

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

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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

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

Legal Corner

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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

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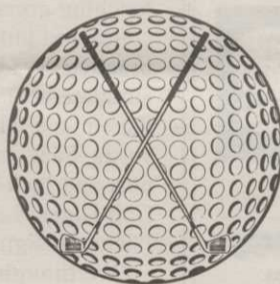
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and grossly negligent conduct, in violation of public policy. In a somewhat technical but crucial aspect of the agreement, the court's decision to throw out the entire release turned on common contract clause that was missing from this particular release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