Avoiding Triple Bogeys: Risk Management on the Big Stage

I. Why Risk Management for Sports Entities is Different?

I often tell the bright eyed law students and young lawyers who approach me in awe and ask how exciting it must be to be a "sports" lawyer, "sports law is just regular law taking place in a sports environment." OK, so that's mostly true, but not entirely. Of course the sports industry, like other, insular worlds, has its own lingo and peculiar – to outsiders – practices. And yes, as a result of these peculiar practices legal principles applicable to sports do often come into being. Therefore, if you are representing a sports entity and have not been involved in that sport on a long term basis, it is a good idea to walk the course, arena, track and spectator viewing areas to get a feel for that athletic environment. Also, ask your client a lot of questions. You may be making false assumptions that could prove disastrous if not corrected early in your representation.

This presentation will focus on some sport specific risk management business considerations and legal issues.

II. Assumption of Risk in Sport

A. The General Rule

Attendees of and participants in sporting activities, and some others, assume the commonly known risks inherent in athletic endeavors. "[T]he plaintiff is said to have assumed the particular risks inherent in a sport by choosing to participate and the defendant generally owes no duty to protect the plaintiff from those risks." *Knight v. Jewett, 3 Cal.4th 296 (1992).* Hockey pucks are expected to fly errantly off hockey sticks and sail into the stands. *Modec v. City of Eveleth, 224 Minn. 556 at 563-564.* Baseballs are known to fly off in an unintended direction. *Alwin v. St. Paul Baseball Club, 672 NW2nd 570 (2003).* And golf balls often miss their intended landing place (or the hole), ending up in an eye or bonking someone on the head. *Anand v. Kapoor, 2009 NY Slip Op 3110.* Were these events to happen in a comedy at the theatre, we'd all be laughing because no one would be seriously hurt. Unfortunately, people do get seriously hurt while participating in or attending sporting events and activities; some even die. *Palaski v. State of California, Cal. Court of Appeals, 5th Appellate Dist. (2007).* In most cases, these individuals have no legal recourse because they "assumed the risk" of incurring the

injury that felled them, when they purchased a ticket or signed a participation release and waiver of liability or simply knowingly entered the sports environment. See *Alwin, 672 NW2nd at 571*. "We have found no authority for the proposition that a sports facility operator has a duty to reduce the effects of an injury that is an inherent risk in the sport, or to increase the chances of full recovery of a participant who has suffered such a sports-related injury, or to give notice regarding any first aid equipment that may be available for such a purpose." *Rotolo v. San Jose Sports and Entertainment, LLC, Cal. Court of Appeal, 6th Dist. (2007).* This principle is commonly known as primary assumption of risk.

Likewise, courts typically have no sympathy for the golfer injured by his careless fellow golfers. See *Anand, supra* (golfer hit in eye with misdirected golf ball by [former] friend and fellow physician); *Shin v. Ahn, 165 P.3d 581 (2007)* (golfer struck in temple by golf ball hit by another golfer comprising his threesome.)

B. The Exception to the General Rule

As with all sound legal principles, there are situations in which the burden of proof and liability shifts from the sports fan or participant (or other victim) to the entity responsible for organizing the sporting activity or who built or manufactured equipment or other items or structures in the sports environment. Hosts of sporting events are, however, cautioned not to permit or allow unsafe conditions to exist that are not within the normal anticipated scope of the athletic activity. "[G]iven Saffro's resulting neurological injuries which have impaired his memory, and the evidence of inadequate provision of water and electrolyte fluids, this may be a case in which the burden of proof regarding causation would be shifted to Elite as a matter of public policy." *Saffro v. Elite Racing, Inc. (2002) 119 Cal.Rptr.2d 497at p. 502.* Burden shifting in this context is known as secondary assumption of risk in many jurisdictions.

III. Golf through the Risk Management Magnifying Glass

Given the state of the law, a prudent legal advisor for a sports organization would meet with and educate those business people responsible for event management about how to create a safe environment and how to reduce risk of injury. In addition, certain

procedures should be put in place to avoid, mitigate or manage unanticipated situations that arise spontaneously.

