

Before You Sign The Sports Facility Lease Agreement

(By John M. Sadler, Sadler & Company, Inc. 3-10-06)

Sports/recreation organizations (ex: teams, leagues, tournament hosts, camps, individual instructors, gymnastics studios, martial arts studios, hunt clubs, etc.) often lease outdoor or indoor sports facilities to conduct their activities such as playing and practice. Likewise, sports facility owners (both municipal and private) make the facilities available to sports organization in exchange for rental income or to serve the community.

A written Facility Lease Agreement is normally prepared by the legal counsel of the sports facility owner and must be signed by the sports/recreation organization prior to use. Before signing such an agreement, the sports/recreation organization (and its attorney and insurance agent) should always review the lease terms to make sure that they are fair as regards to liabilities accepted and transferred and whether the sports/recreation organization is in compliance with the insurance requirements.

Indemnification/Hold Harmless Provision

Liability is one of the most important issues that is addressed under sports facility lease agreements. Liabilities can arise out of injuries to third parties (ex: spectators and participants) that are related to improper construction of facilities, improper maintenance or facilities, arising out of trespassers that get hurt on the facilities either during the off season or after hours, improper supervision or instruction given during the practice or playing of the game or activity itself, umpiring, security, concessions, other vendors, emergency medical care, parking lots, etc. Under the eyes of the law, either party to the contract or both parties to the contract are legally liable for these types of incidents mentioned above to the extent that such party is responsible for safety in such area and to the extent that such party has been negligent. However, the normal allocation of tort liability under the legal process can be circumvented if the lease agreement calls for a different result where one party contractually accepts the liability that may ordinarily belong to the other party.

An indemnification or hold harmless provision in these lease agreements governs whether the sports/recreation organization or facility owner is contractually responsible when a third party (ex: spectator or player) is injured and suffers damages. In summary, this provision requires one party to the contract (indemnitor) to pay for the legal defense costs and to pay damages on behalf of the other party to the contract (indemnitee) under certain circumstances. The indemnification/hold harmless provision can be drafted to allow for three different outcomes: 1) Limited Form: each party is responsible for only its own negligence, 2) Intermediate Form: one party is responsible for 100% of the total liability for both its sole negligence or its partial negligence, or 3) Broad Form: one party is responsible even if the other party is solely negligent.

Since the sports facility owner is the party to the contract that normally is in the position of "power", it is not surprising that its legal counsel will normally draft the indemnification/hold harmless provision to fall under 2) or 3) above.

Limited Form Indemnification/Hold Harmless Provision

The most equitable type of indemnification/hold harmless provision (Limited Form) requires each party to be responsible for its own negligence and to pay the legal defense costs and damages on behalf of the non negligent party that is also shot gunned into the lawsuit. This type of indemnification/hold harmless provision is in keeping with a spirit of reciprocity and fairness. Sports/recreation organizations should always attempt to negotiate the Limited Form provision.

Some may question why the Limited Form provision should even be included in a facility lease agreement since it does not shift liabilities and only restates the liabilities that exist under common law. However, adding such a provision does serve a legitimate purpose in that it provides for a contractual remedy (in addition to the tort remedy) that makes it easier, less expensive, and more certain for the indemnified party to enforce its rights when only the indemnitor is at fault.

Sample language for the Limited Form is as follows: Both the Sports/Recreation Organization and Facility Owner agree to mutually indemnify and hold harmless one another and their respective directors, officers, employees, volunteers, and agents for all imposed by law third party claims, damages, losses, and expenses including but not limited to reasonable attorney's fees resulting from bodily injury and physical injury to tangible property including loss of use thereof caused by the Sports/Recreation Organization's or Facility Owner's own negligence arising out of the subject matter of this lease.

Intermediate Form Indemnification/Hold Harmless Provision

The next most equitable type of indemnification/hold harmless to the sports/recreation organization (Intermediate Form) requires the sports/recreation organization to be responsible for all liability for both parties as long as the sports/recreation organization was either solely or partially (could be as little as 1%) negligent. Before agreeing to this type of Intermediate Form indemnification/hold harmless agreement, the sport organization must verify that its General Liability policy contains "contractual liability" coverage for these types of lease agreements.

Sample language for the Intermediate Form is as follows: The Sports/Recreation Organization agrees to indemnify and hold harmless the Facility Owner and its respective directors, officers, employees, volunteers, and agents for all imposed by law third party claims, damages, losses, and expenses including but not limited to reasonable attorney's fees resulting from bodily injury and physical injury to tangible property including loss of use thereof to the extent caused by the sole or partial negligence of the Sports Organization arising out of the subject matter of this lease. (Note: this language contains some key terms and provisions that give it a better chance of being covered by the sports/recreation organization's General Liability policy.)

