

The Little Act That Could: The Volunteer Protection Act of 1997

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There's nothing stronger than the heart of a volunteer. . .¹

INTRODUCTION

One of the more gratifying life experiences is serving as a volunteer. Volunteerism is a highly regarded and respected form of community involvement around the world. Whether one is a licensed professional volunteering services (such as a *pro bono* lawyer or doctor) to a local charity tournament, Little League baseball, or the American Camping Association; or whether one simply is a good-hearted, altruistic volunteer wanting to help a particular cause, these unpaid workers donate time and energy in a variety of community and recreational settings. Sometimes volunteers get involved for career development. Others simply want to meet people and have fun. In some situations, volunteers might be responding spontaneously to a crisis or emergency.²

While motivations for volunteering are as varied as the multitude of environments in which volunteers become involved, an area of concern not

1. Col. Jimmy Doolittle played by actor Alec Baldwin in the movie, *Pearl Harbor*, 2001.

2. In response to many emergencies, voluntary and other uncompensated services may fall under the direction of the Federal Emergency Management Agency (FEMA) and the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121 et seq. (2003).

often considered by volunteers and event organizers is the potential liability for damages caused by the conduct of volunteers. Consideration of liability and other risk management issues is vital to any recreational event, particularly one involving volunteers.³ Though reported lawsuits against volunteers are rare, some individuals may be reluctant to participate in a volunteer capacity out of fear of the potential legal liability or threats from frivolous lawsuits that can still be costly to the individual volunteer.⁴ This fear has led to a steady reduction in the number of volunteers throughout the United States and the call for reforms that cap damages in a variety of settings.⁵

Although the number of lawsuits against volunteers are infrequent, the federal Volunteer Protection Act of 1997 ("VPA") serves as a fundamental attempt to protect the volunteers of public and private nonprofit agencies, and of governmental entities.⁶ The VPA was written in a way to shield individual volunteers only to a small degree, and it does not necessarily protect the nonprofit organization itself.⁷ If nonprofit and other volunteer organizers and organizations were completely immune from lawsuits, some authors believe that these entities might not be deterred from engaging in behavior that could injure participants.⁸

The authors of this article identify and discuss weaknesses of the VPA as a legislative step to protect and encourage volunteers. Some legal researchers believe that the VPA, though well intentioned, does not go far enough to protect volunteers from litigious plaintiffs who might seek financial redress for

3. David W. Hartmann, *Volunteer Immunity: Maintaining the Vitality of the Third Sector of Our Economy*, 19 U. BRIDGEPORT L.REV. 63 (1989).

4. George Bush, *Remarks Accepting The Presidential Nomination At The Republican National Convention In Houston* (1992), at <http://bushlibrary.tamu.edu/papers/1992/92082002.html>, "some moms and pops won't even coach Little League anymore." See also Howard P. Benard, *Little League Fun, Big League Liability*, 8 MARQ. SPORTS L.J. 93 (1998).

5. 42 U.S.C. §14501(2)(a)(2) (1997), ". . .the decline in volunteerism is a national concern." See also, Thomas A. Eaton, *Revisiting the Intersection of Worker's Compensation and Product Liability: An Assessment of a Proposed Federal Solution to an Old Problem*, 64 TENN. L. REV. 881 (1997). Other governmental attempts to limit liability involving tort actions include the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (1994); Price-Anderson Act, 42 U.S.C. § 2210 (1994 & Supp. 1999); the Superfund Amendment and Reauthorization Act of 1986, 42 U.S.C. §§ 9601-9675 (1994).

6. *Id.* §14501, et seq. (1997).

7. The terms nonprofit and not-for-profit are synonymous. Paul J. Galanti, *Indiana Nonprofit Corporation Act*, 25 INDIANA L. REV. 999 (1992). Either term, however, does not mean that the organization does not want to be profitable nor does it mean that making a profit is a bad thing.

