CLM 2018 Annual Conference
March 14-16, 2018 in Houston, TX

Danger Zone: Healthcare Liabilities Associated with Outbreaks and Natural Disasters

I. The Risk of Natural Disasters and Outbreaks

A. Overview of recent natural disasters and outbreaks

1. According to recent studies, the number of natural disasters is on the rise. In 1970, the average number of reported natural disasters was 78. In 2004, this number jumped to 348. From 1980 to 2009 there was an 80 percent increase in the growth of climate-related disasters. Some of the more recent and memorable natural disasters affecting the U.S. include Hurricane Katrina, Hurricane Harvey, and the wildfires on the West Coast – all of which have impacted the delivery of healthcare services.

2. From the Avian flu in China to Ebola in West Africa to Zika in South America to MERS in the Middle East, the risk of pandemic outbreaks are on the rise around the world. The number of new diseases per decade has increased nearly fourfold over the past 60 years, and since 1980, the number of outbreaks per year has more than tripled. According to the World Health Organization ("WHO"), it is a matter of time before we experience a serious pandemic.

B. How Recent Disasters and Outbreaks Have Affected Healthcare Providers

1. Hurricanes

a. In 2005, Hurricane Katrina hit New Orleans cutting off city power. The backup generators of Memorial Medical Center did not support air-conditioning, and the temperature climbed. Shortly thereafter, the generators failed, throwing the hospital into darkness and cutting off power to the machines that supported patients' lives. In the end, 45 patients died at the hospital and some doctors acknowledged that they had been euthanized.

b. In 2017, Hurricane Harvey made landfall in Texas and brought unprecedented and catastrophic flooding. One of the most memorable images from the storm was a

photo of nursing home residents sitting in waist-deep water. Although officials initially told the owners to shelter in place, the flood waters quickly rose within 45 minutes preventing an evacuation. The owner took a photo of the conditions and it was posted on Twitter in order to request help from officials who were eventually able to rescue everyone. Not all nursing homes have been as fortunate. During Hurricane Katrina, residents were trapped inside a New Orleans nursing home as it filled with water. In the end, 35 drowned in their wheelchairs and beds.

c. In 2005, Brighton Gardens Nursing Home decided to evacuate its residents as Hurricane Rita approached. Although the evacuation was not "mandatory," Bellaire officials had "strongly urged" all area nursing homes to evacuate. Fifteen hours later, the bus used to evacuate the residents had exploded with 24 bodies inside. According to state officials, the charter bus had a lapsed registration and a history of driver violations. Reportedly, it had been pressed into service to help with the emergency evacuations.

2. Wildfires

a. The Northern California wildfires of 2017 created what the L.A. Times described as an unprecedented healthcare crisis that served as a wake-up call. In total, more than 17 major fires burned across eight counties in the Napa wine country forcing at least 20,000 people to evacuate. Two hospitals – Kaiser Permanente Santa Rosa Medical Center and Sutter Santa Rosa Regional Hospital – had to evacuate patients as the fires approached. Other hospitals in the area saw an influx of patients suffering from serious burns, breathing problems, asthma, smoke inhalation and injuries caused while evacuating. Another issue arose with the lack of power for communication and the inability to access medical records online in order to assist with treatment.

b. The fires also affected the delivery of other healthcare such as medication. Safeway pharmacists traveled from other parts of the state to help the stores that were filled with patients and brought medicines with them to keep up with the extra demand. Once a state of emergency was declared, California's pharmacy board instituted a disaster protocol allowing pharmacists to dispense medication without prescriptions advising the pharmacists to use their best judgment to help patients. Despite this, many patients were still unable to get vital prescriptions like seizure medications. Many encountered hurdles with insurance companies, which pharmacists typically had to call individually to approve the refill requests.

3. Flu and Emerging Viruses

a. The Flu epidemic of 1918, otherwise known as the Spanish Flu, was the deadliest in modern history, infecting almost a third of the world population and resulting in the death of 50 million people. In 2009, another flu pandemic, the Swine Flu, started in

Mexico and quickly spread to over 74 countries, where it infected an estimated 43-89 million people. Although this strain was not very lethal, the amount of time it took to spread worldwide was alarming. Currently, the U.S. Centers for Disease Control and Prevention (CDC) ranks H7N9, otherwise known as the Avian flu, as the flu strain with the greatest potential to cause a pandemic. If so, the CDC estimates the death toll could be in the tens of millions. The federal pandemic influenza plan predicts that 30% of the population could be infected, which would quickly overwhelm the public health and health-care delivery systems in the U.S. Specifically, staffing, space, infection control, and availability of drugs/supplies would be impacted.

b. Emerging Viruses (Ebola): The first recorded Ebola case occurred about 40 years ago. Since then there have been at least 6 significant outbreaks. The initial 1976 strain was lethal, but difficult to transmit. Since then, the Ebola virus has continued to mutate and with each mutation it has been trading its virulence for more exposure.

