

Navigating Consumer Refund Demands on Account of the COVID-19 Pandemic

If any events served as harbingers of the oncoming halt of social life as we know it, it may well have been the abrupt, mid-March cancellations of college basketball conference tournaments and interruption of the NBA season. In rapid succession, March Madness was cancelled, the NBA and NHL seasons were put on hold, spring and summer concerts postponed, theaters shuttered, and the start of the MLB season delayed indefinitely. The Masters was moved to the fall, Wimbledon cancelled, and the Summer Olympics rescheduled for 2021. Now, sports fans anxiously await decisions as to what will become of the 2020 NFL and college football seasons.

Understandable frustration among fans (who, in many cases, purchased tickets for such events long ago), coupled with event sponsors and ticket sellers — also understandably — being caught off guard by the unprecedented nature and scope of the crisis, has quickly led to lawsuits over refunds and refund policies. In recent weeks, consumers have filed proposed class actions against third-party ticket sellers and resellers Ticketmaster, Live Nation, StubHub, and SeatGeek, as well as against MLB and its teams, and the South by Southwest festival. The lawsuits allege that ticket sellers are improperly shifting the cost of COVID-19-related disruptions to buyers — many of whom are suffering financial hardship — by holding onto advance ticket sale proceeds. The sellers are doing so by classifying missed events as “postponed” instead of cancelled, offering credits for cancelled events instead of refunds, or both. The strength (or lack thereof) of any particular lawsuit aside, these cases are all reflective of the very real issues and public pressure facing these businesses. On top of the lawsuits, State Attorneys General have discussed opening investigations into refund practices, Members of Congress have stood on their soapboxes, and the Twitter-verse is rife with demands for recourse.

With additional cancellations and postponements almost certain to follow in the months ahead, the issue of consumer refunds will continue to present serious challenges for not only high-profile professional sports leagues and their ticketing partners, but for a host of event-based and/or seasonal businesses, big and small, that similarly collect fees for products and services well in advance of delivery. Among the businesses likely to face (or continue to face) consumer refund demands into this summer include hospitality and catering venues that have canceled corporate conferences, weddings, and other gatherings; theaters, amusement parks, and museums that sell season passes and advance tickets; beach, pool, and golf clubs that charge annual member dues; and summer camps. All of these businesses collect fees or deposits in advance, and spend (at least a portion of) those funds in the ordinary course of business on salaries, subcontractors, and capital improvements. They will all be curtailed, in whole or part, by continuing social distancing measures. Like MLB and the ticketing businesses, these businesses will have to consider both the legal and reputational implications when crafting their responses — indeed, as a general matter, all are heavily dependent on their brands and loyal, recurring customer bases.

In late April, two baseball fans brought a proposed class action, *Ajzenman et al. v. Office of the Commissioner of Baseball et al.*, No. 2:20-cv-03643 (C.D. Ca.), against MLB, its 30 teams, Ticketmaster, Live Nation, and StubHub. That action, and MLB’s response thereto, may be instructive. The complaint alleges that the defendants, *inter alia*, violated California consumer protection laws by postponing games with no prospect of them being rescheduled, thereby avoiding triggering refund obligations associated with cancellations. To that point, MLB had uniformly treated March and April games as postponed in accordance with team rain check policies, and therefore teams did not issue refunds. MLB had maintained this policy for over a month although it was immediately apparent that the 2020 season would not be 162 games of business as usual. Most recently, reports have emerged that MLB teams may play a 100 game season beginning in late-June or early-July, with games played in empty stadiums and the teams



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A week later, MLB announced that its teams *may* refund tickets for games missed on account of the COVID-19 pandemic, with each team setting its own ticket policy. Most teams are now offering fans the option of credit toward future games plus an incentive, such as a 10-25 percent bonus toward additional games or parking, or a refund upon request. For example, the New York Mets and Los Angeles Dodgers are offering fans with single game tickets an option to exchange their tickets for a future game plus a 10 percent credit, or a refund. The Texas Rangers are offering an exchange plus up to four additional tickets to a “non-premier game” as a thank you to fans who accept a credit instead of a refund. The Philadelphia Phillies announced that their ticket office will reach out directly to ticketholders and offer credits or refunds. Even the New York Yankees are offering refunds for single game tickets, although that option is reduced to the fine print of their policy. As of this date, it appears that the Milwaukee Brewers are the only MLB team not offering a refund option to fans holding single game tickets.

