



Emergency Response: Civil Liability of Volunteer Health Professionals

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Summary

The devastation inflicted on the Gulf region by Hurricanes Katrina and Rita in 2005 and Hurricanes Gustav and Ike in 2008, in addition to recent disasters in the Midwest due to tornadoes and flooding, triggered mass relief efforts by local, state, and federal government agencies, as well as private organizations and individuals. As unpaid volunteers have carried out much of the relief effort, some have questioned whether such volunteers—particularly medical personnel, so-called “volunteer health professionals” (VHPs)—will be protected from potential civil liability in carrying out their duties. This report provides a general overview of the various federal and state liability protections available to VHPs responding to disasters. This report does not discuss liability of VHPs who go abroad to render assistance.

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Introduction

In 2010, various communities across America were hit hard by natural disasters ranging from the Tennessee and Arkansas floods to tornadoes in the Midwest and Tropical Storm Hermine in the Gulf region. When volunteers go to these disaster areas as they did when Hurricane Katrina hit Louisiana and the surrounding states in 2005, questions arise as to the potential civil liability of those volunteer health professionals (VHPs)—individually licensed medical professionals who gratuitously provide medical services in response to these regions’ clear need for medical skills and services. The concern is that the potential threat of medical malpractice liability, in particular, may give pause to these VHPs.

This report discusses the patchwork of federal and state laws that operate to protect volunteers generally, which can include VHPs, and those laws that trigger liability protection only for VHPs¹—with a focus on some of the midwestern states in addition to the Gulf region. Whether a VHP is protected from civil liability depends on a number of factors, including under whose control the VHP operates and whether or not a state of emergency has been declared. The liability protections discussed in this report generally shield volunteers from *civil* liability for negligent conduct (i.e., a failure to take adequate care that results in injuries or losses to others). Civil liability for conduct that is more egregious than mere negligence, such as willful, or grossly negligent conduct, is not protected, unless otherwise noted. Criminal conduct is also not protected.

Federal and State Volunteer Protection Acts

Laws shielding volunteers from liability have been enacted on both the federal and state level; the statutes discussed in this section apply in non-emergency as well as emergency situations. On the federal level, Congress passed the Volunteer Protection Act (VPA) in 1997.² This statute provides immunity for ordinary negligence to volunteers (not only medical volunteers) of nonprofit organizations or governmental entities so long as (1) the volunteer was acting within the scope of his or her responsibilities; (2) the volunteer was licensed or certified in the state where the harm occurred, *if licensure or certification was required*; (3) the harm was not the result of willful action, grossly negligent behavior, etc.; and (4) the harm was not caused by the volunteer’s operation of a vehicle.³ The act does not prohibit the nonprofit or governmental entity from bringing a civil action against its own volunteers, nor does the act shield from liability the nonprofit or governmental entity for the actions of its volunteers. Furthermore, the VPA expressly preempts state standards that provide less protection than the act.⁴

¹ Various commentators have offered suggestions for creating an across the board standard governing VHP liability in disaster situations. See, e.g., James J. Hodge, Jr., Lance A. Gable, and Stephanie H. Calves, *Volunteer Health Professionals and Emergencies: Assessing and Transforming the Legal Environment*, 3 *Biosecurity and Bioterrorism: Biodefense Strategy, Practice and Science* 216 (2005) available at <http://www.liebertonline.com/toc/bsp/3/3>.

² P.L. 105-19, codified, as amended, at 42 U.S. C. § 14501 *et seq.* For background, see CRS Report 97-490, *Volunteer Protection Act of 1997*, by (name redacted).

³ 42 U.S.C. § 14503(a).

⁴ *Id.* at § 14503(d). However, where the civil action is in a state court and all parties are citizens of the same state, the VPA permits states to pass statutes that declare “the election of [the] State that [the VPA] shall not apply, as of a certain date, to such civil action in the State.” *Id.* at § 14502(b). Thus far, only New Hampshire has done so.

