

# Sports Litigation Alert

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## Experts Consider the Risk Management Side of Resuming Sports

Risk management, which some might construe as the intersection of law and insurance, is a vital concept in the sports world these days. That's because leagues, teams, facilities, and others are caught between financial survival and legal risk. What is the balance?

We sought the answer to that question in an exclusive interview with Lori Windolf Crispo, Area President of Sports & Leisure Insurance at RPS Bollinger, a leading underwriter of sports insurance and a managing general agent for a well-known golf and country club program and Carla Varriale-Barker, a shareholder at Segal McCambridge Singer & Mahoney, Ltd. and chair of the firm's national Sports, Recreation and Entertainment Practice Group.

**Question:** *Now that we are in back-to-school season, what are your thoughts about resuming sports and recreation activities in light of the COVID-19 pandemic? Is it safe? Safe enough?*

**LC:** It should be safe for return to play, or I'll say it would be safe if we could all follow CDC guidelines, wear masks where possible, and maintain social distancing. We have seen the success of these protocols in other countries that now have excellent test positivity rates as a result of their ability and willingness to adhere to preventive measures for COVID-19. If you look at the NBA, who is performing well within their tightly prescribed bubble of safety, sports and recreation activities can be resumed as long as we are willing to set standards, and adhere to them.

Unfortunately, our country as a whole is divided on the issue of adopting, following and/or enforcing safety guidelines, and that poses the biggest risk to returning to play — or returning to any semblance of our life pre-COVID. Whether it's due to political beliefs, naiveté, or the myth of invincibility, there will be those who will not follow appropriate measures, and who will pose a threat to the health and safety of others. Further, without unified mandates and return-to-play plans, it



Lori  
Windolf Crispo



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will be even more difficult to enforce best practices. If Georgia is full steam ahead for fall high school sports, but Florida schools have not made the decision yet, that sends a mixed message as to what the right procedure should be. The disparity from district to district or state to state is a big issue for sports associations and schools. If football is considered a full contact, high-risk sport that is prohibited under one state's phased guidelines, but in the neighboring state (which could be one town away), players are fully suited up regardless of test positivity rates, that makes it tough to enforce safety protocols to keep participants healthy.

Two ends of this spectrum are highlighted in the debate about college football. A number of conferences have opted out of the season because they say they can't guarantee the health and safety of participants and staff. Yet, star players, like Trevor Lawrence of Clemson want players to form a players' association to get back to football, by encouraging schools and conferences with the tag line "play college football." Their take is that football players (and ostensibly other serious college athletes) will be safer and healthier within the confines of team rules, will have better access to healthcare and testing on campus, and will be more motivated to follow COVID prevention guidelines than if they were off for the season, hanging out at home. If coaches truly had that power over their

players' behavior, I would agree with them. Many of those who are fighting for return to play in any sport say they'll do anything to get on the field or court — or do anything to make it possible for their kids to play. I would like to believe that “do anything” means strict adherence to safety measures.

**CVB:** Safe enough is a difficult concept, and one that makes a sports/recreation/fitness facilities lawyer like me queasy. We have seen some success stories at the professional sports level—and some not-so-successful efforts. Are there takeaways? Obviously, schools, rec leagues don't have the resources to create a “bubble”, nor is that a workable solution. My suggestion for schools and rec leagues that decide to open for sports, is to be reasonably prudent, informed of current developments and protocols and adhere to guidelines promulgated by local and national authorities. And be sure to consult with a knowledgeable insurance broker before opening for business to assess what insurance covers you—and doesn't—and that you have it in place (this is similar to the advice I would give before any season gets underway)— make sure you have done a comprehensive insurance review and get information about whether COVID-19 related claims would be covered.

***Q: How has the pandemic altered the value of having a waiver?***

**CVB:** I don't think the pandemic has impacted the value of a waiver of liability (keep in mind that the question of whether a waiver of liability, any waiver that purports to waive claims someone might otherwise have, is governed by state law). That means whether a waiver, pandemic or no pandemic, is enforceable depends on each state's laws.

I am a proponent of a clear and detailed waiver of liability that also advises of the risks of injury associated with a particular activity, so it serves a dual purpose: a waiver of liability and an express assumption of the risk. In the waivers of liability that I draft, I include (in unmistakable, BOLD and conspicuous language) that the waiver relinquishes certain legal rights once it is executed and that the signatory has read, understood, and accepted the terms of the waiver. The signatory can seek legal counsel before signing it. In my experience, this supports a waiver if it is ever subject to judicial review.

