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Legal and Risk Management Considerations and Implications of Carelessly Drafted Game Contracts: Avoiding a Legal Hurricane

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Weather plays a crucial role in sport event management. Ignoring predicted weather conditions or not effectively communicating them may lead to unanticipated legal, financial, environmental, and social impacts. In 2018, the University of Akron and University of Nebraska football teams were forced to cancel their contest after severe lightning and rainstorms caused significant delays, thus creating a ripple effect that produced other potential risk management issues. This article examines the legal and risk management considerations of this situation, including the possible implications of a carelessly drafted game contract as well as potential strategies to mitigate legal exposure. The authors evaluated the potential application of contract ambiguity as well as contract impracticability and contract impossibility. To mitigate such issues from reoccurring, the authors suggest utilizing an enterprise risk management planning approach to create procedures as part of mitigating the risk of inclement weather in collegiate athletics event management.

Keywords: event management, risk management, game contracts, contract ambiguity, force majeure

Introduction

At the start of the 2018 college football season, the University of Akron football team had already kicked off when the University of Nebraska associate athletic director was made aware of multiple lightning strikes near Memorial Stadium (McKewon, 2018a). Shortly afterward, he informed both teams that the game

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needed to be delayed until the severe lightning and rainstorm had passed (McKewon, 2018b). While weather conditions such as lightning or thunderstorms can occur rapidly, the strength and duration of such occurrences can be quickly anticipated and evaluated for presentation to the decision-makers (Tonmoy et al., 2019). However, in this situation, a decision was not made to postpone or cancel the game for almost three hours, despite earlier lightning and severe rain weather predictions (McKewon, 2018a). It is important to note that during the three hours, fans in attendance were not asked to leave the stadium despite severe lightning in the immediate area (McKewon, 2018a). Additionally, the University of Nebraska associate athletic director, who was in charge of the conduct of the game, informed both teams that the game would need to be delayed due to severe lightning and thunderstorms in the area per the University of Nebraska's policy (McKewon, 2018b). During the three-hour delay, Nebraska officials consulted with the Big Ten Conference office and Fox Sports about rescheduling the game broadcast and determined that play could resume on Sunday at 10:30 a.m. (McKewon, 2018b). However, officials representing the University of Akron were not included in the discussion (McKewon, 2018a).

Akron representatives were also excluded from other key logistical considerations if the football game was to be delayed and then restarted at a later day and time (McKewon, 2018a). Nebraska officials deliberated on offering to house the Akron players in university dorms during a delay but did not communicate any such accommodation changes with the Akron officials (McKewon, 2018a; Sherman, 2018). As a result of being kept in the dark about any potential accommodation modifications, the Akron football team flew back home at the flight time originally scheduled before the game was canceled (McKewon, 2018a). Akron athletic director Larry Williams stated that the lack of communication between Nebraska, Fox Sports, and themselves regarding the resumption of the game and availability of hotel accommodations for the football team were the primary reasons for flying back to Akron at the originally scheduled time (McKewon, 2018a).

Weather plays a crucial role in sport event management, as it may influence the attitudinal and behavioral responses of spectator attendance as well as the conduct of the game. Ignoring predicted weather conditions or not effectively communicating them with counterparts in event management could lead to unanticipated financial, environmental, and social effects, including game cancellation. As a result, one may also posit that the Nebraska Athletic Department's lack of planning for responding to such an event was the actual act that led to the game being canceled. Not completing a game created a ripple effect by producing other potential risk management issues: (1) Does Nebraska owe Akron any compensation for playing the game up until cancellation? (2) Will there need to be

a refund for tickets? (3) Will the holder of the broadcasting rights seek financial compensation as a result of the game's cancellation? (4) Will any sponsors be requesting a refund? (5) Will this game ever be made up? Nebraska's decision thus impacted more than just the game itself. Without appropriate communication to discuss when, or if, the game was to be restarted, the parties were forced to look to the game contract.

This article examines the legal and risk management considerations of this carelessly drafted game contract, as well as potential risk management strategies to mitigate legal exposure. The first section provides more background that led up to the game cancellation. The second section illustrates contract issues, including contract ambiguity, contract impracticability, contract impossibility, and contract implications. The third section of this article describes an off-shoot of traditional risk management: enterprise risk management. The fourth section discusses the steps to implement the enterprise risk management process. Concluding remarks comprise the final section.

Background Description

In this case, the agreement between the Board of Regents of the University of Nebraska and the University of Akron (the "Akron-Nebraska Game Contract") was relevant for only one issue: compensation for the visiting team. Clause four of the Akron-Nebraska Game Contract stipulated that the University of Akron would receive a $1.17 million payout as compensation for playing the University of Nebraska in Lincoln (Akron-Nebraska Game Contract, 2014, clause three). According to the contract's terms, Akron "shall be paid a flat dollar guarantee of $1,170,000 to be paid on or before March 1, following the scheduled game" ("Akron-Nebraska Game Contract", 2014, clause three). However, it was unclear what payment would occur, considering the game began but was not completed. When asked if Akron would still be compensated for the canceled game, Nebraska's deputy athletic director and chief of staff, Bob Burton, replied, "I don't know the answer to that" (Sherman, 2018, para. 9). Even though part of the game had already begun, it was canceled due to inclement weather with no makeup game in place. Furthermore, at the time of this writing, the University of Nebraska had not compensated the University of Akron for its travel, accommodations, or related expenses for the canceled game (Gabriel, 2019).

According to the 2019 NCAA Football Rules Book that deals with suspension of games, four options exist. First, the game can be resumed at a later date. Second, the game can be terminated with the score staying as indicated on the scoreboard. Third, a team forfeits the game. Fourth, the game is declared as no-contest. Notably, for a non-conference game, the athletic directors or their designees, with input

from the coaches, must agree on one of the four options (NCAA Football Rules Book, 2019). However, the Akron athletic administrators were not consulted, thereby potentially making the decision a violation of NCAA bylaws.

