

## PROMOTING PUBLIC HEALTH AND PROVIDER RESPONSE TO EMERGENCIES AND DISASTERS

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### ABSTRACT

*Recent natural disasters in this country highlighted that domestic emergency and disaster responses systems are significantly weak. Much of this weakness is related to inappropriate leadership of response efforts by federal authorities, based on the federal Stafford Act. Further, model legislation that attempts to promote effective response efforts, such as a proposed uniform state act, are redundant in light of policies that already attempt to address critical issues such as provider coordination, civil liability and workers' compensation. To promote effective and efficient public health and provider response to emergencies and disasters, this Article proposes a federal statute that gives control of response efforts to those most familiar with the local environment—the affected states—and builds upon current state-to-state policy regarding use and deployment of voluntary healthcare providers. It also differentiates between natural and human-sourced disasters and emergencies due to the substantively different skills needed to address each, and similarly differentiates between those states with and without experience in addressing these events, while providing for federal funding not only for federal resource deployment but also for potentially more nimble and relevant state-to-state assistance. Further, to ensure legal clarity and uniformity, it covers voluntary healthcare practitioner civil liability through the Federal Tort Claims Act, but only if providers are engaged through the existing state-state*

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*Emergency Management Assistance Compact infrastructure so as to incentivize organized provider assistance. Finally, it also addresses potential conflict of law issues regarding workers' compensation by covering all requested voluntary healthcare practitioner workers crossing state lines in disasters and emergencies through the Federal Employees Compensation Act.*

## I. INTRODUCTION

*"It was as if the earth was slipping gently from under our feet. Then came the sickening swaying of the earth that threw us flat upon our faces. We struggled in the street. We could not get on our feet. Then it seemed as though my head were split with the roar that crashed into my ears. Big buildings were crumbling as one might crush a biscuit in one's hand. Ahead of me a great cornice crushed a man as if he were a maggot - a laborer in overalls on his way to the Union Iron Works with a dinner pail on his arm."<sup>1</sup>*

On April 18, 1906, the landscape of the San Francisco Bay area was forever changed.<sup>2</sup> As the epicenter of the legendary 1906 earthquake, the Bay area experienced violent shocks lasting 60 seconds and sustained an ensuing blazing fire.<sup>3</sup> Three thousand people died as a result of the earthquake.<sup>4</sup> With each passing day, California inevitably draws one day closer to its next major earthquake.<sup>5</sup> After a "strong" earthquake's initial powerful strike, citizens of the state can typically expect to experience

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<sup>1</sup> The San Francisco Earthquake, 1906, <http://www.eyewitnesstohistory.com/sfeq.htm> (last visited Nov. 12, 2007).

<sup>2</sup> See Jesse McKinley, *A Solemn Anniversary Makes Room for Festivity, Too*, N.Y. TIMES, Apr. 19, 2006, at A16 (discussing the 1906 earthquake).

<sup>3</sup> See Kenneth Chang, *The Ground Shook, A City Fell, and Lessons Still Resound*, N.Y. TIMES, Apr. 11, 2006, at F1.

<sup>4</sup> See Katie Hafner, *Over a Fault Line, Tying the Furniture to the Walls*, N.Y. TIMES, Apr. 13, 2006, at F7 (stating that the earthquake killed 3000 people).

<sup>5</sup> State of California Department of Conservation News Release, *Department of Conservation: Quakes Will Come, Be Prepared*, (April 15, 2004), available at [http://www.conservation.ca.gov/index/news/2004%20news%20releases/Pages/nr2004-07\\_earthquake\\_prediction.aspx](http://www.conservation.ca.gov/index/news/2004%20news%20releases/Pages/nr2004-07_earthquake_prediction.aspx) (calling for preparation for an inevitable major California earthquake, even though such earthquake may not be imminent).

aftershocks, most of which will occur during the following first week with some extending out six months.<sup>6</sup>

Almost a century after the earthquake of 1906, on the morning of August 29, 2005, Hurricane Katrina devastated southeast Louisiana.<sup>7</sup> The mighty hurricane claimed more than 1,464 lives.<sup>8</sup> Mr. Dumas Carter, an eight-year veteran of the New Orleans Police Department, described his experience of Hurricane Katrina:

The winds are hitting the building so hard that water is forcing itself in through the window seals and the brick. It's chiseling the mortar out between the wood and the brick on windows. On the north side of the building, it is now raining in all of those rooms, horizontally, a good seven inches from the window. Most of the beds are soaked, the sofas are soaked, the carpet's soaked, the power's flickering. Then we lose power. I'm on the fifth floor, at the top of this building, and in the corner that's getting hardest hit. The building is rocking.<sup>9</sup>

Having acquired a familiarity with the post-earthquake fall out, states like California may now be better prepared to respond to earthquakes.<sup>10</sup> Similarly, other states having previously encountered certain disasters and emergencies may learn from prior experiences and create appropriate response infrastructures for the future. But how will states like California be able to respond effectively to unfamiliar disasters, such as

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<sup>6</sup> US Geological Survey, Earthquake Hazards Program, *available at* <http://quake.usgs.gov/prepare/future/respond/index.html> (last visited Sept. 24, 2007).

<sup>7</sup> See Joseph B. Treaster & Abby Goodnough, *Powerful Storm Threatens Havoc Along Gulf Coast*, N.Y. TIMES, Aug. 29, 2005, at A1 (describing Hurricane Katrina and its effects).

<sup>8</sup> See Louisiana Department of Health and Hospitals, Hurricane Katrina Deceased Reports, *available at* <http://www.dhh.louisiana.gov/offices/page.asp?ID=192&Detail=5248> (last visited October 3, 2007).

<sup>9</sup> Statement of Dumas Carter, quoted in *New Orleans: Survivor Stories: Beyond Soundbites: Detailed First-Hand Accounts From People Trapped in the City After Katrina- What They Did, What They Saw, How They Stayed Alive* 26 Minneapolis/St. Paul Citypages (Sept. 20, 2005) (*available at* <http://citypages.com/databank/26/1294/article13694.asp?page=4>) (last visited Sept. 24, 2007).

<sup>10</sup> See generally US Geological Survey, *Top Earthquake States*, [http://earthquake.usgs.gov/regional/states/top\\_states.php#alaska](http://earthquake.usgs.gov/regional/states/top_states.php#alaska) (last visited Sept. 24, 2007) (identifying California as experiencing 23.2% of the total earthquakes occurring in the United States between 1974 and 2003).

Katrina-like hurricanes and flooding? And what would all states do in the event of an unexpected human-sourced event such as a bioterrorism attack?

Clearly, there is a current society-wide weakness regarding how to cope with such disasters.<sup>11</sup> This weakness centers on determining the best means of coordinating response efforts. More specifically, as recent disasters have illustrated, critical response issues include whether the most efficient coordination of these efforts exists when allocated to the federal government, or to the state and local governments; how to avoid the chaotic nature of needed volunteer health care providers entering into a state suffering a disaster; and how to incentivize providers to cross state lines in a predictable manner by providing adequate protection against the possibility of their injury while also ensuring provider accountability through clear civil liability measures.

Extant laws and policies such as the federal Robert T. Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”) currently provide for state assistance in the event of an emergency or disaster.<sup>12</sup> Further, there have been attempts to streamline the volunteer health care provider efforts in response to disasters. The National Conference of Commissioners on Uniform State Laws (“NCCUSL”) has proposed the model state Uniform Emergency Volunteer Health Practitioners Act (“UEVHPA”),<sup>13</sup> which is designed to meet patient surge capacity during

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<sup>11</sup> See, e.g., Dave Gershman, *Global Health Focus at U-M*, ANN ARBOR NEWS, September 12, 2007 available at <http://www.mlive.com/news/aanews/index.ssf?base/news-24/1189628124279610.xml&coll=2> (last visited October 2, 2007) (noting that “[s]everal hundred people attended a University of Michigan symposium Tuesday on the sixth anniversary of the Sept. 11 attacks to discuss whether the world is prepared to tackle monumental public health crises, from infectious diseases like SARS to man-made disasters like a massive terrorist attack. The answer: ‘Not yet.’”); Nancy Bompi, *Disaster workers must learn to communicate in foreign languages*, ASBURY PARK PRESS, September 22, 2007 available at <http://www.app.com/apps/pbcs.dll/article?AID=/20070922/LIFE/709220335/1006> (last visited October 2, 2007) (reporting that “[w]hen emergency workers arrived at mobile home parks in Swannanoa, N.C., to evacuate people during floods in 2004, they encountered a bigger problem than too much water. None of them could speak Spanish.”); and Interview with Bryan Liang, *The Ethics of Quarantine: A Debate on How Best to Contain a Worldwide Pandemic*, ATLANTA LIFE MAGAZINE, 14 (August 2007) available at [www.atlantailifemag.com](http://www.atlantailifemag.com) (click on “virtual magazine”; then click on “previous issues” and go to “August 2007”) (last visited October 3, 2007) (noting “U.S. education and preparedness are woefully lacking.”).

<sup>12</sup> Robert F. Stafford Disaster Relief and Emergency Assistance Act, PUB. L. NO. 92-288, as amended 42 U.S.C. 5121 et. seq. as amended, available at <http://www.fema.gov/about/stafact.shtm> (last visited Sept. 24, 2007).

<sup>13</sup> See UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT (2006) (PREFATORY NOTE), available at <http://www.uevhp.org/DesktopDefault.aspx>

emergencies and disasters by proposing an approach for deployment of volunteer health practitioners (“VHPs”) through coordination of registration, scope of practice, civil liability, and workers compensation efforts.<sup>14</sup> NCCUSL indicates that the UEVHPA allows for the efficient influx of VHPs to the affected state by expediting credential verification and allowing the affected state the right to limit the scope of assistance by VHPs.<sup>15</sup>

Yet, when examining the shortcomings of previous emergency and disaster responses, as well as extant laws and proposals, it appears that these weaknesses arise from the lack of coordinated state led efforts to address emergencies and disasters. There is a clear need to shift the exercise of disaster and emergency responses to local authorities that have intimate familiarity with the people, places, and resources of the affected locale.

On the other hand, there are existing processes for efficient provider resource allocations, negating the need for further legislatively-created, state bureaucratic layers that concomitantly create conflict of laws issues. However, clarification does appear necessary with respect to liability concerns and workers’ compensation to protect those treated and those providing treatment in the event of injury. Because public health response preparedness is of significant importance to national security, federal legislation is the best vehicle for addressing these concerns.

Below, we provide an analysis of these issues and propose federal legislation to promote effective public health responses to emergencies and disasters. In Part II, we address the current framework of public health legal preparedness. Specifically, a discussion of the Emergency Management Assistance Compact, which allows member states to access state-to-state mutual assistance for relief efforts in the event of emergency or disaster situations, is provided.<sup>16</sup> In addition, we provide an overview of the Stafford Act, which is the existing mechanism governing the federal declaration of an emergency or disaster,<sup>17</sup> and discuss the disaster response

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?tabindex=1&tabid=55 [hereinafter UEVHPA] (discussing the NCCUSL proposed UEVHPA).

<sup>14</sup> See UEVHPA (PREFATORY NOTE). The civil liability and worker’s compensation parts of the Act are still under discussion. See the proposals, *available at* [www.law.upenn.edu/bll/archives/ulc/uiehsa/2007\\_amdraft.htm](http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007_amdraft.htm) (last visited Sept. 24, 2007).

<sup>15</sup> See *id.* (discussing the need to remedy the current deficiencies that impair the ability of the state to utilize VHPs).