I am not an advocate of using a waiver to address potential COVID-19 liabilities, particularly at the youth sport level and the collegiate level. Why? Too many unknowns and uncertainties for someone to knowingly

assume the risk, and a pandemic-related illness is not going to be inherent risk in the sport or activity. I am interested to see how the courts will evaluate these waivers. My sense is not favorably.

**LC:** Prior to the pandemic, sports organizations were hit-or-miss with regard to signed waivers and releases of liability. If they implemented a waiver it was often because their liability insurer required it. Or if there were lawyers who were volunteer parents for the league, they might have one. And if they lived in a state that supported the viability of a waiver (particularly one that could be signed by a parent on behalf of a minor child), and the league was aware of this, they would have a waiver.

With the advent of the pandemic, suddenly everyone wants a waiver, thinking it will be a panacea to their exposure to COVID related claims. Waivers are not a cure-all, but they are an important part of a risk management toolbox to minimize liability. Since we are fighting an invisible enemy (the COVID virus), teams and leagues need to do everything they can to protect themselves from lawsuits. Despite the varying perspectives on waivers state by state (as Carla mentions), there is still value to implementing them. First and foremost, they serve as a warning notice about the possible transmission of COVID during activities and the resulting health dangers. Waivers can also require that, in consideration of being able to play, the participant must waive and release his or her right to sue the organization if they contract COVID during sponsored activities. However, even with the proper legally acceptable language, a signed waiver will not shield an organization from all claims. You cannot waive gross negligence or reckless conduct; and as mentioned, in some states, a parent cannot waive the minor child's right to sue. Therefore, a waiver should be used in concert with risk management strategies in order to best protect organizations from third party claims.

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Another way the pandemic has affected the value of a waiver, is that many states are now enacting special legislation barring lawsuits against businesses for COVID-related claims. There are currently 11 states that have passed COVID immunity laws, and there is also a lobbying effort in Congress to approve federal immunity protection. If these laws expand into more states or get federal approval, it will greatly reduce the need for a COVID-specific waiver. Even so, I do believe there is still value in deploying a signed waiver to put participants on notice about the inherent risks, even if you may not need to rely on the waiver if a lawsuit comes about.

**Q:** *Can a waiver or similar exculpatory language regarding COVID protect a facility, school or team? What about potential spectator claims?*

**LC:** The real answer here is it depends. If you have an effective waiver in place — one that is written in clear, legally accepted language — there should be some protections for organizations from liability claims. Waivers can also serve as a deterrent from lawsuits, because a plaintiff’s attorney will have to defeat or invalidate the waiver first before a suit can proceed. That alone is sometimes an effective strategy for avoiding nuisance claims. In the case of negligence, however, if the facility, school or team promised a safe environment by following certain protocols which they then failed to uphold, a waiver is not going to protect you from that lawsuit.

Spectator claims are likely going to fall outside the realm of a waiver. Parents attending their child’s game, or spectators at a school event are most likely not signing a waiver in order to attend. There may be instances where you can include a waiver on a ticket (as major league sports and ski resorts do), if you charge admission. For the most part, however, unless there is a lot of extra manpower available to handle the collection, oversight and archiving of waivers, organizations are not likely to ask spectators to sign waivers. As a result, while spectator claims may still go through, it will be much harder to prove causation if a spectator contracts COVID, and it will be difficult to prove that a duty of care was owed to spectators by the team, facility or school.

**CVB:** I don’t think so, though the question of spectator claims is an interesting one. A waiver won’t excuse a lapse in maintenance/disinfecting procedures, over crowding, for example. I think questions about proving where/how a person was exposed to CO-

VID-19 are going to be particularly challenging — not sure how many of those we will see because the causation proof can be so daunting.

**Q:** *What needs to be in a fan waiver to help reduce a team or facility’s insurance costs?*

**CVB:** Here are my essential ingredients. Assuming the jurisdiction permits/enforces a waiver, my essential ingredients are clear and unmistakable language (no legalese!) about what legal rights that the signatory might otherwise have are being relinquished, and that the signatory understands and accepts this agreement.

