

A SPECIAL AMBASSADORS' FORUM

GLOBAL COVID-19 AND SPORTS: THREATS AND RESPONSES

October 2020



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NOTICES

The Special Ambassador’s Forum is a collection of observations, research, policies, and comments on current medical research related to COVID 19; medicine and sports; National Football League policies; legal considerations to exposure claims and liability mitigation; and international political perspectives from Ambassador Charles Ray (Ret.) and Ambassador Pjier Simunovic, Embassy of Croatia.

An excerpt monograph from this work, providing greater detail on the legal aspects of this subject, was previously published as “*Global Covid-19 and Sports: Exposure Claims and Liability Mitigation Considerations*”. *This publication* may be found here:

<http://www.ili.org/images/stories/documents/ICTS-SPORTSCOVID-MONOGRAPH%202020.pdf>

Video of the full conference may be found here:

<http://ili.org/about/news/1225-ili-hosts-icts-ambassador-s-forum-global-covid-19-and-sports.html>

AMBASSADOR’S FORUM: “GLOBAL COVID-19 AND SPORTS: THREATS AND RESPONSES”

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AMBASSADOR'S FORUM
GLOBAL COVID-19 AND SPORTS: THREATS AND RESPONSES

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OCTOBER 2020

AMBASSADOR'S FORUM

GLOBAL COVID-19: THREATS AND RESPONSES

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PREFACE

PROFESSOR YONAH ALEXANDER AND PROFESSOR DON WALLACE, JR., EDITORS

The national, regional, and global spectrum of biological challenges is limitless. Throughout recorded history, these infinite safety concerns stem essentially from two inevitable sources of enduring actual and potential dangers to individuals, communities, societies, and civilizations.

The first critical threat is caused by Mother Nature's disasters, such as earthquakes, cyclones, and infectious diseases. The second concern are man-made menaces, including violent radicalism, terrorism, and war. The key question then is whether the United States and the International Community are prepared to identify, prevent, and counter current and future biological threats.

In this connection our current academic and professional effort is publishing a Report on "Global COVID-19 and Sports: Threats and Responses" that consists of contributions by invited interdisciplinary panelists at our recent Ambassadors' Forum on "Global Covid-19 and Sports: Threats and Responses" that was held on July 30, 2020, via Zoom conferencing and hosted by the International Law Institute (ILI) and the Inter-University Center for Terrorism Studies (IUCTS). Speakers at this Ambassadors' Forum included Distinguished University Professor Rita Colwell (University of Maryland College Park and Johns Hopkins University Bloomberg School of Public Health); Dr. Richard B. Reff, MD (Orthopedic Surgeon and Sports Medicine Specialist); Carl Francis (Director of Communication at the National Football League Players Association); Chalana Damron, Tom Gies, Kristof Roox (attorneys at Crowell & Moring); Ambassador (Ret.) Charles Ray (a former U.S. diplomat and military officer); and Ambassador Pjer Simunovic at the Embassy of Croatia (holding the Presidency of the Council of the European Union). The event is available to view at <http://ili.org/about/news/1225-ili-hosts-icts-ambassador-s-forum-global-covid-19-and-sports.html>. Subsequently, Laurence Winston, an attorney also at Crowell & Moring contributed to the current Report as well.

It should also be noted that in view of the significant role of law in planning for the security, health, business, and sports world in the shadow of the continuing coronavirus pandemic, we decided, with the approval of Crowell & Moring, to also publish a Monograph on "Global Covid-19 and Sports: Exposure Claims and Liability Mitigation Considerations". The authors of this publication were the attorneys from Crowell Moring LLP, namely, Chalana Damron, Thomas P. Gies, Kristof Roox, and Laurence Winston. This publication is available to view at <http://ili.org/about/news/1234-global-covid-19-and-sports-exposure-claims-and-liability-mitigation.html>. The abbreviated version of the Monograph is incorporated in the current, slightly edited and updated, Report.

This Preface provides a brief academic context from the perspectives of the Editors of this publication as well as relevant Acknowledgements.

MOTHER NATURE AND MAN-MADE BIOLOGICAL THREATS

Biological agents are micro-organisms too small to be seen with the naked eye and can include bacteria, viruses, and fungi. Some of the most serious viral agents are those that produce, for example, smallpox and yellow fever. Bacterial agents can induce the plague and Anthrax.

Biological threats are difficult to control as they require a delivery system, or “vector,” that can make distribution difficult and dangerous. Furthermore, it seems likely that if terrorists were to use a biological weapon, they would probably choose a bacteriological rather than a viral or rickettsial agent due to available countermeasures as well as the difficulty of cultivating viruses.

In addition, toxins, the poisonous byproducts of micro-organisms, plants, and animals, fall somewhere between biological and chemical agents as they are non-living substances. Toxins are relatively easy to manufacture and extremely virulent. Botulinum toxins, for example, can be more toxic than some nerve agents on an equal-weight basis.

Moreover, many agents are considered capable of spreading disease among humans, animals, or plants. Disease develops when people and animals are exposed to infectious micro-organisms or to chemicals which are produced by such organisms. After an incubation period, during which organisms are multiplied, the disease may even cause death. Mention should also be made of a number of fungal pathogens, such as smut of wheat, that is capable of destroying crops as well as resulting in famine and costly diseases.

Despite these types of classification of biological challenges, historical and contemporary records provide extensive evidence regarding the nature, intensity, and health security implications of existing threats. These massive data sources also serve as a warning to beware of future catastrophic losses to human lives as well as political, social, economic, and strategic costs to those societies affected by biological pathogen attacks.

For example, in the 14th Century, the Black Plague wiped out 30-60 percent of Europe’s population. Likewise, the 1918 influenza pandemic, regarded as the deadliest in modern times, killed an estimated 50 million people worldwide, about 675,000 of them in the United States. Additionally, the Asian flu, originated in China in 1957-1958, resulted in the death of some one to four million people.

More recently, the sudden Ebola outbreak that began in 2014 presented a major health security challenge nationally, regionally, and globally. This deadly disease has created unprecedented fear and anxiety over public safety, not only in parts of West Africa, but also the United States, Europe, and elsewhere.

To be sure, the Ebola virus reappeared again in the Congo at different periods during 2018-2020. Similar outbreaks as well as other contemporary health security challenges are anticipated in the future.

Mention should be made of the Zika virus infection that is spread by mosquitoes (which are also the vectors of many other diseases), sexually, and through blood transfusion as well as laboratory exposure. The disease causes microcephaly and many other birth defects. Another grave humanitarian concern is the cholera epidemic that has occurred in war-torn Yemen where more than 100,000 cases have been recorded by World Health Organization (WHO) sources, a quarter million of them children. This disease is caused by bacteria from water or food contaminated with feces.

Supplementing Mother Nature’s biological threats are man-made intentions and capabilities to deploy a wide range of weapons against perceived or actual adversaries in the struggle for power within and among nations. From the dawn of history to modern times numerous theologians, philosophers, politicians, military strategists, scientists, academics, and other participants and observers of the world’s security concerns have underscored the continued trends toward mass destruction capabilities.

In sum, to prevent a potential “Black Plague”-like disaster as well as man-made threats, it behooves all nations to recall the warning in Shakespeare’s King Lear, “We make guilty of our disasters the sun, the moon, and stars, as if we were villains on necessity; fools by heavenly compulsions...” (Act 1, Scene 2).

Bill Gates similarly asserted in a February 2017 Security Conference in Munich that “by the work of nature or the hands of a terrorist...an outbreak could kill tens of millions in the near future unless governments begin to prepare for these epidemics the same way we prepare for war.”¹

COVID-19 AND AN ACADEMIC CONTEXT

The current novel coronavirus, also known as Covid-19, has alarmed the world in early 2020 because of similarities with the SARS (the acute respiratory syndrome) some 17 years ago, which killed almost 800 people. On March 11, 2020 the WHO declared the escalating biological threat a pandemic and two days later the United States designated the crisis a National Emergency. By September 1, 2020, the United States registered 6,036,569 coronavirus cases, resulting in a total of 183,689 deaths. During the same period the pandemic has confirmed 25,533,086 cases with a total death toll of 851,647 worldwide.

As the cutoff publication date of the current Report on “Global COVID-19 and Sports: Threats and Responses” is October 6th, 2020, the grim pandemic statistics have risen to the total of 7,422,407 cases and 209,615 in the United States. The pandemic has also confirmed 35,567,574 cases and 1,450,563 deaths globally.²

Many questions have arisen during the past nine months ranging from the exact origin of the pandemic in China, to whether the worst is yet to come, to what are the best response practices to prevent the next outbreak.

In view of the current and future looming biological threats that pose continual and unprecedented security challenges to those in the U.S. and abroad, the co-sponsors of the Ambassadors’ Forums have organized a total of five Zoom Conferences this year. These events include the already mentioned “Covid-19 and Sports: Threats and Responses” (July 30, 2020) as well as four other Forums , “Combating Global Coronavirus: From Isolation to International Cooperation” (March 26, 2020); “Combating Global Coronavirus: A Preliminary Assessment of Past Lessons and Future Outlook” (April 14, 2020); “Global Covid-19 and the Economy: Costs, Lessons, and Future Outlook” (May 20, 2020); and “Global Covid-19 and Energy: Threats and Responses” (June 25, 2020). The recorded contributions of these Forums will be published as distinct reports in the coming months.

It should also be noted that numerous academic programs relevant to previous biological challenges were undertaken by the Inter-University Center for Terrorism Studies (IUCTS), the Inter-University Center for Legal Studies (IUCLS), and the International Center for Terrorism Studies (ICTS), and their earlier institutional structures during the past half-a-century. These activities consisted of seminars and publications seeking to provide insights into historical lessons learned, future potential biological threats, and offer recommendations for rapid response strategies by public and private entities.

¹ Avi Selk, “Bill Gates: Bioterrorism Could Kill More Than A Nuclear War - But No One Is Ready to Deal With It.” [The Washington Post](#), February 18, 2017.

² The statistical data is drawn from press reports such as the tally kept by [The Washington Post](#), September 1, 2020 and October 6, 2020 as well as from other sources such as the John Hopkin’s University global COVID-19 data.

For example, the latest published Report on “Biological Terrorism: International Dimensions” was released in June 2019. It consisted of contributions presented at a seminar hosted by Professor Don Wallace, Jr. at the ILI on March 28, 2019. Participants at the event included Dr. Larry Kerr (Director, Pandemics and Emerging Threats, Office of Global Affairs, U.S. Department of Health and Human Services); Professor Rita Colwell (Distinguished University Professor at the University of Maryland, College Park and Johns Hopkins University Bloomberg School of Public Health, and Senior Fellow, Potomac Institute for Policy Studies); Dr. Daniel M. Gerstein (Senior Policy Researcher at the Rand Corporation, and Former Acting Undersecretary and Deputy Undersecretary in the Science and Technology Directorate, Department of Homeland Security); Dr. Gerald L. Epstein (Distinguished Research Fellow at the Center for the Study of Weapons of Mass Destruction, National Defense University); and Dr. Meghan Delaney (Chief of Pathology & Laboratory Medicine and Medical Director for Transfusion Medicine, Children’s National Medical Center, and Associate Professor of Pathology & Pediatrics, George Washington University). Professor Yonah Alexander served as moderator of the event and closing remarks were made by General (Ret.) Al Gray (Twenty-Ninth Commandant of the U.S. Marine Corps, and Senior Fellow, Potomac Institute for Policy Studies).

ACKNOWLEDGEMENTS

At this time, we wish to express our deep appreciation for ILI members Robert Sargin, Jason Everett, and Emma Andrews for their guidance and support in producing this Report and facilitating the Covid-19 conferences series.

Additionally, special thanks are due to those who provided administrative and research assistance, namely Mythili Kotagiri (Rutgers University graduate), Caitlyn Enroth (undergraduate at the Tufts University), Seth Snyder (undergraduate at the University of Virginia), Aaron Sugarman (undergraduate at the University of North Carolina), and Adam Cooper (undergraduate at the University of Virginia). All are currently or have previously participated in IUCTS Internship Programs.

CONTRIBUTORS

THIS SECTION OF THE REPORT CONSISTS OF PRESENTATIONS MADE BY THE SPEAKERS AT THE AMBASSADORS' FORUM ON "GLOBAL COVID-19 AND SPORTS: THREATS AND RESPONSES" THAT WAS HELD ON JULY 30, 2020 VIA ZOOM CONFERENCING. UPDATES AND REVISIONS HAVE BEEN CONTRIBUTED BY THE INVITED PARTICIPANTS IN OCTOBER 2020.

DISTINGUISHED UNIVERSITY PROFESSOR RITA COLWELL

UNIVERSITY OF MARYLAND, COLLEGE PARK; JOHNS HOPKINS UNIVERSITY, BLOOMBERG SCHOOL OF PUBLIC HEALTH

A predictive capacity that allows estimating the risk of an outbreak of COVID-19 would be a powerful public health benefit. A model has been developed, based on an extended set of variables including environmental parameters, that allows prediction of risk of COVID-19 cases in a community four to eight weeks in advance, making it possible to prepare for an outbreak.

The model derives from research done during the past forty years on cholera and makes it possible to predict cholera outbreaks. Much of the research on cholera was carried out in the Chesapeake Bay, United States, and Bangladesh and India, the latter beginning in 1975. Sensors deployed on satellites, e.g. Landsat initially, provided data on sea surface temperature, sea surface height, and chlorophyll in the Bay of Bengal, notably from stations in the Bay of Bengal adjacent to coastal village communities where cholera outbreaks occur annually. The early crude, but effective, correlations of those environmental parameters with cholera cases proved surprisingly strong and the model was successfully employed in subsequent studies to improve understanding of factors driving cholera epidemics. More recent sophisticated satellite sensors allow measurement of a wide array of parameters, including movement of populations. Progressive improvement of the model developed for cholera in Bangladesh was sufficiently effective that prediction of cholera was extended to include Mozambique, Senegal, and other countries in Africa.

