**INTRODUCTION**

Units of government enjoy immunity, or protection from legal liability, for many of their activities. This immunity is not, however, unlimited. During an emergency, the needs of a small group of people (their personal lives, businesses, and property) frequently must be considered and balanced against society’s greater interest. Disaster response statutes and common law provide customary defenses and immunities for protection of emergency responders who are working in the capacity of a government employee.

**IMMUNITY UNDER STATE LAW**

To protect from litigation, state legislatures may incorporate into tort law liability immunities for negligent official acts. Such acts must be within the employee’s scope of employment for immunity to apply. State disaster or emergency statutes often contain more specific immunity provisions to protect government officials engaged in critical decision-making procedures in emergencies. Some states have gone further, putting into place broad immunities shielding a variety of players (i.e., the state, political subdivisions, or local governmental entities) who act during an emergency response rather than just the individuals involved in decision making. Such provisions are typically contained in a state’s emergency management laws.

Some states make particular immunity provisions for emergency workers, whether volunteers or employees. Also, immunities exist for people owning or controlling real estate or motorized vehicles who voluntarily authorize the use of their property during an emergency. So-called “Good Samaritan” statutes may also provide immunity to certain classes of emergency medical responders, although they may not apply if the responder is working in an official capacity.

**IMMUNITIES UNDER FEDERAL LAW**

General tort immunity may also bar a civil lawsuit springing from an emergency or disaster response. For the federal government, two tort immunity doctrines may apply: “governmental function” and “discretionary action.”

The governmental function guards long-established or inherent measures assigned by constitution or statute, and other actions such as collecting taxes, law enforcement, and legislation. Such actions are usually performed solely by a governmental entity and done for the benefit of the public, with no private sector equivalent. Thus, emergency planning and response has immunity as a traditional or inherent governmental function.

The Federal Tort Claims Act (FTCA) contains the discretionary action exclusion. Discretionary immunity centers on a particular governmental act or decision instead of the type of activity undertaken. Its purpose is to protect government policy makers from worrying about lawsuits during disaster planning and response. If, however, the action objected to does
not involve a permitted use of policy judgment, the government is not protected.

In Berkovitz v. United States, the US Supreme Court created a two-part test of the FTCA’s discretionary immunity exemption. The first step requires analyzing the nature of the conduct in question. If the conduct is not optional but is instead mandated by a federal statute or policy, then the discretionary immunity exemption will not apply. The employee had no choice but to follow the directives. The Court reasoned that, in the absence of choice, there is no discretion to protect. Immunity applies only if there is no statutory, regulatory, or procedural policy mandating a specific course of action. The conduct must involve some personal judgment, which then must be evaluated to determine whether it is the sort of judgment the discretionary immunity exemption was designed to guard. The exemption shields only governmental actions and decisions based on public policy (i.e., social, economic, or political policy). If the activity was not founded on public policy, then the suit may continue.

Most states recognize some form of this test within their own statutes. Where state courts have mentioned repeatedly that the discretionary immunity exemption provided by their code is essentially the same as the FTCA’s, the discretionary immunity test applies.8

In the recent Commerce and Industry Insurance Company v. Grinnell Corporation decision, the 5th Circuit Court of Appeals reversed summary judgment by a lower court, finding that the discretionary immunity test was inappropriately employed. The Circuit Court held that specific fire-department regulations decreed accepted procedures for firefighters at a warehouse fire, and that the firefighters had violated them.10 The Court stated that the city could not be allowed the immunity exemption and remanded the case for further proceedings.

The Commerce and Industry Insurance Company decision may indicate the potential future evolution of cases brought against emergency management organizations for improper actions during disasters or emergencies. In an emergency response such as that in the Commerce and Industry Insurance Company case, the Courts may hold the organization and its employees responsible for actions that fall outside established regulatory standards (such as the requirement to have a current plan) and standard operating procedures. Emergency management may be hard pressed to rely on discretionary immunity to protect themselves and their employees from liability.

In conclusion, it’s important to point out that courts interpret waivers of government immunity extremely narrowly. They look closely into the facts underlying the proposed waiver.11 Also, tort immunities may not always apply. They are virtually never to be had if death, injury, or damages result from conduct other than willful conduct, gross negligence, wanton disregard, or bad faith on the part of government employees or entities.12

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REFERENCES

1. See generally Lerner at 335.
2. See, e.g., IND. CODE § 34-13-3-3 (2004), which includes a long list of actions for which government and its employees are immune.
3. See, e.g., IND. CODE § 34-13-3-3 (2004), which requires that actions must be within the scope of employment if they are to be protected.
5. See, e.g., IND. CODE § 10-14-3-15(a) (2004).
10. Alleged negligent actions and omissions included: (1) attempting to restore electrical power before an electrical inspection had been conducted, in violation of code and policy; (2) turning off the sprinkler system without posting personnel with two-way radios at the sprinkler valves, in contravention of a specific regulation; (3) opening the large bay doors before the fire was declared out, despite wind velocities of 21 mph; (4) failing to “overhaul” any of the upper level racks even though they had been subjected to intense heat; and (5) departing the scene “under these conditions” within six minutes after declaring the fire out, without leaving adequate personnel and equipment for a fire watch. Id. at 569.
11. Caillouette v. Hercules, Inc., 827 P.2d 1306, 1311-13 (N.M. App. 1992). The New Mexico Department of Public Safety was found not to have waived immunity on the facts of the case in a wrongful death action arising from a HAZMAT cleanup incident.