THE VOLUNTEER PROTECTION ACT OF 1997

PHILIP H. BARTELS

This article discusses the broad, but still little-known, federal immunity shield from liability that protects the volunteers of charitable organizations.

A question which is all-too-frequently asked of attorneys and accountants is: If I were to volunteer in any capacity for a charitable organization, could I thereby become personally liable for the negligence claims filed against it, and also for other potential liabilities of the organization? Historically, the issue of immunity has been focused on the entity liability of charitable organizations. In recent years, however, the focus of liability has now shifted over to the volunteers, who many times have deeper pockets than their charitable organizations and who are thus perceived as being better targets of litigation.

Against this backdrop, Congress has fortunately stepped in and answered this important question in 1997 via its enactment of a still little-known federal act, which has far broader provisions for volunteer immunity than the typical narrow scope of the traditional volunteer immunity laws in various states. Moreover, significantly for the volunteers in a number of those states, this broad federal act has preempted most of the volunteer immunity state laws. As a result, once a volunteer of any charitable organization—whether it is a corporation, trust, unincorporated association, or other type of charitable entity (and even if it is not an IRS-recognized Section 501(c)(3) entity)—has been able to meet a certain five-part eligibility test under the federal act, then, as a matter of federal law the volunteer is immune from any personal liability.

PHILIP H. BARTELS, a member of the Connecticut and New York Bars, is Of Counsel at the Greenwich, Connecticut office of Shipman & Goodwin LLP. His practice includes the pro bono representation of various charitable corporations and trusts in Connecticut and New York.

An overview of the Volunteer Protection Act

The VPA's legislative history and its five-part eligibility test for volunteers. The Volunteer Protection Act of 1997 (the "VPA") became effective on 9/16/1997.[1] As stated with full clarity 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 respective volunteer immunity laws in order to provide a nationwide and uniform standard for volunteer immunity in response to what has been described as the "litigation craze" and "[o]ur 'sue happy' culture'."[2] The uniformity that has been provided by the VPA's nation-wide standard is obviously helpful not only for national charitable organizations (such as the Red Cross) but also for local charitable organizations (such as food banks and children's soccer leagues).

There are two types of charitable organizations which are covered by the VPA. First is any charitable organization which has received from the IRS the recognition of its Section 501(c)(3) tax-exempt sta-

tus. Second, also covered is any other charitable organization which, although it does not have a Section 501(c)(3) recognition of exemption from the IRS, nonetheless it 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"[3]. (Each of said two types of "covered not-for-profit [charitable] organizations" under the VPA is a "CNPO.") (Also, although it is not the focus of this article, also covered by the VPA are the volunteers of any governmental entity, which would include the service on a municipal board or commission.[4])

The volunteers of a CNPO who are eligible for coverage under the VPA are the directors, officers, trustees, and (very importantly) any *other* persons who contribute their services to those organizations, but with two common-sense limitations. More specifically, a CNPO volunteer cannot receive any compensation from the CNPO (but the individual can receive reasonable reimbursement or allowance for expenses actually incurred). In addition, the CNPO volunteer cannot receive any other thing of value that is in lieu of compensation and that is in excess of $500 per year. [5]

Once a volunteer of any charitable organization has been able to meet a five-part eligibility test under the Volunteer Protection Act (VPA), then, as a matter of federal law the volunteer is immune from any personal liability.

Once a volunteer has met these easy-to-satisfy first two requirements, *viz.,* the organization is a CNPO and the volunteer is not paid by the organization, there is a straight-forward five-part eligibility test (the "VPA Eligibility Test") which 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]." [6] The VPA Eligibility 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 misconduct] "that: (A) constitutes a crime of violence (as that term is defined in section 16 of [U.S.C.] title 18) or 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. section 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."