8. Brenda Kimery, *Tort Liability of Nonprofit Corporations and their Volunteers, Directors and Officers: Focus on Oklahoma*, 33 TULSA L. J. 638, 686 (1997). See also, Hartmann, *supra* note 3, at 80.

damages caused during a volunteer activity.⁹ While the VPA does protect volunteers of nonprofit organizations from liabilities due to ordinary negligence, there are exceptions to the VPA and they are numerous. This makes the VPA powerfully symbolic but impractical, and in need of reform.¹⁰

HISTORY OF THE ACT

The VPA was first introduced at the federal level in 1985 but did not become law until 1997.¹¹ This Act was essentially designed to extend traditional charitable immunity, sovereign immunity, and Good Samaritan laws found at the state levels to the federal level. During President George H.W. Bush's term, the President urged model state volunteer service protection laws, rather than a federal law that would gain state-by-state adoption.¹² Though every state had a law related to the liability of volunteers, the laws varied greatly and were inconsistent.¹³ To dramatize the need for a federal volunteer liability protection act, Representative John Porter (R- IL) assigned bill number 911 to the proposed Volunteer Protection Act.¹⁴

Congress ultimately did pass the VPA so that individuals would be encouraged to serve as volunteers by establishing a comprehensive and

9. Not all authors agree with the premise of the Act. *See for example*, Jamie Brown, *Legislators Strike Out: Volunteer Little League Coaches Should Not be Immune from Tort Liability*, 7 SETON HALL J. SPORT L. 559 (1997); Andrew F. Popper, *A One-Term Tort Reform Tale: Victimized the Vulnerable*, 35 HARV. J. ON LEGIS. 123 (1998). *See also*, Frances Fendler Rosenzweig, *Shielding Volunteers from Tort Liability: Congress Expands the Safety Zone*, ARK. LAW., Fall 1997, at 34.

10. *See Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201 (Ohio 1998). Though this case did not address the Act, it did provide an excellent analysis of the legal issues related to the liability of volunteer nonprofit organizations such as the American Youth Soccer Organization (AYSO) and its deterrent effect on parents who might otherwise contribute their time to volunteer but for the risks and costs of potential litigation. *See also*, Melinda Smith, *Tort Immunity for Volunteers in Ohio*: *Zivich v. Mentor Soccer Club, Inc.*, 32 AKRON L. REV. 699 (1999).

11. Introduced by Representative John Edward Porter in the House in 1985 and subsequently for many years. Alfred R. Light, *Conscripting State Law to Protect Volunteers: The Odd Formulation of Federalism in "Opt Out" Preemption*, 10 SETON HALL J. SPORT L. 9, 14 (2000).

12. Charles Tremper, *Volunteers Vulnerable: Protective Laws are a Shield Full of Holes*, 4 DEC. BUS. L. TODAY 22 (Nov./Dec. 1994). *See also*, NONPROFIT RISK MANAGEMENT CENTER, 2001 STATE LIABILITY LAWS FOR CHARITABLE ORGANIZATIONS AND VOLUNTEERS, at http://www94311.temp.w1.com/pubs/PDFs/ssl_01rev.pdf (Sept. 2001).

13. *Id.*

14. Kenneth Biedzynski, *The Federal Volunteer Protection Act: Does Congress Want To Play Ball?* 23 SETON HALL LEG. J. 319, 324 (1999).

consistent approach to volunteer immunity and to reduce their fear of being sued.¹⁵ The VPA states that

the Congress finds and declares that 1.) the willingness of volunteers to offer their services is deterred by the potential for liability against them; 2.) as a result, many nonprofit public and private organizations and governmental entities, including voluntary associations, social service agencies, educational institutions, and other civic programs have been adversely affected by the withdrawal of volunteers from boards of directors and service in other capacities.¹⁶

Specifically, the VPA "provides certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities."¹⁷ The VPA protects, volunteers who perform services (including officers, directors, trustees and direct service), volunteers for a nonprofit organization or governmental entity, and volunteers who receive no compensation (reasonable reimbursement for expenses incurred is allowed) or nothing of value in lieu of compensation in excess of \$500 per year.¹⁸ However, the Act seems unclear as to whether the \$500 per year is in cash or in kind or a combination of the two.

