

## **PUBLIC SERVICE, PRIVATE ENTITY: SHOULD THE NATURE OF THE SERVICE OR ENTITY BE CONTROLLING ON ISSUES OF SOVEREIGN IMMUNITY?**

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### INTRODUCTION

Sovereign immunity is one of the basic tenets of American legal theory.<sup>1</sup> Justification for the doctrine lies in the balancing of public needs: governments provide vital services to citizens, and the public benefit of having these services outweighs citizens' interests in unlimited accountability arising from their delivery.<sup>2</sup> When the cost of exposure to unlimited liability outweighs the benefits of accountability, the government's ability to continue public services is placed in jeopardy. Sovereign immunity serves to protect the public by ensuring the continued availability of essential public services.

Modern local governments are increasingly outsourcing to private firms for public service provision.<sup>3</sup> Privatization is used as a solution where government programs are failing<sup>4</sup> because private firms offer flexibility in program operation and management and are more adept at responding to changing circumstances than governmental entities.<sup>5</sup> Governments also benefit from private partnerships by way of the resulting resources and personnel that become available for other uses.<sup>6</sup>

Privatization and its resulting benefits can be encouraged by extending sovereign immunity to private entities providing public services. The principal justification for sovereign immunity applies equally to

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<sup>1</sup> See generally *Peavler v. Bd. of Comm'rs*, 528 N.E.2d 40, 41 (Ind. 1988) (describing the doctrine's roots in the common law of the English monarchy and early acceptance in the United States by the Supreme Court).

<sup>2</sup> See *infra* Part II.B.

<sup>3</sup> See *infra* note 129 and accompanying text.

<sup>4</sup> See *infra* note 130 and accompanying text.

<sup>5</sup> See *infra* note 131 and accompanying text.

<sup>6</sup> See *infra* note 136 and accompanying text.

private entities: the public's interest in the continued delivery of essential services far outweighs their interest in redressibility. This Note proposes that the controlling factor in the realm of sovereign immunity should be the nature of the service provided. In privatization, modern governments are finding new solutions to problems that have hindered effective public service delivery. Immunity would encourage the beneficial trend towards privatization.

This Note focuses specifically on emergency medical services to illustrate these concepts. Because emergency medical service is a vital part of any infrastructure,<sup>7</sup> the public interest served—the protection of citizens' health and welfare—makes continued and improved delivery of utmost importance. Part I discusses the doctrine of sovereign immunity and the public policy behind it. Part II examines the various methods private entities currently employ to gain immunity under individual state statutes, and is divided into sub-parts based on the type of immunity statute a particular state employs. Finally, Part III explores the policy justifications that favor extending sovereign immunity to private emergency medical service providers, and proposes state legislative action to implement private entity immunity where public services are involved.

## I. SOVEREIGN IMMUNITY AND ITS POLICY JUSTIFICATIONS

### A. *Sovereign Immunity Generally*

Sovereign immunity is:

A judicial doctrine which precludes bringing suit against the government without its consent. Founded on the ancient principle that “the King can do no wrong,” it bars holding the government or its political subdivisions liable for the torts of its officers or agents unless such immunity is expressly waived by statute. . . .<sup>8</sup>

Sovereign immunity “has deep-seated historical bases and is a well established concept.”<sup>9</sup> The doctrine is statutorily based in a majority of

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<sup>7</sup> See *infra* note 136.

<sup>8</sup> BLACK'S LAW DICTIONARY 1396 (6th ed. 1990) (citing *Md. Port Admin. v. I.T.O Corp. of Baltimore*, 395 A.2d 145, 149 (Md. Ct. Spec. App. 1978)).

<sup>9</sup> COMM. ON THE OFFICE OF ATTORNEY GEN., NAT'L ASS'N OF ATTORNEYS GEN., SOVEREIGN IMMUNITY: THE LIABILITY OF GOVERNMENT AND ITS OFFICIALS 5 (1976); see also *Hans v. Louisiana*, 134 U.S. 1, 12–13 (1890); *Hill v. United States*, 50 U.S. (9 How.) 386, 389 (1850) (pronouncing the doctrine as “universally assented to” and stating that “[n]o maxim is thought to be better established”); *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 444 (1834); *Peavler v. Bd. of Comm'rs*, 528 N.E.2d 40, 41 (Ind. 1988) (“Early in the country's history, the U.S. Supreme Court noted that no suit may be commenced against the United States without its

states<sup>10</sup> and constitutionally based in the minority.<sup>11</sup> The distinction determines which branch of government retains control over immunity, and thus governs its scope.<sup>12</sup> Immunity may only be altered, limited, or abolished by the branch of government in control of such issues.<sup>13</sup>

Sovereign immunity applies to the state itself in addition to its agencies, employees, and officers.<sup>14</sup> Courts examine several factors to determine whether a specific entity or person is included within the reach of sovereign immunity.<sup>15</sup> Governmental immunity is derived from

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consent.”) (citation omitted); RESTATEMENT (SECOND) OF TORTS § 895B, cmt. a (1979) (“The sovereign immunity of the British crown . . . carried over to the several American states . . .”).

<sup>10</sup> See, e.g., COLO. REV. STAT § 24-10-106 (2003); KAN. STAT. ANN. § 75-6109 (1997); ME. REV. STAT. ANN. tit. 14, § 8103 (West 2003); MICH. COMP. LAWS § 691.1401 (2001); MO. ANN. STAT. § 537.600 (West 2000); N.H. REV. STAT. ANN. § 29-A:1. (2001); N.J. STAT. ANN. § 59:1-2 (West 1992); N.M. STAT. ANN. § 41-4-4 (Michie 2003); OH. REV. CODE ANN. § 2744.02 (West 2002); PA. STAT. ANN. tit. 1 § 2310 (West 1995); S.C. CODE ANN. § 15-78-60 (Law. Co-op. 2003); TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1997); UTAH CODE ANN. § 63-30-3 (1997); WYO. STAT. ANN. § 1-39-104 (Michie 2003).

<sup>11</sup> See, e.g., FL. CONST. art. X, § 13; KY. CONST. § 231; MT. CONST. art. II, § 18; W. VA. CONST. art. VI, § 35.

<sup>12</sup> 1 CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENT § 1:5 (2003).

<sup>13</sup> “Most states have also waived immunity in various degrees at both the state and local government levels.” BLACK’S LAW DICTIONARY 1396; see also *Ohio Valley Contractors v. Bd. of Educ.*, 293 S.E.2d 437, 441 n.5 (W. Va. 1982) (listing cases which “reflect judicial opinions significantly altering governmental immunities for local political subdivisions or entities”) (citations omitted). But see RESTATEMENT (SECOND) OF TORTS § 895B, cmt. b (noting legislative “eliminati[on] or modif[ication] [of] the general tort immunity” as a response to judicial abolition of the doctrine); NAT’L ASS’N OF ATTORNEYS GEN., *supra* note 9, at 99 (“In almost all instances in which a state court has abolished immunity, the state legislature has either completely reinstated it or limited the liability statutorily.”).

<sup>14</sup> See RESTATEMENT (SECOND) OF TORTS § 895B(1) (“A State and its governmental agencies are not subject to suit without the consent of the State.”); see also *Bd. of Educ. v. Mayor of Riverdale*, 578 A.2d 207, 210 (Md. 1990) (“The reason for this is that State agencies exist merely as the State’s ‘hands or instruments to execute [the State’s] will . . . .’” (quoting *City of Baltimore v. State*, 195 A.571 (Md. 1937))); *Ohio Valley Contractors*, 293 S.E.2d at 438 (“[t]he state and its agencies performing state functions statewide are entitled to this absolute immunity”) (citations omitted).

