ARTICLE

THE FEDERAL VOLUNTEER PROTECTION ACT: DOES CONGRESS WANT TO PLAY BALL?

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I. Introduction

The importance of volunteers[1] in this country cannot be understated.[2] Without volunteers, many non-profit as well as charitable organizations could not exist.[3] Perhaps the importance

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[1] As a general matter, a "volunteer" is defined as "[a] person who gives his service without any express or implied promise of renumeration." BLACK'S LAW DICTIONARY 1576 (6th ed. 1990).

[2] *See generally* Leda E. Dunn, *"Protection" of Volunteers Under Federal Employment Law: Discouraging Voluntarism?*, 61 FORDHAM L. REV. 451, 452 n.13 (1992) (providing statistics regarding volunteers).

[3] One author has described this need as follows:

> The United States is burdened by an unimaginable debt.

of the volunteer can best be seen in the context of recreational sports.[4] With regard to the millions of sporting events which are

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> It is unthinkable that we could afford to pay for the services currently provided by volunteers. More than 85 million Americans engage in volunteer activities. These volunteers spend an average of 5 hours a week on volunteer projects, and provide 16.5 billion hours of volunteer services each year. It is clear from President Bush's "thousand points of light" theme, that volunteer efforts represent a high national priority. One wonders how our present way of life could continue without such volunteer efforts. Considering that these services are conservatively valued at $110 billion a year, it is clear that the government could not afford to finance such services with current government revenues.

Joseph H. King, Jr., *Exculpatory Agreements for Volunteers in Youth Activities–The Alternative to "Nerf®" Tiddlywinks*, 53 OHIO ST. L. J. 683, 686-87 (1992) (footnotes omitted).

[4] Recently, in support of this proposition, the Ohio Supreme Court stated:

> It cannot be disputed that volunteers in community recreational activities serve an important function. Organized recreational activities offer children the opportunity to learn valuable life skills. It is here that many children learn how to work as a team and how to operate within an organizational structure. Children also are given the chance to exercise and develop coordination skills. Due in great part to the assistance of volunteers, nonprofit organizations are able to offer these activities at minimal cost. In fact, the American Youth Soccer Organization pays only nineteen of its four hundred thousand staff members. The Little League pays only seventy of its 2.5 million members. Clearly, without the work of its volunteers, these nonprofit organizations could not exist, and scores of children would be without the benefit and enjoyment of organized sports.

Zivich v. Mentor Soccer Club, Inc., 82 Ohio St. 3d 367, 371, 696 N.E.2d 201, 205 (1998) (citation omitted).

Similarly, a commentator recently noted the following:

> Over nineteen million children, between the ages of five and fourteen, participate in their communities' recreational baseball, softball, and tee-ball leagues. However, that statistic does not account for the additional millions of children who participate in the other athletic activities offered in their communities' recreational leagues. Our towns and communities need people to volunteer their time for recreational sports activities, not because there is an economic interest involved, but because we want to provide our Nation's youth with a positive community upbringing. Regardless of whether it

held each year in this country, countless volunteers serve as coaches, referees, team managers, league officials, and trainers.[5] These volunteers assist the hundreds of millions of sports participants who train, practice, and compete in their respective sports.[6] Undoubtedly, the success and survival of amateur sports in the United States is dependent on the services of these volunteers.

Despite the immense importance of volunteers, however, the 1980's saw a reduction in the number of individuals who were willing to serve as volunteers.[7] This trend was apparently due to the increasing fear of legal liability.[8] In recognition of the great need for these volunteers, particularly in the sports context, some states began to enact "volunteer statutes"[9] in order to protect the

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> goes unrecognized, participation in community sponsored sports programs is just as vital to children's social development as is their attending school, church or synagogue, Boy Scouts, or other community youth groups.

Howard P. Benard, *Little League Fun, Big League Liability*, 8 MARQ. SPORTS L.J. 93, 131 (1997) (footnote omitted).

[5] *See, e.g.* King, *supra* note 3, at 686-88 (underscoring the massive amount of volunteers donating their services nationwide, particularly as it pertains to recreational activities). Arguably, these individuals are "participants." *See* Ray Yasser, *In the Heat of Competition: Tort Liability Of One Participant to Another; Why Can't Participants Be Required to be Reasonable?*, 5 SETON HALL J. OF SPORT L. 253, 254 n.4 (1995). In other words, they have a direct involvement with the athletes and the events. However, other individuals also play just as an important, but less visible, role such as proprietors, sponsors, league organizers, and groundskeepers. *See* Kenneth W. Biedzynski, *Sports Officials Should Only be Liable for Act of Gross Negligence: Is That the Right Call?*, 11 U. MIAMI ENT. & SPORTS L. REV. 375, 376 n.2 (1994).

[6] As one author aptly noted, "[m]any activities for young people are made possible only by the willingness of volunteers to give freely of their time and energy." King, *supra* note 3, at 683. *See also* Daniel Nestel, *"Batter Up!": Are Youth Baseball Leagues Overlooking the Safety of Their Players?*, 4 SETON HALL J. OF SPORT L. 77 (1994) (stating that each year approximately 8 million youths between the ages of five and fourteen participate in some form of organized youth baseball); Christopher A. Terzian, Recent Statute, 10 SETON HALL LEGIS. J. 332, 332 (1987).

[7] *See* Benard, *supra* note 4, at 120-21 (providing statistics showing a major decline in the volunteer population in the late 1980's).

[8] *See* King, *supra* note 3, at 689. *See generally* Anthony S. McCaskey & Kenneth W. Biedzynski, *A Guide to the Legal Liability of Coaches for A Sports Participant's Injuries*, 6 SETON HALL J. OF SPORT L. 7 (1996) (discussing and analyzing the various legal duties owed to participants by coaches and referees).

[9] A "volunteer statute" is distinguished from a "Good Samaritan" statute which for the most part "narrow[s] the liability of aiders who negligently administer pre-hospital emergency care." Frank J. Helminski, *Good Samaritan Statute: A Time for Uniformity*, 27 WAYNE L. REV. 217, 218 (1980) (footnote omitted). For a listing of

volunteer.[10] These laws essentially provided the volunteer with a qualified immunity from tort liability.[11] The apparent purpose of these laws was to shield the volunteer from legal liability[12] and to encourage volunteerism.[13] It has been argued, however, that fears of the risk of legal liability are unfounded and thus perhaps these statutes are unnecessary.[14]

However, not all of the states passed volunteer statutes. Most notably, New York and California have not enacted such legislation.[15] Additionally, there was the problem of the lack of uniformity among the states.[16] Many of the statutes which had

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the various states enacting these statues, *see infra* notes 38-60, and accompanying text.

[10] *See infra* notes 27-36. The statutes which were passed, according to one commentator, were comprised of a variety of types which could be summarized as follows:

> "Some statutes apply to such volunteers in general, whereas other statutes or provisions apply to certain types of volunteers, such as coaches, managers, and game officials. Some statutes affect only claims by specified classes of potential claimants, such as participants in the activity which the volunteer is providing services, while others at least arguably appear broader in their reach." King, *supra* note 3, at 705-06 (footnotes omitted).

See also Mel Narol, *Sports Participation With Limited Litigation: The Emerging Reckless Disregard Standard*, 1 SETON HALL J. OF SPORT L. 29, 38 (1991).

[11] *See infra* notes 27-36. Both New Jersey and Pennsylvania enacted volunteer laws in 1986. *See* Terzian, *supra* note 6, at 332 n.3.

[12] *See infra* notes 110-113 (discussing the basis for enacting the Federal Volunteer Protection Act). An additional justification given for enacting these laws was the reduction of insurance premiums. *See* Terzian, *supra* note 6, at 335 (discussing New Jersey's volunteer statute). *See also* King, *supra* note 3, at 690-91 (discussing the effects on volunteerism caused by the rising costs of obtaining insurance).

[13] *See* Terzian, *supra* note 6, at 335. *Cf.* King, *supra* note 3, at 684-85 (advocating that courts enforce exculpatory agreements and releases in order to encourage the participation of volunteers).

[14] *See* Terzian, *supra* note 6, at 332. *See also* Daniel L. Kurtz, *Protecting Your Volunteer: The Efficacy of Volunteer Protection Statutes and Other Liability Limiting Devices*, C726 A.L.I.-A.B.A. 263, 269, 275, 292-93 (Apr. 9, 1992) (noting a "scarcity of claims against volunteers" and also noting that "[i]n the last several years, there has not been a successful suit brought against a volunteer in California." (citation omitted)). Other commentators, however, have taken the opposite position. *See* Benard, *supra* note 4, at 94.

[15] Both New York and California, however, have introduced sports volunteer legislation. *See infra* notes 62 & 64 and accompanying text.

[16] *See* Benard, *supra* note 4, at 96-98 (explaining the problem caused by some states having passed volunteer laws while other states have not).

been passed either conflicted with one another[17] or were perceived to be inadequate.[18] Thus, despite its saving grace, the volunteer statute was not heralded by all as the answer to the issues facing volunteers.[19]

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[17] According to one commentator, this uncertainty has also become a concern for the insurance underwriting industry.

> The varying standards embodied in the [volunteer] statutes as well as the gaps in coverage create grave uncertainty for insurance underwriters, making legislative changes unpredictable and, therefore, vitiating the certainty of reduced liability that leads to reduced rates and wider availability of D & O [Director and Officer] insurance (although this has occurred in any case due to the cyclical nature of insurance underwriting economics).

Kurtz, *supra* note 14, at 289.

[18] *See* Kurtz, *supra* note 14, at 270 (stating that "[i]n the 1980s, every state passed some form of volunteer immunity legislation. But the states' responses were inconsistent and often muddled by fierce political tugs-of-war between nonprofit organization advocates and the organized trial bar, which opposed the immunization of volunteers from liability."). *See also id.* at 290, 291 (noting the inadequacy of the various volunteer statutes because "[n]o state law can immunize a person from Federal claims."). Another claim of inadequacy was because these laws, according to at least one commentator, did not provide for volunteers associated with local recreation departments. In other words, "[v]olunteer coaches associated with Little League Baseball, Inc. or Pop Warner Football would be afforded protection, but volunteer coaches who affiliate with a municipality or town recreation department would not. Herein lies the problem, or shortcoming, with not having specific statutory protection for all volunteer coaches." Benard, *supra* note 4, at 127. Along similar lines, another argument against the various state volunteer laws has been that they are too narrow in who they restrict. According to one commentator, many of these laws only protect officers and directors and not "direct service volunteers who lack director or officer status." David W. Hartmann, *Volunteer Immunity: Maintaining the Vitality of the Third Sector of Our Economy*, 10 BRIDGEPORT L. REV. 63, 66 (1989) (footnote omitted).

