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FAQ – CIVIL JUSTICE AND PRISON HEALTH CARE: ALL LOCKED UP AND BEHIND BARS

Do sick and injured inmates have a right to health care while incarcerated?

Yes. The U.S. Supreme Court has long recognized that prisoners have a constitutional right to adequate health care through the Eighth Amendment's ban on "cruel and unusual" punishment. To constitute an Eighth Amendment violation, prison personnel must act with "deliberate indifference to serious medical needs of prisoners."¹ However, like any patient, inmates have the right to be treated in a non-negligent manner. In other words, even if inadequate health care does not rise to the level of a constitutional violation, state negligence standards still may be violated. Enforcing these rights in court, however, can be very difficult for inmates.

How does a prisoner receive health care?

There are three possible scenarios:

- 1) The prison is government-run, with the government providing health care.
- 2) The prison is government-run, with the government outsourcing health care to a private contractor. As reported by *Prison Legal News*, "Around 20 states outsource all or some of the medical services in their prison systems,"² while the federal government outsources some aspects of health-care operations in its facilities.³
- 3) The prison is corporate-run, with a private company operating the inmate health care system. As of 2013, private prisons held 19 percent of federal prisoners and 7 percent of state prisoners.⁴ This population is increasing. From 2000-2013, the number of state and federal prisoners in private prisons rose by more than 46 percent (from 90,815 in 2000⁵ to 133,000 in 2013⁶). When looking solely at federal prisoners in private prisons, the numbers more than doubled, going from 15,524 in 2000⁷ to 41,159 in 2013.⁸

Why would governments turn to private prison companies to provide health care services?

Cost Savings. State and federal budgets are being strained⁹ by the exploding prison populations.¹⁰ This rapid growth is often attributed to "a series of 'get tough' policies enacted in the 1980s and into the 1990s, such as truth in sentencing laws, mandatory minimums, mandatory drug sentences, life sentence without possibility of parole, and the three-strikes law."¹¹ Along with prison population growth comes the accompanying cost of providing health care for inmates¹² (many of whom enter prison with chronic illnesses,

infectious diseases and other health problems¹³). In addition, the number of inmates over the age of 55 is rising, increasing 234 percent between 1999 to 2013.¹⁴ The cost to treat these patients is, on average, at least 2-3 times that of other inmates.¹⁵

Outsourcing health care to private prison health care companies, which are predicated on a cost-cutting model to boost profits,¹⁶ may sound appealing to cash-strapped governments despite what it might mean for the quality of care provided.¹⁷ Some contracts require specific cuts in health care costs, such as the five-year contract between Florida's Department of Corrections (FDOC) and Corizon, the nation's largest for-profit prison health care provider,¹⁸ where the company agreed to provide the current quality of medical care to Florida state prisoners for 7 percent less than it cost the FDOC.¹⁹

Reduced accountability. Outsourcing prison health care allows governments to transfer some or all of their legal liability to private contractors when inmates suffer medical injuries.²⁰ On a related note, prison health care privatization can enable governments to essentially hand off oversight responsibilities relating to the provision and quality of medical services. However, governments are not always “off the hook” when outsourced or private health care is inadequate. State officials, in particular, can sometimes be held jointly responsible when a private company has been “deliberately indifferent to serious medical needs of prisoners.”²¹

Can private health care be unsafe for prisoners?

Yes. Whether it is due to cost cutting or simple disregard for inmates' well-being, health care for prisoners is often abysmal and can be deadly. This problem permeates every part of the country.

For example, from January 2013 through May 2014 in Illinois, there were “significant lapses in care” in an “unacceptably high” 60 percent of the cases in which state prisoners died of natural causes.²² This was the finding of an independent report submitted by medical experts in connection with a class action lawsuit that alleged unsafe medical care at the state's prisons, care provided to roughly 50,000 inmates by Wexford Health under a 10-year, \$1.36 billion contract.²³ The report uncovered serious problems with treatment of ordinary illnesses, such as a doctor stopping a diabetic patient's insulin treatment “after his blood sugar levels were found to be normal while he was on the insulin,”²⁴ an inmate's foot being amputated after a “grossly mismanaged” ulcer²⁵ and a prisoner who was sent to the hospital two weeks after a “rapidly progressive paralysis of the lower half of his body,” leaving him in a wheelchair.²⁶