<sup>15</sup> See *Rucker v. Harford County*, 558 A.2d 399, 403–04 (Md. 1989) (noting that the primary factor for determining whether an agency is one of the state is whether state has control over the entity or person); *Ohio Valley Contractors*, 293 S.E.2d at 438 (“Factors to consider are whether the body functions statewide, whether it does the State’s work, whether it was created by an act of the Legislature, whether it is subject to local control, and its financial dependence of State coffers.”) (internal citations omitted); 1 CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENT § 1:13; see also *Ky. Ctr. for the Arts v. Berns*, 801 S.W.2d 327, 331 (Ky. 1991) (employing “a two-pronged test, the first consisting of the ‘direction and control of the central State government,’ and the second consisting of being ‘supported by monies which are disbursed by authority of the Commissioner of Finance out of the State treasury.’”) (quoting *Gnau v. Louisville & Jefferson County Metro. Sewer Dist.*, 346 S.W.2d 754, 755 (Ky. Ct. App. 1961)); *Kettner v. Wausau Ins. Co.*, 530 N.W.2d 399, 403 (Wis. Ct. App. 1995) (stating that the protections offered by the state sovereign immunity statute “apply to those agents who act under a master-servant relationship with the government”) (citations omitted).

sovereign immunity and applies to municipalities, political subdivisions, counties, and agents of the state.<sup>16</sup>

Some states apply the governmental/proprietary function distinction in determining whether governmental immunity applies in a specific instance.<sup>17</sup> Immunity will only apply in jurisdictions following this rule when the court determines a governmental function is at issue. Some courts apply the discretionary/ministerial act distinction.<sup>18</sup> Further, many jurisdictions abandoned these tests because “[t]he classification of functions as governmental or proprietary was elusive and uncertain and often led to inconsistent results.”<sup>19</sup>

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<sup>16</sup> 1 CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENT § 1:1 (“While the governmental immunity of counties and municipal corporations is derived from the state’s immunity, it is narrower in scope than sovereign immunity.”); *see also* *Mayor of Riverdale*, 578 A.2d at 210 (“While the governmental immunity of counties and municipalities is much narrower than the immunity of the State, nevertheless the immunity of counties and municipalities is derived from the State’s sovereign immunity.”) (citations omitted). Some states have extended this type of immunity specifically by statute to emergency medical service providers. These statutes will be discussed *infra* Part II.

<sup>17</sup> *See* NAT’L ASS’N OF ATTORNEYS GEN., *supra* note 9, at 4; CHARLES S. RHYNE ET AL., TORT LIABILITY AND IMMUNITY OF MUNICIPAL OFFICIALS 15–18 (1976). The distinction can be described as follows:

The common-law governmental-proprietary distinction was derived from the dual nature of municipal corporations. On one hand, a municipality is a corporate body, capable of performing the same proprietary functions as any private corporation and liable for its torts in the same manner and to the same extent as well. On the other hand, a municipality is an arm of the state, and when acting in the governmental or public capacity, it shares the sovereign immunity traditionally accorded to the state.

1 CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENT § 2:1.

<sup>18</sup> This distinction affords immunity only to those officials who exercise discretion in carrying out their duties and denies immunity to officials carrying out routine or ministerial tasks. *See* *Kari v. City of Maplewood*, 582 N.W.2d 921, 923 (Minn. 1998) (“A discretionary act requires the exercise of individual judgment in carrying out the official’s duties. In contrast, a ministerial act is ‘absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts.’”) (citations omitted); NAT’L ASS’N OF ATTORNEYS GEN., *supra* note 9, at 25; RHYNE ET AL., *supra* note 17, at 15–18.

<sup>19</sup> *Peavler v. Bd. of Comm’rs*, 528 N.E.2d 40, 42 (Ind. 1988); *see* *Austin v. Mayor of Baltimore*, 405 A.2d 255, 259–60 (Md. 1979) (upholding the test based on *stare decisis*, but acknowledging its difficulties). “The majority today concedes that the line between governmental and proprietary functions is often difficult to define and is sometimes illusory in practice.” *Id.* at 273 (Cole, J., dissenting) (citation omitted); *Ohio Valley Contractors*, 293 S.E.2d at 440 (noting the “inherent uncertainty and incomprehensibility of predictable results attendant to the . . . distinction”) (citations omitted); *see also* 1 CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENT § 2:1 (“The distinction between governmental and proprietary functions was often unclear. As the Supreme Court observed, the distinction between a municipality’s governmental and proprietary functions is better characterized not as a line but as a succession of points.”); NAT’L ASS’N OF ATTORNEYS GEN., *supra* note 9 at 25; RHYNE ET AL., *supra* note 17, at 15–19.

*B. Policy Justifications Supporting Sovereign Immunity*

Several policy considerations have traditionally been advanced in support of sovereign immunity.<sup>20</sup> One of the most frequent rationales for the doctrine is that it protects state resources from depletion due to the need to satisfy judgments and defend against suits.<sup>21</sup> Another policy justification is “the need for the orderly administration of the government, which, in the absence of immunity, would be disrupted if the state could be sued at the instance of every citizen.”<sup>22</sup> A third justification is based on the notion that “the general public . . . would reap all the benefits from vigorous and effective performance of duty by the public official.”<sup>23</sup> The concept underlying the third justification is that public officials faced with the potential of liability stemming from the performance of their duties might refrain from acting, thus compromising the effective delivery of public services.<sup>24</sup>

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<sup>20</sup> The contention that the policy goals served by sovereign immunity generally support the extension of immunity to private entities providing emergency medical service is discussed *infra* Part III.

<sup>21</sup> See *Berek v. Metro. Dade County*, 396 So. 2d 756, 758 (Fla. Dist. Ct. App. 1981) (offering “the protection of the public against profligate encroachments on the public treasury” as a justification for sovereign immunity); *Peavler*, 528 N.E.2d at 41 (advancing as a justification “a reluctance to divert public funds to compensate for private injuries”); *Brown v. Wichita State Univ.*, 547 P.2d 1015, 1027 (Kan. 1976) (stating that sovereign immunity is supported by “the necessity to protect the state treasury”); *Messina v. Burden*, 321 S.E.2d 657, 660 (Va. 1984) (“[T]he doctrine of sovereign immunity serves a multitude of purposes including but not limited to protecting the public purse . . . .”); *Kettner v. Wasau Ins. Co.*, 530 N.W.2d 399, 403 (Wis. Ct. App. 1995) (stating that “[t]he purpose of [the sovereign immunity] statute is to protect the government and taxpayers from excessive claims by limiting the government’s exposure to potential liability”); see also NAT’L ASS’N OF ATTORNEYS GEN., *supra* note 9, at 6 (noting that a typical policy justification for governmental immunity is the “need to prevent the diversion of public funds to compensate for private purposes”).

<sup>22</sup> *Berek*, 396 So. 2d at 758 (citation omitted); see *Brown*, 547 P.2d at 1027 (noting that the burden of defending suits would “inhibit the administration of traditional state activities”); *Bd. of Educ. v. Mayor of Riverdale*, 578 A.2d 207, 211 (Md. 1990) (noting that governmental immunity “prevents any burdensome interference with the State’s governmental functions”); *Messina*, 321 S.E.2d at 660 (“[T]he doctrine of sovereign immunity . . . provid[es] for smooth operation of government”); see also NAT’L ASS’N OF ATTORNEYS GEN., *supra* note 9, at 6.

<sup>23</sup> RHYNE ET AL., *supra* note 17, at 12.

<sup>24</sup> See *Kari v. City of Maplewood*, 582 N.W.2d 921, 925 (Minn. 1998) (holding that paramedics were entitled to official immunity because the absence of immunity might produce “a chilling effect on the discretion to be exercised” by such persons); *Messina*, 321 S.E.2d at 660 (advancing that sovereign immunity “eliminat[es] public inconvenience and danger that might spring from officials being fearful to act”); RHYNE ET AL., *supra* note 17, at 8; see also *Peavler*, 528 N.E.2d at 44 (“Governmental immunity . . . avoids inhibiting the effective and efficient performance of governmental duties.”); *Brown*, 547 P.2d at 1028 (noting that the imposition of liability on governmental agencies that routinely provide services that most private companies decline to offer due to the high risk involved “might become extremely burdensome to the taxpayers”).