[19] One commentator offered the following criticisms of the volunteer statutes. First, many states had not (and still have not) passed such laws. *See* King, *supra* note 3, at 706. Second, these laws are subject to a variety of limitations and exceptions. *See id.* For example, the line between "ordinary" negligence and willful and reckless conduct (including gross negligence) has not been clearly defined. *See id.* at 706-07. Third, various volunteer statutes do not preclude the vicarious liability of an organization for the negligence of its volunteers. *See id.* at 709. Finally, volunteer statutes do not adequately inform potential plaintiffs of a limitation upon a potential tort action until litigation has begun. *See id.* Because of these inadequacies, this commentator concluded that volunteer statutes are "bromidic" and inadequate. *See id.* In terms of volunteer statutes which pertain to sports referees, one commentator has similarly concluded that these laws are inadequate, in part, because in the case of referees they are frequently compensated more than is permitted under most statutes in order to qualify as a "volunteer;" therefore, a volunteer law offers "little, if any, protection." Darryll M. Halcomb Lewis & Frank S. Forbes, *A Proposal for a*

Perceiving a serious problem, Congress introduced legislation in 1985 to resolve the dilemma.[20] Representative John Porter (R-Ill.) introduced legislation in the House of Representatives which was ironically designated as "H.R. 911" to convey the urgency with which Congressman Porter thought Congress should act.[21] However, this legislation received intense criticism and it did not immediately become law.[22] This state of affairs did not change

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Uniform Statute Regulating the Liability of Sports Officials for Errors Committed in Sports Contests, 39 DEPAUL L. REV. 673, 705 (1990).

[20] *See* Kurtz, *supra* note 14, at 272. *But see* King, *supra* note 3, at 702 n.89 (claiming that legislation which eventually became the FVPA was first proposed in 1989).

[21] *See* Kurtz, *supra* note 14, at 270.

[22] One commentator offered the following critique:

> For a number of reasons . . . the proposed federal statute is not an effective response to the threat of liability facing volunteers. First, the bill has not yet been enacted. Second, the bill does not itself create volunteer immunity, but rather seeks to encourage states to enact some form of volunteer immunity by increasing by a mere 1 percent the fiscal year allotment that would otherwise be made to such state under the Social Services Block Grant program. Third, the bill's recommended volunteer immunity requires not only that the volunteer have been acting in good faith within the scope of his duties with the organization or entity, but also that his conduct not have been willful or wanton. . . . [T]he concept of willful or wanton conduct, representing some ill-defined way a form of more extreme negligence, may not afford volunteers sufficient predictability or protection. Fourth, the states may, if they choose, condition immunity on adherence by the organization or entity to risk management procedures including the mandatory training of volunteers. It is unclear what procedures and training would be required to satisfy this requirement. Thus, the proposed immunity accorded to volunteers could be subject to another set of imponderables, undercutting the reassurance the statute was designed to foster. Fifth, the states may also create an exception to immunity for injuries arising out of the operation of motor vehicles and other vehicles. Sixth, the states may require as a condition for conferring volunteer immunity that the organization or entity provide a financially secure source of recovery against it, because under the bill, the organization or entity remains potentially liable for injuries it causes. This would, of course, greatly increase the cost of the activity and ultimately price many activities out of existence. Seventh, the bill does not limit the right of the organization or

until recently when, on June 19, 1997, President Clinton signed into law the Federal Volunteer Protection Act (FVPA).[23] The FVPA became effective 90 days later. With the passing of the FVPA it would appear that the rules of the liability game have changed. Just how much and whether the changes are good remains to be seen.

This article analyzes the FVPA and concludes that it was much needed legislation, especially as it concerns the millions of volunteers who assist, guide and govern youth and amateur sports in this country. Despite criticism questioning the need for the FVPA, in terms of sports volunteerism, it is a step in the right direction. Although the FVPA has some drawbacks and legal concerns, perhaps these shortcomings can be overcome through judicial interpretation or statutory amendment.

Part II of this article recites and outlines the existing body of volunteer statutes as enacted by the various state legislatures. Part III discusses the pre-enactment history of the FVPA, as well as the provisions of the Act which were signed into law by President Clinton. Finally, Part IV reconciles the FVPA with the various state laws and concludes that although the FVPA raises some legal concerns for both plaintiffs and defendants, this legislation is a "good call" when it comes to volunteers and youth and amateur sports volunteers.

II. Sports Volunteer Statutes Enacted by the State Legislatures

Over the years various statutes have been enacted in order to provide volunteers[24] with a qualified tort immunity.[25] These

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entity to sue the volunteer presumably for contribution or indemnity.

King, *supra* note 3, at 702-04 (footnotes omitted).

[23] 42 U.S.C.A. §§ 14501-14505 (West Supp. 1998). The complete version of the FVPA is reprinted herein at Appendix A.

[24] The doctrine of charitable immunity has no relationship to laws protecting volunteers. *See* Hartmann, *supra* note 18, at 63-64. In essence, "[c]haritable immunity never protected volunteers. It is merely coincidental that, by the time charitable immunity died out, volunteer immunity had gained public support." *Id.* at 64 (footnote omitted).

[25] For nearly every volunteer statute ever enacted there is a universal disclaimer

statutes vary in their application and in their effect.[26] For example, certain states have enacted laws which provide immunity only to the officers and directors of a non-profit organization. Examples of such states include California[27] and Colorado.[28]

Other states have passed more generalized volunteer laws or volunteer acts which apply not only to directors and officers but also to "direct service volunteers." Examples of these states would include Alabama,[29] Arizona,[30] Arkansas,[31] Mississippi,[32] and North Carolina,[33] South Dakota,[34] Utah,[35] and Wyoming.[36]

Some states have enacted more restrictive legislation which provides qualified immunity to volunteers who donate their services as either sports officials[37] or in a recreational setting. These states include Arkansas,[38] Colorado,[39] Delaware,[40] Georgia,[41]

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to immunity which denies protection from tort liability in the event the volunteer has acted intentionally, willfully, wantonly, or in a grossly negligent matter. Hence, as used herein the term "qualified tort immunity" denotes the qualification that the volunteer is provided with tort immunity if he or she has not acted in an intentional, willful, wanton, or grossly negligent manner. *See generally* McCaskey & Biedzynski, *supra* note 8.

[26] It is not unusual to find that a state has enacted various volunteer statutes which pertain to different volunteers, different activities, or different organizations.

[27] *See* CAL. CORP. CODE § 5047.5 (West Supp. 1999); Cal. Corp. Code § 9247 (West 1991).

[28] *See* COLO. REV. STAT. §§ 13-21-115.7 to 116 (1997).

[29] *See* ALA. CODE § 6-5-336 (1993).

[30] *See* ARIZ. REV. STAT. ANN. §§ 12-981 to 982 (West Supp. 1998).

[31] *See* ARK. CODE ANN. §§ 16-6-101 to 105 (Michie 1994 & Supp. 1997).

[32] *See* MISS. CODE ANN. § 95-9-1 (1994).

[33] *See* N.C. GEN. STAT. §§ 1-539.10 and 539.11 (1996).

[34] *See* S.D. CODIFIED LAWS §§ 47-23-28 to 23-31 (Michie 1991 & Supp. 1998).

[35] *See* UTAH CODE ANN. §§ 78-19-1 and 19-3 (1996).

[36] *See* WYO. STAT. ANN. § 1-1-125 (Michie 1997).

[37] In sports volunteer parlance, the terms "sports official" has been used to define either a coach or team manager, a referee, or both. *See supra* note 5 and accompanying text. The definition depends upon the jurisdiction having the statute.

[38] *See* ARK. CODE ANN. § 16-120-102 (Michie Supp. 1997) (providing immunity only to individuals "officiating" sports contests pertaining to non-profit organizations or governmental entities).

[39] *See* COLO. REV. STAT. § 13-21-116(2.5)(a) (1997). However, Colorado's sports volunteer statute only references coaches, not referees, and its immunity provisions only apply to claims made by "young persons" who are defined as individuals who are 18 years of age or younger. *See id.* § 13-21-116(2.5)(b).

[40] *See* DEL. CODE ANN. tit. 16, §§ 6835 to 6837 (1995). Delaware's sports volunteer statute applies to coaches and referees, their assistants, and to anyone who

Illinois,[42] Indiana,[43] Louisiana,[44] Maryland,[45] Massachusetts,[46] Minnesota,[47] Mississippi,[48] Nevada,[49] New Hampshire,[50] New Jersey,[51] New Mexico,[52] North Dakota,[53] Ohio,[54] Oklahoma,[55] Pennsylvania,[56]

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prepares a playing field for practice or competition. *See id.* § 6835(2)(a)(b)(c). It also applies to sponsors or operators of a non-profit sports program. *See id.* § 6836(b). In 1995 a legislative proposal was made to revise the Delaware sports volunteer law. *See* H.B. 253, 138th Gen. Ass. (Del. 1995).

[41] *See* GA. CODE ANN. § 51-1-41 (Supp. 1998). Interestingly, Georgia's sports volunteer law is limited to conduct which occurs "within the confines of the athletic facility at which . . . [an] athletic contest is played." *Id.* Georgia also has enacted a second sports volunteer immunity statute which pertains to the liability of a coach or referee performing in an Olympic competitive sport or training program or a sport (or training program) recognized by the NCAA. *See id.* § 51-1-20.1.

[42] *See* 745 ILL. COMP. STAT. ANN. 80/1 (West 1993). An amendment to the Illinois sports volunteer statute was proposed in 1996. *See* H.B. 2654, 89th Gen. Ass. (Ill. 1996). As of the time that this article was written, this amendment would include board members and officers of a non-profit association.

[43] *See* IND. CODE ANN. §§ 34-30-19-1 to 19-4 (West Supp. 1998). Indiana's sports volunteer statute was recently amended to provide a definition of a "volunteer." Ind. Code Ann. § 34-6-2-150 (West Supp. 1998).

[44] *See* LA. REV. STAT. ANN. § 2798 (West 1997). There is currently a legislative proposal to amend Louisiana's sports volunteer statute to provide that the receipt of compensation shall not void the volunteer's immunity. *See* H.B. 37, 1999 Reg. Sess. (La. 1998).