A. The Clubhouse and Other Structures

Golf course clubhouses and other physical structures on the golf course property are subject to the same legal and risk management issues as any other building or similar structure. Appropriate levels of property, casualty, and liability insurance coverage are necessary. Compliance with municipal, local, state and federal building and access codes is necessary (including fire safety compliance). Disabled access routes must available in compliance with applicable laws. A liquor license is most often a requirement, depending upon whether the golf club operates its own bar and restaurant, in addition to other factors.

B. Paths, Walkways and Bridges

Not only must your paths, walkways and bridges be compliant with municipal, local and state laws and ordinances (including environmental laws), your golf facility must also be compliant with state and federal disability laws. See *Americans With Disability Act, 42 U.S.C. § 12101 et seq.* ("ADA"). However, in accordance with the primary assumption of risk doctrine discussed above, golf course operators are rarely held liable for injuries resulting from conditions that are apparent and foreseeable. See *Cancelliere v. IGA Membership Corporation, 2009 NY Slip Op 30898* (golfer slips and falls on wet wooden bridge while golfing with friends); *Raux v. City of Utica, 2009 NY Slip Op 825* (plaintiff stepped into unmarked hole on golf course); *Lombardo v. Cedar Brook Golf & Tennis Club, Inc., 2007 NY Slip Op* 3661 (experienced golfer injured by slipping on wet grass while descending the 17th tee); *Bockelmann v. New Paltz Golf Course, 284 AD2d 783 [2001]* (golfer slips and falls on wooden bridge and injures ankle).

C. Sponsor Exposition Area and Hospitality

Typically tent structures are erected for sponsor exposition areas, and not infrequently for sponsor hospitality functions held in conjunction with golf tournaments. Electricity will most likely be needed in these tented areas for lighting, televisions, computers, and food service and catering operations. Tented structures must be constructed with accommodations related to sudden inclement weather, disability access, and electrical safely codes. If gas powered generators or cooking implements will be used, these present additional potential injury and safety concerns. Finally, if entertainment will be provided in hospitality tents, additional risk management measures may be necessary depending upon the nature of the performance(s).

D. Vendors and Caterers; Subcontractors

A wide variety of vendors, caterers and service providers are hired in connection with golf tournaments. It is important to ensure that these individuals and businesses hold appropriate licenses for the services they are providing (e.g. liquor license) and to obtain "additional insured" status on their liability insurance coverage. Professional liability insurance may also be required for service providers with a specific specialty such as translators, printers, medical service providers, electricians or stylists. Furthermore, agreements with vendors should be clear on whether subcontracting is permitted and which party bears responsibility for the deeds of permitted subcontractors. Indemnification with respect to subcontractors is prudent.

E. Parking Areas, Parking Shuttles and Adjacent Property

Golf tournament organizers usually contract for additional parking areas with nearby businesses, municipalities and government agencies. These parking areas, and the route to the golf tournament, are as much an extension of the golf facility as the parking areas adjacent to the clubhouse. See *Gellman v. Seawane Golf & Country Club, Inc. 24 AD3d 415 [2005]* (summary judgment for plaintiff property owner for private nuisance, trespass and negligence due to property damage from frequent array of golf balls from adjacent golf course); *Hawkes v. Catatonk Golf Club, Inc., 288 AD2d 528 [2001]* (summary judgment for golf course reversed in favor of golf patron hit in eye by errant golf ball while standing in parking lot before entering golf clubhouse); *Welch v. City of Glen Clove, 273 AD2d 302 [2000]* (summary judgment for golf course reversed in favor of neighbor hit by golf ball while on her adjacent property). Security guards should be posted at parking lots; especially during early morning and when darkness falls. Furthermore, if parking shuttles are utilized, pick-up and drop-off areas should be scrutinized for risks such as uneven ground or pavement. Finally, shuttle bus drivers (among others) should be subject to criminal background screening and drug testing by their employers.

