

VOLUNTEER PROTECTION BILLS OFFER “CARROT OR STICK” TO STATES  
TO ENACT FEDERAL “FEEL GOOD” TORT REFORM

James C. Kozlowski, J.D., Ph.D.

© 1997 James C. Kozlowski

On March 4, 1997, H.R. 911 was introduced in the House of Representatives: “To encourage the States to enact legislation to grant immunity from personal civil liability, under certain circumstances, to volunteers working on behalf of nonprofit organizations and governmental entities.” As characterized by the Bill, “the willingness of volunteers to offer their services is deterred by potential personal liability for simple mistakes made in the course of volunteer service.” Further, H.R. 911 provides the following rationalization proposing federal legislation in an area of the law traditionally governed by state law (i.e., personal injury liability for negligence):

[B]ecause Federal funds are expended on useful and cost-effective social service programs which depend heavily on volunteer participation, protection of volunteerism through clarification and limitation of the personal liability risks assumed by the volunteer in connection with such participation is an appropriate subject for Federal encouragement of State reform.

Federal “encouragement” in the bill takes the form of a one percent increase in the fiscal year allotment for a State’s Social Services Block Grant under Title XX of the Social Security Act. To obtain such increased federal funding, States would have to certify to the Secretary of Health and Human Services that state tort reform legislation has been enacted which meets the requirements of H.R. 911 to limit the liability of volunteers. Specifically, under Section 4 of the Bill, States must provide the following “Limitation on Liability for Volunteers”:

[A]ny volunteer of a nonprofit organization or governmental entity shall incur no personal financial liability for any tort claim alleging damage or injury from any act or omission of the volunteer on behalf of the organization or entity if-- (1) such volunteer was acting in good faith and within the scope of such volunteer's official functions and duties with the organization or entity; and (2) such damage or injury was not caused by willful and wanton misconduct by such volunteer.

The Bill defines “volunteer” as “an individual performing services for a nonprofit organization or a governmental entity who does not receive-- (A) compensation (including reimbursement or allowance for expenses), or (B) any other thing of value in lieu of compensation, in excess of \$300, and such term includes a volunteer serving as a director, officer, trustee, or direct service volunteer.”

## JUNE 1997 LAW REVIEW

Under H.R. 911, a “nonprofit organization” is defined as “any organization described in section 501(C) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code.” Accordingly, the Bill would not apply to volunteers of unincorporated, non-profit associations providing their services through informal community service organizations and local sports associations.

The House Bill further provides that a State may “impose one or more of the following conditions on and exceptions to the granting of liability protection to any volunteer of an organization or entity” and still meet the certification requirements of H.R. 911:

- (1) The organization or entity must adhere to risk management procedures, including mandatory training of volunteers, as defined by the Secretary of Health and Human Services by regulation.
- (2) The organization or entity shall be liable for the acts or omissions of its volunteers to the same extent as an employer is liable, under the laws of that State, for the acts or omissions of its employees.
- (3) The protection from liability does not apply- (A) if the volunteer was operating a motor vehicle, vessel, aircraft, or other vehicle for which the State involved requires the operator or vehicle owner to maintain insurance; (B) in the case of a suit brought by an appropriate officer of a State or local government to enforce a Federal, State, or local law; and (C) to the extent the claim would be covered under any insurance policy.
- (4) The protection from liability shall apply only if the organization or entity provides a financially secure source of recovery for individuals who suffer injury as a result of actions taken by a volunteer on behalf of the organization or entity. A financially secure source of recovery may be an insurance policy within specified limits, comparable coverage from a risk pooling mechanism, equivalent assets, or alternative arrangements that satisfy the State that the entity will be able to pay for losses up to a specified amount. Separate standards for different types of liability exposure may be specified.

Section 3 of H.R. 911 expressly provides that: “Nothing in this Act shall be construed to preempt the laws of any State governing tort liability actions. In other words, the House Bill in no way proposes to replace existing negligence principles used by state courts to determine personal injury liability under state law. On the contrary, the intent of H.R. 911 is to entice States which have not already done so to adopt a lower legal standard of care for certain volunteers, i.e., no liability for negligence, only willful and wanton misconduct.

