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# FORE!

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**BEST PRACTICES ISSUE**



# Private Club Liability Issues

## A Look at Errant Golf Balls and Lightning

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*The following is an excerpt from one of the chapters of NCA's new publication, The Legal Reference Guide for Private Clubs. This handbook is designed to assist clubs in avoiding and addressing a wide array of legal challenges, ranging from operational matters and human resource issues to governance and membership policies. This comprehensive resource provides information on areas of liability and exposure that can arise and ways to be proactive in managing the risk. Written by attorneys specializing in private club issues, this definitive resource offers guidelines and policies to help clubs and their counsel avoid and manage legal risks and exposure.*

**G**enerally, a negligence claim is for damages resulting from the wrongful or substandard acts of another. In order for a negligence claim to arise, the following elements must be present: a duty, a breach of that duty, a resulting injury, and a loss. Some of a club's important duties are to obey the law, protect the safety of its members, staff and guests when they are on the premises, and maintain facilities and equipment in good working order. Claims of negligence discussed in this article will focus on errant golf balls and lightning.



## Best Practices: Errant Golf Balls

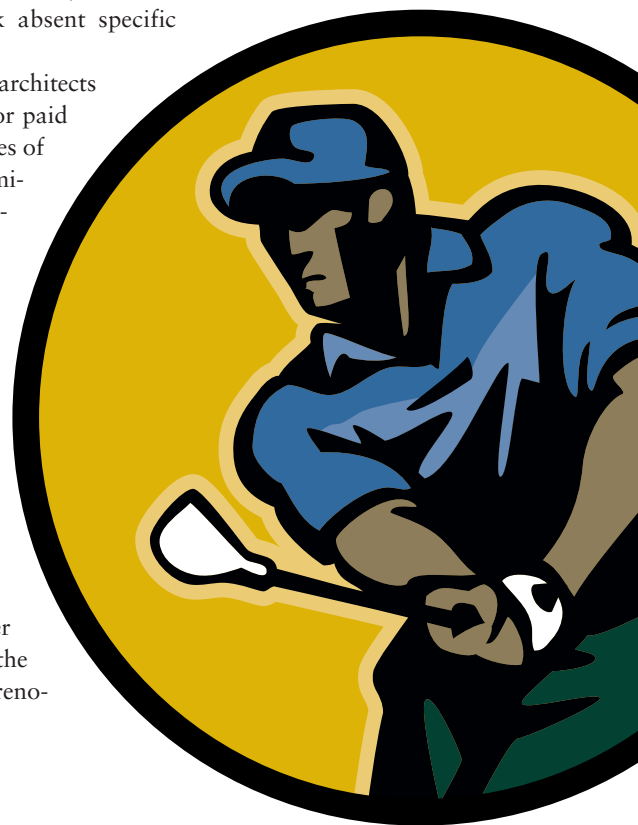
Errant golf balls have been a source of potential liability for golf facilities around the country for many years. On the golf course a hard club head makes contact with a hard ball that is projected at a high speed with a high degree of uncertainty where the ball will land. Courts recognize this inherent risk and in published appellate decisions through the years have developed guidelines for when liability arises from errant golf balls.

Court cases are primarily published after an appeal. This means the case was first decided by a judge or jury, or that a judge entered an order in the case before judgment, and then the losing party appealed that result. The vast majority of cases are settled before or during trial, or they end when the judge or jury decides the case. This means there is no published legal opinion explaining the result of most

cases. Parties to disputes and their insurance companies rely on the principles outlined in the published court opinions to decide how to address injuries and claims such as those resulting from errant golf balls, and then often resolve the case without litigation.

The laws addressing injuries resulting from an errant golf ball vary from state to state. The general rule historically has been that individuals who come on to the golf course are assuming the risk of the possibility of injury on the golf course property. At the same time, individuals on property adjacent to the golf course generally have not been held to assume the risk absent specific circumstances.

Courses and course architects have been found liable (or paid settlements) under theories of negligent design and similar theories. Some potential risks can be avoided by not making an existing situation worse. For example, extensive tree removal may increase the number and velocity of balls striking persons or property beyond the prior tree line barrier. The club should work with its golf professionals, architects and other consultants to evaluate the impact of any potential renovations. >>>





These same professionals can assist the club in addressing circumstances that have arisen over time, such as older driving ranges that are too short for today's balls and drivers. Some operational changes, such as limiting drivers on the driving range and utilizing reduced flight golf balls, can help decrease injuries and limit liability related to the driving range.

Each facility must evaluate these specific conditions for itself with its advisors.

