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Route To: ___/___/___/___

SPORTS FACILITIES

How the law affects the sports facilities industry

and the LAW

Case Highlights Importance of Having Full Sports Facility Insurance Coverage

By John E. Tyrerell and Kelly Woy

Earlier this summer, the United States District Court for the District of New Jersey issued an insurance *coverage* opinion which, quite appropriately, involved a dome *covering* over a baseball field. *Healthquest of Cent. Jersey, LLC v. Antares AUL Syndicate 1274 et al.*, 2020 U.S. Dist. LEXIS 136036 (D.N.J., July, 31, 2020). The Court decided, consistent with New Jersey precedent, that Plaintiffs' claims of bad faith for denial of coverage could not survive a motion for summary judgment, due to the existing dispute of material fact as to the cause of the incident dome collapse.

Plaintiffs Healthquest of Central Jersey, LLC ("Healthquest") and Diamond Nation LLC ("Diamond Nation") are entities that operate a health and fitness club and a sports tournament and training facility, respectively, in Flemington, New Jersey. Diamond Nation owns real property in Flemington containing an outdoor turf baseball field, and is the sole owner of the air-supported dome structure that covers the baseball field during the winter months. In January 2016, the Original Dome over the baseball field failed; Diamond Nation had a Replacement Dome constructed, which was designed by the same engineer as the Original Dome, using the same specifications. The Replacement Dome was "designed to withstand a snow load of 30 pounds per square foot" and wind speeds of up to 120 miles per hour.

Defendants issued an insurance policy to both Plaintiffs as named insureds, effective November 3, 2016 through April 15, 2017, which provided coverage for external risks of direct physical loss to the Replacement Dome unless the loss is caused by an excluded

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Decision Suggests Event Attendance Can Trigger Tax Obligations

By Dana Stone, Penn Law 3L

With traditional sports leagues suspended, the esports and video game industry is having a moment. Notwithstanding the economic downturn, the video game industry has seen an increase in revenue during the pandemic as many fans embrace the fast-growing industry. In fact, in March, video game sales in North America were up 34 percent from those in March 2019. As video games go from household hobby to professional sports status, video game publishers will aim to capitalize on this surge in popularity through many channels, specifically trade shows and conventions. A recent case in Washington State highlights a consideration publishers should account for when deciding to attend conventions once large gatherings are permitted to resume.

Popular video game developer and publisher, Riot Games, Inc. ("Riot") recently discovered the unforeseen sales tax risk presented by participating in a trade show or convention. In *Riot Games, Inc. v. Washington*, BTA Dkt. No. 15-118 (Feb. 11, 2020), the Washington State Board of Tax Appeals ("Board") upheld the Department of Revenue's determination that Riot's participation in a trade convention in Seattle created a sufficient nexus with Washington to trigger payment of the state's business and occupation ("B&O") tax.

Washington imposes a B&O tax on "every person that has a substantial nexus" in the state. A substantial nexus can be established by a person with a physical presence in Washington, engaging in activities that are "significantly associated with the person's [or representative's] ability to establish or maintain a market for its products" in the state. Such activities include exhibiting at a

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Decision Suggests Event Attendance Can Trigger Tax Obligations

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trade show and performing activities aimed at establishing or maintaining customer relationships. Since 2016, Washington allowed a trade convention exception in which businesses such as Riot can participate in one trade show per year without establishing a substantial nexus, as long as they do not make sales at the convention. There's a catch – to qualify for the exception, the trade convention cannot be open or marketed to the general public. This means that marketing for the convention must be limited to specific members and invited guests.

Prior to November 2012, Riot (based in California) did not have any employees or physical place of business in Washington. Its only direct contact with the state was its attendance at an annual multi-day gaming convention in Seattle. In August and/or September of 2010, 2011 and 2012, Riot sent several employees to participate at the Penny Arcade Expo ("PAX"). Industry insiders and the general public gather each year at PAX to explore exhibitor booths, participate or watch gaming tournaments and try out new games. Open to the public, approximately 70,000 people attended PAX during the years in question. Riot attended PAX to promote League of Legends (Riot's popular multiplayer online video game) and engage with the general community. During 2010 and 2011, Riot made no direct sales at the convention. Rather, at its booth, Riot handed out swag and representatives played games with visiting fans.