A successful retrospective study of cholera in Yemen during 2016 was accomplished and published in 2017. A brief communication from that publication appeared in the journal *Scientific American*. Fergus McBean, a British aid agency leader who read the communication suggested a collaboration on cholera in Yemen. In the spring of 2018, we provided cholera risk maps monthly for Yemen. Regions of predicted highest risk received medical supplies, safe drinking water, and public health personnel, strategically placed in Yemen. With these and other measures, the number of cholera cases was significantly smaller in those regions in 2018. Being able to act preemptively by providing medical supplies and safe drinking water made a difference. We continue to provide monthly risk reports to the UK foreign aid agency, DFID, and collaborate with DFID, the UK meteorological agency, UNICEF, and NASA.

Interestingly, in 2019 the study area was expanded to include Sudan and prediction of cholera risk was found to be very high in Sudan in August 2019 and proved to be accurate as cholera broke out in that country. The conclusion is that real-time prediction of cholera is practical and feasible.

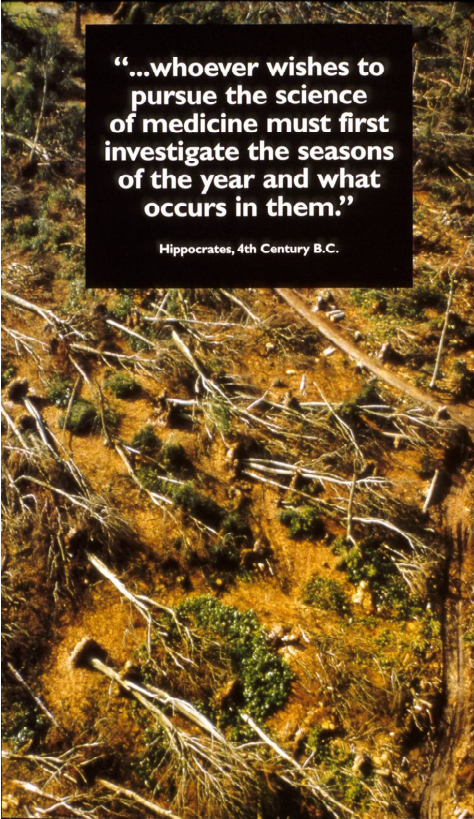
With onset of the COVID-19 pandemic, the question was asked if the prediction model for cholera could be applied to the coronavirus. Using COVID-19 data from 2019 to the present and the hypothesis that the virus is transmitted via airborne routes, namely aerosol

transmission is a major factor, the virus attaching to water droplets, with droplet transmission in the environment, not only person to person, but over a large distance. The cholera model was further developed. Initial analyses used SARS data from earlier outbreaks globally. The COVID-19 coronavirus is known from studies of other investigators to be a variant of SARS, namely SARS CoV-2. An initial deployment of the model using COVID-19 retrospective case data for Michigan, USA, in April 2020, was successful. Additional analyses of COVID-19 cases elsewhere in the United States indicate the model does have the capacity to predict high-risk geographical areas.

In complementary research, ground truth data for COVID-19 are being collected, namely detection and enumeration of the virus in wastewater. A contract from the State of Maryland Department of the Environment provides data on the presence of the virus in sewage samples collected in Prince George's county, Frederick, Seneca, and other sampling is underway in Virginia and the District of Columbia. Molecular methods are employed to detect the virus and its variants. These data allow determination of the presence of the virus before cases have been confirmed, i.e., detection of the virus circulating in the community, i.e., discharged in the feces of asymptomatic carriers, as well as individuals in early stage of infection.

Trend analysis of virus abundance in wastewaters is particularly useful. If numbers of virus in sewage rises, more confirmed cases in the community can be expected. Conversely, if distancing, masking, contact tracing, and other methods employed to reduce incidence of the disease are effective, the trend in virus discharge in sewage will decline, providing evidence to support opening community activities.

In summary, environmental data related to seasonality of the disease, biological characteristics of the virus, ground truth data and epidemiological information can provide accurate and actionable risk prediction of COVID-19. Pandemics have been recorded historically since 1347 and occurrence of such pandemics is approximately every hundred years. Thus, another COVID-like outbreak of disease in our future is a realistic possibility. It is an appropriate response to COVID-19 to reevaluate the benefits and costs of reduction of tropical forests, hunting wild animals, e.g., bush meat, and other non-sustainable practices in a world where the population is expected to increase from 7.5 B to ca. 10 B. Exposure to new emerging infectious disease agents will truly be catastrophic.



“...whoever wishes to pursue the science of medicine must first investigate the seasons of the year and what occurs in them.”

Hippocrates, 4th Century B.C.

**A Special Ambassadors' Forum:
"Global COVID-19 and Sports:
Threats and Responses"**

July 30th, 2020

Rita R. Colwell, Ph.D., D.Sc.
Distinguished University Professor

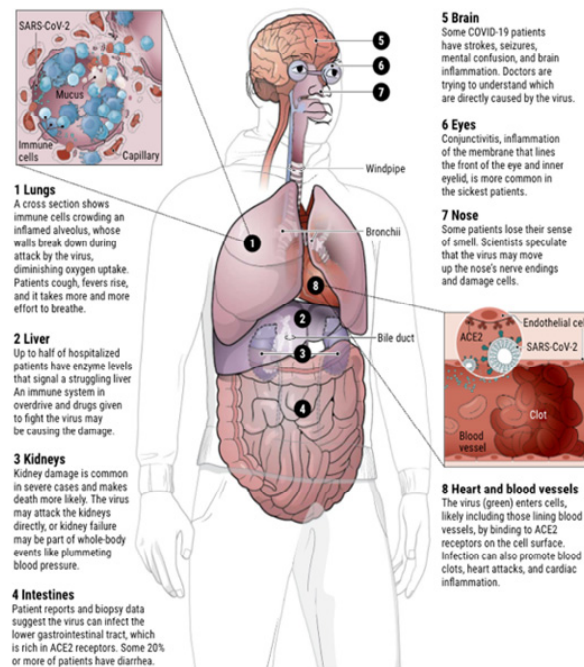


Is COVID-19 polymicrobial and systemic?

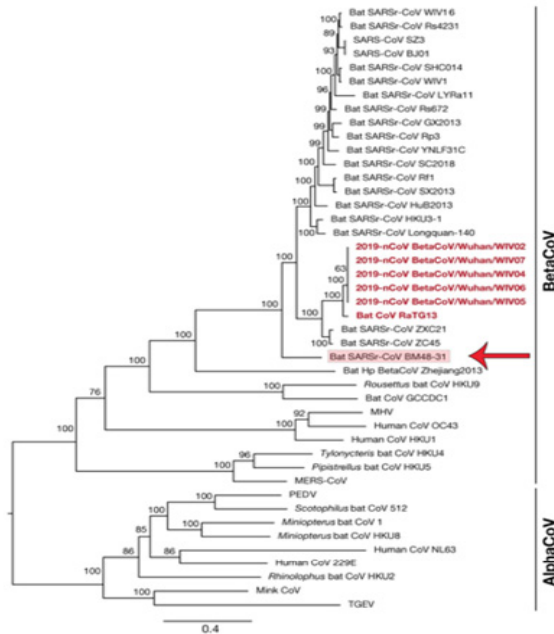
How does coronavirus kill? Clinicians trace a ferocious rampage through the body, from brain to toes

By Meredith Wadman, Jennifer Couzin-Frankel, Jocelyn Kaiser, Catherine Maticic. Science, Apr. 17, 2020, 6:45 PM

<https://www.sciencemag.org/news/2020/04/how-does-coronavirus-kill-clinicians-trace-ferocious-rampage-through-body-brain-toes>



Metagenomic Detection of SARS-CoV-2 Coronavirus

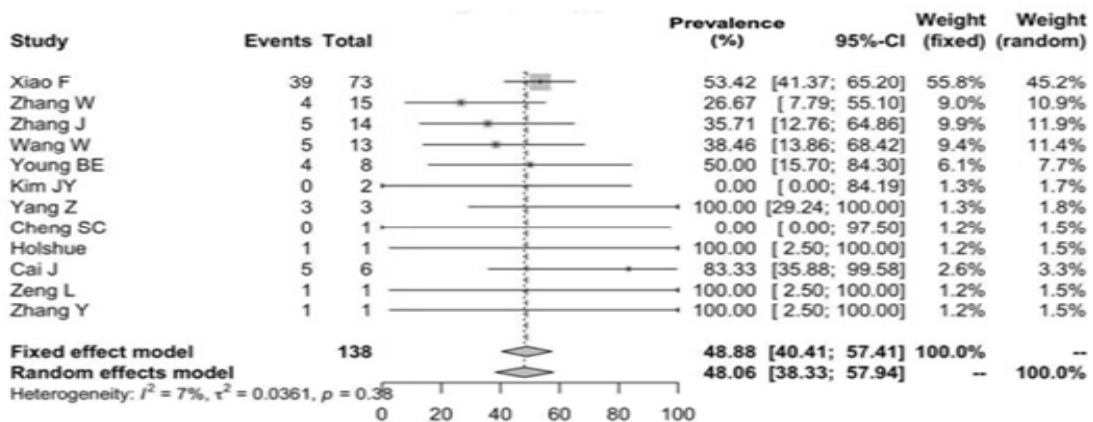


Phylogenetic tree from Zhou et al. (2020) showing the placement of five strains of 2019-nCoV (original nomenclature for SARS-CoV-2). The arrow and highlighted virus strain was identified using automated analysis in the cloud (app.cosmosid.com).

Zhou, et al. (2020) A pneumonia outbreak associated with a new coronavirus of probable bat origin. Nature, 579, 270–273

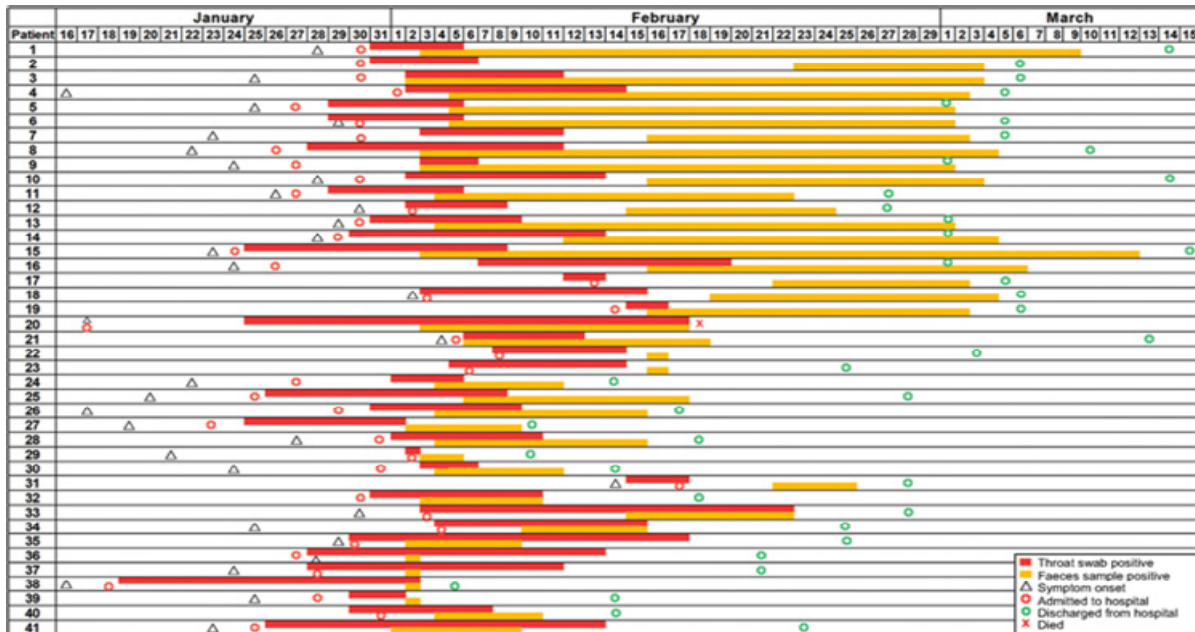
SARS Cov-2 viral RNA has been detected in 48.1% of stool samples

Stool viral RNA positivity rate



Gastroenterology

Positive Stool Samples Detected After Respiratory Sample Tested Negative During Recovery



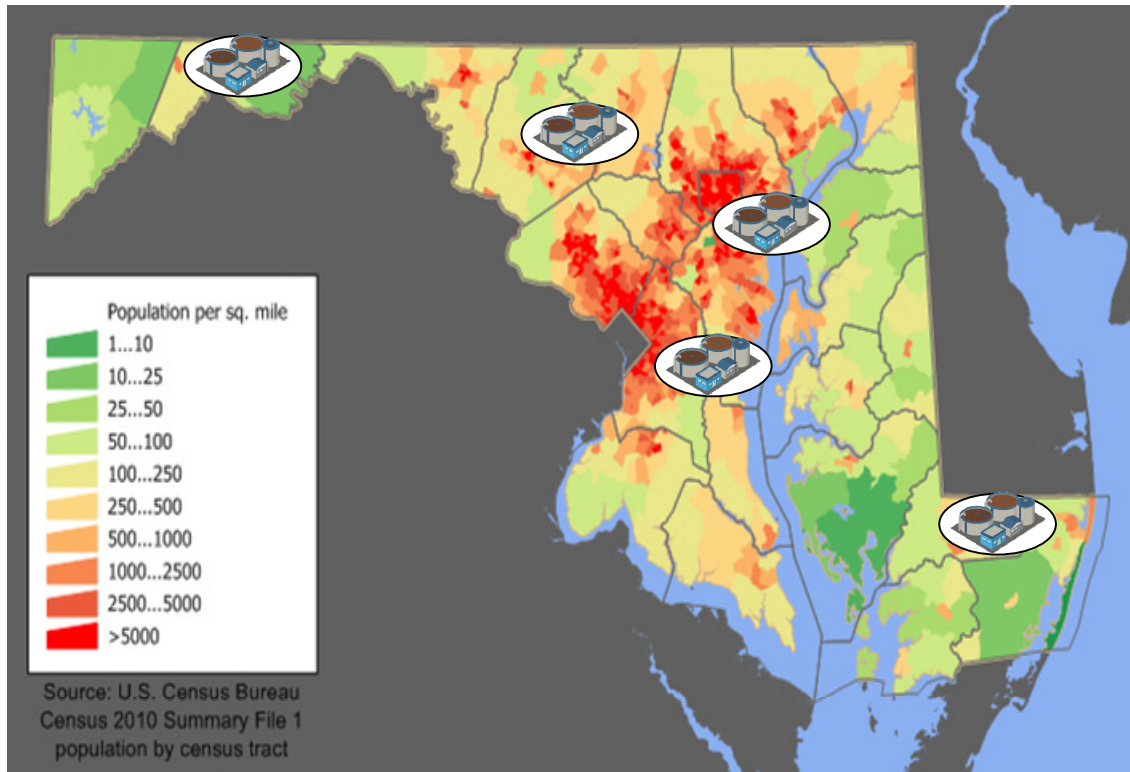
Wu Y, Guo C, Tang L, et al. Prolonged presence of SARS-CoV-2 viral RNA in faecal samples. 2020 *The Lancet Gastroenterology – hepatology*. Volume 5, Issue 5, 434 - 435

