Sovereign Immunity, application to volunteers

Number: INFORMAL

Date: March 06, 1997

The Honorable Ginny Brown-Waite, Chairwoman
Senate Committee on Health Care
Hernando Government Complex
20 North Main Street, Room 200
Brooksville, Florida 34601

Re: HEALTH, DEPARTMENT OF--SOVEREIGN IMMUNITY--HEALTH--VOLUNTEERS--applicability of sovereign immunity to private medical providers volunteering medical services. ss. 766.1115, 768.1355, 768.28, Fla. Stat. (1996 Supp.).

Dear Senator Brown-Waite:

You ask substantially the following questions:

1. Does section 766.1115, Florida Statutes (1996 Supplement), contain the necessary elements for extending sovereign immunity to private-sector health care providers, who may or may not be supervised by a governmental contractor when delivering services in their private facilities, for services to patients who are referred to the providers by a governmental contractor?

2. Do the income requirements provided in section 766.1115(3)(e), Florida Statutes (1996 Supplement), raise a constitutional question relating to equal protection to the extent that persons who are uninsured but do not meet the income test are ineligible for services under the Access to Health Care Act?

3. Would sovereign immunity protection extend to private employees of health maintenance organizations or private hospitals who deliver health care services in public schools pursuant to section 768.1355, Florida Statutes (1996 Supplement)?

Attorney General Butterworth has asked me to respond to your letter. Based upon a review of these issues, it appears:

1. Section 766.1115, Florida Statutes (1996 Supplement), which requires that the contract between a health care provider and the governmental contractor be subject to supervision and regular inspection by the governmental contractor, and which states that the health care provider acting in conformity with the contract is an agent for purposes of section 768.28(9), Florida Statutes, grants immunity to such a provider.

2. While this office must presume the constitutionality of any duly enacted statute, legislation in the economic and social welfare area has generally been tested under a deferential standard of review in which the courts have considered preserving the fiscal integrity of welfare programs to be a legitimate state interest.

3. Section 768.1355, Florida Statutes (1996 Supplement), would provide immunity from civil liability for volunteers who perform medical services for a nonprofit organization, which includes a governmental entity, for any act or omission performed in the scope of their official duties as specified by the nonprofit organization that results in personal injury or property damage. The nonprofit organization, however, may be held liable for such acts of the volunteers.

Question One

According to your letter, the Senate Health Care Committee is reviewing section 766.1115, Florida Statutes (1996 Supplement), the Access to Health Care Act (Act). You state that the Act is designed to increase access to health care for certain low-income persons by encouraging health care providers to volunteer or donate their services in exchange for sovereign immunity protection for those services under the Act.[1] Patient referrals are made by the government contractor, defined in the Act as the Department of Health and Rehabilitative Services (now the Department of Health), county health departments, a special taxing district with health care responsibilities, or a hospital owned and operated by a governmental entity.[2]

You refer to the report on section 766.1115, Florida Statutes (1996 Supplement), prepared by the Senate Health Care Committee staff, which discusses the decision of the Fourth District Court of Appeal in *Noel v. North Broward Hospital District.*[3] While the court certified the question of whether consultants paid to deliver services to indigent children under the Children's Medical Services (CMS) program are protected by sovereign immunity, the district court's opinion has raised the issue of whether health care providers primarily delivering services at their private facilities may reasonably rely on the Act for sovereign immunity protection.

In *Noel*, the statutes establishing the CMS program did not specifically extend immunity to consultants. The matter of whether immunity should be given to the CMS consultants was, in the *Noel* court's opinion, "an issue to be dealt with by the Florida legislature."[4] In section 766.1115, Florida Statutes (1996 Supplement), however, the Legislature has dealt with the issue, providing in subsection (4):

"A health care provider that executes a contract with a governmental contractor to deliver health care services on or after April 17, 1992, as an agent of the governmental contractor is an agent for purposes of s. 768.28(9), while acting within the scope of duties pursuant to the contract, if the contract complies with the requirements of this section. A health care provider under contract with the state may not be named as a defendant in any action arising out of the medical care or treatment provided on or after April 17, 1992, pursuant to contracts entered into under this section. . . ."

