

LEGAL CORNER

## On release forms, don't overstep your legal bounds

By NANCY SMITH

Owners of sports facilities are often relieved to learn that the signature on a release form can insulate them from liability when a sports participant is injured. But an Oregon facility recently learned the hard way that seeking too much protection in a release can result in getting no protection at all.

A federal appellate court recently held that an Oregon sports resort may as well have had no release form signed because the one it used was so all-encompassing that it stepped beyond legally acceptable bounds. The court threw out the entire release, even though some of its terms were appropriate. The resort will now face a trial against the injured sports participant, who suffered severe personal injuries.

In the decision of *Farina v. Mt. Bachelor, Inc.*, the Ninth Circuit Court of Appeal ruled that the release form used by the ski resort was entirely invalid because it included a release for more than Oregon law permitted.

The court provided two lessons for all owners of sporting facilities: (1) do not seek release from injuries caused by intentional or grossly negligent conduct; and (2) make sure release agreements have a provision that will allow valid releases to survive when portions of the agreement are found improper.

Anthony Farina went to the Mt. Bachelor in Oregon to ski. When he purchased a season pass, he signed a form releasing the facility for liability. The release included a "Skiers' Responsibility Code" and warned of the inherent risks of personal injury associated with downhill skiing.

Farina released Mt. Bachelor from liability for personal injuries or death he might suffer in his use of the sports facility. The release included injuries that could occur not only from the ordinary negligence of the facility, but also from "any other theory of liability."

Farina suffered multiple fractures on March 31, 1992, while skiing at Mt. Bachelor. In a lawsuit to recover for his injuries, Farina alleged that he ran into an unmarked boulder hidden below the crest of a hill which obstructed his view as he approached on his skis.

Under Oregon state law, the resort could ask skiers to sign a release for injuries cause by the resort's ordinary negligence. The court threw out this release, however, because it found that the term "any other theory of liability" would include release for intentional and grossly negligent conduct, in addition to ordinary negligence.

Oregon law, like most all states, has a public policy against waiving rights for future injuries caused by intentional or grossly negligent actions. An

Continued on page 53

Nancy Smith, J.D., is an attorney practicing in Pasadena, Calif. Her "Legal Corner" feature appears regularly in GCN. You may call her with story suggestions/queries at 818-585-9907.

NEW TECHNOLOGY

## Introducing a temperature gauge to the controlled-release mix

By JOHN WALTHER

As superintendents face pressures from the proliferation of competing courses as well as player demand for world-class turf, industry suppliers are providing technological advancements which are greatly helping to solve their problems.

The result is higher quality turf in every climate, as well as better use of the often limited dollars in the average superintendent's budget.

Perhaps the first major step in this direction was the introduction of polymer-coated urea technology. Although not perfect when developed some years ago, it did bring turf managers the advantage of "slow" or "controlled-release" fertility.

Further development of this technology virtually eliminated the environmental factors which contribute to the release of nitrogen except one: temperature. United Horticultural Supply has taken another step forward with its polymer-coated ESN nitrogen which responds to temperature changes and releases nutrients as they are needed by turf.

It works like this: as temperatures cool and the nutrient demands of the turfgrass diminish, the ESN polymer coating responds by reacting to the temperature in the turf thatch and reducing the release of nitrogen.

Conversely, as temperatures rise and plant growth is stimulated, ESN responds by increasing the release of nitrogen.

Turfgrass performance is enhanced and wasteful nitrogen release is greatly reduced.

While the production of temperature-based controlled release nitrogen seems simple enough in concept, production of the product is complicated and difficult to duplicate.

The first step in the production process is to apply a micro-thin water-permeable polymer membrane over a spherical, uniformly-sized urea granule.

For ultimate success this membrane must completely encapsulate the urea granule and be free of holes and imperfections.

The second step is the application of a water-dispersible, abrasion-resistant top coat. This surrounds the polymer-coated granule and protects the underlying polymer from damage during handling, blending, transportation and application.

Such protection is critical to the success of ESN performance since the release mechanism is based on the diffusion of nutrients which are dissolved and then dispersed through the polymer membrane.