Broad Form Indemnification/Hold Harmless Provision

The third option (Broad Form) is not equitable to the sports/recreation organization and may be contrary to state law in some states as it can be considered to be against public policy and "unconscionable". This option requires the sports/recreation organization to accept responsibility for even the sole negligence of the facility owner. For example,

such a Broad Form indemnification/hold harmless agreement may require the sports/recreation organization to assume liability on behalf of the facility owner in the event of bleacher collapse or roof collapse. Such liability would ordinarily fall upon the facility owner as the party that is responsible for construction and maintenance. Requiring the sports/recreation organization to be responsible for these losses would be totally unreasonable and such assumption of liability should never be accepted under any circumstances.

Sample language for the Broad Form is as follows: The Sports/Recreation Organization agrees to indemnify and hold harmless the Facility Owner and its respective directors, officers, employees, volunteers, and agents for all imposed by law third party claims, damages, losses, and expenses including but not limited to reasonable attorney's fees resulting from bodily injury and physical injury to tangible property including loss of use thereof to the extent caused by the negligence of either the Sports Organization or the Facility Owner arising from the subject matter of this lease.

Before signing a facility lease agreement with either the the Intermediate Form or Broad Form provision, the sports/recreation organization should seek advice from their attorney or insurance agent and strike these provisions from the contract and replace them with the appropriate Limited Form language. The insertion of the new provision should be initialed by the sports/recreation organization. Taking this action is the legal equivalent of making a counter offer to the terms of the lease. Under most circumstances, the facility owner will accept this change. If the facility owner does not accept this change, the fallback position of the sports/recreation organization would be to consider accepting the Intermediate Form language. However, the Broad Form language should never be accepted.

Insurance Requirements For Sports Organization

The facility lease agreement will normally require a Certificate Of Insurance evidencing a General Liability policy with a carrier rated at least A- under AM Best for financial strength with an "each occurrence" limit of at least \$1,000,000. and that the facility owner is added as "Additional Insured".

It is important to make sure that you are in compliance with the insurance requirements under the lease so that you are not in "breach of contract".

You will want to make sure that your General Liability policy adequately covers the contractual liability that you may be assuming in the indemnification/hold harmless provision of the lease. Most General Liability policies automatically contain the necessary "contractual liability" coverage for "insured contracts" such as facility leases unless one of the following three problems is encountered:

- 1) The wording of the indemnification/hold harmless is so broad as to require you to accept liability beyond the types of liabilities that are covered by General Liability policies. Beware if the wording in the indemnification/hold harmless agreement requires you to assume liability for any of the following: "any and all liability" (you should only assume liability for bodily injury and physical damage to tangible property including loss of use thereof); all "property damage" (should be limited to physical damage to tangible property including loss of use thereof); liability that goes beyond negligence or tort liability such as breach of contract; and liability for

common General Liability exclusions such as pollution, property of others in your care, custody or control, or professional liability.

- 2) Your General Liability policy has an endorsement entitled "Contractual Liability Limitation" or a similar endorsement. If your policy has this endorsement, you will have no coverage for the liabilities that you assume in your facility lease because it will not be considered an "insured contract".
- 3) Your General Liability policy has an endorsement entitled "Amendment Of Insured Contract Definition CG2426" or a similar endorsement. If your policy has this endorsement, you will have no coverage if you assume the sole negligence of the other party.

Insurance Requirements For Facility Owner

In addition, the facility lease agreement should require the facility owner to provide evidence that it carries its own General Liability policy to cover incidents arising out of the negligence of the facility owner. Such General Liability policy should be placed with a carrier that is rated at least an A- under AM Best for financial strength and should have an "each occurrence" limit of at least \$1,000,000.

Summary

As you can see from the discussion above, you and your insurance carrier have a lot to lose if you do not carefully review the terms of the facility lease agreement before you sign it. It is best to hire an attorney or better yet recruit an attorney to be part of your management team so that you can receive some free legal services. If you refuse to seek legal advice, the risk management principles outlined above will be of assistance in reducing your risk.

DISCLAIMER: THE INFORMATION IN THIS ARTICLE IS NOT LEGAL ADVICE. BEFORE SIGNING ANY FACILITY LEASE, YOU SHOULD CONSULT WITH LOCAL LEGAL COUNSEL AND YOUR INSURANCE AGENT.

Copyright 2006 Sadler & Company, Inc. All Rights Reserved