Many master planned golf course communities have included within the community's deed restrictions specific easements that allow golf balls to go onto the adjacent properties and also permit golfers to retrieve such errant golf balls. Such easements place a burden on the golfer to be reasonable (for example, not to scale a wall or tear down a fence), but burden the adjacent property owners with waivers of any claims that result from the balls and golfers coming onto their properties.

With these general principles in mind, the following are a few examples of actual cases that illustrate the various areas of concern for clubs regarding errant golf balls.

- In 2009, a woman in Chagrin Falls, Ohio, was driving down a road adjacent to a golf course when a golf ball hit her windshield and caused the glass on the driver's side to shatter. The driver was sprayed

with shattered glass. The club had recently begun allowing public play, which allegedly resulted in increased errant shots. Local police and town officials stated there had been several incidents of balls leaving the course. In this case, a repeated history of balls leaving the club's property could be evidence of poor design or that the club knowingly put the public at risk. The argument could be made that the club knew or should have known that there was a risk to drivers on the roadway adjacent to the club's property, and drivers adjacent to club property do not assume the risk of errant shots.

- A man attending a golf tournament was on the practice putting green when he was struck by a golf ball hit from the nearby driving range. The injury to his neck caused a massive stroke, leaving the golfer unemployable and in a wheelchair. The golf course settled for \$7.5 million after two days of trial. The plaintiff alleged that the golf course operators were well aware that errant golf balls regularly landed on this putting green. Defendants countered that the design of the practice facility was similar to many other clubs and that golfers assumed the inherent risk of being hit by a golf ball. Defendants also alleged that there was no previous record of injury at the golf course. Again, a repeated history of shots being misdirected to a location where golfers regularly congregated and would not anticipate incoming tee-shots could be evidence the course failed to maintain safe premises.

- Liability can arise due to evidence of repeated errant shots to the same location where screening is possible but not provided. A woman standing on the deck of a golf course clubhouse in Illinois was hit in the head by an errant golf ball. A jury awarded her \$32,132 (*Prochnow v. El Paso Golf Club*). In

*Most courts have adopted the general rule that golfers on the golf course assume the risk of being unintentionally hit by a reasonable golfer's shot.*



that case, the plaintiff alleged that agents and employees of the golf club were well aware that the specific area of the clubhouse deck was repeatedly hit with errant golf balls and that guests were unprotected from shots from the 7th tee box. The jury noted that the need for screening, fencing or other barriers was reasonably foreseeable to the defendants.

■ In a recent case, *Shin v. Ahn*, the California Supreme Court articulated the history and theory behind the general rule that participants in the sport of golf on the golf course have assumed the risk of injury by errant golf balls. In *Shin*, the Court provided a thorough summary of the assumption of risk doctrine as it applies to a golf course operator's conduct, quoting this well-settled legal principle as follows:

We recognized that careless conduct by co-participants is an inherent risk in many sports and that holding participants liable for resulting injuries would discourage vigorous competition. Accordingly, those involved in a sporting activity do not have a duty to reduce the risk of harm that is inherent in the sport itself. They do, however, have a duty not to increase that inherent risk....Thus, sports participants have a limited duty of care to their co-participants, breached only if they intentionally injure them or 'engage in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.'...This application of the *primary assumption of risk doctrine* recognizes that by choosing to participate, individuals assume that level of risk inherent in this sport (case citations omitted).

## Risk and Reasonable Behavior

The above theory of assumption of risk had previously been applied to non-golf sports. In the *Shin* case, the California Supreme Court applied the assumption of risk doctrine to golf, stating:

We hold that the primary assumption of risk doctrine does apply to golf and that being struck by a carelessly hit ball is an inherent risk of the sport....As we explain, whether defendant breached the limited duty of care he owed other golfers by engaging in conduct that was 'so reckless as to be totally outside the range of the ordinary activity involved in [golf]'...depends on resolution of disputed material facts.

As a result, in California a golfer on the golf course assumes the risk of other golfers' *reasonable* behavior, and errant golf balls are to be expected on the golf course. Whether the behavior was in fact *reasonable* is a question for the finder of fact (the judge or jury). This rule is generally applied in other states. The California Supreme Court observed two facts inherent in the game of golf that make this standard appropriate:

Hitting a golf ball at a high rate of speed involves the very real possibility that the ball will take flight in an unintended direction. >>>



If every ball behaved as a golfer wished, there would be little ‘sport’ in the sport of golf. That shots go awry is a risk that all golfers, even the professionals, assume when they play.”...