I put this language in a prominent place and use font size/bolding to ensure it is conspicuous.

I add certain assumption of the risk language and include a statement of the types of injuries that can be incurred, with a statement that is not exhaustive and that the signatory, or his/her doctor, should determine if the activity is appropriate for him or her. If this seems like overkill, I can only tell you that I have seen this sort of language be pivotal to a judge or a jury. I include it.

And I include personal onus on the signatory. If they have questions, to communicate with the organization about those questions or concerns, or to seek legal advice, since they are signing a legal document. I think that is important and I have seen a judge look at these nuggets of information/evidence as favorable.

**LC:** Carla addressed the elements of an effective waiver. I will simply say this from an insurance perspective: It is highly unlikely that anyone’s insurance costs will be reduced on the basis of implementing a waiver. Whether it is a standard waiver and release, or a COVID-specific waiver, having one in place is more likely to be a risk management requirement from your liability insurer, than a premium-reducing tactic, like a good driver credit.

**Q:** *At what point is catching COVID covered under the assumption of risk doctrine?*

**LC:** When people think of assuming the risks of sports participation, they think of injuries, not necessarily of contracting an illness. Even in cases where wrestlers, for example, have contracted MRSA from contact with wrestlers or mats, the illness could be deemed to be inherent to the sport of wrestling (unlike golf, where you would never think of MRSA as a risk to golfers). With COVID, the risks of transmission are in every activity, not just sports. Therefore, I believe it would be difficult to apply the assumption of risk doctrine as a defense for contracting COVID.

**CVB:** *I don't think it is.*

**Q:** *What suggestions do you have for facilities who want to be proactive about resuming operations, yet careful about contributing to the spread of COVID-19?*

**CVB:** Keep informed, coordinate with local health authorities, be knowledgeable about guidelines and industry-specific protocols. And be able to demonstrate that you have done so. If inquiries, complaints come to you, remember the three R's: record, react, review. Be able to demonstrate that you have been proactive (a good step to meet the "reasonably prudent" standard under liability law).

**LC:** The only weapons we have right now against COVID are social distancing, wearing of masks whenever possible, minimizing the size of groups (whether outdoors or indoors), and prohibiting travel between different geographic areas unless test positivity rates are equally low in all areas involved (below five percent, or preferably even less). We need for all sports organizations and schools to adhere to these rules in order to flatten the curve, so that sports of all types can have a future. This is truly a balancing act. We have seen success from countries who have adhered to strict guidelines, or groups, like the NBA, who have excelled (thus far) by enforcing strict protocols. This is not the time to over-promise and under-deliver (or be overzealous and pay the price). There are many well-crafted return to play documents put out by national sports organizations that should be used for guidance on this, in conjunction with state and local guidelines governing sports and permissible gathering sizes. Strictly following these best practices — and being willing to take a step backward when positivity rates begin to climb — is the most important thing we can all do to give sports organizations a chance for the future.

**Q:** *How have your respective businesses changed in light of how you advise clients with respect to COVID-19?*

**LC:** One of the most depressing aspects of working through the pandemic is having to give our insureds answers that they don't want to hear. I do not want to tell them that they are not covered for COVID-related claims. Whether it's an event cancellation claim, a business interruption claim, or a liability claim, most policies exclude claims arising from pandemic or epidemic conditions, or they may have a virus/bacteria exclusion. Or in the case of business interruption, the government shutdown of their business does not meet the eligible definition of cause of loss. It is difficult to deliver this bad news to folks whose finances depend on revenues that have been negatively impacted by COVID. In addition, the world of amateur sports has been devastated by the virus, as have so many other businesses. Without games, practices or tournaments, the organizations are losing revenues and the membership dollars that keep them in business. Further, as we all know, implementing the necessary safety protocols costs money, exacerbating the strain on already depleted budgets. It is very hard to witness the turmoil and the fallout from the pandemic among people and organizations I have worked with for many years.

**CVB:** Most of my clients are in the sports, recreation and fitness industries. They have been battered by the pandemic and one of the many financial, emotional, managerial challenges they have faced is how to address the dangers posed by the pandemic, while pivoting to a business model that works — if they can. We all have to stay informed and engaged, even when it is tempting to downplay it or to go negative and dismiss it. Like any other challenge, it's best met head-on.