On the state level, all 50 states and the District of Columbia have enacted their own volunteer protection statutes that provide varying degrees of liability protection.⁵ These state statutes are not preempted by federal law so long as they provide greater liability protections. Mississippi, for instance, provides broad civil liability protection to any volunteer who qualifies under the statute by providing services *or* goods to a volunteer agency, unless the injury complained of was the result of (a) conduct that was intentional, grossly negligent, etc., or (b) the operation of a motor vehicle.⁶ Texas also provides immunity to volunteers of a charitable organization for any act or omission resulting in death, damage, or injury if the volunteer was acting in the course and scope of the volunteer's duties or functions.⁷

Many states, in addition to having VPA-type laws, have enacted statutory provisions geared specifically toward volunteer health professionals (VHPs). These statutes are like the VPA in that they provide immunity from civil liability and are not dependent on, or triggered by, an emergency situation. Often immunity is provided so long as certain conditions are met. For example, as discussed above, Texas has statutory provisions that provide immunity to ordinary volunteers of charitable organizations, but Texas law also shields from civil liability a VHP who serves as a direct service volunteer of a charitable organization.⁸ For the VHP to be eligible for such immunity, the patient or party responsible for the patient must sign a written statement that acknowledges (1) that the volunteer is providing care that is not administered for or in expectation of compensation, and (2) the limitations on the recovery of damages from the volunteer in exchange for receiving health care services. Notwithstanding these requirements, a VHP can still be immune from civil liability even if the patient is incapacitated due to illness or injury or the patient is a minor and the person responsible for the patient is not reasonably available to sign the acknowledgment required.⁹ Similarly, Oklahoma's Volunteer Professional Services Immunity Act¹⁰ protects Oklahoma-licensed VHPs from civil liability, when, among other things, such VHPs receive no compensation and the patient signs a consent form. Mississippi and Alabama have somewhat broader provisions. Mississippi protects Mississippi-licensed medical personnel and extends this liability protection to other medical personnel who receive special volunteer licenses to practice in the state.¹¹ Alabama provides civil liability protections to VHPs who gratuitously provide limited medical services as part of an "established free medical clinic." Under Alabama's statute, VHPs can be licensed in any state to receive protection.¹² Other statutes can be somewhat vague; for example, Louisiana's statute that protects licensed VHPs operating as part of nonprofit medical clinics does not appear to provide any reference as to whether such protection is limited only to those VHPs licensed in Louisiana or whether it includes out-of-state medical licensees.¹³

⁵ Sharon Hoffman, *Responders' Responsibility: Liability and Immunity in Public Health Emergencies*, 96 Geo. L.J. 1913, 1944 (2008).

⁶ Miss. Code. Ann. § 95-9-1 (2010).

⁷ Tex. Civ. Prac. & Rem. § 84.004(a) (2010).

⁸ Tex. Civ. Prac. & Rem. § 84.004(c).

⁹ Tex. Civ. Prac. & Rem. § 84.004(f).

¹⁰ Okla. Stat. tit. 76, § 32 (2010).

¹¹ Miss. Code. Ann. §§ 73-25-38(1), (3).

¹² Ala. Code. § 6-5-663 (2010).

¹³ La. Rev. Stat. § 9:2799.5(1), (3) (2010).

Good Samaritan Statutes

In addition to VPA-like statutes, every state and the District of Columbia has enacted its own “Good Samaritan” statute, which protects individuals who gratuitously provide emergency assistance from civil liability.¹⁴ Generally, Good Samaritan statutes lower the applicable standard of care owed by the person providing assistance.¹⁵ These statutes were first enacted to protect the doctor, who, although under no duty to help, provides emergency assistance to another but fails to adhere to the otherwise applicable standard of care when doing so. “Emergency” in this context refers to medical emergencies. To be eligible for immunity, many Good Samaritan statutes require that the volunteer or rescuer act in good faith and must not have received or expected any compensation for his or her efforts.¹⁶ Not all Good Samaritan statutes are the same, as some protect a narrow class of individuals such as physicians and other medically licensed personnel, while others protect a broader class of persons such as the casual bystander who renders emergency assistance.¹⁷ Another example of how Good Samaritan statutes vary is that some limit protection to care provided at the scene of an “accident,” whereas others apply to an “emergency”; some apply to both accidents and emergencies.¹⁸

