

# Shielding Volunteers of Charitable Organizations from Liability



By Philip H. Bartels

## Introduction

An issue that often confronts many practitioners is the potential liability that a client may incur in connection with volunteer work for a Connecticut charitable organization. Historically, the issue of immunity was focused on the liability of the charitable organizations themselves. In recent years, however, this issue has frequently been focused on the liability of the volunteers, who many times have deeper pockets than their charitable organizations.

In 1997, there was a very important development in this area of law because of the enactment of a still little-known federal act, which has far broader provisions for volunteer immunity than Connecticut's very narrow volunteer immunity statute. Significantly for volunteers in Connecticut, this broad federal act has preempted the Connecticut statute. As a result, once a volunteer of a Connecticut not-for-profit corporation, trust, unincorporated association, or any other type of Connecticut charitable organization (and even if it is not an IRS-

qualified Section 501(c)(3) entity) has been able to meet a certain five-part test under the federal act, then the individual is immune from any personal liability.

### A. An Explanation of the 1997 Federal Act.

The Volunteer Protection Act of 1997 (the "VPA") became effective on September 16, 1997.<sup>1</sup> As stated in the accompanying House of Representatives' 1997 Report, the reason underlying the VPA's enactment was

to supplant the then-existing patchwork among the states regarding their volunteer immunity laws in order to provide a nationwide and unitary standard for volunteer immunity.<sup>2</sup>

Two types of charitable organizations are covered by the VPA. First is any charitable organization that is an IRS-qualified Section 501(c)(3) entity. Second, also covered is any other charitable organization that, although it does not have a Section 501(c)(3) exemption from the IRS, nonetheless, is a "not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes." (Each of these two types of "covered not-for-profit organizations" under the VPA is a "CNPO.")

The volunteers of the CNPOs who are eligible for coverage under the VPA are the directors, officers, trustees, and (importantly) any other persons contributing their services to those organizations, but with two common-sense limitations. First, the CNPO volunteer cannot receive any compensation from the CNPO (but the individual can receive reasonable reimbursement or allowance for expenses actually incurred). Second, the CNPO volunteer cannot receive any other thing of value that is in lieu of compensation and that is in excess of \$500.00 per year.<sup>4</sup>

Under the VPA, there is a straight-forward five-part eligibility test (the "VPA Test") that must be met in order for a CNPO volunteer to be immune from personal liability for "an act or omission of the volunteer [when the individual was acting] on behalf of the [CNPO]."<sup>5</sup> The VPA Test is the following:

1. "The volunteer was acting within the scope of the volunteer's responsibilities in the [CNPO] at the time of the act or omission."
2. "If appropriate or required, the [CNPO] volunteer was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the volunteer's responsibilities in the [CNPO]."
3. "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."

4. "The harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft or vessel to: (A) possess an operator's license; or (B) maintain insurance."
5. "[The volunteer did not engage in conduct] that: (A) constitutes a crime of violence (as that term is defined in section 16 of [U.S.C.] Title 18) or an act of international terrorism (as that term is defined in section 2331 of Title 18) for which the defendant has been convicted in any court; (B) constitutes a hate crime (as that term is used in the Hate Crime Statistics Act (28 U.S.C. 534 note)); (C) involves a sexual offense, as defined by applicable State law, for which the defendant has been convicted in any court; (D) involves misconduct for which the defendant has been found to have violated a Federal or State civil rights law; or (E) where the defendant was under the influence (as determined pursuant to applicable State law) of intoxicating alcohol or any drug at the time of the misconduct."<sup>6</sup>

When each of these five elements of the VPA Test has been met, not only is the CNPO volunteer totally shielded from ordinary damages,<sup>7</sup> but the person is also shielded from any punitive damages.<sup>8</sup> However, because the sole focus of the VPA is to provide immunity to the CNPO's *volunteers*, the VPA explicitly states that it does not affect the possible liability that the organization, itself, might incur as a result of a CNPO volunteer.<sup>9</sup> In addition, as one would expect, the VPA does not provide immunity if the CNPO were to sue one of its own volunteers.<sup>10</sup>

The significant reach of the VPA has been reaffirmed in two important United States District Court decisions. First, in the 2003 decision of *Armendarez v. Glendale Youth Center, Inc.*,<sup>11</sup> a former employee had filed a lawsuit against the particular CNPO (a youth center) and also against its volunteer board members for her statutory claim for unpaid wages under the Federal Fair Labor Standards Act.<sup>12</sup> As a result of the fact that the

charitable organization in *Armendarez* was a CNPO, and because each of the five elements of the VPA Test had been satisfied by its CNPO volunteers, the district court dismissed that portion of the lawsuit which was against the board members.<sup>13</sup>