Financial Reasons Group of Five Play Power Five Schools

The NCAA Division I Football Bowl Subdivision (FBS) is comprised of the Group of Five schools and Power Five schools. The Power Five consists of the member schools of the five conferences that are considered the highest level of intercollegiate football and financial revenue production. In an analysis of financial differences between Power Five and Group of Five Division I universities, Walker and Misawa (2018) reported the athletic budgets at Power Five institutions ($97.6 million) were nearly triple those in the Group of Five schools ($32.8 million).

As a result, it is not unusual for a Group of Five school, such as the University of Akron, to play a Power Five school, such as the University of Nebraska, as a way to increase their athletic department budget. In such instances, the home team Power Five program may agree to pay a Group of Five program $800,000 to $1.8 million to play (also referred to as a buy game) an intercollegiate football game (Dellenger, 2020). While such amounts are relatively small for a Power Five program, one buy game may constitute 5% of a Group of Five total athletic department budget. A recent example includes the Ohio State University contractually agreeing to pay the University of Buffalo $1.7 million to play a football game in 2020. Similarly, Kent State University will be deprived of $1.5 million due to its game against Penn State University being canceled (Dellenger, 2020).

Challenges Involving Game Contracts

It is noteworthy that contracts between Division I college teams are often developed years in advance of the date of the game (Sanderson & Siegfried, 2018). As a result, college athletic departments may experience novel legal challenges uncontemplated at the time of signing, such as those created by the COVID-19 pandemic. At the time of this writing, the United States is still negotiating the remnants of a global pandemic that has meaningfully impacted athletic departments' ability to operate in a customary manner due to health and safety reasons. Furthermore, it is unclear what language is being added to in-game contracts to address this reality. Certainly, the explicitly applicable language concerning a pandemic is lacking in the Nebraska-Akron Game Contract. Additionally, unique legal issues may arise with attempting to engage and communicate in reasonably prudent managerial decision-making policies and procedures (see Adelson, 2020). The unique challenges posed by the COVID-19 pandemic also necessitate including language in any new game contract reflecting this reality.

While the aforementioned game cancellations resulted from the COVID-19 pandemic, a potential scenario in which a college football team sues another for failing to reschedule a game due to weather concerns is not without precedence. In 2018, Arkansas State University sought $650,000 in financial damages against the University of Miami for refusing to reschedule a game promptly, as stated in the contract between the schools (Associated Press, 2018). Extrapolating from the Arkansas State versus Miami situation, logic would suggest that Nebraska and Akron consult the game contract for any guidance on what to do if the lightning and thunderstorms led to the contest's cancellation. In fact, there was language in the contract—in clause nine—that included a list of conditions that would void the agreement, arguably including the $1.17 million due to Akron.

To further complicate matters, none of the language in clause nine in the contract covered the agreed-upon remedy if the game was canceled due to lightning or severe thunderstorms (Akron-Nebraska Game Contract, 2014, clause nine). Ambiguity thus existed as to whether the University of Nebraska athletic department, due to the fact the contest had started before the cancellation of the game, was required to pay the University of Akron $1.17 million as stated in the game contract. The ambiguity in game contract language and lack of appropriate implementation of weather-related risk management created potential legal exposure for the University of Nebraska.

Contract Issues

Of particular interest to the parties to the contract, given the game's cancellation, was a provision enumerating specific occurrences that would make the Akron-Nebraska Game Contract void. The relevant language of the clause said the Akron-Nebraska Game Contract "shall be void in the event it becomes impossible to play the game by reason of disaster, fire, hurricane, tropical storm, [or] flood," as well as other events unrelated to weather (Akron-Nebraska Game Contract, 2014, clause nine). The curiously drafted clause included items such as tropical storms and hurricanes, which are objectively unlikely events to occur in the American Plains, yet failed to identify more likely occurrences in the State of Nebraska such as severe thunderstorms, lightning, or tornados (Livingston, 2016).

Many organizations tend to employ previously used boilerplate terms in the contract (Hillman & Rachlinski, 2002). Thus, one potential reason for the existence of the curious weather-related terms in the Akron-Nebraska Game Contract might be related to the concept of boilerplate contracts. Kar and Radin (2019) stated that "all boilerplate text serves the same essentially contractual function, and they do not recognize the critical difference between terms that parties co-operatively communicate and agree to during contract formation" (p. 1140). As a result, the contracting parties might use boilerplate contracts, also referred to

as pseudo-contracts, to schedule an event (Kar & Radin, 2019). However, such form agreements may not be reviewed or updated on a consistent basis (Murfree & Moorman, 2021). Such lack of attention further undermines any communication or incentives by the relevant parties to become familiar with the content of contracts, including severe weather-related issues. Relevant contracts ought to be context-specific, which may not be the case when using boilerplate contracts.

Most university athletic events are governed by a game contract to provide necessary specificity. A contract has been historically defined as "the agreement of two or more parties to do or not to do certain acts," (*Green v. Biddle,* 1823, p. 92), as there is a reciprocity of obligation (*Trustees of Dartmouth College v. Woodward,* 1819). More specifically, a contract is traditionally an agreement containing a set of promises between at least two parties, who are duty-bound by the agreement, which also provides a legal remedy in the event there is a breach (*Sea Breeze Estates, LLC v. Jarema,* 2018). Certain contracts, such as those that cannot be performed within a year, must be reduced to writing and signed by the parties (Larsen & Oakes, 2020).

In order to have a valid contract, the threshold elements include (1) an offer, (2) acceptance, (3) consideration, (4) legality, and (5) capacity (*Bowles v. One Main Financial Group, L.L.C.,* 2020). Any valid contract must contain an outward unambiguous manifestation by the offering party to a receiving party, clearly communicating the proposed terms. That receiving party must unequivocally communicate back to the offering party an acceptance of the proposed terms. Any valid contract must also contain consideration, a mutuality of obligation in that both parties to the agreement give something up while also receiving something perceived as value—the reciprocity of obligation. Finally, the subject of the contract must be sufficiently defined, not be illegal or against public policy, and all parties to the agreement need to be of sound age and mind to make such a decision. Since the respective parties to the contract were unable to agree on rescheduling the game, and the Akron-Nebraska Game Contract is silent about whether storms or lightning will void the agreement, ambiguity exists concerning the rights and liabilities of the parties.