The courts have recognized the Legislature's authority to statutorily create agency status for purposes of sovereign immunity. In *Mingo v. ARA Health Services, Inc.*,[5] the court noted that the Legislature has bestowed such status on health care providers contracting with the Department of Corrections in section 768.28(10)(a), Florida Statutes.[6]

Where the Legislature has not made such a designation, however, the determination of whether the provider is "acting as an agency of the state [will be made] under the facts and circumstances of a particular relationship."[7] In such cases, it is the right to control, not the

actual control that a principal chooses to exercise over an agent, that determines the relationship between the parties.[8] While the *Noel* court considered where treatment was given as one factor to be reviewed, it was not the sole factor considered in determining who had the right of control over the consultant's actions.

For example, in Attorney General Opinion 76-188 this office concluded that independently insured private health institutions that volunteered their services to the Department of Health and Rehabilitative Services to administer the swine flu vaccine were agents of the department and, therefore, protected by section 768.28, Florida Statutes. This office was informed that the department was unable to implement the program in larger population areas without the assistance of volunteer private health institutions. The department selected the private institutions that would administer the vaccines and it had the authority to terminate the relationship. In addition, this office was advised that the department intended to monitor and control the performance of such agencies to ensure that the institutions complied with department and federal guidelines.

In section 766.1115, Florida Statutes (1996 Supplement), the Legislature has determined that as a matter of law, the health care providers under contract with governmental contractors and acting in conformity with the terms of that contract are acting as agents of the state or its political subdivisions for purposes of section 768.28(9), Florida Statutes (1996 Supplement). In bestowing such status, the statute requires that the contract provide for the governmental contractor's right to dismiss or terminate a health care provider and to have access to the patient's records, to be informed of adverse incidents and treatment outcomes, to make patient selections and initial referrals, to approve patient care, and to supervise the provider. Notice of the agency relationship must be provided to every patient or patient's representative, and the governmental contract must establish a quality assurance program to monitor services delivered under the contract.

Such provisions were adopted by the Legislature in order for the health care provider to be considered an agent of the governmental contractor.[9] Whether in a particular situation there is compliance with the terms of the statute and contract presents a mixed question of law and fact which this office cannot resolve; however, in order for immunity to apply to the health care providers as agents, the provisions of the statute must be satisfied and the provider must comply with the requirements of the contract containing the required provisions.

Accordingly, it appears that section 766.115, Florida Statutes (1996 Supplement), which requires that the contract between a health care provider and the governmental contractor is subject to supervision and regular inspection by the governmental contractor, and which states that the health care provider acting in conformity with the contract is an agent for purposes of section 768.28(9)(a), Florida Statutes, grants immunity to such providers who act in conformity with the contract.

Question Two

Section 766.1115(3)(e), Florida Statutes (1996 Supplement), defines the term "Low income" to mean:

"1. A person who is Medicaid-eligible under Florida law;
2. A person who is without health insurance and whose family income does not exceed 150 percent of the federal poverty level as defined annually by the federal Office of Management and Budget; or
3. Any client of the department who voluntarily chooses to participate in a program offered or approved by the department and meets the program eligibility guidelines of the department."

You ask whether the income requirements above raise a constitutional question relating to equal protection to the extent that persons who are uninsured but do not meet the income test are ineligible for services under the Act.

This office must presume that duly enacted legislation is constitutional until a court of competent jurisdiction declares otherwise in an appropriate judicial proceeding.[10] In an effort to be of assistance, however, I would note the following.

While legislative action may not be arbitrary or capricious, legislation in the economic and social welfare area has generally been tested by the courts under a deferential standard of review. If the statutory classification has some rational basis, it does not offend the Constitution merely because the classification is "not made with mathematical nicety or because in practice it results in some inequity."[11] Moreover, preserving the fiscal integrity of welfare programs has been considered a legitimate state interest.[12]

Question Three

The Florida Volunteer Protection Act, section 768.1355, Florida Statutes, was created by the 1993 Legislature as a general volunteer immunity statute, providing immunity from civil liability for acts or omissions resulting in personal injury or property damage by persons who perform volunteer services for a nonprofit organization.[13] Section 768.1355(1), Florida Statutes (1996 Supplement), provides in part:

"Any person who volunteers to perform any service for any nonprofit organization, including an officer or director of such organization, without compensation, except reimbursement for actual expenses, shall be considered an agent of such nonprofit organization when acting within the scope of any official duties performed under such volunteer services. Such person shall incur no civil liability for any act or omission by such person which results in personal injury or property damage if:

(a) Such person was acting in good faith within the scope of any official duties performed under such volunteer service and such person was acting as an ordinary reasonably prudent person would have acted under the same or similar circumstances; and
(b) The injury or damage was not caused by any wanton or willful misconduct on the part of such person in the performance of such duties."