SENATE BILL PREEMPTS STATE LAW

In stark contrast, analogous bills in the Senate (S. 544 and S. 543 are virtually identical) would expressly preempt “the laws of any State to the extent that such laws are inconsistent with this Act.” The Senate bills provide an exception, however, for State law that “provides additional protection from liability relating to-- (1) volunteers or to any category of volunteers in the performance of services for a nonprofit organization or governmental entity; and (2) nonprofit organizations or governmental entities.” Further, the Bill provides that federal preemption of existing state law may be avoided if a State enacts specific state legislation. In particular, Section 3(b) of the senate bill provides as follows for “Election of State Regarding Nonapplicability”:

This Act shall not apply to any civil action in a State court against a volunteer, nonprofit organization, or governmental entity in which all parties are citizens of the State if such State enacts a statute-- (1) citing the authority of this subsection; (2) declaring the election of such State that this Act shall not apply to such civil action in the State; and (3) containing no other provisions.

Accordingly, even if a State enacts the nonapplicability law prescribed in the bills, state law would still be preempted in cases involving any out-of-state individuals or organizations.

Similar to H.R. 911, the senate bills provide the following rationalization for preempting an area of law traditionally left to the States.

[B]ecause Federal funds are expended on useful and cost-effective social service programs, many of which are national in scope, depend heavily on volunteer participation, and represent some of the most successful public-private partnerships, protection of volunteerism through clarification and limitation of the personal liability risks assumed by the volunteer in connection with such participation is an appropriate subject for Federal legislation...

[R]eform efforts should respect the role of the States in the development of civil justice rules, but recognize the national Government's role.

When it was introduced in the on April 9, 1997, Senator Paul Coverdell (R - Ga.) described “the national Government’s role” within the context of the upcoming “Presidents' Summit for America's Future” co-chaired by President Clinton and President Bush April 27-29, 1997 in Philadelphia:

## JUNE 1997 LAW REVIEW

This is an effort to mobilize millions of citizens and thousands of organizations to ensure a bright future for our youth and make effective citizen service an integral part of the American way of life. A number of leading corporations and service organizations have made specific commitments of resources and volunteers to achieve the summit's goal.

The leaders at the summit will issue a great call to action for Americans, asking them to volunteer their time and efforts in community service. This is in the best tradition of America. The thread of helping your neighbor and taking an active part of civic life runs all through the history of our Nation. It is woven deeply into the fabric of our communities. It is a tie that binds us together as a robust and healthy society.

According to Coverdell, "many who would heed that call to participate in the great tradition of volunteerism will not do so" due to "fear of punitive litigation." Specifically, Coverdell cited a recent Gallup study which found "one in six volunteers reported withholding their services for fear of being sued." In addition, Coverdell noted: "About 1 in 10 nonprofit groups report the resignation of a volunteer over litigation fears." Accordingly, Coverdell asserted that his proposed "Volunteer Protection Act of 1997" was necessary "to grant immunity from personal civil liability, under certain circumstances, to volunteers working for nonprofit organizations and governmental entities."

### PUBLIC BENEFIT ORGANIZATION?

Unlike H.R. 911, Coverdell's bill does not limit the term "nonprofit organization" to a charitable nonprofit corporation as defined in section 501(c)(3) of the federal tax code. On the contrary, Coverdell's bill would also include volunteers performing services for "any not-for-profit organization organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes." In so doing, Coverdell's bills, unlike H.R. 911, would apply to volunteers of unincorporated, non-profit associations providing their services through informal community service organizations and local sports associations. On the other hand, the proposed "Volunteer Protection Act of 1997" could generate more, rather than less, litigation on the issue of whether the federal immunity statute applies to the conduct of particular individual claiming to be a "volunteer," and whether the recipient of such volunteer services qualifies as a "public benefit" organization.

Similar to H.R. 911, Coverdell's senate bills would limit liability for volunteers of such nonprofit organizations or governmental entities to harm "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."

## JUNE 1997 LAW REVIEW

While generally limiting the liability of individual volunteers to willful/wanton misconduct or gross negligence, both H.R. 911 and the senate bills expressly provide that the proposed "Volunteer Protection Act" would have "No Effect on Liability" for the nonprofit organization or governmental entity. Specifically, H.R. 911 provides that: "Nothing in this section [i.e, Section 4. "Limitation on Liability for Volunteers" to willful and wanton misconduct by such volunteer] shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to injury caused by any person." Similarly, the senate bills would not provide any immunity to nonprofit organizations or governmental entities.