Contract Ambiguity

Beyond these fundamental elements, a critical underlying component of any agreement for the purpose of valid contract formation and interpretation, the language of an agreement must be unambiguous. This is material, as the document governing the rights and responsibilities between the parties should have one single meaning. A contract should not be subject to several conflicting interpretations. No provision in a contract should be ambiguous, which occurs when the agreement's "terms are inconsistent on their face or if the phraseology

can support reasonable difference of opinion as to the meaning of the words employed and obligations undertaken" (*Hasbro, Inc. v. Mikohn Gaming Corp., 2007,* p. 262). However, it is important to emphasize that an ambiguity may not necessarily exist just because a person has a subjectively different perception of a contract's terms (*Niehaus v. Cowles Bus. Media, Inc.,* 2003). An ambiguity must be due to the existence of more than one objective meaning, when the uncertainty is viewed in the totality of the agreement, as well as considering the common practices, customs, and terminology that is generally part of a particular business (*Curry Rd. Ltd. v. K Mart Corp.,* 1990).

Excluding ambiguity from a contract to clearly ascertain the meaning of a document is critical. The rationale is because "a written contract duly signed and executed speaks for itself and is binding on the parties" (*Glekas v. Boss & Phelps, Inc.,* 1981, p. 588, citing *Gagnon v. Wright,* 1964), which is destroyed with the presence of a reasonable disagreement about the agreement's interpretation and terms. Thus, when resolving a dispute concerning a contract's meaning, a court will review the document in its entirety in order to determine whether an ambiguity exists (Collins v. Harrison-Bode, 2002). This analysis typically begins by trying to interpret the contract exclusively by what is written in the "four corners" of the agreement (Fuller Landau Advisory Services Inc. v. Gerber Finance. Inc., 2018). If the language in a contract—after reviewing the document in its totality—can be reasonably interpreted in conflicting ways by the parties, then a court will consider external ways of interpreting what the parties had intended from their words, and the legal effect these words sought to create (*CNH Industrial N.V. v. Reese,* 2018). Resolving ambiguity involves the legal interpretation and construction of the agreement—providing legal meaning to the language and operationalizing that meaning (Klass, 2020). A court can use outside evidence, such as the negotiations between the parties before the contract's execution, as part of interpreting the meaning and constructing the contract's legal effect (*Chubb Custom Insurance v. Prudential Insurance Company of America,* 2008; *Cummings Inc. v. Dorgan,* 2009). This interpretation usually occurs through testimony or other documentary evidence.

A court, when interpreting and construing an ambiguous contract, is likely to construe it against the party responsible for drafting the agreement (*Moulor v. American Life Insurance Company,* 1884). Courts take this traditional approach strictly against the party who principally drafted the contract because that person was in the best position to make the agreement as explicit as possible based on their understanding of the terms, as well as to that party's benefit. Thus, this party was in the most advantageous position. Therefore, in the event no single reasonable interpretation is clearly evident, the drafting party should not be able to benefit from the ambiguous language (*Weber v. PACT XPP Technologies,*

AG, 2016). This policy position of interpreting a contract against the party that drafted the document is done to safeguard the rights of the other party that did not have a significant role in creating an ambiguous agreement.

University of Louisville v. Duke University (2008)

One common instance of ambiguity is due to a clause being written in an imprecise or imperfect manner, which creates doubt about what the parties had intended (*Nissho Iwai Europe PLC v. Korea First Bank,* 2002). This type of dispute arose in *University of Louisville v. Duke University* (2008), a first-of-its-kind lawsuit over the interpretation of allegedly ambiguous language in a game contract (Grow, 2011). Louisville and Duke had signed an "Athletic Competition Agreement" in 1999 that obligated the parties to play each other four times in two sets of home-and-home football games on the following dates and locations: October 5, 2002, in Durham, North Carolina; October 6, 2007, in Louisville, Kentucky; October 4, 2008, again in Durham, and finally on October 3, 2009, in Louisville (Duke University and University of Louisville Competition Agreement, 1999, herein after "Competition Agreement"). However, Duke unilaterally withdrew from the Competition Agreement in early 2003 after playing only one game in the four-game series (ESPN.com news services, 2008).

In 2007, Louisville sued for breach of contract in Kentucky state court to enforce the liquidated damages clause of the Competition Agreement. The relevant section called for the breaching party to pay $150,000 per canceled game "if no contest with a team of similar stature is scheduled [by the non-breaching party] … to replace the one canceled because of the breach …" (Competition Agreement, 1999, para. 13). Since there were three games remaining, Louisville claimed it was entitled to $450,000 in total. Duke argued that it had been relieved from paying any liquidated damages because its football team had performed so poorly over the years that any team from Division I would be a team of similar stature (Sperling, 2008). Therefore, because Louisville had rescheduled the 2007 and 2008 games with teams from Division I schools (and had yet to schedule for the 2009 season, making it premature to claim breach), Duke should be relieved from paying the liquidated damages. In essence, Duke argued that its record was so poor that any college football team would have been a "team of a similar stature," which would have met the definition of the language in the liquidated damages clause. Thus, the issue in the case was determining the meaning of the phrase "a team of similar stature."

Louisville argued that the language "a team of similar stature" was ambiguous, opening the door for additional interpretation and legal construction. However, the court disagreed that the phrase "team of a similar stature" was

ambiguous and instead interpreted and gave legal construction to it using the "plain and ordinary meaning" of the phrase (*University of Louisville v. Duke University,* 2008, p. 2). The court used Webster's Seventh New Collegiate Dictionary to define similar stature as being "on the same level" (*University of Louisville v. Duke University,* 2008, p. 2). Since the Competition Agreement did not provide specific parameters or modifiers, the court concluded that any team competing "at the same level of athletic performance as the Duke football team" constituted a team of similar stature (*University of Louisville v. Duke University,* 2008, p. 3). The court's interpretation of similar stature stemmed from Duke's 2007 performance on the football field: wins. Because Duke had only won one game in 2007, virtually any team from Division I was a team of similar stature. Therefore, the court dismissed Louisville's lawsuit.