[45] *See* MD. CODE ANN. CTS. & JUD. PROC. § 5-406 (1998) (applying to volunteers working with "athletic clubs"). *See also* MD. CODE ANN. CTS. & JUD. PROC. § 5-802 (1998) (applying to "athletic officials" and coaches).

[46] *See* MASS. GEN. LAWS ANN. ch. 231, § 85V (Supp. 1998).

[47] *See* MINN. STAT. ANN. § 604A.11 (Supp. 1998).

[48] *See* MISS. CODE ANN. §§ 95-9-3 & -9-5 (1994) (applying to referees only).

[49] *See* NEV. REV. STAT. ANN. § 41.630 (1996) (applying to referees only).

[50] *See* N.H. REV. STAT. ANN. § 508:17 (1997 & Supp. 1998). New Hampshire's current sports volunteer statute contains a provision which conditions the volunteer's immunity on the volunteer having received authority to act as a volunteer in writing. *See id.* § 508:17(I)(a). Just last year legislation was proposed to eliminate the writing requirement. *See* S.B. 464, 155th Sess. of the Gen. Ct. (N.H. 1998).

[51] *See* N.J. STAT. ANN. § 2A:62A-6 (West Supp. 1998). New Jersey also has a statute which pertains to compensated coaches. *See id.* § 2A:62A-6.1. According to one commentator, New Jersey's volunteer statute was the first of its kind and it is the most comprehensive of all volunteer statutes relating to sports officials or recreational activities. *See* Benard, *supra* note 4, at 132. More recent evidence of the progressive nature of New Jersey's legislation can be found in a proposed bill which would require criminal background checks on volunteer coaches and sports officials. *See* A.B. 356, 208th Legis. (N.J. 1998).

[52] *See* N.M. STAT. ANN. §§ 41-12-1 to 12-2 (Michie 1990). The immunity provided under New Mexico's sports volunteer statute only applies to actions brought by individuals under the age of 18. *See id.* § 41-12-1.

Rhode Island,[57] Tennessee,[58] Texas,[59] and West Virginia.[60] Other states have such legislation pending or such legislation has been previously introduced. These states include Alabama,[61] California,[62] Hawaii,[63] and New York.[64] Finally, some states have entirely repealed their sports volunteer statutes.[65]

A review of these laws make it clear that they vary greatly in coverage, scope, and requirements for immunity from liability.

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[53] *See* N.D. CENT. CODE § 32-03-46 (Supp. 1997).

[54] *See* OHIO REV. CODE ANN. § 2305.381 (Anderson 1998). See also Ohio Rev. Code Ann. § 2305.382 (Anderson 1998) (sponsors of sports program or team). Ohio's sports volunteer statutes have been described as that Legislature's sign of "encouraging the sponsorship of sports activities and protecting volunteers." *Zivich*, 82 Ohio St. 3d at 371, 696 N.E.2d at 205.

[55] *See* OKLA. STAT. ANN. tit. 76, § 31 (West Supp. 1999). The Oklahoma statute does not specifically mention coaches, referees or other athletic personnel, however it does provide immunity for volunteers working with "charitable organizations." *See id.* § 31(A). The Oklahoma legislature had deemed a "charitable organization" to include organizations dedicated to "recreational" activities. *See id.* § 31(D)(2).

[56] *See* PA. STAT. ANN. tit. 42, § 8332.1 (West 1998).

[57] *See* R.I. GEN. LAWS § 9-1-48 (1997). Rhode Island's sports volunteer statute only provides immunity against actions brought by individuals 19 years of age or younger. *See id.* § 9-1-48(d)(1). Recently, legislation has been introduced which would amend Rhode Island's statute such that cities and towns would be exempt from liability in certain circumstances when they would permit non-profit corporations to utilize a city or town recreational facility. *See* S.B. 2518, 1997-1998 Legis. Sess. (R.I. 1998) (also applying the same proposal to the City of Cranston).

[58] *See* TENN. CODE ANN. §§ 62-50-201 to 50-203 (1997).

[59] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 84.001 to 84.008 (West 1997 & Supp. 1999). Similar to Oklahoma's statute, *see supra* note 55 and accompanying text, the Texas volunteer statute does not expressly refer to coaches, referees or other sports volunteers; however, it does provide immunity for volunteers working with tax-exempt organizations or non-profit organizations who organize and operate "youth sports and youth recreational" programs. *Id.* § 84.003(1)(A).

[60] Like Texas' volunteer statute, West Virginia has enacted a statute that provides immunity as it pertains to non-profit organizations that operate and organize recreational activities. *See* W. VA. CODE §§ 55-7C-1 to 7C-4 (1994). *See also* § 55-7C-2(4)(B)(x).

[61] *See* H.R. 173, 1996 Reg. Sess. (Ala. 1996); S.B. 625, 1996 Reg. Sess. (Ala. 1996).

[62] *See* S.B. 1324, 1993-1994 Reg. Sess. (Cal. 1994).

[63] *See* H.B. 1339, 18th St. Legis. (Haw. 1995).

[64] *See* S.B. 3590, 220th Ann. Legis. (N.Y. 1997) (proposing amendment of New York's not-for-profit corporations act); A.B. 1636, 220th Ann. Legis. (N.Y. 1997) (proposing amendment of New York's general obligations law); S.B. 2957, 219th Gen. Ass., 2nd Reg. Sess. (N.Y. 1995) (proposing amendment to New York's civil rights law).

[65] One state which has done so is Nebraska. *See* NEB. REV. STAT. §§ 25-21,195 to 25-21,199 (repealed 1990 Neb. Laws LB 594, § 1).

For example, with regard to sports volunteer laws, some of these statutes fail to define key terms.[66] Other statutes do not provide a complete waiver of immunity, but rather, a waiver of immunity equal to either the amount of applicable insurance coverage[67] or for a certain class of participants based upon their age.[68] Other statutes appear to be unworkable or inconsistent[69] in relation to other statutes.[70] Additionally, some states expressly condition the

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[66] *See, e.g.*, ARK. CODE ANN. § 16-120-102 (b) (Michie Supp. 1997) (providing immunity for "sports official" yet failing to define exactly what constitutes a "sports official"); GA. CODE ANN. § 51-1-41 (Supp. 1998) (providing immunity to sports officials who officiate amateur games, however, limiting this immunity to actions taking place "within the confines of the athletic facility" but failing to further define this term); MISS. CODE ANN. § 95-9-3(1) (1994).

[67] *See, e.g.*, DEL. CODE ANN. tit. 16, § 6836(a) (1995). In actuality, Delaware's law provides that immunity is waived to the amount of applicable insurance or the amount of "the minimum liability insurance coverage required by law if no coverage applicable to the negligent act or omissions exists." *Id. See also* MINN. STAT. ANN. § 604A.11 (subd. 2)(1) (Supp. 1998).

[68] *See, e.g.*, 745 ILL. COMP. STAT. ANN. 80/1(d) (West 1993) (providing immunity for coaches, managers and instructors (or their assistants) who provide services in sports programs "which is primarily for participants who are 18 years of age or younger. . . ."); MASS. GEN. LAWS ANN. ch. 231, § 85V (Supp. 1998).

[69] North Dakota's sports volunteer law appears to be inconsistent with itself. Unlike most sports volunteer laws which provide a broad immunity which is only excepted in the case of gross negligence or the like, the North Dakota statute requires that in addition to the volunteer's actions not constituting an act of "willful misconduct or gross negligence," the volunteer, at the time the harm was caused, must have been "acting in good faith, in the exercise of reasonable and ordinary care, and in the scope of that person's duties for the sports team." N.D. CENT. CODE § 32-03-46 (1)(a) (Supp. 1997).

[70] Most sports volunteer laws except willful, wanton, or grossly negligent conduct from immunity. However, Illinois' sports volunteer law, in pertinent part, applies the following standard in determining liability:

> [N]o person who . . . renders services as a manager, coach, instructor, umpire or referee . . . shall be liable to any person for any civil damages . . . unless the conduct of such person falls substantially below the standards generally practiced and accepted in like circumstances by similar persons rendering such services or conducting or sponsoring such sports programs, and unless it is shown that such person did an act or omitted the doing of an act which such person was under a recognized duty to another to do, knowing or having reason to know that such act or omission created a substantial risk of actual harm to the person or property of another. It shall be insufficient to impose liability to establish only that the conduct of such person fell below ordinary standards of care.

745 ILL. COMP. STAT. ANN. 80/1(a) (West 1993). *See also* PA. STAT. ANN. tit. 42,

grant of immunity upon the volunteer's completion of educational or safety training.[71] Finally, some sports volunteer statutes possess nearly all of these traits.[72]

There is very little case law interpreting the various sports volunteer statutes. Perhaps the first published decision dealing with a sports volunteer statute was the New Jersey case of *Byrne v. Boys Baseball League.*[73] In *Byrne*, an eleven year-old baseball catcher was warming up a pitcher.[74] During the warm up, the catcher, who was not wearing his mask, was struck in the eye with a pitched

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§ 8332.1(a) (West 1998) (applying essentially the same standard).

Additionally, New Hampshire's sports volunteer law is unique in that immunity only attaches if the volunteer has a writing authorizing him or her to act on behalf of the organization he or she is providing services to. *See* N.H. REV. STAT. ANN. § 508:17 (1997 & Supp. 1998). There is currently a legislative proposal to remove this requirement from the statute. *See supra* note 50 and accompanying text.

[71] *See, e.g.*, LA. REV. STAT. ANN. § 2798(B); N.J. STAT. ANN. § 2A:62A-6(c)(1)(2) (West Supp. 1988); N.D. CENT. CODE § 32-03-46 (1)(c) (Supp. 1997); OHIO REV. CODE ANN. § 2305.381(B) (Anderson 1998).

[72] See, e.g., N.M. STAT. ANN. § 41-12-1 (Michie 1990). New Mexico's statute limits immunity to coaches or referees working with individuals under the age of 18 up to the amount of insurance coverage. *See id.* The standard for defeating immunity is as follows:

> Any . . . manager, coach, athletic instructor, umpire, referee or other league official . . . is not liable . . . for any civil damages . . . unless:
>
> A. the conduct of that person . . . falls substantially below the standards generally accepted and practiced in the sport in like circumstances by similar persons or similar nonprofit associations rendering those services . . . ;
>
> B. it was reasonably foreseeable that the person's or entity's conduct would create a substantial risk of injury or death to the person or property of another; and
>
> C. the harm complained of was not a part of the ordinary give and take common to the particular sport.