Indeed, as the district court importantly observed: "[T]he broad, plain language of the VPA indicates it covers all liability whether rooted in tort or contract...[and] the historical and statutory notes following the VPA state, [t]his Act applies to *any* claim for harm caused by an act or omission of a volunteer."<sup>14</sup> A similar result of full dismissal was reached in 2004 in *Nunez v. Officer Duncan, et al.*, regarding the tort claims filed against the volunteer president of the American Corrections Association (a New York not-for-profit corporation).<sup>15</sup>

Because the vast majority of volunteer directors, officers, trustees, and other persons who contribute their services to a CNPO conduct themselves in a non-reckless manner on behalf of their CNPO, thus, they would satisfy the VPA Test. Accordingly, they could expect to be fully shielded, pursuant to the VPA, from any personal liability as a result of their volunteer activities.

**B. The extent to which that federal law now preempts Connecticut statutory law dealing with the insulation of volunteers working for charitable organizations from liability for various acts.**

In Connecticut, but only for Section 501(c)(3) entities, there has been a traditional immunity from liability state statute that is limited just to a narrow group of volunteers of those entities. This statutory defense for volunteers in Connecticut is contained in Section 52-557m of the Connecticut General Statutes. Pursuant to the statute, a director, officer, or trustee (but *not* any other type of volunteer), who serves without compensation for a Connecticut not-for-profit entity (whether or not it is a corporation) that must have received Section 501(c)(3) status, shall not be liable if, in sum, the individual's conduct did not constitute reckless, willful, or wanton misconduct.<sup>16</sup>

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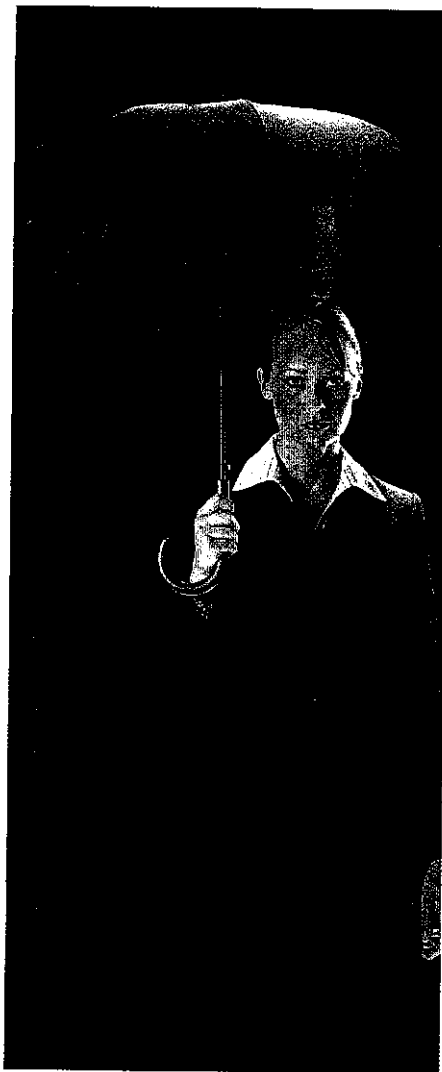
vide a nationwide standard, therefore, the VPA explicitly states that it preempts all state laws on this matter.<sup>17</sup> The sole exception to the federal preemption is if the particular state law “provides *additional* protection from liability” to volunteers.<sup>18</sup> In this context, and although the level of immunity from liability under the VPA and under the Connecticut statute are essentially the same, nonetheless, there are three very significant differences between the VPA and the Connecticut statute.

First, while the VPA applies to all charitable entities, whether or not they have received Section 501(c)(3) exempt status. In contrast, the Connecticut statute narrowly applies only to charitable entities that have received Section 501(c)(3) status.

Second, the VPA covers any volunteer (even if he is not a director, officer, or trustee). However, the Connecticut statute narrowly applies only to a relatively small group of volunteers, *i.e.*, only the corporate elite consisting of the directors, officers, or trustees (of a Section 501(c)(3) organization).

Third, the Connecticut statute narrowly applies only to conduct undertaken “in the exercise of [the volunteer’s] policy or decision-making responsibilities,”<sup>19</sup> whereas the VPA has no such restriction. As a result, the Connecticut statute indisputably provides less protection from liability for charitable organization volunteers generally (or, as stated in the converse, the VPA provides immunity for a far larger pool of volunteers than the Connecticut statute). The result is clear: Connecticut law has been preempted by the VPA as of the federal law’s September 16, 1997 effective date.