Implications for Louisville v. Duke (2008)

This ruling has several implications. First, the judge in the *University of Louisville v. Duke University* (2008) case used a plain meaning approach to construe the language "team of similar stature" because no definition existed in the Competition Agreement. Therefore, neither party was entitled to allow extrinsic evidence. Had there been a section in the contract that provided such a definition, the parties' intent could have been more accurately reflected and potentially avoided the need for Louisville to introduce outside evidence and this issue altogether. Such a definition embedded in the agreement, assuming it was not ambiguous on its face, would have saved Louisville and Duke time and money as they litigated this matter.

Another implication relates to the outcome of the lawsuit. Although the court ruled that no ambiguity existed, which merited a plain meaning interpretation of the agreement based on the ordinary meaning of its words, the court may have misinterpreted the agreement. Grow (2011) argued that the court used a flawed legal analysis by interpreting the contract at the time of the breach, as opposed to the parties' expectations at the time of formation. Grow (2011) asserted that the court should have constructed a "team of similar stature" in 1999, at the time of contract, as opposed to the time of breach in 2007. At the time the parties signed the contract, Duke had come off a 4-7 season in the Atlantic Coast Conference, one of the top conferences in college football. Grow (2011) thus posited that "on the same level" should be based on the 4-7 record from 1999, not the 1-11 performance in 2007. Grow's criticism illustrates the perils of failing to specifically define critical words and phrases in contracts, as even the plain meaning and construction may be misconstrued.

Contract Impossibility – Impracticability

Another legal doctrine that may apply to the curiously drafted game contract relates to the parties' remedies in the aftermath of the game contracts' potential non-performance: contract impossibility that precludes performance. The legal doctrine of contract impossibility may allow a party to avoid liability if a supervening event occurs that, without fault, makes it "impracticable" to perform a duty that was the basic assumption of the contract (*Prusky v. Reliastar Life Insurance Company,* 2006, referencing the Restatement [Second] of Contracts § 261). Instead of holding a party liable to perform, if that essential term or condition ceases to exist prior to the performance, a contract dissolves and excuses the parties from executing its terms (*Texas Co. v. Hogarth Shipping Corporation,* 1921). This exception relates to limited situations in which an unforeseen risk at the time of contract formation rendered it very difficult to perform. Alternatively, under an exception known as frustration of purpose (Restatement [Second] of Contracts § 265), the Nebraska-University of Akron event impairs the contract's purpose to the point that it destroys the value of the intended performance provided. Thus, objectively, the intended performance cannot occur (see *Opera Company of Boston, Inc. v. Wolf Trap Foundation for Performing Arts,* 1987).

The issue of foreseeability is one element of discharge due to impossibility. In Mishara Construction v. Transit-Mixed Concrete Corp. (1974), the Supreme Court of Massachusetts posed another question that was broader than foreseeability. The court looked to the normal commercial circumstances surrounding the transaction and asked whether the parties developed a contingency that "the parties could reasonably be thought to have foreseen as a real possibility which could affect performance" (*Mishara Construction v. Transit-Mixed Concrete Corp.,* 1974, p. 367). Was it a type of risk that one party was tacitly accepting and, if so, would performance normally be considered notwithstanding the risk? If the risk was so unforeseen that it was not considered as a real possibility that could impact performance, then it would look to be excused (see *Opera Co. of Boston v. Wolf Trap Foundation for Performing Arts,* 1987, citing Judge Learned Hand in *Companhia De Navegacao Lloyd Brasileiro v. C.G. Blake Co.,* 1929). Impracticability, according to the aforementioned, may be more complex than whether a risk was foreseeable at the time of contract.

The modern evolution of contract impossibility also includes contract impracticability. Impracticability is a less rigid concept than impossibility; it may excuse performance for reasons of it being unreasonably burdensome, difficult, or expensive. Additionally, performance may be excused if the principal purpose is substantially frustrated without fault of the non-performing party (see Restatement [Second] of Contracts, § 265). A party seeking this defense may only do so if it used reasonable efforts to overcome obstacles to performance (Abrams &

Roderick, 2020). A party seeking to defend contract non-performance based on impracticability must prove that (1) the supervening event was unexpected, (2) performance would be extremely burdensome and difficult, and (3) the risk had not been assumed at the time the contract was formed, causing impracticability (*Armstrong v. Clarkson College,* 2017). Discharge by impracticability, importantly, does not require the supervening event to be unforeseeable; instead, it may be something unexpected.

Opera Company of Boston, Inc. v. Wolf Trap Foundation for Performing Arts (1987)

One case that may be instructive for the instant issue involving the curiously drafted game contract between Nebraska and Akron comes from the world of opera. In *Opera Company of Boston, Inc. v. Wolf Trap Foundation for Performing Arts* (1987), an opera company sued an outdoor auditorium for breach of contract after a severe thunderstorm knocked out power to the facility at approximately 6:30 p.m., two hours prior to the scheduled performance. Power would not likely have been restored to the facility until at least after 11 p.m., and the performance was canceled. The facility never paid the opera company for the canceled performance, even though the company was ready to perform at the time of cancellation. At trial, the venue alleged that the doctrine of impossibility excused performance due to the power outage making performance impracticable. However, the district court found that the supervening event was foreseeable and therefore ruled in favor of the plaintiff.

On appeal, the issue was whether the district court erred by not accepting the impossibility of performance as a valid defense. The appellate court began by analyzing the doctrine of impossibility of performance as a defense for breach of contract. In reviewing several Supreme Court cases, the court emphasized the evolution of the doctrine to acknowledge instances where fairness requires a contract to be voided if an aspect that the parties depended on being present was no longer possible (*Texas Co. v. Hogarth Shipping Corporation,* 1921; *The Tornado. Ellis v. Atlantic Mutual Insurance Company of New York,* 1883). The appeals court also cited additional, prominent legal scholars to reflect the liberalization of impossibility doctrine, including impracticability, and to move beyond evaluation merely concerning foreseeability. The court reviewed commentary from Corbin on Contracts, who characterized impossibility as "in the interest of reason, justice, and fairness," as well as Williston on *Contracts,* who labeled the impracticability doctrine as "essentially an equitable defense" (*Opera Company of Boston, Inc. v. Wolf Trap Foundation for Performing Arts, 1987,* p. 1099). The court also looked to the Restatement on Contracts concerning the impossibility of performance, finding the following language instructive:

> Even where the obligor has not limited his obligation by agreement, a court may grant him relief. An extraordinary circumstance may make performance so vitally different from what was reasonably to be expected as to alter the essential nature of that performance. In such a case, the court must determine whether justice requires a departure from the general rule that the obligor bears the risk that the contract may become more burdensome or less desirable. (*Opera Company of Boston, Inc. v. Wolf Trap Foundation for Performing Arts,* 1987, p. 1099, referencing Restatement [Second] of Contracts, chapter on Impracticability of Performance and Frustration of Purpose, emphasis added)

Synthesizing these resources, the court concluded that equity was a fundamental concept of the impracticability doctrine and that its application must be done when it is fair and just.