   The most recent outbreak of Ebola began in March of 2014. At the peak of transmission 300 and 400 new cases were being reported in Africa every week. Officially, over 27,000 people were infected and over 11,000 died. However, the WHO believes these figures substantially understate the magnitude of the outbreak given the estimated case fatality (CFR) rate of 70%. To put this in perspective, the Spanish Flu killed 50 million people worldwide in 1918 with a CFR of only 2-5%. According to the WHO, the recent Ebola outbreak was "the most severe, acute health emergency seen in modern times" and for the first time, it was treated here in the U.S.

   On September 26, 2014, Charles Duncan arrived in Dallas, Texas from Liberia. Shortly after he landed, he was taken to the ER and discharged home. He returned two days later and was ultimately diagnosed with Ebola. Before he died, Mr. Duncan infected two of his nurses despite strict quarantine and the use of personal protective equipment ("PPE"). This is not surprising since health care providers represent about 10% of all recent Ebola cases, which is understandable given the rate of contagion. At the peak of the infection, an Ebola patient can have 10 **billion** viral particles in just one-fifth of a teaspoon of blood. Compare that to someone with hepatitis C who only has 5-20 **million** particles.

II. <u>Identifying Risks to Health Care Providers</u>

A. Possible lawsuits can arise from: personal injury claims, employment claims, property damage claims, EMR related claims, HIPAA/data breach claims, vaccination claims, and coverage issues.

B. Personal Injury Lawsuits

1. *Preston v. Tenet Healthsystems Mem. Med. Ctr., Inc.,* 485 F.3d 804 (5th Cir. 2007): After Hurricane Katrina, a class action suit was filed against a the hospital and its parent company alleging they failed to prepare for and respond sufficiently to a foreseeable disaster and that emergency plans for evacuation and backup power were inadequate. The case reached a settlement after nearly 6 years of litigation. A commentary on the case published in the Journal of the American Medical Association said that health care entities may increasingly face legal action for deficiencies in emergency preparedness and called for clearer legal standards for hospitals so health care entities are not compelled to prepare endlessly for every contingency.

2. *Duncan v. Emergency Med. Consultants, et al*., No. DC-14-13184, 44th District Court, Dallas, Texas: After dying from Ebola, Mr. Duncan's heirs filed suit alleging that the hospital's physicians and nursing staff failed to use ordinary care in providing treatment to Mr. Duncan when he presented to the Emergency Department with signs of Ebola. Although the case had legal challenges, a confidential settlement was reached and a final judgment was entered.

3. *Nina Pham v. Tex. Health Res.*, No. DC-15-02252, 68th District Court, Dallas, Texas: One of the nurses who contracted Ebola while caring for Mr. Duncan filed suit against the hospital for "failing to prepare for a known and impending medical crisis," failing to develop policies and procedures to train its staff in the proper treatment of Ebola patients, and failing to have proper personal protective equipment. The case settled for an undisclosed amount.

C. Other Types of Lawsuits/Claims

1. *Outten v. Genesis Health Care, LLC,* No. 13-4708, 2014 U.S. Dist. LEXIS 111621 (E.D. Penn., Aug. 12, 2014): A registered nurse sued her employer, a local hospital, for unlawful discrimination and wrongful termination when she chose not to attend work in October of 2012 during Hurricane Sandy. Plaintiff claimed that the hospital allowed other employees to stay home during the storm, but terminated Plaintiff when she failed to report to work. Plaintiff failed to meet her burden of proof and the court granted a summary judgment in favor of the Defendants.

2. *Mass. Nurses Ass'n v. Brigham Women's Hospital*: In 2017 the Superior Court ruled that nurses had to follow the hospital's policy regarding immunization. *But see Valent v. Board of Review Dept. of Labor,* 436 N.J. Super. 41 (Super. Ct. N.J. 2014) where in 2014 the Board of Review held the nurse was unfairly denied unemployment benefits after she was fired for refusing a flu shot without claiming a religious or medical exemption.