In an audit by the Washington Department of Revenue, the Department determined that Riot's attendance at the conventions in 2010, 2011 and 2012 created a sufficient nexus with Washington to trigger the B&O tax. Riot disagreed with this determination for 2010 and 2011 because it did not make any sales at the convention in those years, and obtained a temporary revenue registration certificate in August 2012. Instead, it contends that it did not have a nexus with Washington until it hired an employee located in the state in November 2012, at which point it registered with the Department for tax reporting purposes on a permanent basis.

In February of this year, the Board upheld the Department of Revenue's nexus determination, finding that Riot's activities at PAX were sufficient to allow Riot to maintain a market for its products in Washington. Although no sales were made at the convention in 2010 and 2011, Riot had gross sales to Washington customers of $533,410 and $1,573,083 in those years. The Board noted that Riot employees interacted with PAX participants by promoting League of Legends

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SPORTS FACILITIES and the LAW

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Appeals Court Opens Door for Pro Soccer Stadium in Miami

By Robert J. Romano, JD LLM of St. John's University

The Miami Freedom Park, LLC, a sports business group led by businessman Jorge Mas and international soccer icon David Beckham, overcame what it hopes is the last legal hurdle to continue moving forward with a plan to build a billion-dollar soccer complex known as Miami Freedom Park. The proposed site is where Melreese Country Club is currently located, seventy-three-acres of city-owned property located at 1400 Northwest 37th Avenue, Miami, Florida.

When the City of Miami and MFP began discussing this project in 2018, it attracted significant opposition due to the fact that, a) the proposed site included the only public golf course in the City of Miami, a popular venue for residents and for a wide variety of charitable activities, b) community activists were outspoken in asserting that MFP is trying to capitalize on the relatively cheap price of the land located in a poorer, historically black section of the city, and that c) a significant portion of the costs for the project will be absorbed by the taxpayers for both the land and construction of the stadium, concerns similar to those the citizens of Miami confronted when a new stadium was built for Major League Baseball's Miami Marlins.

One prominent Miami resident and taxpayer, multi-millionaire Bruce C. Matheson, asserted that the stadium will destroy the neighborhood's quality of life, arguing that, "Twenty-five thousand people entering that neighborhood will wreak havoc with noise, traffic, and pedestrian congestion, because it's not only a proposed soccer stadium, it's a proposed concert stadium."[1] Similar concerns were echoed by other neighborhood residents and land owners at various city meetings and public hearings.

However, Matheson went further than just voicing his objections, he filed a lawsuit in state court to end the stadium development project altogether. Per his lawsuit, Matheson alleged that the $9 million MFP offered to pay for the land was below market value and that the county could have demanded much more for the property if the proper public bidding criteria were followed. Specifically, Matheson's suit claimed that granting MFP publicly owned land in a no-bid deal was a violation of law and that the ballot initiative surrounding the proposed stadium and related commercial development was therefore invalidated because of such. On March 21, 2019, however, the trial court did not agree with Matheson's assertions and granted the City's motion for summary judgment before entering a final judgment in favor of both the City of Miami and MFP.

Undeterred, Matheson continued his fight by filing an appeal with the Court of Appeals of Florida, 3rd District. Per the appeal, Matheson claimed that (a) the trial court applied the wrong standard for reviewing a ballot question challenge[2]; (b) the ballot question camouflaged the chief purpose of the charter amendment, which was to waive the existing charter protections of competitive bidding and fair market value; and (c) the ballot question was defective because the proposed terms were misleading as presented.[3]

The Appeals Court, however, was not persuaded, and the three-judge panel affirmed the lower court's decision, holding that Matheson's lawsuit failed to demonstrate that the ballot summary was clearly and conclusively defective and in addition, the ballot summary gave fair notice of its chief purpose and therefore was not misleading to the public.[4]

With no more legal challenges, and since the citizens of Miami previously approved through a referendum vote that the City of Miami can rent the Melreese land for the project, MFP has proposed a lease to the City of Miami which includes the following provisions:

- A 99-year lease with annual rent payments to the City of Miami of no less than $3.5 million per year, with the total amount being based on a third-party fair-market-value appraisal;
- The creation of a 58-acre public park and 11 soccer fields;
- Payment of the full cost of remediation of the property to permit for public use of the park;
- The construction of Inter Miami CF's home stadium, entertainment and retail space, office tech hub and hotel at no cost to city taxpayers;
- Living-wage salary for employees;
- A commitment to complete creation of the public park at the same time or prior to completing construction of the stadium.[5]