1 42 U.S.C. sections 14501 *et seq*. (VPA).
2 H.R. Rep. 105-101(I), at pp 5-6 (1997).
3 VPA, at section 14505(4). See *The Wrongful Death Beneficiaries of Christopher Elliot, Deceased v. La Quinta Corp.*, 2007 WL 757891, at p. 3 (N.D. Miss., 3/8/2007) (there is an "extremely broad definition of 'organization' under the [VPA]").
4 VPA, at section 14503(a).
5 VPA, at section 14505(6).
6 VPA, at sections 14503(a) and (g).
7 VPA, at section 14503(a).
8 VPA, at section 14503(f).
9 VPA, at section 14503(d).
10 VPA, at section 14503(c). *See James v. Paton*, 2016 WL 1449207, at p. 2 (W.D. Wash., 4/13/2016).
11 *Armendarez v. Glendale Youth Center, Inc.*, 265 F. Supp. 2d 1136 (D. Ariz., 2003).
12 29 U.S.C. sections 201 *et seq*.
13 *Armendarez*, supra note 11, 265 F. Supp. 2d at 1141.
14 *Id.*, at 1140 n. 5.
15 *Nunez v. Officer Duncan*, 2004 WL 1274402, at p. 1 (D. Ore., 6/9/2004).
16 *Brush v. Jiminy Peak Mountain Resort, Inc.*, 2008 WL 11409499, at p.3 (D. Mass., 11/25/2008).
17 *Ibid.*
18 *Neighborhood Assistance Corp. of America v. First One Lending Corp.*, 2012 WL 1698368, at p.10 (C.D. Cal., 5/15/2012).
19 *Halton v. Parks*, 2017 WL 933042, at p. 6 (D. Neb., 3/3/2017); *Probert v. Family Centered Services of Alaska, Inc.*, 2011 WL 13187285, at p. 2 (D. Alaska, 3/11/2011) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice"). *Contra: World Chess Museum, Inc. v. World Chess Federation, Inc.*, 2013 WL 5663091, at pp. 2–3 (D. Nev., 10/15/2013).

When each of the foregoing five elements of the VPA Eligibility Test has been met, which is easy to do for a typical volunteer, not only is the CNPO volunteer then totally shielded from ordinary damages,[7] but the volunteer is also shielded from any punitive damages.[8]

Because the vast majority of volunteer directors, officers, trustees, and other types of volunteers (*e.g.,* the Saturday morning "mom and pop" volunteers) who contribute their services to a CNPO do conduct themselves in a non-reckless and non-grossly-negligent manner on behalf of their CNPO, they would satisfy the VPA Eligibility Test. Accordingly, they can expect to be fully shielded, pursuant to the VPA, from any personal liability as a result of their volunteer service.

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 liability which the organization, itself, might incur as a result of a CNPO volunteer's conduct.[9] Moreover, as one would expect, the VPA does not provide immunity if the CNPO were to sue one of its own volunteers.[10]

The repeatedly-confirmed broad reach of the VPA. The broad reach of the VPA has been reaffirmed years ago in two important and much-cited U.S. District Court decisions. First, in the often-followed and most prominent 2003 VPA decision of *Armendarez v. Glendale Youth Center, Inc.,*[11] a former employee had filed a lawsuit against the particular CNPO (a youth center) and also against its volunteer board members for the plaintiff's statutory claim for unpaid wages under the Federal Fair Labor Standards Act.[12] 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 Eligibility Test had been satisfied by its CNPO volunteer board members, the U.S. District Court dismissed that portion of the lawsuit which was filed against the volunteers.[13]

Indeed, as the court importantly observed therein: "[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."[14] A similar result of the full dismissal of the claims against a CNPO volunteer was reached in 2004 in *Nunez v. Officer Duncan,* regarding the tort claims filed against the volunteer President of the American Corrections Association (a New York not-for-profit corporation).[15] In sum, the courts have treated the VPA as a strong (statutory) affirmative defense to protect volunteers.

