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Practice Update

Mitigating the Effect of Event Cancellations During the COVID-19 Pandemic

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Across the country concerts, conferences, sporting events, resorts and theme parks of all sizes are closed, postponed or cancelled as a result of the COVID-19 pandemic, and the cancellations are predicted to continue through at least mid-summer if not longer. The restrictions and recommendations limiting group gatherings and the inherent danger of such gatherings at this time makes it impossible for events to continue in the way they were planned or previously conducted.

The impact on the various industries that rely on group gatherings (such as sports leagues/teams, venues, conferences, convention centers, catering, theme parks, ski resorts, etc.) is already far reaching and the uncertainty of when the limitations on group gatherings will be lifted and when it will be safe to resume events simply adds to the uncertainty permeating each of these industries.

To be sure, group entertainment and events will come back as the virus' impact dissipates or as a vaccine or other treatments are developed, but in the interim, and for the foreseeable future, the decisions companies make now will determine the ultimate financial impact and how quickly a return to business as usual after this unprecedented time can be accomplished. Of principal importance are

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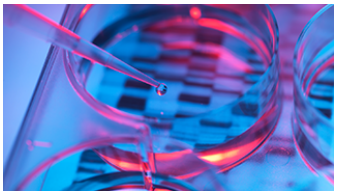

considerations regarding the innumerable contracts implicated by necessary event cancellations, the obligations to ancillary services such as vendors, marketing agencies, presenters, speakers, artists, and security (to name a few), and obligations to attendees/ticketholders.

This article addresses each, analyzing both the legal considerations for companies forced to cancel events, as well as the practical impact of the decisions companies are making at this time.

The Contract is King

A thorough analysis of each contract impacted by event cancellations or closures is paramount to mitigating the potential impact and financial consequences of this pandemic. Preliminarily, companies should identify those contracts which can be terminated without repercussions or without cause and analyze the financial impact of any termination, including any potential litigation arising out of contract termination. Immediately, companies need to analyze whether their contracts allow for cancellation without penalty as a result of a health-related interruption and analyze the long term impact of cancellation versus delay.

Of particular importance in each contract are provisions relating to any preconditions to termination, including any means or timing of termination and required notification for termination, whether any security deposit or down payment may be kept, whether the contract has a liquidated damages provision in the event of cancellation, whether the contract requires rescheduling in lieu of cancellation or provides a credit toward a future event, any right to postpone the event without penalty, and whether the contract contains a *force majeure* provision permitting termination as a result of health-related events or governmental action or mandates and the strictures of such a provision. Each such provision is discussed below.

(1) *Preconditions to Termination* – Even if termination is permitted under the various contracts related to the event, it is important to analyze any preconditions to termination. Common preconditions relate to timing of termination, means of termination, and necessary notification provisions. Terminating a contract without strictly adhering to any preconditions unnecessarily subjects the terminating party to litigation or a claim that the termination was not valid.

Timing of Termination – The majority of event contracts permit cancellation without penalty (or with minimal penalty) if sufficient notice is provided or limit damages to the amount of the security deposit if cancellation takes place with sufficient notice before the event. It is important to identify and track any such timing provision in each contract so as to ensure compliance with these requirements. Further, many contracts will permit cancellation based on some unforeseen event only if notice is provided within a set time period after the event occurs (e.g. 10 days from the date of the occurrence). If such a limitation exists, companies should weigh the risk of cancelling an event long before the event is scheduled with the risk of losing the opportunity to terminate the contract without penalty if they wait too long. This is especially problematic in the current environment where it is unclear when the impact of COVID-19 will pass to allow public gatherings to resume or when public gatherings resume it is unknown in what form or capacity.

Notification Provisions – Similarly, the majority of event contracts contain a provision outlining the means of notification of the other party. These provisions generally come into play where a party has breached the agreement, but they should generally be followed when terminating the agreement as well when a breach has not yet occurred. Alternatively, these contracts may provide a specific notification provision related to

terminating based on a *force majeure* event (discussed below). If so, it is imperative to follow the precise parameters of the notification provision, so as to ensure the termination is valid and effective.

