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Public Health Legal Preparedness
Briefing Memorandum # 3[1]

Governmental Liability for Non-recipient Harms[2]

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ISSUE: Are state/local governments liable for harms to non-recipients when they ration vaccines, drugs, or other medical goods during an emergency?

RESPONSE: Rationing health care services in an emergency will not subject the state to liability for harms to non-recipients, unless the rationing occurs in a discriminatory manner in violation of civil rights protections.

Imagine the following scenario. Smallpox has broken out in several major cities in the United States. Residents in affected areas clamor to reach designated vaccination sites. Even though cities have stockpiled smallpox vaccine in preparation of an outbreak, the vaccination sites only have enough vaccine to inoculate 75% of those who show up. While this public health intervention largely contains the spread of the disease, several hundred people are not able to receive the vaccine, and suffer various harms. Does the state government incur any liability by rationing health care during an emergency?

[1] On December 11, 2002, the CDC Public Health Law Program, the Association of State and Territorial Health Officials, and the National Association of County and City Health Officials sponsored a peer consultation workshop on selected legal and policy issues related to public health legal preparedness for bioterrorism. The *Center for Law and the Public's Health* hosted the workshop. This memorandum was prepared in response to an issue of shared interest to workshop participants.

[2] This Memorandum is intended as a guide for use by public health attorneys and practitioners attending the Workshop. It is not intended to be, and cannot be relied upon to offer, specific legal advice.

Sovereign Immunity

States are generally immune to individual lawsuits ("sovereign immunity"), based upon the Eleventh Amendment to the United States Constitution, state constitutional and statutory provisions, and common law.[3] The Eleventh Amendment applies only to cases in federal court, but many states have separately codified sovereign immunity in state courts as well. Sovereign immunity, however, is not absolute. A state does not have sovereign immunity from suits filed in another state's courts unless immunity is specifically granted by the forum state. More importantly, the state may waive, and often does waive, immunity and consent to suit in state or federal courts.[4]

Many states have passed statutory waivers of sovereign immunity that permit negligence claims against the government or government officials, with certain exceptions. Most such state acts are modeled after the Federal Tort Claims Act ("FTCA"), which renders the Federal government liable for certain tort claims but exempts tort claims based upon "discretionary" acts by government officials.[5]

In addition, Congress may abrogate a state's sovereign immunity under the Eleventh Amendment if it passes a statute pursuant to a constitutional provision that takes precedence over the Eleventh Amendment and the statute explicitly abrogates state immunity. Only Section 5 of the Fourteenth Amendment has been expressly identified as meeting this standard by the Supreme Court.[6] This provision allows for the enactment of legislation enforcing the due process and equal protection clauses of the Fourteenth Amendment. Therefore, where Congress explicitly permits individuals to receive money awards against states for engaging in employment discrimination in violation of the Fourteenth Amendment (as is permitted under the 1972 amendments to the Civil Rights Act of 1964), Eleventh Amendment sovereign immunity will not apply.[7] By contrast, the basic civil rights statute, 42 U.S.C. § 1983, has been held to not contain sufficiently explicit language to abrogate the Eleventh Amendment.[8]

In some states, officials have the same immunity as the state when the act occurs during the performance of state duties. Other states have qualified immunity for state officials—immunity may depend upon whether the official had a good faith justification or reasonable basis for the action.[9] Courts have upheld sovereign immunity based upon the discretionary exception for failures to provide adequate medical care, on the theory

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[3] PROSSER, WADE et al., CASES AND MATERIALS ON TORTS (9th ed.), 621-22 (1994).

[4] Immunity may be waived explicitly through a constitutional or statutory provision, or constructively through state participation in a federal transaction or program that subjects the state to federal court jurisdiction. *See* Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959).

[5] 28 U.S.C. § 2680 (a) (Discretionary acts are act "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.") *See also* Berkovitz v. United States, 486 U.S. 531 (1988).

[6] *See* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

[7] *See* 42 U.S.C. §§ 2000e(a), (f), 2000e-2(a), 2000e-5(a)-(g).

[8] *See* Quern v. Jordan, 440 U.S. 332 (1979); Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989).

[9] PROSSER, WADE et al., at 636.

that such failures were policy decisions made on the basis of allocating limited resources.[10]

State Duty to Provide Emergency Care

Courts have been reluctant to impose liability on the state for not affirmatively providing services, even when members of the public have relied on the availability of these services. The Supreme Court has held that "the Due Process Clauses generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[11]

States may be sued under tort law where the state has assumed a specific duty to the public or to a specific individual because of the existence of a special relationship. However, courts have upheld state sovereign immunity in several lawsuits involving negligence of state employees involved in emergency response to 911 calls.[12] Courts are likely to treat claims of inadequate access to medical care due to rationing during an emergency similarly to the claims under these 911 cases.

Potential Areas of Liability

State sovereign immunity protection does not apply to discriminatory actions by state officials. Discriminatory rationing practices, whether intentional or unintentional, resulting in significant disparities in available medical services to groups according to race, national origin, sex, age, or disability, may subject the state to liability.[13] Given the complexity and variability of state law and the novel nature of this question, it is difficult to generalize the extent to which specific discriminatory acts would subject a state to liability in a particular jurisdiction. Nevertheless, an overt discriminatory act by a state official would likely fall outside of the scope of the official's state duties, rendering the discretionary acts exception inapplicable, thereby eliminating an immunity claim. Moreover, a state could face liability for a discriminatory state rationing policy if the state has waived immunity for discrimination claims. Additional research is necessary to

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[10] *See*, *e.g*., C.R.S. by D.B.S. v. United States, 11 F.3d 791 (8th Cir. 1993); Fang v. United States, 140 F.3d 1238 (9th Cir. 1998); Fullmer v. United States, 34 F.Supp.2d 1325 (D. Utah 1997). *See generally* Elizabeth Williams, Claims Arising From Conduct of Governmental Employee in Administering or Failing to Administer Medical Care as Within Discretionary Function Exception of Federal Tort Claims Act, 172 A.L.R. Fed. 407 (2001).

[11] DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, 196 (1989).

[12] The plaintiffs in these cases argued that sovereign immunity should not apply since the actions of the employees were ministerial rather than discretionary, and that the state had created a special relationship by creating 911 response services. The court found that the state had no special relationship and that sovereign immunity applied. *See* Wanzer v. District of Columbia, 580 A.2d 127 (D.C. 1990); Hines v. District of Columbia, 580 A.2d 133 (D.C. 1990); Johnson v. District of Columbia, 580 A.2d 140 (D.C. 1990).

[13] For example, if locations in affluent areas received greater vaccine allocations immediately while locations in poorer, predominantly-minority areas did not, residents of the poorer area could claim that the vaccine was distributed in a discriminatory manner.

determine the specific application of discrimination law to state immunity in different states.

Conclusion

State governments and officials will not incur liability merely for failing to adequately prepare for an emergency situation. Resource allocations related to rationing of emergency supplies will likely fall under the discretionary exception of state torts claims acts. However, negligent actions by state employees could result in liability if the actions fall outside the scope of the discretionary exception. The extent of liability will vary from state to state according to specific state laws and the scope of the negligence. Rationing decisions that result in administering emergency care in a discriminatory manner may subject the state to liability.