However, very importantly, the VPA's affirmative defense (similar to other affirmative defenses) must be timely raised in the volunteers' Answers to the Complaint, even if the defendant volunteers and their attorneys were to be completely unaware of the existence of the availability of the VPA's affirmative defense. In such circumstances, only very limited aspects of the VPA can then be raised by the volunteers as a defense at trial.[16] For example, if a plaintiff alleges that the defendant volunteers had engaged in reckless misconduct, and a VPA affirmative defense had not been filed by the volunteers, the volunteers would be limited to only being able to assert at trial the VPA's favorable-to-defendants higher standard of requiring "clear and convincing proof" of reckless misconduct; the VPA shield against volunteer immunity would no longer be available to them in that case.[17])

The broad reach of the VPA has been reaffirmed years ago in two important and much-cited U.S. District Court decisions.

Moreover, the strength of the VPA's liability shield to protect volunteers has been confirmed as an exception to the federal courts' customary doctrine of according a liberal interpretation to a lawsuit's complaint[18]. Normally, if a Federal Rules of Civil Procedure 12(b)(6) Motion to Dismiss a Complaint were to be filed by a defendant based on the inadequacy of the plaintiff's allegations against him/her in the Complaint, the courts will typically deny the Motion to Dismiss without prejudice and instead permit the plaintiff to undertake discovery to further ascertain the defendant's possible liability.

However, in the context of the VPA, there has been a significant level of judicial intolerance in connection with the strategy undertaken by many plaintiffs in their lawsuits filed against CNPOs regarding their all-too-frequent "blunderbuss" shotgun, "wide net" practice of suing the organization's principal volunteers as additional defendants, *viz.,* its officers and directors (presumably in the plaintiffs' effort to try to get some quick settlement dollars from the volunteers). If a CNPO defendant volunteer has, to accompany his/her VPA Motion to Dismiss, also filed an Affidavit which shows that the volunteer meets the VPA Eligibility Test, then, in response, a number of decisions have denied a plaintiff's standard request to be able to first undertake discovery. Instead, these courts have granted the volunteer's VPA Motion to Dismiss the lawsuit against the volunteers.[19]

Finally, the broad reach of the VPA is confirmed by the fact that, in the midst of the decisions which have cited *Armendarez* with approval, there has been only one decision since the 1997 enactment of the VPA which has cut back on the Act's broad reach—and said solitary decision has never been followed by any other court. More specifically, in the 2013 decision in *American Produce, LLC v. Harvest Sharing, Inc.,* at issue was the plaintiff's claim that defendant Harvest Sharing had allegedly violated a federal act, the Perishable Agricultural Commodities Act (PACA), by failing to pay the plaintiff for agricultural commodities which it had shipped to Harvest Sharing.[20] Because the cash–strapped Harvest Sharing was unable to pay for the goods, the plaintiff also sued Harvest Sharing's two volunteer officers and directors for Harvest Sharing's failure to pay the plaintiff.

In order to ensure the continuing strength of the VPA, the courts have been wary of extending its reach beyond the contours of the Act's statutory construct.

In response to the Harvest Sharing volunteers' defense that they were protected from any PACA liability on the basis of the VPA, the court held that the VPA's "volunteer immunity extends only to suits brought against volunteers pursuant to *state law*."[21] Thus, the court held that the VPA does not extend to volunteer liability which is asserted regarding a claim made against the volunteers as a result of their alleged failure to comply with a federal law, such as the PACA.[22] Importantly, in the context of any precedential weight to be accorded to the 2013 decision in *American Produce,* not only has no decision ever followed *American Produce* as constituting persuasive authority, also no decision has even cited the 2013 decision with approval.

