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FILE NO. S-1171

TORT LIABILITY:

**County Liability When County
Health Department Sponsors
Swine Flu Vaccination Program**

**Honorable Martin Rudman
State's Attorney
Will County
Joliet, Illinois 60431**

Dear Mr. Rudman:

I have your letter wherein you state that the Illinois Department of Public Health has designated the Will County Health Department to be the sponsoring agency for the Swine Flu Vaccination Program in Will County. You ask the following three part question concerning this program:

"What liability is the County of Will incurring by having the County Health Department conduct this program: a) by the negligent actions of its regular employees,

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b) by the negligent actions of the volunteers working in this program, and c) from adverse results of the vaccine?"

In opinion No. S-602 (1973 Ill. Att'y. Gen. Op.

108) I advised that a county health department is an agency of the county. Health department employees are thus employees of the county. (1951 Ill. Att'y. Gen. Op. 226.)

In opinion No. NP-445, issued April 21, 1972, I explained that a volunteer can be considered an employee when a statute so provides. A volunteer can be considered an employee for the purposes of county tort liability. The definition of "employee" in the Local Governmental and Governmental Employees Tort Immunity Act is stated in section 1-202 of the Act (Ill. Rev. Stat. 1975, ch. 85, par. 1-202) as follows:

"'Employee' includes an officer, member of a board, commission or committee, servant or employee, whether or not compensated, but does not include an independent contractor."
(emphasis added.)

Because this definition includes both compensated and uncompensated workers, a county's liability for the torts of an employee of the county health department is the same as its liability for the torts of a department volunteer.

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The National Swine Flu Immunization Program of 1976 (Public Law 94-380) was approved by the President on August 12, 1976. This Act added subsections (j), (k) and (l) to section 317 of the Public Health Service Act (42 U.S.C. 247(b)). In order to make sure that the swine flu vaccine will be available, Congress protected those administering the vaccine from liability for other than their own negligence. In addition, the exclusive remedy for any injury or death arising out of the vaccination program is against the United States. Subsection (k) of section 317 of the Public Health Service Act provides in pertinent part:

"(k) (1) (A) The Congress finds that -

'(i) in order to achieve the participation in the program of the agencies, organizations, and individuals who will manufacture, distribute, and administer the swine flu vaccine purchased and used in the swine flu program and to assure the availability of such vaccine in interstate commerce, it is necessary to protect such agencies, organizations, and individuals against liability for other than their own negligence to persons alleging personal injury or death arising out of the administration of such vaccine;

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'(ii) to provide such protection and to establish an orderly procedure for the prompt and equitable handling of claims by persons alleging such injury or death, it is necessary that an exclusive remedy for such claimants be provided against the United States because of its unique role in the initiation, planning, and administration of the swine flu program; and

* * *

The exclusive remedy provided for in the Act means that the United States is liable for any claim based upon an act or omission of a program participant. This fact is stated in paragraph (2) (A) of subsection (k):

''(2) (A) The United States shall be liable with respect to claims submitted after September 30, 1976 for personal injury or death arising out of the administration of swine flu vaccine under the swine flu program and based upon the act or omission of a program participant in the same manner and to the same extent as the United States would be liable in any other action brought against it under such section 1346(b) and chapter 171 except that -

'(i) the liability of the United States arising out of the act or omission of a program participant may be based on any theory of liability that would govern an action against such program participant under the law of the place where the act or omission occurred, including negligence, strict liability in tort, and breach of warranty;

* * *

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"Program participant" is defined in paragraph (2) (B) of subsection (k) as follows:

"(B) For purposes of this subsection, the term 'program participant' as to any particular claim means the manufacturer or distributor of the swine flu vaccine used in an inoculation under the swine flu program, the public or private agency or organization that provided an inoculation under the swine flu program without charge for such vaccine or its administration and in compliance with the informed consent form and procedures requirements prescribed pursuant to subparagraph (F) of paragraph (1) of this subsection, and the medical and other health personnel who provided or assisted in providing an inoculation under the swine flu program without charge for such vaccine or its administration and in compliance with such informed consent form and procedures requirements."

According to this definition, the Will County Health Department is a program participant as long as it provides vaccinations without charge and complies with the Act's informed consent procedure. As a program participant, the Health Department is generally protected from liability for the actions or omissions of its employees and volunteers. However, there are two exceptions to this general rule.

First, the Department must cooperate with the United States in defending any suit based upon the alleged

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acts or omissions of the Department. Paragraph (2)(C)(6) of subsection (k) provides as follows:

"(6) A program participant shall cooperate with the United States in the processing or defense of a claim or suit under such section 1346(b) and chapter 171 based upon alleged acts or omissions of the program participant. Upon the motion of the United States or any other party, the status as a program participant shall be revoked by the district court of the United States upon finding that the program participant has failed to so cooperate, and the court shall substitute such former participant as the party defendant in place of the United States and, upon motion, remand any such suit to the court in which it was instituted."

Secondly, the United States may recover payments that it made which resulted from the failure of the Department to carry out its contractual relationship to the United States or from the negligent conduct of the Department. Paragraph (2)(C)(7) reads as follows:

"(7) Should payment be made by the United States to any claimant bringing a claim under this subsection, either by way of administrative settlement or court judgment, the United States shall have, notwithstanding any provision of State law, the right to recover for that portion of the damages so awarded or paid as well as any costs of litigation resulting from the failure of any program participant to carry out any obligation or responsibility assumed by it under a

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contract with the United States in connection with the program or from any negligent conduct on the part of any program participant in carrying out any obligation or responsibility in connection with the swine flu program. The United States may maintain such action against such program participant in the district court of the United States in which such program participant resides or has its principal place of business." (emphasis added.)

It is apparent from the above paragraph that the United States has a right to recover payments made on account of the negligence of Will County Health Department employees and volunteers. Because the Department is an agency of Will County, the United States has a right to recover such payments from the County. Therefore, it is my opinion that Will County is liable to the United States for the costs incurred by the United States which resulted from the negligence of Department employees and volunteers in conducting the swine flu vaccination program. The Local Governmental and Governmental Employees Tort Immunity Act does not protect the County from this liability since paragraph (2)(C)(7) states that the United States has a right to recover "notwithstanding any provision of State law".

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It should be noted parenthetically that the Tort Immunity Act does not appear to protect the county from liability for injuries caused by negligence in carrying out a vaccination program. Section 6-104(b) of the Act (Ill. Rev. Stat. 1975, ch. 85, par. 6-104(b)) provides that the county is not liable "for an injury caused by an act or omission in carrying out with due care" a program to control the communication of disease within the county. Thus, when a county administers a vaccination program it is not immune from liability for negligence under the Local Governmental and Governmental Employees Tort Immunity Act.

In regard to part (c) of your question, the United States may seek recovery from the County only when the Health Department fails to carry out its contracted obligations to the United States or when the Department employees or volunteers have been negligent in administering the vaccine. Therefore, assuming that the Will County Health Department cooperates with the United States in litigation concerning the swine flu vaccination program, Will County will be liable

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for the adverse effects of the vaccine only if these effects are attributable to the Health Department's failure to perform its contractual obligations or to the negligence of Department employees or volunteers.

Very truly yours,

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