F. Golf Carts

Injuries resulting from golf cart accidents represent a high volume of golf bodily injury insurance claims and lawsuits. The combination of narrow pathways traversing hilly terrains, spectators, and the tendency of golf cart drivers to be more free-wheeling and daring than would normally be the case in a traditional vehicle, creates a potential for disaster. In addition, I

have experienced the frequent phenomena of golf carts being given to teenage volunteers who do not even possess drivers' licenses. Perhaps there is something about the wide open space and idyllic setting that causes otherwise responsible adults to act irrationally with respect to golf carts. See *Pappas v. Cherry Creek, Inc. 2009 NY Slip Op 7239* (golfer thrown from golf cart driven by his friend and fellow golfer while attempting to negotiate a U-turn on a path between the sixth green and seventh tee); *Mendoza v. Club Car Inc., (2000) 96 Cal.Rptr2d 605* (plaintiff golfer suffered serious injuries, including a broken neck, when attempting to gain control of an electric golf cart that he parked on a slope, when parking brake spontaneously released causing it to roll down hill). Sports organizations utilizing golf carts are cautioned to obtain proper insurance coverage for injuries related to such vehicles and to, in appropriate circumstances, obtain release and waivers of liability from those non-employees using such carts.

G. Employees

Employees of golf clubs and facilities are generally treated no differently in the law than similarly situated employees of non-sports establishments in the same jurisdiction. An employment lawyer advising a golf course owner would give the same advice with respect employer-employee risk management issues, as she would give her other business clients in the state. After reading this article, she would also be able to counsel her sports business clients on the elements and duties under primary and secondary assumption of risk. It is important to know the interplay of this doctrine with other general legal obligations of employers. See *Kaplan v. Exxon Corp., 126 F.3d 221(3d Cir. 1997) and Hughes v. Seven Springs Farm, Inc. 563 Pa. 501, 762 A.2d 339 (2000)* (discussing viability of the assumption of risk doctrine in relation to comparative negligence).

Boem & Associates v. Workers' Comp. App. Bd., 133 Cal.Rptr.2d 396 (2003) , involved a claim for workers compensation benefits by a greens worker at golf course who suffered two heart attacks and had had four-way bypass surgery. In this context, the court was asked to address the interplay between the workers' compensation and Medi-Cal programs in relation to the payment of an injured employee's medical expense. In a complicated procedural context not applicable to this discussion, the court determined that the Workers' Compensation Board erroneously applied provisions of the California Medical Assistance Program and denied petitioner due process. In *Colmenares v. Braemar Country Club, Inc., (2001) 107 Cal.Rptr.2d 719,* the foreman of the golf course maintenance crew injured his back and was ordered

by his doctor to only engage in "light duty" jobs. When Colmenares was fired for poor work performance, he brought suit for age discrimination, disability discrimination, breach of implied contract, breach of implied covenant, and intentional infliction of emotional distress. The golf course won dismissal of the suit on summary judgment. It also won Colmenares appeal of the disability claim on the basis that the employee did not establish that he was disabled within the meaning of the California Fair Employment and Housing Act, *Gov. Code, §12900 et seq.*

H. Security

The scope and expertise of security personnel needed for any athletic spectacle will vary with the nature, popularity and location of the event. Golf tournaments take place in remote rural areas, suburban areas and adjacent to or in large urban areas. In some locations, use of volunteers or experienced private event security companies may be appropriate. In other contexts, contracts with and coordination with local police officials is a must. Special arrangements may be necessary to handle unique situations such as "stalkers" or "orders of protections." Police or highway patrol may be needed to direct traffic flowing into the sporting facility and its parking areas. Assessing and implementing proper security measures is an import risk management exercise for sporting event organizers.

I. Volunteers

Most sporting events would not occur without the services of scores of dedicated volunteer workers. Golf tournaments, like many other athletic activities, utilize large numbers of volunteers in a wide variety of capacities. They often meet and greet, chauffeur players and VIPs (in cars and golf carts), conduct food and beverage service, perform security functions, serve as runners for the media, provide medical services, serve as drug testing escorts, and any number of other tasks. Event organizers are well advised to ensure that their various liability insurance policies include coverage for volunteer workers and that the overall contract for the sporting event allocates liability for volunteer activities and/or contain indemnity provisions related thereto.