In order to ensure the continuing strength of the VPA, the courts have been wary of extending its reach beyond the contours of the Act's statutory construct. The courts have been vigilant not to permit a person who is undeniably a CNPO volunteer to misuse the VPA affirmative defense. In the only Court of Appeals decision which has substantively ruled on the merits of a volunteer's VPA affirmative defense, *Institute of Cetacean Research v. Sea Shepherd Conservation Society,*[23] it was uncontested that the individuals who were defendants were volunteer directors of a Section 501(c)(3) corporation. However, the Ninth Circuit noted that each of the volunteer directors had ratified the transfer of the assets of the CNPO to a foreign affiliate to continue the CNPO's "whale defense strategies" (including throwing smoke bombs and glass containers of acid at whaling ships), in response to which the Court of Appeals had issued an injunction against the volunteers and their CNPO.[24]

The court importantly observed that: "[t]he power of courts to punish for contempt is a necessary and integral part of the independence of the judiciary", . . . , [and thus] the VPA [immunity shield] does not reach [*i.e.,* does not prevent the exercise of] federal courts' power to find volunteer board members in contempt of their orders".[25] Thus, the court held that the volunteers' intentional ratification of the outsourcing of the CNPO's injunction-violative conduct to an affiliate thereby caused them to be ineligible for VPA immunity protection.[26]

A second decision with the same level of judicial caution was the court's detailed analysis of the facts to make sure that the CNPO volunteer in *Collett v. Hamilton County, Ohio,* was eligible to assert the VPA affirmative defense.[27] On the surface of the CNPO volunteer's defense in that case, because it was uncontested that she was performing volunteer services for a political subdivision (Hamilton County) at the time of the incident, it thus appeared that the volunteer would be eligible for the VPA immunity shield. However, on a closer review by the court regarding the background evidence, the court found that in order for the volunteer to qualify for her simultaneously-occurring paid private employment in connection with a task similar to her volunteer duties, she was required to provide eight hours of volunteer work per month for the county. Thus, her employment-required, stand-alongside volunteer service caused her to be ineligible for VPA immunity because, via her directly-related private employment,

[20] *American Produce, Inc. v. Harvest Sharing, Inc.*, 2013 WL 1164403, at p. 1 (D. Colo., 3/20/2013).
[21] *Id.,* at p. 3 (emphasis added).
[22] *Id.,* at p. 5.
[23] *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, 774 F. 3d 935 (CA-9, 2014).
[24] *Id.,* at 949.
[25] *Id.,* at 957.
[26] *Id.,* at 956.
[27] *Collett v. Hamilton County, Ohio*, 2019 WL 121360 (S.D. Ohio, 1/7/2019).
[28] *Id.,* at pp. 16–17.
[29] *Mitchell v. Imperato*, 2019 WL 2599199, at p. 3 (E.D. Cal., 6/25/2019).
[30] *Ibid.*
[31] *Armendarez*, supra note 11, 265 F. Supp. 2d at 1139.
[32] *Ibid.*
[33] *Haltom v. Parks*, 2017 WL 933042 (D. Neb, 2017), at p. 6.

she had received a thing of value in excess of the VPA's maximum of $500 per year.[28]

In addition, in order not to dilute the strength of the dedicated focus of the VPA to provide to a volunteer the immunity against a third party's claim, a VPA decision has held that the Act does not create a private right of action for a volunteer to be able, *as a plaintiff,* to sue third parties for tortious conduct that was allegedly perpetrated against the volunteer.[29] In that case, wherein a third party had allegedly discriminated against a CNPO's volunteers when the volunteers were in the midst of exercising their right of free speech during the course of their volunteer work, the court held that the VPA does not create a private right of action to permit the volunteers to be able to sue the third party.[30]

Preemption of state laws

The issue of whether or not a state's volunteer immunity laws are subject to preemption is limited to cases involving claims against a volunteer which have been asserted only under s*tate* law. Depending on the wording of a state's volunteer immunity laws, the VPA may permit the full or partial preemption of a state's laws.