In addition, the senate bills provide that punitive damages may not be awarded against such entities absent clear and convincing proof that the harm was caused by the willful misconduct of the volunteer. In reality, punitive damages, which punish the defendant rather than compensate the plaintiff, are the exception rather than the rule. As a result, such a limitation on damages is unlikely to have any significant effect on volunteer liability.

### ALLOCATE FAULT

The senate bills would also require courts to "determine the percentage of fault for each party responsible for the claimant's harm, whether or not such person is a party to the action." Moreover, the senate bills would require courts to render a separate judgment against each defendant "in an amount... in direct proportion to the percentage of responsibility of the defendant." In so doing, the senate bills would effectively abolish the general principle of joint and several liability among defendants in a personal injury action involving a volunteer.

Under the principle of joint and several liability, the plaintiff can recover all or part of a damage award from among multiple defendants found liable for negligence. This principle ensures that a plaintiff will be made whole without regard to the relative degree of fault among multiple defendants, or the fact that one or more of the parties sharing responsibility for the injury have little or no assets to pay any judgment. In contrast, the senate bills would require that damages be awarded in direct proportion to the percentage of fault apportioned among multiple defendants, including persons who are not party to the suit.

### ILLUSORY PROTECTION

Both H.R. 911 and the senate bills refer to, and purport to provide "Liability Protection for Volunteers." Such protection from lawsuits may be illusory. The November 1988 NRPA Law Review column, entitled "Proposed Federal Volunteer Protection Act: Form or Substance?" reviewed very similar proposed legislation to that described above. As noted in this article, limiting volunteer liability to willful or wanton misconduct would not necessarily "protect" such individuals from lawsuits:

## JUNE 1997 LAW REVIEW

While state legislation inspired by the bills may provide volunteers with a potent defense to tort liability, it does not necessarily preclude their being sued. With or without state legislation, volunteers can still be sued. The plaintiff's attorney will simply have to change the boilerplate language in the personal injury complaint to allege willful/wanton misconduct, rather than ordinary negligence...

State legislation in compliance with the proposal would lower the applicable legal standard of care for volunteers from ordinary negligence to willful/wanton misconduct. Ordinary negligence can be mere carelessness or a momentary oversight which creates an unreasonable risk of harm and causes injury. Rather than mere carelessness, willful/wanton misconduct requires intentional or outrageous misconduct. As the term suggests, "willful" requires an intent or will to injure. While not intentional, "wanton" misconduct demonstrates an utter lack of care and complete disregard for the physical well being of others...

Once sued, the volunteer must then defend the lawsuit to avoid a default judgment. If a volunteer has no available insurance coverage or the sponsoring agency will not provide for indemnification, defending a lawsuit can put "personal assets at risk" whether or not liability is ultimately imposed. The legislation, therefore, does not address the real concern of volunteers which is indemnification, not a lower standard of care.

Similarly, the above described volunteer protection legislation being considered by the 105th Congress would do nothing to protect volunteers from lawsuits. Rather than lowering the applicable legal standard of care from ordinary negligence to willful and wanton misconduct, real statutory protection would require the indemnification of volunteers by the nonprofit organizations or governmental entities who benefit from their services. Accordingly, Congress would perhaps do better to consider legislation which would require recipients of federal funding to provide indemnification of volunteers.

### STATE LAWS PROVIDE MODELS

As noted in the November '88 law review column, in many jurisdictions, "existing state law provides volunteers in public park and recreation agencies with the type of limited immunity" proposed federal volunteer immunity legislation. For example, the article noted that, volunteers for public agencies in Pennsylvania "would appear to have both limited immunity and, more importantly, indemnification under the pertinent provisions of the state tort claims act (42 Pa.C.S.A. 8501 et seq.)": In pertinent part, this existing legislation in Pennsylvania defined "employee" as follows:

## JUNE 1997 LAW REVIEW

Any person who is acting or who has acted on behalf of a government unit whether on a permanent or temporary basis, whether compensated or not and whether within or without the territorial boundaries of the government unit, including... any elected or appointed officer, member of a governing body or other person designated to act for the government unit...