President Bill Clinton eventually signed the VPA into law on June 18, 1997.¹⁹ The VPA was signed during President Clinton's Summit for America's Future, an initiative aimed at increasing volunteerism and community service among Americans.²⁰

CONDITIONS OF THE VPA

The VPA applies to any nonprofit organization that is organized for a public benefit. This includes, of course, 501(c)(3) organizations and governmental entities.²¹ Unlike the concepts of sovereign or governmental

15. Since 1995, at least forty-eight state and ten federal laws have been enacted that limit liability in tort. American Tort Reform Association, *Tort Reform Record*, June 2003, at http://www.atra.org/files.cgi/7601_Record6-03.pdf.

16. 42 U.S.C. § 14501 (a).

17. *Id.* § 14501 (b).

18. *Id.* § 14505 (6). Note that the VPA is ambiguous in that it does not define whether the \$500 is per event only or is cumulative or how to value in kind gifts or services, for example.

19. Center for Non-profits, *Federal Volunteer Protection Act*, at http://www.njnnonprofits.org/vol_protect_act.html (last visited November 18, 2003).

20. *Id.*

21. A 501 c 3 organization is also referred to as a nonprofit or charitable organization and may be tax exempt and receive grants from outside sources tax free as long as it meets the conditions of organizational purpose under 26 U.S.C. § 501(c)(3). Giving to a 501 c 3 organization also is tax

immunity, the VPA only applies to individuals, not the organizations or agencies for which they volunteer. Additionally, punitive damages may not be awarded against a volunteer unless the plaintiff can show by clear and convincing evidence that the harm was proximately caused by the volunteer's willful or criminal misconduct.²² Also, in order for the volunteer to be covered by the VPA the volunteer must be acting within the scope of his/her responsibilities at the time of the act or omission, and the volunteer must be properly licensed, certified or authorized to conduct (if appropriate) that activity or practice.²³ The VPA also excludes tort protection for volunteers in the following six instances: for willful or criminal misconduct; gross negligence; harm due to the use of a motor vehicle, vessel or aircraft or any vehicle for which a license or insurance is required; flagrant indifference to the rights or safety of the individual harmed; sexual misconduct, hate crimes, crimes of violence, and conduct while under the use of alcohol or drugs.²⁴

The VPA does not prohibit a nonprofit or governmental agency from taking appropriate civil action against its own volunteer, nor does it prohibit a state agency from establishing its own conditions or exceptions to volunteer liability protection.²⁵ Potential state exceptions to the VPA may include specific state laws that require adherence to particular risk management procedures, including mandatory safety training of volunteers, or laws that make organizations liable for the acts or omissions of its volunteers to the same extent as their employees.²⁶ Furthermore, the VPA does not apply if a state has an expressed statute against volunteer immunity.²⁷

This has created a somewhat confusing federal law because theoretically a state could opt-out of the act entirely. In this case the VPA would not apply to volunteers for nonprofit or government agencies in that state, and their volunteers would not have protection.²⁸

deductible and serves as an incentive to maintain a well-run organization. Dean Papademetriou, *Legal Issues for Nonprofit Cultural Organizations: A Primer for Lawyers and Board Members*, 44 BOSTON B. J., Sept.-Oct. 2000, at 12.

22. 42 U.S.C. § 14503 (f).

23. *Id.* § 14503 (a).

24. *Id.* § 14503 (f).

25. *Id.* § 14503 (d).

26. *Id.*

27. *Id.* § 14502 (b).

28. *Id.* § 14502 (b). *See also* Light, *supra* 11, at 13.

RELATION TO CHARITABLE IMMUNITY

In the nineteenth and twentieth centuries, the charitable immunity doctrine provided charities full immunity from torts by the acts of their members, directors or employees.²⁹ If a particular state offered charitable immunity, practicing doctors and other licensed professionals who often donate their efforts to charitable organizations for free, were able to maintain some sense of security by purchasing additional insurance for volunteer activities.