Additionally, MFP will provide, through what is being called a *community benefits agreement,* $5 million to the City of Miami for a Riverwalk/Baywalk project, $20 million for park maintenance and free access to the soccer fields at Miami Freedom Park for City of Miami youth.[6] The new stadium is scheduled to be completed by the 2021 season, however the additional community benefits will be finalized over the course of the next several years. The draft lease, which still needs the approval of the City, can be found on the Miami Freedom Park website, together with artist renderings of the final project. ●

1 https://www.miaminewtimes.com/news/wealthy-miami-heir-bruce-matheson-sues-to-kill-david-beckham-soccer-stadium-deal-9514392

2 MFP position was that Matheson failed to preserve the argument that the trial court committed reversible error in applying the accuracy test to the referendum. Matheson contends that the accuracy test requires a challenger only to prove that the summary *either* was not "clear and unambiguous," *or* was misleading (a disjunctive rather than conjunctive burden), rather than *both* of these alleged deficiencies.

3 2020 Fla. App. LEXIS 11122

4 2020 Fla. App. LEXIS 11122

5 https://miamifreedompark.com

6 https://www.miaminewtimes.com/news/david-beckhams-stadium-plans-met-with-skepticism-at-first-overtown-meeting-9356613

The Ins and Outs of a Workable Risk Management Plan

By Jim Moss

As a former litigator, I dreaded finding a risk management plan as an item I needed to disclose to the plaintiffs. They have become road maps for plaintiff's counsel to sue and checklists for winning those lawsuits.

It is impossible to identify all the risks associated with any business, facility or event. If you try, the library you have written will have no value except to a plaintiff. One who is looking to see what you did wrong since your plan will lay out every rule you failed to follow.

Once you have identified potential risks, you have to start the process again, because so many things have changed. Any maintenance, sign changes, or staff changes will probably require alterations to your risk management plan.

What's worse, the next accident or emergency that occurs will probably not be found in your plan. When you roll the dice, the results can circumvent your carefully written plan, leading you back to square one. In short, you will be left dealing with an emergency you never thought or one that took off in a direction you never imagined.

In 45 years of guiding on rivers and mountains, as well as my 35 years of practicing law, I've never found an incident that was described in a risk management plan. Consequently, every response to an emergency is off the cuff.

Ultimately, you are constantly re-writing or redoing your plan on the fly, providing the plaintiff's attorney with a simple checklist of what you were supposed to do and when.

Here's an example: your plan says in any emergency you are to first call the risk manager who will determine if the issues need outside response or can be handled in house. That's a great idea, there's no need to call paramedics when a band aid suffices. The next step in the plan is to assess the situation by the person reporting the emergency with a simple checklist of information the risk manager believes he or she needs. That checklist has 10 to 12 items the risk manager needs answered before implementing the plan.

When you have an arterial bleed you need outside help, immediately. If you follow the plan, you will be sued for waiting too long to provide first aid. If you don't follow the plan, you will be asked, on the stand, why you didn't follow the plan. Either way, you are squirming on the witness stand, which is the last place you want to look incompetent, or, worse, wrong.

Another issue with a comprehensive plan is the fact no one who will be using it has ever taken the time to read and understand it. Only the author can decipher the multi-volume treatise created, so again, the plan is ignored as the problem explodes. And once again, you have provided the opposing attorney; the opportunity to find fault. "Why did you not follow your risk management plan?" Your answer will probably be "because the issue was not in the risk management plan."

The next question you will face: "This seems like something that would occur every day, and you failed to identify it and put it in your plan?"

Most front-line employees are not paid to read and understand the plan, yet 99 percent of the time they are the employees that are expected to execute the plan when a problem arises. They often are not given any training other than to follow the plan. However, your guests, customers and clients expect all employees to know and understand the risk management plan. Their lawyers will point that out to the jury, repeatedly.

Finally, a plan has no value unless it can be implemented. Your front-line employees, those dealing with the future plaintiffs won't ever have access to the plan, will never understand the plan, and you will never train them on the pan.

Here are some suggestions:

First: Only write down what you've trained on.