The term "nonprofit organization" is defined to mean "any organization which is exempt from taxation pursuant to 26 U.S.C. s. 501, or any federal, state, or local governmental entity."[14] Thus, the term expressly includes governmental entities. In Attorney General Opinion 93-88, for example, this office concluded that those persons providing services to a county who qualify as

volunteers under the act would be protected from liability when acting within the scope of their official duties and as a reasonably prudent person would act under similar circumstances.

The statute does not specify or limit the type of services provided by volunteers under the act other than to require that they be performed without compensation as defined therein, except for reimbursement for actual expenses.[15] This office has stated that the statute would appear to be applicable to attorneys providing pro bono legal services to a nonprofit organization.[16] This office stated, however, that to be covered under the act, such services must be performed in good faith and be within the scope of the official duties performed under such volunteer service, with the volunteer acting as an ordinary reasonably prudent person. The act does not protect a volunteer's wanton or willful misconduct.

Similarly, section 768.1355, Florida Statutes (1996 Supplement), would appear to provide some protection from civil liability for the actions of a volunteer from a health maintenance organization or private hospital in providing services to a governmental entity. The actions performed by the volunteer, however, must be within the scope of the nonprofit corporation's official duties; accordingly, the duties of the governmental entity to be performed by the volunteer would have to be prescribed by the governmental entity.

Section 768.1355(1), Florida Statutes (1996 Supplement), states that the volunteer shall be considered an agent of the nonprofit organization if acting within the scope of any official duties of the nonprofit organization. Section 768.1355(2), Florida Statutes (1996 Supplement), provides:

"Except as otherwise provided by law, if a volunteer is determined to be not liable pursuant to subsection (1), the nonprofit organization for which the volunteer was performing services when the damages were caused shall be liable for such damages to the same extent as the nonprofit organization would have been liable if the liability limitation pursuant to subsection (1) had not been provided."

The final staff analysis of the bill, which was passed as Chapter 93-139, Laws of Florida, and codified as section 768.1355, Florida Statutes, states:

"The bill provides that if a volunteer is determined not to be liable, the nonprofit organization for which the volunteer was performing services shall be liable."[17]

Therefore, while the Florida Volunteer Protection Act may provide immunity from civil liability to the volunteer who performs medical services for a nonprofit organization for any act or omission resulting in personal injury or property damage, the nonprofit organization may be held liable for such acts of such volunteers.

I trust that the above informal advisory comments may be of assistance to you in resolving this matter.

Sincerely,

Joslyn Wilson

Director, Division of Opinions
Assistant Attorney General

JW/tgk

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[1] *See* s. 766.1115(3)(d) and (e), Fla. Stat. (1996 Supp.), respectively defining "Health care provider" or "provider" and "Low-income."

[2] *See* s. 766.1115(4)(d), Fla. Stat. (1996 Supp.). *And see* s. 766.115(3)(c), Fla. Stat. (1996 Supp.), defining "Governmental contractor." While the statute refers to the former Department of Health and Rehabilitative Services, those duties have now been assumed by the Department of Health.

[3] 644 So. 2d 989 (Fla. 4th DCA 1995), *question certified,* Case No. 86.685. *See* pp. 3, 17-19, 30 and 33, A Review of the Access to Health Care Act, Report of the Staff of the Senate Health Care Committee, December 1996.

[4] *Id.* at 992.

[5] 638 So. 2d 85 (Fla. 2d DCA 1994). *Cf. Suwannee County Hospital Corporation v. Golden*, 56 So. 2d 911, 913 (Fla. 1952), concluding that a hospital district was not possessed of sovereign immunity, and s. 1, Ch. 77-86, Laws of Florida, amending s. 768.28, Fla. Stat., to make the monetary limitations on liability specified therein applicable to *all* state agencies and subdivisions of the state, as defined in s. 768.28(2), regardless of whether these agencies and subdivisions possessed sovereign immunity prior to July 1, 1974.