In particular, there are two important Connecticut Superior Court decisions that have confirmed the VPA’s preemption of the Connecticut statute. In each case, the Superior Court held in favor of preemption on the grounds that the VPA provides greater protection than the state statute.<sup>20</sup>



Moreover, there have been three recent Superior Court decisions in 2005 and 2006 that have simply assumed, without any analysis regarding the matter of the federal preemption, that volunteers in Connecticut are covered only by the VPA.<sup>21</sup>

In addition, the VPA expressly permits a state either to partially opt out of the VPA (regarding in-state lawsuits that involve only residents of the particular state), or to require that one or more preconditions must be met in order for a volunteer to be eligible for immunity under the VPA (for example, requiring the CNPO to carry a liability insur-

ance policy with certain coverage).<sup>22</sup> Significantly, Connecticut has not done either one of those things. Thus, the VPA is without any exception the sole source of volunteer immunity standards in Connecticut.

C. The extent to which state law continues to be useful so that volunteers who are sued can seek indemnification for their attorneys’ fees and expenses.

In brief, the issue of a not-for-profit’s indemnification regarding the legal defense fees of its volunteers, who are ultimately proven in a lawsuit to be immune from liability under the VPA, is a matter that is not addressed by the VPA. Accordingly, indemnification would not be subject to any preemption by the VPA.

A CNPO volunteer who is made a party to a lawsuit or administrative hearing sometimes could incur defense costs independent of the CNPO. For example, although a finding that the CNPO volunteer is covered by the VPA would result in dismissal (and, therefore, elimination of any risk of liability), the volunteer would still have incurred costs in getting to that point. In this context, a director or officer is eligible to receive the indemnification from his Connecticut not-for-profit corporation (and regardless of whether or not the corporation does have Section 501(c)(3) status) pursuant to the subject Connecticut act, *viz.*, the Revised Nonstock Corporation Act (the “RNCA”).<sup>23</sup>

More specifically, the test under the RNCA, which only applies to corporate directors and officers for the mandatory indemnification of their legal defense fees, is whether or not the director or officer has been “wholly successful, on the merits or otherwise”<sup>24</sup> in a “proceeding” (which term is very broadly defined)<sup>25</sup> in which he has defended his conduct as a volunteer. Importantly, this indemnification of legal defense fees is applicable not only in the

context of a pending lawsuit or administrative proceeding, but it also applies to a director or officer who is threatened to be made a party to a pending or even to a not-yet-filed lawsuit or administrative proceeding.<sup>26</sup>

Moreover, a not-for-profit corporation is permitted to advance the legal expenses incurred by a director or officer prior to the final disposition of the case so long as the individual complies with the two-prong test requiring the director or officer: (i) to agree in writing to repay the advancement if the corporation (or if a court) were to subsequently determine that the individual is not entitled to indemnification; and (ii) to confirm in writing that the conduct was undertaken in good faith and in what the individual had reasonably believed to be in the best interests of the corporation.<sup>27</sup>

Yet, the RNCA's indemnification and advancement provisions cover only the directors and officers (and also the employees and agents) of not-for-profit corporations (and also other nonstock corporations).<sup>28</sup> Consequently, the issue arises as to whether a not-for-profit corporation can also indemnify or advance legal defense fees to other persons and, in particular, the corporation's ordinary volunteers. In sum, the answer is yes.

First, the RNCA has the customary enabling provision that gives all nonstock corporations the relatively broad flexibility to conduct their lawful activities in such manner as their directors may decide (but subject to the customary predicate that the interests of the state and third parties cannot thereby be negatively impacted).<sup>29</sup> Second, this statutory principle is consistent with the long-standing common law principle that a corporation "has such implied powers as are necessary to carry its express powers into effect."<sup>30</sup> Thus, because one of the numerous express powers granted in the RNCA to a not-for-profit corporation is the power to defend itself,<sup>31</sup> necessarily, the corporation must have the implicit power also to defend its volunteers who have been sued at the same time.

Accordingly, the board of a not-for-profit corporation would be able to adopt a policy of providing for the indemnification and for the advancement of the legal defense fees of its volunteers who are not directors or officers. Provided, however, that to ensure that the corporation acts in an

even-handed manner, this indemnification and advancement would necessarily have to be predicated upon standards comparable to the indemnification and advancement requirements in the RNCA.

