## THE VOLUNTEER PROTECTION ACT OF 1987

# H.R. 911

# 'It *Is* An Emergency'

On February 2, 1987, Congressman John Porter (R-Ill.) introduced legislation that encourages states to exempt all volunteers from civil liability except for acts of willful and wanton misconduct. The 99th Congress adjourned before a similar bill Porter introduced could be considered.

"We have it fittingly numbered HR 911," Porter said at a press conference to announce the bill. "It *is* an emergency."

Called The Volunteer Protection Act of 1987, the legislation would withhold one percent of Social Services Block Grants from any state that fails to extend liability protection to volunteers by the beginning of the 1989 fiscal year, redistributing those funds to states that have complied.

"Fears of personal liability exposure are spreading like wildfire throughout the volunteer community," Porter said. "All types of nonprofit groups, from universities and town governments to school boards and social service agencies like Catholic Charities, are facing the withdrawal of the time and skills of individuals on boards of directors and in other volunteer capacities.

The bill was written to protect the individual volunteer. Organizations remain legally liable.

"People are simply unwilling to jeopardize their family assets through volunteer work—and who can blame them? My bill offers a solution to this serious problem."

Porter then introduced VOLUNTEER Vice Chair Joyce Black, also representing a host of other voluntary organizations with which she is involved.

After posing the question, "Why is this legislation so important?" Black addressed three points: (1) Insurance premiums have spiraled; (2) many nonprofit organizations must make a choice between purchasing premiums and providing program services; and (3) many nonprofit insurance policies are not inclusive; they exclude child abuse and health programs, for example—ones that really need the liability coverage.

"Some volunteers are becoming leery of service both on boards and as direct service volunteers because they fear lawsuits against them as individuals," Black said. "This fear threatens the very basic beliefs of voluntarism, for without citizen volunteers, there would be no voluntary sector."

It is important that volunteers be protected from this type of liability. The bill states that "within certain States, the willingness of volunteers to offer their services has been increasingly deterred by a perception that they thereby put personal assets at risk in the event of liability actions against the organization they serve."

The cost of liability insurance has become so high that many nonprofit organizations cannot afford to provide this protection for their volunteers. It has resulted in the withdrawal of service from boards of directors and other volunteer positions.

The following articles analyze the long, hard route to passage of both H.R. 911 and meaningful state legislation to protect volunteers from civil liability. They also tell what you can do, and the first step is simple—write a letter.

## GETTING H.R. 911 PASSED: How the Process Works and What You Can Do

**By Judy Haberek**

A bill to require states to adopt volunteerism protection measures against civil lawsuits or lose one percent of their Social Services block grants may go down to defeat again without a methodical, targeted lobbying effort on the part of volunteer-involving groups.

There are a number of roadblocks ahead for H.R. 911, the Volunteer Protection Act of 1987, introduced by Rep. John E. Porter (R-Ill.) in February.

In a nutshell, local voluntary organizations face dramatic jumps in liability insurance rates for voluntary boards and service volunteers—a squeeze also being felt, for instance, by physicians with medical malpractice insurance rates that have gone through the ceiling in the past few years.

Legislation to curb both these problems was pending before the 99th Congress last year. Both measures were designed to prod states to take action, in lieu of passage of one federal law, but both issues failed.

In the case of the bill to grant immunity from civil lawsuits to volunteer groups, Porter tried an 11th hour maneuver to gain passage of his measure by adding the components of his bill to an appropriations bill. Although it was defeated by a

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narrow margin, support for the idea did surface. This occurred even though the bill itself was not an appropriations measure, because it would not involve the need for any federal funds to implement. Representatives are often willing to overlook these congressional technicalities, however, and Porter may well try the same gambit again this year if the traditional legislative process fails or runs out of time with the press of other business before the 100th Congress.

This brings us to efforts that volunteer organizations can take to increase the chances for passage of this bill and the pitfalls they face along the way. Porter has proven that he is willing to work and is committed to the immunity for volunteers, but he cannot get the bill through the usual congressional process without grassroots support from around the country.

Porter is a member of the Appropriations Committee. His attempt last year to place the volunteer immunity bill on an appropriations measure was a logical one, because a member of Congress has the most power and clout when working through a committee on which he or she serves.

