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SPORTS FACILITIES

How the law affects the sports facilities industry and the LAW

Court Tells Jets' PSL Holder to Sit Down

By Stephanie Scamman & Jeff Birren

NFL fans can be wildly enthusiastic about their teams, and the lawyers who represent those fans can be equally keen on filing class action lawsuits against those same teams. So it was recently for the New York Jets. The team was sued by James T. Gengo, one of their Personal Seat License ("PSLs") holders. In January 2018 the Jets changed their ticket sales policy and began selling season tickets in sections that did not also require the purchase of a PSL. Gengo objected to this change.

Gengo responded by suing the Jets in U. S. Court in New Jersey. He alleged that this policy violated the covenant of good faith and fair dealing, the New Jersey Consumer Fraud Act ("CFA") and a violation of the New Jersey Truth-In-Consumer Contract, Warranty and Notice Act. It should go without saying that it was filed as a class action case. That case went nowhere, fast, as the District Court granted the motion to dismiss in August 2018 (*James T. Gengo v. Jets Stadium Development, LLC & the New York Jets LLC*, United States District Court, District of New Jersey, Civil Case No. 18-8011 (SRC), 8-30-18 ("*Gengo v. New York Jets*")). Even prior to that defeat Gengo had withdrawn his last claim (*Id.* at 6, fn 2). With attorney's fees on the line, Gengo appealed to the Third Circuit. That court yawned.

On August 29, 2019 the Circuit issued its opinion. It affirmed in a "NOT PRECEDENTIAL" opinion that needed only three pages (James T. Gengo v. Jets Stadium Development LLC, New York Jets LLC, United States Court of Appeals of the Third Circuit, Case. No. 18-3103,

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Going to the Dogs: Keeping Your Liability on a Leash

Why You May Have to Accommodate Service Dogs at Your Sporting Events

By Carla Varriale, of Havkins, Rosenfeld, Ritzert & Varriale

People with disabilities have the right to use (and do use) the same facilities and services as individuals without disabilities. That premise is not a confusing one. However the questions of what types of facilities are considered "places of public accommodation" pursuant to the anti-discrimination laws and the types of reasonable accommodations that are required by federal, state and local laws often prove confusing to premises owners. The overarching objective of the anti-discrimination laws is to permit people with disabilities to fully participate in everyday life and that includes the right to equal use and enjoyment in housing, transportation, and goods and services offered at places pf public accommodation. The focus of this article is on a topic that inspires confusion to premises owners and operators in lights of these laws: the requirement that "places of public accommodation" must allow "service animals" on the premises in order to assist disabled patrons with particular tasks that are related to his or her disability. It is against the law to discriminate against a person who is availing themselves (or trying to) of a place of public accommodation because that person is accompanied by a guide dog, hearing dog, or service animal (and a "service animal", to make matters more confusing, is defined depending on the Federal, State, City or local law(s) that are applied).

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Finding for Sports Facility in Negligence Case Reversed

A New York state appellate division court has reversed a lower court, finding that the Bronx County judge was too quick to conclude that a basketball player, who suffered an injury at a sports facility and sued, assumed the risk of that injury when he decided to play basketball.

Plaintiff Nigel Samuels alleged he was injured while playing basketball when he slipped on an accumulation of dust, and fell.

Defendant Town Sports International successfully moved for summary judgment, arguing for an affirmative defense of primary assumption of the risk.

The doctrine limits the scope of the defendant's duty of care (*Morgan v State of New York*, 90 NY2d 471, 483-484, 685 N.E.2d 202, 662 N.Y.S.2d 421 [1997]). It relieves an owner or operator of a sporting venue from liability for those risks inherent in the sport that the plaintiff was participating in where the plaintiff was aware of the risks; had an appreciation of the nature of the risks; and voluntarily assumed the risks (Morgan, 90 NY2d at 484).

The underlying policy of the doctrine is "to facilitate free and vigorous participation in athletic activities" (*Cotty v Town of Southampton*, 64 AD3d 251, 254, 880 N.Y.S.2d 656 [2d Dept 2009]), "not to exculpate a landowner from liability for ordinary negligence in maintaining its premises (*Sykes v County of Erie*, 94 NY2d 912, 913, 728 N.E.2d 973, 707 N.Y.S.2d 374 [2000])," according to the appeals court.

The appellate division court conceded that "an owner may not be held liable if the injury results from certain conditions inherent in a participant's outdoor game of basketball" (id. [irregular surfaces]; see also *Felton v City of New York*, 106 AD3d 488, 965 N.Y.S.2d 414 [1st Dept 2013] [cracked, repaired and uneven outdoor court]).

However, "the same is true if a condition on an indoor basketball court is otherwise open and obvious (see *Egbebemwen A. v New York City Dept. of Educ.,* 148 AD3d 440, 441, 48 N.Y.S.3d 404 [1st Dept 2017] [wrestling mat on indoor gym floor]; *Ciocchi v Mercy Coll.*, 289 AD2d 362, 735 N.Y.S.2d 144 [2d Dept 2001] [the plaintiff collided with badminton pole stored in the corner of the gym]).