Wastewater Surveillance Provides a Non-Invasive Early-Warning of COVID-19 Infections in the Community

- SARS-CoV2 has been detected in stool samples of patients infected with the virus
- The virus has been detected in sewage samples in the United States, Australia, the Netherlands and Sweden
- Wastewater monitoring can be used to determine where COVID-19 and also the approximate number infected, without having to test every individual in a location. This will provide an indication of effectiveness of containment within the community
- The method can be used to measure effectiveness of interventions, e.g., social distancing. (SARS-CoV-2 detected in raw sewage in Tucson by Gerba et al, 2020).
- Wastewater analysis for surveillance of viruses is not new. World Health Organization (WHO) guidelines for environmental surveillance of poliovirus circulation recommended sampling inlets of wastewater treatment plants (WHO, 2003).

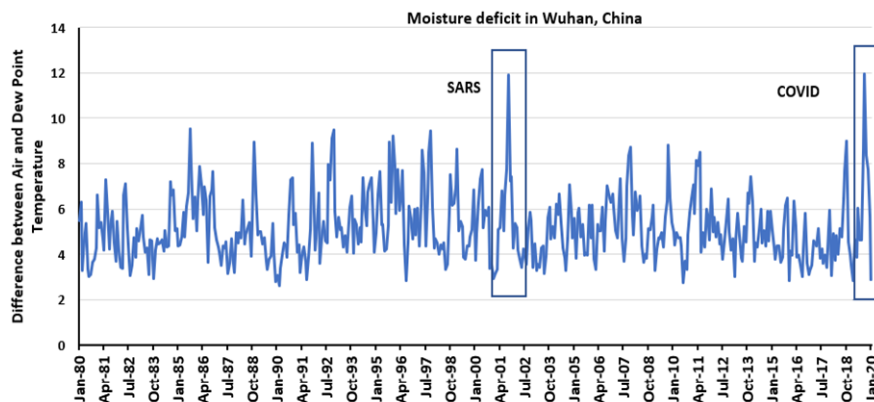
Mallapaty S. How sewage could reveal true scale of coronavirus outbreak. *Nature*. 2020 Apr;580(7802):176-177
 Wu et al., SARS-CoV-2 titers in wastewater are higher than expected from clinically confirmed cases. medRxiv preprint 2020 doi: <https://doi.org/10.1101/2020.04.05.20051540>

COVID-19 tracking in wastewater underway

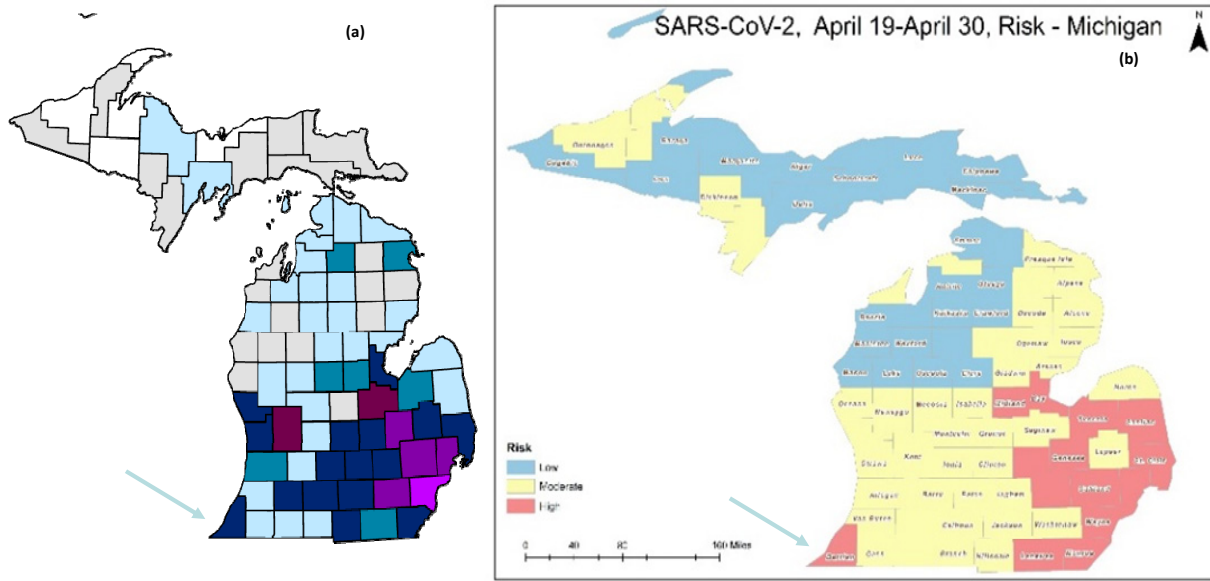


Coronavirus of 2019

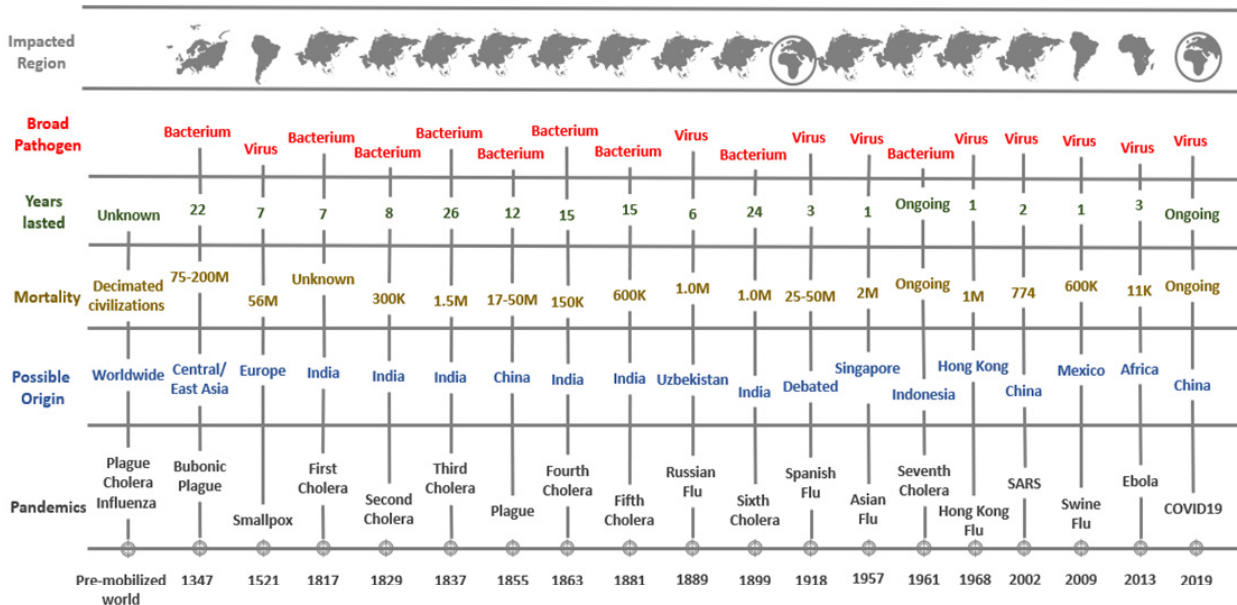
- Significant knowledge gaps exist in our understanding as to how the pandemic has evolved, but most importantly, how this respiratory virus spreads and how this pandemic will end?
- One of the potential mechanisms, and thus the hypothesis of the proposed research, is that the virus can become airborne (aerosol transmission) or can attach to large water droplets (droplet transmission) in the environment (inside built infrastructure or outdoor air) given favorable ambient moisture conditions.



Difference between air and dew point temperatures
(NASA-MERRA data) in Wuhan, China



Preliminary version of Pathogen Aerosolization Index (a) Actual COVID19 cases-deep blue shows high human cases and (b) predicted COVID19 risk.



Major pandemics of the past



DR. RICHARD REFF

MD – ORTHOPEDIC SURGEON; SPORTS MEDICINE SPECIALIST; ADVISOR TO THE US OLYMPIC COMMITTEE

The information that's coming almost hourly has become overwhelming to the world of sports. I'm presenting to you as not only a sports doctor but also as a sports fan, and I think we all have a little bit of that within us.

We are now facing new vocabulary in our general speech that has to do with the world of sports, such as weird, crazy, unpredictable, strange, different, "who knows what tomorrow will bring", and words of optics versus ethics.

We see headlines that are changing almost on an hourly basis; not on a weekly or monthly basis, it's happening very quickly.

This week is a monumental week in the world of sports in the United States because sports has now officially reopened. It's significant that the first ball was thrown out by Dr. Anthony Fauci, who we certainly know very well at this point, even though many of us have never met him in person, but we feel like we all know him.

This week, the Major League Baseball season has begun, the National Basketball Association has reopened today, the National Hockey League, begins tomorrow, and the National Football League training camps are beginning again. Now, we have to ask ourselves, "Is this a good thing?". Is this dangerous? Now we need to explore these questions.

We also then need to consider a lot of different factors in relation to the pandemic. The risk-benefit ratio that we should consider for sports. The safety factors for participants, which would include players, coaches, and staff, the safety of spectators, fans, and parents in youth sports. Then we also have to think about the ethics of participation. Is participation being driven by the financial gain of the organizers and owners? Is it driven by politics? Is it driven at the risk of the health of the participants?

We know that in sports there are necessary and unnecessary risks. The necessary risks, of course, are that if you are playing a sport, you may get injured. The unnecessary risks are somewhat the unknown part of this whole pandemic that we really don't have a good handle on.

Just to reiterate the value of sports in our society. Our culture is very strongly associated with sports. It provides a diversion to daily life's pressures. It clearly is an industry of entertainment. And it does provide an economic stimulus in our economy. There are jobs, not just the highly compensated individuals who are very small in number in relationship to the entire picture. But also, the jobs of those individuals, the vendors, the ticket salespeople, the parking lot attendants, the hotel employees, etc., they all are part of this entire picture.

The Aspen Institute's Project Play has produced some very good information as it relates to children and kids in sports and the value of sports in the active life of a child, that goes beyond just their tender ages, it goes right up until adulthood. We know participation in sports is a very important component in a child's life and the life of our community. Sports participation does help the health and welfare of the society that we live in.

But we have to take a step backwards for a second; sports are important, but sports are games. Life and death is reality, and we're giving a lot of attention to restarting games, and I emphasize the word games, lest we forget that people are sick and dying from the Covid-19 pandemic. This next slide is a physician in Baltimore who just recently passed away, and he was the director of an intensive care unit that was dealing with COVID-19 patients.

From the overview of sports in general, I tried to break it down to different categories. We have international sporting events, professional sports, college sports, high school sports, and youth sports.

The Olympic Games... no other sports event embodies the global perspective of COVID-19. Virtually every country in the world participates in the event and therefore is affected by the pandemic. Every four years we look forward to the world's youth coming together in a, and I'll emphasize the word, *peaceful*, gathering – it's not to be taken lightly.

We look forward to the inspiration we derive from those athletes who have in many cases sacrificed and prepared for many years to achieve their Olympic dreams.

The Olympic Games have only been cancelled in our modern history since 1896 three times. On all three occasions it was related to a World War. World War I and World War II in particular.

In reality we are in the midst of a war, a different form of war with an enemy that we're trying to describe, we're trying to understand, and one that we can't see and don't really have a grasp how we can protect ourselves from it.

Right now, the Olympic Games have not been cancelled, they've been postponed. But the challenges and logistics to having a normal Olympic Games in the presence of COVID-19 are monumental and are potentially insurmountable.

I created an acronym called F.A.T. a number of years ago when I was helping to plan the Maccabiah games. I've found when you break down things into common denominators, it's easier for people to understand them and organize their planning efforts.

In most events, if you can provide **Food, Accommodation, and Transportation [F.A.T.]** in a safe, healthy, and efficient way, you're pretty much guaranteed of having a very successful event. These three areas: **Food, Accommodation, and Transportation**, are affected by the ability of organizers, with the pandemic, to be able to move forward.

Professional sports: We're witnessing the chaotic return of play of some, such as Major league Baseball. We're witnessing the well-thought out plans of others, such as the National Basketball Association and the National Hockey League. And we will witness the return of the big brother of American sports, and that is the National Football League.

Let's not pretend that there are not controversial ethical and health concerns by the resumption of play by these entities. Players are opting out because of lack of confidence in health and safety protocols, which include testing, rules, and environment. Are resources, from a controversial perspective needed by the general population being diverted to allow high priced sports to occur? How do sports franchises have better access to testing and speed of testing results that across the board are not available to the rest of us? And I'm including myself because I'm a medical professional and this is not easy to get.