Means of Termination – Additionally, watch out for provisions that identify a specific means of termination. These provisions are less common than the timing and notification provisions discussed above, but they have just as much of an impact on ensuring that the contract is properly terminated.

(2) ***Security Deposits/Down Payments*** – Many event contracts contain provisions permitting the venue or vendor to maintain a security deposit, pre-payment, or down payment made to secure the contract even if the contract is validly terminated or made impossible due to circumstances outside of the control of the parties. Review each contract carefully for such provisions and work with your venue or vendor to negotiate around that provision if the event is rescheduled, or reduce the amount of the deposit or down payment in exchange for future events or other the promise of future compensation.

(3) ***Liquidated Damages*** – It is important to analyze whether an event cancellation becomes more costly as the date of the event nears or whether the contract contains a liquidated damages provision dictating an escalating damages scale the longer you wait to cancel the event. Such provisions are common in contracts tied to events and the existence of such a provision changes the calculation of whether and when to postpone or cancel the event. These provisions are especially problematic in the context of COVID-19 because end date is unknown and it is not clear when group gatherings will be able to resume.

(4) ***Rescheduling Requirements*** – Many event contracts require the parties' respective cooperation to reschedule where it becomes impractical or

impossible to perform as required under the contract. In such a case, simply terminating the agreement without making an effort to reschedule may subject the terminating party to litigation. Rescheduling is particularly difficult in the current environment, however, because it is unclear when events will be permitted and can be rescheduled. Depending on the language of the agreement, however, negotiating to reschedule alone may satisfy the requirement. Contracts may similarly include provisions allowing for postponement without penalty where performance becomes impossible. In such circumstances, any agreement regarding when the postponed event will take place should be extremely broad and excuse performance entirely if performance ultimately becomes impossible or impractical.

(5) ***Force Majeure*** – Most contracts contain some sort of *force majeure* provision, however, the specifics of that provision will dictate whether the parties are excused from performance as a result of COVID-19 or whether termination may result in litigation. The most beneficial provision, and least likely to be written into an event contract prior to this pandemic, forgives performance based on mass health-related events. The relevant language is often written into a list of qualifying events under the *force majeure* clause and generally references "plague," "epidemic," "pandemic," "outbreaks of infectious disease," "mass-illness" or any other "public health crisis," including "quarantine" or "other employee restrictions." Many event contracts, however, do not contain such a provision (though most likely will going forward), and as a result parties are developing theories to fit this pandemic into other categories forgiving performance. One such provision that will likely have far reaching implications during this time is a provision excusing performance where restricted by "government regulation" or where performance of the contract becomes illegal. Courts generally interpret *force majeure* provisions narrowly, however, so it is important to review the relevant language closely.

These provisions will no doubt result in a great deal of litigation in the next few years analyzing what language excuses performance as a result of pandemic, but in the interim, it is important to work with an attorney to gauge the risk of litigation and the likelihood of success based on the specific provision written into each contract.

Ultimately, your goal going into this should be to identify a path forward that reduces the risk of litigation while maximizing capital retention until group events are able to resume on a regular basis.

Work with your Ancillary Service Providers and Vendors

Beyond the analysis of whether or not you can terminate the contract, companies need to consider the long term impact of doing so, including the long term financial implications of cancelling contracts with ancillary vendors or other service providers and the risk of litigation from vendors where the contract does not make it absolutely clear that cancellation is authorized. Further, it is important to take stock of those ancillary services and vendors for whom you have a necessary symbiotic relationship or for which you currently maintain a beneficial contract that would have to be renegotiated. Though termination may be the most cost effective solution in the short term, the risk of litigation and the potential to lose a beneficial relationship should be considered. If cancellation is not necessary or the most effective means of weathering this storm, it is of paramount importance that companies establish a coordinated plan across vendor groups which allows them to maintain the beneficial relationships while mitigating the burden of the pandemic.