A recent investigation in Arizona uncovered “disturbing cases of inadequate treatment” by private prison health care companies Corizon and Wexford Health Sources in state prisons.²⁷ According to a former Corizon patient care technician, staffing levels left dementia patients unfed, incontinent inmates sitting for hours in their own feces and other prisoners dead. In one case, a pregnant inmate in jail on drug charges was forced to have a cesarean delivery and quickly moved back to her cell where her wound re-opened.²⁸ She alerted prison staff but was refused medical attention. When she was finally able to see medical staff two weeks later, they then treated her with a “wound vacuum” and table sugar – an antiquated treatment used before the invention of antibiotics.²⁹

In Florida, according to a *Palm Beach Post* investigation, “Just months after all medical care in state prisons was privatized, the count of inmate deaths spiked to a 10-year high in January [2014] and continued at a record pace through July.”³⁰ Among the countless victims of life-threatening health care: a 24-year-old Florida man, in jail for a misdemeanor, who alerted health care workers after he felt “his intestines escaping from his rectum.”³¹ As reported by the *Miami Herald*, “Fellow inmates begged Corizon’s staff to take him to a hospital” but instead the Corizon nurse “obtained some K-Y Jelly, and pushed the intestines back in,” civil court records show.³² “Hours later, at a local hospital, doctors found an abscess compressing his spine.”³³

In 2015, Corizon was fired by New York City after its Department of Investigation (DOI) discovered that the “company had hired doctors and mental health workers with disciplinary problems and criminal convictions, including for murder and kidnapping. It also found that missteps by Corizon employees might have contributed to at least two recent inmate deaths.”³⁴ In one case, “an inmate was left dying, untreated for six days while uniformed officers, doctors, mental health clinicians and nurses made 57 visits to his cell without assisting him.”³⁵

What can a prisoner do legally if he or she has been provided unsafe health care?

Before harmed federal inmates can even file a lawsuit, they must first jump through administrative hurdles established by the Prisoners Reform Litigation Act (PLRA).³⁶ Many states have passed versions of the PLRA, which similarly obstruct state court access.³⁷ Once those obstacles are overcome, an inmate’s legal options depend on three main factors: 1) whether s/he is in local, state or federal prison; 2) whether the health care is provided by the government or a private company; and 3) the degree of harm inflicted.³⁸

What if an inmate is provided inadequate health care in a *federal* facility?

Health care provided by the government. If a federal inmate’s harm is caused by “deliberate indifference to a serious medical need,” this mistreatment may violate the U.S. Constitution’s Eighth Amendment prohibition against cruel and unusual punishment.³⁹ That may give rise to a “constitutional tort” also known as a “*Bivens*” action,⁴⁰ allowing a lawsuit against prison officials (but not against the federal government itself). “Deliberate indifference” is a much higher standard than “negligence” or “malpractice,”⁴¹ requiring “more than ordinary lack of due care.”⁴²

If the harms committed against the inmate do not rise to the level of a constitutional violation the inmate may still be able to bring a malpractice claim under the Federal Tort Claims Act (FTCA).⁴³ The FTCA allows federal prisoners (without regard to citizenship status) assigned to publicly-run prison facilities to file a tort claim against the United States when a federal employee has injured them. Before a claim can be filed under the FTCA, the inmate must exhaust administrative remedies by first filing a complaint with the Bureau of Prisons. There are also strict limits on the kinds of damages they may recover.⁴⁴

Health care provided by a private company. If a federal inmate happens to be housed in a privately-run federal prison, or his or her health care is provided by a private contractor,

his or her rights completely change. The Supreme Court has said that *Bivens* actions are not available to federal inmates in private prisons as long as state tort law provides an alternative remedy, irrespective of how sufficient that remedy may be.⁴⁵ In addition, federal prisoners held at privately-run facilities cannot sue under the FTCA because contractors are not federal employees for purposes of the Act.⁴⁶ However, as the Supreme Court has suggested, remedies against private companies may still be available under state tort law.⁴⁷

What if an inmate is provided inadequate health care in a state or local facility?

If a state or local inmate's harm is caused by "deliberate indifference to a serious medical need," this mistreatment may violate the U.S. Constitution's Eighth Amendment prohibition against cruel and unusual punishment.⁴⁸ In that case, inmates can pursue a civil rights action in federal court under 42 U.S.C. Sec. 1983. While a state government cannot be sued under Section 1983, state and local officials can be sued. (If found liable, the state will usually indemnify their employee.⁴⁹) In addition, *private* health care contractors and their employees can be sued under Section 1983. In fact, a state official and private contractor may be jointly liable for causing harm.⁵⁰

If a claim does not rise to the level of a constitutional violation, a private prison official may be liable under state medical malpractice law. Cases against the state are more difficult because of sovereign immunity issues. Most states have some kind of state tort claims act modeled on the FTCA, waiving sovereign immunity to some extent and allowing some claims to proceed. However, these laws typically have administration requirements and contain liability limits.⁵¹

What additional obstacles do prisoners face in accessing the civil justice system and what are the ramifications?