In setting out the elements of the impossibility of performance, the appeals court emphasized that an occurrence may be unexpected as opposed to unforeseeable. This conclusion reflected comments from the Restatement of Contracts drafters, which opined that a reasonably foreseeable event does not undo the ability to avoid performance due to impracticability or frustration of purpose. Instead, "[f]actors such as the practical difficulty of reaching agreement on the myriad of conceivable terms of a complex agreement may excuse a failure to deal with improbable contingencies" (*Opera Company of Boston, Inc. v. Wolf Trap Foundation for Performing Arts,* 1987, p. 1101). In other words, when using an equitable approach, the totality of the circumstances is examined.

Taking into consideration the doctrine of impossibility's development and expert commentary, the Court of Appeals for the Fourth Circuit disagreed with the district court as to whether the defense applied in the instant case. In particular, the court concluded that the lower court erred in conclusively ruling for the opera company due to the power outage being foreseeable.

> Foreseeability, as we have said, is at best but one fact to be considered in resolving first how likely the occurrence of the event in question was and, second whether its occurrence, based on past experience, was of such reasonable likelihood that the obligor should not merely foresee the risk but, because of the degree of its likelihood, the obligor should have guarded against it or provided for non-liability against the risk. (*Opera Company of Boston, Inc. v. Wolf Trap Foundation for Performing Arts,* 1987, p. 1102-1103)

In other words, the foreseeability of an incident was merely one consideration in the totality of the circumstances. Other factors must be addressed. Since the trial judge did not engage in this process, the appellate court reversed and remanded the case with instructions.

Implications of *Opera Company of Boston, Inc. v. Wolf Trap Foundation for Performing Arts* (1987)

Opera Company of Boston, Inc. v. Wolf Trap Foundation for Performing Arts (1987) reflects the liberalizing nature of the doctrine of contract impossibility, and that it possesses equitable aspects that call for application in a flexible manner. The equitable notions the case exhibits may create issues for consistent application. Furthermore, if each instance depends on the novel application of the doctrine based on the totality of circumstances, the result may become less predictable. These two implications are significant in industries that may be disrupted for myriad reasons where the parties have limited control.

Another implication that is important to acknowledge is the power a fact-finder possesses when he or she is asked to determine whether impracticability existed in the totality of the circumstances using an equitable approach. Since equity deems done that which ought to be done (see *Owens v. Continental Supply Co.,* 1934), the doctrine may lead to creative outcomes that the parties did not necessarily intend at the time of the agreement. This doctrine also allows judges the leeway to craft potential resolutions that are difficult to predict. Indeed, many industries depend on consistent application of laws; deviation from this approach makes seeking a remedy through the legal system a less than an optimal proposition.

Consequences for Nebraska-Akron Game Contract

While this situation could be resolved by the parties, it serves as an example of an increasingly more common issue related to the risks inclement weather pose when intercollegiate teams play. Game cancellations in football due to nature disasters are so frequent that this occurrence may have become the "new normal" (Murfree & Moorman, 2021). For example, the incidence of extreme weather throughout the United States has resulted in the postponement or outright cancellation of numerous high-profile athletics contests (Wong, n.d.). In 2019, Hurricane Dorian forced the cancellation of several football games such as Charleston Southern at South Carolina (Shelton, 2020), as well as Florida A&M versus North Carolina A&T State. The 2018 college football season saw even more high-profile games canceled or rescheduled in the South and Midwest, including West Virginia at North Carolina State, Boston College versus Wake Forest, and Iowa State versus South Dakota State (Smits, 2018; Visser, 2018). A 2018 bowl game between Boise State and Boston College was even called off because of severe weather, making it the first postseason bowl game to be canceled because of weather. The increasing volatility of weather phenomena, such as hurricanes, lightning, flooding, and wildfires (Ocko & Sun, n.d.), means this is a topic that athletic departments will continue to encounter.

Murfee and Moorman (2021), reflecting the importance of using legal instruments to address the increasing pressing issue of extreme weather impacting college sports, analyzed the language of 36 Division I college football game contracts as part of a study exploring the industry's approach to inclement weather. The authors found seven contracts did not include language related to how weather-related events would impact the game contract, and 10 game contracts contained clauses that provided a general description of ambiguous language as qualifying events, such as "'acts of God,' 'natural disaster,' and 'acts of God and Nature'" (Murfee & Moorman, 2021, p. 135). Thus, if presented with a similar inclement weather scenario as Nebraska and Akron faced, 47% of the sample may have also experienced issues with interpreting the game contract, let alone enforcing the appropriate contractual remedy.

A review of the Nebraska-Akron Game Contract revealed neither lightning nor thunderstorms (likely weather occurrences in the area) were mentioned in the contract. Instead, tropical storms and hurricanes, both of which are not common to the area, were stipulated. Therefore, while the language in clause nine was explicit and communicated one objectively reasonable interpretation of what specific conditions would render the agreement void, the fact that the most likely weather conditions were absent communicates a perplexing message for a factfinder to ferret out of the agreement. It also displays that clause nine was carelessly drafted. If a lawsuit seeking to void the game contract was filed by either Nebraska or Akron, a court may use the *University of Louisville v. Duke University* (2008) case as persuasive authority and adopt a plain meaning interpretation of the agreement. This would necessitate construing the agreement based on the four corners of the document, without any ambiguity present, and ultimately inferring the parties' intent by reading what was written in clause nine. As a result, thunderstorms would not be a condition precedent to voiding the agreement. However, it is also possible that a court could find that ambiguity existed. As the *University of Louisville v. Duke University* (2008) case illustrates, a court's interpretation and legal construction of the contract may differ from the intent of the parties.