The best solution is often negotiating with the vendor to avoid litigation and avoid issues resuming events in the future while simultaneously allowing for a guaranteed termination without litigation if resuming events becomes impractical or

impossible. Any such agreement with a vendor or ancillary service provider should be set forth in writing and take into consideration the indefinite amount of time gatherings may continue to be put on hold. Further, any required rescheduling of the event, should be calculated from the date group gatherings are allowed to resume rather than based on a set number of days or months (i.e. within a year after the government lifts mandates limiting group gatherings).

Commitments to Attendees or Ticketholders

Finally, upon the decision to cancel or postpone an event, companies should immediately notify attendees and ticket holders. The choice to refund tickets, provide credit to ticketholders toward future events, or cancel without providing a refund largely depends on the specific provisions of the ticket agreement, any ancillary agreements with or advertisements to ticketholders, and the likely public relations impact of the decision.

Over the past few weeks, several companies have been hit with a string of lawsuits as a result of event cancellations, where tickets were not fully refunded or where monthly or yearly passes were not reimbursed for unused time. In some cases, the plaintiffs allege that the ticketing company changed their policy so as to avoid providing full refunds and in others, the plaintiffs are claiming that various season passholders should have been refunded for the time period in which they could not make beneficial use of their passes.

At this point class-actions have been filed against Ticketmaster Entertainment Inc. and its parent Live Nation Entertainment Co. (*Derek Hansen v. Ticketmaster Entertainment Inc. et al.*, Case No. 3:20-cv-02685, in U.S. District Court for the Northern District of California), Major League Baseball (*Ajzenman et al. v. Office of the Commissioner of Baseball et al.*, Case No. 2:20-cv-03643, in the U.S. District Court for the Central District of California),

Stub Hub (*McMillan v. Stubhub Inc. et al.*, Case No. 3:20-cv-00319, in the U.S. District Court for the Western District of Wisconsin), Vail Resorts Management Company (*Hunt v. The Vail Corporation,* Case No. 3:20-cv-02463, in the U.S. District Court for the Northern District of California), EDM festival Lightning in a Bottle (*Yesenia Jimenez et al. v. Do Lab Inc.,* Case No. 2:20-cv-03462, and *Tessa Nesis et al. v. Do Lab Inc. et al.*, Case No. 2:20-cv-03452, both in the U.S. District Court for the Central District of California), Six Flags Theme Parks Inc. (*Rezai-Hariri v. Magic Mountain LLC et al.*, Case No. 8:20-cv-00716, in the U.S. District Court for the Central District of California), 24-Hour Fitness USA Inc. (*Brenda Labib v. 24 Hour Fitness USA Inc.*, Case No. 4:20-cv-02134, in the U.S. District Court for the Northern District of California), and LA Fitness (*Barnett v. Fitness International LLC*, Case No. 0:20-CV-60658 in the U.S. District Court for the Southern District of Florida), among others.

Most of these lawsuits claim breach of contract, breach of warranty, violation of various state consumer fraud and consumer protection laws, negligent misrepresentation, fraud, and unjust enrichment, or some combination of those claims. Regardless of the outcome of the various lawsuits, which will largely depend on the specific language used in any ticketholder agreement, any advertising, and whether policies were in fact followed or changed as a result of the pandemic, it is clear that a continued stream of similar litigation, likely in the form of class actions, are expected to follow.

As a result, companies cancelling events without providing refunds for unused tickets or unused time on season passes should be prepared to defend their decisions and should review the known claims that have already been advanced in these lawsuits. Many of these lawsuits may fail because the agreements with ticketholders disclaim liability for unused time or provide for cancellation or contain mandatory arbitration or mediation provisions, however, the expense to respond to such lawsuits, even if

successful, should be part of the calculation when determining next steps and identifying means of limiting the financial impact of cancellations.