That is something the employee can carry, read, understand and use in an emergency. You never see an EMT arrive in an ambulance to a medical scene and pull out a book to figure out what to do next. But you are expecting your employees to understand everything you wrote.

For your risk management plan to work, it needs to be something employees can understand and execute. The perfect risk management plan is one that can fit into an employee's pocket or on the back side of his employee ID, or a 3x5 card.

So, how can you create an effective risk management plan that any employee can access and use? First, try to think differently and try not to think of what could go wrong. Second, use the tools at your disposal. You have employees who use a phone, radio or some system of communication. Make sure to effectively use those means of communication.

A scenario where you have a brush fire next to the stadium based on a comprehensive plan would identify water outlets, hoses, rakes, shovels and maybe moving valuable property out of the way. Great, but it does not provide you with solutions, just lists. It provides the opposing side with a checklist. Did you get the shovels? Did you have enough shovels? Why didn't you have enough shovels?

Instead, think about what you have. You have a maintenance crew that has immediate access to everything you need. You have personnel on hand to move valuable equipment. You have transportation to move cars because they have the keys.

The front-line employee with his 3x5 card checks it thoroughly. The first thing on the card says *what is wrong*. The second thing says: call your boss. If his/her boss is not available, then call his or her boss' boss. Next, keep calling with your radio or phone until someone is reached. That higher-up manager can call 911. All of this information can be on the back of the 3x5 card. The front side says what is wrong, get people out of the way and call for help. The back side of the

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card has the names of the people to call and how best to reach them.

Why round up shovels, hoses and rakes if no one is around to use them. Why organize people who have never used a shovel to put out a brush fire. The maintenance crew probably has the tools and experience.

Second: Don't just write a plan, write an education program for employees.

Without proper training, every risk management plan has little chance of succeeding. If your employees are not trained in how to use every aspect of your plan, who knows what types of problems that they will run into and when.

Third: Don't just write a plan, create a response.

Using this approach your risk management plan will become an easy tool everyone can use. When I wrote a risk management plan for a ski area that included 27 lifts, 2800 condos and hotel rooms, 27 restaurants/bars, 120 vehicles for 300 to 3,000 3000 to 300 (depending upon the time of the year and two day-care centers) it came out to be 27 pages long.

The ski patrol knew the plan well and they used it every day. While our snow shovelers did not, they could read a 3x5 card and knew where the phones were around the property.

Fourth: Create a plan that will be understood by the people who are responding.

More importantly, the ski-area plan was based on the Incident Command System. The ICS system is used by all law enforcement, fire and land management agencies to deal with problems. It was designed so that teams of fire fighters, law enforcement personnel, forest service officers and secret service agents could work together using a system that coordinates identical responses, paperwork and like-minded training.

When you see fires burning through the west or a hurricane rips up the east coast on the nightly news, the responders, whatever the badge on their shirt says, are using the ICS system to communicate, respond to, and track the issues they face.

If your risk management plan follows this program, then fire, search & rescue or law enforcement officers arrive on the scene and resolve the problem.

Think about how many changes you would have to make in your risk management plan in the past decade with new risks. Terrorists,

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hostage situations, Covid-19 and what about serving alcohol and the related problems at stadiums. The pages you threw away when you stopped serving alcohol you are now frantically trying to locate when you started serving beer again.

Fifth: Write a plan that stays up to date.

Keep these questions in mind. What is your liability when you don't keep your plan up to date? How many plans had been written to cover infectious diseases?

When writing the plan, understand that you have control over it. When an incident occurs, factors that were previously thought to be controllable can become problems. A few of the problems that can occur: employees can panic, tools required to address the problems are not where they are supposed to be, and/or and the person who knows how the plan is supposed to work quit six months ago.

Sixth: Don't confuse a response to a problem as changes that need to be made.

One of the worst feelings a litigator can have is going through a client's risk management plan after a disaster. If a plan had a specific course of action based on prior incidents and included documentation of those incidents, but the organizers did not list/implement changes to the plan (or make a new plan), litigators will likely become concerned.

Creating a safety improvement plan, as part of your risk management plan, could benefit a plaintiff's attorney.

For example, a ski patrol office used to have a giant map of the area on the wall (near base camp). When an accident occurred, a pin would be placed on the map so the patrollers could identify area(s) causing issues.