Id.

The above liability standard seems to suffer from the same sort of vagueness as the Illinois statute, *see supra* note 42 and accompanying text, and it also fails to delineate a workable definition for what type of conduct is part of the "ordinary give and take common to the particular sport." N.M. STAT. ANN. §41-12-1(c) (Michie 1990).

[73] 236 N.J. Super. 185, 564 A.2d 1222 (App. Div. 1989).

[74] *See id.* at 187, 564 A.2d at 1223.

ball and sustained injuries.[75] The catcher's parents sued, claiming gross negligence and willful conduct on the part of the coach.[76] Basing his response on New Jersey's sports volunteer law,[77] the coach moved for summary judgment.[78] However, in order for the coach or official to have immunity under New Jersey law, he must have "participated" in a safety and training program.[79] The coach in *Byrne* admitted that he had not participated in such a program, but justified his actions by pointing out that the league for which he coached had not established one.[80] Therefore, the issue in *Byrne* was whether a coach could still obtain immunity under the New Jersey statute if the coach did not attend the required safety and training programs because the league or organization in which he volunteered did not offer such a program.[81]

After reviewing what little legislative history existed, the appellate court concluded that a subsequent amendment of the law[82] "makes plain that actual program *attendance* is the

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[75] *See id.*

[76] *See id.*

[77] *See supra* note 51 and accompanying text.

[78] 236 N.J. Super. at 187, 564 A.2d at 1223.

[79] *See id.*

[80] *See id.*

[81] At the trial level the court held that a volunteer was still afforded immunity even if he did not attend a safety training program if the league or team did not offer one. *See id.* at 187, 564 A.2d at 1224. The New Jersey Appellate Division framed the issue as follows:

> The issue then is whether . . . [New Jersey law] required participation as a condition to immunity only if the league or team had established a safety and training program or if, to the contrary, the legislative intention was to mandate the establishment of a program as a *quid pro quo*, as it were, for the immunity, thus granting it only to those volunteers who had actually participated in such a program.

Id.

[82] The current New Jersey statute provides, in pertinent part:

> a. Notwithstanding any provisions of law to the contrary, no person who provides services or assistance free of charge, except for reimbursement of expenses, as an athletic coach, manager, or official, other than a sports official accredited by a voluntary association as provided by P.L. 1979, c. 172 (C. 18A:11-3) and exempted from liability pursuant to P.L. 1987, c. 239 (C. 2A:62A-6.1), for a sports team which is organized or performing pursuant to a nonprofit or similar charter or which is a member team in

unequivocal prerequisite for entitlement to the immunity."[83] The court based its conclusion on the public policy of encouraging the creation of safety and training programs (which would not occur if immunity could be had without coaches attending such programs),[84] as well as legislative statements which clearly supported the court's interpretation.[85] Accordingly, the matter was reversed and remanded.[86]

The Colorado case of *Jones v. Westernaires, Inc.*[87] was decided several years after the *Byrne* decision. In *Jones*, the plaintiff, a volunteer working for an organization which taught and promoted "horseback riding and other equestrian activities for young persons," stepped in a ditch and injured her leg.[88] As a

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> a league organized by or affiliated with a county or municipal recreation department, shall be liable in any civil action for damages to a player, participant or spectator as a result of his acts of commission or omission arising out of and in the course of his rendering that service or assistance.
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> . . . .
>
> c. (1) Nothing in this section shall be deemed to grant immunity to any person causing damage by his willful, wanton, or grossly negligent act of commission or omission, nor to any coach, manager, or official who has not participated in a safety orientation and training skills program which program shall include but not be limited to injury prevention and first aid procedures and general coaching concepts.
>
> (2) A coach, manager, or official shall be deemed to have satisfied the requirements of this subsection if the safety orientation and skills training program attended by the person has met the minimum standards established by the Governor's Council on Physical Fitness and Sports in consultation with the Bureau of Recreation within the Department of Community Affairs, in accordance with rules and regulations adopted pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.).

N.J. STAT. ANN. § 2A:62A-6(a) and (c)(1)(2) (West Supp. 1998).

[83] 236 N.J. Super. at 189, 564 A.2d at 1224.

[84] *See id.*

[85] *See id.* at 190, 564 A.2d at 1225.

[86] *See id.*

[87] 876 P.2d 50 (Colo. Ct. App. 1994).

[88] *Id.* at 52. At the time of the incident the plaintiff was "attempting to guide an out-of-control wagon toward a stack of hay under [a] . . . pole barn." *Id.*

result of her injuries the plaintiff sued, claiming that the trench was a dangerous condition "and that [the] defendant was negligent in the design, excavation, illumination, and construction of the barn and its adjoining grounds."[89] The defendant organization responded to plaintiff's complaint by raising statutory immunity as a defense.[90] The trial court granted the defendant's motion based on statutory immunity.[91]

On appeal, the plaintiff's primary argument was that the statutory immunity was meant to only apply to individual volunteers, not corporations.[92] The Colorado Court of Appeals rejected that argument.[93] In formulating its opinion, the Court of Appeals applied sound construction principles to its analysis of various statutes, and held that Colorado's statutory scheme "reasonably construed provides immunity for a volunteer providing services as a leader, assistant, teacher, coach, or trainer for a program serving young persons or providing sporting programs or activities for young persons, even if that volunteer is a corporation."[94]

In a more recent decision in *Rolison v. City of Meridian,* the Mississippi Supreme Court strictly applied Mississippi's sports volunteer law and found immunity for the City of Meridian where a softball player had been hit in the head with a bat after a teammate had thrown it during the game.[95] The injured player

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89 *Id.*

90 *See id.*

91 *See id.*

92 Jones v. Westernaires, Inc., 876 P.2d 50, 52 (Colo. Ct. App. 1994). The pertinent statutory provision relied upon by the defendant corporation provided:

> No person who performs a service or an act of assistance, without compensation or expectation of compensation, as a leader, assistant, teacher, coach, or trainer for any program, organization, association, service group, educational, social or recreational group, or nonprofit corporation serving young persons or providing sporting programs or activities for young persons shall be held liable for actions taken or omissions made in the performance of his duties except for wanton and willful act[s] or omissions. . . .

Id. (quoting Colo. Rev. Stat. § 13-21-116(2.5)(a) (1987)).

93 *See id.* at 52-53.

94 *Id.* at 53.

95 691 So.2d 440 (Miss. 1997).

sued the city, claiming that the game's umpires were chosen and compensated by the City and that they were inadequately trained.[96] The plaintiff alleged that the City's failure to adequately train its umpires caused the game to be "conducted in an unreasonably unsafe manner."[97]

As part of its defense, the City claimed that Mississippi's sports volunteer law provided immunity to the umpires as well as to the City.[98] At the trial level summary judgment was granted in favor of the City.[99] On appeal, the court first found that the umpires, not the City, had control over the game and that the City's sole connection to the umpires appeared to be compensating the umpires who were part of an unincorporated, uninsured umpire association.[100] Second, the court found that the tortious conduct was not reasonably foreseeable and therefore the umpires could not have prevented it.[101] Finally, the court held that under Mississippi's sports volunteer law the umpires were immune from suit and the record did not show any evidence of willful conduct on their part.[102] Accordingly, the Supreme Court affirmed the grant of summary judgment.[103]

Despite the few reported decisions, when Congress had an opportunity to review the issue they concluded that in the context of estimating liability risks, many volunteers were subjected to uncertainty and guesswork.[104] With various laws having different requirements and other laws applying in only certain situations, coupled with the fact that not every state had passed a sports volunteer law, it appeared as if this Nation's sports volunteers

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96 *See id.* at 441.

97 *Id.* The plaintiff had alleged that the throwing of bats was commonplace and that the incident "might have been avoided if the City had taken action against bat slinging in the past." *Id.*

98 *See id.*

99 *See id.*

100 *See* Rolison, 691 So.2d at 442.

101 *See id.* at 444.

102 *See id.* at 445.

103 *See id.*

104 *See, e.g.*, Jamie Brown, *Legislators Strike Out: Volunteer Little League Coaches Should Not Be Immune From Tort Liability*, 7 SETON HALL J. OF SPORT L., 559, 569 (1997) (opining that the various laws represented a "piece-meal approach [which] means that the protection of coaches from liability varies from state to state, with no real consistency.") (footnote omitted).

needed better and more consistent protection.

III. Congress' Best Pitch - The FVPA

In light of the uncertainty of the scattered state laws, a paucity of case law interpreting these statutes, as well as perceived fears of legal liability, Congress decided to act. The result was the enactment of the FVPA.[105] Historically, the FVPA is not a "new" law because Congress has been wrestling with the legislative objective of providing more favorable laws for volunteers for quite some time.[106] In fact, prior to its enactment into law on June 19, 1997,[107] extensive lobbying was made in support of the FVPA.[108] The Judiciary Committee's report on the proposed FVPA legislation is one of the best sources for both discerning Congress' intent in passing the FVPA as well as the issues Congress considered.[109] The report explains Congress' findings on various issues.

First, the Committee discussed the problem which the FVPA was designed to address: the tortious liability of volunteers and their disappearance because of a perceived risk of a lawsuit. The

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[105] *See supra* note 23.

[106] *See supra* notes 20-22. *See also* Benard, *supra* note 4, at 123-26 (discussing various Congressional efforts since the 1980's to address the volunteer law issue).

[107] *See* Statement by President of the United States, Pub. L. No. 105-19, 1997 U.S.C.C.A.N. (111 Stat. 218) 169 [hereinafter *Enactment*].

[108] *See, e.g., Ashcroft Aims to Boost Volunteer Work with Protection From Frivolous Lawsuits* (News Release, Senator John Ashcroft) (visited Feb. 5, 1999) <http://www.senate.gov/member/mo/ashcroft/general/4-7-97.htm> (advocating volunteerism and the need to pass the FVPA); *Gramm Bill Aims to Protect Volunteers From Lawsuits* (Press Release, Senator Phil Gramm) (visited Feb. 5, 1999) <http://www.senate.gov/member/tx/gramm /general/press/vol.html> (urging Congress to pass the FVPA); *HR 1503 Dear Colleague* (Congressman Mark Souder visited Feb. 5, 1999) <http://www.house.gov/souder/dc5697.htm> (letter from Congressman Souder urging other Congressmen to vote in favor of the FVPA); *Promoting Volunteerism* (Senator Timothy Hutchinson) (visited Feb. 5, 1999) <http://ftp.senate.gov/member/ar/hutchinson/general/4-24-97.h> (promoting the need for volunteers and the passage of the FVPA); *Senate Bill Protects Volunteers From Liability Lawsuits* (Am. Veterinary Med. Ass'n) (last modified June 15, 1997) <http://www.avma.org/onlnews/javma/jun97/s061597g.html> (discussing the efforts of various United States Senators in attempting to pass the FVPA).

