In this session, we will explore the potential liability and legal obligations sponsors and providers of recreational activities, sporting events, field trips and other similar activities. In the sport and recreational context, this includes issues related to participant and patron behavior, such as fans and players who are injured at or in connection with major sporting events or in the course of recreational activities, and injuries arising in connection with special events such as rock concerts, stage plays, commencement ceremonies, and trade shows. The breadth and number of diverse major events and activities being hosted and sponsored has increased exponentially in recent decades. Unfortunately, the incidence of accidents and injuries occurring in connection with those events seems to be markedly on the rise, too. To cite just a few recent examples:

- One fan is killed and another critically injured in a one vehicle accident involving a bus carrying Kansas State University fans to a football game at the University of Kansas in November, 2006. They were riding on the “Cat Tracker,” a retrofitted school bus that took Wildcat fans to games but was not owned or operated by the University.

- A student falls and is injured on an icy sidewalk during a school organized, curriculum-related field trip after a University employee on-site directs the students to traverse the icy sidewalk. *Webb v. University of Utah*, 125 P.3d 906 (Utah 2005).
A nursing student is killed when a van overturns while she and a group of other students are on their way to a hospital as part of a field trip. See *Whittington v. Sowela Technical Institute*, 438 So.2d 236, (La.Ct.App.3d 1983), *writ denied*, 443 So.2d 592 (La. 1983).

Several community college students are injured in an automobile accident occurring en route to an intercollegiate soccer match. Their vehicle was being driven by a college employee. See *Barnhart v. Cabrillo Community College*, 76 Cal.App.4th 818, 90 Cal.Rptr.2d 709 (Cal.App.4th 2000).

A student falls from a cliff at night and is injured during a university sponsored field trip after consuming alcoholic beverages. See *Beach v. University of Utah*, 726 P.2d 413 (Utah 1986).

An army cadet who fell and broke his neck when a railing collapses during the Army-Navy football game at Veterans Stadium received more than $1 million in a settlement with the City, the seating manufacturer, and the Stadium’s security company.

A college student enrolled in a course designed to train guides for horse-packing trips was injured off campus while riding in an open bed of a classmate’s pickup truck as they worked on an assignment to map a route for a later class trip. See *Stockinger v. Feather River Community College*, 111 Cal.App.4th 1014, 4 Cal.Rptr.3d 385 (2003).

In this session, we will identify some of the significant trends, developments and recent cases involving tort and other claims against colleges and universities arising in connection with field trips, sporting events and recreational activities. Using recent cases and news stories regarding potential claims as a springboard for discussion, we will examine various ways in which higher education administrators, faculty members and athletics administrators can take
steps, pro-actively, to help reduce the likelihood and severity of accidents and injuries in the first instance. We also will highlight the importance of having appropriate policies, procedures and protocols in place to address issues such as emergency and evacuation plans; training for ushers, security officers and event staff; effective crowd and traffic control measures; and requirements for field trips. Finally, we will discuss the advisability of having sound claims handling and resolution procedures in place for when the worst occurs, and the importance of effectively using the attorney-client privilege and the work product doctrine. Throughout the session, our focus will be on pro-active steps institutions can take to help identify, analyze and mitigate some of the inherent risks attendant to hosting major sporting events, recreational activities and field trips in order to help reasonably protect our people while at the same time reducing potential institutional legal liability.

Court decisions from various jurisdictions serve as good examples to help highlight the growing trend toward holding colleges and universities legally responsible for incidents and injuries occurring in connection with their sporting and other major events on campus. Some of these cases have involved criminal or reckless conduct by a third party who was not an employee or agent of the defendant university, but who caused injury to a University student, fan, faculty member, staff member or alumnus at a university sponsored event. Hayden v. Univ. of Notre Dame, 716 N.E.2d 603 (Ind. Ct. App. 1999), for example, presented such an issue. In that case, William and Letitia Hayden, were season ticket holders in the south endzone of the University of Notre Dame’s football stadium for many years. Their seats were always behind the goalpost in the south endzone. During an intercollegiate football game on September 16, 1995, one of the teams kicked a ball that landed near their seats when it was not stopped by
the existing net behind the goalpost. Mrs. Hayden was knocked out of her seat and injured her shoulder when a unknown fan dove out of a seat several rows behind her in an attempt to catch the football. The court assumed that the unidentified fan who knocked Letitia Hayden out of her seat committed an intentional criminal act. See id. at 605 n.1. The trial court granted Notre Dame’s motion of summary judgment on the grounds that the University did not owe Mrs. Hayden a duty to protect her from the intentional criminal act of an unknown third person. See id. at 604. On appeal, however, the Indiana Court of Appeals reversed. See id. at 607. A petition to transfer the case to the Indiana Supreme Court was denied.