It's not gloom and doom for everything. We do need to remember the thrill of victory and what sports has meant for our society.

This is contrasted however with what might be considered the "new normal," whatever that really is. The "new normal" in Major League Baseball. Look on the left, we have cardboard fans, we have an enormous stadium. To the right, we now see people, managers, wearing masks. We have empty seats. We have minimal physical contact.

The chaos, in my opinion, that we're seeing currently in Major League Baseball (we glibly talked about the Marlins a bit before the session began) Games have been cancelled and there's an extraordinarily high number of positive tests coming out of a single team. Testing is not done daily within this system. There's a home and home schedule were there are travel concerns. There is the whole issue of F.A.T. that I mentioned before. So, we may actually look back at the major league baseball experience sometime in the near future and look at this as an example of what not to do, instead of how they managed it nicely.

In contrast, the NBA, at the moment, has created a bubble environment. What's a bubble environment? It's effectively creating a quarantine with strict rules. You can't leave the bubble. If you do, then there are consequences. There are strict quarantine protocols in place. There are daily tests of COVID-19.

The National Hockey League has had a very similar approach to this problem by creating not one, but two bubbles because of the geography. There's a bubble in Edmonton and there's also a bubble in Toronto. Again, similar situations and across a geographical border. It can be done.

And then we have the National Football League. Will the Major League Baseball experience be the window to what will happen to the National Football League? If we look at it, fans will be permitted in the stadiums, albeit smaller capacity. Is that really necessary? If you look at the financials from what has been reported by the Green Bay Packers, which are the only team in the National Football League that is publicly owned, so they're required to file with the SEC papers, so it becomes a window to the rest of the league in terms of what the financial situations are.

The Packers President Mark Murphy said we're good; we're in good shape. We can pay the entire payroll, essentially its covered, by the media money. If we do have fans in the stands, we've calculated that it only will take 12,000 people so that we can break even. I don't know how accurate that is or isn't, but that also takes into account that if you are open, you also have individuals working there, and you have to pay their salaries. Players, however, are opting out. They are uncertain as to their personal safety.

Then we move to college sports. Most universities and colleges are going to virtual education in the fall to keep students apart and minimize social gathering and contact. Live classroom experiences will be minimal. I have a son who will be a sophomore at a major university so 100% of his classes will be online. School administrations are making drastic changes for the health and welfare of the students and faculty. How do collegiate sports fit into that model?

Colleges are bracing for huge losses also for declining enrollment due to the pandemic. At the same time, athletic departments are facing dramatic losses of their own, starting with the cancellation back in March of the NCAA Basketball Tournament. So, there are a lot of financial pressures here.

Salaries within the athletic departments in relation to the rest of the departments at universities are extremely high. Ridiculously high, I won't say ridiculous, that's unfair, but extremely high in relationship to the average professor who is teaching the kids. The health and welfare of the student athletes; is that being taken into consideration? Or, are they being sacrificed to pay the salaries of the high-priced salaries? What is the justification for holding sports but not holding classes? It's a reasonable question to ask.

Will college football happen in 2020? What are some of the colleges doing in order to try to minimize risk? On the left is the coach at the University of North Carolina Chapel Hill, and he's actually got a 6-foot long poll and he's demonstrating to his players what 6-feet apart really means. On the right, it's hard to see but player number 12 has a newly constructed face shield inside of his helmet to try and prevent further exposure of breathing from one player to another.

Updates are happening more than daily, just to give you an idea of the constant changing of the landscape. And this is all over the place, it's not just in the East. It's in the Midwest, it's in the West, etc. Governor Cuomo of New York has just come out with an edict saying that there will be no fans at college sports in his state of New York.

So, what are the current responses to what we are seeing within the collegiate ranks? The Ivy League was the first conference to come out with a definitive strategy and plan. They cancelled all sports in the Fall. The Big 10 cancelled all conference games. Going down the line, two of the big ones, the SEC in the South and the Big 12 in the South, are being somewhat ridiculed in the media because of their failure to come up with any definitive plan. They keep saying they were going to have a decision by the end of the July. Well, we only have one more day in July. And they said now we're pushing it off to August. The NCAA has also cancelled all 22 of its fall championship sports.

HIGH SCHOOL SPORTS:

The absence of sports in high school is tragic, it's sad, but in reality, it's no less strange than the forced virtual school experience these kids are having to go through. Decisions that are being made at the high school level are based upon local regulations and it's all over the board all over the place in pretty much every jurisdiction in the United States. What we really see is that there's a lack of strong oversight for the health and safety of these kids.

Just as an example of the difficult challenge of social distancing: on the left we see a batter, a catcher, and an umpire. They are all within six feet. When the player is on first base, the first baseman doesn't say to the runner on first base, "Excuse me, you have to get 6 feet away from me." No, the game has to proceed.

On the left the picture on the slide is a commentary of what was, on the right is today, this is a view from a helicopter of a Little League field with empty stands.

I have some personal opinions in regards to youth sports from my perspective as an Orthopedic Surgeon. I've seen in the last six weeks kids who were playing in soccer clubs, lacrosse clubs, travel baseball, gymnastics clubs, and even tackle football. It's really bizarre and irrational when you're sitting and listening to the stories of kids who were injured and how this whole thing has manifested.

I live in Montgomery County, Maryland. Montgomery County is one of the more controlled counties in the United States, in terms of regulations. Most of the patients and the kids that I

have taken care of live in Montgomery County but none of them are playing in Montgomery County. All these organizers are taking these kids out of Montgomery County into Delaware and other counties in the state of Maryland and other places just to play.

I've had the opportunity to ask a lot of the parents what their thinking is, and it's not very rational. I really see that the health and safety of the youth seem to be secondary to some of the financially-based motivations of the organizers and perhaps they are trying to delude the parents of these kids about their sports potentials. As I said, holding these events outside of restricted zones is not a safe practice.

In conclusion, the landscape of sports is changing almost hourly and no one knows what really is going to happen. With all this information that's coming at us from so many different directions, the one common denominator is that there's no consistency in the approach or understanding of the health and safety issues. The lack of leadership and direction from the highest levels is disturbing. It seems that every governmental entity and sports organizations are acting independently and trying to invent their own wheel. There's no clarity and strategy from governing bodies, which is not just government but also from those governing bodies that organize sports. The decisions that are based on scientific evidence are greatly ignored, and are being motivated more by politics than by science.

In summary, I would say to everyone, wear your mask, limit physical contact, practice social distancing, wash your hands frequently (I've never washed my hands so much in my entire life), and frequent use of hand sanitizer.

To end on a light note, this was the original music score for "Take Me Out To The Ball Game," which is certainly relevant to this time of year. And I thought I would go through the song:

"Take me out to the ball game, **but not this year**. Take me out with the crowd, **there are no crowds this year**. Buy me some peanuts and Cracker Jacks, **not this year either**. I don't care if I never get back, **you're not going anywhere this year**. Let me root, root, root for the home team, **that's OK, but you have to do it from home**. If they don't win, it's a shame, **that's true**. For it's one, two, three strikes you're out, **at least some things haven't changed**!. At the old ball game, **and we really have to wonder will it ever be the same?**

CARL FRANCIS

DIRECTOR OF COMMUNICATIONS, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION

I am very honored to be here, with such a distinguished group. One of the things I really wanted to share is to give a timeline of how we got to where we are today. I wanted to share something on our website that I think is important for the audience to view. One of the things I think is unique about our sport, particularly as an organization, is our job to protect the welfare, the wages, and most importantly the health and safety of our players. The health and safety of our members has been the cornerstone of our organization since its inception. We all know that is a pretty tall task when you're talking about a 100% injury rate every year sport. But more importantly when this conversation surrounding COVID began to unpack no one had much information, but everyone heard reports of how dangerous and hazardous this could be. A lot of our players began to have the same questions around mid-March at our Board of Player Representatives meeting. And what's interesting, as I talked to several people, they seemed to separate the concern of this virus from everyday people and NFL players. So, when the virus was introduced to us, our medical advisors Dr. Tom Meyer and Sean Sansivari began to have conversations with medical experts on "what is this virus? What's the context of it?"

This conversation began around the March and April. We felt as though there was enough time to learn, study evaluation and get the right answers to assess how this would impact our training camps, practices and upcoming season.

So we did take a step back to see the big picture of "okay, what was their process of resuming play?" Because we were all learning from each other, we were all gathering information from each other from afar, which is important when we're all trying to achieve the same goal in terms of resuming or getting back to play. The first action items were to shut off our offseason activities. We just cancelled them all. We told the National Football League in no way would our players attend offseason training activities—many camps that are usually held around that time and most importantly any activities that required a player to report to the training facility.

Then around that same time the Commissioner Roger Goodell made the decision that he would move forward with the draft, and we didn't necessarily have a concern with his decision because of their plans to host the event virtually.

The NFL draft was unique because it gave our fans, partners and the audience a personal insight into the business of football around the draft.

Then as we started getting closer in the May period, we really started getting more information how COVID would impact our business and how do we properly plan for training camp. Our executive committee was brought together, and we started having meetings on all the reports we were getting from our medical experts, along with the National Football League. And what we started to realize is that there was a lot of information we did not know at the time. We were not surprised because it was a new emerging, novel virus. But what made it a little unnerving was the fact that we didn't understand how it would impact other sports as they were beginning to restart their season. When we read reports Adam Silver and others contemplating whether they should play or not or how they can build this infrastructure in order to provide a safe and healthy environment for their members, we started to take notice. But one of the things we did notice was we are a much different sport than most because our sport requires a physical behavior/contact. It requires people to

physically engage with each and every play. And so, with those elements in place, it becomes harder to figure out what's the best way to move forward.

But not only that bucket, there were many buckets that we had to work within to figure out "how do we get back to playing?" And those buckets are actually still in the process of being reviewed. We all know this was not an overnight process of trying to figure out how to resume and get back to a new normal. A couple of those buckets were—and we mentioned earlier—fans, whether they would be attending the games. Stadium workers, parking attendants, guest services at the games. We had to deal with the media, how are we going to manage media interviews. How are we going to manage the staff at the facility, because one of the decisions we made was to have all training camps at their local facilities to reduce and mitigate more interactions.

And then one of the things we wanted to monitor were the states where we had clubs. Because we were not just in the NFL environment, we were in the world environment like everyone else. So we looked at areas such as Arizona, where the Arizona Cardinals play. We looked at California where we have two of our teams, the LA Rams and LA Chargers. You have Florida where we have Jacksonville Jaguars, Tampa Bay Buccaneers and Miami Dolphins.

Different from basketball, it is really difficult to place football in a bubble because of the number of people who are involved in the sport. So how does that look? We were prepared to move forward with the training camp. One of the things we talked to the NFL about was if we can't come to an agreement on when training camps start then we have to put in a strong acclimation period for our member and one of those included we are not playing preseason games. There is a lot of football terminology around that subject that I don't want to bore our audience with today. They may matter to the common fan, but we weren't sure whether the fans were going to be at the games anyway. We wanted to make sure that players were in an acclimation period where they could get the daily testing. The NFL wanted every other day, we wanted every day. We wanted an acclimation period where players could feel comfortable and get adjusted to the new norm. So, the acclimation period consisted of how many days players could work on strength and conditioning each day, how many players can go out on the field and interact with each other in the offseason training activity, doing regular training and activities.

These conversations at times became very intense because players are part of public communities. They have families, fiancés, children, and family members who have pre-existing medical conditions who live with them. All of the meetings that I were a part of with our doctors and team physicians, I thought I was more informed than I was until our players asked numerous questions that were very informative and insightful. The question most raised was "how will it impact my family? When I go home will it risk my newborn child? Will I risk my mom who is staying with us, and if I did what's the quarantine period?" I mean all these different elements that impact the average person who are a part of this process. I really want to emphasize that because even though they are trying to get back to play a sport, to do their jobs, most importantly they are concerned about their families because we as the NFLPA, make sure people understand, we don't just represent two thousand NFL players that you see playing on Sundays, we represent them and their families because we are a part of one big business, and if we don't protect them then we can't protect their families.

I would like to show you data we posted on our website to share with our members. We wanted our members to maintain a level of information to stay abreast of how COVID was tracking across the country and in their communities.

The information we shared with our players and the general public are some of the new guidelines were determined by our doctors and medical professionals at the CDC and a number of other medical institutions that we work with every day. Now this number below we wanted to share because it's important, we wanted to be very transparent and to ensure that everyone had the information, particularly our members. So, the 107 positive tests during the offseason that don't necessarily include players reporting to camp. They include players who secured their own tests, during the offseason, who went back to the facilities, players who had offseason surgeries, pre-existing injuries from the previous season. The 107 number includes that number as well as the players that exist today. Now, we have had positive tests since players have reported from last Tuesday I believe up until yesterday. One thing I believe is important to know is we want to make sure if a player tests positive. If so that's not a bad thing, because at the end of the day you have to know where you status so you won't be a spreader.

There is a lot of misinformation regarding what is a positive test. And our players, they want to know, because a lot of them have not been tested. Some of them have the fear being asymptomatic. Many of them do not want to infect their family members. So positive tests are good for them because at least they know "Hey I have it now, what can I do to get treatment and recover? Now I can quarantine from my family, I can separate myself from my teammates, I can track, trace, get treatment, and get back to my normal life."

I wanted to make sure players understood, there is the ability to opt-out, and we have had several players who have decided to opt-out. That's good, because if you're opting out because you fear, as any normal human that is facing this awful virus, you have the right to say "listen." We had one young man, I won't say his name, but he decided to opt out because his wife just had a child, and his wife has type-2 diabetes, so he decided to opt out. There is a player name Laurent Duvernay-Tardif who is a doctor and starting offensive lineman for the Kansas City Chiefs. He decided to opt out so he could continue his work as a medical assistant in a hospital in order to save lives and help support the frontliners who are helping to mitigate and get rid of this awful virus.

