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Volunteer Protection Act of 1997

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Summary

The Volunteer Protection Act of 1997 (VPA), P.L. 105-19, became law on June 18, 1997, when the President signed S. 543, 105th Congress. As passed by the Senate, this bill was identical to H.R. 911, 105th Congress, as reported by the House Committee on the Judiciary on May 19, 1997 (H.Rept. 105-101). The VPA, whose effective date is September 16, 1997, immunizes individuals who do volunteer work for nonprofit organizations or governmental entities from liability for ordinary negligence in the course of their volunteer work. It also limits punitive damages and noneconomic damages against volunteers who are held liable. It does not affect the liability of nonprofit organizations or governmental entities. The purpose of the VPA is to encourage people to do volunteer work for such nonprofit organizations and governmental entities. Howeever, it allows states affirmatively to declare it inapplicable to suits in their state in which all parties to the action are citizens of the state.

Background and Preemption

The common law (*i.e.*, court-made law) of all 50 states allows individuals to bring tort suits to recover monetary damages for personal injuries or property damage caused by another person's negligent or willful conduct. Almost all states, however, limit the liability of volunteers to some extent. In order to encourage people to do volunteer work who are presently deterred from doing so for fear of liability, the VPA preempts state tort law to limit their liability. It does not limit the liability of nonprofit organizations and governmental entities for the negligence of their volunteers. (Unless a state provides "charitable immunity," then, under the common law doctrine of *respondeat superior*, such organizations and entities, like all employers, are generally vicariously liable for the negligence of their employees and volunteers.)

Section 3 of the VPA provides that it preempts inconsistent state laws except to the extent that such laws provide additional protection from liability to volunteers, nonprofit organizations, or governmental entities. This means that state laws that impose caps on noneconomic and punitive damages, or other tort reforms that benefit defendants, continue to apply in suits resulting from a volunteer's negligence. In addition, the VPA allows

states to enact statutes "declaring the election of such State that this Act shall not apply to such civil action in the State." If they do so, then the VPA would not apply in any action if all parties to the action are citizens of the state.

Section 4(d) of the VPA provides that it does *not* preempt five specific types of state law:

> (1) A State law that requires a nonprofit organization or governmental entity to adhere to risk management procedures, including mandatory training of volunteers.
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> (2) A State law that makes the organization or entity liable for the acts or omissions of its volunteers to the same extent as an employer is liable for the acts or omissions of its employees.
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> (3) A State law that makes a limitation of liability inapplicable if the volunteer was operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or vehicle owner to possess an operator's license or to maintain insurance.
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> (4) A State law that makes a limitation of liability inapplicable if the civil action was brought by an officer of a State or local government pursuant to State or local law.
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> (5) A State law that makes a limitation of liability applicable only if the nonprofit organization or governmental entity provides a financially secure source of recovery for individuals who suffer harm as a result of actions taken by a volunteer on behalf of the organization or entity . . . .

DEFINITION OF "VOLUNTEER" AND "NONPROFIT ORGANIZATION"

Section 6 of the VPA defines "volunteer" to include a person who performs services for a nonprofit organization or governmental entity and who receives no more than $500 per year plus expenses actually incurred. It defines "nonprofit organization" as a § 501(c)(3) organization or a "not-for-profit organization organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes." The VPA provides that an organization shall not be deemed a nonprofit organization for purposes of the VPA if it "practice[s] any action that constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note)."

Liability Limitations

Section 4(a) of the VPA provides immunity to volunteers for nonprofit organizations or governmental entities acting within the scope of their responsibilities, provided that, "if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities . . . ." The immunity is for ordinary negligence, not for "willful or criminal conduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer." This liability

limitation does *not* apply to nonprofit organizations or governmental entities; they may continue to be held vicariously liable for the ordinary negligence of their volunteers, even if volunteers are immune. Nonprofit organizations and governmental entities, however, continue to benefit from any liability limitations provided by state law.

Section 4(f) of the VPA provides that the above limitations on volunteers' liability shall not apply to misconduct that constitutes (1) a crime of violence or act of international terrorism for which a defendant has been convicted, (2) a hate crime, (3) a sexual offense for which the defendant has been convicted, (4) a violation of a federal or state civil rights law, or (5) an act committed while under the influence of alcohol or any drug.

Joint and Several Liability

Section 5 of the VPA eliminates joint and several liability for noneconomic damages with respect to volunteers' work for nonprofit organizations and governmental entities. We will explain these terms. Section 6 of the VPA contains a lengthy definition of "noneconomic losses," but the term refers primarily to pain and suffering and similar damages that are not pecuniary losses, such as medical expenses and lost wages.

