

April 7, 2020

A WORLD WITHOUT SPORTS – WHAT HAPPENS NOW?

To Our Clients and Friends:

On March 11, 2020, the massive and worldwide business of professional sports began to shut down because of the COVID-19 pandemic. First it was the National Basketball Association shutting down “until further notice.” The next day it was the Professional Golf Association Tour and Formula 1, and by month’s-end, March Madness, Major League Baseball, the Premier League, Champions League, the 2020 Tokyo Olympic Games, the National Hockey League, and every other prominent sporting event was suspended, postponed, or canceled. That has sent ripples through the entire inter-connected business of sport:

- **Television and Radio Networks:** The golden goose for many networks is live sports. ESPN2 is not built to show a six-hour “National Puppy Day” marathon like it did recently. And not to state the obvious, but there is no new sports content to show right now. That calls into question the multi-*billion* dollar deals that give the networks the right to broadcast games that are on ice now.
- **Satellite and Cable companies:** Like television networks, the satellite and cable companies rely on sports to draw in customers, and thus pay huge sums to the networks to have the right to transmit those games into our homes. Moreover, many satellite and cable companies sell packages or add-ons that are based on the ability to access sport-specific content.
- **Media, Gambling, and Fantasy Sports:** In today’s hyper-connected world, every play and game is dissected in the print, online, radio, and television media. There are entire operations—with blogs, news services, podcasts, and 24-hour content—devoted not just to leagues, but even specific teams. And then on top of all that, wagering on sports creates millions in revenue just in the United States, and fantasy sports is in the billions. But without games, there is less to wager on, and most fantasy sports depend on the real players performing on the field, pitch, ice, or court.
- **Sponsors and Advertisers:** Companies sponsoring and advertising during sporting events count on these events to obtain a return of investment on their sponsorship and media spend. In addition to the lost exposure during the event, many companies have marketing campaigns, promotions, on-site activities, and other activations planned in connection with the events. Some companies’ businesses and brands are built around specific sports or events.
- **Leagues, Teams, and Athletes:** Leagues face the prospect of losing significant revenue from the broadcast rights and from sponsors. Teams also face the loss of media revenue and attendance revenue. And the stoppage of play will affect player salaries, trades, and transfers,

and the sponsorship opportunities for athletes. And, of course, the health of players, coaches, and fans, is at top of mind for all.

With all this upheaval across a multi-billion dollar industry that is not just a business but a passion for many, it is not all doom and gloom. Just as companies, leagues, teams, and event organizers must consider potential obligations and liabilities, there are also opportunities. All stakeholders may wish to renegotiate or modify existing deals, as additional opportunities and risks unfold. It might also be the right time to adjust to a changing landscape and prepare for the possibility that the demand for sports may diminish, or that pent up demand brings additional sponsorship opportunities on the horizon.

So stakeholders need to consider the short-, medium-, and long-term impacts of this abrupt shutdown of professional sports and worldwide health crisis. In the short-term, stakeholders should be focused on an analysis of their rights and liabilities and any opportunity to restructure unfavorable deal terms. It also requires monitoring of the changing landscape and patchwork of federal, state, and local regulations to respond to COVID-19 (e.g., bans on gatherings). In the medium- and long-term, stakeholders should evaluate their goals and strategies, with attention to the economic climate since spending on sports is discretionary, and the industry may be vulnerable in a prolonged stoppage and worldwide recession or depression. Further, stakeholders need to identify new contractual protections for future non-traditional events that may result in the cancellation of events.

So What Does the Contract Say?

The analysis for all stakeholders will often start, and sometimes end, with the contract. Whether it is the relationship between the network and the league, the cable/satellite providers and the networks, advertisers and the networks, the sponsors and the league or teams, or the players associations and the league, the fundamentals of the original deals have likely changed or merit change. Now is the time to identify and clear possible contractual roadblocks by considering the common contractual terms and issues below.

For example, sponsors of sporting events, leagues, and teams will want to examine common provisions that permit the sponsor or media company to reduce the fees it pays, require the parties to renegotiate key terms like price, or that permit the parties to terminate the agreement:

- **Reductions/Quotas:** review any clauses requiring the league or team to deliver a minimum number of qualifying sponsorship opportunities within a given period.
- **Changed Circumstances:** determine whether your contract contains a clause that protects the sponsor from circumstances that have a material adverse effect on the rights granted to the sponsor. A key focus here is often on whether the event has been postponed or canceled.
- **Termination Rights:** most contracts contain a clause that permits a party to terminate the contract for another party's material uncured breach of the agreement. (This can often be used as leverage to renegotiate the terms.)

- **Ancillary Benefits:** a failure of the league or team to receive ancillary benefits—tickets, media rights, etc.—could qualify as damages if not received.
- **Excusing Performance Under a Contract – Force Majeure Clauses:** Force majeure is a contractually defined event that may excuse performance under a contract. While force majeure clauses are most often triggered by “acts of God,” such as natural disasters, the various government lock-down orders may be a triggering event. A mere change in market conditions or the economics of the deal will not be sufficient to trigger the clause.