The protective top coat is water soluble and dissipates on contact with moisture, exposing the polymer-coated urea granule to the environment. The polymer coating is the only factor that controls the rate of water diffusion into the urea granule and the subsequent movement of the dissolved nitrogen through the membrane into the soil environment.

John Walther is fertilizer product manager at United Horticultural Products in Aurora, Ore.



UHS believes temperature-controlled, polymer-coated urea is superior to other controlled-release nitrogen because the rate of release is unusually linear when compared to the up-front release which is normal with less-advanced products.

The linear release of ESN results in more even turf growth without the flushes or lack of adequate release associated with the older technology found in most controlled-release fertilizers.

In addition to supplying "nutrients on

demand," ESN has demonstrated the ability to maximize the overall health and color of the turf as well as reduce the frequency of mowing.

Because the technology involved in the manufacturing process is so advanced, the temperature-controlled polymer coating can be engineered to control nitrogen release over a wide range of time intervals.

This sophistication allows ESN to be produced in formulas which match the unique climatic conditions in various

Continued on page 14

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## Leslie comment

Continued from page 12

tional Relations' State Sports and Tourism Administration.

Polackwich came away from his meeting with Sochan saying: "To me personally, it's a four-star deal, bringing golf to my ancestral country, because golf has done so much for me... This is a seed. My basic idea is creating golf for juniors. That would later translate to adults."

His forecast for Poland? "They want to wait for the economy to stabilize. Then they can build golf courses to complement other tourist attractions, like their great ski areas. They have 3 million visitors a year to [ski area] Zarkopani alone."

Golf Nation could use a few more Steve Polackwiches — Golf Ambassadors who take it upon themselves (even when they're vacationing in their ancestral lands) to expound on the virtues of golf.

The world is ripe for the invasion of golf:

- It took 20 years for Moscow to get its golf course after Robert Trent Jones Sr. and Jr. first traveled there. How long for Steve Polackwich in Poland?

- Arnold Palmer in 1985 opened the Bamboo Curtain long enough to design Chung Shan Golf Course in China, with Ed Seay and Bob Walker. J. Michael Poellot and Brad Benz did a couple more in 1987-88. Now golf is bur-

geoning there, with 11 courses in the ground and more than 80 under construction or in planning.

- Israel has but one golf course, yet may boast a half-dozen in another year or two.

- Egypt had only 36 holes for the longest time. But architect Larry Packard is doubling that.

- Golf is being revisited in a big way in India, where it has been long lost despite having perhaps the world's oldest golf club outside the UK, Royal Calcutta, formed in 1829.

- Even in Yugoslavia — even as bombs burst within earshot — officials dreamed of golf development a couple of years ago.

Roll the film. I want to see that ending.

Checking out where various course architects have taken golf can send you flipping through your atlas. A smattering: Alister Mackenzie in Uruguay, Harry Colt in Trinidad; C.H. Alison in Malaysia (1931); James Braid in Singapore (1924); Percy Clifford in Mexico and Colombia; George Cobb in the Bahamas (1965); George Fazio in Panama (1974); Gary Player in Bophutatswana (1979); Rees Jones in Namibia (1977); Robert Trent Jones Sr. in Guadeloupe (1977), Brazil (1958) and Sardinia (1972); Jack Nicklaus in the Cayman Islands (1985); Willie Park in Monaco (1917); Seth Raynor in Bermuda (1924); and Ron Fream in St. Kitts, Fiji, Brunei...

...  
In this month's question-and-answer feature (see page 37), course architect Greg Nash bemoaned the fact that the golf cart and lack of caddies have changed how people look at golf courses.

"I changed a lot of my design philosophy the day I played Pinehurst No. 2, which you can't take a cart on," he said. "When you walk that golf course, it is astounding to see all the undulations and depressions that Donald Ross designed that you never would see if you were riding a cart, and the impact of the way the golf hole plays.

"I came to a realization that there were a lot of little things I'd been missing because I'd never seen or felt them. So I started putting them into my designs. It's amazing the intricacies and subtleties on the courses in the UK that you don't see over here."