Okay, so what we require each team to do is to prepare an Infectious Disease Emergency Report. The plan will consist of what actions and protocols clubs will use to ensure players health and safety. The first day the player gets to the facility until the end of training camp. What happens in training camp if the player tests positive, what's the first step? If he gets hurt, what's the next step? If he gets COVID, is he placed on the football injury list? All these different elements that relate to COVID. This process took a very long time to negotiate with the NFL doctors and its medical consultants. Players were not allowed to report to the facilities unless each team IDER plans were submitted. Yesterday, I believe, was the last day that everyone had to submit their plans. Each plan was over 50 pages teams had to provide details, develop safety protocols. Clubs were required to send the plan to the NFL and our team to review along with NFL medical officials. As of today, IDER plans of all 32 teams have been approved, all 32 teams are reporting to camp, and now players are in the acclimation process. One of the things I will tell you is the initial acclimation for each player, when a player reports, the player has to test the first day he reports, the second day he reports, he gets a day off the third day, and then he has to test again on the fourth day. Each player is required to have two negative tests before he is even allowed to enter the building. He has to

have two negatives, because we wanted to confirm the false-negatives and make sure players felt safe enough to report and allow into the building.

So, this is our daily tracker that we provide to players, sort of a metric of where the testing results are around the country in each team city. So, players can see for themselves where there has been an uptick in negatives or decrease in positives. And players know that these are areas where the risk is a lot higher so for the most part it's important that, as we mentioned earlier, that you take responsibility for ensuring your safety. And it's all the things we just saw, we just read and mentioned. Where your mask, wash your hands, stay six feet away. They have really done a great job of ensuring that each facility in our league is in somewhat of a quarantine as relates to making sure that players are in the safest environment possible. And those who are infected have them removed from the facilities as soon as possible. But most important when you leave the facility that's when you have to enter the world of everyday life and make decisions. If you have children, do you allow anyone into your home that hasn't been tested? Do you allow yourself to go out to dinner with your family with no mask and not sit six feet away from the next table? Do you go to events? Do you go to functions? Do you have activities where you will be in a group of more than ten? These are the things that unfortunately we can't control but our players have taken a personal oath so say, "we need to do it because I need to protect my family and we want to play football."

So, I just wanted to give you a glimpse of some of the things that we've shared with our members to ensure, as much as possible, that they be given all the information they can on this novel and emerging virus. Also, to ensure that they understand that colleges are watching them, more importantly high schools students who have lost their seasons, a lot of small colleges that have lost their season. So a lot of them understand the importance, if you want to play, these are the things that you must dedicate yourself to doing, because we have the information and getting back to play is no different than what we're telling all of America: wear your mask, wash your hands, and please use six feet distance in order to get everyone back to some sense of normalcy.

I. INTRODUCTION

The COVID-19 pandemic has devastated organized sports across the globe. Major sporting events have been cancelled or postponed, beginning with the Tokyo Olympics, now rescheduled for 2021. In Britain, sponsors of the Open Championship, the world's oldest professional golf tournament, cancelled the event for only the fourth time in its 150-year history. Even the Tour de France was postponed and will now take place at end of August with draconic safety measures. The Canadian Football League canceled its upcoming season for the first time since 1919. In the United States, both professional and collegiate sports came to a sudden halt in March, after a member of a National Basketball Association (NBA) team tested positive just before a scheduled game. The remainder of the NBA season was put on hold, as was the schedule for the National Hockey League (NHL). At the collegiate level, the pandemic caused the cancellation of all winter/spring competitions, including both the men's and women's NCAA basketball tournaments. These are two of the marquee events on the U.S. collegiate sports calendar, and the principal source of revenue for the NCAA.

Professional and collegiate sports leagues have taken unprecedented steps to resume operations while limiting infection spread and reducing liability exposure. Both professional and college football teams continue to face significant challenges in trying to complete their fall 2020 schedules. Continued uncertainty about the appropriate standard of care and constantly evolving guidance on recommended preventative measures continue to frustrate these efforts.

This monograph will summarize some of the more significant steps taken by the sports world to respond to the pandemic, in the context of ongoing efforts to mitigate virus exposure liability facing event sponsors, sporting leagues and teams, and employers.

II. GENERAL PRINCIPLES OF LEGAL LIABILITY FOR EXPOSURE INJURY IN THE UNITED STATES

Plaintiffs, such as athletes or spectators who contract COVID-19, may seek to bring claims against leagues, sports teams, and event organizers, under theories of negligence, gross negligence, or intentional torts. While COVID-19 exposure litigation is as novel as the virus itself, the general principles of tort liability, specifically negligence and gross negligence, are firmly established in United States jurisprudence.

A. NEGLIGENCE

Claims of negligence may be one of the most common types of claims brought in personal injury lawsuits. In these cases, plaintiffs allege that the defendant failed to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances. While this behavior often consists of actions, negligence can also be established when a defendant failed to act when there was a duty to do so. To prevail in a negligence lawsuit, plaintiffs must prove key elements to establish liability: duty, breach of duty, injury, and causation. Proof of breach of duty and causation could present significant challenges for both

parties and will undoubtedly be hotly contested in future COVID-19 exposure lawsuits.

1. **Breach of Duty:** If there is a duty, a plaintiff must establish that defendant breached that duty. This element will depend on the appropriate standard of care – meaning, the degree of care a reasonable person should have exercised. To this end, a plaintiff may be able to establish a breach of a standard of care if a defendant fails to take steps to reduce the risk of the spread of COVID-19 recommended by government agencies, or if the defendant fails to take preventative steps that most others in the same industry have taken. If an industry has an inconsistent patchwork of preventative steps in place, plaintiffs will likely have more difficulty establishing breach of duty because the standard of care may be relatively unsettled.
2. **Causation:** A plaintiff must demonstrate a link between the breach of the duty and the accident that caused plaintiff’s injuries. This may be difficult to prove if a plaintiff is unable to point to a “causation moment” and establish that COVID-19 was contracted on defendant’s premises. For example, proof of a causal link may be more easily established when a plaintiff resides in a nursing home or has been grounded aboard a cruise ship. In contrast, it will likely be difficult to establish that a plaintiff contracted COVID-19 as a result of a sporadic or short-term interaction.

B. GROSS NEGLIGENCE

This cause of action will turn on the degree to which the defendant has diverged from the appropriate standard of care. To bring a claim of gross negligence, a plaintiff must establish defendant’s lack of care that goes beyond negligence but demonstrates reckless disregard for the safety or lives of others. A plaintiff who can establish gross negligence may be entitled to a greater amount of damages.

III. EXPOSURE LIABILITY DURING THE COVID-19 PANDEMIC

The general principles summarized above frame the discussion of the exposure liability risk facing U.S. event organizers, including sponsors of sporting competitions. Liability risk is one of many concerns facing sporting event sponsors as they resume operations. Sporting event sponsors obviously wish to protect the health and safety of their participants and other stakeholders. One of their principal challenges is to minimize virus spread while staging competitions under commercially-viable conditions in a manner that minimizes the financial and reputational risk of litigation. In addition to addressing various operational and commercial considerations that are beyond the scope of this summary, sporting event sponsors are anticipating exposure-related legal claims from various constituencies, including employees and other staff, individual teams, players, patrons, media representatives, and vendors. Continued uncertainty about the transmission of the virus causing COVID-19 affects dozens of decisions that must be made in developing resumption plans. A primary focus of these plans is identification of and adherence to the rapidly evolving standard of care, informed by governmental responses and industry developments.

A. GOVERNMENTAL RESPONSES IN THE UNITED STATES

1 EARLY ACTIONS

(a) State and local public health authorities began issuing shelter-in-place, “stay at home” and/or business closure orders in February, shortly after the January 30 announcement by the World Health Organization (WHO) that COVID-19 constituted a public health emergency.^{vi} In the United States, California was one of the leaders in this effort. Governor Newsom supplanted a series of county-level public health orders by promulgating a state-wide public health emergency on March 4. The Governor that day announced several measures to control the spread of the virus in an attempt, among other goals, to avoid overwhelming the state’s hospitals and other health care facilities.^{vii}

(b) More than 45 states announced COVID-19 public health orders in February and March. Hundreds of similar orders have been issued by counties, cities and other local government entities.

These early proclamations required most businesses to shut down and imposed strict limitations on almost all aspects of both commercial activity and personal travel. The cumulative effect of these orders has been characterized as the national “lockdown.” Most of these orders contained exceptions for employees working for businesses deemed “essential” under a series of guidance documents issued in March by the Cybersecurity and Infrastructure Security Agency of the U.S. Department of Homeland Security.^{viii}

(c) Many of the orders included unprecedented quarantine restrictions for individuals entering a state from other jurisdictions. For example, in March, Rhode Island Governor Raimondo issued an executive order imposing a 14-day quarantine on individuals entering the State from other jurisdictions.^{ix}

(d) At the federal level, beginning on January 15, the U.S. Department of State issued a series of international travel restrictions and advisories, culminating in a March 19 ban on all international travel.^x

(e) President Trump declared a national emergency on March 13, two days after the WHO’s declaration that COVID-19 had reached the pandemic stage.^{xi}

(f) On April 16, the White House announced its Guidelines for Opening Up America Again. The Guidelines set forth a conceptual framework for a phased-approach for state governments to follow, at their discretion, in lifting their lockdown

orders. The goal was to facilitate the reopening of business and other personal activity, using criteria tied to reductions in the number of COVID-19 cases, positive tests, hospitalizations and deaths.^{xii}

2. FEDERAL GOVERNMENT REGULATORY INITIATIVES

- (a) The Center for Disease Control and Prevention (CDC) has been the federal government's principal public-facing entity responsible for coordinating the government's response to the pandemic. Beginning in March, CDC has issued hundreds of guidance documents with technical information and recommendations for managing activities across the economy, including hospitals and other health care providers,^{xiii} businesses and employers generally,^{xiv} schools and childcare services,^{xv} colleges and other institutions of higher learning,^{xvi} first responders and law enforcement personnel,^{xvii} gatherings and community events,^{xviii} parks, sports and recreation,^{xix} correctional and detention facilities,^{xx} and retirement communities and independent living facilities.^{xxi} Among CDC's more significant recommendations containing best practices that will define the standard of care in virus exposure litigation include: its guidance on cleaning and disinfecting protocols,^{xxii} its recommendations for testing in various environments following a virus diagnosis,^{xxiii} and a recent (August 6) recommendation on why people should wear masks as a way to minimize infection spread,^{xxiv} CDC has also issued several advisories regarding contact tracing and other monitoring strategies for businesses,^{xxv} in addition to a series of industry-specific guidance documents addressing specific concerns presented in industry sectors including restaurants and bars, small businesses, and construction.^{xxvi} CDC has also published guidance listing considerations for election polling locations during the pandemic.^{xxvii}
- (a) CDC guidance documents regarding reopening the workplace closely track longstanding guidance issued by the National Institutes on Occupational Health, which articulates a "hierarchy of controls" intended to reduce the risks associated with various types of occupational hazards.^{xxviii}
- (b) The Occupational Safety and Health Administration (OSHA) has issued numerous regulatory guidance documents, emphasizing specific measures that employers should take in order to reduce the risk of infection spread in the workplace.^{xxix} Much of this guidance relies on a statutory provision in the OSH Act known as the "general duty clause," which provides that "each employer shall furnish to

each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”^{xxx} OSHA has been criticized in some quarters for its failure to issue a temporary emergency mandatory standard for employers operating during the pandemic, and for its failure to take other action to enforce the general duty clause. As with CDC, OSHA’s initiatives have been labeled as recommendations and not mandates, a matter that will likely be a significant issue in exposure litigation.

- (c) The Equal Employment Opportunity Commission (EEOC) has issued more than a dozen guidance documents attempting to clarify employer obligations and employee rights under the federal employment discrimination laws enforced by the Commission. In March, EEOC published comprehensive guidance for pandemic preparedness under the Americans With Disabilities Act.^{xxx} Much of EEOC’s subsequent guidance focuses on permissible employer actions with respect to testing for COVID-19 and conducting medical inquiries under the ADA and related statutes.^{xxxii}

3. STATE AND LOCAL PUBLIC HEALTH ORDERS

- (a) States, counties and local governments continue to issue a virtual blizzard of orders addressing the conditions for re-opening during the pandemic. Most states have issued orders setting forth a three or four phased reopening strategy. Some states moved relatively quickly from the initial phase, issuing orders that eased restrictions to permit a wide range of businesses to reopen. Government officials in other states have moved more slowly, in response to emerging information about the continued spread of the virus. Most of these orders continue to restrict the size of permissible large gatherings, and make distinctions between and among the types of businesses that are permitted to reopen, and the conditions that must be met before moving to the next stage.
- (b) Recent spikes in COVID-19 cases and the identification of “hot spots” in various parts of the country have led some states to delay moving to the next phase of their reopening plans; still others have retreated from earlier positions that permitted reopening on a wider scale. A number of states and local governments have imposed quarantine rules for travelers from other jurisdictions, notably including the States of New York, Connecticut, and New Jersey, and the City of Chicago.^{xxxiii} These orders generally require individuals arriving from designated locations to self-quarantine for 14 days.

