by Brendan S. Everman

Closing Argument

Force Majeure and COVID-19 Live Event Cancellations

The COVID-19 pandemic has caused the cancellation or postponement of numerous high-profile events, including Coachella, the Ultra Music Festival, Wimbledon,[1] and the Tokyo Olympics. Parties affected by the cancellations are debating whether the coronavirus outbreak constitutes a force majeure event that excuses a party's nonperformance of contractual obligations if an unforeseeable event prevents such performance

A force majeure clause defines the scope of events that might excuse nonperformance by a party. These clauses are common and may list an "epidemic" (or something similar) as a triggering event. A-list performers are generally protected by broad force majeure clauses. Most force majeure clauses, however, do not list every triggering event because the purpose of these provisions is to protect against the unexpected.

Absent an applicable force majeure clause, courts may apply the common law doctrine of impracticability as a defense to performance under a contract. The Restatement (Second) of Contracts Section 261 recognizes the doctrine of impracticability as a defense when performance under a contract would involve "extreme and unreasonable difficulty, expense, injury, or loss."[2]

Recent epidemics like Zika, Ebola, H1N1, and SARS did not result in the widespread cancellation of high-profile events. Consequently, there is no clear legal precedent for how courts would apply force majeure clauses or the impracticability doctrine to the coronavirus outbreak. However, existing case law suggests that nonperformance could be legally excused under current conditions.

For example, in *Opera Co. of Boston v. Wolf Trap Foundation for the Performing Arts*,[3] an opera performance in a national park was canceled when a power outage endangered the safety of 6,500 ticket holders. The court recognized that the impracticability defense could be invoked because the unexpected (albeit foreseeable) power outage could have threatened public safety.

Conversely, in *OWBR LLC v. Clear Channel Communications, Inc.*,[4] an event organizer canceled a music industry conference scheduled in Maui five months after the September 11 terrorist attacks. The court noted that, although a terrorist attack is a force majeure event, "poor economic conditions, lower than expected attendance, or withdrawal of commitments from sponsors and participants" are not. The court held that "a force majeure clause does not excuse performance for economic inadvisability, even when the economic conditions are the product of a force majeure event." The court reasoned that there was "no specific terrorist threat to air travel to Maui" five months after September 11 and that to excuse "a party's performance under a force majeure clause ad infinitum when an act of terrorism affects the American populace would render contracts meaningless in the present age."

The takeaway from these cases is that "economic inadvisability," even if caused by the coronavirus, is unlikely to excuse contractual nonperformance. Instead, the critical inquiry is whether the coronavirus outbreak threatens the health and safety of participants or causes "extreme and unreasonable" expense. Ultimately, this determination will turn on an evolving understanding of the coronavirus itself as well as facts specific to each event.

The coronavirus outbreak will undoubtedly result in a flood of lawsuits. Indeed, they have already begun. A ticketholder filed a putative class action in Los Angeles Superior Court against the organizer of the Lightning in a Bottle music festival for refusing to issue refunds for the canceled event.[5]

Event organizers and other companies involved in events should prepare themselves for the reality that when the COVID-19 crisis subsides, the courts will be interpreting the legal fallout for years. ■

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[1] Isabel Togoh, *Report: Wimbledon's Organizers Set for A $141 Million Payout After Taking Out Pandemic Insurance*, FORBES, Apr. 9, 2020.
[2] *See, e.g.*, In re Marriage of Benjamins, 31 Cal. Rptr. 2d 313, 317 n.3 (Ct. App. 1994); Florida Laundry Svcs., Inc. v. Sage Condo. Ass'n, Inc., 193 So. 3d 68, 68 (Fla. 3d DCA 2016).
[3] Opera Co. of Boston v. Wolf Trap Fdn. for Perfoming Arts, 817 F. 2d 1094 (4th Cir. 1987).
[4] OWBR LLC v. Clear Channel Cmmc'ns, Inc., 266 F. Supp. 2d 1214 (D. Haw. 2003).
[5] Cameron Sunkel, *Lawsuit Filed Against Lightning In A Bottle Over Lack of Refunds*, EDM.com (Apr. 7, 2020), https://edm.com/news/lightning-in-a-bottle-faces-lawsuit.