Public Health Service Act Provisions Providing Immunity from Medical Malpractice Liability

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Summary

A 1992 and a 1996 amendment to the Public Health Service Act provide that certain entities and health care practitioners shall be deemed federal employees for purposes of medical malpractice liability. This means that they are immune from such liability, but that the United States may be liable under the Federal Tort Claims Act for their medical malpractice. The 1996 amendment took effect only on September 24, 2004.

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Two subsections of the Public Health Service Act, 42 U.S.C. §§ 201 *et seq*., make certain health care practitioners and entities immune from medical malpractice liability: 42 U.S.C. § 233(g) and (*o*). The first was added to the Public Health Service Act by the Federally Supported Health Centers Assistance Act of 1992; the second by the Health Insurance Portability and Accountability Act of 1996. This report will refer to them as the 1992 amendment and the 1996 amendment.

Federal Tort Claims Act

Before we discuss the 1992 and 1996 amendments, we must discuss the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, to which they implicitly refer. State law generally makes employers liable for the torts of their employees committed within the scope of their employment. The FTCA waives sovereign immunity to make the United States similarly liable, in accordance with the law of the state where a tort occurs, for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment. . . ." 28 U.S.C. § 1346(b).[1] It also makes federal employees immune from all lawsuits arising under state law for torts committed within the scope of their employment. (The FTCA does not prevent a federal employee from being sued for violating the Constitution or a federal statute that authorizes suit against an individual.) Sometimes, Congress wishes to immunize a private organization, or its employees or volunteers, from tort liability. One way it may do so is to enact a statute declaring that the organization or its employees or volunteers shall be deemed federal employees for purposes of the FTCA. That is what the 1992 and 1996 amendments do,[2] although they provide immunity apparently only from medical malpractice liability, and not from all liability under state tort law.

1992 Amendment

This provision reads:

> [A]n entity described in paragraph (4), and any officer, governing board member, or employee of such entity, and any contractor of such an entity who is a physician or other licensed or certified health practitioner (subject to paragraph (5)) shall be deemed to be an employee of the Public Health Service [for purposes of medical malpractice liability].[3]

Paragraph (4) defines the entity in question as "a public or nonprofit private entity receiving Federal funds under section 254b of this title." Section 254b is the Health Centers Consolidation Act of 1996, P.L. 104-299,[4] which authorizes grants for "health centers," which it defines as entities that serve "a population that is medically underserved or a specially medically

[1] The FTCA, however, contains exceptions under which the United States may not be held liable even if, under state law, a private employer may. In addition, the FTCA does not permit punitive damages against the United States, regardless of state law. See CRS Report 95-717, *Federal Tort Claims Act*, by (name redacted) and (name redacted).

[2] At least 50 other federal statutes do so as well. These statutes are listed in CRS Report 97-579, *Making Private Entities and Individuals Immune from Tort Liability by Declaring Them Federal Employees*, by (name redacted), which also suggests pros and cons of providing immunity in this way.

[3] 42 U.S.C. § 233(g)(1)(A). Department of Health and Human Services regulations under the 1992 amendment appear at 42 C.F.R. Part 6.

[4] Prior to 1996, § 254b referred to other grant programs.

underserved population comprised of migratory and seasonal agricultural workers, the homeless, and residents of public housing."

Paragraph (5), referred to in the above quotation from the 1992 amendment, defines "contractor" for purposes of the 1992 amendment; in other words, it sets forth which contractors are deemed employees of the Public Health Service for purposes of liability.

The 1992 amendment continues:

> The remedy against the United States for an entity described in paragraph (4) and any officer, governing board member, employee, or contractor (subject to paragraph (5)) of such an entity who is deemed to be an employee of the Public Health Service [and thus of the United States] pursuant to this paragraph shall be exclusive of any other civil action or proceeding to the same extent as the remedy against the United States is exclusive pursuant to subsection (a) of this section.[5]

Subsection (a) provides that the remedy against the United States provided by the FTCA, or by alternative benefits provided by the United States, "for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action."[6]

What this means is simply that an entity or individual described in the 1992 amendment cannot be sued for medical malpractice that an individual committed in the scope of his duties. Any medical malpractice claim that, in the absence of this provision, could have been brought against such an entity or individual may instead be brought against the United States under the FTCA, or under a statute that provides alternative federal benefits.

1996 Amendment

The 1996 amendment gave to "free clinic health professionals" the same protection that the 1992 amendment gave to entities, officers, governing board members, employees, and contractors. The 1996 amendment provides that "a free clinic health professional shall in providing a qualifying health service to an individual be deemed to be an employee of the Public Health Service." 42 U.S.C. § 233(*o*)(1). It also provides: "Subsection (g) of this section [i.e., the 1992 amendment] [and other subsections] apply to a health care practitioner for purposes of this subsection [the 1996 amendment] to the same extent and in the same manner as such subsections apply to an officer, governing board member, employee, or contractor of an entity described in subsection (g)(4) of this section." 42 U.S.C. § 233(*o*)(5).[7] In other words, free clinic health professionals have the same immunity as the entities and individuals covered by the 1992 provision.[8] Note that the 1996 amendment, unlike the 1992 amendment, grants immunity only to individuals, not to entities.