## II. SURVEY OF STATE STATUTES UNDER WHICH PRIVATE EMERGENCY MEDICAL SERVICE PROVIDERS MAY CURRENTLY ENJOY IMMUNITY

The analysis below illustrates the types of immunity statutes that may benefit private emergency medical service providers. In most states, private entities will not benefit from express statutes, but may be able to gain immunity under either general sovereign or express emergency medical service immunity provisions.<sup>25</sup> Statutes authorizing governmental entities to contract with private entities for the provision of emergency medical services often provide the conduit through which general sovereign or governmental immunity statutes become applicable to private corporations.<sup>26</sup>

The definitions provided in various immunity statutes play an important role in this analysis and are examined closely. The states discussed below are organized into five categories: (1) those with statutes under which individual emergency medical technicians may be offered immunity; (2) those with statutes under which private entities may be offered immunity; (3) those with statutes under which both individual technicians and the private entities employing them may be entitled to immunity; (4) those that have not addressed the issue squarely, but where statutes and case law provide nominal support for private entity immunity; and (5) those with potentially applicable notice and/or damage-cap provisions.

### A. States With Statutes Immunizing Individual Technicians

In Massachusetts, emergency medical technicians enjoy personal immunity for liability arising from the good faith performance of job duties.<sup>27</sup> This provision applies to rendering emergency medical services, as well as transportation to a hospital or other safe place.<sup>28</sup> Additionally, individual technicians are not liable to a hospital to which they deliver a patient if the patient is admitted.<sup>29</sup> This statute is to be applied narrowly and is unlikely to provide any further protections than those enumerated therein.<sup>30</sup>

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<sup>25</sup> Carrie Ovey Wiggins, Note, *Ambulance Malpractice and Immunity: Can a Plaintiff Ever Prevail?*, 24 J. LEGAL MED. 359, 367 (2003).

<sup>26</sup> See *infra* notes 60–61 and accompanying text.

<sup>27</sup> See MASS. ANN. LAWS ch. 111C § 21 (Law. Co-op. 2004).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See *Musto v. Cataldo Ambulance Serv.*, Civ. A. No. 93-7071-E, 1995 WL 389944, at \*2 (Super. Ct. Mass. Feb. 28, 1995) (denying liability of a technician who provided services “during a non-emergency routine transfer”).

Mississippi immunizes certified technicians from liability arising from the provision of emergency medical care to a person in need.<sup>31</sup> The statute requires that the care be rendered “in good faith and in the exercise of reasonable care” and applies to care given at the scene of an emergency or while in transit to a medical facility.<sup>32</sup> The statute also applies to omissions made in good faith while using reasonable care.<sup>33</sup> While this statute would presumably provide protection to private emergency medical personnel, there is no indication that its protections would extend to the employer of an emergency medical technician or paramedic.<sup>34</sup>

Montana offers limited immunity to emergency medical technicians for “failure to obtain consent in performing acts . . . where the patient is unable to give consent and there is no other person present legally authorized to consent, provided that such acts are in good faith and without knowledge of facts negating consent.”<sup>35</sup>

Individual emergency medical technicians and paramedics in Ohio are immunized from losses arising from the provision of medical care, absent willful or wanton misconduct.<sup>36</sup> The officers and employees of private entities that have contracted with a political subdivision are immune from liability arising from the negligence of an emergency medical technician or paramedic, absent willful or wanton misconduct.<sup>37</sup> There is no indication that this immunity extends to private entities themselves.<sup>38</sup>

While the immunity in the above states is statutorily granted to individual emergency medical technicians, a private entity employing technicians may successfully argue that no vicarious liability can attach where the employee is individually immune.<sup>39</sup> In Louisiana, this defense was held to be available to private ambulance companies when the liability

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<sup>31</sup> MISS. CODE ANN. § 73-25-37 (Supp. 2003).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* § 73-25-37(2)(c).

<sup>34</sup> *See Willard v. Mayor of Vicksburg*, 571 So. 2d. 972, 975 (Miss. 1990). The court denied summary judgment to the ambulance operator, but refused to interpret § 73-25-37, deciding the case on other grounds. *Id.* The court “invite[d] the legislature to review and amend [the provision] to include a pre-existing duty exception. Those who have a pre-existing duty to render aid should not be allowed to hide behind the cloak of the Good Samaritan Statute.” *Id.*

<sup>35</sup> MONT. CODE ANN. § 50-6-206 (2003).

<sup>36</sup> OHIO REV. CODE ANN. § 4765.49(A) (Anderson 2003).

<sup>37</sup> *Id.* § 4765.49(B).

<sup>38</sup> *But see infra* Part II.B for discussion of another Ohio statute. One scholar has studied the two sources of immunity potentially available to emergency medical service and technicians in Ohio and has concluded that because each provision enumerates a different standard of care, conflict is bound to arise in a litigation context. Wiggins, *supra* note 25, at 369–70.

<sup>39</sup> Wiggins, *supra* note 25, at 369.

of the private ambulance service is vicarious, stemming solely from the liability of its personnel.<sup>40</sup>

Louisiana statutorily affords immunity to certified emergency medical personnel from liability arising from the rendering of emergency medical care to an individual “while in the performance of . . . medical duties and following the instructions of a physician.”<sup>41</sup> This immunity also extends to “public agencies engaged in rendering emergency medical services.”<sup>42</sup>

Pursuant to the Political Subdivisions Tort Claim Act,<sup>43</sup> Nebraska adopts governmental immunity with certain statutory exceptions.<sup>44</sup> The state also grants exemption from tort liability to “out-of-hospital emergency care provider[s]” for emergency medical services rendered in good faith.<sup>45</sup> The immunity does not apply if the liability arises in connection with the operation of a motor vehicle while under the influence of drugs or alcohol.<sup>46</sup> The statute is further restricted when the liability results from gross negligence or willful or wanton misconduct.<sup>47</sup> Recent decisions by the Nebraska Supreme Court have followed the *Kyser* court’s reasoning and declined to impute liability to the employer where the individual employee was immune by statute.<sup>48</sup>

#### B. States With Statutes Immunizing Entities Only

Governmental entities in the state of Maine are generally immune from liability pursuant to statutory provision.<sup>49</sup> Governmental entities<sup>50</sup>

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<sup>40</sup> *Kyser v. Metro Ambulance Inc.*, 764 So. 2d 215, 219 (La. Ct. App. 2000). *See also* Wiggins, *supra* note 25, at 369 (discussing *Kyser* and noting that “[i]f other states applied this court’s reasoning, then all ambulance services in states with codified immunity statutes would be eligible, irrespective of whether they were governmentally or privately owned”).

<sup>41</sup> LA. REV. STAT. ANN. § 40:1233(A)(1) (West 2001).

<sup>42</sup> *Id.* § 40:1233(A)(2).

<sup>43</sup> NEB. REV. STAT. §§ 13-901–13-926 (1997).

<sup>44</sup> *Id.* § 13-902.

<sup>45</sup> *Id.* § 71-5194(1).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *See Hatcher v. Bellevue Volunteer Fire Dep’t.*, 628 N.W.2d 685, 695 (Neb. 2001) (rejecting the claim that a volunteer fire department which provided emergency medical services remained liable even though the individual firefighters were immune under a specific statutory provision); *Drake v. Drake*, 618 N.W.2d 650, 661–62 (Neb. 2000) (reaffirming “that the immunity conferred upon ambulance attendants by [§ 71-5194] also immunizes the city or other entity with whom those individuals might be in an agency relationship” and declining to impute vicarious liability on a fire company based on the negligence of an employee); *see also Wicker v. City of Ord*, 447 N.W.2d 628, 633 (Neb. 1989) (stating that “when a public employee has been found to be immune from liability, this court has generally held that such immunity extends to the political subdivision”).