J. Spectators

For those of us who have worked for sports organizations, **it's all about the spectators**! They make the "show" possible by watching the sports event on television and buying tickets to see the live spectacle. Not only are sporting event organizers duty bound to provide a safe environment for the contestants in the

athletic activity, they must also provide a reasonably safe and comfortable environment to attract and maintain spectator support. See *Jones v. Three Rivers Management Corp., (1978) 394 A.2d 546* (reverse of negligence jury verdict for stadium sued by spectator hit in the eye by a baseball while walking in interior walkway of at Three Rivers Stadium). While not all potential spectator injuries can be anticipated, an organizer of a sporting event is well advised to have a risk management assessment conducted throughout the preparations for the event, and particularly during the hours leading up to the sale of tickets. Additional monitoring should be conducted by relevant organization staff and volunteers, throughout the duration of the sporting event, until the last spectator and volunteer drive away. Release and waiver of liability language is commonly used on ticket backs to absolve event organizers of responsibility for injuries to spectators and/or ticket holders, once they enter a sporting event.

K. Weather and Force Majeure

The force majeure clause is not incidental in contracts for outdoor sporting events. Mother Nature is both the friend and foe of golfers and golf course owners and operators. The greens need both the sun and the rain. Nothing beats walking the greens as a golfer or spectator on a beautiful sunny day with a light breeze blowing. No one, on the other hand, wants to be around when the thunder storms roll in; especially if accompanied by lightening. Like any prudent business owner, golf courses must have emergency evacuation plans related to inclement weather. Signage is often posted with instructions on what to do in case of severe weather conditions that require evacuation of the golf course. (This information may also be printed in the official event program.) Golf tournament organizers engage or have on staff weather experts who monitor Mother Nature with sophisticated computer equipment. Thus, precautions are taken prior to a storm arriving. Insurance policies should be evaluated for their coverage of weather related incidents, property damage and injuries.

L. People Movers and Scooters

Elderly or disabled spectators and employees may seek to utilize motorized assistance devices such as so-called “People Movers” or “Segways” and traditional scooters. Many golf courses have rules against the use of motorized vehicles other than golf carts. Further, given the negative experiences and high injury rates resulting from golf cart use, golf club operators may be naturally disinclined to permit the use of Segways and scooters; especially by individuals who are infirm due to age or not particularly

dexterous due to a disability. The typical rolling and hilly golf course terrain is not likely to be favorable to these alternative vehicles. On the other hand, failure to permit the use of such vehicles by disabled individuals seeking to participate as others who are able to enjoy the golfing activity, may result in ADA liability for the golf club owner or event organizer. See *PGA Tour, Inc. v. Martin, 532 U.S. 661, 674-75, 121 S. Ct. 1879, 149 L.Ed.2d 904 (2001).*

IV. It's Not Over after the final Putt Clicks the Tin

Risk management does not end when the competition or sports activity is over. Indeed, it often takes days or a week to "break down" after a major golf tournament is over. There may even be more social activities scheduled as part of a celebration. While ensuring that the break-down process proceeds in an orderly manner, sports event organizers should also prepare a wrap-up report which contains a listing of information related to any "incidents" or "injuries" that may result in future claims or lawsuits. The preferred format is to have an "Incident Report Form" distributed at several locations and specific persons assigned to collect relevant information in the event of an incident. The Incident Report should be given to the organization's legal department or outside counsel, as well as to relevant insurance carriers as advance notice of potential claims. Remind your client that an event is not over until the final wrap-up reports are submitted.

V. Other Sport Contexts

Of course, golf is not the only context in which the above liability concerns come into play. The "field of play" may be different in other sports, but similar legal principles and analysis apply.