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[5] 42 U.S.C. § 233(g)(1)(A).

[6] The 1992 amendment's incorporation of subsection (a), with its reference to "medical, surgical, dental, or related functions" appears to indicate that the immunity provided by the 1992 amendment does not extend to torts other than medical malpractice.

[7] The 1996 amendment appears to use "professional" and "practitioner" interchangeably.

[8] This appears to indicate that it provides immunity only for medical malpractice, not for other torts; see footnote 6, *supra*.

The 1996 amendment defines some of the terms quoted above:

> [T]he term "free clinic" means a health care facility operated by a nonprofit private entity meeting the following requirements:
>
> (i) The entity does not ... accept reimbursement from any third-party payor (including reimbursement under any insurance policy or health plan, or under any Federal or State health benefits program).
>
> (ii) The entity ... either does not impose charges on the individuals to whom the services are provided, or imposes a charge according to the ability of the individual involved to pay the charge.[9]
>
> [T]he term "qualifying health service" means any medical assistance required or authorized to be provided in the program under title XIX of the Social Security Act.[10]

Title XIX of the Social Security Act is Medicaid, 42 U.S.C. §§ 1396 *et seq*. The 1996 amendment thus grants immunity to health professionals who, at free clinics, provide medical assistance required or authorized to be provided under Medicaid. However, because a free clinic by definition may not accept reimbursement under a federal or state health benefit program, and Medicaid is such a program, it appears that the 1996 amendment does not apply to health professionals who provide medical assistance at clinics that accept Medicaid funds. The type of medical assistance for which they are immune, in other words, is *defined* by reference to Medicaid, but apparently does not include medical assistance *reimbursed* under Medicaid.[11]

What is a "health professional" under the 1996 amendment? The term is not defined, but a health professional, like a free clinic, may not "receive any compensation for the service from the individual or from any third-party payor." He or she, however, "may receive repayment from the free clinic for reasonable expenses." 42 U.S.C. § 233(*o*)(2)(D). The 1996 amendment does not state that a health practitioner may not receive other compensation from the free clinic, but it seems to imply it, as there would seem to be no reason for the statute to specify that a practitioner may receive repayment if he or she could receive other compensation.[12] The health practitioner must also be "sponsored" by the free clinic. This means that the free clinic must submit an application to the Secretary of Health and Human Services, and the Secretary must determine "that the health care practitioner is deemed to be an employee of the Public Health Service." 42 U.S.C. § 233(*o*)(5)(C). In short, a health care practitioner must be approved by the Secretary in order to receive immunity under the 1996 amendment.[13]

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[9] 42 U.S.C. § 233(*o*)(3)(A).

[10] 42 U.S.C. § 233(*o*)(4).

[11] The conference report says: "Eligible health professionals must provide qualifying services (i.e., *otherwise* available for Medicaid reimbursement) at a free clinic or through programs conducted by the clinic." H.Rept. 104-736, 104th Cong., 2d Sess. 279 (1996) (emphasis added).

[12] Language in the conference report supports this interpretation: "This provision extends Federal Tort Claims Act coverage to certain medical volunteers in free clinics . . . . Health professionals must meet certain conditions before they are deemed employees of the Public Health Service Act [sic]. They must be licensed or certified in accordance with applicable law and they must be volunteers; they may not receive compensation for the services in the form of salary, fees, or third-party payments. However, they may receive reimbursement from the clinic for reasonable expenses . . . ." H.Rept. 104-736, 104th Cong., 2d Sess. 278-279 (1996). In addition, the title of 42 U.S.C. § 233(*o*) is "*Volunteer* services provided by health professionals at free clinics." (Emphasis added.)

[13] The Health Resources and Services Administration of HHS has issued a "Notice whereby a person can determine (continued...)

The 1996 amendment took effect only on September 24, 2004, when the Health Resources and Services Administration of HHS issued a Program Information Notice titled *Federal Tort Claims Act Coverage of Free Clinic Volunteer Health Care Professionals*.[14] The 1996 amendment had authorized to be appropriated $10 million for each fiscal year "[f]or purposes of making payments for judgments against the United States . . . pursuant to this section arising from the acts or omissions of free clinic health professionals."[15] Congress, however, did not appropriate funds for this purpose until FY2004, when it appropriated $4,850,000.[16] It appropriated $100,000 to carry out the provisions of 42 U.S.C. § 233(*o*) in FY2005,[17] and $40,000 in FY2006.[18]

Interaction of the 1996 Amendment with the Volunteer Protection Act[19]

The Volunteer Protection Act (VPA), 42 U.S.C. §§ 14501-14505, which was enacted in 1997, provides immunity for ordinary negligence to volunteers acting within the scope of their responsibilities in nonprofit organizations or governmental entities, provided that, "if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities." The immunity does not apply to "willful or criminal conduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer." This liability limitation does *not* apply to nonprofit organizations or governmental entities; they may be held liable for the ordinary negligence of their volunteers, even if volunteers are immune. Nonprofit organizations and governmental entities may, however, sue their volunteers. The VPA, unlike the 1996 amendment, does not make the United States liable for the torts of the volunteers whom it immunizes from liability.

