

LEGAL COLUMN

Is There An Inherent Duty To Rescue?

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It is often asked of me if a federal law enforcement officer ("LEO") has a general affirmative duty to rescue another in the absence of a statutory, contractual or common law duty to do so. The various "good samaritan" acts promulgated by individual states and the federal government are designed to protect those individuals who, despite having no pre-existing legal obligation to offer assistance, do render emergency care at or near the scene of an emergency, gratuitously and in good faith. Generally speaking, such a person would not be liable for any civil damages as a result of any act or omission on their part, unless that person acted with gross negligence. In contrast, a person who has no pre-existing duty to rescue and who resolves not to rescue could not be held liable for damages by virtue of being a non-actor. Whether a LEO has a general duty to rescue depends on whether the LEO has a pre-existing legal duty to do so. It should be noted that the various "good samaritan" acts do not protect a person who has a pre-existing duty to rescue. The question arises whether a federal law enforcement officer is deemed to have a legal pre-existing duty to offer assistance even in circumstances unrelated to federal law enforcement, and hence cannot be in the position to refuse to act.

At common law there is no duty to rescue. "The law has persistently refused to recognize the moral obligation of common decency and common humanity, to come to the aid of another human being who is in danger....". (See W. Prosser, *Law of Torts* Section 56, at 340 (4th ed. 1971)). Only in certain limited situations, as for example where the actor was responsible for placing the imperiled person in his endangered position, has a duty been recognized. However, once rescue operations have begun, the rescuer is held to a duty of due care. The individual who has no pre-existing duty to rescue and is acting gratuitously and in good faith would have the privilege of being protected under the applicable "good samaritan" act. A person who does have a pre-existing duty to rescue would be protected by the various scope of employment affirmative defenses and immunities associated with the exercise of police power.

In determining whether a local, state or federal law enforcement official owes a common law duty of rescue to an

individual, a distinction must be made between a "general law enforcement official" and a "non-general law enforcement official." A general law enforcement official, such as a local police officer, is under a general duty to go to the aid of an individual. This duty arises out of the general responsibility of the police to protect the lives and the welfare of the citizenry. (See *Lee v. State*, 490 P.2d 1206, (Alaska 1971). For instance, a state police officer or state trooper is charged with the enforcement of all criminal laws of the state, and has those powers usually and customarily exercised by peace officers. A federal agent, however, has limited derivative police power as defined by statute or memoranda of understanding and is distinguished from a general law enforcement official. Thereby, a federal agent who exercises limited police power as defined by statute (usually restricted to the particular mission of the federal agency) is under no **inherent** duty to aid an individual. A federal agent does not have a pre-existing duty to protect the public outside the confines of the federal system, whether on or off duty.

In *Flynn v. United States of America*, 902 F.2d 1524, (1990) the plaintiff brought action against the United States to recover for wrongful death of an injured pedestrian's rescuer who allegedly was killed as the result of the actions of National Park Service officers who had stopped outside the national park to render assistance to the pedestrian who had been struck by a motor vehicle. The U.S. Court of Appeals held that it is reasonable to impose upon general law enforcement officials the duty to rescue. According to the Court, the National Park Service officers, however, are not "general law enforcement officials". The National Park Service officers have no general duty to protect the public outside the confines of the national park system. Since the incident in question occurred outside the confines of the national park system, they had no statutory or common law duty to render assistance (The significance of this finding was that the U.S. had no vicarious liability for the "private" out of scope actions of its employees.). The National Park Service officers were acting as private individuals who were under no duty to stop and render assistance. It follows therefore that federal agents have no duty to render assistance to an individual outside the confines of the federal system. If the federal agent chooses to render assistance outside the confines of the federal system, any protection he or she may be afforded would come only from the applicable "good samaritan" statute. Hence, according to the common law, federal law enforcement officers do not have a general duty of rescue and an omission to do so will not result in

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liability.