Similarly, with regard to the volunteers of all other CNPOs in Connecticut, *viz.*, unincorporated charitable associations, charitable trusts, and other charitable entities, the directors (or trustees) of such CNPOs can likewise adopt a policy of providing for the indemnification and the advancement of the legal defense fees of their directors, officers, and other CNPO volunteers. Of course, the policy must be based on standards comparable to the indemnification and advancement requirements in the RNCA. Finally, it should be noted that there are no restrictions against a CNPO regarding the adoption of its indemnification and advancement policies even after one of its volunteers has already been sued.

## Conclusion

The VPA's Federal Preemption indeed has had a very positive impact in Connecticut for the not-for-profits and for their volunteers.

From the perspective of Connecticut charitable organizations, they have unquestionably benefited from the VPA because their potential volunteers no longer need to be reticent about serving because of any issues of possible personal liability. Conversely, from the perspective of not-for-profit volunteers in Connecticut, a significantly greater number of them are now protected by the applicable immunity shield, *i.e.*, the VPA, in sharp contrast to the limited group of Section 501(c)(3) organizations' directors, officers, and trustees who had been previously protected by the Connecticut statute prior to September 16, 1997. CL

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## Notes

1. 42 U.S.C. §§ 14501, *et seq.*
2. H.R. REP. 105-101(I), at 6 (1997).

3. 42 U.S.C. § 14505(4). *See The Wrongful Death Beneficiaries of Christopher Elliot, Deceased v. La Quinta Corp.*, 2007 U.S. Dist. LEXIS 16837, at p. 3 (N.D. Miss. 2007) (There is an "extremely broad definition of 'organization' under the [VPA]").
4. *Id.*, at § 14505(6). Also, although it is not the subject of this Article, it is important to note that the volunteers who perform services for any governmental entity, which would of course include service on the volunteer boards and commissions of a municipality, are also covered by the VPA if they can meet the two common-sense limitations.
5. *Id.*, at § 14503(a).
6. *Id.*, at § 14503.
7. *Id.*, at § 14503(a). An example of an "ordinary damages" claim is one for lost wages by a CNPO employee who had been fired. *See the next Paragraph of the Article.*
8. *Id.*, at § 14503(e).
9. *Id.*, at § 14503(c).
10. *Id.*, at § 14503(b).
11. 265 F. Supp. 2d 1136 (D. Ariz. 2003).
12. 29 U.S.C. §§ 201, *et seq.*
13. 265 F. Supp. 2d at 1141.
14. *Id.*, at 1140 n.5 (Cits. and Internal Quotation Marks omitted; Emphasis in the original; ellipses added).
15. 2004 U.S. Dist. LEXIS 11037, at p. 2 (D. Ore. 2004).
16. Connecticut General Statutes ("C.G.S."), at § 52-557m.
17. 42 U.S.C. § 14502(a).
18. *Ibid.* (Emphasis added).
19. C.G.S. § 52-557m.
20. *See Foss v. Nadeau*, 2003 Conn. Super. LEXIS 3206, at pp. 8-9; *Gaudet v. Braca*, 2001 Conn. Super. LEXIS 3352, at p. 6 ("The VPA will now preempt [C.G.S. § 52-557m] when it [the VPA] offers more immunity than such statute"), *vacated on other grounds* 2002 Conn. Super. LEXIS 3274.
21. *See Shafer v. Sullivan*, Post 2212, 2006 Conn. Super. LEXIS 1506, at p. 2; *Avenoso v. Mangan*, 2006 Conn. Super. LEXIS 489, at p. 14; *Singletary v. Poyton*, 2005 Conn. Super. LEXIS 527, at p. 3.
22. 42 U.S.C. § 14502(b) and §§ 14503(d)(1)-(4).
23. RNCA, at C.G.S. §§ 33-1000, *et seq.*
24. *Id.*, at § 33-1118.
25. *Id.*, at §§ 33-1116(8): "'Proceeding' means any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, arbitral or investigative and whether formal or informal."
26. *Id.*, at §§ 33-1116(7) and (8).
27. *Id.*, at §§ 33-1119(a) and 1122(a).
28. *Id.*, at § 33-1125.
29. *Id.*, at § 33-1001(a).
30. *Community Credit Union, Inc. v. Connors*, 141 Conn. 301, 305, 105 A.2d 772, 774 (1954) (Cits. omitted).
31. RNCA, at C.G.S. § 33-1036(1).