Furthermore, this instant situation creates ambiguity as to whether the game contract could be voided due to impracticability. The modern trend looks at foreseeability as one element, but the trend toward the event being unexpected and part of the totality of the circumstances makes for a more nuanced analysis than just foreseeability. A party seeking to defend non-performance based on impracticability would likely be required to prove that a supervening event was unexpected, performance would be extremely burdensome and challenging, and the risk had not been assumed at the time the contract was formed, causing impracticability (*Armstrong v. Clarkson College,* 2017).

In the instant case, a court could look to *Opera Co of Boston v. Wolf Trap Foundation for Performing Arts* (1987) as persuasive authority. Such a factfinder could examine equitable principles as part of building a defense based on contract impracticability. In particular, the Fourth Circuit Court of Appeals highlighted the importance of considering how often a supervening event occurs in a specific industry. This likelihood may mean evaluating the course of performance between parties or what is considered commonplace within the college athletics industry when encountering inclement weather. These factors may assist a court in deciding whether impracticability is, in the totality of the circumstances, a viable defense to performance. In the alternative, such factors may assist a factfinder in deciding whether the risk was not just foreseeable, but also so likely that "the obligor should have guarded against it or provided for non-liability against the risk" (*Opera Co of Boston v. Wolf Trap Foundation for Performing Arts,* 1987, p. 1103).

College athletics, as an industry, depends on creating consistent policies and procedures. However, it is not uncommon for schools and conferences to draft contracts that are unique from each other (Murfree & Moorman, 2021). The lack of communicating appropriate contract language in a boilerplate agreement could also create a financial dispute regarding payment between the universities. As a result, there may be a lack of communication consistency in the contract, which may lead to potential litigation (e.g., *University of Louisville v. Duke University,* 2008) or disputes (e.g., University of Akron and University of Nebraska).

To properly implement and communicate appropriate contract policies and procedures, it is important for college athletics to understand that a live audience of tens of thousands of spectators are owed a reasonable duty of care (Ludden, 2013; Maloy, 1993). The potential liability due to breach of contract for failing to perform a game contract is a risk that athletic departments must avoid or at least mitigate. Inclement weather is not only one of the chief foreseeable risks of harm, it is likely an expected risk and one that is commonly considered in the course of performance throughout the college athletics industry. Therefore, convincing a factfinder that a failure to perform should be excused on the basis of an unexpected supervening risk, regardless of the totality of the circumstances, may present difficulties. Instead, parties may be better served by avoiding a legal conundrum and, in addition, to avoid engaging in careless drafting of the legal agreement, instead of focusing on risk management and risk mitigation preparedness. In the event a game is canceled, an athletic department faces a variety of issues that may ripple beyond simply legal concerns about contract drafting and interpretation into the realm of risk management. The following section provides risk management analysis and strategies based on the legal and factual issues previously discussed.

Enterprise Risk Management

Similar to traditional risk management processes, enterprise risk management (ERM) fosters an organizational policy for managing foreseeable risks. ERM and traditional risk management procedures necessitate that each of the organization's significant risks must be identified and assessed. Referred to as integrated, holistic, or strategic risk management, Lundqvist (2015) states that ERM is composed of traditional risk management with the addition of risk governance. Risk governance offers structure to the risk management process while detailing the responsibilities, authority, accountability, rules, and procedures to make appropriate risk management decisions (Lundqvist, 2015). Furthermore, risk governance encourages a culture of risk awareness and communication throughout the organization (Aebi et al., 2012). As a result, from a holistic viewpoint, ERM may be perceived as traditional risk management plus risk governance. Organizations may choose to utilize the traditional risk management process with risk governance to achieve an integrated approach to risk management—ERM (Lundqvist, 2015).

Comparable to traditional risk management, the fundamental features of ERM include: (1) the commitment of top administrators when establishing the risk policy and (2) the participation of all employees in the management of foreseeable risks within their job responsibilities (Andersen & Schrǿder, 2010; Jankensgard & Kapstad, 2021; Klučka & Grünbichler, 2020; Miller et al., 2010; Slovic & Peters, 2006). Conceptually, ERM perceives risks as being a substantially interconnected collection of risks that need to be managed, not only as a reaction to the distinctive attributes of a specific threat but with an emphasis on comprehending and interpreting the interrelationships of all of the foreseeable risks (Andersen & Schrǿder, 2010; Jankensgard & Kapstad, 2021; Klučka & Grünbichler, 2020; Miller et al., 2010).

While traditional risk management may be used effectively, it has been viewed as identifying, measuring, monitoring, and reporting risk in a silo structure with little formality, structure, or communication between parties (Lundqvist, 2015). The silo risk management approach allows individual areas to manage risks in isolation, with each silo handling risks separately without the element of risk governance (Niehaus, 2017). As an integrated risk management approach, ERM may be considered to offer a broader perspective from the silo approach that increases communication among and between relevant parties (Fraser & Simkins, 2016). Thus, without the integration of risk governance to provide structure and review, organizational employees during contract negotiations may overlook foreseeable risks (e.g., severe weather typical to the location), leading to less desirable consequences (e.g., visiting team leaving resulting in game cancellation).

Ai et al. (2016) found that acting myopically in the risk management process due to the silo approach causes a deviation from a more favorable enterprise-wide strategic plan that employs risk governance to provide direction and structure. For example, the Akron representatives did not communicate with Nebraska that they were leaving Lincoln at their originally scheduled time. In both cases, the representatives from each school managed their perceived risks without communicating with their counterparts. Finally, the weather-related risks did not appear to be communicated well by the home team and therefore not received well by the visiting team. In these instances, the representatives from both universities were functioning in a silo environment in which they thought best for only their teams. However, the implementation of enterprise risk management would offer more direction and control through risk governance. As a result, both parties would have a better comprehension of their overall responsibilities and accountabilities. An example of how interconnected risks were present in the Akron-Nebraska case may be seen in Figure 1.