It is also necessary to consider the federal agent's responsibility under the due process clause of the United States Constitution. The due process clause forbids the federal government itself to deprive an individual of life, liberty, or property without due process of law, but its language cannot be fairly extended to impose an affirmative obligation on the federal government or its employees to ensure that those interests do not come to harm through other means. (See U.S.C.A. Const. Amend. 5). The federal government's failure to protect an individual against private violence generally does not constitute a violation of the due process clause, because the clause imposes no **general** duty on the government to provide members of the general public with adequate protective services. The due process clause is phrased as a limitation of the government's power to act, not as a guarantee of certain minimal levels of safety and security. Nothing in the language of the due process clause requires the federal government to protect life, liberty, and property of its citizens against invasion by private actors. The purpose of the due process clause is to protect the people from the federal (or state) government, not to ensure that the government protects them from each other.

In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the mother of a child who had been beaten by his father brought a federal civil rights action against the social workers and local officials who had received complaints that the child was being abused by the father, but had not removed him from his father's custody. The Supreme Court held that the State (as used here, the term "state" refers generically to state and local governmental entities and their agents) had no federal constitutional duty to protect the child from the father after receiving reports of possible abuse. The purpose of the due process clause was to protect the people from the state, not to ensure that the state protected them from each other. In *DeShaney*, the plaintiff mother, contended that the state's knowledge of his danger and expressions of willingness to protect him against that danger established a "special relationship" giving rise to an affirmative constitutional duty to protect. The affirmative duty, however, arises not from the state's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitations which it has imposed on his freedom to act on his own behalf, through imprisonment, institutionalization, or other similar restraint of personal liberty. In *DeShaney*, the Supreme Court held that no affirmative duty existed, for the harms the plaintiff suffered which occurred not while the state was holding custody, but while the child was in the custody of his natural father, who was in no sense a state actor. While the state may have been aware of the dangers that the child faced, it played no part in their creation, nor did it do anything to render him more vulner-

able to them. Furthermore, it is the state's affirmative act of restraining the individual's freedom to act on his own behalf - through incarceration, institutionalization, or other similar restraint of personal liberty - which is the "deprivation of liberty" triggering the protections of the due process clause, not its failure to act to protect his liberty interests against harms inflicted by other means. The due process clause of the Fifth Amendment does not require a federal, state or local governmental entity to protect citizens from private violence or other mishaps not attributable to the conduct of its employees. Of course, it follows that the due process clause imposes no affirmative duty upon a federal agent to rescue unless the perceived harm stems from government action.

In conclusion, under common law federal agents are deemed not to be "general law enforcement officers" and thus have no legal duty to render assistance to individuals outside of their federal confines, and thereby would not be liable for damages for non-acting. Likewise, federal agents, under the civil rights statutes, have no duty to act or to protect citizens from dangers not attributable to their own actions. Any action or inaction by a federal agent under these circumstances is solely within the discretion of the federal agent, who when he/she becomes an actor as opposed to non-actor, could be protected by the various "good samaritan" acts of the states or the federal government. An analysis of these acts will follow in subsequent columns, especially their applicability to retirees who will be "218" carriers of concealed weapons.

Generally, it is safe advice that unless a federal agent spontaneously confronts a crime of violence committed in his/her presence which poses an imminent risk of death or serious bodily injury to him or herself or others (which is behavior protected by the good samaritan acts), the role of the agent should be confined to alerting local law enforcement of the perceived illegal conduct, since in the absence of **imminence** of death or serious bodily injury "good samaritan" acts may not protect the agent. Gratuitous efforts to intervene in non-emergency situations (traffic stops, drug transactions) may place the federal agent in an out-of-scope status to confront claims, accusations and lawsuits by him or herself in a private capacity without the help of the federal government, and can result in forfeit of affirmative defenses and protective immunities, as well as a fully paid defense effort by the Department of Justice.



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