Illinois, Alabama, and Louisiana, for instance, have Good Samaritan laws that offer broad but varying degrees of coverage to medically related personnel. Illinois’s Good Samaritan law protects physicians licensed in *any* American state or territory who provide emergency care, so long as the resulting harm was not caused by willful or wanton conduct.¹⁹ Again, however, the term “emergency” is used in the medical context, and courts are left to determine on a case-by-case basis what constitutes an emergency that triggers the act’s protections.²⁰ Alabama’s Good Samaritan statute protects medical personnel who gratuitously and in good faith provide emergency care “at the scene of an accident, casualty, or disaster” from being liable for *any* civil damages arising out of such care.²¹ Louisiana’s Good Samaritan statute provides liability protection to medical personnel licensed in Louisiana who provide medical services “at the scene of an emergency.”²² It appears that while a medical personnel licensed to practice in another state does not enjoy protection under Louisiana’s Good Samaritan statute, such individual cannot be prosecuted for practicing without a license if he offers gratuitous assistance in an emergency situation.²³ In contrast, Iowa’s Good Samaritan statute protects from liability *all individuals*, not just medical personnel, who render emergency care or assistance “at the place of emergency or

¹⁴ Stewart R. Reuter, *Physicians as Good Samaritans*, 20 J. Legal Med. 157 (1999).

¹⁵ *Id.* at 158.

¹⁶ Carl V. Nowlin, *Don’t Just Stand There: Help Me!*, 30 Wm. Mitchell L. Rev. 1001, 1007 (2004).

¹⁷ *Id.* at 1008. As of 2006, the Good Samaritan statutes of 36 states and the District of Columbia protected any person, though the protection may apply only in limited emergency circumstances. See Emergency Systems for Advance Registration of Volunteer Health Professionals - Legal and Regulatory Issues Project: An Overview Power Point Presentation, available at <http://www.publichealthlaw.net/Projects/ESAR-VHP.php>.

¹⁸ Nowlin, 30 Wm. Mitchell L. Rev. at 1008.

¹⁹ 745 Ill. Comp. Stat. 49/25 (2011).

²⁰ See *Rivera v. Arana*, 322 Ill. App. 3d 641, 651 (2001).

²¹ Ala. Code. § 6-5-332.

²² La. Rev. Stat. Ann. § 37:1731(A).

²³ *Id.* at § 37:1731(B).

accident or while the [injured] person is in transit” unless their acts or omissions constitute reckless or willful and wanton misconduct.²⁴

Debate exists as to how far Good Samaritan laws should extend in terms of who is covered and for what kind of actions. For example, there was much controversy surrounding the California Supreme Court decision in *Van Horn v. Watson*,²⁵ which held that the state statute only shields rescuers from liability if they provide medical care in an emergency situation. The *Van Horn* case stemmed from a 2003 car accident in the Los Angeles area where the passenger-defendant pulled the plaintiff out of what she thought was a car at risk of exploding.²⁶ The plaintiff was left a paraplegic and sued Torti, one of the defendants, for negligence. Torti sought immunity under California’s general Good Samaritan provision.²⁷ The court of appeals held and the California Supreme Court affirmed that the civil liability protections did not apply to Torti because she was not providing emergency medical care to the plaintiff. Since the ruling in December 2008, California lawmakers amended the state Good Samaritan provision to offer greater legal liability protections to those who “render emergency medical *or nonmedical* care at the scene of an emergency.”²⁸

Emergency Powers and Public Health Emergency Statutes

Except insofar as they waive it, the federal and state governments enjoy sovereign immunity from suit.²⁹ The federal government has waived this immunity with the passage of the Federal Tort Claims Act,³⁰ and some state governments have similar statutory provisions.³¹ Such acts generally immunize government employees from tort liability for torts committed within their scope of employment, and instead allow the government to be held liable in accordance with the law of the state where a tort occurred. Thus, apart from the VPA, VPA-like statutes, and Good Samaritan statutes, one additional way to shield VHPs from individual civil liability during an emergency is to declare them non-paid employees of the federal government or a state government for liability

²⁴ Iowa Code § 613.17 (2010). An emergency includes but is not limited to “disaster” as defined in § 29C.2 of the Iowa Code or the period of time immediately following a disaster for which the governor has issued a proclamation of a disaster emergency. *Id.*

²⁵ *Van Horn v. Watson*, 197 P.3d 164 (Cal. 2008).