<sup>49</sup> ME. REV. STAT. ANN. tit. 14 § 8103(1) (West 2003).

<sup>50</sup> *Id.* § 8104-B(3).

and their employees<sup>51</sup> are immune from liability stemming from the exercise of discretionary functions.<sup>52</sup> A “governmental entity” includes the state and its political subdivisions<sup>53</sup> and any emergency medical service acting within its scope of authority.<sup>54</sup> Thus, if a private provider fits the statutory definition and can show that it was exercising a discretionary function, it will enjoy immunity.<sup>55</sup>

Ohio employs the governmental act distinction in affording immunity to political subdivisions and their employees.<sup>56</sup> A “governmental function” is defined to include “police, fire, emergency medical, ambulance, and rescue services or protection.”<sup>57</sup> “Political subdivision” is defined to include entities “responsible for governmental activities in a geographic area smaller than that of the state.”<sup>58</sup> Another provision authorizes governmental entities to contract with private fire or emergency medical service companies for the provision of services.<sup>59</sup> Emergency medical service is deemed a governmental function by statute, and political subdivisions entitled to immunity include entities responsible for such functions.<sup>60</sup> Therefore, a private entity providing emergency medical service should be entitled to immunity under these provisions.

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<sup>51</sup> *Id.* § 8111(1)(c).

<sup>52</sup> *Roberts v. Maine*, 731 A.2d 855, 857 (Me. 1999). The Maine courts use a four-factor test to determine if a function is discretionary. To pass the test, the challenged conduct must be “essential to the realization or accomplishment” of a “basic governmental policy, program or objective.” *Id.* Under this reasoning, a successful argument could be mounted in favor of extending immunity to private emergency medical service providers because such services are essential to the accomplishment of a basic governmental policy, namely, citizen health protection.

<sup>53</sup> ME. REV. STAT. ANN. tit. 14 § 8102(2), *amended by* Act of June 23, 3003, 2003 Me. Laws 489.

<sup>54</sup> *Id.* tit. 14 § 8102(1-A). “Emergency medical service” is defined by the statute as “a nonprofit, incorporated ambulance service . . . receiving full or partial financial support from or officially recognized by the State, a municipality or county . . . except when the emergency medical service is acting outside the scope of activities expressly authorized by the State, municipality, [or] county.” *Id.*

<sup>55</sup> *See supra* note 52 and accompanying text.

<sup>56</sup> OHIO REV. CODE ANN. § 2744.02(A)(1) (Anderson 2003) (providing that political subdivisions are immune from liability arising from the performance of a governmental function by the subdivision or an employee); *see also supra* notes 17, 18 and accompanying text (indicating that proprietary functions form an exception to immunity).

<sup>57</sup> OHIO REV. CODE ANN. § 2744.01(C)(2)(a).

<sup>58</sup> *Id.* § 2744.01(F).

<sup>59</sup> *Id.* § 9.60(C).

<sup>60</sup> *See Wiggins, supra* note 25, at 370.

*C. States With Statutes Immunizing Private Entities and Their Employees*

In Arizona, private ambulance companies whose services are procured by a city, town or proprietor are not liable in tort absent a finding of gross negligence or intentional misconduct.<sup>61</sup> The immunity extends to individual emergency medical technicians, but not while operating a motor vehicle.<sup>62</sup>

An Illinois statute provides immunity from liability for those who, in the course of employment duties, provide medical services of an emergency or non-emergency nature in good faith and absent willful and wanton misconduct.<sup>63</sup> The same provision protects persons, "including any private or governmental organization or institution that administers, sponsors, authorizes, supports, finances, educates or supervises the functions of emergency medical services personnel" from liability "for any act or omission in connection with administration, sponsorship, authorization, support, finance, education or supervision of such emergency medical services personnel, where the act or omission occurs in connection with activities within the scope of this [provision]."<sup>64</sup> Consequently, private entities and their employees are immune under the statute for liability arising from the provision of emergency medical care.<sup>65</sup>

Michigan offers immunity to, among other medical personnel, emergency medical technicians providing care outside of a hospital, for acts or omissions not amounting to gross negligence or willful misconduct.<sup>66</sup> The immunity specifically extends to "life support agenc[ies]" and their employees.<sup>67</sup> A life support agency is defined as "an ambulance operation . . . or medical first response service."<sup>68</sup> Thus, private

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<sup>61</sup> ARIZ. REV. STAT. ANN. § 9-500.02(A) (West 1996).

<sup>62</sup> *Id.*

<sup>63</sup> 210 ILL. COMP. STAT. ANN. 50/3.150(a) (West 2000).

<sup>64</sup> *Id.*

<sup>65</sup> See *Collins v. Superior Air-Ground Ambulance Serv., Inc.*, No. 1-01-4386, 2003 Ill. App. LEXIS 526 (Ill. App. Ct. April 29, 2003). In *Collins*, the court did not address the merits of defendant ambulance service's affirmative defense of immunity under § 50/3.150(a), but did set out four factual questions that would have to be resolved for the statute to apply. First, the court stated that defendant had the burden of proving it acted in good faith. Second, whether defendant was "an authorized agency entitled to immunity under the EMS Act" needed to be determined. *Id.* at \*44. Third, the defendant had to show it did in fact render medical services, and fourth, plaintiff was "entitled to . . . the opportunity to discover facts which could establish whether [defendant's] acts in transporting [plaintiff] were wilful [sic] and wanton." *Id.*; see also *Washington v. City of Evanston*, 782 N.E.2d 847, 856 (Ill. App. Ct. 2002) (holding that § 50/3.150(b) granted immunity to defendant hospital as "coordinat[or], monitor[or] and supervis[or] [of] the regional EMS system").

<sup>66</sup> MICH. COMP. LAWS § 333.20965(1) (2004).

<sup>67</sup> *Id.* § 333.20965(1)(d).

<sup>68</sup> *Id.* § 333.20906(1).

entities and their employees are statutorily immunized from liability resulting from patient care rendered outside of a hospital.

A Rhode Island statute provides immunity to licensed emergency medical service providers for liability arising “in connection with services rendered outside a hospital,” provided that the care was within the scope of the person’s training, absent gross negligence or willful and wanton misconduct.<sup>69</sup> The same statute provides similar immunity to an “agency, organization, institution, [or] corporation . . . that sponsors, authorizes, supports, finances, or supervises the functions of emergency medical services personnel.”<sup>70</sup> A “principal, agent, contractor, employee, or representative” of one of the above enumerated entities is also afforded immunity pursuant to this provision.<sup>71</sup> Thus, by its terms, this provision provides immunity to private entities and their employees. Private ambulance services that are solely used to transport patients in non-emergency situations are exempted, however.<sup>72</sup> Where a private ambulance service is engaged in transporting patients in both emergency and non-emergency situations, one court has held that “a functional approach” is to be used in determining whether immunity applies.<sup>73</sup>

*D. States Where Private Entity Immunity for Emergency Medical Service Providers Remains an Open Issue*

By statute, New Mexico grants immunity from tort liability to a “governmental entity” and “any public employee” for virtually all torts.<sup>74</sup> Pursuant to the statute a governmental entity must provide a defense for and pay any judgment entered against a public employee for a tort committed within the scope of the employment.<sup>75</sup> A “governmental entity” is defined as “the state or any local public body.”<sup>76</sup> A “local public body” means “all political subdivisions of the state and their agencies, instrumentalities and institutions.”<sup>77</sup> “State” or “state agency” means the

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<sup>69</sup> R.I. GEN. LAWS § 23-4.1-12(a) (2001).

<sup>70</sup> *Id.* § 23-4.1-12(b).

<sup>71</sup> *Id.* § 23-4.1-12(c).

<sup>72</sup> *Id.* § 23-4.1-13.

