

# Sports Litigation Alert

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## Risk Management and Action Sports Events: Old Rules Apply to New Sports

By **Brian R. Socolow**

While action sports fans love the thrills and spills inherent in action sports such as skateboarding, motocross, snowboarding and snowmobile climbing, promoters of action sporting events are often interested in less exciting pursuits, such as minimizing potential legal risks from these newer forms of sporting events. While everyone remembers Jake Brown's 45 foot drop off the skateboarding ramp in the 2007 X Games and wondered how he survived that fall, few spectators realize that what makes these events so exciting also creates some legal challenges for those responsible for these competitions

Action sports continue to increase in popularity. BMX made its Olympic debut in Beijing and is credited with helping the Olympics reconnect with a younger audience. ESPN, which broadcast the first X Games in 1995 and now broadcasts summer and winter X Games every year, recently announced that it plans to launch single sport events to expand the geographic exposure of its coverage and increase content opportunities. Sponsorships, attendance and press coverage have grown each year. But the bottom line is these sports create many of the same legal challenges as their traditional counterparts, from ensuring spectator and participant safety to avoiding and even preventing marketing catastrophes such as "ambush marketing." This article addresses some of these issues and how organizers can effectively deal with them.

### Spectator Safety

Unlike traditional sports located in stadiums or race tracks with large seating sections, many action sporting events are viewed by spectators who can stand within several yards of the course and the athletes. The potential for injury to

spectators is a concern for event organizers, whose liability may depend on what steps were taken to prevent injuries and/or notify spectators of the potential dangers of being in close proximity to competition.

Although action sports differ in some ways from traditional sporting events, which have spawned a long history of legal cases relating to spectator safety, action sports can draw upon that body of law for guidance. Laws governing liability for spectator injuries at sporting events have been evolving, reflecting the evolution that has occurred in the events themselves, which now routinely feature a heavy dose of in-event entertainment. In general, an organizer of a sporting event has a duty to make sure the property is reasonably safe and free from dangerous elements that the organizer knows about, or should know about.

But as early as 1913, courts recognized that some sports involve potentially dangerous activity and equipment and courts developed a "limited duty rule." The courts reasoned that fans who attended baseball games were aware of the inherent dangers of attending a baseball game, such as being hit by a foul ball or a thrown bat, and that the fans assumed the risk of being injured. This provided some protection for stadium owners if an injured fan sued the stadium owner for negligence.

The Nevada Supreme Court recently affirmed that stadium owners and operators have a limited duty to protect against injuries, such as those arising from foul balls, but owners and operators can satisfy that duty by including warning language on tickets, providing some areas of

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protected seating, making announcements before a game reminding fans of potential injuries from foul balls, and posting signs at every entry with similar reminders. In the case before the court, a fan who had left her seat to visit a beer concession stand that did not have protective shielding was struck by a foul ball and sued the stadium owner. Because the stadium owner had implemented all the warnings mentioned above, the court held that the owner was not liable for negligence.

As baseball, hockey and other sports have evolved over the years, with bigger, faster players, improved equipment that increases the speed of the game and stadiums offering more in-game entertainment, courts have refined the limited duty rule in several important ways. Courts have held that where the inherent dangers of a sport are not known, fans have not assumed the risk involved in attending a game and can sue a stadium owner for an injury. For example, more than 50 years ago, one Ohio court held that the risks of hockey were not common knowledge, so an injured spectator did not assume the risk of injury. This argument might be used today in action sports settings because the inherent dangers in watching action sports might not be considered well known, despite their recent popularity on ESPN and other broadcast outlets. For this reason, many sporting event organizers provide prominent warnings and disclaimers on tickets and on signs near sporting events that remind spectators of the dangers of the event they are planning to watch.

There is well-developed case law involving ski resorts and the travel industry regarding warnings about dangers and disclaimers of liability printed on tickets. Courts have held that such disclaimers are enforceable if they are “reasonably communicated” to the ticket buyer. This usually means that text in very small type would not be considered reasonably communicated, unless the ticket buyer had been given notice of the language on the ticket (for example, if a sign near the ticket-buying window contained the same language and/or told the ticket buyer to read the warnings and disclaimers on the ticket).