"Here, defendant failed to establish that accumulated dust on an indoor basketball court is inherent in the sport of basketball. Nor did defendant establish that the alleged condition was an open and obvious one (Morgan, 90 NY2d at 488 [tennis player tripped on torn net on indoor tennis court; not a risk inherent in the sport of tennis so as to relieve premises owner of liability, as a matter of law])."

SPORTS FACILITIES and the LAW

Former Orioles Minor Leaguer Sues Team and Stadium Owner

By William J. Robers, of Sparks Willson, P.C.

Former Baltimore Orioles draftee and Delmarva Shorebirds shortstop Jared Breen has sued the owner of the Shorebirds, 7th Inning Stretch, LP ("7th Inning Stretch") and Wicomico County, Maryland (owner of the Arthur W. Perdue Stadium, home of the Shorebirds) (the "County"), in the U.S. District Court for the District of Maryland for injuries he suffered in a 2015 game.

According to the complaint, during the first inning of a game on July 3, 2015, Breen was tracking a fly ball toward left field when he crashed into a concrete wall, which separated the spectators from the field. It is undisputed that the wall did not have any protective padding. As a result of the collision with the wall, Breen claims that he suffered a fractured right patella, a broken orbital, a concussion, a fractured nose, a punctured sinus, and trauma to his back.

Breen was released by the Orioles on November 19, 2015. He continued to recover from his injuries at his home in Atlanta. His dream of playing in the major leagues is over. He alleges that he has still not recovered entirely from the injuries and the collision has left him permanently, partially disabled.

The lawsuit claims that the "height, material, location, construction, design, and maintenance of the wall created a defective and dangerous condition for baseball players . . ." Breen asserts that the County owed him a non-delegable duty of care to provide and maintain safe premises. He alleges that the County breached its duty by not remedying or warning him of the dangerous condition.

In his claims against 7th Inning Stretch, Breen claims that the company owed him a duty of care to exercise reasonable care in maintaining the stadium in a safe condition. He alleges that 7th Inning Stretch breached such duty by failing to maintain the wall in a safe condition or adequately warn of the dangerous condition.

7th Inning Stretch has answered the suit by admitting that the concrete wall was not padded at the time of the incident (although both sides now admit that padding has been added to the wall after the incident, as a remedial measure). 7th Inning Stretch has also asserted various affirmative defenses, including without limitation, contributory negligence, assumption of risk, laches and waiver. 7th Inning Stretch claims that Breen "was at all times aware of the location of the wall in the stadium and the condition of the wall."

The County filed a motion to dismiss, which was granted in part on August 6, 2019. The County argued that, under the Maryland Local Government Torts Claims Act (the "LGTCA"), Breen was required to notify the County within 180 days after the injury. Breen claims to have sent notice of his claim to the County via certified mail on February 24, 2016 (admittedly 54 days after the LGTCA deadline). But an affidavit from the risk manager for the County states that the County never received notice of a claim. Maryland District Court Judge Deborah K. Chasanow ruled that Breen failed to comply with the LGTCA notice requirement, thus granting the County's motion to dismiss. Judge Chasanow ordered an evidentiary hearing, however, to determine whether Breen demonstrated good cause for waiving the notice requirement, and whether the case against the County may continue.

The result in this case may provide further jurisprudence for premises liability litigation and the role of waivers and the assumption of risk with respect to participant injuries.

Introducing John E. Tyrrell

John E. Tyrrell is one of the founding Members of *Ricci Tyrrell Johnson & Grey* and is the firm's Managing Member.

Mr. Tyrrell's practice is focused on three major areas. First, he has decades of experience in the representation of operators and managers of stadiums, *arenas and recreational facilities*, including professional and collegiate sports teams, golf courses, ice rinks, gymnastics facilities, rowing associations and paintball facilities. Mr. Tyrrell is trial counsel to such entities, and also provides risk management and liability prevention consultation to these clients. He has developed a particular expertise in prosecuting and defending contractual indemnity and insurance claims, both at trial and through declaratory judgment proceedings. Mr. Tyrrell has consistently lectured at training sessions for the supervisory staff of a stadium operator. He has also authored information guides, ticket and pass disclaimers, prospective releases, patron signage and other communication devices used at facilities. Mr. Tyrrell received the Finance Monthly Magazine 2016 Global Award for Sport Lawyer of the Year.

John E. Tyrrell

Mr. Tyrrell also represents his clients in *commercial litigation* disputes. He has handled cases involving vendor, dealer and franchise agreements, restrictive covenants and other forms of breach of contract claims. Mr. Tyrrell successfully represented the operator of a multi-use stadium in a claim against the provider of a beverage line system resulting in the replacement and remediation of the entire system. He has secured defense verdicts in trials involving alleged commercial damages in the tens of millions of dollars.