<sup>73</sup> *Lavallee v. Alert Ambulance Servs.*, 854 F. Supp. 60, 62 (D.R.I. 1994) (noting that the functional approach looks to the type of transportation the ambulance service was engaged in at the time of the incident at issue).

<sup>74</sup> N.M. STAT. ANN. § 41-4-4(A) (Michie 2003).

<sup>75</sup> *Id.* §§ 41-4-4(B)(1), 41-4-4(D)(1). The statute relieves the governmental entity of the duty to defend if an insurance company provides a defense. *Id.* § 41-4-4(B).

<sup>76</sup> *Id.* § 41-4-3, amended by An Act of April 8, 2003, 2003 N.M. Laws 399 § 3(B).

<sup>77</sup> *Id.* § 41-4-3(C).

State of New Mexico or any of its branches, agencies, departments, boards, instrumentalities, or institutions.<sup>78</sup>

Whether or not immunity will apply to a private emergency services provider is a fact specific issue, with the dispositive inquiry being whether the private entity can fit within any of the above definitions. The Supreme Court of New Mexico has recognized that sovereign immunity applies to independent contractors acting on behalf of the state for tortious acts committed within the scope of their duties,<sup>79</sup> providing precedent for a successful argument on behalf of a private corporation with a state contract to provide emergency medical service.

In South Carolina, governmental entities are immune from suit based on discretionary acts of the entity, employee, or the “performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee.”<sup>80</sup> Governmental entities are defined as the “[s]tate and its political subdivisions.”<sup>81</sup> The definition of employee includes “any . . . agent of the State or its political subdivisions . . . and persons acting on behalf or in service of a governmental entity in the scope of official duty.”<sup>82</sup> Thus, for a private emergency service provider to receive immunity under these provisions it must be deemed to be carrying out an official duty on behalf of a governmental entity. A classification of independent contractor will preclude immunity.<sup>83</sup>

Tennessee waives sovereign immunity for governmental entities for losses arising from an employee’s negligence with listed exceptions, including discretionary functions.<sup>84</sup> “Governmental entity” is defined as “any political subdivision of the state of Tennessee including, but not limited to, any municipality, metropolitan government, county” and others.<sup>85</sup> The only way that private emergency medical service providers

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<sup>78</sup> *Id.* § 41-4-3(H).

<sup>79</sup> *See Saiz v. Belen Sch. Dist.*, 827 P.2d 102, 117 n.14 (N.M. 1992) (“[B]y specifically excluding independent contractors from the definition of ‘public employee’ . . . we can infer that the legislature retained immunity for the tortious acts of independent contractors committed within the scope of their duties.”).

<sup>80</sup> S.C. CODE ANN. § 15-78-60(5) (Law. Co-op. Supp. 2003).

<sup>81</sup> *Id.* § 15-78-30(d). The term “political subdivision” is defined to include counties and municipalities. *Id.* § 15-78-30(h). The term “state” includes the state itself and “any of its offices, agencies, authorities, departments, commissions, boards, divisions [and] instrumentalities.” *Id.* § 15-78-30(e).

<sup>82</sup> *Id.* § 15-78-30(c).

<sup>83</sup> *Id.* § 15-78-30(i).

<sup>84</sup> TENN. CODE ANN. § 29-20-205 (Supp. 2003). Thus, immunity is retained where a discretionary function gives rise to liability.

<sup>85</sup> *Id.* § 29-20-102(3)(A).

can benefit from this immunity is if they qualify as a political subdivision of the state by virtue of a contract with such an entity. This argument is supported by the holding of the Supreme Court of Tennessee: “[A]mbulance service is a necessary function of city government, imposed by the government’s basic mandate to protect the health, safety, and welfare of its citizens.”<sup>86</sup> Thus, if a city chooses to privatize ambulance service for its residents, the ambulance service may be deemed an instrument of a governmental entity entitled to immunity.

Texas provides sovereign immunity to governmental units for torts committed by its employees unless three conditions are found to exist.<sup>87</sup> “Governmental units” are not defined in the statute.<sup>88</sup> Texas courts have interpreted the statute as providing immunity to governmental employees for discretionary acts.<sup>89</sup> To qualify for immunity, medical personnel must be exercising governmental—not medical—discretion.<sup>90</sup> Private emergency medical service providers may qualify as governmental employees or units if they have a contract with a local government to provide emergency services and are exercising medical discretion, otherwise they will not receive immunity.<sup>91</sup>

In Virginia, for a private entity to receive immunity, it must first qualify as a state employee. Once the entity is qualified, the Commonwealth assumes liability up to \$100,000, or the maximum limits of liability of any insurance policy in place at time of loss, whichever is

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<sup>86</sup> *City of Memphis v. Bettis*, 512 S.W.2d 270, 273 (Tenn. 1974) (recognizing as part of the court’s longstanding jurisprudence that “the mere collection of fees from a given service does not per se transform an otherwise public function into a private one”).

<sup>87</sup> TEX. CIV. PRAC & REM. CODE ANN. § 101.021 (Vernon 1997). The conditions are: (1) the injury or property damage arises out of the “operation or use of a motor-driven vehicle or motor driven equipment; and (2) the employee would be personally liable to the claimant according to Texas law; and (3) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.” *Id.*

<sup>88</sup> *See id.*

<sup>89</sup> *See City of El Paso v. Higginbotham*, 993 S.W.2d 819, 822 (Tex. App. 1999); *see also Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997); *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994).

<sup>90</sup> *Kassen v. Hatley*, 887 S.W.2d 4, 10–12 (Tex. 1994). To determine whether governmental discretion was in fact exercised, “[t]he focus must remain upon the facts of the individual case and the underlying policies promoted by official immunity.” *Id.* at 12. The court also listed several factors which courts should consider and recognized that “[s]uch decisions necessarily involve a balancing of individual rights and the public interest.” *Id.*

<sup>91</sup> *See Carrola v. Guillen*, 935 S.W.2d 949, 952 (Tex. App. 1996) (stating that “emergency medical service is particularly deserving of immunity”); *see also Ayala v. City of Corpus Christi*, 507 S.W.2d 324, 328 (Tex. Civ. App. 1974) (“[Emergency medical service is] a service kindred to the police or fire service. This type of service is incident to the police power of the state: i.e. to protect the health, safety, and general welfare of its citizens.”).

greater.<sup>92</sup> "Employee" is defined to include "any officer, employee or agent of any agency, or any person acting on behalf of an agency in an official capacity, temporarily or permanently in the service of the Commonwealth."<sup>93</sup> Thus, a private entity which contracts with an entity included in the definition of "agency"<sup>94</sup> for the provision of emergency services may qualify as a state employee if acting "in an official capacity."<sup>95</sup>

The Fourth Circuit held that volunteer fire departments, rescue squads, and their employees are protected from liability by sovereign immunity.<sup>96</sup> Local governments are authorized to contract with volunteer fire fighting and emergency medical service companies and such companies are statutorily deemed "instrumentalities of the state" entitled to sovereign immunity.<sup>97</sup> Whether this statute applies to private concerns is an open issue.

In Wyoming, governmental entities and employees acting within the scope of their employment are immunized from tort liability.<sup>98</sup> The term "governmental entity" is defined to include "state . . . or any local government."<sup>99</sup> "Local government" is defined as "cities and towns, counties . . . all political subdivisions of the state, and their agencies, instrumentalities and institutions."<sup>100</sup> There are two methods by which a private emergency medical service provider may receive immunity. A provider may qualify as an "agenc[y], instrumentalit[y], [or] institution[]"<sup>101</sup> of a political subdivision, and therefore fit within the definition of "governmental entity." Alternatively, if a private entity can qualify as an employee of a governmental entity, a different statute provides that the State assumes liability for damages arising from the negligence of a health care provider employed by a governmental entity.<sup>102</sup>

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<sup>92</sup> VA. CODE ANN. § 8.01-195.3 (Michie 1998).