Shanking the ball is a foreseeable and not uncommon occurrence in the game of golf. The same is true of hooking, slicing, pushing, or pulling a golf shot. We would stress that it is well known that not every shot played by a golfer goes to the point where he intends it to go. If such were the case, every player would be perfect and the whole pleasure of the sport would be lost. It is common knowledge, at least among players, that many bad shots must result although every stroke is delivered with the best possible intention and without any negligence whatsoever.

Given those facts, golf shots may strike other players. This does not give a player license to behave unreasonably when taking his shot. The California Supreme Court noted:

Many factors will bear on whether a golfer’s conduct was reasonable, negligent, or reckless. Relevant circumstances may include the golfer’s skill level; whether topographical undulations, trees, or other impediments obscure his view; what steps he took to determine whether anyone was within range; and the distance and angle between the plaintiff and defendant.

This California case is a good example of the general rule adopted by most courts that golfers on the golf course assume the risk of being unintentionally hit by a *reasonable* golfer’s shot. This may have the

consequence of causing an injured party to look to the club rather than the golfer for compensation for injuries.

To protect itself, the club should take seriously any reports of injuries or repeated errant golf shots in a particular location. The club can work with its architect, golf professional, insurance broker and other advisors to evaluate whether any unreasonable risk to their members and guests exists.

## Best Practices: Lightning

Lightning has long been considered an “act of God” for which others, such as a golf course facility, could not be held liable. However, with the development of technological resources and with various golf leadership organizations taking the position that courses should take reasonable steps to protect against lightning dangers, some courts have begun to evaluate whether a club can be held responsible for lightning-related injuries if the club failed to meet certain standards.

Golf course operators need to evaluate carefully the lightning detection, warning and shelter the operator will provide. Having made that determination and considering the club’s obligation to provide safety services competently, the club must ensure that its members are educated and its staff well trained to execute those procedures and safety features.

There are a number of factors a course should evaluate to determine what are reasonable steps for their specific facility. Some of those factors include the following: the amount of money the golf course management has available for safety equipment; >>>

## Other Areas of Potential Liability

In addition to errant golf balls and lightning strikes, there are a number of other areas of potential legal liability that may arise. Although the physical plant and facilities may vary from club to club, most clubs share certain types of potential negligence liability. For example, in the clubhouse, the club may have potential liability exposure related to its food and beverage operations, alcohol service, and possibly a spa and fitness center. City clubs have food and beverage operations, meeting rooms and possibly sleeping rooms. Yacht clubs have docks, fuel and other areas of potential liabilities. On golf courses, liability can be associated with golf cars, water, and chemicals application. Clubs may have other facilities such as pools and spas that present additional areas of potential liability.

### *Food and Alcohol*

Food and alcohol present a number of areas of potential liability for clubs. Each club must comply with the licensing and regulatory requirements of its specific jurisdiction, which may include federal tax issues, state regulations, and county and city specific regulations. Clubs should be sure their employees are trained so that their actions do not create additional potential liability for the club. For example, as a general rule regarding food service, the club has a responsibility to provide accurate disclosure when questioned about food preparation and ingredients by diners.

### *Fitness Centers*

The club should adopt, maintain and follow a regular maintenance schedule for all of its fitness equipment. Good maintenance can help avoid injury and accidents, and good maintenance records can help avoid liability. Appropriate warnings and signage should always be used to indicate the special risks associated with each piece of equipment, particularly weight training equipment, especially if the fitness center is unsupervised.

### *Child Care Services*

The laws governing child care are very specific and require that specific licensing and operating procedures be followed. Therefore, a club must be sure, if its actions fall within its jurisdiction's definition of "child care," that it obtains the appropriate licenses. Many states define "daycare" for licensing purposes to include offering any child care of more than three hours. The laws related to child care vary by state. Generally, each state requires staffing qualifications and training, as well as minimum standards for regulating the health and safety of children.

### *Golf Cars*

Golf and country clubs should consider adopting golf car safety guidelines. The National Golf Car Manufacturers Association publishes sample Golf Course Safety Guidelines. The club's guidelines should cover a broad range of issues related to the use, ownership and access of golf cars on the club's premises.

### *Pools*

If a club has swimming pool amenities, the club must comply with all applicable federal, state and local regulations. For example, federal law now requires that all pool drains be equipped with anti-entrapment devices or systems that comply with the ASME/ANSI A112.19.8 performance standard, or any successor standard; and that each public pool and spa with a single main drain other than an unblockable drain shall be equipped, at a minimum, with one or more of the devices or systems designed to prevent entrapment by pool or spa drains. In addition, a club should provide signage, lighting and other measures appropriate to its specific facilities.