The problem with the volunteer immunity bill is its jurisdiction—it has been referred to the Judiciary Committee and Porter is not a member of that panel. The chairman of that committee is Rep. Peter Rodino (D-N.J.), who also chairs the Monopolies and Commercial Law Subcommittee. That panel gets first crack at the bill. If it passes it, the full committee would then consider it, followed by the full House and, if passed, the Senate committees.

There is no companion bill to H.R. 911 in the Senate yet, which means that senators cannot simultaneously work on the issue and would only do so if first passed by the House.

Rodino, of course, controls the agenda for the Judiciary Committee. Ominously, he has not added his name to the approximately 75 cosponsors of H.R. 911.

According to the Coalition for Volunteer Immunity, however, Rodino has agreed to hold hearings on the bill if Porter and the volunteer community can get 140 House members to sign on as cosponsors of the bill.

### What To Do

The first task, then, for volunteers is clear—contact your local representative and urge him or her to cosponsor the legislation. Volunteer-involving organizations should urge their service volunteers and as many people as possible to write their members of Congress directly.

In your own words, urge him or her to cosponsor H.R. 911 or, if they already have done so, to work to get their colleagues to sign on to the bill. A short letter is all that is needed. It would be helpful for volunteers to emphasize what services to the community would be eliminated or curtailed if their project were forced to cease operations because of high insurance costs.

Letters to House members can be sent to the person directly, c/o U.S. House of Representatives, Washington, DC 20515. It would also be valuable to write to your two senators and urge them to introduce a companion bill to H.R. 911. Write to your senator c/o U.S. Senate, Washington, DC 20510.

If your elected representative is a member of the Judiciary Committee, your letters are particularly needed and will have a more immediate effect. This should not discourage citizens whose representatives serve on other committees, however. The 140 cosponsors needed for the bill are just as critical as support within the Judiciary Committee.

A long and impressive list of supporters of the bill is already in place. That list includes 63 nonprofit organizations that use the services of volunteers. Although all of these groups are on record as supporting the measure, their practical support can and does vary. Some admitted that—aside from going on record in favor of the bill—they have done little or no work to urge their members to lobby for the bill. So, to a large extent, voluntary organizations need to take a leadership role in this task.

One group that has started grassroots lobbying is the Volunteer Trustees of Non-Profit Hospitals. Its initial lobbying effort can serve as a blueprint for others. It is writing a letter to Porter to urge his continued action and making sure that hospital administrators know the contents of the bill and its status. More importantly, however, the group is urging hospital administrators to make an appointment to see their representative so that they can personally lobby for the bill.

## PEAT, MARWICK SURVEY: LIABILITY CRISIS IN THE MAKING

A recent survey of 2,532 leaders in the volunteer arena points out the immediacy of the liability crisis. According to a survey by Peat, Marwick, Mitchell & Co. and INDEPENDENT SECTOR, more than 80 percent of respondents believe the directors' and officers' liability problem is damaging the quality of governance in U.S. national volunteer organizations and has reached crisis proportions.

When asked by Peat Marwick who or what was to blame for the problem, more than half of the volunteer organization directors pointed their fingers at lawyers and juries granting huge awards. Also, 46 percent cited heavy publicity on large settlements. More than half blamed the insurance industry.

More than three fourths of Peat Marwick's survey group belong to organizations that carry director and officer liability insurance. Ninety percent of those in the for-profit sector had insurance protection, compared with only 71 percent among the not-for-profit groups.

Of the nonprofits, 86 percent of hospitals and 83 percent of municipal officials were covered. Museum directors at 45 percent and orchestra executives at 54 percent made up the low end of the scale of insured.

A third of the entire sample said that premiums had risen more than 300 percent at the last renewal of coverage. Only six percent said that rates had not changed.

"There has been serious concern over the past two years over the liability exposure faced by the members of boards of not-for-profit organizations," said Frederick J. Turk, Peat Marwick's national director of services to nonprofit groups. "As auditors and business advisers, we are committed to seeing this situation resolved and to helping board members maximize their effectiveness."

In another survey, 35 state officials noted that only 11 states had current or proposed plans to bring relief to directors and officers. Also, none of the state commissioners rated these initiatives as politically feasible.

This situation makes it even more urgent that volunteer groups rally around H.R. 911, which would, if passed, simultaneously give an incentive to all states to enact limits on liability.

This method probably is *the* most effective. This is your chance to bring home to your representative how much damage could be done to his or her constituents if the bill is not passed. Putting a plea in terms of how many senior citizens won't get hot lunches, for instance, is literally a bread-and-butter issue an elected official can't ignore.