²⁶ Jim Sanders, “Legislature seeks to aid good Samaritans; Bills would expand liability protection for rescue efforts,” *Sacramento Bee*, Jan. 14, 2009, at A1.

²⁷ Cal. Health & Safety Code § 1799.102. (2008) (“No person who in good faith, and not for compensation, renders emergency care at the scene of an emergency shall be liable for any civil damages resulting from any act or omission.”).

²⁸ Cal. Health & Safety Code § 1799.102 (2009) (“(B)(2) ... no person who in good faith, and not for compensation, renders emergency medical or nonmedical care or assistance at the scene of an emergency shall be liable for civil damages resulting from any act or omission other than an act or omission constituting gross negligence or willful or wanton misconduct.”).

²⁹ Federal sovereign immunity traces its roots to the English common law doctrine that the state can do no wrong. State sovereign immunity appears to derive from the same source, and the Supreme Court has held that the states did not lose this essential power upon ratification of the federal Constitution. *Alden v. Maine*, 527 U.S. 706 (1999).

³⁰ 28 U.S.C. §§ 1346(b), 2671-80. See CRS Report 95-717, *Federal Tort Claims Act (FTCA)*, by (name redacted).

³¹ See, e.g., Fla. Stat. § 768.28 (2008); Tex. Civil Prac. and Remedies Code Ann. § 101.025 (2008); La. Rev. Stat. Ann. § 13:5108.1 (2008).

purposes. This can be done for particular volunteers in all situations or only when a general state of emergency or public health emergency has been declared.³² Under federal law, one example is the Pandemic and All-Hazards Preparedness Act.³³ It permits the Secretary of Health and Human Services (HHS) to appoint VHPs as intermittent personnel of the National Disaster Medical System (NDMS), which provides medical services when a disaster overwhelms local emergency services. NDMS volunteers benefit from the same immunity from civil liability that many employees of the Public Health Service enjoy.³⁴ Emergencies can be declared at both federal and state levels by the President of the United States, a state governor, and sometimes by other local authorities.³⁵ Depending on the type of emergency declaration—for example, disaster or public health emergency—and the level of authority from which the declaration derives—that is, federal, state, or local government—the extent to which VHPs can be deployed, utilized, or immunized from liability will vary.

Every state has a regime for declaring a general emergency or disaster, and such a declaration can explicitly trigger liability protections or allow the governor to do so.³⁶ Kansas's emergency management statute, for example, shields state government employees, agents, and volunteer workers from civil liability for any death or injury to persons or damage to property as a result of any activity performed during the declared emergency, except where there is willful misconduct, bad faith, or gross negligence.³⁷ In such an emergency situation, Kansas's provisions also deem any member of a regional medical emergency response team to be a state employee for liability purposes.³⁸ Alabama's statutory provisions protects a broad group of "emergency management workers," as the definition of the term includes employees, volunteers, or entities of *other* states performing emergency management services during a declared emergency.³⁹ By contrast, Mississippi's emergency management statute provides civil liability protection only to state government employees and agents during a declared emergency.⁴⁰

Some states also have regimes for public health emergencies, which, like general emergency management statutes, provide varying degrees of coverage.⁴¹ The declaration of a public health

³² See also CRS Report RS20984, *Public Health Service Act Provisions Providing Immunity from Medical Malpractice Liability*, by (name redacted); CRS Report 97-577, *Making Private Entities and Individuals Immune from Tort Liability by Declaring Them Federal Employees*, by (name redacted).

³³ 42 U.S.C. § 300hh-11(d)(1).