<sup>16</sup> Emergency Management Assistance Compact: EMAC Articles of Agreement, Article 1 *available at* <http://www.emacweb.org/?146> (last visited Sept. 24, 2007).

<sup>17</sup> Elizabeth B. Bazan, *Robert T. Stafford Disaster Relief and Emergency*

interplay between state and federal governments, concentrating on the Federal Emergency Management Agency (“FEMA”). The examination of FEMA explores the current tensions that exist during public health emergencies attributable to such interplay and the issues inherently associated with FEMA.

Part III explores the structure of the UEVHPA, including its proposed registration system to address interstate provider licensing,<sup>18</sup> the applicability of the act,<sup>19</sup> the scope of service prescribed for VHPs,<sup>20</sup> and the proposed systems to address civil liability<sup>21</sup> and workers’ compensation coverage<sup>22</sup> for VHPs. This part also identifies the shortcomings associated with the UEVHPA and how those shortcomings stifle public health preparedness.

In Part IV, the themes for a more appropriate course for public health preparedness and response are suggested. It first notes that there are extant provisions for provider deployments, which do not demand additional state laws and particularly those that may rely on federal leadership and response control. Second, it emphasizes that to promote effective and efficient public health response to emergencies and disasters, it is critical that control be vested with state and local governments.<sup>23</sup> Further, the necessity to distinguish natural from human-sourced disasters is discussed, and suggests how states may assist each other to improve public health responsiveness through allowing a state to tailor requests for types of assistance based on the disaster type and need, thus allowing its unique infrastructure to flex to meet public health demands. This section also raises the issues associated with liability and workers’ compensation for providers based on state law. It indicates that the legal challenges associated with overlapping and uncertain legal rules and their applicability in emergency and disaster circumstances demand a uniform and overarching federal regulatory scheme during these events.

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*Assistance Act: Legal Requirements for Federal and State Roles in Declarations of an Emergency or a Major Disaster*, CONGRESS RESEARCH SERVICE REPORT FOR CONGRESS (September 16, 2005) (SUMMARY), available at <http://fpc.state.gov/documents/organization/53688.pdf> (last visited Sept. 24, 2007).

<sup>18</sup> See UEVHPA § 5.

<sup>19</sup> See UEVHPA § 3.

<sup>20</sup> See UEVHPA § 4.

<sup>21</sup> See UEVHPA § 11.

<sup>22</sup> See UEVHPA § 12.

<sup>23</sup> See Russell S. Sobel & Peter T. Leeson, *Flirting With Disaster: The Inherent Problems With FEMA*, 573 POLICY ANALYSIS 1 (July 19, 2006), available at <http://www.cato.org/pubs/pas/pa573.pdf> (last visited Sept. 24, 2007) (discussing the need to “tak[e] the federal government out of the disaster relief process altogether.”).

In Part V, a proposed federal statute designed to more effectively and efficiently promote public health and provider resource use is offered. It places controls of response assistance in state hands, differentiates natural versus human-sourced disasters, encourages coordination of state expertise as well as provider deployment using existing processes. It addresses liability through the use of the Federal Tort Claims Act, and links such coverage to provider procurement through the Emergency Management Assistance Compact. Further, it addresses workers' compensation issues using the Federal Employees' Compensation Act, which provides compensation for "disability or death of an employee resulting from personal injury sustained while in the performance of his [or her] duty."<sup>24</sup> These latter provisions provide both uniformity and predictability while simultaneously maximizing effective use and access of resources and specific expertise, since protections afforded VHPs must presuppose any coordination efforts in order to properly recruit volunteer practitioners for response.

Finally, in part VI, the paper offers some concluding remarks.

## II. CURRENT PUBLIC HEALTH PREPAREDNESS

The public health infrastructure includes "legislatures' enactments that authorize the creation of government public health agencies and other statutes that endow them with broad legal authorities. . . ."<sup>25</sup> Public health preparedness may consist of instances that involve many different "sectors."<sup>26</sup> In addition to health providers, some situations may involve law enforcement agencies, the national security community, and other private sector agencies.<sup>27</sup> This section is primarily concerned with the current state of public health preparedness concerning utilization of VHPs through the channels of the Emergency Management Assistance Compact and the federal Stafford Act.

### *A. The Emergency Management Assistance Compact*

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<sup>24</sup> 5 U.S.C. § 8102 (2007).

<sup>25</sup> Anthony D. Moulton et al., *What is Public Health Legal Preparedness?*, 31 J.L. MED. & ETHICS 672, 673 (2003).

<sup>26</sup> *Id.* at 676 (describing how the roles of these sectors will "narrow" or "broaden" depending on the particular threat at issue).

<sup>27</sup> *Id.* (listing "public health, law enforcement, the judiciary, the private bar, the national security community, and elected officials" as some of the sectors involved).

Presently, the Emergency Management Assistance Compact (“EMAC”) allows states to mutually contract to share emergency interstate response resources.<sup>28</sup> There are several significant players that oversee the implementation of assistance under EMAC. The National Emergency Management Association (“NEMA”) is comprised of the state’s “emergency management” directors,<sup>29</sup> and is dedicated to improving preparation and response for emergencies and disasters.<sup>30</sup>

The EMAC Committee functions within NEMA,<sup>31</sup> is the managerial body of the compact, and primarily consists of representatives from certain states.<sup>32</sup> The Chair of the Operations Committee works directly with the EMAC Executive Task Force to focus on EMAC readiness and on continuously improving implementation processes.<sup>33</sup>

In “times of emergency,” NEMA staff and EMAC member states unite to “coordinate relief efforts.”<sup>34</sup> The efforts begin when the governor of a “Requesting State,” i.e., a state that has “formally or informally requested interstate assistance through EMAC,”<sup>35</sup> issues a state of emergency, and that state’s representative thereafter notifies EMAC.<sup>36</sup> The Requesting State also requests deployment of the “A-Team,”<sup>37</sup> which is the “primary point-of-contact for requesting and acquiring assistance provided under EMAC,” and “consists of two persons from any Member State who [is] knowledgeable about” public health preparedness and implementation

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<sup>28</sup> Emergency Management Assistance Compact, Article 1, *supra* note 16 (click on “full text of the agreement can be viewed by clicking here”).

<sup>29</sup> National Emergency Management Association: NEMA – Past and Present, *available at* <http://www.nemaweb.org/?980> (last visited Sept. 24, 2007).

<sup>30</sup> *Id.*

<sup>31</sup> Emergency Management Assistance Compact: Who Administers EMAC? *available at* <http://www.emacweb.org/?143> (last visited Sept. 24, 2007).

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

<sup>33</sup> *Id.*

<sup>34</sup> Emergency Management Assistance Compact: How Does EMAC Work? *available at* <http://www.emacweb.org/?142> (last visited Sept. 24, 2007).

<sup>35</sup> “Requesting State” from the Emergency Management Assistance Compact: EMAC Dictionary *available at* <http://www.emacweb.org> (follow “EMAC Dictionary” hyperlink under “Mutual Aid Resources” drop-down) (last visited Sept. 24, 2007).

<sup>36</sup> Emergency Management Assistance Compact, *supra* note 34 (discussing party state responsibilities).

<sup>37</sup> “A Team” from the Emergency Management Assistance Compact: EMAC Dictionary, *available at* <http://www.emacweb.org> (follow “EMAC Dictionary” hyperlink under “Mutual Aid Resources” drop-down) (last visited Sept. 24, 2007). *See also* Emergency Management Assistance Compact: How Does EMAC Work?, *available at* <http://www.emacweb.org/?142> (last visited Sept. 24, 2007).



of EMAC.<sup>38</sup> The state and A-Team collaborate to determine needs, costs, and availability of resources to respond to the disaster or emergency.<sup>39</sup>

Next, the requesting state completes the “requisition and negotiation of cost” and thereafter receives resources to address the disaster or emergency.<sup>40</sup> Subsequently, the assisting state, i.e., a state “providing assistance to another Member State” through EMAC,<sup>41</sup> requests reimbursement and ultimately receives reimbursement for its services from the requesting state.<sup>42</sup>

For example, in California, EMAC allows an authorized representative to request health care provider assistance from another member state by contacting that state’s authorized representative.<sup>43</sup> EMAC sets out specific requirements for member states for requesting and receiving these practitioners.<sup>44</sup> In addition to other responsibilities, EMAC requires member states to “become familiar with possible joint member situations,” “become familiar with other states’ emergency plans,” create “inventory and set procedures for interstate loan and delivery of human and material resources,” set procedures for delivery of assistance, and develop “plan[s] and procedures for managing and provisioning assistance.”<sup>45</sup> Hence, “[t]he strength of EMAC and the quality that distinguishes it ... lies ... [in part, in its] ability to move any resource one state has to assist another state, including medical resources.”<sup>46</sup>

Through EMAC, “licenses, certifications, and permits recognized by the [a]ssisting [s]tate will be recognized by the receiving state, subject to limitations and conditions prescribed by the governor’s [of the receiving

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<sup>38</sup> *Id.* at “A Team” from the Emergency Management Assistance Compact: EMAC Dictionary, *available at* <http://www.emacweb.org> (follow “EMAC Dictionary” hyperlink under “Mutual Aid Resources” drop-down) (last visited Sept. 24, 2007).

<sup>39</sup> *Id.*

<sup>40</sup> *See* Emergency Management Assistance Compact: How Does EMAC Work?, *available at* <http://www.emacweb.org/?142> (last visited Sept. 24, 2007).

<sup>41</sup> “Assisting State” from the Emergency Management Assistance Compact: EMAC Dictionary, *available at* <http://www.emacweb.org> (follow “EMAC Dictionary” hyperlink under “Mutual Aid Resources” drop-down) (last visited Sept. 24, 2007).

<sup>42</sup> *See* Emergency Management Assistance Compact: How Does EMAC Work? *available at* <http://www.emacweb.org/?142> (last visited Sept. 24, 2007).

<sup>43</sup> CAL. GOV’T CODE § 179.5 (Article 3, subd. (b)) (West 1995 & Supp. 2006).

<sup>44</sup> Emergency Management Assistance Compact, Article 3, *supra* note 16.

<sup>45</sup> *See* Emergency Management Assistance Compact: How Does EMAC Work? *available at* <http://www.emacweb.org/?142> (last visited Sept. 26, 2007).

<sup>46</sup> Emergency Management Assistance Compact: What is EMAC? *available at* <http://www.emacweb.org/?9> (last visited Sept. 26, 2007).

state] executive order.”<sup>47</sup> Insofar as liability is concerned, EMAC provides that the requesting state deem “those rendering aid and assistance under the compact. . . . [such as VHPs, as]. . . . agents of the requesting state for purposes of tort liability and immunity,” and thus shield the VHPs from liability for any good faith act or omission therein.<sup>48</sup> To address workers’ compensation coverage, EMAC provides that member states “provide compensation and death benefits” to their own injured or killed members, “as if the death or injury” occurred in the VHPs own state, thus the party states will “take care of their ‘own.’”<sup>49</sup>

### B. The Stafford Act

In addition to EMAC, the Stafford Act provides for state assistance through a Presidential declaration of a major disaster or emergency.<sup>50</sup> While EMAC provides for “mutual assistance” between states,<sup>51</sup> the Stafford Act provides for state-federal interaction via a federal declaration of an emergency or disaster situation and subsequent federal assistance.<sup>52</sup>

Under the Stafford Act, the declaration of an emergency or disaster is initiated by a request from the governor of the affected state, with the exception of those emergencies where the “subject area” of the emergency is “exclusively or preeminently in the federal purview.”<sup>53</sup> In the latter instance, the President may make a declaration absent a governor’s request.<sup>54</sup> Generally when an incident arises, the governor makes the declaration request directly to the FEMA Regional Director.<sup>55</sup> Thereafter, the FEMA Regional Director and state jointly perform a preliminary damage assessment (“PDA”) with which the Regional Director then “prepares a summary of the PDA findings.”<sup>56</sup> The Regional Director then submits an analysis of the PDA with recommendations to the Associate

<sup>47</sup> See Emergency Management Assistance Compact: EMAC Articles of Agreement *supra* note 16 (describing Article V of EMAC, “Licenses and Permits”).