Historically speaking, laws controlling liability for volunteers were strictly related to state law. Texas, for example, has programs and laws designed to protect volunteer health care providers from liability and to encourage volunteerism.³⁰ Specific protection is provided to physicians in Texas who volunteer and provide non-emergency medical services, as long as the physician is acting in good faith, the patient provided written consent, and the physician is not being compensated by the charitable organization.³¹

Still, over time, the charitable immunity doctrine was substantially eroded through the mid-1980s either legislatively or by court decisions.³² In response to the loss of immunity, nonprofit organizations sought insurance for their volunteers; however, the availability and cost of insurance is still prohibitive for many nonprofit entities. While there are nearly 1.4 million nonprofit organizations in the United States, very few of them purchase (or have the means to purchase) liability insurance.³³ Purchasing standard Directors and Officers (D & O) Liability Insurance should be common practice, but it can be costly.³⁴ In response to the mid-80s nonprofit insurance crisis, state legislators enacted some liability provisions for directors and officers.³⁵ This legislation resulted in situations where the volunteers engaged in establishing policies could actually have more protection than the volunteers engaged in fulfilling the policies.

29. Charles Robert Tremper, *Compensation for Harm from Charitable Activity*, 76 CORNELL L. REV. 401, 410 (1991). *See also*, Note: *The Quality of Mercy: 'Charitable Torts' and their Continuing Immunity*, 100 HARVARD L. REV. 1382 (1987).

30. Gwendolyn L. Pulido, *Immunity of Health Care Providers in Texas: Bartering Legal Rights for Free Medical Care*, 2 SCHOLAR 323, 342 (2000).

31. *Id.*

32. *See also*, Frank L. Maraist & Thomas C. Galligan, Jr., *The Employer's Tort Immunity: A Case Study in Post-Modern Immunity*, 57 LA. L. REV. 467 (1997).

33. Tremper, *supra* note 12, at 401.

34. *Id.* at 419.

35. *Developments in the Law - Nonprofit Corporations*, 105 HARVARD L. REV. 1578, 1680-18681 (1992).

As long as charitable immunity remains in some form, plaintiffs who are allegedly injured by the actions of a nonprofit organization will try to find other avenues for recovery. One possible avenue is to reach into the potentially deeper pockets of the officers and directors of the organization, as well as of other volunteers. When insurance companies began to discontinue offering insurance for nonprofits, heightened awareness of the need for changes in the charitable immunity doctrine led to the VPA; however, the VPA has done little to address the insurance expense and concerns of volunteers.

RELATION TO SOVEREIGN IMMUNITY

The concept of sovereign immunity, a common defense for state governments, their employees and other agents, appears to apply under the VPA if the volunteer was acting as a volunteer in a state capacity. Along the same lines, the similar concept of governmental immunity, a defense for city, local government entities and schools, could apply if a volunteer was acting as a volunteer who was otherwise a government employee. However, in these situations the immunity applies to the governmental-related entity, not to the individuals, and only applies to ordinary negligence, not wanton and willful behavior or reckless misconduct.³⁶

Plaintiffs who seek damages from volunteers acting in the capacity of a state or governmental function would have to sue the individuals under the particular state's tort claims act which often cap the amount of compensation that can be paid to the injured party. Some states specifically limit the liability of a nonprofit organization's potential liability. For example, judgments in Colorado are limited to the extent of existing insurance coverage.³⁷ Torts committed by individuals engaged in charitable work for nonprofits, and falling under stated conditions, are limited to \$20,000 and \$250,000 in Massachusetts and South Carolina respectively.³⁸

RELATION TO GOOD SAMARITAN LAWS

"Good Samaritan" laws provide immunity from liability for those who have no legal responsibility or duty to respond or help others, but voluntarily

36. See, e.g., Henry Cohen, *The Volunteer Protection Act of 1997*, 45 FED. LAW. 40 (March-Apr. 1998).

37. COL. REV. STAT. § 7-123-105 (2003).

38. MASS. GEN. LAWS ANN. ch. 231, §85k (2003); S.C. CODE ANN. §33-56-180 (2003).

and without compensation come to the aid of injured individuals.³⁹ Many states provide a variety of statutory protections for volunteer rescue and services. Some states offer general protections for nonprofit officers and directors, but others are more specific referencing protection for sports officials, referees, and others including those who receive special training for the use of automated external defibrillators, for example.⁴⁰

CASES INVOLVING THE VPA

Gaudet v. Braca

In the unreported opinion of *Gaudet v. Braca*,⁴¹ plaintiff Nicole Gaudet sought money for injuries that she suffered while selling tickets for a high school soccer game on September 20, 1997 when a partially constructed ticket booth fell on her.⁴² The Joel Barlow High School Football Booster Club and the High School administration authorized construction of the booth for ticket sales, concessions, and snacks. John Braca, a member of the Football Booster Club was not paid to construct the booth, and the Booster Club was considered a nonprofit club.