Mr. Tyrrell can be reached at 215-320-2090, or email at jtyrrell@rtjglaw.com

Venue Liability 101: The Duty Owed to Guests And Patrons

By Shawn Green, of Havkins Rosenfeld, Ritzer & Varriale

Energetic fans attend games at sports stadiums, and music venues encounter enthusiastic guests hoping to sing and dance. When thousands of people enter a venue to attend an event, it is a significant task to oversee crowds in an attempt to create a safe environment that avoids accidents and injuries. While it may be impossible to avoid all accidents, anticipating the behavior of guests and patrons may help minimize or avoid liability.

In *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868 (1976), New York's Court of Appeals abolished any distinctions between trespassers, licensees, and invitees. It held that New York landowners and occupiers owe a duty of reasonable care to maintain a property in a safe condition, under all of the circumstances. Subsequently, in *Burgos v. Aqueduct Realty Corp.,* 92 N.Y.2d 544, 706 N.E.2d 1163 (1998), the state's highest court clarified the duty owed for injuries arising out of the criminal acts of third parties. Although owners or occupants may have a common law duty to minimize foreseeable dangers on their property, liability may only be imposed where negligent conduct in failing to minimize foreseeable dangers is a proximate cause of the injury.

The standard venue operator or event organizer must meet in order to comply with its duty to minimize foreseeable dangers, however, is not uniform to all events; it will be based on the foreseeable dangers of the event in question. There are a multitude of factors that may be relevant in the analysis of the duty owed, including the type of event, the anticipated crowd size, the crowd capacity, the available of alcohol, the age range of the patrons, and prior criminal acts in the area or at prior similar events, among others. Therefore, those charged with operating a particular event must be prepared for the particular risks associated with the event, and take reasonable measures to address those risks. It is key to be aware of the type of occurrences that are likely to occur and provide security or other protection that is adequate under the circumstances.

As an example, in *Maheshwari v. City of New York*, 307 A.D.2d 797, 763 N.Y.S. 2d 287 (2004), New York's Court of Appeals addressed issues of foreseeability and proximate cause in the context of a venue operator's duty to provide adequate security at the 1996 installment of the annual Lollapalooza festival, which was held on Randall's Island. A violent assault occurred in one of the surrounding parking areas and the injured guest sued various defendants, including the venue owner or organizer. The court held that the defendants were not liable for the assault because reason-

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able security measures and that the assault on the plaintiff was not foreseeable result of an alleged security breach, under the circumstances. It specifically pointed to a lack of prior similar incidents at prior installments of the event. This decision is instructive on a venue owner's duty of care owed to guests. It re-enforces the idea that venue owners are NOT the insurers of a visitor's safety.

In *Rotz v. City of New York*, 143 A.D.2d 301, 532 N.Y.S.2d 245 (1st Dep't 1988), however, the Appellate Division, First Department analyzed the dangers that should have been reasonably anticipated at a free Diana Ross concert at Manhattan's Central Park in 1983. The plaintiff was standing in a crowd where patrons were "jammed in like sardines" when a commotion erupted and he was injured in a subsequent stampede. The contract with the event organizer specifically mentioned the possibility of "civil commotion" and "riots." The court noted that the event owner and operator was obligated "to provide an adequate degree of general supervision of the crowd invited by exercising reasonable care against foreseeable dangers under the circumstances prevailing." In applying this standard, it held that there were questions of fact as to whether adequate crowd control measures had been in place. The court specifically highlighted the contract language as evidence of advance knowledge of the defendants as to the particular risks to be anticipated at the event.

In *Vetrone v. Ha Di Corp.,* 22 A.D.3d 835, 803 N.Y.S.2d 156, (2nd Dep't 2005), the injured plaintiff had been hired by a restaurant owner and party organizer to provide security at a New Year's Eve party and to deny entry to ticket holders once the restaurant reached capacity. The owner and organizer sold tickets to more people than the restaurant could hold, and also admitted non-ticket holders. A ticket holder who was denied entry by the plaintiff after capacity was reached became violent and assaulted the plaintiff. In analyzing a trial court's decision to grant summary judgment to the restaurant owner, the Appellate Division, Second Department reversed largely based on a foreseeability analysis. The court determined that it was foreseeable that ticket holders who were refused entry might become unruly and violent. It held that the plaintiff "reasonably had the right to expect that [the defendants] … would not so overbook the event as to require him, acting virtually alone, to face a large crowd of angry ticketholders who paid to attend the party, but were unexpectedly and rudely denied entry and told to go home."

Together, these three decisions illustrate the manner in which a venue owner or

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("*Gengo*"). The courts can now focus on disputes that matter.

The Facts

For decades the New York Giants and New York Jets played at the first Meadowlands Stadium, which was later deemed obsolete by the then-current NFL standards. So the teams set out to build a new stadium better designed to capture revenue streams that did not exist when the older stadium was built. Consequently, the Jets and Giants jointly developed the new stadium in the Meadowlands that opened in 2010. The clubs also created the New Meadowlands Stadium Company, LLC to own and operate the stadium (*Gengo v. New York Jets* at 2). The Jets Stadium Development Company owns and operates the Jets' interest in the stadium (*Id.*).