<sup>93</sup> *Id.* § 8.01-195.2.

<sup>94</sup> Agency is defined as "any department, institution, authority, instrumentality, board or other administrative agency of the government of the Commonwealth of Virginia." *Id.*

<sup>95</sup> See *Edwards v. City of Portsmouth*, 375 S.E.2d 747, 749-50 (Va. 1989) (holding that the provision of ambulance services by a city is a governmental function); see also VA. CODE ANN. § 32.1-156(B) (authorizing counties to enter into contracts for the provision of emergency medical services).

<sup>96</sup> *Overman v. Occoquan, Woodbridge, Lorton Volunteer Fire Dept., Inc.*, No. 90-2475, 1991 WL 255849, at \*3, 4 (4th Cir. Dec. 6, 1991) (per curiam).

<sup>97</sup> VA. CODE ANN. § 27-23.6(A).

<sup>98</sup> WYO. STAT. ANN. § 1-39-104 (Michie 1999).

<sup>99</sup> *Id.* § 1-39-103(a)(i).

<sup>100</sup> *Id.* § 1-39-103(a)(ii).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* § 1-39-110(a). But see *id.* § 1-39-103 (a)(iv)(B) (providing that independent contractors are not included within the meaning of "public employee").

*E. States With Notice and/or Damage Cap Provisions Potentially Applicable to Private Emergency Medical Service Providers*

Florida waives sovereign immunity by statute for the state and its agencies and subdivisions.<sup>103</sup> By definition, these agencies and subdivisions include corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.<sup>104</sup> The state, agencies, and subdivisions are not liable for punitive damages, pre-judgment interest, or in excess of \$100,000 per plaintiff, and not in excess of \$200,000 per occurrence without legislative action.<sup>105</sup> Notice must also be presented to the appropriate agency and the state insurance department within three years after the accident.<sup>106</sup> Employees of the agency or subdivision are immune from suit and a claimant's exclusive remedy is against the governmental entity.<sup>107</sup>

Minnesota waives sovereign immunity for loss of property or personal injury or death caused by the act or omission of an employee of the state while acting within the scope of his employment to the extent a private person would be liable.<sup>108</sup> Certain exceptions to liability are enumerated, including discretionary functions of employees.<sup>109</sup> Pursuant to the waiver of immunity, the statute limits the amount of damages recoverable.<sup>110</sup>

Municipalities within the state also waive immunity<sup>111</sup> subject to similar damage limits.<sup>112</sup> A municipality is defined to include, among other entities, any "city . . . county, town, public authority, [or] public corporation."<sup>113</sup> The definition of employee includes people "acting on behalf of the municipality in an official capacity."<sup>114</sup> A private emergency medical service provider that contracts with a municipality may qualify as

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<sup>103</sup> FLA. STAT. ANN. § 768.28(1) (West 1997).

<sup>104</sup> *Id.* § 768.28(2).

<sup>105</sup> *Id.* § 768.28(5); see *N. Broward Hosp. Dist. v. Eldred*, 466 So. 2d 1210, 1211 (Fla. Dist. Ct. App. 1985) (holding that the statutory damage limits apply to "corporations primarily acting as instrumentalities or agencies of the state").

<sup>106</sup> FLA. STAT. ANN. § 768.28(6)(a).

<sup>107</sup> *Id.* § 768.28(9)(a). There is no immunity for employees acting in "bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." *Id.*

<sup>108</sup> MINN. STAT. ANN. § 3.736(1) (West 1997).

<sup>109</sup> *Id.* § 3.736(3)(b).

<sup>110</sup> *Id.* § 3.736(4). The limits range from \$300,000 to \$1,000,000. *Id.*

<sup>111</sup> *Id.* § 466.02 (West 2001).

<sup>112</sup> *Id.* § 466.04. A different provision enumerates exceptions to the waiver of immunity. *Id.*

<sup>113</sup> *Id.* § 466.01(1).

<sup>114</sup> *Id.* § 466.01(6).

“acting on behalf of the municipality in an official capacity” and thus acquire immunity.<sup>115</sup>

The Supreme Court of Minnesota has recognized that “[d]enying [defendant paramedic] official immunity would have a chilling effect on the discretion to be exercised by emergency vehicle drivers enroute to medical emergencies, and would conflict with our well-established law respecting the independent judgment that must be exercised by public servants in emergency situations.”<sup>116</sup> It seems the court may be willing to expand this rationale to apply to technicians rendering medical care in an emergency situation.

Vermont waives sovereign immunity for losses caused by its employees acting within the scope of employment if a private person would be liable under the same circumstances, with damages capped at \$1,000,000 by statute and exceptions listed, including discretionary functions.<sup>117</sup> The section identifying positions that qualify as “state employees” is, by its terms, to be construed expansively.<sup>118</sup> If a private entity can qualify as a state employee not exercising a discretionary function it may benefit from immunity because a plaintiff’s “exclusive right of action” is against the state.<sup>119</sup>

In West Virginia, “[e]very person, corporation, ambulance service, emergency medical service provider, emergency ambulance authority, emergency ambulance service or other person which employs emergency medical service personnel . . . or provides ambulance service in any manner” must obtain liability insurance with a minimum limit of \$1,000,000 per occurrence.<sup>120</sup> The statute further provides that such organizations and their employees cannot be liable for amounts in excess of the policy limits unless the loss was caused by intentional or malicious conduct.<sup>121</sup> Private entities are covered under the definition of “emergency medical service provider.”<sup>122</sup>

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<sup>115</sup> *Id.* While the text of the statute excludes independent contractors except for nonprofit firefighting corporations, it is unclear whether private emergency medical services would fall under the exception to the definition of “employee.” *Id.*

<sup>116</sup> *Kari v. City of Maplewood*, 582 N.W.2d 921, 925 (Minn. 1998) (holding city paramedic immune from liability resulting from a collision with the plaintiff while responding to an emergency).

<sup>117</sup> VT. STAT. ANN. tit. 12, § 5601 (2003).

<sup>118</sup> *Id.* tit. 3, § 1101.

<sup>119</sup> *Id.* tit. 12, § 5602(a).

<sup>120</sup> W. VA. CODE ANN. § 16-4C-16(1) (Michie 2001).

<sup>121</sup> *Id.* § 16-4C-16(2).

<sup>122</sup> *Id.* § 16-4C-3(h). The definition includes “any . . . corporation . . . public or private, which owns or operates a licensed emergency medical services agency providing emergency medical service in [West Virginia].” *Id.*

Suits against the state of Wisconsin are permitted pursuant to a notice provision and liability limits.<sup>123</sup> The maximum amount recoverable against a governmental entity is \$50,000; the personal liability of governmental employees is capped at \$250,000.<sup>124</sup>

In Wisconsin, liability is the general rule, and immunity is the exception.<sup>125</sup> One of the exceptions to liability is for agencies of governmental subdivisions and political corporations for the discretionary acts of their employees.<sup>126</sup> While the statute does not define agency, the Court of Appeals has construed it to include parties involved in a master-servant relationship with the government, and to exclude independent contractors.<sup>127</sup> The court stated that the existence of a master-servant relationship is a question of fact that hinges upon how much control the governmental entity has over the agent.<sup>128</sup> Thus, private emergency medical service providers may qualify as agents of the state and be entitled to immunity for the negligence of their employees, but such a determination is an issue of fact.

### III. POLICY CONSIDERATIONS SUPPORTING THE EXTENSION OF IMMUNITY TO PRIVATE PROVIDERS OF PUBLIC SERVICES

Increasingly, local governments are partnering with the private sector for the provision of public services.<sup>129</sup> Decisions regarding privatization

<sup>123</sup> WIS. STAT. ANN. §§ 893.80(1)(a), 893.80(3), 893.82 (West 2002).

<sup>124</sup> *Id.* §§ 893.80(3), 893.82(6).

<sup>125</sup> *Linville v. City of Janesville*, 497 N.W.2d 465, 470 (Wis. Ct. App. 1993).

