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62706

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FILE NO. S-891

STATE MATTERS:

**Liability of State For
Contracts and Torts of
Area Agencies on Aging**

Kenneth Holland, Director
Department on Aging
2401 West Jefferson Street
Springfield, Illinois 62762

Dear Mr. Holland:

This responds to the request of your predecessor for an opinion on certain matters pertaining to area agencies on aging. Area agencies on aging administer certain programs of the Department on Aging and, except for the City of Chicago, such agencies are either not-for-profit corporations or affiliates of such corporations. I understand that such area agencies were established for purposes of participating in Federal grants under the Older Americans Act of 1965, as amended. (42 U.S.C. 3001 et seq.) Section 304 of that Act

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(42 U.S.C. 3024) provides in relevant part as follows:

"(a) In order for a State to be eligible to participate in the programs of grants to States from allotments under section 3023 and section 3026 of this title —

(1) the State shall, in accordance with regulations of the Commissioner, designate a State agency as the sole State agency (hereinafter in this subchapter referred to as 'the State agency') to: (A) develop the State plan * * * and (E) divide the entire State into distinct areas (hereinafter in this subchapter referred to as 'planning and service areas') * * *

(2) the State agency designated pursuant to paragraph (1) shall —

(A) determine for which planning and service areas an area plan will be developed, in accordance with subsection (c) of this section, and for each such area designate, after consideration of the views offered by the unit or units of general purpose local government in such area, a public or nonprofit private agency or organization as the area agency on aging for such area; and

* * *

(b) An area agency on aging designated under subsection (a) of this section must be —

(1) an established office of aging which is operating within a planning and service area designated pursuant to subsection (a) of this section, or

(2) any office or agency of a unit of general purpose local government, which is designated for this purpose by the chief elected official

or officials of such unit, or

(3) any office or agency designated by the chief elected official or officials of a combination of units of general purpose local government to act on behalf of such combination for this purpose, or

(4) any public or nonprofit private agency in a planning and service area which is under the supervision or direction for this purpose of the designated State agency and which can engage in the planning or provision of a broad range of social services within such planning and service area,

and must provide assurance, found adequate by the State agency, that it will have the ability to develop an area plan and to carry out, directly or through contractual or other arrangements, a program pursuant to the plan within the planning and service area. In designating an area agency on aging, the State agency shall give preference to an established office on aging, unless the State agency finds that no such office within the planning and service area will have the capacity to carry out the area plan.

* * *

Your first question is:

"(a) Whether and in what circumstances the State is liable for the contracts and intentional or nonintentional torts of such agencies and their employees arising from their functions in carrying out state and federal programs administered by the Department?"

The State of Illinois, except as provided by "AN ACT to create the Court of Claims, etc." (Ill. Rev. Stat. 1973,

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ch. 37, pars. 439.1 et seq.), may not be made a defendant or party in any court. (Ill. Rev. Stat. 1973, ch. 127, par. 801.) The State then is liable for the torts and contracts of these agencies, if it is liable at all, only as provided by "AN ACT to create the Court of Claims, etc.", supra. Under section 8 of "AN ACT to create the Court of Claims, etc." (Ill. Rev. Stat. 1973, ch. 37, par. 439.8), the liability of the State in a case sounding in tort shall not exceed \$100,000 to or for the benefit of any claimant. There is no limit on the liability on a contract claim.

The State is not liable for the contracts or torts of independent contractors. (Siekman v. State, 10 Ill. Ct. Cl. 286.) Thus, whether the State could be liable in the Court of Claims depends on whether area agencies on the aging are independent contractors or State agencies.

In my previous opinion No. NP-870, issued February 4, 1975, I was of the opinion that a director of an area agency was not a public officer. (A copy of that opinion is enclosed.) This was based in part on the facts that the agencies are not delegated any statutory powers conferred upon the Illinois Department on Aging; that it is not a statutorily created

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governmental unit; and that it is not a body politic. From this it follows that it is not a State agency.