³⁴ The Secretary of HHS may also accept the assistance of the VHPs as temporary volunteers under 42 U.S.C. § 217b. Under applicable regulations, such volunteers may receive legal protections including protection from civil liability claims under the FTCA. See e.g., 45 C.F.R. § 57.5; see <http://www.phe.gov/preparedness/pages/default.aspx>.

³⁵ See Sharona Hoffman, *Responders' Responsibility: Liability and Immunity in Public Health Emergencies*, 96 Geo. L.J. 1913, 1921 (2008).

³⁶ For a discussion of the federal government's public health emergency preparedness, see CRS Report RL33579, *The Public Health and Medical Response to Disasters: Federal Authority and Funding*, by (name redacted); for a discussion of state public health emergency preparedness, see James G. Hodge and Evan D. Anderson, *Principles and Practice of Legal Triage During Public Health Emergencies*, 64 N.Y.U. Ann. Surv. Am. L. 649 (2008), available at http://www1.law.nyu.edu/pubs/annualsurvey/issues/documents/64_NYU_ASAL_249_2008.pdf.

³⁷ Kan. Stat. Ann. §48-915(b) (2009).

³⁸ *Id.* at § 48-915(c).

³⁹ Ala. Code. § 31-9-16(d).

⁴⁰ Miss. Code. Ann. § 33-15-21(a).

⁴¹ For example, Florida has statutory provisions that address both emergency management (Fla. Stat. §§ 252.31 *et seq*) and public health emergencies (Fla. Stat. §§ 381.00315). On the federal level, the Secretary of HHS can also declare a public health emergency pursuant to the Public Health Service Act.

emergency triggers special protections for medical personnel, which often includes liability protection for VHPs.⁴² Florida's health emergency statute, for example, extends the liability protections that state employees enjoy to all volunteers who respond to a public health emergency declaration.⁴³ Louisiana's health emergency statute declares that "during a state of public health emergency, any health care providers (licensed in-state) shall not be civilly liable for causing the death of, or injury to, any person, or damage to any property except in the event of gross negligence or willful misconduct."⁴⁴

Even where emergency or public health emergency statutes do not explicitly grant liability protections to VHPs, these statutes generally allow governors to impose such protections for volunteers where appropriate. In 2005, for example, Louisiana Governor Kathleen Blanco, pursuant to her public health emergency powers, issued an executive order temporarily suspending all licensure requirements for medical volunteers (so long as they are licensed in other states) and declaring such volunteers to be state employees shielded from civil liability.⁴⁵

Emergency Mutual Aid Agreements

Emergency mutual aid agreements may be instituted among political subdivisions and Indian tribal nations within a state, out-of-state with neighboring political subdivisions, or internationally with Canadian provinces. Approved by Congress in 1996, the Emergency Management Assistance Compact (EMAC),⁴⁶ which has been codified into state statutes, provides a prearranged structure for a state to request aid from other states when affected by disaster. Since 1996, all 50 states have agreed to the terms of EMAC, as have the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam. In addition to EMAC, states have entered into other interstate mutual aid agreements.⁴⁷

⁴² The terrorist attacks of September 11, 2001, and the subsequent anthrax scare spurred states to draft legislation to facilitate widespread health emergencies. At the request of the Centers for Disease Control and Prevention, Professor Lawrence Gostin spearheaded the effort to draft the Model State Emergency Health Powers Act (MSEHPA). Under the Model Act, VHPs "shall not be liable for any civil damages as a result of medical care or treatment related to the response to the public health emergency." For additional information about the MSEHPA, see James G. Hodge, Jr., and Lawrence O. Gostin, *The Model State Emergency Health Powers Act*, January 2002, available at <http://www.publichealthlaw.net/MSEHPA/Center%20MSEHPA%20Commentary.pdf>.

⁴³ Fla. Stat. § 381.00315(2); 768.28(9)(a) (2010).

⁴⁴ La. Rev. Stat. Ann. § 29:771(c).