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*Refinance of a 9-hole public course plus construction funds for additional 9 holes.*

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**\$2,400,000 - WHITTIER GC, Whittier, CA & VICTORIA GC, Los Angeles, CA**  
*Refinance of two 18-hole public courses.*

**\$5,000,000 - THE BEACH CLUB GOLF LINKS, Ocean City, MD**  
*Refinance of an 18-hole public golf course and construction financing of an additional 18-hole public course.*

**\$3,600,000 - THE HERITAGE GOLF CLUB, Atlanta, GA**  
*Construction financing for an 18-hole public golf course and a line of credit for new acquisitions.*

**\$5,200,000 - AVILA BEACH RESORT, San Luis Obispo, CA**  
*Refinance of an 18-hole resort golf course.*

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## Temperature

Continued from page 13

geographic areas in the country.

In practical application, the hydrated ESN polymer is best described as elastic, very durable and resilient. This characteristic is very desirable in turf applications, including high traffic areas where many hard, shell-like controlled-release fertilizers are prone to shatter.

At the same time the polymer is transparent and thus a turf manager may visually monitor the liquefaction of the urea and be assured that adequate nitrogen is available to turf over time.

While moisture is important to the initial hydration of ESN, one of the fundamental advantages of the product is that after the initial hydration the rate of nutrient release is not affected by moisture.

The continuous polymer membrane enables the release of nutrients at a predictable rate regardless of the presence of either excessive or very little moisture.

In contrast, common controlled-release fertilizers are affected by moisture. Sulfur-coated urea, for example, will release more nutrients through holes and imperfections in its coating when increased moisture is present. Therefore, each time it rains or irrigation is applied, nutrient release increases and the accuracy of the stated longevity of the product comes under question.

Moisture also affects soil microbiological populations. These populations are difficult to predict with varying soil-moisture levels. The end result may be an unpredictable breakdown of the sulfur-coated urea, methylene urea and ureaform.

While ESN precision-controlled nitrogen may not solve all the problems turf managers face in today's hurry-up, do-it-better industry, it has shown under real world conditions that it can be a major factor in the production and maintenance of consistently beautiful turf.

GOLF COURSE NEWS



CALENDAR

November

4 — 6th Annual Rutgers Professional GolfTurfManagement School and Alumni Awards Banquet in East Brunswick, N.J. Contact 908-828-6900.

4-7 — Georgia GCSA Annual Meeting at Jekyll Island. Contact Karen White at 706-769-4076.

7-9 — Penn State Golf Turf Conference in State College, Pa. Contact Dr. Peter Landschoot at 814-863-3475.

7-10 — Turf and Grounds Exposition in Rochester, N.Y. Contact 800-873-TURF.

9 — Impact of Golf Business Symposium in Myrtle Beach, S.C. Contact the University of South Carolina Department of Sport Administration at 803-777-4960.

9-10 — Golf Course Expo in Orlando, Fla. Contact Golf Course News Conference Group at 207-846-0600.

9-11 — 1st International Hong Kong & China Golf Exhibition and Conference in Hong Kong. Contact Golf Media Group at (+61 9) 322 3222.

12-14 — 16th Annual International Irrigation Exposition and Technical Conference in Phoenix. Contact 703-573-1913.

13-16 — 7th Annual West Virginia GCSA Turf Conference and Show in Morgantown. Contact David Tennant at 304-594-1541.

14-16 — Midwest Regional Turf Foundation Turfgrass and Ornamental Seminar in Lafayette. Contact 317-494-8039.

16-18 — Tree Care Industry Exposition '95 in Indianapolis. Contact National Arborists Assn at 800-733-2622.

21 — The Alliance for Environmental Concerns Annual Environmental Seminar in Bedminster, N.J. Contact Ilona Gray at 201-595-7172.

December

4-7 — 26th Annual Georgia Turfgrass Conference and Trade Show in Atlanta. Contact 404-228-7300.

5-7 — Kansas Turfgrass Conference at Kansas Expocentre, Topeka. Contact Cliff Dipman at 913-539-4053.

5-8 — Ohio Turfgrass Foundation Conference and Show in Columbus, Ohio. Contact 614-261-6750.

6-8 — Minnesota Turf and Grounds Conference and Show in Minneapolis. Contact Scott Turtinen at 612-473-0557.

6-8 — Rocky Mountain Regional Turfgrass Conference and Trade Show in Denver. Contact Julia Marie at 303-688-3440.

12-14 — Georgia Turfgrass Conference and Show in Atlanta. Contact 404-975-4123.