Volunteer immunity in the context of a claim made against a volunteer under federal law is fully preempted by the VPA. In the context of the issue of state volunteer immunity law preemption, and as stated with full clarity in the prominent *Armendarez* decision (and as common sense would dictate), the preemption provisions in the VPA "cannot be interpreted to prevent the [exclusive] application of the VPA to Federal law [claims of liability]".[31] Stated another way, the federal courts have exclusive jurisdiction under the VPA when volunteer immunity is sought in connection with a claim that is made against a volunteer under a federal law. Thus, any issues regarding VPA preemption are to be limited to cases involving a claim of a volunteer's liability under state law, and not under federal law.[32] This result is confirmed by the fact that in the decisions which do hold that a state's volunteer immunity laws have not been preempted by the VPA, the claims therein which have been asserted against CNPO volunteers have exclusively involved state tort law claims and other state law claims.

Before reviewing the VPA's provisions regarding state law preemption, it should be noted that one state has resolved the state law preemption issue in a very simple way. In brief, Nebraska incorporated the VPA immunity coverage into its state laws, as confirmed in the 2017 decision in *Haltom v. Parks*, as follows: "Specifically, [Neb. Rev. Stat.] § 43-3716 [explicitly] shields [the subject Nebraska CNPO] from liability 'to the full extent provided in the Federal Volunteer Protection Act of 1997'."[33]

A review of the VPA's atypical statutory language regarding preemption. Unlike many federal statutes, the VPA is not an "all or nothing" federal statute requiring the preemption of the entirety of a state's laws, that is, if a provision in a state's laws were to provide less protection than the federal statute in connection with the same subject matter, the state's law would typically be preempted. However, there was a recognition by Congress in the VPA regarding the increasing "states' rights" clamor that there needed to be a cutback in the federal statutes away from Congress' traditional default presumption of having total federal preemption of states' laws.

Therefore, upon a close reading of the VPA's statutory text, there are different levels of federal preemption that have been explicitly written into the VPA. First, the primary section of the VPA addressing preemption states the following:

> **§ 14502(a) Preemption.** This chapter [the VPA] preempts the laws of any State *to the extent that such laws* are *inconsistent with this chapter*, except that this chapter shall not preempt any State law that provides additional protection from liability relating to volunteers or to any category of volunteers in the performance of services for a nonprofit organization or governmental entity. (Emphasis added).

In the context of said subsection (a), and utilizing the time-honored principle of statutory construction that no term or terms in a federal statute are to be rendered superfluous and thus are not to be ignored, a focus must be made on the above-highlighted six words of limitation, *viz.,* "to the extent that such laws".

If these words of limitation had not been included in the statutory text, the result would have been the customary total federal preemption in the event that there were to be a conflict between the provisions of the VPA and a state's immunity laws. For example, if a state's volunteer immunity laws had provided less protection than the VPA for some of the CNPO volunteers in the state (*e.g.,* the state law would not cover all CNPO volunteers, but instead, the state law immunizes just the CNPO's volunteer officers, directors, and trustees and with greater immunity protection than the VPA), the entirety of the state volunteer immunity law would normally have been preempted.

However, via these words of limitation, and if there were particular provisions of a state's immunity laws which provide greater immunity but even for just a small group of volunteers, nonetheless, such

state law provisions will survive VPA preemption regarding the state law's coverage of only the small group of volunteers—*and* for the rest of the CNPO volunteers in the state who would not be covered by the narrow State law, they would instead be covered only by the lesser protections of the VPA.

Finally, in addition to the above-quoted VPA section 14502(a), there are three additional VPA carve-outs which are very narrow regarding a preemption of state immunity laws. The first very narrow carve-out is if a special state law were to become enacted in a state after the VPA's 9/16/1997 effective date and if it were to apply exclusively to lawsuits in that state's courts against volunteers and which involve only "citizens" of that state, and also if the state's laws explicitly provide that the VPA shall not apply to such in-state lawsuits, the VPA would not preempt such unique "in-the-state-only" volunteer liability laws.[34] The second very narrow carve-out from preemption is if a state's volunteer immunity law, for example, were to "require[ ] a nonprofit organization or governmental entity to adhere to risk management procedures, including mandatory training of volunteers."[35] If a state were to add one or more of these special provisions, it would cause that portion of a state's immunity law regarding the added provisions not to be preempted by the VPA.

