

Talent Deals and the Impact of a Pandemic: Rethinking Force Majeure

The Bottom Line

- *As state and local governments lift coronavirus restrictions, performers who have a credible fear of contracting COVID-19 while performing their obligations may not be able to invoke the force majeure clause in their talent agreements to be excused from their commitments.*
- *Agencies and advertisers should consider including a new “Modification” provision in their talent agreements to address the possibility that certain events, which do not rise to the level of a force majeure but nevertheless pose significant concern, may be cause for the parties to modify the terms of the agreement, or to cancel it entirely.*

The coronavirus pandemic (COVID-19) has affected nearly every facet of daily life, and has taken a heavy toll on countless industries. The advertising industry, which relies heavily on the personal services of actors, performers and other talent, is no exception.

As the first reports of the health threat began to rapidly spread in late February and early March, and later as mayors and governors locked down cities and non-essential business activities in an effort to mandate social distancing, the considerations affecting talent agreements also began to shift. From the moment COVID-19 began to sweep across the country, advertising agencies found themselves faced with the challenge of determining how to handle talent agreements for services that were now impacted by the virus.

Much has been written recently about the concept of “force majeure,” a contractual provision that insulates a party from breach if that party’s performance of the contract becomes impossible due to an unanticipated act of God or government. In the context of existing talent deals, as well as those in negotiations for future services, it is useful to consider whether (and at what point) the coronavirus crisis may constitute a force majeure event, and whether an alternative approach to addressing concerns posed by the coronavirus, using a partnership-oriented perspective, would be more prudent from a legal and business perspective.

Force Majeure Clauses in Talent Agreements

Force majeure clauses typically cannot be invoked unless the event in question makes it impossible or illegal for the performance of the contract to take place as contemplated. This is a high standard that, many would argue, was not met for quite some time during the outset of the coronavirus crisis.

A pandemic would fall into the category of a force majeure if:

- A performer’s ability to provide the services was made impossible due to the performer’s own sickness; or
- If travel or attendance on set or at an event is made impossible or illegal due to a mandatory quarantine ordered by a governing authority.

In such a case, it seems clear that the novel coronavirus shouldn’t necessarily be treated any differently than any other force majeure event.

The trickier question arises when no government-ordered quarantine or travel ban is in effect. This was the case during the initial stages of the coronavirus, when concerns and fears about the contagion, however reasonable, slowly began spreading days and weeks before the virus itself was reported to have taken root throughout the United States, and well before any federal, state or local governments instituted widespread measures to contain the disease.

During those early days, performers, like many other individuals, questioned the wisdom of undertaking air travel or attending crowded events. But canceling big events and long-planned productions due to a “fear” of contracting the coronavirus is a difficult proposition, since “fear” and “concern” do not rise to the level of making performance “impossible.”

In the absence of an outbreak in the location where talent was required to go, and in the absence of travel restrictions or other government mandates, many performers were faced with the uncomfortable choice of either performing their obligations and risking contracting or spreading the virus, or breaching their talent agreement and risking legal and financial penalties.

During this period, advertisers and agencies were also in an uncomfortable position, where their options appeared to be expecting talent to still perform despite health and safety concerns, or risk significant losses by canceling events or productions that may have been able to go on safely.

This gray area is bound to reappear as the coronavirus curve flattens and begins to swing downward, and governmental restrictions on social distancing are relaxed. Inevitably, as the pandemic begins to subside, individual talent may continue to express reasonable fears or concerns about reentering the public sphere, or traveling to certain locations, or otherwise resuming performance of their professional obligations.

The same uncertainties presented at the outset of the crisis will return, where the absence of governmental restrictions may prevent a performer from invoking a force majeure clause, but credible fears of contracting coronavirus may cause the talent to weigh the pros and cons of defaulting on their obligations.

How Talent Agreements Can Address COVID-19 Concerns

From a practical standpoint, where the talent’s concerns regarding coronavirus risks are reasonable and warranted, advertisers and agencies may want to consider avoiding a strict position requiring talent to perform or else be in breach of their contract, subject to the talent foregoing fees for services not yet provided. Advertisers and agencies run the risk of being harmed if a celebrity winds up contracting the coronavirus on set during a commercial production, or during a festival or other large event.

The health and safety of the talent, and all other staff and crew working on a production, should be taken seriously by all parties involved.

To that end, agencies should consider including a new “Modification/Cancellation” provision in the termination section of their talent agreements. Such a provision can address the possibility that certain events, which do not rise to the level of a force majeure but nevertheless pose significant concern, may be cause for the parties to modify or cancel the agreement.

Where a performer reasonably believes that the imminence of such an event — like the spread of coronavirus — poses a significant threat to his or her health and safety, then the talent should notify the agency and the parties can work together to decide on the best resolution to the concern. Such resolution could include:

- Postponing or rescheduling the services;
- Modifying the services so that the talent is not required to travel or perform in person; or

- Cancelling the services entirely and terminating the agreement.

Agency Retain Decision-Making Authority

In facing a request to modify or terminate services due to a bona fide coronavirus-related concern, agencies have to grapple with a number of considerations in addition to the wishes of the talent. Agencies need to contend with all of the various other contracts that may exist for the production at issue, and could face financial liability with other vendors and service providers in the event of a delay or cancellation of the services.

Therefore, even if the parties are negotiating in good faith, agencies must be sure to retain the sole authority to exercise the right to modify or cancel, and should do so only after considering what consequences might arise based on other vendor agreements in effect.

In addition, because of the significant liabilities agencies risk by cancelling a production, it is important that talent, in exchange, be willing to forego payment entirely as a consequence of refusing to perform their services. This arrangement balances the risks equitably between both parties, whereby agencies risk cascading losses and liabilities due to cancellation of an event, and the talent risks losing a paycheck for services that he or she never rendered.

However, there are a few gradations of middle ground that parties should consider, as they could result in a more palatable outcome for both sides:

- **Modifying the Approach:** Instead of terminating, the parties can agree to modify the services in a way that makes the talent comfortable performing despite the coronavirus (such as a live-stream instead of a live appearance, or self-producing a video or sound recording instead of appearing on a set or in studio).
- **Terminating Fully:** If the services are ultimately terminated, then the agency and advertiser must reserve the right to withhold all payment or receive a refund of a prorated portion of the talent's fee, attributable to services that were never performed and usage of the talent's services that was never made possible.
- **Terminating, With Room for Future Work:** The agency's right to terminate can also be accompanied by a right of first refusal in the event the campaign is reintroduced or the production is ultimately rescheduled at a later date. Under this approach, the advertiser and agency would be obligated to approach the talent first to be re-hired for the program, before approaching any new talent. This approach can help reassure the talent that he or she will not miss out on work opportunities or be cast aside and be replaced with someone else.

Big Picture Implications

While the notion of a "Modification/Cancellation" provision has been spurred by the recent coronavirus crisis, and the fact that many of the legitimate concerns it has caused may not meet the standards for invoking a force majeure clause, these challenges are not unique to this particular pandemic. There are many instances where similar issues regarding cancellation of performance may arise due to imminent threats that have not yet materialized. Some examples include natural disasters like wildfires, hurricanes or tsunamis, or volatile political events, such as an increase in political violence or instability, any of which may be tracked and may pose imminent threats to health and safety in certain conditions, just like the coronavirus pandemic.

Thus, while it is particularly timely to rethink force majeure provisions and consider adding new language to address imminent health and safety risks, this exercise has applications which go far beyond our current crisis and can help parties plan for unanticipated events well into the future.

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