issue in *Saldana*. The estates of four individuals who resided at two New Jersey nursing homes and who passed away from COVID-19 brought negligence and wrongful death lawsuits against the nursing homes. The nursing homes removed the matter to federal court, but the district court dismissed the cases for lack of subject-matter jurisdiction and remanded them to state court. The Third Circuit affirmed the district court's order dismissing the cases for lack of jurisdiction. Unlike *Saldana*, the *Maglioli* court unequivocally held that the "PREP Act creates an exclusive cause of action for willful misconduct" and "easily satisfies the standard for complete preemption." However, as the negligence claims asserted by the plaintiffs did not allege willful misconduct, the Court held that the claims were not completely preempted and belonged in state court..

The Fifth Circuit and the Seventh Circuit have opined in dicta that the PREP Act completely preempts willful misconduct claims but does not preempt other claims. See [Mitchell v. Advanced HCS, L.L.C.](#) (following *Maglioli* and declining to find that claims were preempted where they involved only ordinary negligence); [Martin v. Petersen Health Operations, LLC](#) (declining to find claims were preempted when the allegations did not pertain to a covered countermeasure).

In sum, while courts have been consistent in finding a lack of complete preemption of all state law claims on the basis of the PREP Act, there is inconsistency regarding whether a claim for willful misconduct is preempted, which the Supreme Court has declined to resolve. Accordingly, going forward, there may continue to be inconsistent holdings among the Circuit Courts of Appeal on whether the PREP Act preempts a willful misconduct claim, and interpretation of the application and scope of the PREP Act's immunity protections may vary by state.

Looking ahead

Although the U.S. Supreme Court declined to resolve the conflict between the Ninth and Third Circuits on the question of preemption for claims of willful misconduct, no circuit has found that the PREP Act will completely preempt all state-law claims. Accordingly, for the time being, determinations regarding whether the PREP Act provides immunity for state-law claims and the scope of such coverage will be largely left to the state courts to resolve.

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