\* For more information contact the GCSAA Education Office at 913-832-4430.

Legal Corner

Continued from page 13

Oregon Supreme Court opinion had previously held that "agreements to exonerate a party from liability or to limit the extent of the party's liability for tortious conduct are not favorites of the courts." The Oregon Supreme Court has held that such exculpatory clauses in release forms are valid only if they are limited to ordinary negligence.

Generally, state law prohibits any type of insurance or indemnification for intentional acts. Otherwise, the principle holds, persons could plan an attach on a person and then purchase insurance, or get a release, that would protect them from responsibility for their intentional and wrongful conduct.

The federal court of appeal had little difficulty concluding that the overreaching release included the possibility of exonerating Mt. Bachelor from intentional

Continued on next page

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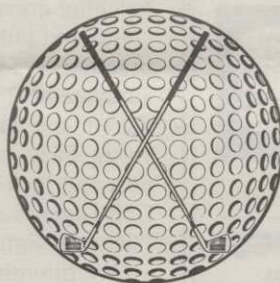
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## ADVERTISERS' INDEX

Cir.#	Advertiser	page
117	American Cyanamid	23-25
131	The Andersons	49
104	Buckner/Legacy	4-5
154	C-LOC Retention Systems, Inc.	52
112	Club Car	22
157	Colorado Lining Co.	52
150	Continental Bridge	52
133	DTN Weather Center	50
167	Eagle Golf & Landscape Products	53
111	EarthRight Technologies, Inc.	16
152	Environmental Compliance Systems	52
103	Inwood Structures	3
163	Excel Bridge Mfg.	53
115	Farmer's Marketing	17
109	Flowtronex/PSI	13
128	Fore Par	48
164	Formost Construction Co.	53
—	Golf Asia '96	55
110	Greyrock Capital Group	14
160	Harrington/Harco Corporation	53
137	Jacobsen	56
161	Jesco Products/Pinhigh	53
108	John Deere	10-11
140	Kincaid*	18-19
151	Kirby Markers	52
166	Lester Building Systems	53
102	Midwest Railroad Ties	3
118	Milorganite	26
106	Par Aide	8
134	Partac	54
162	Pavelec Bros. Construction	53
158	Precision Small Engine	52
153	Precision Tool Prod. Co.	52
124	Rain Bird	42-43
119	Ransomes, Ransomes America Corp.	28
132	Rhode Island Turfgrass Show	49
113	Rhone-Poulenc*	18-19
—	Rhone-Poulenc*	13
126	Rocky Mt. Turf Conf. & Trade Show	46
121	Rohm & Haas	34-35
105	Sandoz Agro Inc.	6-7
125	Sandoz Agro Inc.	44-45
114	Seed Research of Oregon	20-21
130	Simply Products	48
120	Standard Golf	33
165	Steadfast Bridge Co.	53
135	Tee & Green Sod	54
101	Tee-2-Green	2
107	Textron Financial Corp.	9
122	Toro Comm'l. Prod. Div.	38-39
155	Trims International Software	52
127	Turflite, Inc.	48
156	Yard Edge	52
129	York Bridge Concepts	48

\* Appears in regional editions.

## Legal Corner

Continued from previous page

and grossly negligent conduct, in violation of public policy. In a somewhat technical but crucial aspect of the agreement, the court's decision to throw out the entire release turned on common contract clause that was missing from this particular release agreement.

Contracts often contain what attorneys refer to as a "severability" clause. Such a clause states that if one provision of the contract is determined to be invalid, it may be severed from the rest of the contract. When the invalid portion is "severable," it does not contaminate the remaining valid provisions of the contract.

In such an instance, valid parts of the agreement will be enforced while invalid provisions will be "severe" and held unenforceable. The Mt. Bachelor release agreement did not contain a severability clause. Without such a provision in the release contract, the court of appeal held that the invalid portion of the release invalidated the entire contract.

Although the opinion can only be used by lawyers to interpret Oregon law, the opinion sends a word of caution to sports facilities everywhere. The decision is persuasive in other states because the basic principles are common to other jurisdictions. A brief review of existing release forms to assure they are not overreaching and contain the appropriate "severability" clause could avoid costly and time-consuming jury trial in the future.