The express language of the contract provision will govern. Review your force majeure clause to determine (1) whether the COVID-19 pandemic may trigger the clause; (2) what the force majeure clause excuses; (3) what the contract requires when giving notice; and (4) whether the contract requires a specific form of notice. A more detailed discussion of force majeure provisions and a helpful flowchart are available at <https://www.gibsondunn.com/force-majeure-clauses-a-4-step-checklist-and-flowchart/>.

- **Choice of Law/Forum Selection Clauses:** If contractual or other disputes require adjudication, the forum in which the dispute is heard may affect the strength or weakness of the contractual claims. Many contracts contain forum selection clauses or arbitration clauses, which will designate the substantive law that governs the dispute and the forum, whether federal or state court or arbitration. The COVID-19 pandemic has dramatically affected the ability of the courts to proceed as usual. In many state and federal courts, in-person hearings before judges are temporarily on hold. In some courts—including New York Supreme Court—only “essential” filings are being accepted. Arbitrations may be experiencing less change, though in-person hearings have been replaced with videoconference hearings.

While the contract terms are critical, even if the contract does not address this current situation, there are equitable common law defenses to any breach of contract action that will need to be analyzed. The most common equitable defenses are frustration of purpose and impossibility (a.k.a., impracticability). Both require an unforeseen event that affects performance of the contract. But frustration of purpose is available when that event makes one party’s performance virtually worthless to the other while impossibility generally requires performance to be objectively impossible.

In addition, stakeholders should conduct a comprehensive analysis to determine whether an efficient breach exists. For instance, to the extent the contract contains provisions on the available damages, the cost of performance may be more than the worst case exposure if there were a breach. It is important, however, that this analysis take into account both economic and non-economic factors, such as loss of goodwill or damage to a stakeholder’s brand.

In sum, the current situation likely requires consideration of a stakeholder’s current contractual obligations. Stakeholders should then leverage that knowledge to consider whether to terminate contracts, ask for relief, renegotiate certain terms, enforce rights, or proceed as business as usual. Now may be the time to engage in formal or informal discussions with contractual counterparties regarding their plans or to send a reservation of rights letter along with sponsorship payments.

What Else Is on the Horizon?

In addition to examining existing contractual obligations, many will need to negotiate and draft new contracts and address emerging issues against the backdrop of great uncertainty ahead. For instance, those stakeholders planning marketing and promotional events in connection with NBA playoffs will need to enter into new contracts with vendors and others associated with the playoffs. But it is not clear when the playoffs may occur, if at all.

It is important to consider how the current fluid and dynamic situation, including further government orders and policies, can be addressed in contracts drafted today. For example, parties may wish to address discretionary, rather than mandatory, cancellations or delays as well. Likewise, when events are rescheduled or employees are hard at work addressing new challenges, parties will want to consider the allocation of risks for workers, contractors, and guests who may be exposed to the virus.

Throughout all of this, you will also want to keep in mind that when times are tumultuous, email communication may be rapid-fire, and usual precautions for internal communications can slip. Remember that communications may be discoverable in future litigation and remind your employees of policies regarding confidentiality and privacy.

What About Potential Bankruptcies and Insolvencies?

The COVID-19 crisis is already affecting the financial solvency of global businesses in unprecedented ways. Even if bankruptcy is not anticipated, it is critical that companies understand the triggers and thresholds for financial stress for their own businesses and also for material contract counterparties. Early forecasting and flexibility, as well as understanding how your contractual rights in sponsorship and other contracts may be impacted in bankruptcy, can allow companies to react in this fast-changing economic environment. Here are some steps you can take now:

- **Understand Your Material Contracts and Sponsorship Agreements:** Even when your company's financials look solid, it is important to investigate the health of contractual counterparties. Make sure you understand both parties' rights and obligations related to liquidity and performance. By doing so, you can identify how to maneuver within the documents to avoid breaching or where to seek amendments if needed.
- **Understand the Impact of Bankruptcy on Your Material Contracts and Sponsorship Agreements:** If distressed sponsorship parties are insolvent or nearing or threatening bankruptcy, the ability of a company to reject, assume, or assign a contract in bankruptcy may impact negotiations and how you structure any potential modifications. Understanding your claims and rights in bankruptcy will help preserve value in the event a bankruptcy filing occurs.
- **Review Debt Documents:** If you are experiencing potential defaults under a debt facility due to unexpected covenant breaches, or otherwise, it is important to understand your rights and remedies under your debt documents. Restructuring alternatives may be available even if not obvious. In the current environment, lenders are not surprised by proactive requests for forbearance and similar relief.

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Gibson Dunn's restructuring professionals have a wealth of experience navigating complex restructuring scenarios, and can assist in developing a value-maximizing game-plan.



Gibson Dunn's lawyers are available to assist with any questions you may have regarding these developments. For further information, please contact the Gibson Dunn lawyer with whom you usually work, or the following authors in Gibson Dunn's Sports Law Practice.

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