[6] *And see* Part IV, Ch. 110, Fla. Stat., extending the state's sovereign immunity protection to volunteers who provide uncompensated services to any state department or agency.

[7] 638 So. 2d at 86.

[8] *See generally Nazworth v. Swire Florida, Inc.*, 486 So.2d 637 (Fla. 1st DCA 1986); *Bryant v. Duval County Hospital Authority,* 459 So. 2d 1154 (Fla. 1st DCA 1984); *DeRosa v. Shands Teaching Hospital & Clinics, Inc.,* 504 So. 2d 1313 (Fla. 1st DCA 1987); Op. Att'y Gen. Fla. 89-70 (1989). *And see Farmers & Merchants Bank v. Vocelle*, 106 So. 2d 92, 95 (Fla. 1st DCA 1958), stating:

"If the person serving is merely subject to the control or direction of the owner as to the result to be obtained, he is an independent contractor; if he is subject to the control or [sic] the person being served as to the means to be employed, he is not an independent contractor

* * *

It is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and a servant."

[9] *See* Final Bill Analysis & Economic Impact Statement on HB 61-E (passed as 92-278, Laws of Florida), Florida House of Representatives Committee on Health Care, dated April 17, 1992.

[10] *See, e.g.,* Ops. Att'y Gen. Fla. 91-07 (1991) (Attorney General's Office may not pass upon the constitutionality of a statute but must presume its validity) and 78-64 (1978); *cf. Adams Packing Association, Inc. v. Florida Department of Citrus*, 352 So.2d 569 (Fla. 2d DCA 1977); Op. Att'y Gen. Fla. 95-32 (1995) (this office cannot comment on the constitutionality of proposed local legislation such as a charter amendment).

[11] *Dandridge v. Williams,* 397 U.S. 471, 485, 90 S. Ct. 1153, 1161, 25 L. Ed.2d 491 (1970), *quoting, Lindsley v. Natural Carbonic Gas Company*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed 369 (1911); *Rye Psychiatric Hospital Center, Inc. v. Shalala*, 52 F.3d 1163, 1172 (2d Cir. N.Y. 1995). *And see*, Patch Enterprises, Inc. v. McCall, 447 F.Supp. 1075, 1079 (M.D. Fla. 1978) (in enacting socio-economic, general welfare legislation, states and their subdivisions are accorded a wide latitude of discretion to select implementing classifications). *Cf. Heller v. Doe*, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993) ("rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices").

[12] *See Shapiro v. Thompson,* 394 U.S. 618, 633, 89 S.Ct. 1322, 1330-1331, 22 L.Ed. 2d 600 (1969); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed. 2d 313 (1985). *And see Downhour v. Somani*, 85 F.3d 261 (6th Cir. Ohio 1996) (existing differentiation between groups of Medicare recipients based on their income is a differentiation amply supported by the legitimate state interest of desiring to control medical costs for those least able to afford them).

[13] Chapter 93-139, Laws of Florida. *See* Final Bill Analysis and Economic Impact Statement, CS/HB 21, Florida House of Representatives Committee on Judiciary, June 22, 1993.

[14] Section 768.1355(1)(b)1., Fla. Stat. (1996 Supp.).

[15] Section 768.1355(1)(b)2., Fla. Stat. (1996 Supp.), provides that the term "compensation" for purposes of the act does not include "a stipend as provided by the Domestic Service Volunteer Act of 1973, as amended (Pub. L. No. 93-113), or other financial assistance, valued at less than two-thirds of the federal hourly minimum wage standard, paid to a person who would otherwise be financially unable to provide the volunteer service." *Cf.* Black's Law Dictionary *Volunteer* p. 1413 (5th ed. 1979); s. 110.501(1), Fla. Stat., defining "[V]olunteer" to mean "any person who, of his or her own free will, provides goods or services to any state department or agency, with no monetary or material compensation."

[16] *See* Op. Att'y Gen. Fla. 94-16 (1994).

[17] Final Bill Analysis and Economic Impact Statement, CS/HB 21, Florida House of Representatives Committee on Judiciary, June 22, 1993. In assessing direct private sector costs, the staff analysis states that while a private individual may not institute an action against a volunteer for damages because of the immunity provided by the bill, an injured individual may sue the nonprofit organization, whose liability would be determined by the doctrine of respondent superior or vicarious liability.