Although area agencies receive money from the State to implement certain State approved programs, this does not make them State agencies. In Kentucky Region Eight v. Commonwealth, 507 S.W. 2d 489, the Court of Appeals of Kentucky stated that the mere fact that corporations receive and administer grants of State funds does not mean that they are State agencies. This case concerned nonprofit corporations organized in various areas of Kentucky to assist in accordance with Kentucky statutes in administering mental health programs and clinics. Such corporations are similar to area agencies on aging.

Because area agencies are not official State agencies, there is at least a presumption that they are independent contractors. (As recipients of grants of public funds, however, they are subject to some requirements similar to governmental agencies. See, for instance, 45 C.F.R. 903.68.) Whether they are independent contractors is ultimately a question of fact and depends on a number of considerations, one of which is the extent of control and supervision that the State would have over an area agency in carrying out its contract.

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From the Federal Act, the regulations promulgated by the Department of Health, Education and Welfare under that Act (45 C.F.R. 900) and the representative contract you have provided, I am of the opinion that in most situations the area agencies on aging are, in fact, independent contractors. Under the regulations and the contract the role of the Department on Aging is limited generally to the approval of a plan, the monitoring and assessing of the implementation and evaluation of the results. I note, however, in some cases the Department on Aging will provide technical assistance. If such assistance is performed in a negligent manner, the State could be liable. This again would depend on the facts.

Your next three questions are as follows:

"(b) Whether and in what circumstances the not-for-profit corporations are liable for the intentional or nonintentional torts of such agencies and their employees arising from their functions in carrying out state and federal programs administered by the Department?

(c) Whether and in what circumstances the directors of the not-for-profit corporations are personally liable for torts of such agencies and their employees arising from their functions in carrying out state and federal programs administered?

(d) Whether and in what circumstances the paid executive of such not-for-profit corporations are personally liable for torts of such agencies

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and their other employees arising from their functions in carrying out state and federal programs administered?"

These questions are primarily the concern of the agencies and only indirectly concern the State. As I have no authority to advise private individuals or corporations, I will advise on these questions in only the most general terms, which should be sufficient for your purposes. If not, and you have a specific factual situation upon which you desire an opinion, I will advise you further.

In general, not-for-profit corporations are not immune from suit. (Darling v. Charleston Hospital, 33 Ill. 2d 327.) They are liable for torts to the same extent as any corporation. Corporations are liable for nonintentional torts of their agents and employees committed during the course of their employment while acting in the scope of their authority. This is so even though the corporation did not authorize, justify or participate in the wrong or have any knowledge thereof. (I.L.P. Agency, §181.) A corporation is liable for intentional torts of an agent or employee acting under the authority or direction of the corporation. However, when the

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agent or employee abandons the business or employment of the corporation and commits an act outside the scope of his authority or employment in a wanton, willful or malicious manner, the corporation is not liable. I.L.P. Agency, §183.

The liability of a director or paid executive of a not-for-profit corporation is summarized in I.L.P. Corporations, §352 as follows:

"A director, officer, or agent of a corporation is liable in damages for injuries suffered by third persons because of his torts, regardless of whether he acted on his own account or on behalf of the corporation and regardless of whether or not the corporation is also liable.

The mere fact, however, that a person is an officer, director, or agent of a corporation does not render him liable for the torts of a corporation or of other officers, directors, or agents, but he must be so connected with the tortious act that he would be personally liable for his willful act or negligent conduct without regard to the liability of the corporation. Therefore, in order to render an officer, director, or agent liable for the torts of the corporation or of other officers, directors, or agents he must have participated in the wrongful act, authorized or directed it, or had such knowledge as to give rise to liability.

Thus a director is not personally liable for the acts or omissions of officers or agents of a corporation, other than codirectors, unless such director participated in the wrong or failed to exercise ordinary and reasonable supervision or ordinary care in the selection of the subordinate officer."

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I understand one of the reasons you are requesting my advice is to determine whether you should require an area agency on aging to obtain liability insurance as a condition of receiving a grant. This is a policy determination for your office. The expenditure of Federal grant money for insurance purposes is to some extent controlled by Federal regulation. See in particular Appendix F, section G-17 of Part 74, Title 45 of the Code of Federal Regulations.

Very truly yours,

A T T O R N E Y G E N E R A L