The parties agreed that Letitia was an invitee of the University at the time of the incident. The issue before the court was whether the third party’s actions which resulted in her injuries were foreseeable and, therefore, whether Notre Dame owed Mrs. Hayden a legal duty. The court applied a “totality of the circumstances test” to establish foreseeability, writing: “a court considers all of the circumstances surrounding an event, including the nature, condition, and location of the land, as well as prior similar incidents.” Id. at 605. According to the court, “the lack of prior similar incidents will not preclude a claim where the landowner knew or should have known that the criminal act was foreseeable.” Applying this test, the court held that “Notre Dame should have foreseen that injury would likely result from the actions of a third party in lunging for the football after it landed in the seating area.” Id. at 606. Thus, the court held that the university owed Letitia Hayden a duty of care to protect her from such injury. See id.

The court supported its holding by noting that Mr. and Mrs. Hayden claimed to have witnessed several prior incidents where fans were jostled or injured by efforts of other fans to retrieve the ball. See id. There was no record evidence that Notre Dame was aware of or had
notice of any of these prior incidents, though, and the plaintiff testified that she had not reported any of the incidents of which she was aware to the University. Nevertheless, the court noted that Notre Dame benefitted from fan enthusiasm and had taken efforts in the past to retrieve footballs but no longer did so. See id. at 607.

What steps, if any, might higher education institutions take moving forward in order to help protect fans attending athletic events on campus from harm while at the same time reducing the risk of institutional liability? Here are some suggestions:

* Print a notice on all event tickets for sports in which fans could be injured (e.g., football, baseball, hockey) indicating that the sport is an inherently dangerous one, that fans could be injured by flying balls or persons diving for them, and that the spectator assumes all risk of injury or harm.

* Raise the net behind the goal post to prevent the possibility of errant footballs flying over it.

* Announce at the beginning of each game that balls may be kicked over the net at times, and that it is not only the fan’s responsibility to give back the ball but that fans should stay in their seats when it occurs and not dive for it.

* Train and orient event staff, buildings and grounds, and maintenance personnel on campus to engage in pro-active risk management. Reward them for identifying problems and bringing forward good suggestions to make the campus a safer place.

In addition to the Hayden case on the college level, there have been a number of reported cases brought by fans injured at professional sporting events in recent years. In Telega v. Security Bureau, Inc., et.al, 719 A.2d 372 (Sup.Ct.Pa. 1998), a spectator who were injured at a
professional football game at Three Rivers Stadium in Pittsburgh brought a negligence action against the provider of security service at the stadium as a result of a disturbance among fans seeking a souvenir ball in the end zone. As in the Hayden case, during a field goal attempt the ball cleared the net and went into the stands near the plaintiff’s season ticket seats. The primary plaintiff stood up, extended his arms and cleanly fielded the ball. When he attempted to sit down, however, he was thrust from his seat and trampled face first into the cement aisle by aggressive fans who stripped him of the souvenir ball. He suffered facial lacerations in the incident, as well as a sprained shoulder and arm and a broken nose that required surgery. Although the trial court granted summary judgment for the security service, on appeal the Superior court reversed, noting that the plaintiffs and others-- prior to the incident in question-- had lodged complaints with the stadium’s Guest Relations Office and security personnel regarding the lack of security and crowd control in their seating area during field goal and extra point attempts. The evidence showed that they had previously complained that the football routinely cleared the net, landed in the stands and created a disturbance among fans seated in that area. Rejecting the trial court’s application of the “no duty rule,” the appellate court held that a spectator could not be expected to assume as inherent in the game of football the risk of being attacked by displaced fans if he catches a soaring football. According to the court, “being trampled by displaced fans is not a risk inherent in or so ordinary a part of the spectator sport of football such that it is certain to occur at any and every stadium in the Commonwealth.”