One of those newer revenue streams was PSLs. In 2010 the Jets announced that in order to purchase season tickets in the 200 level section of the stadium, fans had to purchase PSLs that in turn "provides fans with the guaranteed right to purchase season tickets for specific seats in exchange for a fee, which was $4,0000 per seat in 2010" (*Id.*). Gengo purchased two end-zone season tickets in the 200-level (*Id.*).

The PSL Agreement includes a two-page seat confirmation and a three-page contract. The District Court spent two pages discussing various terms included in the contract (*Id.* at 3-4). Most importantly for the subsequent lawsuit, the District Court noted that the PSL "Agreement does not refer to Plaintiff receiving any 'exclusive rights,' nor does it refer to limitations, covenants, or representations about the manner in which Defendants may sell season tickets for other seats in the Stadium" (Id. at 3).

The Agreement also includes an integration clause and the website's "FAQ" section states that materials found there "is for informational purposes only" and that the actual terms and conditions for each PSL purchased "shall be set forth in the Personal Seat License Agreement…that each purchaser must read and accept to obtain a PSL" (*Id.* at 4).

In 2018 the Jets announced that PSLs would no longer be required in order to purchase season tickets in the 200-level of the stadium (*Id.* at 2). One assumes that attendance had fallen off after two-straight 5-11 seasons.

In his lawsuit, Gengo "alleges that he purchased the PSL 'based on Defendants' representations, express and/or implied, that doing so would give [him] an exclusive right, namely, the purchase season tickets for the 200-level seats'" (Id. at 6). The Jets'

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decision to sell such seats without the PSL requirement ""rendered the PSLs entirely or substantially worthless" (*Id.*). This act further violated the "PSL Agreement's implied covenant of good faith and fair dealing and was a violation of the New Jersey Consumer Fraud Act" (*Id.*).

The Jets' Motion To Dismiss

In response to Gengo's complaint, the Jets filed a motion to dismiss, pursuant to Federal Civil Procedure Rule 12(b)(6), asserting Gengo's complaint lacked subject matter jurisdiction because he failed to state a claim upon which relief can be granted (*Id.* at 1). In Federal Court, Gengo's allegations cannot be merely "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" (*Id.* at 5). The "mere possibility of misconduct" on its face is not sufficient to make a claim for relief (*Id.*).

Unfortunately for Gengo, the District Court agreed. In its ruling, the Court undermined Gengo's position by describing him as someone who did not expect to "lose money in the future resale market of the PSL" (*Id.* at 11). The Court noted that the "Agreement does not refer to Plaintiff receiving any 'exclusive rights,' nor does it refer to limitations, covenants, or representations about the manner in which Defendants may sell season tickets for other seats in the Stadium" (*Id.* at 3).

The Court further noted that the PSL Agreement "features numerous disclaimers regarding the future value and sale of the PSL" (*Id.*). These disclaimers specifically included statements that "Licensee is not acquiring this PSL as an investment and has no expectation of profit as the licensee of this PSL" and, "Licensee is acquiring this PSL for its own use and not with a view to the distribution or resale of this PSL, or any tickets acquired pursuant to this PSL" (*Id.*). It also included the statement that the licensee "acknowledges" that the Jets had "not represented and does not guarantee that there is or will ever be a market for the resale of this PSL" (*Id.*).

The Court stated that the Agreement "clearly defines its scope: in exchange for paying the licensing fee, the PSL grants Plaintiff the 'right and obligation to purchase admission tickets for the Seats of all pre-season and regular season home games of the Jets scheduled to be played at the Stadium'" (*Id.* at 9). In that regard, Gengo "received the "reasonably expected fruits under the contract" (*Id.*).

The Court was convinced that the Jets' "interpretation accords with the clear provisions of the PSL, whereas Plaintiff seeks judicial disregard of the unambiguous contractual language" (*Id.* at 11). The agreement's implied covenant of good faith is not broken "because enforcement of the contract" caused Gengo financial hardship (*Id.*).

The Court found that Gengo "has failed to plead a valid claim under the CFA for three separate and independent reasons" (*Id.* at 12). First, Gengo provided no factual allegations in support of his assertion that the Jets misrepresented the terms, and that those terms induced him to purchase the PSLs (*Id.* at 13). "Without any particularized factual allegations suggesting that [Defendant] intended to deceive consumers," the Jets' alleged misrepresentation, "does not 'stand outside the norm of reasonable business practices' or victimize the average consumer' in any way" (*Id.*).

Second, the Jets have not violated the "clear and unambiguous terms" of the contract (*Id.*). The Jets' "ticket sales policy in other sections of the stadium does not impair, impede, or in any way implicate—in past, present, or future NFL seasons—the license [Gengo] holds for his two seats" (*Id.*). Thus, the Jets cannot be liable for breach of contract.