<sup>48</sup> *Id.* (describing Article VI, “Liability”).

<sup>49</sup> *Id.* (describing Article VIII “Compensation”).

<sup>50</sup> See Bazan, *supra* note 17, at Summary (describing the purpose of the Act).

<sup>51</sup> See Emergency Management Assistance Compact: EMAC Articles of Agreement *supra* note 16, at Article 1 (describing the purposes of the Act).

<sup>52</sup> See Bazan, *supra* note 17 at Summary.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at CRS-3 (citing 42 U.S.C. §5191(b)).

<sup>55</sup> *Id.* at CRS-4 (citing 44 CFR Section §206.33 and §206.48 ).

<sup>56</sup> *Id.* (see also 44 CFR Section § 206.33, providing an exception to the PDA requirement for instances where apparent severity precludes the need to predetermine supplemental Federal assistance).

Director of FEMA, and the Director provides the President with a recommendation regarding the governor's request.<sup>57</sup>

While in general, the President has power to declare a major disaster or emergency only after receiving a gubernatorial request from the Governor of the affected state,<sup>58</sup> the President has authority to declare an emergency without a gubernatorial request where "primary responsibility" rests with the federal government.<sup>59</sup> An emergency declaration may be issued "on 'any occasion or instance' in which the President determines that federal assistance is required."<sup>60</sup> In addition, while the President "may respond to a governor's request for a declaration of a major disaster by a declaration of an emergency, a declaration of a major disaster, or a denial of the request," after the governor asks for an emergency declaration, the President must either declare an emergency or deny the request.<sup>61</sup>

An emergency declaration is based on whether federal assistance is needed to "supplement state and local efforts to save lives, protect property and public health and safety, or to lessen or avert the threat of a catastrophe," and FEMA will "recommend" assistance upon a determination of "inadequacy" of all other services.<sup>62</sup> Likewise, the basis of a major disaster declaration is on a "finding that the situation is or is not of such severity and magnitude as to be beyond capabilities of the state and local government," and that "federal. . . assistance is both necessary and appropriate."<sup>63</sup>

As a matter of statutory mandate, the Stafford Act requires the affected state to first take action under state law and the state's emergency plan before requesting a Presidential declaration of a major disaster<sup>64</sup> or emergency.<sup>65</sup> The affected state must base the assistance request for a major disaster on the basis of insufficient capability of performing relief efforts, which demands supplemental federal assistance.<sup>66</sup> In addition, the

<sup>57</sup> *Id.*

<sup>58</sup> See Bazan, *supra* note 17, at CRS-1 (describing the purpose of the Stafford Act).

<sup>59</sup> Keith Bea, *Federal Stafford Act Disaster Assistance: Presidential Declarations, Eligible Activities, and Funding*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS (August 29, 2005) (CRS-2), <http://www.fas.org/sgp/crs/homesecc/RL33053.pdf> (last visited Sept. 20, 2007) (citing 42 USC 5191(b)).

<sup>60</sup> *Id.*

<sup>61</sup> See Bazan, *supra* note 17, at CRS -6.

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

<sup>63</sup> *Id.* at CRS-4 (ultimately referencing 44 CFR 206.48).

<sup>64</sup> 42 U.S.C. § 5170 (2000).

<sup>65</sup> 42 U.S.C. § 5191(a) (2007).

<sup>66</sup> 44 C.F.R. § 206.36 (b)(1)-(2)(2005).

request must incorporate several factors, including a “preliminary estimates of the types and amount of supplementary Federal disaster assistance needed under the Stafford Act[.]”<sup>67</sup> Similarly, a state’s federal emergency request must include a specific “identification of the type and extent” of federal aid required before action can be taken.<sup>68</sup>

After the request and appropriate conditions are fulfilled, FEMA takes several factors into consideration when determining whether supplemental federal funds are necessary and appropriate to provide to the state, including the extent to which voluntary agencies can meet the needs of disaster victims.<sup>69</sup> This assessment thus provides that if there are volunteer agencies utilized under EMAC that may effectively address the state’s needs absent federal supplemental assistance, then there may be a denial of assistance under the Stafford Act.<sup>70</sup>

Upon the Presidential declaration of an emergency or major disaster, the federal government subsequently assumes control of relief efforts.<sup>71</sup> More specifically, the Director of FEMA appoints a Federal Coordinating Officer (“FCO”) to ensure the follow through of both the Presidential declaration and the FEMA-State Agreement.<sup>72</sup> The FEMA-State agreement “imposes binding obligations on FEMA, States, their local governments, and private nonprofit organizations within the State ... which are legally enforceable.”<sup>73</sup> The agreement identifies the time period, types, and extent for which assistance will be made available.<sup>74</sup> The FCO is responsible for the “initial appraisal of the types of assistance most urgently needed,”<sup>75</sup> and “coordinat[ing] the administration of relief, including the activities of State and local governments, activities of federal agencies, and those of” charitable organizations such as “the American Red Cross, the Salvation Army,” and others.<sup>76</sup> The Director also designates a “Disaster Recovery

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<sup>67</sup> *Id.* at § 206.36 (c)(4).

<sup>68</sup> *Id.* at § 206.35 (c)(4).

<sup>69</sup> *Id.* at § 206.48 (b)(4).

<sup>70</sup> *See generally id.* at § 206.48 (b)(4) (discussing that FEMA takes into account the availability of volunteer agencies’ capabilities of meeting needs when determining whether to recommend assistance under the Stafford Act).

<sup>71</sup> *See generally* Bazan, *supra* note 17, at CRS-7 (discussing the role of federal government as responsible for appointing a federal coordinating officer to oversee relief coordination, after Presidential declaration of an emergency or disaster).

<sup>72</sup> *Id.*

<sup>73</sup> 44 C.F.R. § 206.44 (a) (2005).

<sup>74</sup> *Id.* at § 206.44 (b).

<sup>75</sup> *Id.* at § 206.42 (a)(1).

<sup>76</sup> *Id.* at § 206.42 (a)(3).

Manager to exercise all of the Regional Director's authority in a major disaster or emergency."<sup>77</sup>

Similarly, the Governor of the affected state "designate[s] a State Coordinating Officer [(“SCO”)] to coordinate state and local assistance efforts with the federal efforts."<sup>78</sup> The SCO theoretically works “closely” with the FCO in an effort to effectively engage state efforts with federal efforts, and to “implement[] the state’s emergency plan.”<sup>79</sup>

Regarding specifically available assistance, a Presidential declaration of a major disaster creates the opportunity for two types of federal disaster assistance: general federal assistance and essential federal assistance.<sup>80</sup> The first, general federal assistance, provides for the President to direct any federal agency “to utilize its authorities and ... resources ... including personnel, equipment, supplies, facilities, and managerial, technical, and advisory services[,] in support of State and local assistance.”<sup>81</sup> General federal assistance also allows the President to “coordinate all disaster relief assistance (including voluntary assistance) provided by federal agencies, private organizations, and state and local governments.”<sup>82</sup> In addition, it allows the President to provide assistance to affected state and local governments in several key areas, including provision of health and safety measures,<sup>83</sup> and to “assist state and local governments in the distribution of medicine, food, and other consumable supplies, and emergency assistance.”<sup>84</sup>

In addition to general federal assistance, a Presidential declaration of a major disaster also allows for essential federal assistance, which “provide[s] assistance essential to meet[] immediate threats to life and property. . . .”<sup>85</sup> Essential federal assistance includes the “[u]tilizing, lending, or donating to State and local governments Federal equipment, supplies, facilities, personnel, and other resources[:]”<sup>86</sup> the distribution of “medicine, food, and other consumables” through disaster assistance organizations such as the American National Red Cross and Salvation

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<sup>77</sup> Bazan, *supra* note 17, at CRS-7.

<sup>78</sup> *Id.*

<sup>79</sup> *Supra* note 74 at § 206.42 (b).

<sup>80</sup> Bazan, *supra* note 17, at CRS-9,10.

<sup>81</sup> 42 U.S.C. § 5170a (1) (2005).

<sup>82</sup> *Id.* at § 5170a (2).

<sup>83</sup> *Id.* at § 5170a (3)(D).

<sup>84</sup> *Id.* at § 5170a (4).

<sup>85</sup> *Id.* at § 5170b (a).

<sup>86</sup> 42 U.S.C. § 5170b (a)(1) (2005).

Army;<sup>87</sup> and the acts of performing life saving, property protecting, or public health and safety work on public or private lands or waters, which includes debris removal,<sup>88</sup> search and rescue, emergency medical care,<sup>89</sup> and “clearance of roads and construction of temporary bridges.”<sup>90</sup>

For a Presidential declaration of an emergency, the Stafford Act provides for federal emergency assistance,<sup>91</sup> which is similar to the general federal assistance made available under a declaration of a major disaster.<sup>92</sup> With regard to assistance provided under the Stafford Act, the Disaster Relief Fund (“DRF”) provided for therein serves as the funds necessary for implementation of such actions.<sup>93</sup> For an emergency declaration there is a limit of \$5 million per declaration under the DRF, which the President may extend upon notification to Congress.<sup>94</sup>

Once the President declares a major disaster or emergency, FEMA assumes the responsibility for the majority of relief effort coordination.<sup>95</sup> Once FEMA has established its presence after the federal declaration of a major disaster or emergency, it then controls “the allocation of money across geographic areas,”<sup>96</sup> which presents difficulty in light of its hesitancy to provide expedited relief efforts due to possible backlashes that may result from potential errors associated with “not being cautious enough.”<sup>97</sup>

### C. Issues

There are several factors to consider when examining the state and federal interplay in emergencies and major disaster relief efforts. At its foundation, as a condition for any federal assistance, current law takes

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<sup>87</sup> *Id.* at § 5170b (a)(2).

<sup>88</sup> *Id.* at § 5170b (a)(3)(A).

<sup>89</sup> *Id.* at § 5170b (a)(3)(B).

<sup>90</sup> *Id.* at § 5170b (a)(3)(C).

<sup>91</sup> Bazan, *supra* note 17, at CRS-13 (explaining the Stafford Act).

<sup>92</sup> *See generally* 42 U.S.C. § 5192(a) (2007) (discussing assistance made available under federal emergency assistance); *cf.* 42 U.S.C. § 5170(a) (2007) (discussing assistance provided under general federal assistance); *see also* Bazan, *supra* note 17 at 9-14 (explaining federal statutes).

<sup>93</sup> Bea, *supra* note 59, at CRS-1 (explaining the Disaster Relief Fund).

<sup>94</sup> *Id.* at CRS-2.

<sup>95</sup> *See generally* Bazan, *supra* note 17 (discussion of the role of FEMA following a Presidential declaration).

<sup>96</sup> Sobel & Leeson *supra* note 23, at 8.