The defendant moved for summary judgment invoking the VPA as a complete defense to the plaintiff's claim.⁴³ The Superior Court of Connecticut analyzed the VPA and noted that Congress made it clear that the purpose of this Act was to not only limit the liability of volunteers, but also to encourage the willingness of volunteers to contribute their services.⁴⁴ The court noted that immunity for charitable work was significant in American history, but the VPA focused more on individual volunteers rather than the nonprofit organizations themselves.⁴⁵ The court also noted that courts in the mid

39. Terrence J. Centner, *Tort Liability for Sports and Recreational Activities: Expanding Statutory Immunity for Protected Classes and Activities*, 26 J. LEGIS. 1, 4-5 (2000).

40. Daniel P. Connaughton & John O. Spengler, 11 J. LEGAL ASPECTS OF SPORT 51 (2001). For further discussion of various state laws related to volunteer immunity, see also, Biedzynski, *supra* note 14, at 325-26.

41. *Gaudet v. Braca*, 2001 Conn. Super. LEXIS 3352 (Conn. Super. 2001), *vacated by*, 2002 Conn. Super. LEXIS 3274 (Conn. Super. 2002).

42. *Gaudet*, 2001 Conn. Super. LEXIS 3352, at *1. The construction began just three days earlier.

43. *Id.* at *2.

44. *Id.* at *4.

45. *Id.* at *4-5. The court cited *McDonald v. Massachusetts General Hosp.*, 120 Mass. 432 (1876), as the first case in American jurisprudence wherein a charity was not held liable because it was a charity.

twentieth century began to question why charitable organizations such as hospitals were immune from suit, but the doctors were not.⁴⁶

The court held that the VPA preempts Connecticut state law⁴⁷ under the Commerce Clause of the U.S. Constitution and that this Act allows states to provide more immunity (but not less) unless the particular state follows §14502(b) of the Act.⁴⁸ Holding that the defendant was a volunteer who received no compensation, was acting within the responsibilities of the Football Booster Club, and that the Booster Club was a nonprofit organization, the court granted summary judgment in favor of John Braca.⁴⁹ However, in a subsequent decision the court vacated the motion for summary judgment on the ground that the Football Booster Club could be held liable and that there was a genuine issue as to whether it is a legal entity at all.⁵⁰

*Smith ex. rel. Rodela v. Parents & Teachers Together*⁵¹

In January, 1999, two year old Juan Rodela, Jr., was allegedly injured while under the care of Parents & Teachers Together (PATT). A student who was practicing a cheerleading move apparently struck the plaintiff in the head. PATT was sued under several theories of negligence for allowing cheerleading moves to be conducted in the vicinity of the children and its childcare services.⁵²

The Defendants filed a motion for summary disposition arguing that, among other things, PATT was protected from liability under the VPA.⁵³ In response, the plaintiffs argued that the individual defendants were not volunteers and therefore should not be shielded either by the VPA or Michigan's Governmental Tort Liability Act (GTLA).⁵⁴

46. *Gaudet*, 2001 Conn. Super. LEXIS 3352, at *5, citing *President & Directors of Georgetown Coll. v. Hughes*, 130 F.2d 810 (D.C.Cir. 1942).

47. *Gaudet*, 2001 Conn. Super. LEXIS 3352, at *5. The court noted that the state of Connecticut grants limits on liability for some volunteers and charity workers already under CONN. GEN. STAT. §§. 52-557m, 10-235, & 52-5571 (2003).

48. *Gaudet*, 2001 Conn. Super. LEXIS 3352, at *5-6. The VPA does not favor its nonapplication, but allows states to do so where all parties to the litigation are citizens of that state and the legislation must cite the VPA.