The VPA contains definitions of "nonprofit organization" and of "volunteer," which are not necessary to quote for present purposes. It suffices to say that a clinic could apparently qualify both as a "free clinic" under the 1996 amendment and as a "nonprofit organization" under the VPA, and that a volunteer physician could also be covered under both.[20] But, if a volunteer physician who is covered under both statutes is negligent in the performance of his duties, which statute would apply? The volunteer physician would be immune under either, but the nonprofit organization could be liable under the VPA, while the United States, under the 1996 amendment, could be liable under the FTCA. As a practical matter, the volunteer physician, it seems, would first claim immunity under the 1996 amendment. This is because, if the court found him immune under the 1996 amendment, it would dismiss the case against him without a trial to determine whether he had committed malpractice. If the physician did not qualify for immunity under the 1996 amendment (because, for example, he had not been "sponsored" by the free clinic), then the injured party could still seek to prove gross negligence and thereby hold the physician liable,

(...continued)

when and the extent to which a volunteer health professional at a free clinic is deemed to be a Public Health Service employee." 69 Fed. Reg. 42445 (July 15, 2004).

[14] http://www.bphc.hrsa.gov/freeclinicsftca/application.htm.

[15] 42 U.S.C. § 233(*o*)(6).

[16] P.L. 108-199, 118 Stat. 237 (2004).

[17] P.L. 108-447, 118 Stat. 3123 (2004).

[18] P.L. 109-149, 119 Stat. 2844 (2005).

[19] The 1992 amendment does not apply to volunteers and therefore does not interact with the VPA.

[20] The VPA, however, defines "volunteer" to include persons who receive a "thing of value in lieu of compensation, [not] in excess of $500 per year." A "thing of value" might be deemed "compensation" under the 1996 amendment, thus making a practitioner ineligible for immunity under that statute.

because the VPA provides immunity only for ordinary negligence. The injured party could also sue the clinic and recover even if the physician were guilty only of ordinary negligence, but could not sue the United States.

Suppose that a clinic at which malpractice allegedly occurred were both a "free clinic" under the 1996 amendment and a "nonprofit organization" under the VPA, but the clinic no longer existed (and so could not be sued) and the volunteer physician who worked for it had no malpractice insurance or significant personal assets. In that case, the injured party, in addition to the physician, would benefit from the 1996 amendment, because it would enable the injured party to sue the United States. Could the United States, however, claim that, in order for it to be liable, the plaintiff would have to prove gross negligence? The argument of the United States would be that, if the plaintiff proves only ordinary negligence, then the physician would be immune under the VPA, and, if the physician were immune under the VPA, then it (the United States) could not be liable either. This argument would not appear valid, because the 1996 amendment holds the United States liable under the FTCA, and the FTCA makes the United States liable for "the negligent [not merely grossly negligent] wrongful act or omission" of a federal employee (or one deemed a federal employee under the 1996 amendment or other statute). In other words, if the 1996 amendment applies, the VPA apparently drops out of the picture, even if, on its face, it could also apply.[21]

Conclusion

The 1992 amendment to the Public Health Service Act provides that a public or nonprofit private entity receiving Federal funds under the Health Centers Consolidation Act of 1996, and any officer, governing board member, or employee of such entity, and any contractor of such an entity who is a physician or other licensed or certified health practitioner, shall be deemed a federal employee, and thus immune from liability, for purposes of medical malpractice suits. The 1996 amendment, when it took effect on September 24, 2004, extended this immunity to "free clinic health professionals," which are unpaid volunteers approved by the Secretary of Health and Human Services who provide medical assistance of the sort required or authorized under Medicaid in clinics that receive no reimbursement from insurers or federal or state health benefits programs. Being totally immune from medical malpractice liability, such individuals would not need the partial immunity of the Volunteer Protection Act.

[21] A principle of statutory construction appears to support this analysis. If two statutes, such as the 1996 amendment and the VPA, relate to the same subject matter, but "one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling." Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION, vol. 2B, § 51.05 (6th ed., 2000). The 1996 amendment, though enacted prior to the VPA, deals with a specific categories of volunteers, whereas the VPA deals with all volunteers (as defined in the VPA). And nothing in the VPA suggests that it was meant to supersede the 1996 amendment. Therefore, it appears that, if a volunteer, by the terms of the 1996 amendment and the VPA, could fall under both statutes, the 1996 amendment would govern.

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