<sup>97</sup> Sobel & Leeson, *supra* note 23, at 8, 7, 6 (describing these problems with FEMA).

power from the state and transfers it to the federal government.<sup>98</sup> This is extremely shortsighted at best, since FEMA contains too many bureaucratic layers to allow for quick response and resource allocation.<sup>99</sup> Rather, it is our proposition that State control of relief efforts will allow those with more intimate knowledge with the local infrastructure to provide expedited response.

A critical examination of FEMA reveals apparent problems associated with its structure.<sup>100</sup> Along with being a federal agency, FEMA has the shortcomings associated with a large federal bureaucracy attempting to provide a nimble and rapid response.<sup>101</sup> The bureaucratic framework of FEMA creates a “slow or stalled” reaction when implementing emergency efforts because of all the steps and paperwork necessary as a precondition to consideration of an actual response.<sup>102</sup> At a minimum, this legal infrastructure for public health preparedness and response indicates that there is too great of a federal role and bureaucratic norm, which results in delays, conflicts, and inefficient use of resources.<sup>103</sup>

The events of Katrina illustrate these conflicts quite distinctly. For example, a request from the Louisiana Department of Wildlife and Fisheries for rubber rafts from FEMA was made during the Katrina response.<sup>104</sup> FEMA denied the request, basing its decision on the belief that the “rubber rafts would not be strong enough to maneuver” Louisiana’s “debris-filled water.”<sup>105</sup> This was met by strong opposition and a plea for reconsideration by Louisiana officials with relevant experience, opining that the rubber rafts would in fact be suitable and beneficial to response efforts.<sup>106</sup> On another occasion, a truckload of ice meant for Louisiana was misallocated, eventually ending up in Tucson, Arizona.<sup>107</sup> The driver of the truck received so many disparate instructions from officials that after a journey through twenty-two states, he gave the ice to the polar bears of the Reid Park Zoo in Tucson due to the inability of the officials to coordinate

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<sup>98</sup> See *supra* note 71 and accompanying text.

<sup>99</sup> See generally Sobel & Leeson, *supra* note 23, at 2 (discussing the bureaucratic problems with FEMA).

<sup>100</sup> See generally *id.* (discussing problems inherently attributable to FEMA, such as the problems with bureaucracy, coordination, and adverse incentives).

<sup>101</sup> *Id.* at 2 (describing this problem).

<sup>102</sup> *Id.*

<sup>103</sup> See generally Sobel & Leeson, *supra* note 23 (discussing such problems with FEMA).

<sup>104</sup> *Id.* at 5.

<sup>105</sup> *Id.* at 5.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

the directions for delivery.<sup>108</sup> These simple examples show that to maximize effective and efficient relief efforts, the federal government's role must be minimized, rather than enlarged.<sup>109</sup>

### III. UNIFORM EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT

The Uniform Emergency Volunteer Health Practitioners Act [hereinafter UEVHPA] attempts to address the need for relying on private sector health practitioners and nongovernmental organizations to meet public health demands during emergency and disaster situations.<sup>110</sup> Namely, the National Conference of Commissioners on Uniform State Laws, through the model act, isolates the lack of a uniform system to coordinate volunteer health practitioners who wish to serve populations living in a state with an emergency, and proposes the UEVHPA to address this problem.<sup>111</sup> This is in direct response to the uncoordinated efforts in Katrina and other disaster responses that resulted in tremendous numbers of improperly deployed voluntary providers entering into the affected states.<sup>112</sup>

While recognizing that licensing is a pressing issue, the UEVHPA also recognizes the importance of civil liability and workers compensation concerns. UEVHPA does not currently have definitive civil liability or workers' compensation provisions, although two sections and alternatives have been proposed for the drafting committee's future consideration.<sup>113</sup> These two reserved sections provide options for civil liability<sup>114</sup> and workers' compensation coverage.<sup>115</sup> The provided options for addressing civil liability are based upon the concern that many out-of-state practitioners that provided medical services in Louisiana during Hurricane Katrina faced the "possibility of noncoverage under their medical malpractice policies[,]"<sup>116</sup> as well as recognizing the impact that uncertainty

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 10.

<sup>110</sup> See the Uniform Emergency Volunteer Health Practitioners Act [hereinafter UEVHPA] (2006) (PREFATORY NOTE), <http://uevhpa.org/desktopdefault.aspx?tabindex=1&tabid=55> (last visited Sept. 21, 2007) (click on "Final Act (2006)"; click on "Full Text in PDF").

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> See The Uniform Emergency Volunteer Health Practitioners Act, Summary of Act, available at <http://uevhpa.org/DesktopDefault.aspx?tabindex=0&tabid=53> (last visited Sept. 21, 2007).

<sup>114</sup> See UEVHPA § 11.

<sup>115</sup> See UEVHPA § 12.

<sup>116</sup> See UEVHPA (PREFATORY NOTE).



in liability coverage can have on impeding recruitment of volunteer health practitioners.<sup>117</sup> The UEVHPA drafters also recognized the necessity of a “uniform system to compensate volunteer practitioners” in creating an effective system of worker’s compensation coverage.<sup>118</sup>

#### A. UEVHPA

In 2005, Hurricane Katrina exposed the deficiencies in the use of volunteer health practitioners across state lines, namely that there was no “uniform and well-understood” means to effectively implement a combination of private and public sector programs.<sup>119</sup> It has been claimed that the existing framework lacked a system to address large quantities of spontaneous volunteers.<sup>120</sup>

In an effort to address the need for further uniformity for effective use of providers as well as issues concerning injured patients and providers during an emergency or disaster, the NCCUSL has proposed a model act for state adoption—the UEVHPA, which focuses on interstate licensure, application of coverage, and scope of practice standards to coordinate health practitioner volunteers,<sup>121</sup> and proposes potential alternate means to address VHP civil liability<sup>122</sup> and workers’ compensation coverage.<sup>123</sup>

The UEVHPA addresses these concerns based upon issues of the “host state.”<sup>124</sup> The host state refers to the state that experiences the emergency or disaster and utilizes Voluntary Health Practitioners

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<sup>117</sup> *Id.*

<sup>118</sup> UEVHPA (2006) § 12 (Reserved) Legislative Note.

<sup>119</sup> *See* UEVHPA (PREFATORY NOTE).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *See generally* Summary, The Uniform Emergency Volunteer Health Practitioners Act, Summary of Act, *available at* <http://uevhp.org/DesktopDefault.aspx?tabindex=0&tabid=53> (last visited Sept. 21, 2007) (discussing how the UEVHPA does not presently address civil liability, rather it has an open section for future consideration); *see also* UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT, Prefatory Note (Draft of Reserved Sections 11-12 2007), *available at* [http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007\\_amdraft.pdf](http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007_amdraft.pdf).

<sup>123</sup> *See generally* The Uniform Emergency Volunteer Health Practitioners Act, Summary of Act, *available at* <http://uevhp.org/DesktopDefault.aspx?tabindex=0&tabid=53> (last visited Sept. 21, 2007) (discussing how the UEVHPA not presently addressing workers’ compensation, rather it has an open sections for future consideration); *see also* UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT, Prefatory Note (Draft of Reserved Sections 11-12 2007), *available at* [http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007\\_amdraft.pdf](http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007_amdraft.pdf).

<sup>124</sup> *See* UEVHPA (PREFATORY NOTE).

[hereinafter VHPs] from the responding state;<sup>125</sup> likewise, the host entity refers to an entity located within the host state that utilizes VHPs in response to an emergency or disaster declaration.<sup>126</sup> A VHP refers to a health practitioner who provides health services in a state in which an emergency declaration is in effect.<sup>127</sup>

With respect to substantive provisions, the model statute proposes a registration system to contain organized information about VHPs that is capable of verifying the accuracy of information regarding licensing.<sup>128</sup> One purpose of the proposed registration system is to discourage the noted problem of “spontaneous volunteers,” thereby preventing these volunteers from burdening relief efforts.<sup>129</sup> While the registration system ultimately seeks to increase speed of licensure verification, it in turn takes the power away from the host state to “review and approve” volunteers’ credentials, since any such “review and approve” power subtracts from the desired uniformity.<sup>130</sup>

In addition to creating a uniform registration system for volunteers, the UEVHPA also limits the applicability of the act. Its protections extend to VHPs registered with an approved registration system who are performing services during an emergency declaration.<sup>131</sup>

With respect to licensure, the UEVHPA addresses health care provider interstate licensure reciprocity (i.e., the grant of licensure to an out-of-state health practitioner by the host state during an emergency).<sup>132</sup> The model act allows for such reciprocity subject to the satisfaction of four requirements.<sup>133</sup> First, the VHPs must be in “good standing” and “duly licensed” in another state other than the host state.<sup>134</sup> Second, there must be an existing emergency situation.<sup>135</sup> Third, the VHPs must be “registered with a registration system.”<sup>136</sup> Fourth, the VHPs must comply with UEVHPA’s scope of practice requirements and the laws and restrictions of practice provided by the host state.<sup>137</sup>

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<sup>125</sup> UEVHPA § 2,

<sup>126</sup> *Id.*

<sup>127</sup> UEVHPA § 2 (COMMENT).

<sup>128</sup> UEVHPA § 5 (COMMENT).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> UEVHPA § 3.

<sup>132</sup> UEVHPA § 6.

<sup>133</sup> UEVHPA § 6 (COMMENT).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

Although providing guidance for use of VHPs, the UEVHPA does not limit “rights, privileges, or immunities provided to volunteer health practitioners by [other] laws.”<sup>138</sup> Therefore the UEVHPA does not limit the state from using VHPs through EMAC.<sup>139</sup> EMAC member states may continue to contract with VHPs using existing procedures to receive assistance during public health emergencies.<sup>140</sup>

The UEVHPA also articulates ways in which a state might regulate VHPs through scope of practice provisions.<sup>141</sup> The UEVHPA defines scope of practice as the “extent of the authorization to provide health [...] services granted to a health practitioner by a license issued to a practitioner in the state in which the principal part of the practitioner’s services are rendered, including any conditions imposed by the licensing authority.”<sup>142</sup> Thus, during an emergency, the host state may limit the VHPs “duration of practice,” “geographical areas” in which they may practice, “types of volunteer health practitioners who may practice,” and other matters necessary for effectiveness.<sup>143</sup>

In 2006, the drafters of the UEVHPA reserved two topics for future debate:<sup>144</sup>

- (1) whether and to what extent volunteer health practitioners and entities deploying and using them are responsible for claims based on a practitioner’s act or omission in providing health . . . services (Section 11); and (2) whether volunteer health practitioners should receive workers’ compensation benefits in the event of injury or death while providing such services (Section 12).<sup>145</sup>

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<sup>138</sup> UEVHPA § 9 (a).

<sup>139</sup> *Id.*

<sup>140</sup> UEVHPA § 9 (b).

<sup>141</sup> UEVHPA § 4 and 8.

<sup>142</sup> UEVHPA § 2 (12).

<sup>143</sup> UEVHPA § 4 (a)(1)-(4).

<sup>144</sup> *See, e.g.*, UEVHPA § 12 (“Final action regarding Section 12 of the Act has been deferred until the 2007 Annual Meeting of the National Conference of Commissioners on Uniform State Laws.”) and UEVHPA § 11 (deferring action on Section 11). *See also* The Uniform Emergency Volunteer Health Practitioners Act, Summary of Act, available at: <http://uevhp.org/Desktopdefault.aspx?tabindex=0&tabid=53> (last visited Sept. 21, 2007).

<sup>145</sup> UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT, Prefatory Note (Draft of Reserved Sections 11-12 2007), available at [http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007\\_amdraft.pdf](http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007_amdraft.pdf).