- (c) Recent state and local public health orders have been further informed by updated guidance issued by the WHO, including a significant update, issued on July 9, with new information provided by epidemiologists on how the virus is transmitted.^{xxxiv}

B. LEGAL THEORIES AND CLAIMS ASSERTED IN COVID-19 EXPOSURE LITIGATION

1. Thousands of COVID-19 related lawsuits have been filed to date in federal and state courts across the country. Some of these cases involve commercial contract disputes or insurance coverage matters that are beyond the scope of this discussion. For our purposes, the most significant cases involve negligence and related tort claims brought against various types of facility operators, employers, event sponsors, retailers and hospitality industry businesses. Plaintiffs in such cases allege that the defendant failed to take appropriate steps to protect the plaintiff customer, participant or employee. General tort law principles, including questions involving causation, burden of proof, and assumption of the risk, will apply to COVID-19 exposure litigation.
2. Many of these complaints feature detailed allegations about the defendant's failure to follow federal and state government orders and other regulatory guidance. Typical allegations include claims that the defendant failed to comply with specific regulatory requirements, failed to provide employees with face masks or personal protective equipment (PPE) that would mitigate the risk of infection, failed to enforce social distancing and other strategies recommended by CDC, NIOSH and OSHA, and failed to notify employees of infections involving co-workers. A principal theme of these complaints is that the business was focused on profit at the expense of its employees, guests or customers. Noteworthy complaints making these allegations have been filed against several meat packing companies, cruise ship operators, major retailers, manufacturers, transportation companies, hospitals, nursing homes, and other businesses that have been affected by virus "hot spot" outbreaks.
3. One complaint filed against a meat packing firm alleges 27 specific acts and omissions that constitute gross negligence, including failure to: implement a workplace hazard assessment, implement testing and workplace contact tracing, implement effective screening and monitoring strategies, prevent sick or symptomatic employees from entering the workplace, isolate and send home sick or symptomatic workers, configure communal work environments so that works are spaced six feet apart, modify the alignment of work stations, install physical barriers, implement appropriate cleaning, sanitation and disinfection practices, provide all employees with appropriate personal protective equipment, including face coverings or respirators, require employees to wear face coverings, provide sufficient hand washing or hand sanitization stations, slow production to operate with a reduced work force, implement appropriate engineering or administrative controls to promote social distancing, educate works on revised sick leave or incentive policies, ensure adequate ventilation in work areas, implement a system for workers to alert their supervisors if

they are experiencing COVID-19 symptoms, or if they have had close contact with a suspected or confirmed COVID-19 case, encourage or require workers to stay home when sick, and failing to warn workers that persons suspected of being exposed to COVID-19 were permitted to enter the facility without adequately quarantining or testing negative prior to entry.

4. COVID-19 exposure presents a special type of litigation risk. Virus infection, like other situations in which people may become ill or even die following an exposure to a toxic substance in the workplace, creates the prospect of “take home” claims filed by household members and neighbors of individuals who arguably became infected at work. These claims are not barred by workers compensation, and can be challenging to defend because they typically involve sympathetic plaintiffs.

5. PUBLIC NUISANCE

(a) This is an ancient tort theory recognized in the common law of England. Parties who were adversely affected by a defendant’s action that interfered with recognized, ongoing rights of the public could bring suit against the defendant to seek an equitable remedy. Successful plaintiffs in such claims were entitled to a remedy of abatement, which required the defendant to take appropriate steps, at its cost, to remove the nuisance.

(b) In recent decades in the U.S., this tort has been used more frequently in various “mass tort” situations, including disputes involving environmental pollution, climate change, tobacco, and exposure litigation involving substances such as lead paint. Sophisticated plaintiffs’ lawyers find such cases to be attractive, because of their relatively relaxed causation requirements, the availability of substantial damages (and often attorney’s fees), in addition to the abatement remedy.

6. EMPLOYMENT CLAIMS

(a) Businesses have been sued in hundreds of cases making COVID-19 related claims under various employment protection statutes and common law theories. Principal categories of these claims include:

- (i) Discrimination against, and failure to accommodate, individuals with disabilities that may affect their ability to work on-site
- (ii) Employment discrimination based on recognized protected categories, e.g., age, sex, religion, national origin
- (iii) Retaliation and ‘whistleblower’ claims
- (iv) Violation of federal and state paid leave laws
- (v) Violation of the Worker Adjustment and Retraining Notification Act (“WARN Act”) and similar state laws
- (vi) Traditional labor law disputes brought by labor unions

- (b) Many of these cases are framed as class actions under various statutory provisions. As a general observation, plaintiffs in many of these cases argue that the employer's violation of the operative statutory requirements was part of a pattern of conduct of ignoring the public health and environmental health and safety regulations summarized above, in a way that is generally similar to the standard of care theories summarized above.

7. WORKERS' COMPENSATION

- (a) Workers' compensation is an important aspect of COVID-19 exposure litigation. As a general rule, the exclusive remedy for an individual injured at the workplace is a claim for workers' compensation under rules adopted in each state. Employees with injuries or illnesses covered by workers compensation are barred from filing negligence actions or asserting other tort claims against their employer. The exclusive remedy doctrine does not preclude employees for filing tort claims against third parties alleged to have contributed to the injury or illness.
- (b) There are several recognized exceptions to the exclusive remedy doctrine that have been utilized by plaintiffs' lawyers in pleading their COVID-19 complaints in order to pursue the more lucrative remedies available in tort claims. The scope of these exceptions varies by state law. Among the most common exceptions being invoked by plaintiffs' lawyers include:
 - (i) Fraudulent concealment
 - (ii) Intentional torts
 - (iii) Willful or serious misconduct
 - (iv) Gross negligence
- (c) State government responses to COVID-19
 - (i) Several states have responded to COVID-19 through various measures creating a presumption that a person who contracts COVID-19, while working at a worksite at which there has been an outbreak of the virus, may pursue a claim for workers' compensation. At least six states have enacted various types of presumption statutes. Four states have used executive branch authority to implement presumption policies for first responders and health care workers in response to COVID-19. Four other states have taken executive action to provide a presumption of coverage to other essential workers like grocery store employees.^{xxxv} The purpose of these enactments is to make it easier for employees to receive financial compensation, in recognition of the fact that workers' compensation programs in most states operate on a no-fault strict liability system.

8. IMMUNITIES

- (a) Several states have enacted measures providing immunity from COVID-19 litigation. These enactments are intended to protect certain categories of businesses from the risk and cost of litigation. Many of these protections protect hospitals, other health care providers, and first responders, based on the notion that businesses in these industries must remain open during the pandemic and that they should not be penalized for taking steps to protect the public interest in fighting the spread of the virus.
- (b) Other states have enacted broader liability protections for businesses that make a good faith effort to comply with existing federal and state regulatory requirements, and which take additional prevention measures. For example, on August 5, Georgia enacted the “COVID-19 Pandemic Business Safety Act,” which provides immunity from suit for any business that, among other things, posts a notice at the entrance to its premises advising individuals of the inherent risk associated with the virus, and that the individual is assuming any and all risks of infection.^{xxxvi}
- (c) Nevada has recently taken a different approach, enacting a law that provides protection against COVID-19 exposure claims for businesses including hotels and casinos, on the condition that they implement robust worker protection measures. This law is the first of its kind in the U.S., and may be a harbinger.^{xxxvii}

IV. RISK MITIGATION PRINCIPLES

Liability waivers and releases are exculpatory contractual provisions whereby one party relinquishes the right to recover for injuries caused to a participant that arise out of the known and unknown risks in an activity. While not bullet proof, a well-drafted waiver may be an effective way to limit liability for claims arising out of the transmission of the virus causing COVID-19, while highlighting compliance with the standard of care and appropriate prevention steps.

The enforceability of liability waivers is a matter of state law and, therefore, varies; however, adhering to the general legal framework on liability waivers increases the likelihood of enforceability. In addition, COVID-19 acknowledgments may also reduce liability exposure by establishing that Plaintiff assumed the risk of being exposed to COVID-19.

A. GENERAL LEGAL FRAMEWORK ON LIABILITY WAIVERS

- 1. Waivers should be clear and unambiguous and explain that a signor is waiving rights related to injuries and claims caused by COVID-19.
- 2. Consumer-facing waivers should be in plain language.
- 3. Waivers should clearly state the claims or damages being waived.

4. Waivers must be signed.
5. Waivers should be reasonably drafted and not overly broad.
6. Waivers should provide information sufficient for a consumer to provide informed consent. A well-drafted, consumer-facing, COVID-19 waiver will include language explaining that the company has established and follows good standards of care specific to COVID-19. These statements, however, must be truthful. To this end, businesses should ensure that it is complying with the most recent guidance on how to reduce the transmission of COVID-19.

B. LIMITATIONS ON LIABILITY WAIVERS

1. Employees: COVID-19 waivers are generally not enforceable against employees. Such waivers are widely viewed as contrary to public policy and in violation of state laws protecting the right of employees to file workers' compensation claims.
2. Third Parties: Waivers are limited to the signor and, generally, do not extend to third parties.
3. Public Policy Exception: Waivers for unavoidable activities are likely unenforceable under the public policy exception. Liability waivers governing more voluntary activities are more likely to be enforced.
4. Liability waivers generally cannot exculpate liability for gross negligence, intentional and reckless conduct.

C. ACKNOWLEDGMENTS/NOTICES

1. In litigation, an assumption of risk defense sometimes bars a plaintiff's right to recovery if the defendant can demonstrate that the plaintiff voluntarily and knowingly assumed the risk.
2. COVID-19 acknowledgements and notices are important tools that businesses may use to limit liability in the event of litigation, as they provide evidence establishing that a plaintiff has knowledge of a risk and voluntarily assumed that risk. U.S. law generally limits the assumption of the risk defense to specific risks that were disclosed and understood; the defense generally is not extend to risks that were unknown.

V. STATE OF PLAY IN U.S. PROFESSIONAL SPORTS

The world of sports began to re-emerge from the pandemic lockdown in late May and early June. Measures taken to date illustrate the daunting challenges faced by sporting event sponsors in trying to operate successfully and safely during the pandemic.

A. VARIOUS APPROACHES TO RESUMPTION

1. Professional sports leagues in the U.S. have adopted different strategies to protect players, coaches, and others involved in presenting their games. These differences reflect a variety of different dynamics in the major sports leagues, including issues such as geography and labor relations.
2. Both men's and women's professional basketball leagues decided to adopt what has been called the "bubble" strategy. Creation of an effective bubble requires ongoing attention to a variety of measures intended to keep the virus out of the environment in which participants live and work, ranging from robust sanitation measures for hotels and arenas, to detailed protocols to ensure the participants do not risk infection by leaving designated areas. To date, the bubble strategy appears to have been successful. There are relatively few reports of positive cases or COVID-19 related hospitalizations, and both leagues have been able to resume their schedules without interruption or cancellation.
3. The National Hockey League (NHL) negotiated agreements with its players' union and other participants, including officials, adopting a "two hub city" approach for resumption of the 2019-2020 season. This approach featured re-locating all of its remaining regular season games, and the Stanley Cup playoffs, to arenas in Toronto and Edmonton. Regular season play resumed at the end of May. The NHL operating plan has considerable similarities with professional basketball's bubble strategy, with detailed protocols for reducing the risk of virus spread, including periodic testing of players and other participants. The NHL's plan notably includes a limit of 52 people for each team's travel party. The NHL season has continued with no reported event cancellations or postponements.
4. Professional soccer established a bubble strategy, with the Women's Professional Soccer League resuming play in late June, in an eight-team tournament held in Utah. Men's professional soccer (MLS) resumed its season with a pre-season tournament beginning on July 8, at a "bubble site" in Orlando, Florida.
5. The NASCAR automobile racing organization resumed its season on May 17. NASCAR has adopted a "traveling pod" strategy, by which the sport conducts races at various tracks on its nation-wide circuit under conditions that protect team members and other participants. Like team sports, no fans have been permitted at NASCAR events. The organization has implemented social distancing and testing protocols and has placed a limit on the number of individuals from each racing team who can be present at the track. The NASCAR schedule has continued without interruption, as the organization has been successful in limiting virus spread among its traveling participants.
6. Men's professional golf resumed tournament play in the middle of June, and the LPGA resumed its season at the end of July. Because golfers compete in events located around the country, the various professional golf sponsors have also adopted a "traveling pod" strategy, intended to limit the risk of

exposure for players, caddies, officials, and other participants at each location. Both the men's and women's tours have continued their revised schedules without interruption, and a relatively small number of competitors have been sidelined after positive COVID-19 test results. Both the U.S. Open and The Masters tournament are scheduled to take place, in September and November, respectively. The U.S. Women's Open has been rescheduled to December. As with the regular tour events, all of these major tournaments will take place without fans.

7. Major League Baseball (MLB) has taken a somewhat different approach. The 2020 season has begun with what might be called a "regional pod" strategy, featuring a revised schedule intended to minimize the amount of inter-city travel. The challenges confronted by MLB are discussed below.

B. BASIC CONCEPTS OF PREVENTION

1. All professional sports sponsors, of both team and individual sporting events, have developed operating plans intended to reduce the risk of virus spread. These plans incorporate recommendations issued by CDC and other public health entities. Principal features of these plans include:
 - (a) Periodic testing of players and other event participants
 - (b) Symptom monitoring protocols, including regular body temperature screening
 - (c) Detailed social distancing protocols
 - (d) Cleaning and disinfectant protocols
 - (e) Limited access to sporting facilities
 - (f) A ban on spectators
 - (g) Actions plans to respond to any positive COVID tests or other evidence of infection by a player or other participant in the event, including quarantines
 - (h) Various forms of contact tracing
 - (i) Protocols negotiated between the leagues and players' unions to permit players to opt-out of participation in individual cases where they fear infecting themselves or family members

C. SPECIFIC CHALLENGES – PROTECTING THE BUBBLE

1. Sporting event sponsors continue to be challenged by state and local government public health orders, many of which prohibit mass gatherings of more than a few people. The sports world is also affected by the state and local quarantine orders described above, which make it extremely difficult for participants, particularly people traveling from international locations. Sponsors have had some success in obtaining exceptions from some of these orders. As an example, the United States Golf Association obtained a waiver of the New York quarantine order for participants in the upcoming U.S. Open, to be held in Westchester County, New York.