The plaintiff's attorneys would photograph those maps/pinned locations, and then show how the accident they are suing over occurred at a place with known problems.

You should always create a list of what needs to be done. Anytime any list is created you need to create a program and someone to make sure it gets done. It is not part of risk management; it is part of everyday life in the industry.

Seventh: A risk management plan is *not* a legal defense tool; it provides a map for how to solve problems, nothing more.

Don't confuse risk management with a liability defense. They are not remotely the same thing. Risk management is dealing with problems and resolving those problems. A liability defense is how you stop law-

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New York Sports Club and Lucille Roberts Sued for Charging Illegal Dues and Prohibiting Consumers from Cancelling

New York Attorney General Letitia James has filed a lawsuit against the parent company of New York Sports Clubs (NYSC) and Lucille Roberts for unlawfully charging monthly dues to members and for partaking in a variety of illegal and fraudulent practices involving consumers' cancellation rights. In her proceeding against Town Sports International Holdings, Inc. (TSI Holdings) and Town Sports International, LLC (TSI LLC) — collectively TSI — Attorney General James alleges that the company violated the law by continuing to charge consumers dues and fees, despite the fact that all health clubs and gyms in the state were ordered closed after the coronavirus disease 2019 (COVID-19) pandemic began to spread widely across New York in March. After Attorney General James sent the company a letter in early April, stating she would take necessary steps to protect consumers, TSI implemented a freeze of membership fees and dues on April 8, 2020 and promised consumers they would provide credits in the future, but, on or around September 1, 2020, the company unlawfully resumed charging consumers and never provided them with the promised credits, even charging some consumers who are members of clubs that have yet to open. In connection with today's proceeding, Attorney General James also seeks a temporary restraining order in an effort to immediately block TSI from continuing to charge any dues or fines to New York members who submitted cancellation requests or charging any dues or fines to members in New York whose primary — or home — gym remains closed. The temporary order is subject to court approval.

"Since the COVID-19 pandemic began, New York Sports Clubs and Lucille Roberts have done everything possible to flout their obligations and take advantage of members," said Attorney General James. "Time and again, these gyms have illegally sought to lift up their precarious financial state at their members' expenses, even though many of these very members were simultaneously being crushed under the weight of financial hardships. Today's suit aims to end TSI's illegal efforts to run its members ragged, simply to spot its bottom line."

From March 16, 2020 until August 24, 2020, all gyms in New York were closed by executive order due to the COVID-19 pandemic. But, unlike most gyms in New York that automatically froze memberships at no cost to members until gyms reopened, TSI did not automatically freeze memberships and didn't even do so when consumers asked the company to do so. When consumers contacted TSI to request a freeze or cancellation — in the rare circumstance where they got through — TSI provided differing and often false information that prevented consumers from cancelling, such as telling consumers that cancellations were subject to 45-day advance notice requirements and subject to $10 or $15 cancellation processing fees.

Despite all New York clubs being closed in March, TSI went ahead and charged its members April dues. In early April, Attorney General James sent a letter to TSI, reminding the company that New York's Health Club Law authorizes gym members to cancel their membership when services are no longer available due to a substantial change in operation. On April 8, 2020, TSI announced that it had implemented a membership freeze at no cost to members and promised that "members will receive additional days of membership access equal to the number of days paid for while the clubs were closed in your area." TSI also advised members that they could cancel their membership online and receive an email confirmation. Yet, despite these commitments, after some TSI clubs reopened on August 24, 2020, the company went ahead, on or about September 1, 2020, and — without notice to members — charged September dues, even charging those consumers who attempted to cancel their memberships or whose home clubs remained closed, thus potentially risking consumer safety by forcing many members to take public transportation to use an alternate gym at a location further away from their homes.

On September 14, 2020, TSI LLC and other subsidiaries of TSI Holdings filed petitions for bankruptcy; TSI Holdings has not filed for bankruptcy. That same day, TSI filed a motion to reject certain leases, including leases for nine NYSC locations in New York, for which TSI LLC has already relinquished the keys. There is no indication that TSI exempted members from these nine permanently closed gyms from being charged September dues or that they have contacted members about cancelling their memberships before October dues are charged.