If you are not successful in getting an appointment with the representative in person, don't underestimate the influence a staff member of the representative carries. Make an appointment with the administrative or legislative aide. Convincing him or her of the validity of your cause almost assures you that your message will be given to your elected official.

**Last Minute Flash! Senate Joins In**

As we go to press, we have learned that Senator John Melcher (D-MT) has introduced identical legislation (S. 929) in the Senate.

# PROTECTING VOLUNTEERS FROM SUIT: A Look at State Legislation

## By Steve McCurley

During 1986, the issue of the potential legal liability of board and service volunteers became an area of intense activity at the state level. Beginning with legislation in New Jersey and Pennsylvania, over 13 states passed some form of legislation that altered the legal framework encompassing suits against volunteers. In 1987, this effort to provide greater protection for volunteers has continued, both at the national and state levels.

This article is the first of two that will examine state legislation on this topic. It will examine, in general terms, the legislation that has been passed at the state level and analyze its strengths and weaknesses, while looking at the different options for coverage that various states are enacting.

The second article, which will appear in the summer 1987 *VAL*, will be a chart of the state legislation that has passed, with a brief description of what the legislation covers.

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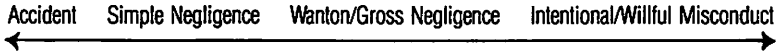
### Overview

Volunteers are subject, like all of us, to a legal responsibility for the actions in which they are involved. Service volunteers may be held liable for any negligence on their part while performing volunteer work; board volunteers have certain obligations in directing and managing the nonprofit agency with which they serve. The legislation passed in various states has been aimed at easing this burden by changing the legal requirements by which we judge a volunteer's conduct in respect to negligence. A simplified way of explaining this is shown on the following "Continuum of Fault":




Moving from left to right, the continuum represents an increasingly "Bad" involvement in a situation, ranging from:

1. An "accident," i.e., something happened connected to the volunteer but not caused by any act or omission on the part of the volunteer.
2. "Simple negligence," in which the volunteer contributed to the wrongdoing, but did so in an inadvertent sense, or by making a small mistake.
3. "Wanton or gross negligence" in which the volunteer was responsible for the wrongdoing in a direct way and through a serious or major mistake.
4. "Intentional or malicious misconduct" in which the volunteer deliberately did something wrong, knowing that the action was incorrect.

Under the legal standards in effect in most states prior to 1986, a volunteer might be held responsible if any of his or her actions could be demonstrated to constitute "simple negligence" or above on the continuum. What most of the new state legislation attempts to do is to move the requirement up to a demonstration that the volunteer did not just make a mistake, but made a major mistake that would constitute "Gross" negligence or "Willful" misconduct. The result is to make it harder for a potential plaintiff to demonstrate successfully that a volunteer is legally at fault, because the definition of "legal fault" has been changed.

### Legislative Options

The exact method by which this change takes place, however, has varied greatly as each state has gone through the process of drafting, amending and enacting legislation. The vast scope and complexity of the voluntary sector and the highly personal world of politics have combined to produce some strange combinations.

Here are the major areas of debate:

**■ What volunteers are covered?**

The legislative initiative began as an attempt to protect volunteers acting as coaches for children's sporting events. It has grown a bit since. The first addition was board members of nonprofit groups. Then the move was to extend protection to all those providing uncompensated service to an organization. There are currently five primary variations of what sort of "Volunteers" a state might choose to protect, as follows:

1. Board members
2. Volunteers on advisory bodies, councils, commissions
3. Direct service volunteers
4. Court-referral volunteers
5. An organization or corporation providing free services

The last two variations are the most intriguing. "Court-referral volunteers" are a recent but growing anomaly. Our current legal system has trouble fitting them into existing categories, as evidenced by the revelation a few years ago that court-referral volunteers were not covered under any existing volunteer liability policy because, in insurance terms, they were not really "volunteers." If they are to be protected, they may well need special mention in legislation.

The final option, "an organization or corporation" that performs volunteer work would be of particular interest to businesses engaged in corporate volunteer projects or to all-volunteer organizations.

The trend in most states has been to cover board volunteers, with more and more states also covering direct service volunteers. The other categories are included in a sporadic fashion.