In 2007, the UEVHPA proposed three alternatives to address the civil liability issue (section 11):

Alternative A to Section 11 provides protection to practitioners based upon their negligent acts or omissions in providing services pursuant to the act and also insulates the entities that deploy and use them from vicarious liability for those acts or omissions. Alternative B provides the same degree of protection from civil liability to volunteers and the entities that deploy and use them as Alternative A, but the victims of negligent acts are entitled to seek compensation from the state under its tort claims laws. . . . Alternative C clarifies that the protections provided to uncompensated volunteers by the federal Volunteer Protection Act, 42 U.S.C. § 14501 *et seq.*, extend to uncompensated volunteer health practitioners under the UEVHPA. This alternative does not address the issue of vicarious liability, leaving the matter to existing state law.<sup>146</sup>

Although not currently finalized,<sup>147</sup> these UEVHPA draft strategies for civil liability provide for different aspects of liability coverage.<sup>148</sup> None of the three alternatives limit liability for VHPs who “[engage in] willful misconduct or wanton, grossly negligent, reckless, or criminal conduct,” or an “intentional tort,”<sup>149</sup> and, importantly, for actions of breach of contract, actions brought by a host entity, or actions “relating to the operation of a [...] vehicle by the practitioner” for which the “state requires the operator to have a valid operator’s license or to maintain liability insurance, other than an ambulance or other emergency response vehicle. . . .”<sup>150</sup> More specifically, Alternative A proposes that during an emergency, VHPs would be absolved of liability for acts or omissions performed when acting within the scope of their responsibility as VHPs.<sup>151</sup> In other words,

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<sup>146</sup> *Id.*

<sup>147</sup> *See supra* note 113.

<sup>148</sup> *See* UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT (Draft of Reserved Sections 11-12 2007), available at [http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007\\_amdraft.pdf](http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007_amdraft.pdf).

<sup>149</sup> *See* UEVHPA, § 11 (Alternatives A-C) (Draft of Reserved Sections 11-12 2007), available at [http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007\\_amdraft.pdf](http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007_amdraft.pdf).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

Alternative A immunizes practitioners completely from ordinary negligence.<sup>152</sup>

Alternative B, on the other hand, “generally” proposes that VHPs and host entities be protected from liability as provided for by EMAC.<sup>153</sup> EMAC, as noted previously, provides that requesting states consider VHPs “agents of the requesting state” for purposes of civil liability and immunity.<sup>154</sup> Finally, Option C proposes that liability should be determined in accordance with the Federal Volunteer Protection Act.<sup>155</sup> The Federal Volunteer Protection Act provides that “no volunteer of a nonprofit organization or government entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity”<sup>156</sup> if certain conditions are met.

Similarly, the UEVHPA also proposes draft versions of workers’ compensation coverage for VHPs.<sup>157</sup> The state model act proposes that the host state regard VHPs as employees of the host state for purposes of workers’ compensation, but only when no other means of coverage exists.<sup>158</sup> The VHP is entitled to benefits based upon their earnings from the previous calendar year.<sup>159</sup>

### *B. Issues*

Several issues are apparent with respect to the UEVHPA. The examination of these issues in the context of federal policy provide an opportunity to consider more efficient means of addressing public health preparedness and response.

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<sup>152</sup> *Id.* UEVHPA § 11 (Comment 4), available at <http://www.uevhp.org/DesktopDefault.aspx?tabindex=1&tabid=69> (last visited November 13, 2007).

<sup>153</sup> See UEVHPA, § 11 (Comment 4) (Draft of Reserved Sections 11-12 2007), available at [http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007\\_amdraft.pdf](http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007_amdraft.pdf). (“The approach of Alternative B is generally consistent with protections afforded state-based volunteers through EMAC,” but also stating some ways in which they “differ.”).

<sup>154</sup> See EMAC art. 6 (liability); see also EMAC Articles of Agreement available at <http://www.emacweb.org/?146> (last accessed Sept. 26, 2007) (describing Article VI, “Liability.”).

<sup>155</sup> See UEVHPA, § 11 (Comment 4) (Draft of Reserved Sections 11-12 2007), available at [http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007\\_amdraft.pdf](http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007_amdraft.pdf).

<sup>156</sup> Volunteer Protection Act of 1997 Section 4(a), 42 U.S.C. § 14503(a) (West 2007)

<sup>157</sup> UEVHPA § 12.

<sup>158</sup> *Id.*

<sup>159</sup> See UEVHPA Prefatory Note (Draft of Reserved Sections 11-12 2007), available at [http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007\\_amdraft.pdf](http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007_amdraft.pdf).

First, the UEVHPA is extensively redundant with existing provisions for public health responsiveness on the state level. Virtually all of its provisions—state-state potential cooperation, civil liability, and workers compensation—are already addressed through EMAC and other laws and policies.<sup>160</sup> The UEVHPA adds very little to improving preparedness but instead introduces another level of bureaucracy into an area where limited, rather than greater, bureaucratic norms are needed. Further, as an envisioned state law, it adds uncertainty as to jurisdictional aspects of adjudicating the very issues it purports to address—state-state issues of response, liability, and workers compensation.

Further, the UEVHPA, as well as federal emergency and disaster statutes, fail to recognize important policy areas that require attention to address the key foundational concern of all of them—effective and appropriate response to disasters and emergencies.

At the outset, there is no differentiation between natural and human-sourced disasters.<sup>161</sup> The expertise required for effective disaster responses are diverse, depending upon whether or not a state has experience or nascent skills addressing a particular event. Substantive differences in needs arise from the distinction in categorization of events—earthquakes in California will require expertise quite different than other emergencies in the same location.<sup>162</sup> Importantly, as implied by this observation, natural

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<sup>160</sup> Indeed, the UEVHPA itself notes it is imitating already extant federal policy. As an example of an appropriate registration system, the UEVHPA identifies the Emergency Systems for the Advance Registration of Volunteer Health Professionals (ESAR-VHP). See UEVHPA § 5 (COMMENT). Following the attacks of September 11, 2001, Congress authorized the US Department of Health and Human Services to allocate funds to “assist” the states in developing ESAR-VHP, and to “encourage” states to create a volunteer registration system. See James G. Hodge, Jr., Lance A. Gables & Stephanie H. Calves, *The Legal Framework For Meeting Surge Capacity Through the Use of Volunteer Health Professionals During Public Health Emergencies and Other Disasters*, 22 J. CONTEMP. HEALTH L. & POL’Y 5, 9-10, 21 (2006). The ESAR-VHP establishes a pre-registration system for VHPs. See U.S. Dept of Health and Human Servs., Health Resources and Services Administration, Emergency System for Advance Registration of Volunteer Health Professionals [ESAR-VHP], available at <http://www.hrsa.gov/esarvhp/> (last visited Sept. 24, 2007). Each system provides “readily available, verifiable, up-to-date information” about the “identity, licensing, credentialing, accreditation, and privileging” of VHPs. *Id.*

<sup>161</sup> See generally UEVHPA § 2 at (2) (not distinguishing between natural and human-sourced disasters).

<sup>162</sup> See generally Reinhard Mechler and Koko Warner, *Differing Economic Impacts and Policy Requirements of Earthquakes, Floods, and Storms: A Case Study of Nicaragua*, International Institute for Applied Systems Analysis (IIASA), available at <http://www.iiasa.ac.at/Research/RMS/july2000/Papers/CATabs1810.pdf> (last accessed

disasters themselves require further dissection into smaller subdivisions of familiar and unfamiliar natural disasters with respect to the occurrence rate in the affected state. In fact, categorization and sub-categorization of disaster types allows for the state to tailor its requests based on its specific needs rather than forcing a one-size-fits-all response, which inevitably leads to uncoordinated efforts and unknowledgeable individuals taking control of disaster response, such as was the case in Katrina.

Related to this concern, state and local governments have the requisite experience and knowledge of their infrastructure to coordinate relief efforts, and in fact are better suited to advance such relief efforts because of awareness of local populations, environments, and needs.<sup>163</sup> The Stafford Act and UEVHPA do nothing to resolve the failure of current legislation to allow the affected state and local governments to coordinate effective relief efforts. Indeed, importantly, the model act does nothing to incentivize state-state cooperative use of experienced persons and extant policies and infrastructures to more efficiently coordinate rapid and effective responses to host state-defined needs.

In addition, current laws and the UEVHPA do nothing to provide for financial assistance to affected states requesting VHPs from a responding state through EMAC.<sup>164</sup> This financial assistance exclusive of federal presence is vital to allowing the state's public health response and preparedness infrastructure to flex with the emergency or disaster. To truly address public health preparedness, public policy must take into account the needs of a state while also considering the ability of the state to coordinate efforts to provide for those needs, including dedicated funding mechanisms that are not premised upon federal control. This current system results in a Sophie's Choice.<sup>165</sup> the state must choose either to control of relief efforts itself, with limited or no funds to perform an effective response; or to request federal financial assistance, with loss of state control that leads to an uncoordinated effort with long delays and continuing bureaucratic

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Oct. 3, 2007) (distinguishing needs in earthquakes that affect underground structures and have little impact on agriculture from tropical cyclones that cause more extensive "above ground and underground" damage resulting in "heavy impact on agriculture") (italics omitted).

<sup>163</sup> See *infra* note 179 and accompanying text (discussing local knowledge).

<sup>164</sup> See UEVHPA § 9 (COMMENT) (2006) (discussing a state's continued ability to utilize VHPs pursuant to EMAC, but saying nothing of specifically providing federal funding).

<sup>165</sup> "A 'Sophie's Choice' is a tragic choice between two unbearable options." See *Sophie's Choice* available at [http://en.wikipedia.org/wiki/Sophie's\\_Choice\\_\(novel\)](http://en.wikipedia.org/wiki/Sophie's_Choice_(novel)) (last visited Sept. 24, 2007).

inefficiencies that leaves disaster and emergency victims in its wake.<sup>166</sup> Any effective and efficient public health preparedness infrastructure must therefore address the importance of allowing financial assistance without requiring federal coordination of relief efforts, thus allowing the state's existing infrastructure to be employed to meet its own needs.

#### IV. THEMES FOR PROMOTING EFFECTIVE PUBLIC HEALTH PREPAREDNESS

##### *A. Avoiding Provider Provision Redundancy*

Appropriate preparedness and emergency and disaster response must allow states to utilize reciprocal licensing for providers. However, in contrast to the redundant provisions under the UEVHPA, such licensing reciprocity is already extant under EMAC for natural and human-sourced disasters.<sup>167</sup>

EMAC currently allows the state to choose which VHPs they wish to enlist for their relief efforts, while also serving as a disincentive to spontaneous volunteers by means of limiting civil liability protections through application of particular state law provisions.<sup>168</sup> The registration provision is mimicked by the UEVHPA, and the civil liability regulation under EMAC is one of the options the UEVHPA drafters are considering for civil liability under the model statute.<sup>169</sup> The effect of the model act, then, is to simply add an unnecessary policy layer to an already burdened legal infrastructure. It provides limited advantages, and as a state model act, creates the problems of uneven application, provision changes by individual state legislatures, and conflict of laws, thus potentially resulting in decreased, rather than increased uniformity.<sup>170</sup>

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<sup>166</sup> See generally Sobel & Leeson, *supra* note 23 (discussing problems with FEMA and bureaucracy).

<sup>167</sup> See *supra* note 47 (discussing licensing provisions under EMAC).