2. Managing the inherent risk associated with travel is another principal concern. Leagues and teams have developed detailed protocols covering all aspects of travel, ranging from transportation to airports or (in the case of Major League Baseball) train stations, to hotel accommodations.
3. Sports leagues and teams continue to focus on sanitation and disinfectant strategies for their venues, including training rooms, lockers, dugouts, media rooms, and other facilities.
4. All the leagues have adopted protocols for body temperature monitoring and other symptoms of COVID-19. Teams have generally assigned medical directors and trainers to monitor the ongoing health of players and other participants.
5. Social distancing is a core component of the resumption strategy. The nature of some sports, which inevitably require close contact between competitors, continues to present challenges for teams and players.
6. Periodic COVID-19 testing is at the heart of most operational plans. Leagues have adopted different approaches to testing frequency as well as mechanisms for addressing issues associated with the delay in reporting results. Sports leagues continue to wrestle with the challenges presented by testing validity. There have been numerous situations of players and other participants who have been temporarily banned from the competitions after testing positive, only to find out later that it was a false positive. Sporting event sponsors, like other businesses, also remain challenged by the practical implications of the delay between testing and notification of results.
7. Professional sports leagues are coordinating with public health agencies in conducting contact tracing. The specific role of leagues and teams in this function varies, depending on numerous factors. The success (or lack thereof) of contact tracing is likely to be a significant issue in COVID-19 exposure litigation.

D. MAJOR LEAGUE BASEBALL – A CASE STUDY

1. As of this publication, Major League Baseball (MLB) has begun its post-season playoffs, having completed its abbreviated regular season schedule which launched on July 23. More than most professional leagues, MLB has been particularly challenged by the virus.
2. MLB spring training was abruptly shut down in March, as the virus spread across the country. After lengthy negotiations with the labor union representing its players, MLB implemented a detailed operating plan, running more than 130 pages, governing this year's schedule. The MLB plan includes the features described above, with modifications deemed appropriate for the sport. Among other things, MLB decided to play the 2020 season with no fans in attendance.

MLB's schedule was challenged from the beginning. The Canadian government barred the Toronto Blue Jays from playing games at their home venue, because of concerns that travel to and from the U.S. would increase the risk of virus spread in Ontario. This required MLB to readjust early season schedules, and ended with Toronto deciding to play its home games in Buffalo, the site of its top minor league team. The regular season was further impacted by an outbreak among players and staff of the Miami Marlins, which occurred during the opening week of the schedule. Numerous games had to be rescheduled as a result of a quarantine and other preventive measures imposed in response.

E. THE NFL

1. After negotiations with the union representing its players, the NFL agreed to a series of protocols intended to reduce virus spread, in adopting its plan to carry on with the 2020 season. Among other things, the league and the union agreed to cancel pre-season games for the first time in modern NFL history.
2. The NFL's regular season began on September 10. The NFL is currently hosting games under COVID-19 protocols that permit attendance by a substantially reduced number of spectators, i.e., 22% of normal stadium capacity. The majority of NFL teams, however, have not allowed spectators to attend games but have announced that they intend to re-evaluate their decision if there are improvements to the coronavirus pandemic.

VI. STATE OF PLAY – PROFESSIONAL SPORTS IN THE EUROPEAN UNION

A. EU/DOMESTIC LAW – GENERAL RULES

1. Tort liability for exposure is a matter of domestic law in the European Union. The EU has no uniform/harmonized tort law. As in the United States, where there are significant differences among the 50 states with respect to tort law principles, including burdens of proof, defenses, and damages, there are material differences on many of these issues across Europe.
2. In general, liability for exposure claims is less of a concern than in the United States. There is a comparative limited possibility for class actions in the EU. Damages in tort claims are also comparatively limited; as a general rule courts in EU member states do not allow punitive damages. For these and other reasons, there are few relevant precedents to help guide event sponsors.
3. In the EU, liability of the event organizer depends on the 'bonus pater familias' principle: if the sports organization has taken the necessary precautions and did everything to follow the COVID-19 safety measures, it is unlikely that the organization can be held liable.

4. The availability of liability waivers is another significant difference between the EU and the United States. The general rule in the EU is that a party may not contract for an exclusion or restriction of legal liability caused by its own negligence/fraud.

B. POSSIBLE LIABILITY ISSUES IF PLAYERS ARE EMPLOYEES

1. Statutory duty: Employers are obligated by statute to guarantee a safe and healthy work environment. Violations of these statutes include criminal sanctions.
2. Courts in EU jurisdictions recognize the voluntary assumption of risk defense in some circumstances. General requirements for this defense include a showing that the party was fully aware of the risks involved with the activity before engaging in it. In order to increase its chances of success with this defense in the event of claims arising from the pandemic, the employer should demonstrate having complied with all (COVID-19 specific) health and safety measures.
3. An open issue in the EU is whether a professional sportsman's refusal to play, despite implementation of appropriate safety measures by the team, might be a breach of the player's contract. To date, EU professional sports teams have not generally adopted the approach taken by US professional leagues that have permitted players to opt-out of playing during the pandemic.

C. PREVENTION TECHNIQUES IN THE EU

1. There are no EU-wide uniform prevention techniques. Measures are taken on a national basis and might differ in each EU jurisdiction. There are even differences at regional level. The general theme is that there is a shift in responsibility: there are specific government guidelines, but it is up to the governing bodies and sports associations to assess the risk and to ensure that there is a safe environment for players. In other words, the prevention techniques are sports association specific. For example, the safety measures in de Tour de France differ from the UEFA's Return to Play protocol for the Champions League.

Most EU professional sporting events have a significant restriction in spectators. In some EU jurisdictions no fans are allowed to attend soccer games. Also the Champion League games were played behind closed doors. The Bundesliga, the first top-flight European league to resume play since the COVID-19 lockdown, accepted limited spectators. Maximum 300 people wearing masks were allowed in the stadium divided into "zones". Players stayed in quarantine during 1 week before the start of the games and balls were disinfected before and after each game.

Men's professional golf resumed in Europe in early July, with a modified schedule beginning with 6 events scheduled at venues in England and Wales. One of the many steps taken by the European Tour in response

to the virus was a decision to hold some of the events at the same venue. Virus player protection protocols include a “buddy system” in which contestants are generally required to have close contact after competition with a designated small group of caddies and other players, in order to reduce the risk of virus spread. This is an adaption of the “cohort strategy” being used in many workplaces around the globe.

2. The Belgian approach for the event industry is worth mention, as an example of an approach that might be successful in minimizing virus spread. A COVID Event Risk Model was developed in partnership with scientific experts, specialized researchers and the Alliance of Belgian Event Federations. It is an educational and risk management model for event organizers and an advisory model for the authorities. Event organizers can use this model to gain an insight into the COVID - 19 safety risks of any event. This is indicated using a green, orange, or red safety label. This label can be used as reference by local governments when granting permits. The label that is awarded is just a guidance.

The final decision-making authority for this resides with the municipal/city authorities.

The COVID Event Risk Model comes with a COVID Event Risk Model Protocol that enables event organizers to assess whether a, event can fulfil the required parameters. The COVID Event Scan primarily evaluates the event from the perspective of the public. For more specific guidelines for participants, artists/performers, employees and suppliers, sector-specific protocols are in place which also provide practical instructions on how to organize a COVID-safe event.

The COVID-19 pandemic results in dramatic lost revenues for teams, event organizers, athletes, sponsors, employees, broadcasters etc. Discussions arise about insurance coverage for annulled events, renewal of insurance policies, refunding of tickets and sponsorship fees, etc. There has even been early litigation about the financial consequences of broadcasting rights for cancelled games. Another dimension with an impact on sports integrity should not be lost out of sight: sanitary measures imposed during the pandemic hinder doping controls. Will there still be a level playing field when the competitions resume?

D. CHALLENGES AND OPPORTUNITIES

1. The COVID-19 pandemic outbreak has affected the EU and its Member States in a dramatic manner with an unprecedented impact. Sport is an important economic sector in the EU, with a share in the national economies, which is comparable to agriculture, forestry and fisheries combined. The sport-related GDP is 279.7 billion euro. This equals 2.12% of total GDP in the EU. Every 47th euro is generated by the sports sector. Sport is employment intensive, meaning that it generates more employment than its share in GDP. Sport-related employment in the EU was 5.67 million persons. That equals 2.72% of total EU employment. Every 37th employee works in the sports sector.

2. However, the crisis is also an opportunity to innovate, to rethink policies and to reassess priorities in the long run.
 - a) Event organizers will be forced to rethink their business model and come up with alternative or parallel digital initiatives. A good example is the digital music festival “Tomorrowland Around the World”. In lieu of their real-life event, Tomorrowland opted to still bring fans together through an online event. Taking place on an island called Pāpiliōnem, the virtual world showcased 60 artists performing on 8 stages that featured different styles of music, mirroring the real Tomorrowland. They even had extra activities such as influential speakers, cocktail recipes and even a library.

VII. STATE OF PLAY – SPECIAL CONSIDERATIONS IN THE UNITED KINGDOM

A. GENERAL PRINCIPLES

1. In the current environment, an institution that is bringing sports players back (such as the Premier League in England) has a duty to create a safe environment for them to operate in. When the Government gave the go-ahead for sports to restart contact training in May, they said that it was up to governing bodies and associations to assess the risk and ensure there was a safe environment for players, which is a significant shift in responsibility.
2. Sports governing bodies have a duty to ensure the safety of sports participants following *Watson v British Board of Boxing Control Limited and Another [2000] EWCA Civ 2116*. This would apply when designing the playing rules and associated safety regulations and protocols.
3. The UK Government expects sports governing bodies to develop playing and safety protocols pertaining to each sport. COVID-19, as a now known risk, must be addressed in those protocols. As part of this, risk assessments need to be carried out for all personnel involved in the sporting activity to ensure that they are reasonably safe.
4. Under the Health and Safety at Work Act 1974, professional clubs, as employers of the players, have a duty to provide a safe environment for players to work within, and if it was found that a player had contracted COVID-19 as a result of returning to training and playing their club could be liable. A breach of the legislation can give rise to criminal liability.
5. Further, clubs could be liable in negligence where they fail to discharge their duties owed to players (under their employer/employee relationship) to ensure that they are safe in the workplace.

B. EARLY GOVERNMENT ACTION

1. Government guidance was centered around doing risk assessments and putting the principal responsibility on the authorities, the leagues and the clubs. This involved risk assessments specifically related to the transmission of COVID -19 and its implementation before any return to work. Any return to work protocols needed to address requirements for employees in ensuring their own safety and that of their colleagues and moreover, a safe working environment including the regular cleaning of equipment and the workplace. These need to be specific and applicable to each sport and workplace although there are obviously likely to be common themes, for example, across contact sports on the one hand, and non-contact sports on the other.
2. Technically speaking, it is possible that governing bodies could be liable for effectively encouraging something that is not safe. The legal cases generally revolve around contact sports like boxing, where the British Boxing Board of Control was found to owe a duty of care to participants. It appears highly arguable that, say, the Premier League owes a duty of care to its players and as such would need to be very careful with the approach it takes and to carry out thorough and detailed risk assessments which are bespoke to the sport of football and to the “workplace” including at training and football grounds. Such considerations would similarly apply to other sports governing bodies.
3. But primarily, the liability will sit with clubs who have an employment relationship with the players. Like every other employer in the country they have a statutory duty under the Health and Safety at Work Act 1974, obliging them to provide a safe work environment. That obligation is potentially a serious one. Ultimately, clubs could be criminally liable for not providing a safe workspace and in a worst-case scenario, for corporate manslaughter.
4. In terms of exploring potential avenues for recovery of damages for someone who has been exposed to COVID-19 resulting in sickness / death, it is likely to be necessary to consider whether the organizers negligently failed to: (i) cancel the event which resulted in the infection; or (i) whether the organizers failed to put in place appropriate mitigation / protections if the event was not cancelled. In addition, the claimant would need to demonstrate: (i) that a duty of care was owed to him/her (this of course will be different depending on whether the individual was a participant or a spectator); (ii) whether there was a breach of duty by not following the relevant regulations, protocols or guidelines; and (iii) causation which may be difficult (e.g. could a claimant prove they did not have the virus before the event which is further complicated by the long incubation period of COVID-19 which may be up to two weeks?). If the above was demonstrated, it may well be arguable that the claimant would be entitled to damages including all reasonably foreseeable losses (e.g. loss of income).

C. LEGAL DEFENSES

1. There are likely to be a number of possible legal defenses that may be arguable in COVID-19 related claims, whether in claims from players, other staff or spectators.
2. The first and most obvious is that there was no breach of duty. This is likely to depend on the protocols that were in place and a defendant's compliance with them which will include all steps taken to mitigate the risks of infection.
3. The second is causation, which as highlighted above, may be difficult to prove by reason of the incubation period of the virus, particularly in the case, say, of spectators who may have attended a sporting event for only a few hours up to two weeks prior to any illness.
4. Thirdly, that there has been a voluntary assumption of risk and/or contributory negligence:
 - (a) Voluntary assumption of risk operates as a complete defense where the injured party was fully aware of the risks involved with the activity before engaging in it.
 - (b) Contributory negligence is a partial defense covering situations where, in the context of a negligent act by the defendant and as a result of failing to take care of themselves, the injured party has been caused harm. The defense operates to apportion liability between the claimant and defendant on the basis of what is fair and reasonable.

D. WAIVERS OF LIABILITY

1. This seems currently to be a bigger issue in the U.S., particularly in respect of college football (i.e. colleges asking students to sign them) and NFL. Under English law, it is likely to be arguable that 'disclaimers', in so far as they exclude or restrict liability for death or personal injury resulting from negligence, will be void by reason of s. 2(1) of the Unfair Contract Terms Act 1977, and, in so far as they exclude or restrict liability for other types of loss (such as financial loss), they are subject to the statutory requirement of reasonableness. Consequently, if a player caught COVID through playing and could show the club had been negligent letting them train or play, it is likely that the waiver would be ineffective. It may work, however, by potentially reducing the amount of liability itself for other causes of action. But ultimately the starting point is that a party cannot exclude or restrict liability through its own negligence for personal injury or death.