3. *Potential HIPAA Claim*: The Nebraska Medical Center fired two staffers who inappropriately accessed the medical records of an aid worker who acquired Ebola overseas and was being treated at the hospital giving rise to a potential HIPAA claim.

III. Managing Risks – Best Practices

A. Plan

A provider should have policies and procedures to address the response to a natural disaster or outbreak. There is no national standard or mandatory set of policies/procedures. However, the lack of policies or disaster plans increases the risk for poor outcome and litigation. Some of the areas to consider when drafting policies and procedures include:

1. Communication: Identify the person(s) responsible for monitoring the situation and obtaining current information and outline how the information is to be disseminated throughout the organization. Designate points of contact responsible for communicating with public officials, the media, staff, patients, and families of patients/staff. Identify a PR firm in advance of a crisis.

2. Personnel: Review HR policies to ensure they address the provider's position on evacuation, overtime, vaccination, sick leave, quarantine, etc. Ensure that plans are made to address the employees' needs outside the health care facility, such as child care. Recently, during Hurricane Harvey, MD Anderson remained staffed to care for patients who could not be discharged thanks to the designated "Ride Out" teams that were prepared to stay during the storm and the hospital's preparation for custodial and food management for the patients and staff.

3. Property: Plan for protection of the property. During Hurricane Harvey, the fortification of the Texas Medical Center in Houston appeared to have paid off for most of its 23 hospitals. Submarine doors were locked protecting foundations that had flooded catastrophically after Tropical Storm Allison in 2001, knocking out power and forcing emergency patient evacuations. Unfortunately, another hospital was not as fortunate. During Hurricane Harvey, water rose in the basement of Ben Taub Hospital, that reportedly spent millions of dollars on flood protections after being devastated by Allison in 2001. Officials announced an evacuation, but the hospital could not evacuate because it was surrounded by water and rescuers could not reach its 350 patients.

4. Contingency Planning: "One is none. Two is one." The planning process should incorporate this military adage – if you have one of something critical and it gets lost or broken, then you have none. Further, sound policies and procedures should incorporate lessons learned from the contingency planning process.

5. Be prepared for the Unexpected: One of the hospitals prepared to safely treat Ebola is Emory University Hospital in Atlanta. Despite its resources and preparations, it encountered unforeseen challenges when it admitted an Ebola patient. Reportedly, the county threatened to disconnect the hospital from the sewer lines if Ebola wastes went down the drain; the medical waste company refused to touch anything from an Ebola patient unless it was first sterilized; couriers would not deliver blood samples to the CDC for testing, and exhausted staff could not even get pizza delivered. This presented a good learning opportunity for developing policies and procedures and highlighted the

importance of developing relationships and having open lines of communication with government officials and vendors in advance of a crisis.

6. Infection Control: Currently, there are only four biocontainment units in the U.S. that are equipped to isolate patients with dangerous infectious. Therefore, admission policies and infection control policies should be reviewed for consistency with the CDC. Provide training to staff responsible for the cleaning and/or disposal of potentially contaminated waste, including the review of proper cleaning procedures. Ensure laboratories review their policies and procedures regarding the proper collection, transport, and testing of infected individuals.

B. Prepare

1. Educate: Education and training is essential to ensure that everyone knows what to do when there is an emergency caused by a natural disaster or outbreak.

2. Evacuate: Some of the most shocking deaths during Hurricane Katrina occurred in nursing homes, where elderly and disabled residents were trapped or abandoned. Now, Louisiana has new state regulations designed to ensure residents in nursing homes centers, are evacuated when necessary. However, these regulations do not extend to assisted-living or other providers. The decision to evacuate should be made early and there should be a plan in place.

3. Vaccinate: Although the U.S. Supreme Court has recognized the power of the government to mandate vaccinations in *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), there are no federal vaccination requirements for the flu. Only three states (AL, CO, and NH) require mandatory flu vaccinations for healthcare providers. Regardless of the state requirements, providers are opting to include mandatory flu vaccinations in their policies and procedures, which may lead to issues especially in states where staff is unionized. Under the National Labor Relations Act, a flu vaccination policy is a mandatory subject of bargaining and a unionized employer cannot unilaterally implement a policy without giving the union the opportunity to bargain, unless the union waived the right. *See Virginia Mason Med. Ctr.*, 358 NLRB No. 46 (2012). Regardless, any policy should have procedures to address employees who object to the vaccine due to religious or health reasons. Some courts have held that lifestyle choices such as veganism may also support an employee's refusal to be vaccinated. *See Chenziraa v. Cincinnati Children's Med. Ctr.,* No. 11-917 (S.D. Ohio, Dec. 27, 2012). Any policy and procedure should advise the employee how to object and make accommodations for valid objections. Also, there should be a procedure for how to terminate a non-exempt employee who fails to comply with the policy.