*Lightning safety is a sort of “Catch-22” issue for clubs. Failing to provide appropriate warning systems may be deemed negligent, but providing systems that may not function fully or that are susceptible to human error can lead to claims the club undertook to provide for members’ safety and then failed to do so.*

the size of the golf course; the number of thunderstorms that occur in the area annually; and the geographical location of the course. Each course should evaluate these factors in connection with considering industry standards. The course should compare itself to others based on factors such as its size, financial status, geographical location and other similarly situated courses.

The USGA has suggested that clubs take a variety of steps to educate and notify patrons about lightning issues. For example, the USGA provides lightning protection warning signs, golf car stickers and other resources. Lighting detection and warning systems are available in a range of prices and with varying degrees of sophistication and effectiveness. Each club, in consult with its insurance and legal advisors, and considering its local laws and standards of care, should determine what is appropriate for its specific facilities.

At a minimum, courses should conspicuously post the USGA warning signs and golf stickers, include safety information in its club documentation, address in the club’s rules and regulations mandatory compliance with safety rules, and take

other steps that are appropriate to the club’s specific circumstances to ensure that members are well advised of lightning risks and safety measures.

Other steps the club can consider are lightning proof weather shelters strategically positioned around the course, a siren system, golf course marshals or other personnel, automated lightning protection systems and weather tracking systems. The club’s professional advisors can provide information on the specific standards that apply. For example, the National Fire Protection Association published standards for the installation of lightning protection systems.

Lightning safety is a sort of “Catch-22” issue for clubs. Failing to provide appropriate warning systems may be deemed negligent, but providing systems that may not function fully (such as if they are automated) or that are susceptible to human error (such as weather tracking data that might be poorly interpreted by pro shop staff) can lead to claims the club undertook to provide for members’ safety and then failed to do so. Clubs should carefully develop a comprehensive lightning safety policy that (1) is appropriate to their facilities, consistent with applicable industry standards for their area and type of facility; (2) is communicated to members in a manner that is clear; and, (3) is implemented in a manner that reduces risks of injury and risks of liability to the club.

Several lightning strike cases decided by appellate courts in the last two decades have been relied on by other courts and, most likely, by potential litigants in settlement negotiations. One such case is *Maussner v. Atlantic City Country Club, Inc.*, decided in 1997 by a New Jersey Court of Appeals.

The *Maussner* court noted that modern technology has rendered storms more predictable, thus indi-



cating that lightning as an “act of God” is no longer a complete defense. The court stated, “where a golf course has taken steps to protect golfers from lightning strikes, it owes the golfers a duty of reasonable care to implement its safety precautions properly.” The court did state, however, that all golf courses have a duty to post warning signs to inform golfers of the safety measures in effect at that course. If the course has not implemented precautionary measures to protect golfers from lightning, the course must also inform the golfers that they play at their own risk.

The *Maussner* court stated the following standard, which is generally consistent with the standards or results articulated by some courts and commentators and is consistent with the club’s obligation (discussed below) to provide competently the safety features it provides.

All golf courses have a duty to post a sign that details what, if any, safety procedures are being utilized by the golf course to protect its patrons from lightning. If a particular golf course uses no safety precautions, its sign must inform golfers that they play at their own risk and that no safety procedures are being utilized to protect golfers from lightning strikes. If, however, a golf course chooses to utilize the particular safety feature, it owes a duty of reasonable care to its patrons to utilize it correctly. This latter standard means, for example, that if a golf course builds shelters, it must build lightning-proof shelters; if a golf course has an evacuation plan, the evacuation plan must be reasonable and must be posted; if a golf course uses a siren or horn system, the golfers must be able to hear it



and must know what the signals mean; and if the golf course uses a weather forecasting system it must use one that is reasonable under the circumstances. This New Jersey case is not binding in other jurisdictions but has been cited for the proposition that a course must disclose its precautionary measures (or lack thereof).

Currently no specific duty to warn of lightning exists, but if a possessor of land undertakes to provide warning of lightning then the warning must be provided in a reasonable, not negligent, manner. However, that standard may change in the future as lightning detection equipment becomes more commonly used to the extent that its use becomes the accepted standard of care. Clubs should be attuned to this fact and watch for developments in this area. Club counsel should advise what standards are currently required in the club’s jurisdiction.

Clubs should incorporate into their regular annual planning a review of legal liability issues. The club’s resources include its senior management and information from their professional organizations, the club’s professional advisors, insurance representatives, and others who provide goods and services to the club. Keeping current on changes in available technology and developments in the legal arena will help the club best evaluate the potential liabilities that apply to its facilities’ goods and services and protect the safety of its members. ■

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