<sup>126</sup> WIS. STAT. ANN. § 893.80(4).

<sup>127</sup> *Kettner v. Wausau Ins. Cos.*, 530 N.W.2d 399, 401, 404 (Wis. Ct. App. 1995).

<sup>128</sup> *Id.* at 404.

<sup>129</sup> See Janna J. Hansen, *Limits of Competition: Accountability in Government Contracting*, 112 YALE L.J. 2465, 2465 (2003) (“Government contracts with private providers for the supply of goods and services have grown in number and magnitude over the last several decades.”); E.S. Savas, *Competition and Choice in New York City Social Services*, 62 PUB. ADMIN. REV. 82, 82 (2002) (noting that “[b]y 1992, the fraction of U.S. local governments that relied entirely on their own in-house units for various programs was small”). According to one study, by 1992, only 6% of local governments directly provided day care facilities, 7% directly provided substance abuse treatment facilities and no local government surveyed operated homeless shelters. Correspondingly, 54, 25 and 5% of the same localities contracted with for-profit firms for day care facilities, substance abuse treatment facilities and homeless shelter operation, respectively. *Id.* at 182-83. “Increasingly, for-profit firms are entering the social service field, providing services directly. . . . Examples . . . are determining eligibility for benefits, administering Welfare-to-Work programs, handling child welfare functions ranging from foster care to adoption to family services, and tracking down ‘deadbeat dads’ to collect support payments.” *Id.* at 90; see also David M. Van Slyke, *The Mythology of Privatization in Contracting for Social Services*, 63 PUB. ADMIN. REV. 296, 296 (“Contracting is the most widely used form of social services privatization and has been on the rise for more than four decades.”). Privatization has been endorsed by both Congress and the President. See George Cahlink, *Jails Inc.*, 34 GOV’T EXECUTIVE 42, 43 (2002) (“Congress has encouraged prison privatization efforts.”);

are motivated by a variety of factors. Privatization is often viewed as a solution where government-operated programs fail to effectively provide public services.<sup>130</sup> The private sector is adept at responding to changing circumstances by implementing innovative methods of program operation, ultimately benefiting the public.<sup>131</sup>

Privately operated public service programs are widely regarded as more efficient and cost-effective than those managed by local governments.<sup>132</sup> Competition is the vehicle through which these results are achieved.<sup>133</sup> Outsourcing to private firms may also benefit citizens by

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*Privatization: Worth a Try if Contracts Are Kept Above the Table*, HOUS. CHRON., June 7, 2003, at 38 (noting “[t]he Bush administration’s push for greater privatization of work done by federal civilian employees”). Of the 1.8 million federal jobs staffed by federal employees, up to 850,000 of those jobs would be taken over by private employees under the White House Office of Management and Budget’s amended rules. *Id.*

<sup>130</sup> See Cahlink, *supra* note 129, at 42–43 (discussing the federal government’s privatization program for federal prisons). “Like state and county governments that embraced prison privatization in the 1980’s and 1990’s, the Bureau of Prisons has found that tougher laws and a scarcity of funds have made it all but impossible to adequately house federal inmates without outside help.” *Id.* at 42; see also Hansen, *supra* note 129, at 2465 (noting that “[l]awsuits challenging the quality of government services can motivate quick change”); Ron Martz, *Fulton Officials Favor Privatization for Embattled Children’s Shelter*, ATLANTA J. CONST., May 30, 2001, at 1B (“One week after Georgia’s child advocate issued a stinging report on the state’s largest emergency shelter for abused and neglected children, Fulton County child welfare officials say they want a private firm to run it.”); Misty Reagin, *Indianapolis Outsources O&M for Waterworks*, 117 AM. CITY & COUNTY 16 (2002) (City officials describing Indianapolis’s privatization decision with respect to city waterworks “‘felt it would be best to leave the day-to-day operations to the experts’”).

<sup>131</sup> Private prisons are able to tailor programs to meet the specific needs of immigrant felons. See Cahlink, *supra* note 129, at 43. In California City, the private contractor in control of the federal prison instituted a program enabling Mexican prisoners to earn the equivalent of a Mexican high school diploma. *Id.* The official in charge of privatization of federal prisons observed that the above program would be cost-prohibitive in a governmentally controlled prison. *Id.* In the social service arena, one study has shown that “[b]etween 1971 and 1979, the fraction of state and local services provided [privately] increased from 25 percent to 55 percent because local governments could not mobilize internally fast enough to take advantage of the federal funding available for new social programs.” Savas, *supra* note 130, at 82 (internal citation omitted).

<sup>132</sup> See Slyke, *supra* note 130, at 297 (“The arguments for privatization have emphasized a combination of reduced costs, improved service, increased management flexibility, specialized expertise, and decreased public monopoly inefficiencies.”).

<sup>133</sup> See Hansen, *supra* note 129, at 2466 (stating that policymakers “believe that the market for contracts will promote efficiency”); Savas, *supra*, note 129, at 82 (observing that competition and choice—critical ingredients for good performance—“are lacking in direct, monopolistic government services, hence the move towards privatization of public services, where the principal benefits are achieved by competition”); Slyke, *supra* note 129, at 297 (discussing the views of privatization advocates: “[T]he greatest potential advantage of a contract-based system rests in the ability to promote competition among private agencies.” (quoting Mark Schlesinger et al., *Competitive Bidding and States’ Purchase of Services: The Case of Mental Health Care in Massachusetts*, 5 J. OF POL’Y ANALYSIS AND MGMT. 245)).

increasing the quality of public services.<sup>134</sup> Further, the political advantages of privatization include reducing government size and freeing up resources which are better utilized for other purposes.<sup>135</sup>

Consistent with the general trend towards privatization of public services, citizens in many areas of the country rely—sometimes exclusively—on private companies for the provision of emergency medical services.<sup>136</sup> As a result, the private sector of emergency medical service is

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<sup>134</sup> See Hansen, *supra* note 129, at 2465 (“Some elected officials believe that private-sector provision of services always results in financial savings and better quality of service over public provision.”); Savas, *supra* note 129, at 90 (stating that the “notion that for-profit private firms could undersell and outperform nonprofit government agencies . . . [n]ow . . . is accepted as the rule rather than the exception”). A study of 347 local health departments revealed that 50% of directors “claimed that privatization helped their department’s performance of core functions.” Christopher Keane et al., *The Perceived Impact of Privatization on Local Health Departments*, 92 AM. J. PUB. HEALTH 1178, 1178 (2002). A previous study showed that “73% of all [local health departments] have privatized at least [one] service.” *Id.*; see also Martz, *supra* note 130 (discussing Fulton, Georgia’s move towards privatizing an under performing children’s shelter); Reagin, *supra* note 130 (detailing Indianapolis’s privatization of city waterworks and the resulting “improved water quality”).

<sup>135</sup> See Hansen, *supra* note 129, at 2465 (stating that “[p]oliticians may want to appear to decrease the size of government by reducing the number of directly employed government workers”); Slyke, *supra* note 129, at 307 (“Increased demands for smaller and more efficient government have led many elected officials and agency executives to seek privatization as a vehicle—some suggest panacea—for controlling costs.”).