Finally, the timing of the Jets' PSL policy change for season ticket seats eludes any essence of misconduct because it does not satisfy an unlawful practice under the

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Introducing Matthew A. Nanninga

Matt Nanninga focuses his practice on general liability tort defense. He has advised clients ranging from large corporations to small business owners on claims handling, loss mitigation, and general defense strategy. He has served as lead counsel for his clients in both state and federal courts throughout Georgia. Matt has experience handling cases in numerous industries, including major indoor/outdoor sports arenas and racetracks, amusement facilities, hotel and hospitality entities, restaurants and nightclubs in the food and beverage industry, national restaurant franchises, gas stations and convenience stores, as well as apartment communities facing high exposure negligent security claims. Matt also represents clients in the trucking and transportation industry.

Prior to entering law school, Matt played professional baseball in the Cincinnati Reds organization and played one season for a baseball club in Antwerp, Belgium. He has received an AV Preeminent Rating from Martindale Hubbell for his high ethical standards and professionalism.

Matt can be reached at 404-885-6221, or nanningam@deflaw.com

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CFA. "To constitute a CFA violation, the misrepresentation must be made at the time of or prior to formation of the contract to induce the creation of the contract" (*Id.* at 14). This policy change occurred after Gengo and the Jets signed their agreement, thus, Gengo continues to fail at proving the Jets violated the CFA (*Id.*). Based on Gengo's inability to plead "a valid claim for relief for either breach of the implied covenant of good faith and fair dealing or for violation of the [CFA]," the District Court granted the Jets' motion to dismiss (*Id.* at 7).

Gengo Appeals

Gengo appealed the District Court's dismissal order, but the Third Circuit Court was just as unforgiving. The case was argued to the Circuit on April 2, 2019 and the Circuit issued its decision on August 29, 2019. The opinion is barely over three pages of text and at the top it is labeled: "NOT PRECEDENTIAL."

The Circuit stated that for Gengo to successfully argue the Jets' actions breached the implied covenant of good faith and fair dealing of the PSL agreement, he had to provide evidence that the Jets' denied Gengo "the benefit of the bargain originally intended by the parties" (*Gengo* at 3). However, Gengo failed to provide any evidence that the Jets denied him at any point his right to buy the tickets for seats 3 and 4 in Section 245a Row 5 of the Mezzanine Endzone A area (*Id.*). The fact the Jets are now selling "adjacent seats to members of the general public does not implicate Gengo's rights and certainly does not strip him of the benefit for which he bargained" (*Id.* at 3).

Gengo further argued that opening these seats to the general public made his PSLs "valueless" and "unsellable", ultimately putting him out $8,000.00" ($4,000.00 per PSL) (*Id.*). The Third Circuit Court pointedly deflated this argument because again it is not Gengo's contracted seats that are for sale to the general public; his claim "at most smacks of a bad deal, not bad faith" (*Id.*).

To prove the Jets' acts violated the CFA, Gengo had to prove the Jets' conduct was unlawful, and that the unlawful conduct caused him ascertainable loss (*Gengo v. New York Jets* at 11). Unlawful conduct "regardless of the type of unlawful practice alleged, [must have the] capacity to mislead [as] the prime ingredient" (*Gengo* at 4). Gengo argued the Jets' omission of exclusivity and ticket policies misled him to believe all other seats in his section would be sold using PSLs (*Id.*). While at the time this was likely, "simply changing the terms on which [the Jets] sell other seats" is not misleading (*Id.*). Gengo's signed PSL agreement stated in clear language that the purpose or "prime ingredient" for the agreement was to give Gengo "the right to purchase season tickets for his selected seats" (*Id.*). Gengo could not prove ascertainable loss because he received exactly what he was promised: access to season tickets for his 200 level seats (*Id.* at 5). "By the plain language of the agreement, he has received, and continues to receive, what he was promised" (*Id.*).

Conclusion

PSL's represent a lucrative treasure trove for team owners in constructing new stadiums or arenas. It works best when either the entire facility sells out using PSLs or when designated PSL sections sell out. However, the cost often creates conflicts with long-standing season ticket holders, many of who cannot afford the PSL price on top of the season ticket price. It also leads to bitter friction when fans such as Gengo, who purchased PSLs and season tickets, discover that fans seated near them or even right next to them did so without having to purchase the PSL. In such circumstances, the enmity that follows can lead to disenchantment, surrendering of seats, or litigation as happened here.

Yet as Gengo and his counsel discovered, that litigation may lead nowhere. It is telling that Gengo did not sue for breach of contract. That makes sense because the actual language of his PSL agreement did not support his claims. As the court pointed out, Gengo got what he paid for. Potential PSL holders everyone should take note of the decision and read potential PSL contracts and related materials carefully before signing their name to such an agreement.

Moreover, that his PSLs are now no longer "unsellable" is not a theory that would endear him to the federal bench. As the court pointed out, the PSL contract did "not represent and [did] not guarantee that there is or ever will be a market for the resale of this PSL." Instead, Gengo agreed that he was acquiring the license "solely for the right to purchase tickets" for his selected seats" (*Id.* at 4).