<sup>168</sup> See *supra* notes 35-40, 47-49 (discussion of utilization of VHPs through EMAC, and applicable civil liability for providers and workers' compensation for providers).

<sup>169</sup> See *supra* notes 132-137 (discussing the registration system under the UEVHPA), and note 153 (discussing EMAC as one option the drafters could choose in terms of determining civil liability under the UEVHPA).

<sup>170</sup> See generally 16 AM. JUR. 2D *Conflict of Laws* § 7 (2006) (in "a jurisdiction which has adopted one of the modern rules for deciding choice-of-law questions... the lex loci is no longer automatically applied to matters of a substantive nature," rather this has been "abandoned in favor of greater flexibility" and allowance of "sensitivity in judgment" that lex loci ignored); see also Daniel S. Reich, *Modernizing Local Responses to Public Health Emergencies: Bioterrorism, Epidemics, and the Model State Emergency Health Powers Act*, 19 J. CONTEMP. HEALTH L. & POL'Y 379, 385 (2003) (discussing a



Although EMAC does have these licensure provisions in place,<sup>171</sup> avoiding the noted conflicts of laws, uneven application, and jurisdictional concerns requires a clearer legal infrastructure.<sup>172</sup> Addressing these issues effectively can be done at the federal level. Because the time and manner of effective responses are national security issues, federal legislation providing uniform application of a preparedness and response infrastructure would be most appropriate. Such policy could build upon extant state policies and agreements through incentives for registration as well as uniformly deal with liability concerns and workers compensation concerns.

### *B. State and Local Control*

Current law and model proposals propagate response efforts led by those with limited local experience, which can concomitantly slow and stall relief efforts.<sup>173</sup> Instead, the state, through its local public health authorities, should lead coordination of relief efforts without federal control of a physical and socio-cultural environment with which it has limited experience or knowledge.

Efforts that limit the role of federal agencies rather than expand it better serve state public health preparedness and response.<sup>174</sup> The comprehension of the needs and the experience of local entities by definition and necessity outpaces any knowledge that federal agencies might have in their activities and responsibilities with regard to emergencies and disasters that effect persons, places, and things that public health authorities address on a regular basis.

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particular model act, and noting that that “no state is required to adopt” it, and explaining that “it is unlikely that the Model Act [would] be adopted in its entirety by any state.”); Earl M. Maltz, *Do Modern Theories of Conflict of Laws Work? The New Jersey Experience*, 36 RUTGERS L.J. 527, 534-535 (2005) (outlining uncertainty in choice-of-laws in interpersonal immunity in tort across state lines); and Bryan A. Liang & Steven D. Small, *Communicating About Care: Addressing Federal-State Issues in Peer Review and Mediation to Promote Patient Safety*, 3 HOUSTON J. OF HEALTH L. & POL’Y 219, 243, 246 (2003) (discussing challenges in choice-of-law issues in mediation and confidentiality in health care that create disincentives for patient safety discussions).

<sup>171</sup> See *supra* note 47 (discussing licensing provisions under EMAC).

<sup>172</sup> See *supra* note 170 and accompanying text (discussing conflict of laws issues).

<sup>173</sup> See *supra* notes 98- 109 and accompanying text (discussing need for local control of disaster response); see also Sobel & Leeson, *supra* note 23, at 2 (discussing problems with federal beauracracy).

<sup>174</sup> See Sobel & Leeson, *supra* note 23, at 1 (discussing need to limit federal government’s role).

Federal law is required here to change these extant laws and policies, as well as avoid the limits of the proposed UEVHPA process. Currently, a request by a governor of the affected state places FEMA in charge of administering the provisions of the Stafford Act.<sup>175</sup> In practice, even though FEMA officials are to consult local agencies of the disaster areas, they repeatedly “deny” these local agencies the authority to make “crucial” assessments and decide emergency resource allocation.<sup>176</sup> By adopting federal law providing states the authority to lead emergency relief resource allocation, states can more effectively coordinate response efforts where best suited on the basis of local knowledge.

### *C. Distinguishing Types of Emergencies and Disasters*

As noted previously, the current legal regime, as well as the proposed one under the UEVHPA, fail to draw a distinction between human-sourced and natural disasters. Yet states experience very different needs with these two distinct categories, and effective public health response requires legal attention to this issue.

For example, while hurricane Wilma was headed for Florida in 2005, Governor Jeb Bush told the House Committee on Homeland Security that “Florida, and other states, know how best to manage their emergencies. . . .”<sup>177</sup> Therefore, states that have previously experienced particular natural disasters and emergencies may be much more likely to have formalized training, processes, and experience to efficiently coordinate public health efforts in the wake of such an event.<sup>178</sup> In this situation, one can infer that they seem to be best qualified to understand the relevant needs, actions, and activities required as well as the associated time frame, the legal means and methods to move the response forward, and other considerations in preparing for and responding to the crisis.<sup>179</sup> They are unwilling response experts, so to speak, of these events.<sup>180</sup>

<sup>175</sup> See *supra* note 71 and accompanying text.

<sup>176</sup> Sobel & Leeson, *supra* note 23, at 5.

<sup>177</sup> Mark K. Matthews, *Govs: We're in Charge of Disasters*, Stateline.org, Oct. 20, 2005, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=61664> (last visited Nov. 20, 2007).

<sup>178</sup> See *generally id.* (discussing how some state governors conveyed the message to the committee that they are better equipped to deal with emergency and disaster situations).

<sup>179</sup> See David L. Feinberg, *Hurricane Katrina and the Public Health-Based Argument for Greater Federal Involvement in Disaster Preparedness and Response*, 13 VA. J. SOC. POL'Y & L. 596, 607 (2006) (discussing how local governments should be

On the other hand, a unique human-sourced disaster may require the state to seek external consultation, particularly federal assistance, to supplement a state's response.<sup>181</sup> For instance, in the wake of a human-sourced bioterrorism attack or contagious diseases, the state may seek the assistance of the federal Center for Disease Control and Prevention ("CDC").<sup>182</sup> The CDC is the agency in the United States whose focus is to protect the public by controlling, responding to, and preventing diseases.<sup>183</sup> In conjunction with federal, state, and local governments, the CDC has promulgated guidelines to respond to biological and chemical terrorism.<sup>184</sup> It appears that it may have much greater experience and expertise to address the bioterrorism analysis and response, as well as preventive efforts for such an eventuality, whereas the state does not due to its unfamiliarity with the relief efforts and infrastructural requirements that such attack would demand.<sup>185</sup> Hence, separating human-sourced disaster and emergency circumstances from natural ones can allow for increased efficiency and effectiveness in relief efforts by parsing what kinds of resources are needed for each and who can best provide them.

Furthermore, a similar approach to distinguishing natural disasters by previous occurrence in specific localities, which draws upon state expertise, can also be helpful in making response efforts more effective. For example, emergency and disaster response can benefit from a division of natural disasters into two categories: familiar disasters and unfamiliar disasters. Such a distinction is invaluable as a basis for assistance. Hence, if Alaska, which has a high occurrence of earthquakes,<sup>186</sup> were to experience

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utilized in a natural disaster because they are the "first line of defense against natural disasters" due to their "close proximity" to the "affected" area, and their "local knowledge" of the local community).

<sup>180</sup> See generally *id.* and accompanying text.

<sup>181</sup> See *id.* at 616 (identifying situations, such as 9/11, in which local governments may become overwhelmed and require Federal assistance).

<sup>182</sup> See Feinberg, *supra* note 179 at 610 (discussing the role of the CDC in Hurricane Katrina).

<sup>183</sup> See "CDC's Mission" <http://www.cdc.gov/about/organization/mission.htm> (last visited Oct. 3, 2007).

<sup>184</sup> See Kevin M. Yeskey, *Bioterrorism: CDC's Public Health Response before the House Committee on Veterans Affairs, Subcommittee on Health*, April 10, 2002, <http://www.hhs.gov/asl/testify/t020410.html> (last visited Oct. 3, 2007) (discussing the guidelines).

<sup>185</sup> See generally *id.* (discussing the importance of the role of the CDC in efforts to address bioterrorism).

<sup>186</sup> US Geological Survey, *Top Earthquake States*, available at [http://earthquake.usgs.gov/regional/states/top\\_states.php#alaska](http://earthquake.usgs.gov/regional/states/top_states.php#alaska) (last visited Sept. 21,

an earthquake of relatively high magnitude, the state most likely has the requisite experienced personnel and resources needed to deal with such a relatively familiar natural disaster. However, although the state does have expertise, it still may require federal emergency financial assistance to better serve public health in specific areas that the public health authorities, themselves, understand and can identify more readily. On the other hand, if West Virginia, with highly limited familiarity in this area,<sup>187</sup> experienced a high magnitude earthquake, it may require significant relief assistance and financial and personnel guidance since the authorities there are unfamiliar with such an event. Yet the state public health authorities there would be much more familiar than any outside agency with the rural populations, their demographics, locations, useful communication means and strategies, and other local information and, thus, may still be best suited to coordinate the response efforts.

At the present time, in the hypothetical case of West Virginia, funding is currently available through FEMA, but such assistance would position federal personnel as the coordinating agents for relief efforts.<sup>188</sup> This likely will not efficiently serve the public health interests of the state. Furthermore, drawing upon Alaska or other states with earthquake response effort experience is limited if federal financial assistance is critical to response efforts. In the first scenario, West Virginia would be required to cede authority to the federal government, which precludes the state's public health infrastructure from leading the relief and response effort, despite its local knowledge of the population and available resources. The latter state-led approach would allow the state to obtain earthquake response experience from knowledgeable states while also taking into account its own unique needs, but without the vital financial assistance available.

Hence, a more effective approach would be for West Virginia to access experienced personnel from states such as Alaska, that are familiar with such events. The Alaskan personnel would be familiar with state issues, substantive earthquake response issues, as well as other concerns that are critical to understand and apply when a state experiences this type of public health emergency or disaster.<sup>189</sup> If additional personnel with broader experience are needed, the state may call upon federal assistance

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2007) (identifying Alaska as the state with the highest occurrence of earthquakes).

<sup>187</sup> *See id.* (identifying West Virginia as reporting only one earthquake occurrence between 1974 and 2003).

<sup>188</sup> *See Sobel & Leeson, supra* note 23, at 2 (discussing the FEMA bureaucracy).

<sup>189</sup> *See supra* notes 177-179 and accompanying text (discussing the ability and desire of states to control relief efforts in wake of disasters and emergencies).

that is narrowly focused on specific needs so as to ensure coordinated and effective deployment of these valuable federal resources. Federal funding should be available in either situation coupled with an effective and appropriate response, not federal entry, as the focus and trigger for federal financial assistance.

Similar considerations may be relevant for human-sourced events. For instance, consider a state with public health personnel that are highly trained for dealing with anthrax because of its locality or high probability of being a target for terrorism. If another state with a similar profile or in geographic proximity to the high risk state experienced an anthrax attack that based on its own abilities, it was unable to effectively respond, the affected state could request assistance from the state with greater familiarity with bioterrorism response, pursuant to EMAC and other established avenues. This response would thus allow a state's public health infrastructure the flexibility to meet demand through state-state cooperation, without requiring federal oversight and control, thus promoting a rapid public health response. Again, where additional expertise is needed in the event that neither state can effectively respond to the event, a specific request to the federal government for resources narrowly tailored to the event could result in a more effective and efficient use of resources in response to the event. Also, federal financial assistance should be available for an effective response, whether federal officials are present or not.