Another result was reached in Edwards v. California Sports, Inc., 254 Cal.Rptr. 170 (Ct.App.2d 1989), where the court held that an arena owner owed no duty as a matter of law to prevent an intoxicated sports fan from climbing a 50-inch high fence (which, according to the
court, was adequate to prevent anyone of average height from falling into a recessed tunnel as a result of slipping, tripping, losing one’s balance or being bumped or pushed). In that case, a fan gathered at the railings and climbed the guard fence after a L.A. Lakers game in order to view the team’s players as they left the building. Although he fell onto the pavement below and suffered severe head injuries, the owner of the premises was exonerated by the court.

In addition to accidental injuries involving players and fans, there have been a number of incidents in recent years involving player injuries in altercations. Here are several recent examples:

· In December, 2006, players for the Denver Nuggets and New York Knicks got into a violent brawl that spilled over into the stands. Both teams were hit with unprecedented $500,000 fines each.

· Five members of the Western Kentucky University football team and eight members of the Western Illinois team were suspended by the NCAA Division I-AA football committee from future championship competition for their participation in a fight that occurred immediately following the end of the NCAA Division I-AA quarterfinal game in Macomb, Illinois. The incident involved multiple players striking or punching one another, as well as a group of players kicking a defenseless individual and striking an individual with their football helmets.

· A similar post-game on-field altercation occurred during a nationally televised football game between Marshall University and Miami University (Ohio). That incident led to the arrest of a Miami assistant coach after he allegedly shoved a celebrating fan who was among hundreds running onto the field after Marshall’s last second victory.
As evidence that football is not the only sport in which these types of incidents occur, in *Kavanagh v. Trustees of Boston University*, 795 N.E.2d 1170 (Mass. 2003), a basketball player for Manhattan College who was punched by a player for Boston University during an intercollegiate basketball game sued the Trustees of Boston University and the coach of the University’s team, alleging the University was vicariously liable for the conduct of its ‘scholarship athlete,’ and that the University and its coach were negligent in that they ‘took no steps to prevent this act.’ The lower court dismissed those counts in the plaintiff’s complaint alleging vicarious liability and intentional infliction of emotional distress, granting the defendants motions for summary judgment on the remaining counts for negligence and negligent infliction of emotional distress. The defendant player who punched the plaintiff was immediately ejected from the game. Until the incident before the court, the Boston University player had not been involved in any physical altercation during a game and had never been ejected from a game. He had no history of fights with either his own teammates or opposing players. In light of these facts, the court affirmed the decision of the lower court and concluded that the incident was not foreseeable to BU or its coach. The court also rejected the proposition that the doctrine of respondeat superior renders schools liable for the acts of their students.

A similar result was reached in *Gauvin v. Clark*, 537 N.E.2d 94 (Mass. 1989), a case in which a college hockey player for Worcester State College sued the other team’s player, coach and college (Nichols College) for injuries he sustained during a hockey game. The injuries resulted from the defendant ramming the “butt-end” of his hockey stick into the plaintiff’s abdomen after a face-off, when the 2 players were no longer competing for the puck. The plaintiff was hospitalized and as a result of the blow and his spleen had to be removed. “Butt-
ending” is a practice that violates a safety rule in hockey and constitutes unsportsmanlike conduct in a hockey game. It is a major penalty and results in disqualification of the penalized player. The court pointed out that personal injury cases arising out of an athletic event, in order to succeed, generally must be predicated on a reckless disregard for safety. According to the court, “participants in an athletic event owe a duty to other participants to refrain from reckless misconduct and liability may result from injuries caused a player by reason of the breach of that duty.” (citing Restatement (Second) of Torts Section 500 (1965)). Because the court concluded that the defendant did not act with a reckless disregard of safety, it held that he was not liable for injuries caused by his violation of the safety rule.