### **Participant Safety**

While action sports apparently have not yet faced legal challenges to the dangerous nature of their events, possibly because of broad releases that competitors sign as a condition to compete, sponsors of action sporting events need to balance the desire to attract fans, media coverage and corporate sponsors with the duty to maintain a safe competition location. Every year, the injuries to action sports athletes remind organizers of the significant dangers their participants face. Some event organizers hire seasoned experts in venue construction, course design consultants and recognized industry vendors and contractors to help increase participant and spectator safety.

### **Dram Shop Laws and Alcohol Liability**

Action sports attract young fans, some of whom are under the legal drinking age. One of the thornier problems for sponsors of action sports, mirroring the problems that more traditional sports have faced for years, is who is responsible for preventing underage fans from drinking and from preventing older fans from getting drunk and getting injured, or injuring others. Because action sports tend to attract a young audience, organizers are careful about how alcohol is presented at events and how sponsors promote alcoholic products.

About 40 states have “dram shop laws” which can subject a property owner to liability in some situations if an individual gets drunk and injures himself or someone else. In some states, these laws are very narrow, for example, holding a tavern owner liable for serving alcohol to someone who is under age. In other states, the laws are very broad, allowing a plaintiff (either the person who was intoxicated or the person who was injured) to sue a property owner for injuries stemming from someone’s intoxication. Usually, a plaintiff must be able to show that serving alcohol was a proximate cause of the injury and that the injury was a reasonably foreseeable consequence of serving alcohol. (Event organizers might be able to reduce this risk by seeking indemnification from the resort or host venue, since it is often those entities that actually serve the alcohol.) Since

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action sporting events attract a young audience, sponsors should be diligent about requiring proof of age before serving anyone alcohol.

### **Business Interruption and Inclement Weather**

Another concern in action sporting events is weather. An event sponsor can spend millions of dollars hosting an action sport competition only to find that a thunderstorm, blizzard or dangerous heat wave cancels the event or keeps fans away. Event organizers should include alternate dates in their venue agreements and pay particular attention to force majeure clauses. Business interruption insurance can provide some compensation in such a situation, but sponsors should also develop plans for getting participants and spectators to safety if inclement weather becomes threatening.

### **Ambush Marketing**

Another issue organizers of action sporting events should consider is ambush marketing. Ambush marketing refers to the practice of companies who are not official sponsors of an event trying to associate themselves with the event. Typically, sponsors pay considerable fees for the exclusive rights to certain advertising opportunities such as banners on the race course, naming rights to tournaments or event locations, being the official provider of a team's uniform or shoes, merchandise tie-ins, and VIP tickets. When unofficial sponsors muscle in on this territory, it can weaken an organizer's bargaining position for next year's event.

Examples of ambush marketing include: a company that did not pay for an official sponsorship of an event buying advertising time before, during and after the broadcast of the sporting event; advertising on billboards that are near the sporting event, for example, outside a stadium or along a marathon route; flying airborne banners or huge inflatables over the event; handing out freebies such as t-shirts, flags or caps near the event so that those inside a stadium are wearing or waving the logos of an ambush marketer; creating ads that reference the sporting event, usually in generic terms to avoid liability for trademark infringement

or dilution; sponsoring individual players at sporting events so that they are wearing the ambush marketer's logo; advertising a sweepstakes which will award tickets to sporting events as prizes; and running ads after an event congratulating the teams or players.

Organizers of action sporting events have some options for dealing with ambush marketing. The organizer can maintain strict control over tickets by using language prohibiting unauthorized uses, such as giving away tickets as part of a sweepstakes. An event organizer can also buy all advertising space that is close to the venues where the sporting events will take place and sell that space only to official sponsors. Other strategies include a public education campaign that emphasizes that sponsorship fees are used to help athletes train for events and an aggressive strategy of publicly identifying ambush marketers (although some marketers will welcome this exposure). Finally, an event organizer can pursue litigation against an ambush marketer if it is using trademarks without permission, but this may produce negative publicity among fans who think guerilla marketing is "cool".

### **Conclusion**

Although action sports often invite the "radical" label, the event organizers are acutely aware that they face traditional legal challenges. With careful planning, action sports organizers can minimize their legal risks, without sacrificing the excitement that fuels the popularity of their events.

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