E. OTHER CONSIDERATIONS

1. Duties to spectators
 - (a) There have been anecdotal reports that in the days leading up to

the lockdown, a number of people contracted COVID-19 whilst attending major sporting events. In particular, infection hotspots were identified in Cheltenham, following the Cheltenham Festival, and concerns about the impact of 3,000 Atletico Madrid fans attending a Champions League match in Liverpool.

- (b) Medical evidence is presently inconclusive as to whether or not these events have acted as a means of spreading the virus. However, as in the United States, the concerns raised by these events, as potential “super-spreader situations”, should serve as a warning that very specific and detailed risk assessments need to be carried out before allowing capacity crowds back to sporting events.
- (c) Consistent with the conservative approach suggested in this outline, many professional sports including football, rugby, golf and cricket have resumed in the UK, but without spectators. It remains to be seen when spectators will be permitted to return and the Government has already postponed a pilot scheme due to a resurgence of COVID-19. Obviously, this remains a critical issue for all professional sports and it is highly unlikely that spectators will be allowed to return in their full numbers until a vaccine is found.
- (d) Insurance: The practical consequence in the COVID-19 context is that existing policies may not cover the current pandemic and premiums for appropriate top-up insurance are likely to be costly, even if such losses would be insurable. It is easy to envisage that a player who contracts the disease at the training ground or during a match and whose career is severely affected by the consequences of the disease will suffer financial losses. Even if a player recovers, their performance (and consequent earning potential) may be impaired for many months. Insurance premiums may therefore be unaffordable for some clubs.
- (e) Punitive damages: Such damages are generally not available in the UK unless the tort is deliberate such as in cases of deceit or defamation, and even then only very rarely.

VIII. STATE OF PLAY - U.S. COLLEGIATE SPORTS

As it pertains, specifically, to collegiate sports, the experience to date is that athletic conferences and schools, when presented with the same data, and the same reality, have come to differing conclusions about whether to resume sports competition.

A. WAIVER VS. ACKNOWLEDGEMENTS

- 1 The National Collegiate Athletic Association (“NCAA”) has banned conventional liability waivers but has permitted schools to have athletes sign pledges stating that the athlete would adhere to health and safety protocols such as wearing masks.

- 2 U.S. Senators Richard Blumenthal (D-CT) and Cory Booker (D-NJ) introduced legislation on June 30, designed to prohibit schools from making participation or receipt of an athletic scholarship conditioned on the signing of COVID-19 waiver.

IX. CONCLUDING COMMENTS

As the sports industry continues to resume operations, refine re-opening strategies, and welcome employees and staff, individual teams, players, patrons, media representatives, and vendors, uncertainty remains. Continuing governmental guidance, state and federal legislation, will all inform the appropriate standard of care in exposure liability litigation. The sports industry should continue to adopt operational plans to resume events in a methodological way that makes room for continuous improvement while taking into consideration available guidance from public health officials and other experts. This approach will help position the industry to avoid costly and protracted litigation.

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Attorney Note: The contents of this briefing are not intended to serve as legal advice related to any individual situation. This material is made available by the contributors at Crowell & Moring LLP for information purposes only.

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- vi https://www.who.int/docs/default-source/coronaviruse/transcripts/ihr-emergency-committee-for-pneumonia-due-to-the-novel-coronavirus-2019-ncov-press-briefing-transcript-30012020.pdf?sfvrsn=c9463ac1_2
 - vii <https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/>
 - viii <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>
 - ix The Governor's original proclamation was limited to people entering Rhode Island from New York, an action that was widely criticized by Governor Cuomo and others, and subsequently rescinded. <https://governor.ri.gov/documents/orders/Executive-Order-20-14.pdf>
 - x <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Italy.html>
 - xi <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>
 - xii <https://www.whitehouse.gov/openingamerica/#phase-two>
 - xiii <https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-recommendations.html>
 - xiv https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fguidance-business-response.html
 - xv <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/guidance-for-schools.html>
 - xvi <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-ihe-response.html>
 - xvii <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-law-enforcement.html>
 - xviii <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html>
 - xix See, e.g., guidance for public pools, water parks and related operations. <https://www.cdc.gov/coronavirus/2019-ncov/community/parks-rec/aquatic-venues.html>, and suggestions for summer camps and other childcare operations. <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/summer-camps.html>
 - xx <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>
 - xxi <https://www.cdc.gov/coronavirus/2019-ncov/community/retirement/considerations.html>
 - xxii <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>
 - xxiii <https://www.cdc.gov/coronavirus/2019-ncov/community/worker-safety-support/hd-testing.html>
 - xxiv <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html>
 - xxv <https://www.cdc.gov/coronavirus/2019-ncov/community/contact-tracing-nonhealthcare-workplaces.html>

- xxvi <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html>,
<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-small-business.html>,
<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/construction-workers.html>
- xxvii <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>
- xxviii <https://www.cdc.gov/niosh/topics/hierarchy/default.html>
- xxix <https://www.osha.gov/SLTC/covid-19/>
- xxx Section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(a)(1).
- xxxi <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>.
This document updated guidance issued by EEOC in 2009, in connection with the H1N1 virus pandemic.
- xxxii https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=
- xxxiii New York COVID-19 Travel Advisory <https://coronavirus.health.ny.gov/covid-19-travel-advisory>; City of Chicago Emergency Travel Order, <https://www.chicago.gov/city/en/sites/covid-19/home/emergency-travel-order.html>.
- xxxiv <https://www.who.int/news-room/q-a-detail/q-a-how-is-covid-19-transmitted>
- xxxv <https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx#:~:text=State%20Response%20to%20COVID%2D19,-States%20are%20taking&text=A%20common%20approach%20is%20to.and%20covered%20under%20workers%20compensation.&text=Six%20states%20have%20enacted%20legislation.for%20arious%20types%20of%20workers>.
- xxxvi <http://www.legis.ga.gov/Legislation/20192020/195211.pdf>
- xxxvii http://gov.nv.gov/News/Press/2020/Gov_Sisolak_signs_Senate_Bill_4_first-in-the-nation_legislation_protecting_Nevada_workers_and_businesses/

COMMENTERS

THIS SECTION OF THE REPORT CONSISTS OF PRESENTATIONS MADE BY THE COMMENTERS AT THE AMBASSADORS' FORUM ON "GLOBAL COVID-19 AND SPORTS: THREATS AND RESPONSES" THAT WAS HELD ON JULY 30, 2020 VIA ZOOM CONFERENCING. UPDATES AND REVISIONS HAVE BEEN CONTRIBUTED BY THE INVITED COMMENTERS IN OCTOBER 2020.

AMBASSADOR CHARLES RAY [RET.]

FORMER AMBASSADOR TO CAMBODIA AND ZIMBABWE

I'd first like to thank all the presenters for some outstanding presentations. You've given us a lot to process, some of it actually quite disturbing, but all of it extremely interesting and, I think, useful. One of the things, listening to all of these presentations but especially this just completed legal presentation, and it follows, or I should say segues into a lot of what we have been doing or not doing over the last couple of years and that is the need for a broad, coherent policy in dealing with these issues. And in the case of sports, particularly international sports, baseball is a good example of it. I followed the adventures of the Toronto team with interest as they were trying to find a home. So, not just a coherent national strategy but we really need to encourage countries to work together to develop ways to harmonize their local laws with and among each other so that eventually we can move forward and move into a more normal situation. I don't know what normal will be after the end of this pandemic but whatever normal is after this, I think one of the new "normals" should be heightened awareness of the need for all of us to work together to make sure that we meet this enemy with a unified front.

And again, I'm absolutely in awe at the amount of detail and very complicated information that you all master. It will probably take my brain at least a week to process most of it but thank you for giving me the opportunity to listen.

AMBASSADOR PJER SIMUNOVIC

AMBASSADOR TO CROATIA; FORMER PRESIDENCY FOR THE COUNCIL OF THE EUROPEAN UNION

We have just been having a great opportunity to listen to a full range of opinions and approaches related to the impact of the pandemic upon sports. Like almost any other human activity, sports have been profoundly affected.

Let me start with an observation following the introduction of my friend, Ambassador Ray. Why having the two of us, two ambassadors, on this panel? Well, I cannot not mention what a friend of mine recently said about diplomacy, providing also a nice explanation for our participation: diplomacy is a *contact sport*, thus, a sport also, in its own right, sharing the sport's suffering under the pandemic. In diplomacy, I mean, just like in most sports, you really cannot do much if you are not getting up close and personal. You can do only so much phoning around or sending emails, but if you are unable to establish a personal chemistry, patiently, over time, going in-person, you basically end up being able to operate only, and that up to a limited extent, within a circle of people you know from before, you cannot widen your network nor employ a full spectrum of essential diplomatic tools. You are deprived of one of the most important aspects of what we need to do and that is to keep creating new friendships and doing a lot of outreach. So, as two *sportsmen*, please accepts us as such, I guess we are entitled to have an opinion of and an insight into what is happening with sports during the pandemic.

Certainly, the effects can be devastating in several aspects, as we have been hearing from the distinguished speakers. The economy, the sport, the economy of sports, the entertainment industry, advertising industry, everything connected with the sports have been put on hold, on a backburner. And that has deeply impacted the careers and lives of athletes, their coaches, and the entire supporting staff.

Let me take a liberty of giving a personal touch here. I still do a lot of sports myself, at a decent level, not a professional level, but I am proud to still be able to keep up with the professionals. I do boxing, and even in my age, I can still put up a good fight. And I'm really happy to see Mike Tyson preparing for a match with Roy Jones Jr., both of them slightly younger than myself, but demonstrating that it can be done. This is indeed uplifting. And this particular sport, boxing, being a contact sport as contact a sport can be, has been devastated. You can do something in a bubble, a bubble has been mentioned several times, but the clubs are hardly functioning, if at all, the coaches have not much to do to earn their living. Young fighters are not able to advance and are generally not able to have any meaningful matches nor meaningful training, related to an actual competition, which is applicable to basically all sports, contact sports prominently. Something can be done in a safer manner in sports such as golf or tennis eventually. But most of the sports are very contact-heavy. The martial arts sports are surely the most contact of them all. And what I do myself, I have installed a heavy bag back home. I train alone, do some shadow boxing. A lot of people do similar exercises. But it is pretty autistic ultimately, one has to admit. The point of any sport is to see an advancement and to measure oneself against the others. To have a kind of interaction. So, it is not an activity meant to be done in isolation, it has a social function and a social nature. You can do something, but you certainly cannot do what is really needed and fulfilling. And psychologically, you are losing steam. You are facing an increasing lack of will and a drop of intensity of training.

I'm speaking from my personal experience, but it is also directly applicable to the professional athletes. If they are not having a rhythm of training targeting a particular date of an event, they are running on empty. They don't focus. Also, when it comes to the professional sports, it is very hard, if not impossible, to have a healthy flow of new athletes and to attract new talent. Basically, the teams are stuck with what they have. So, there is really a stagnation, a loss of dynamics when it comes to the professional sports, but also when it comes to the youth sports and the recreational sports which have been very important to the spirit of a nation and to the people like us who are practicing sports up to one level or another. It is an extremely useful distraction, an outlet and, psychologically, we end being deprived of something which is very dear to a lot of people, from the youth to the professionals and to people who are practicing at the recreational level of higher or lower intensity. And indeed to those who are simply enjoying watching and following. It has been something which has provided societies a focal point of getting together, of wellbeing, and it is really something very positive, integral to a functional, modern society, standing for a well-regulated, healthy and fair competition. It builds up character. Professor Reff was nicely explaining what sport means in terms of bringing up kids in a healthy manner physically and also psychologically.

So, what to do, what to expect? Ideally, circumstances allowing, opening up, judiciously, cautiously, reasonably, following all the precautions. But, to all likelihood, it seems that we will be under the present regime, under severe limitations, for at least another year, until next spring or next summer. Hopefully, the vaccine and the treatment will come before that. It is sad, and widely detrimental indeed, beyond the direct damage to the professional and

recreational sport, that because of the nature of the crisis, stemming from a highly contagious disease affecting our so essential social interaction, we all ended up being deprived of sport when we needed it the most in its great quality of a most useful distraction and source of attention and joy during hard times.

ABOUT THE EDITORS

YONAH ALEXANDER is the Director of the Inter-University Center for Terrorism Studies (at the Potomac Institute for Policy Studies) and the Inter-University for Legal Studies (at the International Law Institute). He is a former Professor and Director of Terrorism Studies at the State University of New York and George Washington University. Professor Alexander also held academic appointments elsewhere such as American, Catholic, Chicago, Columbia, and George Washington University. He has published over 100 books and founded five international journals. His personal collections are housed at the Hoover Institution Library and Archives at Stanford University.

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DR. RICHARD B. REFF, MD, is a Orthopedic Surgeon and Sports Medicine Specialist. He was formerly International Chairman for Safety, Security, and Medical for the 19th (2013) and the 20th (2017) World Maccabiah Games held in Israel. In the past he has been part of the Sports Medicine Committee of the U.S. Olympic Committee, the Board of Directors of the U.S. Olympic Committee, as well as a Venue Physician for Swimming and Diving at the Atlanta Olympic Games in 1996.

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ABOUT THE COMMENTERS

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AMBASSADOR PJER SIMUNOVIC has been Croatia's Ambassador to the United States since September 2017. Croatia is currently holding the presidency of the Council of the European Union. Before assuming his Ambassadorship, together with a career in international affairs journalism and academic research he served in various high-level positions in the Croatian Government, in the fields of national security, defense and diplomacy. He was Director of the Office of the National Security Council, Ambassador to Israel, Defense State Secretary in charge of defense policy, National Coordinator for NATO and Assistant Foreign Minister, heading Division for International Organizations and Security, Political Counselor at the Embassy in Paris, and Deputy Director of Analytical Department in the Foreign Ministry. During his career in journalism, he worked with the BBC World Service in London, with the magazine *Europ* in Paris, and with the Croatian daily 'Večernji list' in Zagreb, covering the collapse of Communism, crisis and war in the former Yugoslavia, and European and Transatlantic affairs.