Accordingly, under this definition, uncompensated volunteers of public entities would be considered employees for the purposes of tort liability. Moreover, this example of existing state law described in the 1988 article mandated that the governmental entities provide employees, acting within the scope of their authority, with legal assistance and indemnification for the payment of any judgment resulting from lawsuits:

Consequently, under existing state law, volunteers of public park and recreation agencies in Pennsylvania, including non-sport volunteers, are guaranteed legal assistance and indemnification for negligent acts which fall short of willful misconduct. The state tort claims act, therefore, provides volunteers of public entities in Pennsylvania with a greater degree of protection against personal liability than that available to sports volunteers of non-profit organizations under the recently enacted volunteer protection statute.

### INDEMNIFICATION?

In recent times, both the President and the Congress have announced that the era of "Big Government" is over. Particularly in areas involving natural resources and environmental protection, many members of Congress have argued that the federal government should defer to the States in establishing programs and priorities for its own citizens. In light of such political rhetoric, it seems ironic that the 105th Congress would suggest or impose on the States limited immunity for volunteers without considering the myriad of existing state statutes.

In many instances, existing state statutes, like the Pennsylvania statute described above, do a far better job than the proposed federal "Volunteer Protection Act of 1997" of providing real protection for volunteers, i.e., indemnification in the unlikely event of a lawsuit. Perhaps, promotion of the best of these existing laws as "model state statutes" would be more effective than proposed federal legislation which co-opts, or even worse pre-empts, an area of the law which has traditionally been left to the States.

### STATE REC USE LAW MODEL

For example, most jurisdictions have adopted state recreational use statutes based in whole or part on a

## JUNE 1997 LAW REVIEW

1965 “model” state recreational use statute. Similar to the proposed volunteer immunity, these state statutes lower the applicable legal duty of care from ordinary negligence to willful and wanton misconduct or gross negligence. Specifically, under these statutes, a landowner who opens his land for public recreational use free of charge owes no duty of care to the recreational user to guard, warn, or make the premises reasonably safe. Rather, the only duty owed is to avoid willful and wanton misconduct. These statutes have provided both private and public landowners with the same type of limited immunity envisioned by the proposed “Volunteer Protection Act of 1997.”

More importantly, however, these state statutes have provided limited landowner immunity, even to agencies of the federal government, without any attempt on the part of the Congress to recommend or mandate a federal standard granting limited tort immunity to particular individuals or groups. Even the Federal Tort Claims Act (FTCA) provides that the federal government will be liable for negligence like a private individual under the law of the jurisdiction where the injury occurs. In so doing, the FTCA adopted existing state law principles of negligence liability, rather than adopt a separate federal standard

Notably, one particular state recreational use statute provides a statutory model for addressing the real concern of volunteers about being sued. Specifically, real liability protection should insulate volunteers from the costs attendant to defending a lawsuit, regardless of whether the applicable legal standard is ordinary negligence or willful/wanton misconduct. In this regard, the Virginia state recreational use statute is unique in that it expressly provides for the indemnification of parties who agree to open their land for public recreational use free of charge:

[W]henver any person enters into an agreement with the Commonwealth or any agency thereof, any county, city, or town, or with any local or regional authority created by law for public park or recreational purposes, concerning the use of his land by the public for any of the purposes enumerated... the government, agency, county, city, town, or authority with which the agreement is made shall hold a person harmless from all liability and be responsible for providing, or for paying the cost of, all reasonable legal services required by any person entitled to the benefit of this section as the result of a claim or suit attempting to impose liability. Va. Code Ann. § 29.1-509.

Similarly, substantive volunteer “protection” would require the sponsors and beneficiaries of volunteer services to hold volunteers “harmless from all liability.” As illustrated by the Virginia recreational use statute, a volunteer indemnification statute would make the nonprofit organization or public entity which benefits from such volunteer services “responsible for providing, or for paying the cost of, all reasonable legal services required by any person entitled to the benefit of” such legislation. In its present form, however, the proposed “Volunteer Protection Act of 1997” may have political appeal for its proponents, but it does not prevent volunteers from being sued. None of the bills in the House or

## JUNE 1997 LAW REVIEW

Senate require indemnification in the event of a lawsuit based upon allegations of willful/wanton misconduct. As a result, these bills may unnecessarily interject federal legislation into an existing patchwork of state statutes which already provide a wide range of limited immunity for various types of volunteers, as well as public entities. In so doing, Congress may actually complicate, rather than forestall, litigation involving volunteers.