Figure 1. ERM interconnected consequences.

ERM Implementation Steps

The steps to implement traditional risk management and enterprise risk management may be similar. However, if traditional risk management is conducted using the silo approach, it may not incorporate the interconnectivity and communication of risks to conduct a sports contest. For this article, the silo approach may be the reason for the poorly drafted or incomplete contract that did not address the foreseeable types of severe weather that likely could occur in the region, resulting in game delay or cancellation. Additional risks would include canceling or rescheduling a game without communication between all parties. The consequence would result in the lack of accommodations and travel for the visiting team, support staff, and traveling fans. Conversely, the real impact of ERM is the addition of a risk governance dimensionality to the analysis (Miller et al., 2010). As a result, applying ERM to the Akron-Nebraska Game Contract would employ risk governance to consider the relationship to the interconnectivity that exists between the risks.

Determine Objectives

The first step in the traditional risk management process and ERM is to determine the objective of risk management. A commonly held view is that a risk management plan aims to reduce exposure to foreseeable risk. The implicit assumption is that risk is costly, so an organization should work to minimize any risks that are foreseeable. As Sharp et al. (2007) summarized: "[t]he safety and well-being of all your constituents should be one of your core values, and risk management is an important tool to carry out that imperative" (p. 17). While there are a number of contract issues that require appropriate design and communication such as security, sponsor/vendor management, and media relations that Division I college football home teams must consider when managing a large event, weather-related issues should not be overlooked among the main objectives.

Identify the Risks

When identifying potential event risks, an organization may consider adhering to the SMART process. Without becoming onerous, those involved in the ERM process should attempt to *specify* foreseeable risks, explain how the importance of the risk can be *measured*, illustrate how the risk reduction will be *achieved*, clarify how *realistic* the foreseeable risks may be, and describe how the *time* of the year may impact the safe conduct of the event (Miller et al., 2010).

Assess the Risks

To assist in removing ambiguity, all parties involved in contract design should assess a wide number of foreseeable factors that may negatively affect the game to the point that the contest needs to be canceled. Risk assessment is about determining the risks that have been identified (Miller et al., 2010). Risk assessment provides a fundamental tool that may be used to determine the risks to be addressed and communicated (Goldstein, 2005). Risk assessments have three primary mechanisms that need to be fully explored and considered: threat, vulnerability, and criticality (see Figure 2; Durling, Price, & Spero, 2005).

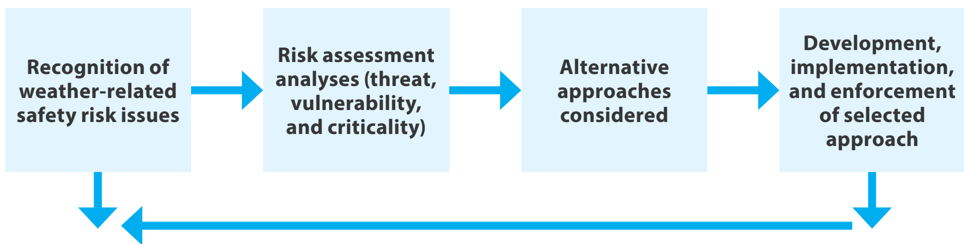

Figure 2. Phases in risk management planning.

Risk Assessments

The first assessment is the significance of the threat (Threat Assessment). When probing potential threats, the frequency and consequences associated with foreseeable risks should be estimated and communicated with all relevant parties (Miller et al., 2010). If the risk strategies concerning the vulnerabilities are not clearly communicated to the associated party, the likelihood of risks may increase (Miller & Wendt, 2012). The second assessment relates to the potential vulnerabilities in case the weather becomes so dangerous that the contest must be canceled (Vulnerability Assessment). A vulnerability assessment helps identify potential weaknesses that may be exploited and suggests options to eliminate or address those weaknesses with input from the parties involved in the ERM process (Miller & Wendt, 2012). The third assessment prioritizes the vulnerabilities and implements action to diminish the likelihood of harmful incidences (Criticality Assessment). Assessing the criticality of an area can help determine the classification of the risk, which will determine the potential areas that will receive attention first (Decker, 2001).

Table 1. Description of Phases in Risk Management Planning

Phase	Description
Recognition of risk problem or need	Recognition of potential severe weather that may occur in the area at the time of the contest that could result in game cancellation Recognition that hotel rooms nearby may be sold out the day before and gameday well in advance
Risk assessment analyses	Threat assessment of potential problem areas such as common severe weather occurrences in the area and the likelihood of nearby hotels being sold out on the days prior, during, and after the game Threat assessment detailing an agreement to cancel and move the game to another day by both schools and broadcast media representatives Vulnerability assessment of nearby hotels being sold out on the days before and on gameday Vulnerability assessment of potential common severe weather occurrences specific to the area that may cause game cancellation Vulnerability assessment of using a boilerplate contract that does not include potential common severe weather occurrences specific to the area that may cause game cancellation Criticality assessment prioritizes the threat and vulnerability assessments
Alternative approaches indicated in the contract	Reserve sufficient number of hotel rooms for the visiting team for the day before and on gameday to prepare against game cancellation In case of hotel sellout to spectators, reserve sufficient number of rooms for the visiting team at backup hotel for the night after the game Negotiate with local hotels to allow the cancellation of visiting team room reservations for the night of the game 24 to 48 hours prior to the game
Development, implementation, and enforcement of selected approach(es)	Realizing that ERM is an ongoing, dynamic process that provides risk governance of direction and structure from university counsel, athletic directors, and head coaches, comprehensively review contractual elements and eliminate “boiler plate” language that does not apply to the possible severe weather in the area in which the contest will take place. Language should also include actions for potential hotel accommodation and travel changes as well as game changes (e.g., date and time) in case of cancellation. Terms of the contract will serve as enforcement of the risk management plan

Once these assessments have been analyzed, all of the parties involved may begin a discussion to alleviate ambiguity and finalize the contract negotiation for the game. During the contract negotiation, the threat, vulnerability, and criticality assessments posed by potentially severe weather typical to the area should be communicated and considered. For example, the potential risk of severe weather in Nebraska during the early fall often includes thunderstorms, lightning, and tornadoes (Livingston, 2016). However, the severe weather indicated in the contract identified hurricanes and tropical storms, neither of which occur in Nebraska. Thus, the existing vulnerabilities presented by thunderstorms, lightning, and tornadoes should be prioritized and discussed by the parties involved in the contract process. As previously mentioned, ERM addresses the interconnected collection of risks, which in the context of this article, may include the diagram of consequences following the previous actions (see Figure 1).