[109] *See* Volunteer Protection Act of 1997, Pub. L. No. 105-19, 1997 U.S.C.C.A.N. (111 Stat. 218) 152 [hereinafter *House Report*].

Committee stated:

Volunteer service has become a high risk venture. Our "sue happy" legal culture has ensnared those selfless individuals who help worthy organizations and institutions through volunteer service. The proliferation of these types of lawsuits is proof that no good deed goes unpunished.[110]

The report also cited to statistics which showed that "the percentage of Americans volunteering dropped from 54 percent in 1989 to 51 percent in 1991 and 48 percent in 1993 . . . [and] that approximately 1 in 10 nonprofit organizations has experienced the resignation of a volunteer due to liability concerns."[111] These statistics seemed to indicate that the Nation's volunteer pool was drying up. In support of the Committee's position on increased litigation, the report also noted increased insurance rates which were allegedly caused by liability concerns.[112] The foregoing, according to the Judiciary

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[110] *Id.* at 153. The Committee continued:

> The litigation craze is hurting the spirit of volunteerism that is an integral part of American society. From school chaperones to Girl Scout and Boy Scout troop leaders to Big Brothers and Big Sisters, volunteers perform valuable services. But rather than thanking these volunteers, our current legal system allows them to be dragged into court and subjected to needless and unfair lawsuits. In most instances the volunteer is ultimately found not liable, but the potential for unwarranted lawsuits creates an atmosphere where too many people are pointing fingers and too few remain willing to offer a helping hand.
>
> The need for relief from these debilitating lawsuits has increased over the last two decades. Until the mid-1980's, the number of lawsuits filed against volunteers might have been counted on one hand. Although the law permitted such suits, in practice very few were filed. Volunteers had little reason to worry about personal liability. In the last two decades, however, the number of suits against volunteers has increased substantially, and those suits have drawn national media attention. The fear of being sued has had an impact on volunteerism, in that is has caused non-profit organizations to stop offering certain types of programs, caused potential volunteers to stay home, and led to an increase in the cost of insurance against potential verdicts.

Id.

[111] *Id.* at 154.

[112] *See id.* The report stated:

Committee, established the need for statutory protection of volunteers.[113]

The next question addressed by the Committee was whether or not Congress should pass a uniform law or whether the individual state volunteer statutes were adequate to protect volunteers.[114] The Committee concluded that Congress was the proper legislator for the subject.[115] The Committee also

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> The increase in liability concerns is also evidenced by the increase in the liability insurance costs of nonprofit organizations. The average reported increase for insurance premiums for nonprofits over the period 1985-1988 was 155%. Little League Baseball reports the liability rate for a league increased from $75 to $795 in just 5 years. In fact, the Little League's major expenditure is not bats and balls, but the cost of obtaining insurance against liability. Many leagues cannot pay the $795 needed, so they operate their programs without coverage or discontinue the program altogether.
>
> It is sometimes difficult to quantify exactly how much of an organization's time and money is spent on liability protection. However, the Executive Director of the Girl Scout Council in Washington, D.C., said in a February 1995 letter that "locally we must sell 87,000 boxes of... Girl Scout cookies each year to pay for liability insurance." And Charles Knob of the United Way reports that insurance deductibles for his organization fall into the range of $25,000-30,000 a year. At three or four lawsuits a year, that diverts $100,000 or more from charitable programs.

Id.

[113] *See House Report, supra* note 109, at 155.

[114] *See House Report, supra* note 109, at 154-55. The report concluded Congress should legislate over volunteer protection because:

> [c]larifying and limiting the liability risk assumed by volunteers is an appropriate subject for federal legislation because of the national scope of the problems, federal expenditures on volunteer-based social programs, the federal government's inability to carry out all services provided by such organizations and due to the effects on interstate commerce.

Id. at 161-62.

[115] *See House Report, supra* note 109, at 154-55. The Committee's report stated:

> It is not enough to leave it to the States to solve this problem. Volunteerism is a national activity and the decline in volunteerism is a national concern. And in many cases, volunteer activities cross state lines. Even a local group may operate across state lines. A Boy Scout troop in Georgia may go on an outing in Tennessee or

determined that the inconsistency in the laws of the various states was the reason for higher insurance rates visited upon leagues and other non-profit organizations.[116] The Committee asserted that the FVPA would adequately address these concerns, and thus Congress should legislate on the subject to avoid inconsistency in the laws and uncertainty.[117]

The Committee's report also contains a dissent which disputed a number of the report's findings. Essentially, the dissent characterized the FVPA as "poorly conceived legislation."[118] In support of this view, the dissent set forth several arguments.

First, the dissent boldly claimed that there was no need for the FVPA because there was "no volunteer liability case in the state

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> Alabama. *A Little League team might routinely play games in Virginia, Maryland and the District of Columbia.* A meals-on-wheels volunteer might daily deliver meals in Kansas City, Kansas, and Kansas City, Missouri. In emergency situations and disasters, such as hurricanes or the floods in our upper Midwest states, volunteers come from many states.
>
> Although every state now has a law pertaining specifically to legal liability of at least some types of volunteers, many volunteers remain fully liable for some actions. Only about half of the states protect volunteers other than officers and directors. Moreover, every volunteer protection statute has exceptions. As a result, state volunteer protection statutes are patchwork and inconsistent. In many states, the volunteer leaders are granted immunity while the direct service providers remain exposed. Substantially different civil justice standards apply to volunteers of the same organization, providing the same services, depending on the state in which the service is delivered. This inconsistency hinders national organizations from accurately advising their local chapters on volunteer liability and risk management guidelines.

Id. (emphasis added).

[116] *See House Report, supra* note 109, at 154-55. The report concludes that because there are few companies that insure volunteers and therefore there is no disparity in insurance rates between states. In other words, "[b]ecause of the small size of the market for volunteer liability insurance, insurers do not differentiate among the [rates applicable in the] States." *Id.* The net effect is that despite the fact that a particular state may have a well drafted volunteer statute, an organization doing business in that state will pay the same rate as would an organization in a state where there is no such statute. In reality, therefore, organizations requiring insurance in "States where the law is protective are forced to vastly overpay if they wish to obtain coverage . . . ." *Id.*

[117] *See House Report, supra* note 109, at 155.

[118] *See House Report, supra* note 109, at 155.

courts whose outcome would have changed had this proposal been law."[119] Additionally, the dissent accused Congress of intruding upon the states' ability to legislate for themselves,[120] claimed that there was no real decline in volunteership[121] and asserted that there was no "relationship between volunteer activity and any perceived risk of civil liability."[122] Additionally, the dissent argued that the FVPA was inadequate because it did not adequately protect against abuse by hate groups.[123]

The dissent also took issue with the FVPA's elimination of joint and several liability as it related to non-economic damages[124]

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[119] *See House Report, supra* note 109, at 155.

[120] *See House Report, supra* note 109, at 165-66. The dissent based this argument on two premises: (1) many states had enacted legislation of their own to deal with the volunteer liability issue, and (2) doubt over Congress' authority to enact such legislation. *See id.* As it relates to this second argument the dissent analogously relied on the Court's decision in United States v. Lopez, 514 S. Ct. 549 (1995), which had the effect of finding a portion of the Gun-Free School Zones Act of 1990 (GFSZA), 18 U.S.C.A. §§ 922q, "beyond Congress' Commerce Clause authority." *See id.* Based on *Lopez*, Congress amended the GFSZA to apply only in the case where the firearms had moved in such a way so as to effect interstate commerce. *See id.* at 166 n.12. The dissent reasoned that the same result would be reached with the FVPA.

[121] *See House Report, supra* note 109, at 165.

[122] *See House Report, supra* note 109, at 164.

[123] *See House Report, supra* note 109, at 166-67. Under the FVPA there are various exceptions to immunity. 42 U.S.C.A. § 14503(f) (West Supp. 1998). One of those exceptions to immunity is where the volunteer's conduct amounts to a hate crime. *See id.* § 14503(f)(B). According to the dissent, the FVPA, as proposed, failed to "insure that protection from liability does not inure to members of hate groups...." *House Report, supra* note 109, at 166. The dissent further explained:

> For example, the provision in the bill exempting members of hate groups from the liability limitations in the bill does nothing to insure that state law does not unnecessarily immunize such persons. Thus if a particular state provides across the board immunity to volunteers, ... [the FVPA] continues to allow a member of a militia or hate group who negligently entrusts a gun to a child (who in turn harms an innocent victim) to avoid responsibility for the negligent entrustment. This is not appropriate. It would seem that if there truly is a basis for federalizing the field of volunteer liability (as the legislation's proponents claim), no civil immunity of hate group members should be tolerated.

Id. at 166-67 (footnote omitted).

[124] *See id.* at 167. President Clinton, in his statement upon signing the FVPA into law, also remarked of his concern for this provision. *See Enactment, supra* note 107, at 169.

and its restriction on punitive damages in certain cases.[125] Finally, the dissent, although arguing that Congress had no authority to pass the legislation, claimed that the FVPA did not go far enough.[126]

Subsequent to the Committee's report, the FVPA was enacted into law. The FVPA was partly based on Delaware and South Dakota law[127] and it features a number of compromises taken from the varying approaches of the different state laws.[128] The first provision of the FVPA proclaims its purpose and sets forth Congress' findings.[129] According to Congress, many volunteers[130] have been deterred from serving because of a fear of liability.[131] As a result, non-profit organizations[132] have been affected[133] and

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[125] *See House Report, supra* note 109, at 167.