_Talazsan v. Northridge Arena Soccer League, Inc.,_ 2002 WL 31720287 (Cal.App.2 Dist. 2002) involved a post-game altercation following a soccer match. The plaintiff, David Talazsan, was beaten and seriously injured by opposing players from a soccer match he had just finished playing. Talazsan sued the Club, the League and the League president for negligence, alleging that the defendants breached their duty to provide security guards at the matches. The defendants moved for summary judgment, alleging that any breach of duty by the Club did not cause Talazsan’s injuries. The trial court agreed, noting that a high degree of foreseeability is required before a duty will be imposed to provide security guards or other protective measures. Talazsan testified that he had seen security guards during at least 4 of the 5 to 7 games he had previously played at the Club. On as many as three occasions, the plaintiff said he had seen those guards intervene when players fought or argued, successfully preventing those situations from escalating. On appeal, the court concluded it was highly foreseeable that fights could occur at any game, making the need for guards at every game just as foreseeable. According to the
court, “a trier of fact could conclude that had the same guards been present that night, they could have stopped the fight before Talasazan was seriously injured.” Importantly, though, the court distinguished the case before it from *Ochoa v. California State University*, 72 Cal.App.4th 1300, 85 Cal.Rptr.2d 768, where a college student was injured in a fight that broke out during an intramural soccer game. The court noted: “that case hinged on whether the public university had a special relationship with its adult students, which imposed a duty to protect the students from the criminal acts of third persons.” Talasazan’s case, on the other hand, involved a private business that had already assumed the costs of providing security guards most of the time but who simply failed to provide them the night Talasazan was injured.

In addition to claims involving injuries to players caused by other players and by fans, there also have been a few reported cases in recent years involving allegations of excessive force, unlawful detention and wrongful arrest by police officers serving as security personnel in connection with sporting and other major events on campus. These can be complex cases, especially where private colleges and universities enlist the assistance of public employees and police departments to provide security, crowd control and traffic control. In such instances, private institutions can find themselves exposed to constitutional duties which otherwise would not apply to them if the local police are acting as their employees or agents. In addition, if relationships between the local municipality and the college are not clearly defined with respect to who is employing the police to work major events (i.e., the University or the City), town-gown relations can become very strained—to say the least--in the event of a lawsuit or claim. Although to date the reported cases in this area have tended to involve professional sports venues and high school athletic contests, the risk of legal liability on the college level is often identical. Thus, a
review of these cases can be instructive to universities using police to help provide security and traffic control for major athletic and other events on campus.

In *Eberle v. City of Anaheim*, 901 F.2d 814 (9th Cir. 1990), a spectator at a professional football game between the San Francisco 49ers and the Los Angeles Rams (now the St. Louis Rams) brought an action under 42 U.S.C. Section 1983 against a group of police officers who were helping to provide security services at the event, alleging that they had arrested him without probable cause, and that they had used excessive force in effecting the arrest, thereby violating his constitutional rights.

The Plaintiffs, Marelene Eberle and Robert Kiser and their respective spouses were 49ers fans who were seated in an area of the stadium filled with Rams fans. During the game, two police officers were dispatched to their seating area after receiving a report from an usher that there were several people in the stands being belligerent, using foul language and making rude hand gestures toward the crowd. The officers observed Mr. Eberle and Mr. Kiser turn their backs to the field and make rude hand gestures to the crowd. One of the men also shook a pom-pom in the faces of people seated nearby. One of the officers later testified that he believed Mr. Kiser was challenging someone seated a few rows behind him to a fight. The officers decided to question Kiser and Eberle in a nearby concourse. Although the men initially refused to leave their seats, they eventually joined the officers in the concourse of the stadium. A crowd of onlookers quickly formed around them and started yelling and cheering. Mrs. Kiser then appeared in the concourse and took both of her fists and pushed against an officer’s chest. Mrs. Eberle then appeared, protesting her husband’s innocence and threw beer on one of the officers. She was arrested for assault and battery. She then resisted arrest by kicking the officers and
placing her hands in a locked position on her chest. Perhaps angered by his wife’s treatment, Mr. Eberle then pushed one officer and grabbed another’s shoulder. He was placed in an index-finger hold control by officers and arrested for interfering with the duties of a police officer. Mr. Kiser was then ejected from the stadium by the officers in order to prevent a fight or other disturbance. The Eberles and Kisers subsequently filed suit against 6 officers and the City of Anaheim under 42 U.S.C. Section 1983. Specifically, they alleged violations of their first amendment rights of free expression, association and travel and their fourth amendment rights to freedom from unreasonable search and seizure from the use of excessive force in effecting their arrests.