Gengo now knows that he is bound by the actual terms of his contract, and not by what he hoped the transaction might lead to one day. Yet that knowledge comes at a price, as Gengo will now be liable for the Jets' litigation costs, though the Jets may have lost a fan.

Stephanie Scamman was a two-sport collegiate athlete at Occidental College, where she received her B.A. in Economics, and is currently working full-time as Director of Research for a small finance company while attending Southwestern Law School as a second-year evening student.

Birren is the former general counsel of the Oakland Raiders and is an adjunct professor of law at Southwestern. He is a Senior Writer for Hackney Publications.

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What is a Place of "Public Accommodation"

Places of public accommodation are broadly defined (and include a private entity that owns, leases or operates a place of public accommodation). In New York, an owner, lessor, lessee or operator of a "place of public accommodation" is subject to Federal (the Americans with Disabilities Act, or "the ADA"), State (the New York State Human Rights Law) and City (the New York City Human Rights Law found in the New York City Admin. Code Sections 8-102(4) and (18) and 8-107.4 and 8-107.155) laws. There are also local laws in Westchester and Nassau counties, for example, that should be consulted as applicable in order to assess what laws apply to the premises in question. Generally speaking, the term "public accommodation" encompasses pools, restaurants, gyms, hotels, school, theaters, stores, and sports facilities. In short, the statutes cover most commercial premises where the public is a business invitee.

Not All Animals are Equal: "Service" Versus "Support" or "Therapy"

As an initial matter, not all animals are equal under the laws.[1] The types of animals that are encompassed within the law can vary depending on whether federal, state or local law is applied, particularly if within New York City (which views the federal and state laws as a "floor" and not "ceiling" for protection and typically offers greater protection to people with disabilities). The location of the premises and the accommodation sought is an important factor. There is an important distinction between a "service animal" versus an "emotional support" or a "comfort" animal.[2] A service animal, simply put, is a working animal that has been trained to do work or to perform tasks for an individual with a disability and the tasks must be directly related to the individual's disability. There is no requirement that the animal wear a particular collar or vest (in fact, that is not dispositive of anything, other than the owner›s ability to purchase such a collar or leash.)[3] There is no certificate

1 The ADA for example, contemplates dogs and even miniature horses as service animals.

2 As noted above, places of public accommodation within New York City should be mindful that the City Human Rights Law does not define or provide limitations concerning service animals. Rather, it puts the burden on the entity seeking to exclude the service animal to prove that the person using one could not benefit from its use, or that the animal would meet the City of New York Human Right Laws high "undue hardship test. See NYC Admin. Code Section 8-102 (18).

3 New York's Governor has signed a bill into law to punish people who "knowingly affix to

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or paperwork that is required to identify the animal as a service animal (and, as discussed below, the owner or operator of the premises cannot request the same be produced before permitting the animal on the premises). Service animals are animals that have been trained to assist with a specific disability.[4] Animals that a person finds comforting or use for companionship are not "service" animals and there is no legal requirement to accommodate a "comfort" or emotional support" animal in a place of public accommodation. Rather, the question of permitting a therapy animal to the premises may present a customer service and management issue and a judgment call on the part of the establishment, but federal. State, and local laws on the subject should be consulted in order to avoid a complaint.

Some federal courts have ruled that dogs that calm their companions during Post Traumatic Stress Disorder ("PTSD") episodes are not service animals. *Riley v. Bd. Of Comm'rs*, 2017 US Dist. LEXIS 153737 at 17 (N.D. Indiana 2017) (citing 28 C.F.R. 104); *Lerma v. California Exposition and State Fair Police,* 2:12-cv-1363, 2014 U.S. Dist. LEXIS 285 (E.D. Cal. 2014); *Rose v. Springfield-Green Cnty. Health Dep't*, 668 F. Supp.2d 1206 (W.D. Mo. 2009) (internal citations omitted). In fact, the *Riley* Court went even further and found that, despite plaintiff claiming to suffer from seizures, loss of balance, and mobility issues, because there is nothing to support a finding of a relationship between those issues and plaintiff's purported PTSD, the dog's purported ability to assist in these issues did not qualify it as a service animal under the ADA. *Riley,* at 16-17. Specifically, the ADA makes a clear distinction between "service animal" and "emotional support animals." Service animals are trained to help their companions with specific jobs, and are covered under the ADA. Emotional support dogs, on the other hand, are not covered under the ADA. *Revised ADA Regulations Implementing Title II and Title III (2010)*. To be a service dog, the animal must take a specific action to help with panic/anxiety attacks. If the dog's mere presence provides comfort, it is not considered a service animal under the ADA. *Id.* Therefore, depending on which law applies, a trained service animal is accorded different treat-

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any dog any false or improper tag identifying the dog as a guide, service, therapy or hearing dog." *See* https://legislation.nysenate.gov/pdf/bills/2017/S6565. New York joined states such as New Jersey, New Mexico, Virginia and Maine to punish and deter abuse.

4 To further complicate matters, the disability may not be readily apparent and the types of disability contemplated under the law can be intellectual or psychiatric and, therefore, may not be readily apparent to the owner or operator of a place of public accommodation.