49. *Id.* at *12.

50. *Id.*

51. 2003 Mich. App. LEXIS 1599 (Mich. App. 2003).

52. *Smith*, 2003 Mich. App. LEXIS 1599, at *1.

53. *Id.* at *2.

54. *Id.* at *3.

The trial court ruled in favor of the defendants who appealed. The Court of Appeals reversed the trial court holding that PATT was not a governmental agency and therefore the GTLA did not apply.⁵⁵ The Court of Appeals affirmed in part, reversed in part, and remanded.⁵⁶ Unfortunately, the court did not offer a discussion of the impact of the Volunteer Protection Act of 1997. Instead, it only utilized the definition of a "volunteer" under the Michigan statute which by definition must be "acting solely on behalf of a governmental agency."⁵⁷ Despite failing to address the VPA, the Court of Appeals felt that the trial court was correct in that none of the alleged actions by PATT would rise to the level of gross negligence.⁵⁸

Momans v. St. Johns Northwestern Military Academy, Inc.

The plaintiffs, parents of current and former students, alleged that St. John's Northwestern Military Academy and certain of its representatives defrauded them and their children in violation of Illinois' Consumer Fraud and Deceptive Business Practices Act. More specifically, the plaintiffs alleged that they were lied to in order that their students would enroll at the institution.⁵⁹ In a novel defense, the individual defendants claimed that they were immune from suit because and were afforded protections by the VPA.⁶⁰

The court noted that the VPA would immunize the defendants-individual directors of the school-if the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer.⁶¹

Armendarez v. Glendale Youth Center, Inc.

Armendarez, a former employee of the Glendale Youth Center, Inc., sued it and the individual board members for unpaid wages under the Fair Labor Standards Act.⁶² The United States District Court for Arizona held that the VPA preempts immunity for volunteers not only under state law, but under

55. *Id.* at *9.

56. *Id.* at *12.

57. *Id.* at 4, referencing MICH. COMP. LAWS ANN. § 691.1401(h) (West 2003).

58. *Id.* at *11.

59. *Momans v. St. John's Northwestern Military Acad.*, 2000 U.S. Dist. LEXIS 5129, *15 (N.D. Ill. 2000).

60. *Id.* at *18.

61. *Id.* at 18-19.

62. *Armendarez v. Glendale Youth Center, Inc.*, 2003 U.S. Dist. LEXIS 8888 (D. Ariz. 2003).

federal law as well.⁶³ Though this case had little or nothing to do with sport, the board members were not liable, giving great deference to the importance of the Act.

PROBLEMS WITH THE VPA

A quick glance at the VPA might create a false impression that volunteers and nonprofits are completely immune from suit. The VPA does not provide direct immunity to nonprofit organizations or government agencies.⁶⁴ If it did, nonprofit organizations might become less diligent in their program planning and monitoring under the false belief that the VPA provides the organization with protection. In fact, many nonprofit organizations may not even be aware of the VPA's existence, though the threat of a lawsuit has effectively motivated organizations and individuals to establish risk management practices and effective volunteer screening and training programs.

Organizations and volunteers who are confused over the liability protection might remain hesitant to contribute as a volunteer out of fear of being sued. Furthermore, only a small percentage of the 1.4 million nonprofit organizations in the United States actually purchase liability insurance due to excessive costs and possibly under the misunderstanding that they have immunity status as a nonprofit organization, and therefore, do not need any insurance.⁶⁵ While certainly it is highly unlikely that a volunteer or nonprofit organization would intentionally harm others, if volunteer organizations erroneously believe that they are immune from suit, it is possible that less responsible conduct might actually be encouraged. The VPA and state volunteer protection laws may further support this false belief of immunity for the organization. In reality the VPA applies to the volunteers themselves.

The VPA excludes liability protection in several situations. First, a volunteer may still be liable in an action brought by the nonprofit organization or governmental entity itself, because the purpose of the VPA is to protect the volunteer from liability to third persons, not from liability to the organization for breach of fiduciary duties.⁶⁶ Second, the VPA does not affect the liability of the organization or entity itself. In addition, liability protection under the VPA does not apply to some types of crimes.⁶⁷ Furthermore, the VPA

63. *Armendarez*, 2003 U.S. Dist. LEXIS 8888, at *8-9.