Depending on the wording of a state's volunteer immunity laws, the VPA may permit the full or partial preemption of a state's laws.

The third and final very narrow carve-out from the VPA preemption is if a state's laws were to further limit an award of punitive damages against a CNPO volunteer, to which the VPA already limits the liability solely to instances of a volunteer's willful or criminal misconduct or a conscious, flagrant indifference to the rights or safety of the victim.[36]

An example of non-preemption of a state's volunteer immunity laws. In the context of an application of the VPA's principal preemption clause in section 14502(a) (which is quoted above), it is helpful to review the text of one particular state's traditional and mainstream volunteer immunity law and also that state's appellate court decision which held that the state's immunity law, in a case involving a plaintiff's state law negligence claim against a CNPO volunteer, was not preempted by the VPA. More specifically, the volunteer immunity law in Connecticut provides a shield only to the officers, directors, and trustees of a Section 501(c)(3) organization when the liability claim against the volunteer leaders arose as a result of "any act, error or omission made in the exercise of such person's policy or decision-making responsibilities" which had been undertaken in good faith and within the scope of the volunteer's official functions and duties.[37] The Connecticut appellate court's 2013 decision in *Sweeney v. Friends of Hammonasset,* involved a defendant Section 501(c)(3) organization (the Friends) which had conducted a nighttime "owl prowl" nature hike at a local state park during which the plaintiff had slipped and broken his wrist; and as a result, with his state tort law claims he sued the Friends and its volunteer President Deanna Becker.[38]

The appellate court affirmed the trial court's decision against the plaintiff, as follows: (1) the Friends was held not to be liable because it did not have possession or control of the subject premises where the injury had occurred (a state park); and (2) importantly herein, President Becker was shielded from liability under the Connecticut immunity law because she was an officer of the Friends, a 501(c)(3) entity, and she had properly exercised her officer position's decision-making responsibilities by undertaking reasonable pre–hike planning with the Friends' volunteer trail guides (who were not sued).[39] The appellate court applied the immunity provisions of the state's law, which it explicitly found were not preempted by the VPA because the state law had provided greater protection to the volunteer leaders of 501(c)(3) organizations in that the state law had, for example, provided immunity not only for a volunteer's negligence but also (and unlike the VPA) for any conduct of gross negligence.[40]

A straight-forward resolution of the unequal treatment accorded to a state's volunteers when only some, but not all, CPNO volunteers have been immunized from liability by that state's non-preempted law which has provided greater protections

[34] VPA, at § 14502(b).

[35] VPA, at § 14503(e).

[36] VPA, at § 14503(f)(2).

[37] Connecticut General Statutes (C.G.S.), at section 52–557m.

[38] *Sweeney v. Friends of Hammonasset*, 140 Conn. App. 40, 43–44, 58 A.3d 293, 296–297 (2013).

[39] *Id.*, 140 Conn. App. at 53–54, 58 A.3d at 302.

[40] *Id.*, 140 Conn. App. at 54–56, 58 A.3d at 302–303. *Accord: Waschle v. Winter Sports, Inc.*, 127 F. Supp. 3d 1090, 1093 (D. Mont., 2015) (Montana's state law had provided greater immunity protection because it had no exception from immunity coverage for gross negligence, and thus, it was not preempted by the VPA).