In these scenarios, it is essential to note is that in times of great stress, effective and efficient responses must be able to use the limited and strained resources available wisely and quickly. Taking advantage of local strengths as well as other state and national expertise should be tailored to the specific event in question, while allowing those with local knowledge and expertise to seek and receive the needed resources from whomever has the relevant expertise to help. An effective response relies upon the flexibility of the system's infrastructure. Thus, flexible response systems should replace the current implementation of an infrastructural policy that wastes valuable financial and human resources and whose failure is and has been borne by those at greatest risk for disaster and emergency assistance.

#### *D. Uniform Liability and Workers' Compensation*

To maximize recruitment efforts of skilled VHPs, there must be provider protection in place. Otherwise the states suffering an emergency or disaster will be unlikely to attract assistance from out-of-state practitioners, and thus will be unable to effectively perform response efforts. To address

liability and workers' compensation coverage, a proper system seemingly exists under the Tort Claims Act of various states. Indeed, as noted previously, EMAC relies on such statutes to address provider liability.<sup>190</sup> These Tort Claims Acts may give some employees, depending on certain criteria, the benefits that come with state sovereign immunity, and thus shield them from civil liability.<sup>191</sup> For instance, Delaware does not recognize a claim or cause of action against "the State or any public officer or employee," when the act or omission was in "connection" with official duty, done in "good faith" and with the "belief" that such act or omission best serves the public interest, and was "done without gross or wanton negligence."<sup>192</sup>

However, in the majority of jurisdictions, the state's Tort Claims Act applies only to "employees, officers, or agents of the government if the relevant acts were performed within the scope of their employment."<sup>193</sup> This provision creates significant challenges regarding the VHPs as employees of the state even when they are requested by a state in the event of a disaster or emergency. Further, the diversity of jurisdictional holdings across states with respect to whom and what is covered within these statutes makes legal certainty tenuous at best for professionals crossing state lines.<sup>194</sup> Indeed, this problem is exemplified by noting the doctrine of contributory negligence,<sup>195</sup> as some states have adopted the doctrine and others have not.<sup>196</sup>

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<sup>190</sup> See *supra* note 48 (describing how employees providing assistance pursuant to EMAC are considered employees of the state and shielded from civil liability, at least when they act in "good faith").

<sup>191</sup> Hodge, Gables & Calves, *supra* note 160, at 35 (discussing such laws).

<sup>192</sup> DEL. CODE ANN. tit. 10, § 4001 (Supp. 1994).

<sup>193</sup> See Hodge, Gables & Calves, *supra* note 160, at 35.

<sup>194</sup> A clear example of this problem arises when directly examining jurisdictional differences in the application of a state's Tort Claims Act. While most jurisdictions hold that agents of the government are immune from liability if performing within the scope of their employment, other jurisdictions allow employees of the government to be held liable for their actions within the scope of employment, although the state does defend the claim. *Id.*, at 35.

<sup>195</sup> John S. Hebrand, *Choice of Law as to Application of Comparative Negligence Doctrine*, 86 A.L.R. 3D 1206 (1978) (West 2007).

<sup>196</sup> For example, when there a conflict arises between whether to use contributory negligence or comparative negligence, courts may use the "most significant contacts" approach; the fact that it may be unclear which doctrine applies may lead to uncertainty. *Id.*

Likewise, workers' compensation laws provide state government benefits to its employees for work-related injuries and death.<sup>197</sup> But in many instances, since not all states define volunteers as employees of the state, workers' compensation may not provide coverage to VHPs.<sup>198</sup> If a jurisdiction lacks statutory provisions that extend workers' compensation coverage to volunteers, this omission could expose VHPs to significant uncompensated harms, and in turn may act to limit success when states attempt to recruit out-of-state VHPs.<sup>199</sup> State-to-state jurisdictional issues also plague applicability of these laws to VHPs. Hence, the same challenges for workers' compensation arise as in the case of civil liability.

Clearly a unified structure for addressing civil liability and workers' compensation is necessary to ensure an effective national strategy to efficiently deploy willing professionals in the event of disaster or emergency. Here, again, because of the national security importance of effective and efficient use of health care resources in the event of an emergency or disaster, federal law is the optimal approach to create an effective infrastructure addressing these issues.

#### V. A PROPOSED ACT

To address the challenges raised by extant law and the proposed state model legislation, we offer the following annotated<sup>200</sup> federal bill to better utilize and promote public health efforts and response to emergencies and disasters. This bill would provide the basis for an improved approach to federal responsibility and assistance based on state requests and needs while avoiding infrastructural redundancy.

##### *A. A Bill*

##### **H. R. —**

*To amend the Public Health Service Act to provide for adequate coordination of public health preparedness and response, and for other purposes.*

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##### **A BILL**

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<sup>197</sup> See Hodge, Gables & Calves, *supra* note 160 at 50.

<sup>198</sup> *Id.* at 51.

<sup>199</sup> *Id.* at 54 (describing how VHPs may not be covered under worker's compensation laws).

<sup>200</sup> The unannotated version of the bill is included in the Appendix.

To amend the Public Health Service Act to provide for adequate coordination of public health preparedness and response and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. Short Title.**

This Act may be cited as the “The Promotion of Effective Public Health and Provider Disaster and Emergency Response Act.”

**SECTION 2. Findings.**

- (1) The bureaucratic organization of current federal relief efforts, including FEMA, led to the slow and stalled response in the aftermath of Hurricane Katrina.
- (2) States have the local knowledge required to perform expedited public health relief efforts under emergency and/or disaster circumstances.
- (3) Current relief efforts fail to recognize the State’s existing infrastructure, and fail to allow the infrastructure to flex by allowing the State to be responsible for coordination of relief efforts.
- (4) To achieve flexibility, the State must have the discretion to tailor the request for assistance based on the particular needs of the state in the natural or human-sourced disaster situation.
- (5) Current laws and agreements between the States including the Emergency Management Agreement Compact and the National Emergency Management Association provide for emergency state coordination of health care providers and resources, but clarification of licensure and workers’ compensation issues in times of disaster and emergencies is required.
- (6) States requiring additional financial resources are left with only federal options that require they cede emergency and disaster response leadership to federal authorities, limiting the ability of state and local public health authorities to quickly and efficiently respond using extant knowledge of the local conditions.



(7) Allowing States to tailor their request for federal assistance will provide a proper process for receiving aid while allowing existing state and local expertise to quickly and efficiently respond to emergencies and disasters.

(8) Allowing for States to request financial assistance exclusive of federal coordination of relief efforts that funds State-to-State expertise use best serves public health interests by allowing States familiar with certain disasters and emergencies to provide guidance and assistance to other States unfamiliar with such events.

(9) The effective deployment of professionals to States experiencing disasters and emergencies from other States requires clarity of civil liability concerns and workers compensation issues.

(10) Effective and efficient response and use of resources for emergencies and disasters is a critically important national security issue.

The findings noted above summarize the issues and observations of extant law and goals associated with effective and efficient public health responses. It expressly notes that locally-based efforts would allow resources requested and provided to be most effectively implemented, that licensure issues and workers' compensation concerns remain to be clarified, and notes effective processes should also foster state-state cooperation. Finally, the findings emphasize the importance of effective and efficient public health response for the national security of the country.

### **SECTION 3. Applicability.**

(1) This Act shall apply to:

(a) All States whose authorized agent declares a natural or human-sourced disaster on behalf of the State and then requests federal assistance under the Stafford Act, under Chapter 68 of Title 42 of the United States Code.

(b) All volunteer health practitioners and public health professionals, whether compensated or not, who are providing

assistance to a State either upon direct request for such assistance by the State under the Emergency Management Assistance Compact or after a Presidential declaration of an emergency or disaster in such State.

Here, the statute's applicability is noted. The Act's provisions are invoked when a state requests assistance on two levels. First, a state's request for assistance under the Stafford Act results in applicability of the proposed legislation. But further, state-to-state requests for assistance also garner the benefits of the Act, and extend such requests to health care providers as well as public health and other relevant professionals. Note that the state controls the invocation of the Act's provisions.

#### **SECTION 4. Natural and Human-Sourced Disasters and Emergencies.**

(1) For the purposes of this Act, there shall be the following categories of disasters and emergencies: natural disasters and emergencies and human-sourced disasters and emergencies.

(a) Natural disasters and emergencies. There shall be two forms of natural disasters and emergencies:

(i) a familiar natural disaster and emergency is one that is natural in nature and of previous or experienced occurrence to the affected locality, as deemed by the affected State; and

(ii) an unfamiliar natural disaster and emergency is one that is natural in nature and of uncommon or unexperienced occurrence to the affected locality, as deemed by the affected State.

(b) A human-sourced disaster and emergency is one that is not natural in nature, and may include biological, chemical, radiological, or other human sources, or does not otherwise fall within the category of natural disaster.

Here, the distinctions between natural and human-sourced disasters and emergencies are provided. As well, the experience of States with respect to

these circumstances is also defined. This distinction provides the framework to efficiently request and obtain assistance from the federal government or through state compacts.

#### **SECTION 5. Types of Assistance.**

- (1) A State may obtain assistance in the following manner
  - (a) In times of familiar and unfamiliar natural disasters, and times of human-sourced disasters, the State may obtain:
    - (i) federal financial assistance under the Defense Relief Fund provided directly to requesting State as permitted under Part 68 of Title 42 of the United States Code, provided, however, that such federal financial assistance may be used as the requesting State deems fit, and all assistance so provided shall be coordinated by the requesting State;
    - (ii) federal personnel assistance as permitted to be provided under Sections 5170a and 5170b of Title 42 of the United States Code, provided, however, that such personnel shall be used by the State in a manner coordinated by the requesting State; and
    - (iii) state personnel assistance shall be made available to the requesting State as provided by the Emergency Management Assistance Compact, or by a direct request of the State as indicated section (3)(1)(b) of this Act, based upon a request from an authorized agent of the requesting State.
  - (b) If a requesting State requests and receives assistance under paragraph 1(a)(iii) of this section from States that are deemed familiar with the natural or human-sourced disaster as defined in Section 4 of this Act, then such assistance shall be deemed federal assistance and eligible for financial assistance as defined under Section 403(1)(b) of Title 42 of the United States Code.
  - (c) Coordination of relief efforts shall be vested with the requesting State as defined in subsection 1(a), provided, however, that the authorized agent of the State may waive such right and

request that the federal agency or representative coordinate any provided assistance.

This section creates efficiencies based upon the needs of the state and allows those most familiar with the local environs at all levels to control allocation of resources. Here, using the foundation of the Stafford Act, federal financial assistance as well as personnel expertise as defined therein continues but is guided by the state requesting the assistance. But further, encouraging the use of cooperating states with experience in the area, which is contemplated to include health care delivery as well as public health expertise, through deeming such assistance eligible for federal assistance, creates incentives to use more nimble state-state agreements and expertise without the need to invoke federal bureaucratic norms before action and response. Of course, because flexibility is critical, not only may the state coordinate federal and state resources, the state may also waive the right to coordinate disaster and emergency efforts, thus allowing the federal agency or representative to take the leadership role when appropriate as deemed by the state.

#### **SECTION 6. Reciprocal Licensure and Delivery of Public Health Services.**

(1) Any health care practitioner duly licensed and in good standing in another State to practice medicine shall receive reciprocal licensure, and shall be allowed to practice medicine in the requesting State, insofar as:

(a) The volunteer health practitioner abides by limitations put in place by the requesting State regarding:

- (i) duration of practice;
- (ii) type of practice; and
- (iii) geographical area of practice; and

(b) A State has requested health care practitioner assistance as under Section 3 of this Act.