To date, TSI has refused to refund member dues for the time period from March 16, 2020 to April 8, 2020, when members were charged dues despite the fact that all NYSC locations were closed. And, contrary to the commitments made on April 8, 2020, TSI does not appear to have given any members credits for the March to April time period when facilities began to reopen in August.

In today's suit, Attorney General James charges TSI with violating numerous New York state laws by charging consumers membership dues for services not being offered; failing to issue credits as promised; imposing unlawful fees and advance notice requirements on cancellation requests; misleading consumers about their

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rights to cancel their memberships; and refusing to honor cancellation requests.

Attorney General James' suit seeks to enjoin TSI from violating New York law, including, but not limited to, charging consumers dues for clubs that have not yet reopened, failing to provide credits for the period from March 16, 2020 through April 8, 2020, and failing to honor consumers' statutory rights to cancel their contracts; restitution for New York consumers; disgorgement; costs; penalties; and the transfer of the $250,000 bond TSI posted pursuant to the Health Club Law to the OAG.

New York's Health Club Law authorizes gym members to cancel their membership under certain circumstances, including "after the services are no longer available or substantially available as provided in the contract because of the [gym's] permanent discontinuance of operation or substantial change in operation," and requires gym owners to provide prorated refunds for such cancellations within 15 days. Additionally, the law further prohibits misrepresentations about consumers' cancellation rights. Finally, the Health Club Law requires that health clubs and gyms post a bond, letter of credit, or certificate of deposit payable in favor of the people of the state of New York for the benefit of any member injured in the event that the gym goes out of business prior to the expiration of the member's contract, or otherwise fails to provide a refund after the member cancels in accordance with the Health Club Law.

TSI owns and operates nearly 100 gyms and fitness clubs in New York state doing business under the brand names New York Sports Clubs and Lucille Roberts.

This matter is being handled by Assistant Attorney General Christopher McCall, Deputy Bureau Chief Laura J. Levine, and Bureau Chief Jane M. Azia — all of the Consumer Frauds and Protection Bureau. The Consumer Frauds and Protection Bureau is a part of the Division for Economic Justice, which is led by Chief Deputy Attorney General Chris D'Angelo and which is overseen by First Deputy Attorney General Jennifer Levy. ●

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peril. The excluded peril provision included "coverage for loss caused by collapse, unless the collapse is caused only by one or more of certain specified perils, including [the] weight of ice and snow," as well as "coverage for losses that result from an act, error, or omission, whether negligent or not, relating to, *inter alia*, the design construction[,] and specification of [the Replacement Dome]."

The Storm and Resulting Dispute

On or about March 14, 2017, the Replacement Dome collapsed as the result of a winter storm, which included accumulation of approximately 19 inches of snow at ground level (approximately 11 pounds per square foot), with a maximum sustained wind speed of 24 mph and gusts reaching 40 mph. Plaintiffs filed a claim with Defendants relating to the failure. An engineer inspected the site and Replacement Dome on behalf of Defendants, and issued a report in which he opined that "the [Replacement] Dome's fabric membrane tore and the [Replacement] Dome failed under weather conditions that the [Replacement] Dome had been designed to withstand." Accordingly, Defendants issued a denial and renewed denial of Plaintiffs' claim, "based on the application of the Policy's exclusions for Collapse and Defects, Errors, and Omissions." Plaintiffs initiated suit, claiming breach of contract, breach of the covenant of good faith and fair dealing for both failure to process the claim in good faith and denying coverage in bad faith, and declaratory judgment that Defendants are obligated to provide coverage to Healthquest relating to the collapse.

Defendants filed a Motion for Summary Judgment. First, Defendants contended that they were entitled to judgment as a matter of law on Plaintiffs' breach of contract and declaratory judgment claims because the failure of the Replacement Dome was not covered by the Policy, as it was caused by a combination of the weight of the ice and snow and a design defect (i.e., a covered peril and an excluded peril). Similarly, they argued that they were entitled to summary judgement on Plaintiffs' bad faith claims because the claims necessarily arose from the policy, which does not provide coverage for the loss, or in the alternative, that their decision to deny coverage was "at least, fairly debatable," as their two denials were supported by the engineers reports.