[41] C.G.S. section 52-557m.

than the VPA but only to the circumscribed group of volunteers. In the context of the Connecticut volunteer immunity law,[41] a good example of a resolution which could be undertaken to eliminate the state law's unequal (if not disparate) treatment of volunteers would (in brief) be the common sense remedy of uniformly providing greater immunity protection to all CNPO volunteers. In 1986, when the Connecticut legislature (11 years before the effective date of the VPA) enacted its first volunteer immunity statute, it limited (as discussed above) the coverage just to a small group of volunteers of Section 501(c)(3) organizations, *viz.,* the CNPO's officers, directors, and trustees. In doing so, the legislature presumably made the implicit presumption that providing immunity for at least some volunteers was in the best interests of their charitable organizations.

The inequity of the Connecticut law's coverage only of a narrow group of volunteers of Section 501(c)(3) CNPOs is highlighted by the fact that if the plaintiff in *Friends* had also sued the volunteer trail guides, these "ordinary" volunteers would not have been covered by the state law. Therefore, the VPA would not have been preempted and the "lesser protection" VPA immunity shield would have to be asserted by the trail guides but which (as a result) would not have shielded these volunteers against any claims of gross negligence that could be made against them by the plaintiff.

Simply put, there is no rational basis to continue to exclude the large group of ordinary Connecticut volunteers from the state's greater immunity protections which have been provided for more than 30 years just to the small group of officers, directors, and trustees of a Section 501(c)(3) CNPO. Moreover, because volunteer officers, directors, and trustees also often perform standard volunteer work in connection with their CNPO's services and programs, if they were to be sued for their volunteer services which they had performed as ordinary volunteers, their claim for immunity in this second capacity could only be made under the VPA with its lesser protections available to them.

With the enactment of the VPA and its establishment of a standard of broad coverage to *all* volunteers and to *all* charitable organizations regardless of Section 501(c)(3) status, and with the repeatedly successful enforcement of said standard by the courts for more than two decades (as discussed above), it would be prudent for the Connecticut legislature to now expand its *Friends*–approved "greater protection" (and thus non–preempted) volunteer immunity law to uniformly cover *all* volunteers of *all* CNPOs in their state.

The importance of the Connecticut volunteer immunity law and the 2013 appellate court decision in *Friends* is that the Connecticut volunteer immunity law is in fact typical of many states' volunteer immunity laws, which are similarly narrow in that they are applicable only to a CNPO's volunteer leaders (the officers, directors, and trustees) and only if the CNPO is a Section 501(c)(3) organization. Likewise, surely it would be prudent for those other states to make similar revisions to their narrow volunteer immunity laws in order to provide increased and non-preempted protections uniformly to all of their state's CNPO volunteers.

In sum, there simply would be no reason that all the volunteers of any CNPO, who are each performing charitable work for the public good, should not have their immunity protection upgraded to the same higher level of immunity protection that has already been granted to some volunteers pursuant to their state's existing volunteer immunity laws.

Indemnification and advancement of attorneys' fees and expenses

A commonly-occurring circumstance involves a volunteer who has successfully asserted the volunteer immunity affirmative defense pursuant to the VPA (or pursuant to a non-preempted state law), but who as a result thereof has necessarily had to incur a not-insubstantial amount of out-of-pocket attorneys' fees and expenses

The issue. In brief, the issue of a CNPO's indemnification (and advancement) regarding the legal defense fees of its volunteers, who are ultimately proven in a lawsuit to be immune from liability under the VPA (or pursuant to a non–preempted state law), is a matter which is not addressed by the VPA. Accordingly, indemnification and advancement would not be subject to any preemption by the VPA.

A volunteer who is made a party to a lawsuit typically will incur defense attorneys' costs independent of the CNPO's defense fees. For example, although a finding that the CNPO volunteer is covered by the VPA (or by a non–preempted state volunteer immunity law) would result in a dismissal of the lawsuit against the volunteer, nonetheless the volunteer would still have incurred some costs to achieve that result.