64. 42 U.S.C § 14503 (c) (2003).

65. Tremper, *supra* note 29, at 402.

66. 42 U.S.C § 14503(b)-(c).

67. *Id.* § 14503 (f).

preempts any state law inconsistent with the VPA unless the state law provides additional liability protection.⁶⁸

Nevertheless, the VPA still permits states, by enacting specified legislation, to "opt out" of its coverage with respect to any civil action against a volunteer in which all parties are citizens of the state.⁶⁹ In addition, the VPA permits states to make volunteer immunity subject to certain conditions, e.g., requiring that organizations provide a financially secure source of recovery for persons who might be injured by a volunteer's actions.⁷⁰ Additionally, since the VPA preempts the substantive and procedural aspects of state law, state judges are required to interpret, enforce, and apply federal law in state proceedings.⁷¹ This could be confusing in situations where there are state and federal statutes that overlap or are inconsistent with each other, raising constitutional issues.⁷²

Joint and several liability for "noneconomic loss" is an issue with regard to interpretation of the VPA as well. The Act provides that a volunteer who is a defendant "shall be liable only for the amount of noneconomic loss allocated to that defendant in direct proportion to the percentage of responsibility of that defendant . . . for the harm . . .".⁷³ The trier of fact is then required to determine the volunteer defendant's percentage of responsibility for the plaintiff's harm.⁷⁴ "Noneconomic loss" includes "losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life . . . and all other nonpecuniary losses of any kind or nature."⁷⁵ Noneconomic loss is contrasted to "economic loss," which means pecuniary loss, including lost earnings and other employment benefits, medical expenses, replacement services loss, and loss of business or employment opportunities.⁷⁶

Because the VPA is still fairly new, somewhat ambiguous, and rarely used, courts have been given little guidance as to how to apply the VPA in state courts. It appears that the Act was hastily passed without consideration for the numerous scenarios and inconsistencies that could play out under the

68. *Id.* § 14503 (d).

69. *Id.* § 14503 (d).

70. *Id.*

71. Light, *supra* note 11, at 48-49.

72. *Id.* at 50-51.

73. 42 U.S.C. § 14504(b)(1).

74. *Id.* § 14504(b)(2).

75. *Id.* § 14505(3).

76. *Id.* § 14504 (b).

Act. For example, do volunteers who engage in fundraising activities that are not directly part of the charitable mission (e.g. a bake sale or a car wash) have some liability protection under federal law that might not be available under state law?⁷⁷ There are no clear-cut answers. The fact remains that as the VPA is currently drafted, many volunteers could remain fully liable for any harm they cause, and all volunteers remain liable for actions not specifically covered by the VPA.

CONCLUSION

It is clear that the Volunteer Protection Act of 1997 was enacted with good intentions to encourage volunteerism and to protect volunteers from lawsuits and provide some measure of immunity. Though most states already had a statute protecting volunteers from a lawsuit to some degree, the VPA sets a national tone and "mandate" to encourage volunteerism while at the same time ensuring some level of immunity, however so slight, to those who volunteer.

It is also understood that in this continued age of frivolous lawsuits and "deep pocket" plaintiff's lawyers, protecting volunteers from liability in certain circumstances provides a valuable legal defense for those who simply want to help their fellow citizens.

Knowing of the existence of the federal Volunteer Protection Act of 1997 is important for those involved in a broad spectrum of recreational activities. Still, utilization of the VPA in a legal defense is rare, and immunity evaporates for a volunteer's conduct that was willful, wanton, negligent or grossly negligent as a matter of public policy.⁷⁸ Unless this federal Act is amended or modified, courts, volunteers, and the affected organizations and agencies will continue to question its meaning and application.

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77. Papademetriou, *supra* note 26, at 12.

78. 42 U.S.C. § 14503(a)(3). See also Melinda Smith, *Tort Immunity for Volunteers in Ohio: Zivich v. Mentor Soccer Club, Inc.*, 32 AKRON LAW REVIEW 699 (1999).

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