

Event cancellations spawn a new wave of COVID-19 consumer class actions

By Neal R. Marder, Esq., and Ali R. Rabbani, Esq., *Akin Gump Strauss Hauer & Feld*

MAY 20, 2020

The COVID-19 crisis has dramatically transformed the nation, as governments, businesses and individuals take unprecedented measures to minimize the impact of the global pandemic.

Many state and local jurisdictions have shut down nonessential businesses and implemented stay-at-home orders, and the federal government issued social distancing guidelines that ran through the end of April.

Among the many consequences of these mitigation efforts are the tens of thousands of live events being canceled.

We are beginning to see class-action lawsuits filed across the country concerning the refund policies these companies have put in place for canceled or postponed events.

The Tokyo Olympics have been postponed until 2021; the NBA, MLB and NHL have suspended their seasons indefinitely; and music festivals and concerts like SXSW and Coachella have been rescheduled or called off.

As businesses in the live events industry wrestle with the fallout from the COVID-19 outbreak, we are beginning to see class-action lawsuits filed across the country concerning the refund policies these companies have put in place for canceled or postponed events.

In *McMillan v. StubHub Inc.*, recently filed in Wisconsin federal court, the plaintiff alleges that StubHub, an online ticket exchange and resale company, wrongfully deprived him and members of a putative nationwide class of cash refunds under its “FanProtect” guarantee after tens of thousands of events were canceled, postponed or rescheduled due to the pandemic.

According to the complaint, StubHub’s guarantee provided consumers with a full refund until late March, when the company retroactively revised its terms to give consumers vouchers worth 120% of the original order price for future orders in lieu of cash refunds (except in jurisdictions where such refunds are required).

The complaint alleges breach of contract, conversion, negligent misrepresentation and violations of California’s Consumer Legal Remedies Act, Unfair Competition Law and False Advertising Law.

Similarly, in *Rutledge v. Do LaB Inc.*, recently filed in California state court, the plaintiff alleges that he and members of a putative nationwide class were denied refunds for tens of thousands of tickets and passes purchased for the Lightning in a Bottle music festival that was canceled as a result of the crisis.

According to the complaint, Do LaB refused to provide refunds based on its refund policy that “all sales are final” and “no refunds will be granted for any reason” except as otherwise required by law.

The refund policy provided that ticket holders could either attend the event if it was rescheduled within 12 months or attend another event that was designated as an official replacement event.

The plaintiff asserts three causes of action for rescission and violations of California’s CLRA and UCL.

These lawsuits could signal a new trend of consumer class actions focused on return and exchange policies for tickets purchased to live events, such as concerts, music festivals and sporting events, that are canceled or postponed due to the coronavirus.

While there are many contractual provisions that could help companies faced with such claims, a well-drafted force majeure clause should be at the top of the list.

To prepare for and potentially avoid similar class action lawsuits, companies in the live events industry should familiarize themselves with the terms and conditions of their consumer contracts to better understand their rights and obligations.

While there are many contractual provisions that could help companies faced with such claims, a well-drafted force majeure clause, which could provide a defense to these kinds of class action claims, should be at the top of the list.

Force majeure clauses excuse a party's nonperformance under a contract when extraordinary events prevent it from fulfilling its contractual obligations.

When evaluating a force majeure provision, there are several key points to consider:

- Generally speaking, courts look to the express language of force majeure clauses to determine whether the specific events listed are covered. Companies should pay particular attention to the events listed in any force majeure clause contained in their consumer contracts for terms such as epidemic, pandemic, public health crisis or government orders, which have the potential to cover the current situation surrounding COVID-19.
- Companies should also note whether their force majeure provisions include broad catchall language (for example, "or other similar causes beyond the control of such party"), which may provide arguments for relief for events that were unforeseeable at the time of contracting.
- Companies should review and carefully adhere to any notice provisions that, for instance, require notice within a certain time period or other action designed to mitigate damages.
- Companies should be mindful of any remedies provided for by their force majeure provisions. While some force majeure clauses permit cancellation of the contract, others provided less drastic relief, such as excusing delays.
- In addition to force majeure provisions, companies should take note of any other terms in their contracts that may impact a force majeure defense. For example, a choice-of-law provision could prove to have a significant impact on a force majeure defense due to jurisdictional differences in force majeure law (as well as the various common law doctrines discussed below). Moreover, a dispute resolution provision may require arbitration and may even limit a consumer's right to proceed on a class action basis.

Ultimately, the applicability of any force majeure clause to the COVID-19 pandemic will depend largely on the terms of the contract at issue, the applicable law and the facts surrounding the specific event at issue.

Even if a business's consumer contract does not contain a force majeure clause, common law defenses such as impossibility (or, in some jurisdictions, impracticability),

frustration of purpose and various additional equitable principles may provide an alternative defense.

Many of these doctrines are typically construed narrowly, but they may be utilized to excuse nonperformance where a company establishes that an unexpected and unforeseeable event occurred that made contractual performance impossible or impracticable. See, e.g., *City of Vernon v. City of Los Angeles*, 45 Cal. 2d 710, 720 (1955) ("A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.").

Companies should pay particular attention to the events listed in any force majeure clause contained in their consumer contracts for terms such as epidemic, pandemic, public health crisis or government orders, which have the potential to cover the current situation surrounding COVID-19.

In addition, some states, such as California, have also separately codified the contractual defense of impossibility. California Civil Code Section 1511(2), for example, excuses performance when it is prevented or delayed "by an irresistible, superhuman cause."

Likewise, California Commercial Code § 2615(a) can excuse or delay contractual performance where it is commercially impracticable.

As live events continue to be postponed and canceled due to the COVID-19 outbreak, and new class action lawsuits are filed relating to the return and exchange policies for tickets to such events, companies can prepare themselves for potential litigation by carefully reviewing their consumer contracts with the principles above in mind.

As a starting point, companies should make sure that their consumer contracts have a force majeure provision that specifically lists pandemics and government orders as triggering events, as well as a catchall provision that covers other unforeseeable circumstances.

This article appeared on the Westlaw Practitioner Insights Commentaries web page on May 20, 2020.

ABOUT THE AUTHORS



Neal R. Marder (L) is a partner in the Los Angeles office of **Akin Gump Strauss Hauer & Feld**. A trial lawyer with a diverse civil litigation practice, he works with in-house counsel, senior management and boards of directors for companies oftentimes facing high-profile business disputes. He can be reached at nmarder@akingump.com. **Ali R. Rabbani** (R) is a senior counsel in the firm's Los Angeles office. He represents clients in complex commercial litigation, with an emphasis on consumer fraud and securities class-action defense, corporate governance and shareholder disputes, intellectual property matters and bankruptcy litigation. He can be reached at arabbani@akingump.com. This commentary reflects the situation at the time it was written based on the rapidly changing nature of the COVID-19 pandemic.

Thomson Reuters develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world's most trusted news organization.