Inmates face a number of other difficulties bringing lawsuits over inadequate or dangerous health care. For example, because they are incarcerated, inmates' damages may be extremely low and juries may be unsympathetic. Noted one New Mexico attorney, culpable defendants may refuse to settle a prisoner's case, "argu[ing] that inmates' damages are minimal since they can't factor in lost wages. That leaves the option of a jury trial, but jurors tend to take a dim view of inmate complaints."⁵²

Similarly, an Illinois attorney explained that "low settlements discourage lawyers from taking cases."⁵³ Another stated, "The economic incentives of the entities that are entrusted is to give as little care as possible.... They're in an industry where they don't think they will be scrutinized. Even if the worst-case scenario happens, juries won't care that much. So they are emboldened."⁵⁴

Because civil lawsuits may be the only means to hold private prison operators, private health care contractors and their employees and government officials accountable for providing dangerous medical care, the scarcity of lawsuits has likely led to even worse conditions. Lawsuits are often the only means for the public and government regulators to learn about unsafe medical practices in the nation's prisons. This is especially true for private contractor-operated

prisons, which, in contrast to government-run federal and state facilities, are under no obligation to be transparent about the level and quality of prisoner health care.⁵⁵ Sometimes it takes repeated litigation and the accompanying publicity to push a legislature to act or force a government agency to implement stronger regulations, exercise greater oversight or terminate a prison health care contract.⁵⁶

NOTES

¹ As the Court explained in *Estelle v. Gamble*, 429 U.S. 97 (1976), “An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical ‘torture or a lingering death,’ the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose” [case citation omitted]. This right was recently re-affirmed by the Court in *Brown v. Plata*, 131 S.Ct. 1910 (2011) (“Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. ‘The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.’ To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison’s failure to provide sustenance for inmates ‘may actually produce physical ‘torture or a lingering death.’ Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society”) [cases and book citation omitted].

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⁴ U.S. Department of Justice, Bureau of Justice Statistics, “Prisoners in 2013” (September 2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

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⁶ U.S. Department of Justice, Bureau of Justice Statistics, “Prisoners in 2013” (Table 12) (September 2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

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- ⁵⁶ For recent examples that illustrate the importance of civil lawsuits, see David Royse, “Medical battle behind bars: Big prison healthcare firm Corizon struggles to win contracts,” *Modern Healthcare*, April 11, 2015, <http://www.modernhealthcare.com/article/20150411/MAGAZINE/304119981>; Dara Kam, “Florida prisons chief to seek revamp of health care contracts,” *News Service of Florida*, February 20, 2015, <http://www.tampabay.com/news/politics/stateroundup/florida-prisons-chief-to-seek-revamp-of-health-care-contracts/2218522>; Craig Harris, “Judge approves Arizona inmate health-care settlement,” *Arizona Republic*, February 19, 2015, <http://www.azcentral.com/story/news/local/arizona/2015/02/19/judge-approves-arizona-inmate-health-care-settlement/23657207/>; Carimah Townes, “Largest Wrongful Death Settlement In California History For Inmate Who Didn’t Get Proper Treatment,” *ThinkProgress*, February 11, 2015, <http://thinkprogress.org/justice/2015/02/11/3621551/corizon-wont-get-away-with-medical-neglect-in-california/>; American Civil Liberties Union, “ACLU Urges D.C. Council to Oppose Corizon Contract,” December 16, 2014, <http://aclu-nca.org/news/aclu-urges-dc-council-to-oppose-corizon-contract>, citing Dan Christensen, “Florida prison officials didn’t ask, companies didn’t tell about hundreds of malpractice cases,” *BrowardBulldog.org*, October 2, 2013, <http://www.browardbulldog.org/tag/wexford-health/>; Dani Kass, “Settlement reached in Fluvanna women’s prison health care lawsuit,” *Daily Progress*, November 29, 2014, http://www.dailyprogress.com/news/local/settlement-reached-in-fluvanna-women-s-prison-health-care-lawsuit/article_46896b32-7811-11e4-9a5d-2f625656c65a.html; Aviva Shen, “Doctors Say Arizona Prisons Mocked Sick Inmates, Left Stroke Victims In Soiled Diapers For Weeks,” *ThinkProgress*, September 11, 2014, <http://thinkprogress.org/health/2014/09/11/3566347/doctors-arizona-prison-health-care-abuse/>.