Following a jury trial, a verdict was returned for the defendants. The court on appeal rejected on waiver grounds Mr. Kiser’s argument that he was arrested merely for cheering his team and otherwise exercising his free speech rights. The court also rejected Mr. Kiser’s fourth amendment claims, noting that he was causing a disturbance of the peace in the stands, which, in turn, justified his being detained. According to the court, his alleged “seizure” was no more than an ‘investigatory detention’ that was justified under the ‘totality of the circumstances’. The court also concluded that the officers’ use of a finger hold did not turn the detention into an arrest, noting: “the use of force during a stop does not convert [the stop] into an arrest if it occurs under circumstances justifying fears for personal safety.” The court ultimately found the officers’ use of force with respect to Mr. Kiser reasonable, noting:

The events giving rise to this case began in the stadium stands between historical rivals. Emotions ran high during these events. Passion can supplant reason. Behavior can become reactive rather than reflective. Aggressive conduct is not uncommon. The potential for violence is omnipresent.
Significant to the court’s conclusion was the fact that Kiser’s wife and friends were scuffling with officers, as well as the fact that a crowd of some 60 to 70 spectators had gathered around the officers, the Kisers and the Eberles to yell and cheer. Under these circumstances, the court concluded, the officers acted in a reasonable and appropriate manner.

A different result was reached in *Ricker v. Weston*, 2002 WL 99807 (3d Cir. 2002). In that cases, the plaintiffs attended an annual Thanksgiving Day football game at Lafayette College in Easton, Pennsylvania between two high school teams. After the game, a group of fans from one of the schools started their traditional walk back to their home state via a toll bridge across the Delaware River. The pedestrian crowd began to spill over from the sidewalks on the bridge to the traveled portion of the roadway, creating a traffic hazard leading to the temporary closure of vehicular traffic on the bridge. Five police officers from Easton’s K-9 Units were present on the bridge to help direct the crowd’s movement. The K-9 unit formed a line across the far side of the bridge. For reasons that are unclear, the officers and their dogs charged the crowd in order to disperse it. During the ensuing melee, the 3 plaintiffs were injured from either dog bites, repeated baton blows, or both and the officers involved were shouting obscenities at the pedestrians during the incident. The officers charged the plaintiffs criminally with charges such as riot, failure to disperse, obstructing highways, aggravated and simple assault, resisting arrest and escape. One of the plaintiffs was subsequently acquitted of all charges. He and others subsequently filed suit under 42 U.S.C. Section 1983 alleging, *inter alia*, violations of their Fourth Amendment rights.

The U.S. District Court denied the defendants’ motion for summary judgment on qualified immunity grounds. On appeal, however, the Third Circuit Court of Appeals held the police chief,
a police captain and the mayor of Easton (not the individual defendant officers who were on the scene) were entitled to qualified immunity. According to the court:

A supervisor may be liable under 42 U.S.C. Section 1983 for his or her subordinate’s conduct if he or she directed, encouraged, tolerated or acquiesced in that conduct. . . . For liability to attach, though, there must be a causal link between the supervisor’s action or inaction and the plaintiff’s injury . . . In other words, the supervisor’s action must be the ‘moving force’ [behind] the constitutional violation.”

Because the mayor, police chief and captain had no involvement in the K-9 officers’ allegedly unconstitutional conduct on the bridge, the court found they were not a ‘moving force’ behind the plaintiffs’ injuries and were entitled to qualified immunity. However, factual or evidentiary issues precluded summary judgment on the question of whether the officers’ conduct violated the Fourth Amendment. It was remanded for further proceedings.

**Claims Handling Procedures: Suggested Steps to Help Reduce Legal Liability When Accidents Do Happen.**

In spite of the best front end risk management and risk assessment program designed to prevent accidents and reduce or avoid institutional legal liability, accidents, injuries and lawsuits will inevitably occur from time to time with respect to field trips, recreational activities and sporting events. When they do, there are a number of steps that can be taken, pro-actively, at the behest of counsel, to help reduce the institution’s liability, expense and damage to reputation. The following list is not intended to be exclusive.

1. **Just the Facts, Please!** Train campus police, fire and emergency personnel employed by the University not to make unnecessary admissions against interest or to express
their personal opinions at the scene of an accident or incident or afterwards (verbally or in writing) concerning who was at fault for the incident, how the University will or should handle it, whether there have been prior similar accidents in the past, etc. These personnel should simply do their jobs and write down the facts, and only the facts, in written their reports.