C. Practice

No battle plan survives first contact with the enemy. Testing policies and procedures with drills and mock scenarios are recommended to help employees learn as well as highlight where the plans could be strengthened.

IV. Defending Claims Arising from these Events

A. Coverage Issues

Carriers are becoming more attuned to the risks associated with natural disasters and outbreaks. Some have launched products to ensure businesses and hospitals from losses occurring from any shutdown necessitated by evacuation or quarantine. In additional to business interruption claims, carriers are adding disaster or pandemic related exclusions and/or offering limited coverage. Below are some general coverage issues that may be triggered by an natural disaster or outbreak.

1. Business Interruption: Business interruption claim could be anything from the loss of key employees to sickness, the quarantine of a facility, the closing of a business for cleaning, or the loss of customers due to the fear of exposure, etc. Many business interruption (BI) policies are triggered only by direct physical damage to property. Without special provisions, BI policies may not be triggered based solely on a pandemic and Civil Authority provisions may not be adequate. See, *Dickie Brennan & Co., Inc. v. Lexington Ins. Co.,* 636 F.3d 683 (5th Cir. 2011) and *Tex. Med. Clinics v. CNA Fin. Corp,* No. H-006-4041, 2008 U.S. Dist. LEXIS 11460 (S.D. Tex., Feb. 15, 2008) where the Courts found that the Civil Authority provision of the policies did not provide coverage for losses caused by a mandatory evacuation orders because the officials who issued the evacuation orders in advance of hurricanes Katrina and Rita did so based on the threat of the hurricane itself…not because the hurricanes had caused property damage in the vicinity of the insured.

2. D&O: There may be exposure for shareholder suits in the event a company's failure to adequately prepare to handle a pandemic adversely affects the company. Whether there is adequate coverage under a D&O policy will depend on the language in the exclusions.

3. Employers' Liability Insurance: May provide coverage for employees not covered by worker's compensation. However, most EL coverage has specific limits of liability unless increased by endorsement. There are two states that do not have limits for coverage – Massachusetts and New York.

4. Property: Most property policies are only triggered by actual physical damage to the property. The presence of an infection or contaminant is not generally covered, especially if there is a contaminate exclusion.

5. Worker's Compensation: Coverage will depend on the laws of the state and may be dependent on an employee showing that he contracted the flu while performing job related activities. As such, some employers, such as health care providers or those who have employees located in high risk areas, may have higher exposure than others.

B. Claim Issues

Liability may stem from claims of medical malpractice, discrimination, invasions of privacy, or violations of other state and federal statutes (e.g., the Emergency Medical Treatment and Active Labor Act [EMTALA]). The following issues may affect claims made during natural disasters or outbreaks.

1. When to declare an emergency: A provider's decision to switch from routine to disaster mode has enormous implications. Issues may arise if the provider's emergency or disaster response is triggered before any official declaration.

2. The appropriate standard of care: In a disaster situation, providers may need to shift to a sufficiency-of-care mode, in which the focus is on saving as many lives as possible rather than ensuring that each patient receives the usual standard of care. This change in the medical standard of care during an emergency may not be reflected in the corresponding legal standard of care, a disconnect that can lead to potential liability exposure for health care practitioners, volunteers, and entities during their response efforts

C. Immunity

1. Despite liability concerns during emergencies, there are no comprehensive national liability protections for health care practitioners or entities in all settings. Instead, an array of liability protections at all levels of government covers practitioners and entities—particularly volunteers and government entities and officials—that act in good faith and without willful misconduct, gross negligence, or recklessness

2. Federal or state suspensions of legal requirements or waivers of sanctions for failing to comply with certain federal or state statutes during declared emergencies may offer additional protections. In the absence of a federal law and/or state specific laws, some liability protections may be provided by Good Samaritan statutes, volunteer protection acts, and tort claims acts.

3. Other protections, such as those pursuant to the Emergency Management Assistance Compact (EMAC) or emergency laws, are triggered only by an emergency declaration.