<sup>136</sup> Residents in the rural areas outside of Bloomington, Illinois depend on LifeLine Mobile Medics to provide the area with ambulance service and paramedics. This is important in rural areas where it can take over thirty minutes to arrive at a hospital. *Analysis of County Impact Acute in Ambulance Study*, PANTAGRAPH (Bloomington, IL), May 5, 2002, at C2. Rural/Metro Corporation, “the nation’s leading provider of private ambulance and firefighting services” provides such services to about 400 communities nationwide. *Rural/Metro Awarded Exclusive Ambulance Contract Renewal for Fort Worth and Surrounding Communities*, BUS. WIRE, April 24, 2003. In Fort Worth Texas and twelve surrounding communities, 850,000 rely exclusively on Rural/Metro Corporation for emergency medical services. *Id.* In New York City, private entities account for almost 50% of “911” ambulance service. Edward M. Dolan, *Fix the Fire Department So It Can Do More*, NEWSDAY, Dec. 12, 2002, at A46. “The private ambulance services of Milwaukee County are a vital component of the emergency medical system.” *Emergency Care; Private Ambulance Service Vital*, MILWAUKEE J. SENTINEL, Jul. 9, 2000, at 5J. In Kansas City, almost one-third of the metropolitan area relies on private corporations for “primary ambulance service.” Kevin Hoffman, *With End of Operations Contract, Ambulance Service Is at a Crossroads*, KAN. CITY STAR, July 1, 2003. In Massachusetts “[p]rivate ambulances now handle 62 percent of emergency calls and 90 percent of nonemergency medical transport calls.” Sue Reinhert, *New Faceoff Over Emergency Medical Services*, PATRIOT LEDGER, (Quincy, MA), Feb. 12, 2003, at 16. Sixty-five thousand residents in the East St. Louis metropolitan area rely on Simmons Ambulance, a private company, for emergency medical services. Deborah L. Shelton, *Hospital Says its Ambulance Service May Have To Be Cut; Move Could Affect Alortan, Centreville and Cahokia*, ST. LOUIS POST-DISPATCH, Jan. 3, 2003, at B2. Additionally, large corporations are increasingly contracting with private ambulance companies to provide services for their employees. Richard Perez-Pena, *Not Counting on 911, Companies Hire Private Ambulances*, N.Y. TIMES, July 6, 2003, at 13.

growing rapidly.<sup>137</sup> A coordinate trend of the past decade is an increasing number of lawsuits filed against ambulance companies.<sup>138</sup> The growing industry is particularly vulnerable to the substantial costs associated with defending against claims.<sup>139</sup> This vulnerability threatens the survival of these private companies, and in turn threatens the large numbers of citizens who rely on them for the provision of emergency medical service.

The extension of sovereign or governmental immunity to private entities providing public services will facilitate privatization and the resulting innovation and efficiency.<sup>140</sup> The policy justifications supporting sovereign immunity generally<sup>141</sup> apply equally to private entities in this context. Protection of resources is an important goal of sovereign immunity.<sup>142</sup> Because a large number of citizens throughout the country rely on private providers for emergency medical services, protecting their resources is a critical objective. The public cannot afford to lose these services, which is a possibility if the entities providing them remain exposed to unlimited liability.

Other policy justifications offered in support of sovereign immunity, namely the need for order in the administration of government and the

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<sup>137</sup> According to a recent Department of Labor report, four out of ten emergency medical technicians were employed by private ambulance companies. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK: EMERGENCY MEDICAL TECHNICIANS AND PARAMEDICS 320 (2004-05). Furthermore, employment opportunities for emergency medical technicians and paramedics are "expected to grow faster than the average for all occupations through 2010," and "[m]ost opportunities for EMT's and paramedics are expected to [be] found in private ambulance services." *Id.*

<sup>138</sup> See David Harrawood et al., *Liability: Is EMS Putting You Out on a Limb?*, 20 J. EMERGENCY MED. SERVICES, 5 (1995), available at <http://www.naemd.org/articles/liability1.htm>; Wiggins, *supra* note 25 at 359 (noting that "claims against [emergency medical service] providers continue to increase"); see also Tresa Baldas, *Mean Streets: As Expectations Rise, Paramedics See More Lawsuits*, 26 NAT'L L.J. 4 (2003) ("Lawyers representing ambulance companies say that over the last decade an increasing number of people have started suing their clients."). Emergency medical technicians and their employers, private or public, can be held liable for both malpractice and negligence. See Thomas A. Moore & Matthew Gaier, *Liability for Negligence by Emergency Medical Technicians*, N.Y.L.J. December 7, 1999, at 3.

<sup>139</sup> Private entities realize that "[j]ust one claim could wipe [them] out." Baldas, *supra* note 138, at A18 (quoting Tyron Picard, an executive vice president for Acadian Ambulance which provides service to Louisiana and Mississippi). Another Acadian employee noted "[y]ou know your company can be devastated from one event . . . [i]t's always in the back of your mind, but you can't think about it on a day-to-day basis." Matthew Volz, Associated Press, *Malpractice Problems Extend to Emergency Medical Workers*, Sept. 18, 2002. Additionally, private entities may not be able to recover costs incurred from their insurance carriers. See Shannon P. Duffy, *Ambulance Co.'s Insurer Has Limited Duty*, 224 LEGAL INTELLIGENCER 93 (May 14, 2001).

<sup>140</sup> See *supra* notes 131-136 and accompanying text.

<sup>141</sup> See *supra* Part II.

<sup>142</sup> See *supra* note 22 and accompanying text.

public benefits flowing from the unhampered delivery of services by public officials, can be offered to support the extension of immunity to private emergency medical service providers. The current state of affairs is unsettled, providing little guidance to emergency medical service companies regarding avoidance of liability.<sup>143</sup> Individual technicians employed by private entities may refrain from acting due to fear of litigation.<sup>144</sup> Excessive litigation can interfere with the orderly and effective delivery of any service, including that provided by a private entity. Immunity would provide private entities and their employees with a sense of security, eliminating these problems and potentially translating into higher quality service for the public.

Emergency medical service is an essential, public necessity.<sup>145</sup> State legislatures should take one of the following steps to ensure that private emergency medical service providers and their employees receive immunity.<sup>146</sup> States can declare the provision of emergency medical service a governmental function. This approach would work in states where immunity hinges on whether a governmental function is at issue. In states where governmental immunity depends on whether the service is provided by a political subdivision or agent thereof, legislators should declare all entities which provide emergency medical service as acting on behalf of political subdivision, municipality or other relevant entity. Finally, in states that do not recognize sovereign or governmental immunity, the proper approach is specific legislation immunizing all emergency medical service providers and their employees. Absent these approaches, states should institute notice provisions and limits on the amounts recoverable by claimants to ensure the survival of private entities providing emergency medical service.

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<sup>143</sup> See *supra* Part II.

<sup>144</sup> See *Kari v. City of Maplewood*, 582 N.W.2d 921, 925 (Minn. 1998) (holding that paramedics were entitled to official immunity because the absence of immunity might produce “a chilling effect on the discretion to be exercised” by such persons).

<sup>145</sup> See *City of Memphis v. Bettis*, 512 S.W.2d 270, 273 (Tenn. 1974) (holding that “ambulance service is a necessary function of city government, imposed by the government’s basic mandate to protect the health, safety, and welfare of its citizens”); *Carrola v. Guillen*, 935 S.W.2d 949, 952 (Tex. App. 1996) (stating that “emergency medical service is particularly deserving of immunity”); *Ayala v. City of Corpus Christi*, 507 S.W.2d 324, 328 (Tex. Civ. App. 1974) (holding that emergency medical service is “a service kindred to the police or fire service. This type of service is incident to the police power of the state: i.e. to protect the health, safety, and general welfare of its citizens.”); *Edwards v. City of Portsmouth*, 375 S.E.2d 747, 749–50 (Va. 1989) (holding the provision of ambulance services by a city is a governmental function).

<sup>146</sup> The proposed immunity would extend only to acts amounting to ordinary negligence. Private firms and/or their employees would remain liable for gross negligence and intentional misconduct.

## CONCLUSION

Extension of sovereign immunity should be controlled by the nature of the service provided rather than by the nature of the entity providing it. The policy justifications supporting sovereign immunity generally support this approach. Basing immunity on the nature of the service provided would encourage privatization, as private entities would have a greater incentive to enter government contracts. The extension of liability to private entities would also encourage experimentation with different types of programs, leading to the cost-effective provision of high quality public services. The benefits of public-private partnerships are numerous, well documented, and extend to both governments and their citizens.