2. **Utilize the Attorney-Client Privilege.** When personal injury accidents or incidents occur and there is any chance that University may have some share of liability or responsibility for them, involve counsel immediately and copy or direct all internal communications concerning the incident, its investigation, recommendations for subsequent remedial action or repairs to counsel. Do not copy non-employees of the institution without counsel’s prior authorization. This can help protect many communications from disclosure in the event of litigation.

3. **The Work Product Doctrine.** When a serious accident or incident occurs, and as soon as litigation seems imminent, counsel should either investigate it on behalf of the University or request, in writing, that another employee or agent of the institution do so, expressly stating in writing that litigation is anticipated in the matter and requesting that the investigator direct his or her report to the institution’s in-house counsel. This approach can help protect the investigator’s documents and materials from disclosure in the event of subsequent litigation regarding the incident.

4. **Circulation of Incident Reports.** Have campus police, fire and ambulance incident reports involving personal injuries and property damage occurring on university property automatically forwarded to the institution’s risk manager. If litigation against the institution seems possible as a result of the incident, have the incident reports forwarded promptly by the
risk manager to in-house counsel.

5. **Kill ‘em With Kindness.** When accidents or injuries do occur on campus, be pro-active in your response. Approach the potential claimant first and, without making admissions or apologies, express concern for their well being, check-up on them regularly to see how they are getting along and follow up with them over time. This compassionate approach can sometimes help prevent a claim from ever being filed or a claimant from retaining counsel. If they threaten to sue or make demands, ask them what it is they want from the institution. If they tell you, inform them that you will check into it and get back to them. Then check with the institution’s counsel. It is often surprising what claimants want, and sometimes pleasantly so.

6. **Avoid just ‘circling the wagons’ when things go wrong.** Going into a defensive posture immediately and refusing to communicate with the claimant can drive them toward litigation and make them angrily conclude that the university does not care about them.

7. **Apologies, Admissions and other Problems.** Litigation, like love, means never [getting] to say you’re sorry. Unfortunately, an apology is still treated in most jurisdictions as an admission against interest when it is made by a defendant or potential defendant. It can be used against you in a court of law unless it is very carefully worded. Before making statements or issuing letters of apology or admitting fault, consult with the institution’s counsel and give them advanced input into what you say. Carefully crafted apologies which do not admit fault can sometimes help prevent claims from turning into lawsuits.

8. **Choose your battles wisely.** If it appears to counsel that the institution has clear liability with respect to a particular claim, try to settle it early and get a signed release of all
claims. It costs less (in money, time and negative publicity) than waiting until the claimant has retained counsel, filed suit and litigated for several years. The best lawsuit is a settled lawsuit, given the uncertainties of litigation. Choose your battles wisely.

9. **Involve Invested People in Preventative Measures.** If your institution is self-insured, consider involving in your preventative law program the same people who are ultimately responsible for defending the lawsuit if things go wrong. They will be personally invested in the process.

10. **Alternative Dispute Resolution.** Consider resolving disputes and claims via early mediation. Mediation is an informal settlement process facilitated by a neutral third party chosen by the University and the claimant. No settlement can be forced upon you. It can save the institution a great deal of time and money, especially if it is used prior to the filing of a lawsuit. Mediation has an excellent track record of success. It often resolves a dispute in less than a day, rather than taking years of protracted litigation. The key is using mediation early, before the attorneys fees and costs get too high.

**Pro-actively identifying, analyzing and reducing risk**

In the wake of the above court decisions, incidents and others like them, there are a number of steps university and athletics administrators and their counsel can take, pro-actively, to identify, analyze and reduce risk on their campuses and in their programs.

First and foremost, is the formation of a campuswide risk assessment committee. At a minimum, the Committee should include an attorney from the University’s legal staff (in order to help protect the Committee’s discussions and deliberations from subsequent disclosure under the attorney-client privilege), as well as a representative of the Department of Risk Management.
These individuals are generally familiar with the types of injuries and claims that have been occurring on campus in recent years. They also should be knowledgeable of the greatest areas of potential liability exposure and risk facing the institution. In addition, a representative from the University’s business operations area (preferably someone with budget authority to help fund implementation of the Committee’s recommendations), and a representative from the facilities operations or buildings and grounds area who can oversee implementation. Finally, representatives from the student affairs staff and individuals with authority over the campus police, fire department and athletic events should be considered as members. The committee should not be too large. It must, however, have the endorsement of the institution’s senior administration in order to be effective. Making appointments to the Committee a presidential appointment can help improve its effectiveness and influence on campus.