[126] *See House Report, supra* note 109, at 165-66. The dissent stated:

> [The FVPA] is also deficient in that instead of merely *permitting* the states to provide for adequate measures to insure that non-profit organizations operate in a safe manner–such as by allowing the states to require that non-profits adopt risk management procedures (such as training of volunteers), be subject to respondeat superior, and have a secure source of funds for victim recovery available–it should have *required* that such procedures be in place. In this way Congress could have helped insure that there was at least a measure of protection for innocent children and vulnerable individuals harmed by negligent conduct without exposing volunteers to any increased risk of legal liability. For example, if we are going to exempt the volunteers of a non-profit gun club whose members unintentionally harm a child during errant target practice, we should make sure that the gun club is subject to liability and has the resources to make the child's family whole.

Id. at 168 (footnotes omitted).

[127] *See* Kurtz, *supra* note 14, at 276.

[128] *See generally supra* notes 38-60 and accompanying text (discussing various approaches taken by the different state legislatures as it relates to the "sports volunteer statutes").

[129] *See* 42 U.S.C.A. § 14501 (West Supp. 1998).

[130] The FVPA defines a "volunteer" as an individual performing services for a non-profit organization or governmental entity without compensation (which may include reasonable expense reimbursement) or, in the case of a volunteer director, officer, or "direct service volunteer," an individual not receiving "any other thing of value in lieu of compensation, in excess of $500 per year . . . ." *Id.* § 14505(6)(A) & 6(B).

[131] *See id.* § 14501(a)(1).

[132] Under the FVPA, a "non-profit" organization is defined as any organization which is given tax exempt status under the Internal Revenue Code or, any

programs run by these organizations have been diminished, causing fewer programs to be available.[134] Since some of these programs were either federally funded or "national in scope," Congress thought it should act because of the effect on commerce.[135] Therefore, pursuant to the Commerce Clause[136] and the Fourteenth Amendment,[137] Congress proceeded to pass the FVPA.[138]

Ironically, almost immediately after setting forth its authority to pass the FVPA, Congress set down a preemption provision which provides that the FVPA pre-empts any state law which is inconsistent with the FVPA.[139] An exception, however, establishes that the FVPA does not "preempt any State law that provides additional protection from liability relating to volunteers. . . ."[140] The FVPA also provides that it does not apply in the case where all

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organization "organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes. . . ." *Id.* § 14505(4)(A) - (B).

133 *See id.* § 14501(a)(2).

134 *See id.* § 14501(a)(3).

135 *See* 42 U.S.C.A. § 14501(a)(4) - (5) (West Supp. 1998). The effect on commerce was stated as being higher "interstate insurance" rates and "services and goods provided by volunteers and nonprofit organizations . . . in interstate commerce . . .." *Id.* § 14501(a)(5) and (6).

136 U.S. CONST. art. I, § 8, cl. 3.

137 U.S. CONST. amend. XIV.

138 The FVPA also provides that because of the "national scope of the problems created by the legitimate fears of volunteers about frivolous, arbitrary, or capricious suits," because of public reliance on programs and social services which are tax exempt, because of the Federal Government's interest in keeping volunteer programs operating because the government could not afford to run them if the programs collapsed, and, because of "lesser burdens" on commerce, Congress had the authority to pass the FVPA. 42 U.S.C.A. § 14501(a)(7)(A) - (D)(i) (West Supp. 1998).

139 The FVPA provides that the following provisions, if found in a state law, would not make that state law "inconsistent" with the FVPA. *See id.* § 14503(d). Those provisions are: (1) a state law which requires the non-profit organization to "adhere to risk management procedures, including mandatory training of volunteers", *Id.* § 14503(d)(1); (2) a state law that the makes the non-profit organization liable for its volunteer's acts "to the same extent as an employer is liable for the acts or omissions of its employees", *Id.* § 14503(d)(2); (3) a state law which "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", *Id.* § 14503(d)(3); (4) a state law which makes the non-profit organization liable commensurate with a "financially secure source of recovery" such as an insurance policy, *Id.* § 14503(d)(4).

140 42 U.S.C.A. § 14502(a) (West Supp. 1998).

parties are from the same state and that state has enacted legislation citing to the FVPA and declaring an election that the FVPA will not apply.[141]

One of the key provisions to the FVPA is its immunity provision, which prescribes the conditions under which a volunteer will be granted immunity.[142] The FVPA provides that the volunteer shall not be liable for harm he caused as long as the following conditions are met: (1) the volunteer must have been "acting within the scope of the volunteer's responsibilities" at the time of the allegedly tortious conduct;[143] (2) if required under state law where the "harm occurred," the volunteer must have been properly licensed, certified, or authorized by that State's "appropriate authorities;"[144] (3) "the harm [must] not [have been] caused by willful or criminal misconduct" on the part of the volunteer;[145] and (4) at the time the harm occurred the volunteer must not have been operating a motor vehicle, "vessel, aircraft, or other vehicle" under which the State required the operator to possess an operator's license or carry insurance.[146] Additionally, there are other qualifiers to the grant of immunity such that the volunteer's conduct must not have constituted either a crime of violence, a hate crime, a sexual offense under state law, a civil rights violation under either a federal or state law, or the volunteer must not have been under the influence of alcohol or drugs at the time of the incident.[147] Furthermore, the FVPA will not provide the volunteer with immunity if the non-profit organization which the volunteer serves decides to bring a civil action against the volunteer.[148]

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141 *See id.* § 14502(b).

142 *See id.* § 14503.

143 *Id.* § 14503(a)(1).

144 *Id.* § 14503(a)(2).

145 42 U.S.C.A. § 14502(a) (West Supp. 1998). The full text of this subsection actually provides that the volunteer must not have acted to have caused harm "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. . . ." *Id.*

146 *Id.* § 14503(a)(4). Presumably this refers to the State where the harm occurred.

147 *See id.* § 14503(f)(A)-(E).

148 *See id.* § 14503(b). This provision must be read together with another provision which provides that the FVPA "shall [not] be construed to affect the

The FVPA also limits the amount of punitive damages and damages for "non-economic loss" that may be recovered against the volunteer. First, the FVPA provides that punitive damages may not be recovered "unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by .... willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed."[149] Second, with respect to non-economic loss,[150] the FVPA provides that non-economic loss is allocated to volunteers "in direct proportion to the percentage of responsibility [of the volunteer]...."[151] This allocation is to be made by the trier of fact.[152]

The reaction to the passage of the FVPA has been favorable[153] and many volunteer organizations cheered the passage of the new

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liability of any nonprofit organization or governmental entity with respect to harm caused to any person." *Id.* § 14503(c). The net affect of these provisions is that the non-profit entity is not restricted by the FVPA.

[149] *Id.* § 14503(e)(1). The FVPA goes on to provide that its punitive damages clause was not meant to "preempt or supersede any Federal or State law to the extent that such law would further limit the award of punitive damages." 42 U.S.C.A. § 14503(e)(2) (West Supp. 1998).

[150] The FVPA defines "non-economic" loss as "losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium ... hedonic damages, injury to reputation and all other nonpecuniary losses of any kind or nature." *Id.* § 14505(3).

Conversely, the FVPA defines economic loss as "pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law." *Id.* § 14505(1).

[151] 42 U.S.C.A. § 14504(b)(1) (West Supp. 1998).

[152] *See id.* § 14504(b)(2).

[153] *See New Safeguards for Volunteers at Nonprofits, Other Agencies,* 4 No. 7 W. VA. EMPLOYMENT L. LETTER 2 (Jan. 1999) (supporting the passage of the FVPA because it addressed problems pertaining to increased insurance and the discouragement of volunteers); Thomas Frenn, *Encouraging Nonprofit Organizations in Wisconsin,* 71 WIS. LAW. 27, 27 (Mar. 1998) (proclaiming that "1997 saw a resurgence in volunteerism" and claiming that in part this resurgence was due to the passage of the FVPA); Frances Fendler Rosenzweig, *Shielding Volunteers From Liability,* 32 ARK. LAW. 34, 35 (Fall 1997) (favoring the FVPA because it filled gaps in Arkansas law on volunteers and it also simplified and broadened protections given to volunteers covered under the FVPA). *See also* Dylan Carp, *The Case of the Litigious Little Leaguer,* 3 TEX. REV. L. & POL. 171,172 (1998) (discussing the constitutional power of Congress to pass the FVPA).

law.[154] Some of the comments indicate a positive response to the fact that, unlike the various state volunteer laws, the FVPA provides a "comprehensive definition" of a "volunteer."[155] Moreover, commentators have also praised the FVPA because it provides a remedy for the outright inconsistency of the various state laws.[156]

Nevertheless, there have been commentators who are not in favor of the FVPA. Among the arguments against the FVPA is the point that it is inequitable to deny an injured party a remedy.[157] Additionally, some commentators have made a "federalism" argument by questioning whether it is desirable for Congress to have legislated in an area of law that is traditionally left to the states,[158] even though that appears to be the legislative trend.[159]

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[154] *See, e.g., Inside Connections: Protection for Volunteers* (Volunteer Ctr. Assistance League of S. Cal., Panorama City, Cal., Nov.-Dec. 1997) (visited Feb. 5, 1999) <http://www1.dev-com.com/vcalsc/connection /connectionsnov97.h>; *Liability Protection for Association Volunteers* (Prof'l Liab. Underwriting Soc'y) (visited Feb. 5, 1999) <http://www.inswebpro.com/profrogs/plus/news/jul97/jul5.htm>; *The Volunteer Protection Act: How the Law Will Affect Associations* (Am. Nat'l Standards Inst., New York, N.Y.) (visited Feb. 5, 1999)<http://web.ansi.org/public/news/1998jan/vpa_9.html>.

[155] *See* Kurtz, *supra* note 14, at 277. According to this commentator, that definition is important because it "preempts complex suits to determine the status of a director or officer, relieving a volunteer from having to establish his status [as a volunteer] . . . ." *Id.*

[156] Although written well prior to the passage of the FVPA, one commentator's observations are worth noting:

> It is apparent that existing state legislation on volunteer immunity is not only piecemeal but also inconsistent from state to state. Many of the statutes are not comprehensive in coverage, suggesting that groups with the most lobbying power have been the most successful in securing immunity for themselves, while leaving other volunteers open to liability. The situation is an appropriate one for model legislation.

Hartmann, *supra* note 18, at 68 (footnotes omitted).

[157] *See* Henry Cohen, *The Volunteer Protection Act of 1997*, 45 FED. LAW. 40, 41 (Mar.-Apr. 1998).