"Joint and several liability" is the common law rule (modified by some states) that, if more than one defendant is found liable for an injury, each defendant may be required to pay 100% of the damages, rather than to pay only an amount proportionate to its share of responsibility for the injury. The plaintiff may choose which defendant to seek damages from (although the plaintiff may not recover more than 100% of his damages), and a defendant who pays more than its proportionate share may seek contribution from other defendants. The purpose of joint and several liability is to make it more likely that the plaintiff will recover his full damages even if one or more defendants is insolvent. Supporters of joint and several liability argue that, if it comes to a choice between an innocent plaintiff recovering less than his full damages or a negligent defendant having to pay more than its share, the latter is the lesser evil. Opponents of joint and several liability argue that the rule causes plaintiffs, in the hope of obtaining full recovery, to sue "deep pocket" defendants that sometimes are at most slightly responsible for the plaintiffs' injuries.

To eliminate joint and several liability only for noneconomic damages, as the VPA does, represents a compromise between these two positions. Plaintiffs may collect their total economic damages from any responsible defendant, but may collect from each defendant only the latter's proportionate share of noneconomic damages. Economic damages presumably are more important in most cases, but noneconomic damages may be more significant for some plaintiffs; one reason that President Clinton gave for vetoing the products liability bill in 1996 was that eliminating joint and several liability for noneconomic damages in products liability cases "unfairly discriminates against the most vulnerable members of our society -- the elderly, the poor, children, and nonworking women -- whose injuries often involve mostly noneconomic losses." House Document No. 104-207, 104th Cong., 2d Sess. 2 (1996) (Veto of H.R. 956).

Punitive Damages

Section 4(e) of the VPA limits awards of punitive damages against volunteers in connection with their work for nonprofit organizations and governmental entities. Punitive

damages are intended to punish and deter egregious conduct, and are not, like economic and noneconomic damages, intended to compensate the plaintiff. Under § 4(e), to recover punitive damages, the plaintiff must establish "by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed." Comparing this with § 4(a) reveals that, although the VPA permits a volunteer to be held liable for compensatory (economic and noneconomic) damages for gross negligence or reckless misconduct, he or she may not be held liable for punitive damages on the basis of such conduct unless such conduct also constituted something worse, namely "willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed."

Note also that § 4(e) makes the burden of proof that the plaintiff must meet to recover punitive damages "clear and convincing evidence." The usual burden of proof in civil cases is the easier-to-meet "preponderance of the evidence" standard, which means essentially that it is more likely than not that the defendant engaged in the conduct with which it is charged. Many states, however, have already raised the standard for recovering punitive damages (in all cases, not only against volunteers) to "clear and convincing evidence."

Pro and Con

Section 2 of the VPA sets forth seven findings in support of the VPA. Their essence is that the threat of liability deters people from volunteering and requires nonprofit organizations and governmental entities to spend money for liability costs and litigation. As a result, nonprofit organizations and governmental entities are unable to provide the level of services that would be desirable.

An argument against the VPA is that limiting liability denies injured people recovery to which they would otherwise be entitled under state law; in particular, the savings that the VPA would confer on defendants will come at the expense of the often-poor people they serve, who can least afford to pay for their injuries. An injured person might also question the equity of being able to recover from a paid employee who caused his injury, but not from a volunteer who did so, even where every other circumstance concerning an accident was identical. As noted, though, even when, under the VPA, a volunteer is immune from liability, the nonprofit organization or governmental entity for which he volunteered may continue to be held vicariously liable for the volunteer's ordinary negligence (as well as for conduct for which the volunteer could be held liable).

An alternative approach, which would limit the liability of nonprofit organizations and governmental entities but still permit accident victims to recover, would be for the federal government to pick up the tab. There is precedent for this in the National Swine Flu Immunization Act of 1976 (Public Law 94-380), which made the United States liable in place of swine flu vaccine manufacturers for injures caused by the vaccine. There is also precedent in the federal statutes that deem volunteers with particular federal programs, such as VISTA and the Peace Corps, to be federal employees for liability purposes. As federal employees, they become immune from state tort liability and the United States becomes liable under the Federal Tort Claims Act, 28 U.S.C. § 2679. (For additional information on these statutes, see CRS Report 97-579 (May 30, 1997)).

As for the VPA's punitive damages standard, the requirement that, to be liable for punitive damages, a defendant have engaged in "willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed," raises the question whether *unconscious* flagrant indifference to safety is less objectionable than conscious, flagrant indifference. This "conscious, flagrant indifference" standard, however, was used in the vetoed products liability bill, and the Senate report that accompanied that bill said that the "conscious, flagrant indifference . . . standard is fair and is similar to the standards of many states." S.Rept. 104-69, 104th Congress, 1st Session 37 (1995).

Another issue that the VPA raises is federalism; *i.e.*, whether it is desirable for Congress to regulate an area it traditionally has left to the states. The argument for preemption would be the desirability of national uniformity as to volunteer liability. The argument against it is that it would be desirable to allow the states to continue to experiment with different options. In fact, though, the VPA allows the states, by enacting new laws, to elect to apply their own laws to cases in which all parties are citizens of the state.

Effective Date; Non-retroactivity

Section 7 of the VPA provides that the VPA takes effect 90 days after enactment (which is September 16, 1997) and applies to any claim filed "on or after" that date but only if the accident occurred after (not "on or after") that date. Thus, if this provision is read literally, there is an inconsistency as to application of the bill to accidents that occur *on* the bill's effective date.