Reasoning and Outcome

In analyzing whether the Motion for Summary Judgment should be granted as to Plaintiffs' breach of contract and declaratory judgment claims, the main issue at hand was the cause of the collapse of the Replacement Dome: that is, whether (1) the weather

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Case Highlights Importance of Having Full Facility Insurance Coverage

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conditions were within the Replacement Dome's specifications and therefore the collapse was caused by a design defect (i.e., if the Replacement Dome had adhered to the manufacturer's specifications, the tear would not have occurred), or (2) the collapse was caused by the localized build-up of snow and partially melted snow on the Replacement Dome, combined with the excessive wind speeds, which exceeded the design snow load for the building and initiated the tear in the fabric membrane. The Court found that that the parties reasonably disputed the cause of the Replacement Dome's failure, and therefore there was at least one genuine dispute of material fact between the parties which precluded summary judgment. Therefore, the Motion for Summary Judgment was denied.[1]

Regarding Defendants' Motion for Summary Judgment on Plaintiffs' bad faith claims, to establish a claim for bad faith in the insurance context, Plaintiffs needed to show that (1) the insurer lacked a "fairly debatable" reason for its failure to pay a claim, and (2) that it knew or recklessly disregarded the lack of reasonable basis for denying the claim. *Pickett v. Lloyd's*, 131 N.J. 457, 621 A.2d 445, 454 (N.J. 1993). "A claimant who cannot establish a right to summary judgment on the substantive claim that the policy was breached, however, cannot prevail on a claim for an insurer's alleged bad faith refusal to pay the claim." *Andrews v. Merchs. Mut. Ins. Co.*, 718 F. App'x 135, 140 (3d Cir. 2018).

Plaintiffs urged the Court to depart from the aforementioned precedent, claiming that this case was distinguishable because when the first denial was issued, it was "flat out wrong." However, the Court declined to do so, pointing out that the Plaintiffs did not file a cross-motion for summary judgment where the case law clearly requires it. The Court further explained that while the first report from the engineer on which Defendants based their first denial did not explicitly state that the loss was caused by a design defect or specification deficiency, it does note that the Replacement Dome collapsed under weather conditions *that it was designed to withstand*, and that the design did not allow the steel cables to prevent the propagation of a tear, which caused the ultimate collapse. Therefore, because Plaintiffs could not establish a right to summary judgment as to their underlying breach of contract claim, Defendants' Motion for Summary Judgment as to Plaintiffs' bad faith claims was granted.[2]

This case demonstrates the importance of making sure you – and your field – are covered. ●

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1 *See Assurance Co. of Am. v. Jay-Mar, Inc.*, 38 F. Supp. 2d 349, 355 (D.N.J. 1999) (denying insurer's motion for summary judgment where "[t]he discrepancy between [] expert reports" as to whether a loss was caused by a covered or excluded peril "creates a genuine issue of material fact which must be decided by the factfinder in this case").

2 *See also Hudson Universal, Ltd. v. Aetna Ins. Co.*, 987 F. Supp. 337, 341 (D.N.J. 1997) (that "an insurer's disclaimer of coverage cannot be held to be in bad faith unless the insured is granted summary judgment on the issue of coverage"); *Tarsio v. Provident Ins. Co.*, 108 F. Supp. 2d 397, 401 (D.N.J. 2000) ("If factual issues exist as to the underlying claim (i.e., questions of fact as to whether plaintiff is entitled to insurance benefits-plaintiff's first cause of action), the Court must dismiss plaintiff's second cause of action-the 'bad faith' claim.").

Decision Suggests Event Attendance Can Trigger Tax Obligations

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and engaging in gaming tournaments with public participants. The Board also held that Riot obtaining a temporary revenue certificate in 2012 did not bar the Department of Revenue from determining upon further information that an additional tax would be due. While the trade convention exception did not go into effect until July 2016 and thus was not applicable to the audit period, the Board noted PAX was marketed to the general public and would not fall under Washington's trade convention exception.

A sales tax obligation arising from attendance or participation at a trade convention is not a new concept. Like Washington, many states provide more lenient rules regarding sales tax nexus in an attempt to encourage conventions and the economic benefits that result from such conventions. For example, in California, any out-of-state business whose sole activity in the state is engaging in a convention or trade show for less than 15 days and whose gross income from that activity is less than $100,000 is not considered to have a nexus with the state for tax purposes. Riot's case demonstrates the importance of investigating the state tax laws well in advance of attending a trade show in another state because each state has its own rules, and participation at a trade show in another state may put an organization at risk of tax obligations there. ●

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The Ins and Outs of a Workable Risk Management Plan

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suits from happening or win a lawsuit. If every person who fell down and skinned a knee sued you when leaving a stadium, you would be in court forever. Most people don't. A lot of people just want a band-aid or dry cleaning. The people who want more recompense can often be assuaged if you listen and respond to their complaints. If all else fails, send these individuals to said organization's legal department.