[158] *Id.* at 43. *See also* Benard, *supra* note 4, at 127-28 (advocating the legislative approach taken by the FVPA but concluding that the individual states should be left to legislate for themselves as it respects this area of the law); *see id.* at 128-29 (arguing that Congress lacks the power to address volunteers and tort liability under the Commerce Clause).

[159] According to a leading commentator on constitutional law, this is indeed the case. That commentator notes:

> In recent years Congress had enacted legislation touching

Beyond these considerations, however, there seem to be glaring problems with the FVPA which commentators have yet to discuss. For example, the FVPA does not provide any immunity protection in the event the organization the volunteer is serving decides to sue the volunteer.[160] The obvious "loophole" created by this provision would be seen in the situation where a plaintiff sues both the volunteer and the organization and the organization impleads the volunteer.[161] In that situation, how does the FVPA help the volunteer? Other concerns with the FVPA are discussed in the next part of this article.

IV. Reconciling the FVPA with the Various State Enacted Sports Volunteer Statutes

In reconciling the FVPA with the various state sports volunteer laws, two issues must be addressed: (1) whether the FVPA is a legitimate piece of legislation; and (2) assuming it is, how will it work with the various state laws?[162] With regard to the first inquiry, the constitutional arguments against the FVPA cannot be considered to be substantial, because the Commerce Clause[163] has traditionally been given such an expansive meaning

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> more and more areas traditionally subjected to state regulation. Often, state statutory schemes predated Congressional action. In initiating a new regulatory scheme, Congress seldom articulates a specific intent to preempt an entire field of regulation. Indeed, it is common for Congress to include a typical "savings clause" explicitly legitimizing concomitant state regulation. Nonetheless, the judicial branch has shouldered the responsibility for discovering congressional intent and, if necessary, invalidating state laws which are superseded because they "impair federal superintendence of the field" and impermissibly interfere with the effectuation of Congressional objectives.

JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 311 (4th ed. 1991) (footnotes omitted).

160 *See* 42 U.S.C.A. § 14503(b) (West Supp. 1998).

161 *See, e.g.*, FED. R. CIV. P. 14 (discussing third party practice in the federal courts).

162 *See generally supra* notes 38-60 and accompanying text.

163 Undeniably, the Commerce Clause is the Constitutional power under which

that it is unlikely that a court would conclude that Congress lacked the authority to have enacted the FVPA under that clause.[164] Therefore, the FVPA would probably pass constitutional muster.[165] However, that is not the end of the analysis.

The second question which must be addressed is whether the FVPA really solves the problem of inconsistent state volunteer laws.[166] One commentator has hinted that federal legislation in this area may be an "impossible" task because of the divergence of various interests.[167] There are a wide variety of different factions on this subject, particularly as to the philosophical issue of whether the injured plaintiff should be entitled to any recovery at

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Congress acted in enacting the FVPA. *See* 42 U.S.C.A. § 14501(a)(7) (West Supp. 1998).

[164] One commentator states that modern Commerce Clause jurisprudence has developed as follows:

> First, Congress could set the terms for the interstate transportation of persons, products, or services, even if this constituted prohibition or indirect regulation of single state activities. Second, Congress could regulate intrastate activities that had a close and substantial relationship to interstate commerce; this relationship could be established by congressional views of the economic effect of this type of activity. Third, Congress could regulate–under a combined commerce clause-necessary and proper clause analysis–intrastate activities in order to effectuate its regulation of interstate commerce. The Court would not independently review the Congressional decision on economic relationships or policy. The only significant checks on the power... [are] specific guarantees of the Constitution such as the Bill of Rights or restrictions in section 9 of Article I.

NOWAK & ROTUNDA, *supra* note 159, at 160.

[165] The FVPA would probably withstand constitutional analysis despite Congress' reference to "liability reform," a state issue, as one of the primary reasons for enacting the FVPA. *See* 42 U.S.C.A. § 14501(a)((7)(D)(ii) (West Supp. 1998) (stating that "liability reform is an appropriate use of powers contained in article I, section 8, clause 3 of the United States Constitution, and the fourteenth amendment to the United States Constitution").

[166] Of course, for purposes of this discussion, I assume that there *is* a problem of inconsistency with the various volunteer laws. Throughout this article there has been authority cited which clearly questions (or at least debates) the existence of any problem because of the lack of case law citing these statutes and overblown media reports. *See supra* notes 73-103 and accompanying text (discussing all three reported decisions involving sports volunteer statutes to date).

[167] *See* Brown, *supra* note 104, at 576.

all.[168] Some states allow recovery up to the amount of applicable insurance coverage[169] while other states bar recovery outright.

However, perhaps just as a fly ball to the warning track provides a great thrill but not a home run, perhaps the FVPA left too much decision making to the states. Before the FVPA was signed into law, there appeared to be a difference of opinion as to whether or not the FVPA would pre-empt state law.[170] The faction in favor of not having preemption won out.[171] Thus, although the FVPA essentially preempted this area of law, in certain cases a state could opt out of having the FVPA as the controlling law.[172] In reality, the states could choose "nonapplicability" and completely bypass the FVPA, leaving the legislative state of affairs as they were prior to the passage of the FVPA.[173] If this were true, what purpose would the FVPA serve?[174]

Similarly, the FVPA permits the inconsistencies that existed under pre-FVPA law to remain intact.[175] For example, the FVPA provides that if a state law requires the volunteer to participate in some form of skill or safety training, that training requirement will not be deemed to be inconsistent with the FVPA.[176] Therefore, the requirement remains intact despite the FVPA.[177]

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168 *Compare supra* notes 18-19, 22 and accompanying text (discussing various arguments against volunteer laws in general).

169 *See supra* note 67 and accompanying text.

170 *See* Brown, *supra* note 104, at 573 n.74.

171 *See* 42 U.S.C.A. § 14502 (West Supp. 1998).

172 Thus, the FVPA preempts the field only to the extent that a state wanted it to. *See id.* § 14502(b). To be fair, however, this statement is true only in so far as lawsuits between parties of the same state can be exempted, providing the state passes a law expressly saying so. *See id.* § 14502(b). As one can imagine, however, laws are not passed in a vacuum. They require extensive lobbying and effort prior to passage. Therefore, one could argue that although a state could opt out of the FVPA, in fact that option may be more theory than reality. Furthermore, the "nonapplicability" qualifier provides that it would only apply to actions in a state court, not a federal court. *See id.* § 14502(b). Therefore, it would appear that in a diversity setting, a state could not opt out of the applicability of the FVPA. *See id.* § 14502(b).

173 *See id.* § 14502(b).

174 Again, however, this argument must be tempered with the acknowledgment that the opt-out provision only applies if the lawsuit is between parties who are citizens of the same state. *See* 42 U.S.C.A. § 14502(b) (West Supp. 1998). Therefore, the "circumvention" argument only applies in non-diversity types of cases.

175 *See id.* § 14503(d).

176 *See id.* § 14503(d)(1).

177 To put this inconsistency into a hypothetical, suppose a volunteer coach who

V. Conclusion

As one examines the issue of volunteer liability, one must first start with the proposition that there is no reason why any state should not enact a sports volunteer law regardless of the FVPA.[178] Although it may be the case that the fear of liability is entirely unfounded,[179] perhaps the truth is that the "perception of risk is very real. . . ."[180] This perception (either founded or unfounded), has led to a progressive legislative movement on both the state and federal levels to protect participants of all kinds in athletic events.[181] Unfortunately, there are vast differences between the

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coaches in a state which requires the coach to attend a safety and training program acts tortiously and injures a participant. *See, e.g., supra* note 71, (discussing state laws requiring training and skill courses). Further, suppose that the volunteer has not attended the safety and training program as he should have. Under the state law, which is still applicable since it is not inconsistent with the FVPA, would the coach have immunity? *See* 42 U.S.C.A. § 14503(d)(I) (West Supp. 1998). Arguably, immunity may still be available under the FVPA, but if the state has opted out of the FVPA, then the coach would not have immunity under either statute. *See id.* § 14502. Thus, despite his belief and reliance on immunity, in reality he has none. Although this may seem to be an extreme example, the end result is still possible.

[178] *See* Benard, *supra* note 4, at 98 (stating that there is "no acceptable reason" for any state not to enact a volunteer statute).

[179] One commentator interestingly noted that between 1978 and 1988, insurance premiums for policies covering volunteers dropped from $5 per volunteer to 50¢ per volunteer. *See* Kurtz, *supra* note 14, at 293. According to this author, these premiums would only drop "'if claims are extremely uncommon and inexpensive.'" *Id.* (quotation omitted). Another commentator has also noted:

> Additionally, the threat of an "avalanche" of lawsuits, which inspired states in the 1980's to enact such legislation, has not materialized. Despite the media's attempt to harm lawyers' images and terrify the public, the number of little league lawsuits are not that substantial. Once the public became better informed on the facts that lawsuits against coaches are quite rare, support for immunity statues would fade.

Brown, *supra* note 104, at 572 (footnote omitted).

[180] Hartmann, *supra* note 18, at 76.

[181] *See* 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS § 11.03[9] (Gary A. Uberstine & Kimarie R. Stratos eds., 1988). This commentator states:

> The Congress and state legislatures have increased their involvement in certain aspects of amateur athletics, and that trend is likely to continue. For example, . . . Congress has passed legislation designed, at least in part, to limit the power of certain associations to discriminate based on gender. Legislatures have also been active in protecting

various state sports volunteer statutes which have been enacted to date.[182] The FVPA was designed to fill these gaps and make the law uniform in order to preserve the Nation's volunteer pool.

If the goal of the FVPA was to streamline and make the various volunteer laws consistent, then consider the following hypothetical situation. According to the FVPA, immunity will only be granted if the volunteer has satisfied a number of requirements, including the requirement that the volunteer must have been properly licensed by the state where the harm occurred if that state has such a requirement.[183] Suppose a volunteer coach takes his team to another state to play in a game and that coach has failed to obtain licensing under that state's law. Subsequently, the coach's negligence causes injuries. In that case, the FVPA would not provide immunity since the coach failed to obtain the proper licensing.[184] Depending upon the law of the state where the harm occurred, that state's law might not provide any immunity for the coach. Under that scenario, how does the FVPA provide protection to the volunteer and more importantly, how does the FVPA meet its goal of streamlining the various state volunteer laws?[185]

> the rights of handicapped students who desire to participate in intercollegiate or other amateur athletics. However, legislatures have not limited themselves to issue of discrimination in intervening in amateur athletics; rather they have been increasingly willing to get involved in issues relating to the management of athletic associations and to the maintenance of athletic associations and to the maintenance of amateurism in the operation of athletic programs. Given the importance of athletic participation and events in the lives of the average American, and the increasingly conservative bent of the judiciary, particularly at the federal level, it is likely that political or legislative involvement in the amateur athletic context will increase during the coming decade.

