

# Sports Litigation Alert

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## College Sponsorships in the Time of Covid-19 and What to Consider

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As 2020 comes to a close, COVID-19 has caused many intercollegiate athletics conferences across all three NCAA divisions to cancel or postpone events or modify competition schedules through the end of the calendar year, and likely beyond. This has created uncertainty among the NCAA, BCS, conferences and collegiate institutions regarding the available level of revenue streams, including NCAA and conference distributions, sponsorship and game-day revenue. Such revenue streams are critical to funding men's and women's sports.

The cancellation or postponement of events can dramatically impact the sponsor's marketing and brand-building strategies, as well as programs designed around the launch of a new product or service. A sponsor's ability to execute carefully planned marketing and branding strategies is diminished and the benefits expected for paying significant six to eight-figure sponsorship fees are placed in jeopardy. For example, if a sponsor's asset portfolio includes game-day exposure, such as sponsored instant replay on the video board, signage or free giveaways, the value of those benefits may be lost.

As such, sponsorship partners may be seeking to cancel, modify, suspend, or re-negotiate payments under existing agreements. Maintaining these revenue streams from disruption may be possible depending on certain factual circumstances, the language and governing law of the contract, and the desire to preserve long term relationship between the collegiate institution and sponsor.

### Agreement Review

Collegiate institutions and sponsors are evaluating how COVID-19 may impact each sponsorship agreement. In broad brush terms, review should include key applicable contractual provisions, including force majeure or canceled/altered event clauses and make-

good rights; fee and payment breakdown throughout the term of the agreement; asset portfolio (typically a schedule outlining sponsor benefits and how they are exercised – game-day, digital media, etc.); and expiration date of the agreement and termination provisions.

### Force Majeure

The force majeure clause is one contract provision in particular that is garnering attention. In the wake of the pandemic, the clause has evolved from a buried boilerplate provision to taking center stage in many contract discussions.

Force majeure means any objective circumstance that is unforeseeable, insurmountable, and unavoidable.

Under certain conditions, force majeure excuses a party's performance due to circumstances beyond that party's control, and is raised as a defense to excuse a party's obligation to perform. Prior to the pandemic, parties may have felt comfortable using generalized, catch-all provisions such as "events beyond a party's reasonable control," or "acts of God," believing that this language was sufficient.

As it turns out, catch-all provisions may be insufficient to enable a party's nonperformance because of the varying impact of the pandemic and the fact it may hinder but not make performance impossible. In addition, states vary in their interpretation of both force majeure clauses and the legal doctrines of impossibility and frustration of purpose. In general, force majeure clauses should identify the specific event that prevent-

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ed performance, as they may be narrowly construed by the courts to include only the events that are the same general kind as those specifically identified within the provision. However, even if the force majeure is applicable to excuse performance, such clauses as drafted do not necessarily provide workable solutions.

Moving forward, parties are contemplating force majeure clauses in ways that they never have previously due to COVID-19, and clearly identifying expectations during the contract drafting process will help to alleviate potential headaches and pitfalls down the road.

### **Taking the Longview**

Under the circumstances of collegiate sporting events being cancelled, postponed and rescheduled almost on a daily basis, with certain exceptions, neither the sponsor nor the university is necessarily looking to blow up the entire relationship.

A notable exception, however, involves Under Armour. In June, Under Armour notified UCLA and U.C. Berkeley that it was ending its uniform and apparel supply sponsorships with the schools by invoking a force majeure clause. The schools continue to battle Under Armour over the termination of their respective 15 year, \$280 million and 10 year, \$85 million deals, in each of which the apparel maker claims termination (rather than re-structure to mitigate losses) was justified 1) due to the universities' failure to perform their obligations; and 2) under a force majeure clause

Notwithstanding this, sponsorship agreements are often characterized by both parties as "partnerships" which establish valuable, long-term commercial relationships. It is not uncommon for both parties to seek to preserve these relationships during challenging times. Certainly, mutually agreed upon commercial solutions are usually preferred over litigation or arbitrations.

Collegiate institutions and sponsors are looking to maintain the partnership and create a path forward based on flexibility. For example, parties may meet and agree to allow variations relating to term extension, shifting or postponing payment obligations, and finding substitute benefits as they relate to the sponsor's asset portfolio. And, if that fails, determine how refunds or payment obligations will be determined and valued.

Going forward, parties may construct or refine agreement provisions that provide options for resolution that preserve the ongoing partnership. For example, in the event that particular sponsorship benefits are no longer available to a sponsor due to circumstances beyond the control of either party, an "unavailable benefits" provision may obligate the parties to first consult in good faith to identify substitute or replacement sponsorship benefits which are of substantially equivalent or greater value than the unavailable sponsorship benefits, with such value to be determined by good faith negotiation and agreement by the parties. Should such good faith negotiations fail to render an agreement or such substitute benefits be inadequate to fully replace sponsorship benefits, the parties may agree to apply a pro-rata reduction formula to sponsorship fees payable under the agreement and/or extend the term so that the sponsor is able to capture benefits in the future at a fair value.

In addition, some schools and their sponsorship partners are looking at creative ways to develop new assets. They are creating new virtual elements to provide new sponsorship inventory that can be offered as make-goods because of lost games earlier in the season. For example, programs such as the Penn State "Virtual Valley Experience" and the Minnesota "Gopher Game-Day Live" offer unique content such as tailgate contexts, trivia and video through social media.

As COVID-19 continues to impact the collegiate world and as parties work to establish contingency plans, informed and open discussions should be promptly pursued by collegiate institutions and sponsors to protect their respective interests under various sponsorship and other agreements.

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