The purpose of the Risk Assessment Committee is to identify areas of potential legal liability and activities posing the greatest risk of injury or property damage, on and off campus, in connection with the University’s activities and programs. Having the Committee address one or two major issues at a time seems to work best. For example, for an academic year the Committee might decide to focus its efforts on one or two of the following major issues, such as major sporting and other events hosted on campus and the institution’s potential liability therefor. Other examples include international study abroad programs, transportation, fire safety and kids on campus. The Committee also might decide to identify as priorities for an academic year any recent incidents or activities that have resulted in injuries or deaths to students, faculty, staff or guests (e.g., a crowd crush during an event, altercations in the stands, police and usher treatment of fans and patrons). Incidents which have led to litigation or institutional liability are excellent
candidates for topics to be addressed by a Risk Assessment Committee. Once the Committee has identified one or two major topics to address, it can begin researching the details surrounding them, identifying the specific risks they pose, asking key players from campus to meet with the Committee to discuss them, determining which risks are inherent and necessary to the institution’s educational mission and which are less so. A critical element in the process is that the Committee narrowly tailor its recommendations to address precisely the threat of injury, harm or liability posed (and no more), rather than using the process as an excuse for eliminating activities or programs that committee members find undesirable for other reasons. The credibility of the Committee, its effectiveness and its viability depend upon its rationality, precision, and focus in carefully crafting reasonable recommendations to the senior administration. Any recommendations which are made but not approved by the administration for implementation should be immediately withdrawn and all references to them eliminated from the Committee’s final report and documentation.

Generally, a landowner has a duty at common law to exercise reasonable care to keep his property in a reasonably safe condition for business invitees. The question of whether a duty to exercise reasonable care arises is governed by the relationship between the parties. According to Section 343 of the Restatement (Second) of Torts (1965):

A possessor of land is subject to liability for physical harm caused to invitees by a condition on the land, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

If, however, the danger posed by a condition on the land is known or “open and obvious” to an invitee, a possessor of land generally is not liable unless he should have anticipated the harm
despite the invitee’s knowledge or the obviousness of the danger.iii

In recent years, there have been were a number of cases involving college and university landowners where the parties’ respective knowledge of dangerous conditions on the premises was a determinative issue. In *Shimer v. Bowling Green State University*iv, for example, a non-athletic event case, the Ohio Court of Claims held that the defendant university did not breach a duty of care owed to a student who fell into an orchestra pit while striking a set following a performance in the school’s theater. The majority held: “[t]here is no duty to warn an invitee if a danger is so open and obvious that the invitee may reasonably be expected to discover it and protect herself.”

In another non-athletic event case, *Gragg v. Witchita State University*,v for example, plaintiffs’ decedent was shot and killed on the campus of Witchita State University by a gang member.vi The plaintiff and her friend had attended a public fireworks display on campus for Independence Day. The event was hosted by the University, its athletic corporation and various corporate sponsors. The plaintiffs brought a wrongful death and survival action against all of the hosts, asserting that the defendants failed to provide adequate security for the event, failed to install adequate lighting on campus and failed to warn of the potential for crime on or near the campus. The trial court granted the defendants’ motion for summary judgment, holding that they owed no legal duty to protect plaintiffs’ decedent from, or warn her of, the criminal acts of a third party; and, that the Kansas Tort Claims act provided immunity to all of the defendants. The Supreme Court of Kansas affirmed, noting the general rule that “. . . in the absence of a ‘special relationship’ there is no duty on a person to control the conduct of a third person to prevent harm to others.”vii Citing various provisions of the Restatement (Second) of Torts, the court found that no special relationship existed between the plaintiff’s decedent and WSU. Nor was it
foreseeable, the court concluded under the totality of circumstances, that Scott would shoot Gragg (plaintiffs’ decedent). The court characterized the crime as “unanticipated” and “unexpected,” and the evidence was unrefuted that “none of the defendants had any knowledge of Scott’s intentions or even that it was likely that he or someone like him would present an unreasonable risk.” With respect to the non-university defendants, the court found that none of them had control of or were owners, occupiers or possessors of the premises. Therefore, no legal duty could be extended to them. Thus, the trial court’s summary judgment in favor of the remaining defendants was likewise affirmed.