Id.

182 *See supra* notes 38-60 and accompanying text (discussing various state laws).

183 *See* 42 U.S.C.A. § 14503(a)(2) (West Supp. 1998).

184 *See id.* § 14503(a)(2).

185 Again, this hypothetical may be just that; a hypothetical. The true risk of liability would depend on whether or not there is even a licensing requirement to begin with. Perhaps the door is open for states to start requiring that coaches and volunteers become licensed which would in effect circumvent the FVPA to some extent.

A final point of contention is whether the FVPA ensures that injured victims are adequately compensated. One of the arguments against volunteer laws is that they do not compensate injured victims. By not requiring the various states to pass laws requiring organizations or individual volunteers to carry insurance, how does the FVPA affect the claimant's ability to recover for his or her injuries?

In terms of the validity of the FVPA, there are some serious constitutional issues which may test Congress' legislation.[186] However, this author has his doubts about whether constitutional challenges would be successful.[187] It will also be interesting to see how receptive the state courts are in cases where there is an

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[186] On some rare occasions Congress has legislated over the subject of sports. One example is the United States Olympic Committee which is governed by the Amateur Sports Act of 1978. 36 U.S.C.S. §§ 371-396 (Law. Co-op. 1996). On even more rare occasions, the United States Supreme Court has spoken about Congress' ability to regulate amateur athletics throughout the states and particularly, as it relates to tort concepts. One such example is the Court's decision in Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Base Ball Clubs, 259 U.S. 200 (1922), an anti-trust case involving competing baseball leagues. In that case Justice Oliver Wendell Homes observed that:

> [t]he business... [of] giving exhibitions of baseball,... are purely state affairs. It is true that in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give these exhibitions the leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business.... [T]he transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As put by the defendant, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place.

Id. at 208-09 (citation omitted).

[187] There may be, however, other constitutional arguments. These arguments may be based on some theory of rights reserved to the states or lack of federal authority to have enacted the FVPA. *See, e.g.*, Martinez v. California, 444 U.S. 277, 282 (1980) (stating "it... remain[s] true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational").

overlap with a state-enacted sports volunteer law and the FVPA. Some of these overlaps have been discussed in this article. Presumably, customary state law negligence principles will apply and the immunity statutes (either state or federal) will act as a potential bar to recovery in a given action,[188] not a new body of law.[189]

Can it be said that the FVPA has filled the gap between the various state volunteer laws? Perhaps the answer is "yes" and "no." The answer will depend on whether more state laws are passed and others are repealed, whether states opt out of the FVPA's application, how the courts interpret the two laws, and the infinite fact patterns which may arise to test the application of the FVPA. As baseball, when the ball first leaves the bat on a deep fly ball, we will have to wait and see if the FVPA is a home run or a deep fly out. The FVPA does not appear to be like a towering Mark McGwire home run, which was a sure thing the moment the ball left his bat.

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[188] At least in the sporting context, one commentator describes the difference between an immunity and a defense as follows:

> When a tort has been committed and a grievous injury incurred, the injured party may have no recourse under the law because of the various immunities or limitations upon the liability that certain defendants enjoy. Immunities are different from defenses. A defense justifies or excuses what would otherwise be a tortious wrong. Immunities and limitations on liability do not justify the wrongful conduct; they simply deprive the injured party of the right to sue.

GEORGE W. SCHUBERT ET AL., SPORTS LAW 208 (1986).

[189] It is highly doubtful that the FVPA will be the basis for the creation of a new body of federal common law which seems to come into play in "matters of substantial national concern that fall within the powers given the federal government by the Constitution." JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 224 (2d ed. 1993) (footnote omitted). *But see* 42 U.S.C.A. § 14501(a)(7)(A) (West Supp. 1998) (stating that the "legitimate fears of volunteers about frivolous, arbitrary, or capricious lawsuits" is a subject for legislation because of its "national scope").

VI. Appendix A: The Federal Volunteer Protection Act

§ 14501. Findings and purpose

(a) Findings. The Congress finds and declares that —

(1) the willingness of volunteers to offer their services is deterred by the potential for liability actions against them;

(2) as a result, many nonprofit public and private organizations and governmental entitles, including voluntary associations, social service agencies, educational institutions, and other civic programs, have been adversely affected by the withdrawal of volunteers from boards of directors and service in other capacities;

(3) the contribution of these programs to their communities is thereby diminished, resulting in fewer and higher cost programs than would be obtainable if volunteers were participating;

(4) because 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;

(5) services and goods provided by volunteers and nonprofit organizations would often otherwise be provided by private entities that operate in interstate commerce;

(6) due to high liability costs and unwarranted litigation costs, volunteers and nonprofit organizations face higher costs in purchasing insurance, through interstate insurance markets, to cover their activities; and

(7) clarifying and limiting the liability risk assumed by volunteers is an appropriate subject for Federal legislation because–

(A) of the national scope of the problems created by the legitimate fears of volunteers about frivolous, arbitrary, or

capricious lawsuits;

(B) the citizens of the United States depend on, and the Federal Government expends funds on, and provides tax exemptions and other consideration to, numerous social programs that depend on the services of volunteers;

(C) it is in the interest of the Federal Government to encourage the continued operation of volunteer service organizations and contributions of volunteers because the Federal Government lacks the capacity to carry out all of the services provided by such organizations and volunteers; and

(D) (i) liability reform for volunteers, will promote the free flow of goods and services, lessen burdens on interstate commerce and uphold constitutionally protected due process rights and

(ii) therefore, liability reform is an appropriate use of the powers contained in article 1, section 8, clause 3 of the United States Constitution, and the fourteenth amendment to the United States Constitution.

(b) Purpose. The purpose of the Act is to promote the interests of social service program beneficiaries and taxpayers and to sustain the availability of programs, nonprofit organizations, and governmental entities that depend on volunteer contributions by reforming the laws to provide certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities.

§ 14502. Preemption and election of State nonapplicability

(a) Preemption. This Act preempts the laws of any State to the extent that such laws are inconsistent with this Act except that this Act 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.

(b) Election of State regarding nonapplicability. This Act shall not apply to any civil action in a State court against a volunteer in which all parties are citizens of the State if such State enacts a statute in accordance with State requirements for enacting legislation–

(1) citing the authority of this subsection;

(2) declaring the election of such State that this Act shall not apply, as of a date certain, to such civil action in the State; and

(3) containing no other provisions.

§ 14503. Limitation on liability for volunteers

(a) Liability protection for volunteers. Except as provided in subsections (b) and (d), no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if–

(1) the volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission;

(2) if appropriate or required, the 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 under taken within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity;

(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; and

(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.

(b) Concerning responsibility of volunteers to organizations and entities. Nothing in this section shall be construed to affect any civil action brought by any nonprofit organization or any governmental entity against any volunteer of such organization or entity.

(c) No effect on liability of organization or entity. Nothing in this section shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person.

(d) Exceptions to volunteer liability protection. If the laws of a State limit volunteer liability subject to one or more of the following conditions, such conditions shall not be construed as inconsistent with this section:

(1)A State law that requires a nonprofit organization or governmental entity to adhere to risk management procedures, including mandatory training of volunteers.

(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.

(3)A State law that makes a limitation of liability inapplicable if the civil action was brought by an officer of a State of local government pursuant to State or local law.

(4)A State law that makes a limitation of liability applicable only if the nonprofit organization or governmental entity provides 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. 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 organization or entity will be able to pay for losses up to a specified amount. Separate standards for different types of liability exposure may be specified.

(e)Limitation on punitive damages based on the actions of volunteers.

(1) General Rule. Punitive damages may not be awarded against a volunteer in an action brought for harm based on the action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity unless the claimant establishes 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.

(2)Construction. Paragraph (1) does not create a cause of action for punitive damages and does not preempt or supersede any Federal or State law to the extent that such law would further limit the award of punitive damages.

(f)Exceptions to limitations on liability. (1) In general. The limitations on the liability of a volunteer under this Act shall not apply to any is conduct that–

(A)constitutes a crime of violence (as that term is defined in

section 16 of title 18, United States Code) 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. 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.

(2) Rule of construction. Nothing in this subsection shall be construed to effect subsection (a)(3) or (e).

§ 14504. Liability for noneconomic loss

(a) General rule. In any civil action against a volunteer, based on an action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity, the liability of the volunteer for noneconomic loss shall be determined in accordance with subsection (b).

(b) Amount of Liability. (1) In general. Each defendant who is a volunteer, shall be liable only for the amount of noneconomic loss allocated to that defendant in direct proportion to the percentage of responsibility of that defendant in direct proportion to the percentage of responsibility of that defendant (determined in accordance with paragraph (2)) for the harm to the claimant with respect to which that defendant is liable. The court shall render a separate judgment against each defendant in an amount determined pursuant to the preceding sentence.

(2) Percentage of responsibility. For purposes of determining the amount of noneconomic loss allocated to a defendant who is a volunteer under this section, the trier of fact shall determine the percentage of responsibility of that defendant for the claimant's harm.

§ 14505. Definitions

For purposes of this Act:

(1) Economic loss. The term "economic loss" means any pecuniary loss resulting from harm (including the loss of earnings

or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

(2) Harm. The term "harm" includes physical, nonphysical, economic, and noneconomic losses.

(3) Noneconomic losses. The term "noneconomic losses" means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation and all other nonpecuniary losses of any kind or nature.

(4) Nonprofit organization. The term "nonprofit organization" means—

(A) any organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 [26 USCS § 501(c)(3)] and exempt from tax under section 501(a) of such Code [26 USCS §501(a)] and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28U.S.C. 534 note); or

(B) any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes and which does not practice any action which 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).

(5) State. The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, any other territory or possession of the United States, or any political subdivision of any such State, territory, or possession.

(6) Volunteer. The term "volunteer" means an individual performing services for a nonprofit organization or a governmental entity who does not receive–

(A) compensation (other than reasonable reimbursement or allowance for expenses actually incurred); or

(B) any other thing of value in lieu of compensation, in excess of $500 per year, and such term includes a volunteer serving as a

director, officer, trustee, or direct service volunteer.