College Sports; Cheerleading

An Ohio court of appeals affirmed summary judgment for Kent State University in the case of a cheerleader rendered paraplegic by her "spotters'" panicked failure to catch her. *Crace v. Kent State University 2009 Ohio 6898-Ohio: Court of Appeals, 10th Dist., Franklin.* The court's ruling was based upon the finding "that primary assumption of the risk negates appellant's negligence and derivative loss of consortium claims." *Id.*

Neighborhood Fun; Volleyball

In *Luna v. Vela, (2008) 169 Cal.App.4th 102-Cal: Court of Appeals, 2nd Dist., Div 7.,* the appeals court overturned and remanded the trial court's grant of summary judgment in favor of the plaintiff, Luna, who was injured during a neighborhood volleyball game. Luna tripped over the lines holding up the volleyball net, when he went to retrieve the volleyball. He fractured his right elbow.

Youth Ice Hockey Game

The parents of a teen ice hockey player were unable to prevail in their appeal of the trial court's decision in favor of defendant ice hockey facility operator. Plaintiff's son died of sudden cardiac arrest while playing in a hockey game. The facility had an automatic external defibrillator (AED) device, but plaintiffs alleged that they were not informed that the AED was on site, or of its location. Furthermore, the parents argued that the ice hockey facility had a legal obligation to have an emergency plan. "Nowhere in the common law have we found authority for imposing on an owner of a sports facility to provide notice to those using the facility of the availability of medical devices in the event that an athlete experiences an injury that is an inherent risk of the sport." *Rotolo, supra.*

Long Distance Road Cycling

In *Palaski, supra,* a cyclist was riding downhill on the shoulder of a highway at approximately 15 to 25 miles an hour. He then attempted to cross a bridge, but lost control of his bike, went over the bridge railing and fell 75 feet to his death with his bicycle. The Court of Appeals upheld the trial court's grant of summary judgment to the State of California. "We hold that the State can assert the primary assumption of risk doctrine in such circumstances." *Id.*

Employee Party; Snow Boarding

A California court of appeals held that "ski resort employees who are not covered by workers' compensation for injuries sustained while participating in recreational activity on their own initiative may not claim the protection of Labor Code section 2801. That statute bars employers from raising assumption of risk as a defense in negligence actions by employees injured in the course of their employment. *Vine v. Bear Valley Ski Company, Cal: Court of Appeal, 1st Dist., Div. 3 2004.* In *Vine*, the plaintiff employee broke

her back and became a paraplegic while attempting a snow board jump at an employee party hosted by her employer. Vine's suit against the resort owner advanced a secondary assumption of risk argument; namely that the ski jump was maintained in such a condition as to increase the risk to snowboarders beyond those inherent in the sport.

Track & Field; Marathon

Most runners know that it is important to hydrate – drink fluids – while running long races or courses. Many are not aware of the dangers of over hydration – hyponatremia -- causing decreased amounts of sodium in the blood stream. To avoid this condition, athletes who training and sweat extensively (especially in warm or hot weather) are cautioned to drink not only water, but also electrolyte fluids such as Gatorade. Regrettably in June 1998, Richard Saffro suffered a grand mal seizure due to severe hyponatremia while on an airplane after running a marathon. His condition also caused a pulmonary edema and cerebral edema. Mr. Saffro suffered neurological deficit causing memory loss. Apparently, the race directors did not have enough water and other sodium replenishing drinks to stock the fluid stations for the duration of the entire marathon. Thus, many runners finishing the race at a slower pace were allegedly greeted by empty and unmanned water stations when they were in search of drinks. In a post-race letter to race participants, the race organizer took responsibility "for any and all of those imperfections" and stated that the following year "you'll be able to drown at our water stations." *Saffro* supra at *500*. The appeal court reversed the trial court finding of summary judgment for the race organizers. "[A] race organizer that stages a marathon has a duty to organize and conduct a reasonably safe event, which requires it to 'minimize the risks without altering the nature of the sport. (Internal references omitted.) This duty includes the obligation to minimize the risks of dehydration and hyponatremia by providing adequate water and electrolyte fluids along the 26 mile course – particularly where the race organizer represents to the participants that these will be available at specific locations throughout the race." *Saffro, supra* at *501-502.*

Play Carefully!