#### **SECTION 7. Civil Liability for Volunteer Health Practitioners.**

- (1) Volunteer health practitioners, upon request from the State under the provisions of section 5 of this Act to provide disaster or emergency assistance, shall be considered an employee of the federal government for purposes of civil liability, provided, however, that the volunteer health practitioners are registered and available through the Emergency Management Assistance Compact.
- (2) Being considered an employee of the federal government, the volunteer health practitioner shall not be liable for civil damages resulting from acts or omissions performed within the scope of his or her responsibilities as defined under section 6 of this act, as provided by the Federal Tort Claims Act, Chapter 171 of Title 28 of the United States Code.
- (3) Nothing in this Act shall be construed to preclude States from providing greater liability protection for volunteer health practitioners.

In these sections, the liability provisions of volunteer professionals are defined. Critically, although we adopt some of the UEVHPA definitions of scope of practice, the invocation and use of these professionals is under requesting state control. However, any civil liability actions against these individuals are subject to the Federal Tort Claims Act to avoid the legal complexities of applying state tort claims acts to out-of-state licensed volunteers acting under emergency or disaster circumstances. To ensure coordinated efforts at deploying volunteers, however, these provisions are applicable only if in concert with the EMAC provisions for provider coordination, which takes advantage of this extant EMAC infrastructure without creating additional bureaucracies. As well, although protections are provided within this section for volunteer health care providers, the section expressly allows states to apply greater protections if they so desire.

**SECTION 8. Workers' Compensation Coverage for Volunteer Health Practitioners.**

- (1) A volunteer health practitioner providing services under the provisions of this Act, and their families, if such volunteer health practitioner suffers from work-related injuries, illnesses, or death in providing such services in good faith, shall be covered by the provisions of

the Federal Employees' Compensation Act, Chapter 81 of Title 5 of the United States Code.

Here, the bill addresses the issue of workers' compensation. Although similar to civil liability provisions, there are provisions under the EMAC between states for workers compensation, a consistent federal framework associated with liability and personnel injury would seem to maintain an even legal infrastructure to address both provider services and provider injury. In this way, adjudication of potential actions associated with a given circumstance can be jurisdictionally efficient through uniform resolution in federal courts, avoiding conflicts of laws and other legal complications.

## VI. CONCLUDING REMARKS

The recent experience with disasters and emergencies indicates clearly that this country requires significant reform to effectively and efficiently provide resources to states and their citizens when tragedy strikes. However, existing laws and proposals fail to take into consideration the existing public health infrastructure and knowledge of states when determining coordination of relief efforts in the wake of emergency and disaster situations. The needs, environment, and populations of particular areas are to be addressed by those with little if any experience or knowledge thereof.

Indeed, extant laws and proposed policies avoid the fundamental goal of providing a flexible infrastructure that allows effective and efficient disaster and emergency response. Existing laws, policies, and proposals fail to note critical differences between human-sourced and natural disasters, and attempt to place a one-size-fits-all federally-dominated approach to extremely diverse events spanning from earthquakes to bioterrorism attacks, and to blanket these processes blindly upon states that have experience in planning and surviving such events as well as on those that do not. Further, they fail to take into account that the potential for nascent expertise within some states could provide significant benefits to others more quickly, efficiently, and effectively without the need for federal personnel intervention.

In addition, there is tremendous uncertainty at present resulting from the failure to address liability concerns and workers' compensation issues in the event patients or providers are harmed. The diversity of state laws and interpretations confound resolution of these issues. Yet proposals focus upon state-based methods that do nothing to clarify these concerns and in

fact add to them through redundant state provisions that become another source of conflict and choice of law difficulties.

To promote effective public health and provider responses to disasters and emergencies, concerns regarding state and local expertise, coordinated and tailored response requests and resources, and liability and workers' compensation issues must be addressed. Mandating federal control when a single dollar or person from the federal government arrives is counterproductive to effective and efficient responses to disasters and emergencies.

Instead, utilizing in-state and out-of-state expertise and leadership in coordinating responses with the benefit of federal financial and appropriate personal assistance is a critical step in this process. In addition, by differentiating between familiar and unfamiliar natural disasters, as well as human-sourced and natural disasters, and helping states subject to these events to draw upon other states with expertise in preparation and/or response to these events further promotes effective responses to disasters and emergencies without needing to invoke vast federal bureaucracies. These efforts also build upon existing agreements and efforts so as to attain the greatest efficiencies and benefits from such arrangements.

Incentivizing providers to participate in response efforts in a beneficial way while also ensuring clear accountability requires a clear and cogent approach so that states, providers, and patients understand the system and rules of engagement in disaster and emergency response. Unclear, uncertain, and conflict-ridden approaches provide little to enhance preparedness.

A federal infrastructure providing for state leadership and adequate resources can provide the best means to engage and deploy financial and human capital for disaster and emergency response. Building on existing systems, focusing upon the use of existing expertise, and establishing clear jurisdiction in circumstances of patient and provider injury can allow the goal of effective and efficient response to be most promisingly attained.

This country requires a system of disaster and emergency response that allows those who know best to assist those who need help. Currently, the inflexible, inefficient and ineffective infrastructure has continued to leave many without the benefits of the laws and the resources that were purportedly put in place for their benefit. We must ensure that a system is established that allows whatever and whomever has the expertise and resources to get assistance to those who have lost their homes and their health because of an emergency or a disaster. Through an appropriate system of response, we can benefit the vulnerable in a way promised by the

laws and policies of preparedness that so far have been a source of disappointment to those victims of emergencies and disasters in this country.



## APPENDIX

### H. R. —

*To amend the Public Health Service Act to provide for adequate coordination of public health preparedness and response, and for other purposes.*

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### A BILL

To amend the Public Health Service Act to provide for adequate coordination of public health preparedness and response and for other purposes.

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- (1) The bureaucratic organization of current federal relief efforts, including FEMA, led to the slow and stalled response in the aftermath of Hurricane Katrina.
- (2) States have the local knowledge required to perform expedited public health relief efforts under emergency and/or disaster circumstances.
- (3) Current relief efforts fail to recognize the State’s existing infrastructure, and fail to allow the infrastructure to flex by allowing the State to be responsible for coordination of relief efforts.
- (4) To achieve flexibility, the State must have the discretion to tailor the request for assistance based on the particular needs of the state in the natural or human-sourced disaster situation.
- (5) Current laws and agreements between the States including the Emergency Management Agreement Compact and the National Emergency Management Association provide for emergency state coordination of health care providers and resources, but clarification of licensure and

workers' compensation issues in times of disaster and emergencies is required.

(6) States requiring additional financial resources are left with only federal options that require they cede emergency and disaster response leadership to federal authorities, limiting the ability of state and local public health authorities to quickly and efficiently respond using extant knowledge of the local conditions.

(7) Allowing States to tailor their request for federal assistance will provide a proper process for receiving aid while allowing existing state and local expertise to quickly and efficiently respond to emergencies and disasters.

(8) Allowing for States to request financial assistance exclusive of federal coordination of relief efforts that funds State-to-State expertise use best serves public health interests by allowing States familiar with certain disasters and emergencies to provide guidance and assistance to other States unfamiliar with such events.

(9) The effective deployment of professionals to States experiencing disasters and emergencies from other States requires clarity of civil liability concerns and workers compensation issues.

(10) Effective and efficient response and use of resources for emergencies and disasters is a critically important national security issue.

### **SECTION 3. Applicability.**

(1) This Act shall apply to:

(a) All States whose authorized agent declares a natural or human-sourced disaster on behalf of the State and then requests federal assistance under the Stafford Act, under Chapter 68 of Title 42 of the United States Code.

(b) All volunteer health practitioners and public health professionals, whether compensated or not, who are providing assistance to a State either upon direct request for such assistance by the State under the Emergency Management Assistance Compact or

after a Presidential declaration of an emergency or disaster in such State.

**SECTION 4. Natural and Human-Sourced Disasters and Emergencies.**

(1) For the purposes of this Act, there shall be the following categories of disasters and emergencies: natural disasters and emergencies and human-sourced disasters and emergencies.

(a) Natural disasters and emergencies. There shall be two forms of natural disasters and emergencies:

(i) a familiar natural disaster and emergency is one that is natural in nature and of previous or experienced occurrence to the affected locality, as deemed by the affected State; and

(ii) an unfamiliar natural disaster and emergency is one that is natural in nature and of uncommon or unexperienced occurrence to the affected locality, as deemed by the affected State.

(b) A human-sourced disaster and emergency is one that is not natural in nature, and may include biological, chemical, radiological, or other human sources, or does not otherwise fall within the category of natural disaster.

**SECTION 5. Types of Assistance.**

(1) A State may obtain assistance in the following manner

(a) In times of familiar and unfamiliar natural disasters, and times of human-sourced disasters, the State may obtain:

(i) federal financial assistance under the Defense Relief Fund provided directly to requesting State as permitted under Part 68 of Title 42 of the United States Code, provided, however, that such federal financial assistance may be used as the requesting State deems fit, and all assistance so provided shall be coordinated by the requesting State;

(ii) federal personnel assistance as permitted to be provided under Sections 5170a and 5170b of Title 42 of the United States Code, provided, however, that such personnel shall be used by the State in a manner coordinated by the requesting State; and

(iii) state personnel assistance shall be made available to the requesting State as provided by the Emergency Management Assistance Compact, or by a direct request of the State as indicated section (3)(1)(b) of this Act, based upon a request from an authorized agent of the requesting State.

(b) If a requesting State requests and receives assistance under paragraph 1(a)(iii) of this section from States that are deemed familiar with the natural or human-sourced disaster as defined in Section 4 of this Act, then such assistance shall be deemed federal assistance and eligible for financial assistance as defined under Section 403(1)(b) of Title 42 of the United States Code.

(c) Coordination of relief efforts shall be vested with the requesting State as defined in subsection 1(a), provided, however, that the authorized agent of the State may waive such right and request that the federal agency or representative coordinate any provided assistance.

#### **SECTION 6. Reciprocal Licensure and Delivery of Public Health Services.**

(1) Any health care practitioner duly licensed and in good standing in another State to practice medicine shall receive reciprocal licensure, and shall be allowed to practice medicine in the requesting State, insofar as:

(a) The volunteer health practitioner abides by limitations put in place by the requesting State regarding:

(i) duration of practice;

(ii) type of practice; and

(iii) geographical area of practice; and

- (b) A State has requested health care practitioner assistance as under Section 3 of this Act.

**SECTION 7. Civil Liability for Volunteer Health Practitioners.**

(1) Volunteer health practitioners, upon request from the State under the provisions of section 5 of this Act to provide disaster or emergency assistance, shall be considered an employee of the federal government for purposes of civil liability, provided, however, that the volunteer health practitioners are registered and available through the Emergency Management Assistance Compact.

(2) Being considered an employee of the federal government, the volunteer health practitioner shall not be liable for civil damages resulting from acts or omissions performed within the scope of his or her responsibilities as defined under section 6 of this act, as provided by the Federal Tort Claims Act, Chapter 171 of Title 28 of the United States Code.

(3) Nothing in this Act shall be construed to preclude States from providing greater liability protection for volunteer health practitioners.

**SECTION 8. Workers' Compensation Coverage for Volunteer Health Practitioners.**

(1) A volunteer health practitioner providing services under the provisions of this Act, and their families, if such volunteer health practitioner suffers from work-related injuries, illnesses, or death in providing such services in good faith, shall be covered by the provisions of the Federal Employees' Compensation Act, Chapter 81 of Title 5 of the United States Code.