Eight: Train, educate and improve your employees as efficiently as you can

As stated above, a risk management plan must be understood by everyone who is expected to respond to a problem(s). This means that 100% of your workforce, including volunteers, must know and understand the plan. My guess is that the only person who knows and understands a risk management plan in a vast majority of companies across the U.S., is the person who wrote it.

You must also make the training as realistic as possible, within reason. Think about angry parents or relatives, the media and public officials who work in law enforcement or medicine. No incident occurs in a vacuum.

The mysteries of evacuating people from a chairlift are all over YouTube for people to see. However, if a real incident occurs, the media will still be there, asking questions. Friends and relatives of those involved, as well as bystanders are going to be in the vicinity. Some could be upset, pester some and angry, while others might be offering assistance. Think about the chairlift accident several years ago where one of the riders worked from CNN and reported from the lift.

Nine: Don't confuse paperwork with planning.

Too often I have walked into an office after the summons and complaint, have been served and the accident report is stacked on top of a 3-ring binder or binders. The binders are dusty and say on the spine Risk Management Plan. You likely have no chance of winning.

Even the ICS system goes too far, sometimes. The first thing on a plan page is the objective, and you write out the goal based on the broad problem. The goal is not to make things worse. Secondary goals include assessing the situation and solving the problem. Those lines should be included in the objective of every risk management plan.

What happens if you don't follow your detailed plan? Sometimes, you can get lucky and not face any challenges or collateral damage. If it does not work, you've given the plaintiff materials they need to sue you.

I was once approached at a restaurant by a woman who had lost her husband at a ski area during the summer. She had transported him to the top of the adjoining pass, and he was hiking home. He expected to be home in a few hours. (Knowing the terrain, I would

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The Ins and Outs of a Workable Risk Management Plan

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have taken a sleeping bag and breakfast.) She had a hand-held radio and intermittently could hear him. A comprehensive plan would have said organize people, call in SAR, lay out a grid line and finally find him later the next day.

I put the lady with the radio in the front seat of my car and drove up the pass. I knew he had been descending and ascending valleys and ridge lines all day. Those valleys could not be seen from the ski area. When he was in a valley, he could not communicate with his line of sight hand-held radio. By driving up the ends of the valleys, we quickly established clear communication and had him walk toward the sound of the semi's passing us. 45 minutes after the lady found me; I was back, finishing up a cold dinner.

No plans were broken because the first step is assessing the situation. I did; I knew what we needed, and I could call in help quickly if needed. I also knew we had 4-5 hours of daylight left and there was a good chance, I could find him in one of the valleys. Problem solved and no self-imposed rules broken.

Did I take a risk? Yes. I delayed calling for more help by an hour. However, I had the freedom to think through the problem and come up with a viable solution. Instead of following a checklist, I thought about the problem. Intermittently she could communicate with her husband. I knew why; line sight radios worked on top, not in the valleys.

Ten: A risk management plan is a response for employees to know and use, not a marketing piece.

Many times, a risk management plan will be advertised or at least mentioned to guests. This approach can become part of the complaint, with plaintiffs arguing "People went to this business because they knew it was prepared.

What's worse, you see a statement about the risk management plan prominently displayed on the website or in a brochure with a statement that employees have been trained in its use. Eventually, those employees graduated and left, and now your team consists of freshman working for work their first year after high school. They have basic first aid training, but no experience. There's no easier way to lose a lawsuit

Things change, especially employees. If your plan is employee dependent or your business is seasonal, you'll have to re-write the plan with every change in employees, promotions or season.

Risk management plans have become a requirement for businesses, programs, events and activities. Make sure it is written to help your clients, customers and guests. In addition, make sure it exposes you as little as possible. ●

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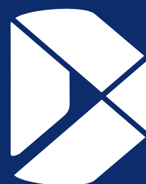

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