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ment that a "comfort" or support animals.

Two Permissible Questions

There are two permissible avenues of inquiry that do not run afoul of the discrimination laws for the owner or operator of a place of public accommodation to rely upon. They are: 1) whether the animal is required because of a disability[5] and 2) what work is the animal trained to perform. Service animals are trained to assist with an array of functions, including assisting with navigation, stability, or balance, carrying and retrieving items, seizure assistance, and alerting their owner to sounds or allergens, according to New York's Attorney General's recent brochure. In other words, the service animal's "work" does not have to be related to mobility issues. *See also Revised ADA Regulations Implementing Title II and Title III (2010)*. No other questions are permitted, including questions regarding the nature of the patron's alleged disability, the animal's certification or lack thereof, or a request that the animal demonstrate its training. Even dogs trained at home to perform certain tasks have been held to be service animals. *See, Vaughn v. Rent-A-Center, Inc.,* 2009 US Dist. LEXIS 20747 (S.D. Ohio, 2009).

Keeping Liability on a Leash: Some Practical Suggestions

Simply put, the best way to "keep your liability on a leash" is to know what is required of you (keeping in mind that the federal law provides a baseline and that New York State and New York City and local laws can, and often do, provide even greater protection to the disabled patron seeking an accommodation). There is no substitute for education and legal advice.[6] There are also

numerous websites, including government websites, that offer a wealth of information and guidance so that you do not run afoul of legal requirements.

Also, educate your employees about what is expected of them with respect to service (and other) animals. Compliance Training is also available at a fee but can assist in both avoiding and defending a potential action. Educate your customers or patrons as well-many places of public accommodation post the law or a policy and what it entails and this includes on websites and appropriate signage.[7]

A good rule of thumb to keep in mind is that, generally, service animals are allowed where the public is allowed. You are required to permit such an animal on the premises of a place of public accommodation, even if there is a "No Pets " policy because service animals are not considered pets. The service animals' entry on the premises cannot be conditioned upon charging a fee. There is no requirement that the service animal receive its own "accommodation" at the premises, such as food or water, or toileting facilities, and it does not need to be permitted to remain on the premises if it is a danger and poses a threat to health or safety of other patrons. A muzzle is not required, however, under New York law, a service dog must be "controlled" on a leash or in a harness. *See NY Civil Rights Law 47-b(4).* The control of the service animal is the responsibility of its owner, not (the premises) owner or manager.

A discrimination complaint is a legal and a customer service issue, and it can carry significant fines and liabilities, especially if a pattern if or practice of discrimination is found. The ADA, and the State and City Human Rights Law, and applicable local laws provide remedies, and depending on the applicable law, injunctive relief, compensatory and punitive damages, and an award of attorney's fees to the complaint are within the array of potential remedies available to a person who has been discriminated against. It's a liability issue for premises owners and operators that should be muzzled through education and careful consideration of the legal requirements.

5 This is not to be confused with asking the patron seeking an accommodation to describe or confirm his or her purported disability. This line of inquiry is not permitted.

6 *See* http://www.ada.gov for ADA compliance information and informal guidance about its regulations. The New York State Attorney General also provides guidance on her website. *See* https://ag.ny.gov/sites/default/files/service_animals_brochure for resources and information.

7 For example, some sports and entertainment venues post the service dog policy on the website and at the premises and invites patrons to communicate with guest services personnel regarding accommodations needed before they visit the facility.

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Havkins Rosenfeld Ritzert & Varriale, LLP
www.hrrvlaw.com
Carla Varriale
Carla.Varriale@hrrvlaw.com

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Alan Goldberger
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www.motorsportservicesinternational.com
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Mets Fan Sues Team After Getting Hit in the Head by a T-shirt Fired from a T-shirt Cannon

A New York Mets fan has named the team in a lawsuit, after he was struck in the head by a bundled T-shirt fired from a T-shirt cannon on the field, which caused him to temporarily lose consciousness and suffer a detached retina.

Plaintiff Alex Swanson was attending June 5, 2019 home game against the San Francisco Giants when the incident occurred. "My client was enjoying what he thought was a perfect day with his three sons and ended up suffering a severe injury that will likely affect the rest of his life," said his attorney, Dustin Levine of Ancona & Levine in Mineola, who filed the negligence claim in Queens County Supreme Court.

The game that day was a blowout with the Mets up 6-0 in the sixth inning. It was at that point that Mets employees walked on to the field with the T-shirt cannon, a fan favorite. Swanson made his way down closer to the field in hopes of getting a T-shirt, according to the complaint.

But the employee holding the gun was having trouble readying the cannon to disperse the T-shirts. At one point, he allegedly lowered the muzzle to deal with the issue. The cannon discharged, striking Swanson in the face.

The plaintiff awoke to his sons and Mets support staff surrounding him. While he went to the nurses' station, he reportedly refused to go to the hospital because he could still see. However, a CAT scan the next day showed that he suffered a concussion and severe eye trauma, with his retina nearly completely severed, according to the complaint.