Evaluation of Alternative Risk Treatments

Even after the contract has been agreed to and signed, it is essential that the athletic department evaluate alternative treatments, including no treatment, gathering additional information, and mitigation (reducing the likelihood or severity of loss). Risk management requires thinking about what could happen in the future. Nevertheless, historical data, such as previous weather patterns, must be addressed to get a sense of what could happen in the future. It is important to remember that the ERM process does not emphasize assessing the uncertainty related to an individual risk, but the overall uncertainty of the athletic department's assortment of risks (Miller et al., 2010; Young & Tippins, 2000). Table 1 provides a short descriptive summary of an ERM planning model.

Risk Management and Contract Drafting Considerations

Rather than allowing boilerplate terms to be part of the game contract, relevant parties from both institutions (e.g., university counsels, athletic directors, associate athletic directors for facilities and events) should make a conscious effort to prevent inappropriate terms from being included. When negotiating a contract, it is useful to incorporate risk governance into the ERM approach so the relationship between likely severe weather patterns and the interrelated consequences that might occur is communicated from a legal and risk management perspective. For example, communication systems should be developed by which appropriate personnel—including but not limited to the general counsel and athletic directors at each institution—should consider the contract items in the light of (at least) the following questions:

1. What severe weather commonly occurs in the area during the time of year the game will be played?

2. If severe weather occurs to the extent that the game is canceled, who should be involved in the decision? How will it be communicated to all parties?
3. If severe weather occurs to the extent that the game is canceled and rescheduled, who should be involved in the decision? How will it be communicated to all parties?
4. If severe weather occurs to the extent that the game is canceled and rescheduled for the next day, have hotel reservations been made to accommodate the visiting team, including coaches, players, staff, and school administrators? How will it be communicated to all parties?
5. If severe weather occurs to the extent that the game is canceled and rescheduled for the next day, have travel arrangements been changed to accommodate the visiting team, including coaches, players, staff, and school administrators? How will it be communicated to all parties?
6. What penalties, if any, will either team face if they do not adhere to the contractual agreements?
7. How will other foreseeable consequences such as finding a new game to fill this slot, and the resulting financial fallout with ticket holders, sponsors, fans, media, etc. be addressed?

Communication and interactions across and between athletic departments are crucial for each to comprehend how risks interrelate with each other. Additionally, effective and timely communication allows representatives from both departments to assess the numerous risk exposures at the enterprise level and narrow them down. By asking these questions beforehand, both sides would strengthen their communication, thereby facilitating trust-building between the parties (Barton, 2015). Furthermore, as part of an athletic department's ERM approach, the home team's legal counsel should share the game contract's proposed language with other critical stakeholders such as the home team's athletic director and the visiting team's counterparts prior to finalizing the agreement. This way multiple broader perspectives of an issue will be provided. Thus, all parties can review and provide feedback on what critical language ought to be included in the governing document before it is complete, pursuant to a well-rounded ERM approach. This approach satisfies the risk governance component of the planning process, which fosters risk awareness and communication, thereby developing a more holistic relationship between the parties to the contract.

Conclusion

The industry of intercollegiate athletics requires the development, implementation, and management of systematic risk management policies and procedures

(Ammon et al., 2004, Miller et al., 2019). Sound risk management strategy means including clear language that is instructive for safely and competently addressing any foreseeable risk of harm. As such, the first line of defense to combat any inclement weather, expected or unexpected, is the use of a meticulously drafted, unambiguous contract that specifically sets out the rights and responsibilities of each party.

An ERM approach is similar to traditional risk management with the addition of risk governance. ERM acknowledges the risks that are interrelated and interdependent to establishing an effective risk management policy (Jankensgard & Kapstad, 2021; Miller et al., 2010). Integrating risk governance into the ERM approach, decision-makers should review and communicate the risks among and between themselves. However, the contract used in the Akron-Nebraska circumstance employed inappropriate boilerplate language, thereby preventing the sides from communicating and understanding the appropriate remedies to resolve the instant situation. Thus, representatives from Nebraska and Akron who should have provided risk governance failed to use ERM, which further exacerbated the matter.

In the Akron-Nebraska case, the athletics department decision-makers from both institutions needed to be aware of the likely risks associated with using ambiguous or ineffective boilerplate language in the game contract. The ambiguity of the contract may have triggered a variety of interrelated risk management events leading to severe financial and reputational consequences. For example, not only was Nebraska facing legal exposure over it potentially owing $1.17 million to Akron, but ambiguity may had existed whether it faced ticket revenue losses, sponsorship losses, future income based on its final win-loss record, or loss of reputation and goodwill due to the negative publicity. If Akron had filed suit to recover the full amount in clause three, and Nebraska would have defended under clause nine, the lawsuit may have dragged on for a significant period of time. Such a lawsuit, given the significant, ambiguous questions of law and fact involved, would likely stay in the public eye for several years. As a result, additional legal fees might have been incurred while potentially damaging the institution's reputation.

This article was not intended to castigate either of the parties involved in this case. Rather, due to the recent increase of severe weather resulting in game cancellations throughout college football, the forgoing analysis sought to illustrate an important implication for practitioners. Significant risk exists for college outdoor sporting events, as numerous foreseeable risks of harm abound. Delaying or cancelling contests due to extreme weather is becoming an increasingly common reality in college athletics. Had the parties implemented the suggestions in this article, instituting systematic approaches to legal contract drafting and risk management, both Nebraska and Akron might have avoided this legal hurricane.

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