**■ What organizations are covered?**

Not all volunteers of all organizations are being covered. One must volunteer for a "qualified" organization. This originally meant for a nonprofit organization, but that definition is rapidly expanding. The options are as follows:

1. *Nonprofit organizations,* with choices

as to whether this covers both incorporated and unincorporated groups; whether the groups must be tax-exempt or a 501(c)(3); and whether certain nonprofits (such as hospitals or educational institutions) are excluded from coverage.

2. *Government entities,* with choices as to the level of coverage among state and local level of government, and quasi-governmental entities.

3. *Individuals,* that is, the volunteer who acts entirely on his or her own, without connection to any organizational structure.

4. *For-profit corporations,* such as those who engage in group projects utilizing company employees.

Nonprofit organizations (of some type) have been the clear winners in most of the legislation, but government agencies are rapidly joining the lists.

**■ To what extent is the volunteer protected?**

There are three basic variations in this area:

1. *"Knowledge/participation":* This option holds that a volunteer cannot be found negligent unless the volunteer was personally involved in the wrongdoing. Involvement might be by actually doing the wrongful act or by ratifying an act committed by another. This variation is commonly enacted to prevent board volunteers from being sued because their nonprofit organization or some other board member has done something wrong, but the board volunteer had no direct involvement in the wrongdoing. It keeps the standard of responsibility at simple negligence, but allows it to be applied only for one's own acts or omissions.

2. *"Wanton/gross misconduct":* This option requires that a volunteer's wrongdoing must be of such a nature as to be seriously flawed, or such a level of mistake that it is not just an inadvertent error on the part of the volunteer but is instead flagrant.

3. *"Willful/intentional misconduct":* This option requires that a volunteer's misconduct be of a deliberate nature, done even though the volunteer knew that it was wrong.

Most states are enacting a level of protection that extends to volunteers who are not engaged in either "wanton or gross misconduct" or in "willful or intentional misconduct."

**■ What are the restrictions?**

There are two areas of restrictions being placed on the protections granted.

The first restriction involves exempting some *plaintiffs* from the requirements of the law. Typically, the liability protection is not extended, for example, if the suit against the volunteer is being undertaken by the agency with which he/she volunteers. This is done for the quite intelligent purpose of providing the agency with the ability to protect itself should board volunteers misperform their duties or functions. An additional variation on the exemption would allow the Attorney General of the state to bring suit without showing the new levels of liability.

Another variation on exemptions is to void the protection if a suit is brought by someone other than a recipient or participant of the organization's programs. Thus, third parties (i.e., innocent bystanders) could still bring suit for simple negligence, but those receiving the benefit of the organization's services would have to show the higher level of misconduct.

The second area of restrictions lies in requirements imposed on volunteers. These range from mandating that the volunteer must be acting within the scope of his/her duties, or must have received specific training and supervision for their volunteer work, or must not be engaged in transportation-related work involving a motor vehicle.

Another area of requirement is that of insurance, with some states extending protection only to the extent that the volunteer is not covered by insurance. These restrictions will undoubtedly grow substantially in years to come, particularly as courts begin the attempt to interpret each state's law.

## What Does It All Mean?

On an immediate basis, this legislation guarantees that the legal status of volunteers will be as confused over the last few years as it has been recently. There are two areas of summary that best suggest how to view the legislation:

**■ What does the legislation NOT do?**

There are three things that the legislation does not accomplish:

1. *The legislation does not prevent volunteers from being sued.* To begin with, the legislation applies only to negligence cases, and there are a lot of other areas for which volunteers might be sued, such as criminal misconduct. Even in negligence cases, the laws do not totally prevent suit; they only make it harder to find a volunteer guilty, and there is a lot of room for argument over whether a specific instance of misconduct constitutes "simple" or

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"gross" negligence.

2. *The legislation does not eliminate the need for insurance.* Insurance, even if not required by the new laws, would be very helpful in providing for the costs of defense or in the event that a volunteer is still held guilty despite the heightened protection.

3. *The legislation does not eliminate the need for good volunteer management.* If anything, it increases it. One of the subtler parts of some of the legislation deals with the requirement that a volunteer be "acting within the scope of his duties." This sounds obvious until you try to prove it. The *hard* way to prove it is retroactively, depending on verbal descriptions of what the volunteer thought he was supposed to do. The *easy* way is to pull out the volunteer's job description. Some state legislation implicitly recognizes the need for volunteer management by requiring training and supervision for volunteers.