⁴⁵ State of Louisiana Executive Department, Executive Order No. KBB 2005-33 (September 12, 2005). In 2006, Louisiana codified § 29:735.1, which provides immunity to volunteer medical health professionals: "During a declared state of emergency anywhere in the State, any health care provider who in good faith voluntarily renders emergency care or first aid to assist persons as a result of emergency whether the aid is rendered in the area subject to the declaration of emergency or elsewhere shall not be civilly liable for causing death, injury to, or any person or damage to any property except in the event of gross negligence or willful misconduct."

⁴⁶ P.L. 104-321, 110 Stat. 3877. EMAC is intended to encourage mutual assistance in "any emergency or disaster that is duly declared by the governor of the affected state(s)," including "natural disaster, technological hazard, man-made disaster, civil emergency aspects of resources shortages, community disorders, or enemy attack." EMAC, Art. I. See also CRS Report RL34585, *The Emergency Management Assistance Compact (EMAC): An Overview*, by (name red acted).

⁴⁷ For example, several states belong to or authorize forest fire compacts, including Montana, New York, and Wyoming. Other states, like New Jersey and New York, have mutual aid statutes that provide for mutual aid during an enemy attack in order to protect bridges, tunnels, and other major infrastructure components.

EMAC addresses concerns regarding liability protection and represents an attempt by its signatories to remove legal obstacles that can impede the flow of aid from bordering states in times of emergency. Under EMAC, when officers or employees of one state render aid in another, they are treated as agents of the requesting state for tort and immunity purposes.⁴⁸ Such individuals, nor the state itself, would not face liability for acts or omissions committed in good faith while rendering aid (including providing supplies and related equipment). Furthermore, EMAC contains a relatively broad reciprocity agreement for persons who from one state render assistance in another. It provides that such individuals who hold a license, certificate, or other permit for the practice of professional, mechanical, or other skills will be considered to be licensed, certified, or permitted to exercise those duties in the requesting state, subject to limitations or conditions set by the governor of the requesting state.⁴⁹ Notwithstanding the recognition of out-of-state licenses, reciprocity is not automatically extended to VHPs who provide services that are not pursuant to an EMAC request for assistance. Unless authorities can verify an individual's claims, they may be reluctant to accept the individual's professional services, particularly where VHPs arrive "spontaneously."

Because licensure of medical professionals is a state matter, verifying whether a VHP is properly licensed during a time of emergency can become problematic. Following the terrorist attacks in 2001, Congress authorized creation of the Emergency System for Advance Registration of Volunteer Health Professionals (ESAR-VHP).⁵⁰ Based in the Office of the Assistant Secretary for Preparedness and Response in HHS,⁵¹ the ESAR-VHP is a federal program that supports states and territories in establishing standardized volunteer registration programs for disasters, public health, and medical emergencies. The program, administered on the state level, verifies the credentials of VHPs in advance so that emergency managers and others have the ability to quickly identify and facilitate the use of VHPs in local, state, and federal emergency responses.⁵²

⁴⁸ EMAC, Art. VI ("Officers or employees of a party state rendering aid in another state pursuant to this compact shall be considered agents of the Requesting State for tort liability and immunity purposes; and no party state or its officers or employees rendering aid in another state pursuant to this compact shall be liable on account of any act or omission in good faith on the part of such forces while so engaged or on account of the maintenance or use of any equipment or supplies in connection therewith. Good faith in this article shall not include willful misconduct, gross negligence, or recklessness.").

⁴⁹ EMAC, Art. V.

⁵⁰ Public Health Security and Bioterrorism Preparedness and Response Act § 107, 42 U.S.C. § 247d-7b.

⁵¹ The ESAR-VHP program was initially based in the Health Resources and Services Administration Office upon its creation in 2002. However, Congress moved the program in 2006 when it created the Office of the Assistant Secretary for Preparedness and Response in HHS with the passage of the Pandemic and All-Hazards Preparedness Act, P.L. 109-417.

⁵² U.S. Department of Health and Human Services, Public Health Emergency, The Emergency System for Advance Registration of Volunteer Health Professionals, <http://www.phe.gov/esarvhp/pages/about.aspx> (last visited January 15, 2011). As EMAC applies to other non-medically licensed professionals, states may include non-health professional volunteers in their registries. *See id.*

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