In this context, and for example in Connecticut, a director or officer of a CNPO corporation is eligible (upon meeting certain statutory criteria, *e.g.,* that the conduct at issue had been undertaken

in good faith, and so forth) to then receive indemnification and also advancement of reasonable attorneys' fees from his/her Connecticut CNPO corporation. These payments are permitted pursuant to Connecticut's mainstream act, *viz.*, the Revised Nonstock Corporation Act (the "RNCA"), which covers CNPO corporations and also other nonstock corporations.[42]

Yet, the RNCA's indemnification and advancement of legal fees provisions cover only the directors and officers (and also the employees and agents) of CNPO corporations (and other nonstock corporations).[43] Consequently, the issue arises as to whether a CNPO corporation can also indemnify or advance reasonable legal defense fees to its *ordinary* volunteers. In sum, the answer is yes.

A solution. First, the RNCA is a typical nonstock corporation statute which is based in part on the 1987 Revised Model Nonprofit Corporation Act (MNCA)—and a total of 37 states have adopted the MNCA in part or in full.[44] Second, the RNCA has the customary enabling provision that gives all nonstock corporations the relatively broad flexibility to conduct their lawful activities in such a 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).[45] Third, this statutory principle is consistent with the standard, long-standing, common-law principle that a corporation "has such implied powers as are necessary to carry its express powers into effect."[46] Thus, because one of the numerous express powers granted in the RNCA to a nonstock corporation is the power to defend itself,[47] necessarily, a CNPO corporation must likewise have the implicit power also to financially help defend all of its volunteers who have been sued as a result of their work on behalf of the CNPO.

The issue of a CNPO's indemnification (and advancement) 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 which is not addressed by the VPA; accordingly, indemnification and advancement would not be subject to any preemption by the VPA.

Accordingly, the board of a CNPO corporation would be able to adopt a uniform policy in its bylaws to provide for the indemnification and for the advancement of the reasonable legal defense fees for all of its volunteers, including those persons who are not directors or officers and whose conduct at issue was within the coverage of the VPA or the state's non-preempted volunteer immunity laws. Provided, however, the CNPO corporation's indemnification and advancement policy would necessarily have to be predicated upon standards similar to the indemnification and advancement requirements in the RNCA (*e.g.,* that the volunteer's conduct had been undertaken in good faith and so forth).

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 in their entity's bylaws of providing for the indemnification and the advancement of the reasonable legal defense fees of their directors, officers, trustees, and all other volunteers. Of course, the uniform policy should 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's adoption of its indemnification and advancement policies even after one of its volunteers has already been sued.[48]

Thus, it would be prudent for Connecticut and other states to consider enhancing their citizens' volunteer immunity (whether it is provided by the VPA or by a state's non–preempted volunteer immunity laws) by encouraging all CNPOs in their states to adopt an appropriate bylaws policy providing for indemnification and advancement of reasonable defense legal fees to volunteers who have successfully asserted their volunteer immunity affirmative defense (or who are in the process of asserting said defense).

Conclusion

The VPA, with its strongly-enforced broad reach of immunity protection, has undeniably had a very positive impact in our nation for the CNPOs and for their volunteers—*and* indeed, also for the members of the public who have benefitted from the services and programs of CNPOs across the country. ■

[42] Connecticut Revised Nonstock Corporation Act (RNCA), C.G.S. sections 33–1000 *et seq.*, at sections 33–1117(a), 1118 and 1122(a).

[43] *Ibid.*

[44] *Model Nonprofit Corporation Act: Official Text with Official Comments and Statutory Cross-References Adopted August 2008, Third Edition,* American Bar Association, Committee on Nonprofit Organizations, Chicago (2008).

[45] RNCA, at C.G.S. section 1001(a).

[46] *Community Credit Union, Inc. v. Connors,* 141 Conn. 301, 305, 105 A.2d 772, 774 (1954).

[47] RNCA, at C.G.S. section 33–1036(1).

[48] RNCA, at C.G.S. sections 33–1117(a) and 1122(a).