**■ What might the legislation eventually do?**

The legislation started out as a reaction to the inability of nonprofit organizations to get liability insurance at reasonable rates. Some day it may help solve that problem. It is reasonable to suppose that making volunteers harder to sue should decrease suits against them and that a decrease in suits should lead to more insurance available at lesser premiums. Do not, however, look for any relief in this area for several years, since until test cases have occurred, no one will know for sure how much protection has really been enacted.

Whatever the outcome, this legislation is too important to be ignored and too important for you not to be involved. It is now being written in a hasty fashion, including only those who are in at the drafting and lobbying stages. You don't want to be left out, and we hope that the information above will give you a better idea of what your own options are in this area.

## How to Draft a Bad Law

The consequences of writing a law in a sloppy fashion may not be immediately obvious, but they can be disastrous. A case in point occurred in Minnesota, one of the first states to pass legislation in this area. The Minnesota legislation read, in its entirety: "A director of trustees of a nonprofit corporation or association who is not paid for services to the corporation or association is not individually liable for damages occasioned solely by reason of membership on or participation in board activities."

This leads one to the interesting question, "What does 'occasioned solely by reason of membership on or participation in' mean?" The answer would seem to be "almost anything." One memorandum from a Minneapolis law firm concluded that the law, either in a narrow interpretation did nothing that wasn't being done by state law, or in a broad interpretation protected the volunteer from all liability, which unfortunately was a violation of several provisions of the Minnesota Constitution. In a tactful statement, the memorandum described the law as "not a model of clarity."

Minnesota is now attempting to enact a revised version of the law.

## For Further Information

To obtain a copy of the legislation in your state or to obtain samples of legislation that contain some of the provisions cited above, write to Kay Drake-Smith at VOLUNTEER, 1111 N. 19th St., Suite 500, Arlington, VA 22209. Enclose a stamped, self-addressed envelope. Please be specific if you are requesting a sample.

## To Help Us Out

We are still collecting samples of state legislation to include in the summer *VAL*. Be sure to tell us whether the legislation has been introduced or enacted, and include a copy of the actual legislation. Send copies to Kay Drake-Smith.

## REP. JOHN PORTER ON H.R. 911

*The following editorial by U.S. Representative John Porter appeared in the August 24, 1986* Chicago Tribune *and is reprinted by permission:*

When your wife or husband tells you they're volunteering to serve on the board of the local United Way or park district, YMCA or school, the first thing you'd better ask is whether they have liability coverage for volunteers. Unfortunately, many organizations are having a tough time keeping volunteers protected. Either they can't get coverage at any cost or, if coverage is available, they can't justify the huge outlays.

Volunteers are the backbone of social progress and community life in America and run many of our local governments from townships to libraries to volunteer fire departments. Like it or not, they are increasingly being exposed to lawsuits which conceivably could cost them their homes or farms.

While it is true that few have been successfully sued, the proclivity of trial lawyers to name everyone in sight as a party defendant and the increasingly unpredictable nature of our tort system have led insurance companies to withdraw from the market. The consequence is less and less liability insurance protection and fewer and fewer people coming forward to volunteer.

The solution: Exempt unpaid volunteers from personal civil liability, except for willful and wanton misconduct. Why should the assets of board members of the Junior League be jeopardized for a slip-and-fall injury in the local thrift shop? That judgment should be paid out of Junior League assets or its liability coverage, not by its volunteers. Otherwise, how can we expect volunteers to continue to come forward?

Who should implement such a solution? The states. It's here where jurisdiction over almost all personal injury litigation has resided for all 200 years of our republic. The Illinois General Assembly has just adopted such a provision in its insurance crisis package. All states should do so.

The role of the federal government? To prod the states to adopt this and other reforms to keep the liability crisis from destroying the competitiveness of American products, undermining the availability and quality of our doctors and hospitals, and withdrawing local government services—from paramedics to picnic grounds and toboggan hills.

To encourage the states, I have introduced legislation in the House of Representatives to redistribute a small amount of federal funds for social service programs to states which have acted by 1988 to exempt unpaid volunteers from civil liability. The money would come from the allocations to states that have not yet done so. State legislatures should be made to focus on the problem now, before the volunteer spirit is permanently crippled.

Who are the volunteers of America? You and me and our families, friends and next-door neighbors. We should not have to fear placing family assets at risk when we donate our time and talent without compensation to serve our communities and charitable organizations.