**Conclusion**

As this brief examination of some of the cases, incidents and claims involving major sporting events, recreational activities and field trips illustrates, the volume of cases and claims being brought in this area seems to be continuing a long-term upward trend. Similarly, the breadth and diversity of the cases and claims being litigated seems to continue its ascent. As a result, higher education institutions find themselves spending increasingly large portions of their limited events and facilities budgets on items such as legal fees, court costs, insurance premiums and related expenses. This, in turn, diverts vital financial resources away from the educational mission of the university.

It seems inevitable that there will continue to be significant tort litigation in each of the substantive areas discussed above. If recent history is any guide, the courts seem likely to continue to have increasingly higher expectations of educational institutions in areas such as the supervision of student-athletes by coaches, the protection of fans, the provision of security at events, the maintenance of facilities and the careful selection of third party providers. With
respect to universities as landowners, recent cases and claims seem to reaffirm the age-old principle that liability will attach where conditions in facilities or on the land are unreasonably dangerous, but not necessarily where they are as open and obvious to the landowner, host or event sponsor as they are to students, faculty, staff, fans, patrons, guests and other participants or patrons. The volume of recent case law also seems to confirm that individuals who are injured are more likely than ever to pursue litigation, even if the accident appears to have been their fault. The willingness of courts to recognize and enforce sovereign immunity claims provides some limited encouragement and comfort for public institutions. But for private institutions, and in connection with those claims where immunity is not available, the time, expense and potential legal liability exposure is only likely to continue to increase.

In the final analysis, the best institutional hedge against litigation and liability arising out of the hosting or sponsoring of sporting events, recreational activities, field trips and other events is pro-active risk assessment, risk management and preventative law on campus. To that end, college and university administrators, athletics administrators and their counsel should consider investing greater resources in preventive law, risk assessment and educational programs for ushers, security, on-site staff and other employees. These steps could be viewed as time consuming and expensive. However, like most good investments, they can pay huge institutional dividends in the long term and are far less costly than even one major claim. In fact, avoiding even one major piece of litigation can save a college, university or program provider literally hundreds of thousands of dollars (or more). Finally, a litigation strategy focused on settling at an early stage those cases which seem most likely to result in institutional liability, while litigating those claims without merit, can result in substantial savings. When mistakes are made by the
institution, which is inevitable, it is generally much more cost effective and efficient to spend the institution’s resources at the beginning of the dispute to pay the injured party reasonable compensation for their claim and take steps to help prevent similar incidents from occurring in the future. Such an approach allows the institution to choose its battles wisely, fighting only those it reasonably believes it can win and defending only those claims which are deemed justified on the merits.

It never will be possible, of course, to eliminate all liability from hosting sporting events, recreational activities or other similar events. With careful planning, though, the financial, human and institutional costs of protracted tort litigation can often be avoided, or at least significantly mitigated.

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ENDNOTES


ii.  *Id.*


vi.  The decedent’s companion also was shot and killed as they walked across a darkened field after exiting the stadium. The gang member, Anthony Scott, apparently acted in what he thought was retaliation for being shot himself earlier in the year. He was promptly apprehended by on-site security, arrested, tried and convicted of murder. There was no evidence that any sponsor, police officer or security officer knew of Scott’s presence on campus or his intent to commit violence there. No other shootings were known to have been committed during or after the event in prior years. There had been only one other fatal shooting on the campus since 1968, and it occurred several years earlier on another part of campus in connection with a separate festival. Police were aware of gang activity occurring within a half-mile from campus and of crime incidence being higher west of campus, with enrollment declining once due to violent crime in the area and gangs in Hillside.

vii.  261 Kan.1037, 1045, 934 P.2d 121, 128. See also *The Restatement (Second) of Torts, Sections* 316-320 (1964).

viii.  The Court cited favorably the following notes from *The Restatement (Second) of Torts, Section* 314A: “[t]he duty in each case is only one to exercise reasonable care under the circumstances. The defendant is not liable where he neither knows nor should know of the unreasonable risk . . . . He is not required to take precautions against a sudden attack from a third person which he has no reason to anticipate.” 261 Kan. At 1046, 934 P.2d at 129.