Swanson claimed that after the incident that the Mets reached out to him and offered him free tickets.

The plaintiff is seeking other deliverables. "First and foremost they should stop using that gun," he told the media. "It bothers me because it could have hit a little kid. I don't know why they use them anymore." Swanson's attorney echoed that in a statement.

"The Mets must be held accountable, and I hope that we will reach an amicable outcome," said Levine. "He (Swanson) has not ill will toward the Mets or the players, but he wants to make sure that the cannon is never used again to protect future fans."

Swanson's action is not the first such lawsuit brought forth by a plaintiff.

Jordan Kobritz, a Professor in the Sport Management Department at SUNY Cortland, has written frequently on the specific topic for Hackney Publications.

In particular, he wrote about a similar case against the Astros brought by one of its fans, Jennifer Harughty.

"The Astros, like most clubs, refused to reimburse Harughty's medical expenses, perhaps fearing such action could be interpreted as an admission of liability," wrote Kobritz, a former Minor League Baseball team owner and current investor in MiLB teams. "Clubs take the position, supported by language on their website and on ticket backs, and reinforced with PA announcements and in-stadium signage, that fans assume all normal and foreseeable risks associated with the sport when they enter a stadium. A majority of courts side with the teams by applying the "Baseball Rule," first adopted over a century ago, when deciding negligence cases. Essentially, the rule states that if teams provide adequate seating behind a protective screen for those fans who request it, they are not liable for injuries resulting from flying bats and balls.

"Harughty's attorney, Jason Gibson, argues the Baseball Rule shouldn't apply to his client. Gibson says, '…you don't assume the risk of having someone fire a cannon at you that creates that much force at that proximity that can cause that kind of damage.' His logic is difficult to refute.

"When the Baseball Rule was first adopted, mascots armed with powerful cannons weren't prowling stadiums armed with powerful cannons. But the sports world has changed since then. At some stadiums, the games have become sideshows to the entertainment, leading to fan distraction.

"… While sympathy may lie with Harughty, the law currently sides with the Astros. But a continued escalation in firepower may ultimately shift the legal advantage to plaintiffs."

The interesting thing about the instant case is that "distraction" may not be as much of a factor since the fan purposefully walked toward the cannon with the objective of getting a T-shirt. On the other side, it will be interesting to see if there were protocols in place if a cannon is malfunctioning. For example, the number one rule for shotgun enthusiasts is to "always keep the muzzle pointed in a safe direction." https://www.nssf.org/safety/rules-firearms-safety/

UNR Plans to Sue Architect Over Stadium Design

The University of Nevada, Reno (UNR) is suing the architect of the Mackay Stadium renovation, claiming that the revamped facility failed to adequately accommodate people with disabilities.

UNR named WorthGroup Architects, a longtime collaborator with the school including most recently on its E.L. Wiegand Fitness Center, as the defendant.

Specifically, it claimed fans in wheelchair seating are unable to see the field. Furthermore, it claimed the new design failed to yield the requisite number of seats required by law for people in wheelchairs.

Texas A&M Introduces Hand-Held Metal Detectors

Guests at the Texas A&M Football game vs. Mississippi State may encounter a new security measure – walk through and hand-held metal detectors – when they enter the stadium. In preparation for Southeastern Conference-mandated enhanced security measures in the fall of 2020, Texas A&M will begin implementing walk through and hand-held metal detectors at various entries to Kyle Field during the final three home football games this season.

"Our obligation is to provide the safest environment possible, and we are always looking for new ways to enhance game day safety features," Texas A&M Director of Athletics Ross Bjork said. "Testing this system of metal-detecting devices will allow us to gather important details as we look to continue enhancing the game day experience while preparing for additional safety features for the 2020 season."

This will help guests and game day support staff begin to familiarize themselves with the process prior to full implementation next season at football and men's basketball games.

The metal detector process will include a standard request for removal of car keys and cellphones, as well as other non-permitted items. An alarm will cause the guest to submit to a secondary screening with the hand-held detector. Guests with special health-related needs can opt to be hand-wanded. The SEC mandated over the summer that all conference schools have metal detectors at all football game entrances before the 2020 season. The rule came out of a proposal from the conference's working group on event security.

Venue Liability 101: The Duty Owed to Guests And Patrons

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operator's duty stems from the foreseeable actions of the anticipated guests and the associated risks of the event. The scope of the duty generally hinges on whether a venue owner or operator knew or had reason to know – based on past experience, common sense, or other factors – that there was a likelihood of certain risks which were likely to endanger the safety of patrons. As a result, a venue owner or operator should make efforts to determine the foreseeable risks that may arise and cause injury to a guest. Reasonable measures should then be taken to address those risks. Doing so may not completely negate the possibility of injury to patrons, but it may serve to significantly minimize the risk of injury – and potentially eliminate any liability.

Shawn Green concentrates his practice on the defense of general and premises liability claims, as well as personal injury matters and related insurance coverage issues.