Like MLB, Live Nation and Ticketmaster have since revised their policies to allow for refunds for all postponed sports games, concerts, and other events. MLS has also allowed their teams to issue their own refund policies. The NHL and NBA have provided guidance to teams, but issued no mandates or blanket rules. On the other hand, StubHub, which suspended its “longstanding ‘FanProtect’ guarantee” refund policy on March 25, 2020, has not budged. StubHub President Sukhinder Singh Cassidy has since commented that “given the impact of the coronavirus, it is not possible to sustain [its historical refund] practice in the near-term.”

There may be issues particular to “ticketing” that do not apply in all instances or, conversely, contract issues applicable to other businesses that do not apply with equal force in the ticketing context — and the conflict between customer relations and economic viability may be even more pronounced in the context of smaller businesses. Still, the overlap of interests and legal constraints is significant, and the response by MLB and other high profile businesses to recent lawsuits and public pressure may provide a broader blueprint for other businesses managing consumer refund demands. The following are a set of considerations for impacted (or potentially impacted) businesses to consider in anticipating, planning for, and responding to these issues.

Know Your Existing Refund Policy

A ticket is a license, and the terms of the license are set out in the fine print on the back of tickets and/or online at the point of purchase. Just as a fan is expected to adhere to the terms of the license (i.e., rowdy fans may be ejected from the stadium), teams and ticket sellers must adhere to the terms of their agreements. Likewise, other businesses must adhere to the terms of their customer contracts. Contracts may have refund or cancellation clauses, or provide defenses to lawsuits (e.g., force majeure or impossibility clauses) that provide potential legal shelter. In either case, businesses that subsequently modify their preexisting policy on account of COVID-19 and/or the economic hardships they face as a result expose themselves to liability contract (i.e., StubHub).

Know the Applicable Law

Different states have different relevant ticket statutes. Fourteen states have laws requiring ticket sellers and resellers to offer refunds for cancelled or rescheduled events. For example, California requires that “[t]he ticket price of any event which is canceled, postponed, or rescheduled shall be fully refunded to the purchaser by the ticket seller upon request.” (Cal. Bus. & Prof. Code § 22507.) New York requires ticket refunds unless, as arguably relevant here, “the performance of such event was rescheduled due to an Act of God, war, riot or other catastrophe ... and [] the advance ticket purchaser was given the right to use his or her ticket for such rescheduled performance or the right to exchange such ticket for a ticket comparable in price and location to another, similar event” or “the back of the ticket conspicuously states that if the performance is cancelled or rescheduled, the ticket distributor shall not be required to refund the ticket price if the ticket purchaser is given the right, within twelve months of the originally scheduled date of the performance, to attend a rescheduled performance of the same event or to exchange such ticket for a ticket comparable in price and location to another, similar event.” (NY ART & CULT AFF § 23.08(3)(ii-iii)). Wisconsin, on the other hand, does not have any state law applicable to advance ticket sales. Hence, why the Milwaukee Brewers are not forced to offer refunds for single game tickets.

Consumer Protection Statutes

More broadly, businesses are subject to state consumer protection laws prohibiting unfair and deceptive business practices. (States may also have regulations pertaining more specifically to particular industries or classes of consumer relationships facing these concerns.) These laws can be enforced by consumers, individually or through class actions, as in *Ajzenman*, as well as by State Attorneys General. Indeed, Live Nation and Ticketmaster announced they would offer refunds for postponed events on the same day New York Attorney General Letitia James commented that her office is looking into ticket refund practices during the pandemic. Businesses should be cognizant of the enforcement climate in their state when addressing consumer refund demands.

Know Your Customers and Weigh the Options

Of course, businesses that follow the letter of the law are still subject to reputational risk if their customers are dissatisfied. And the types of business most likely impacted here all rely on brand loyalty and a recurring customer base. To a large extent, legalities and potential defenses aside, the decision of how to respond to consumer refund demands will be a business decision. While the economic hardships faced by shuttered businesses are no doubt real, so too are those facing their customers. As are the realities of public pressure in a social media age, and the long term dangers of alienating consumers. In balancing these concerns against the backdrop of the legal constraints discussed, businesses may seek compromise positions — as opposed to taking a firm stance (even on strong legal footing). Most MLB teams have offered fans incentives in an effort to hold on to their advance ticket sales, but these offers depend on each team's individual circumstances. A perennially contending, cash rich franchise may not feel the same pressure as a franchise with a struggling fan base or less established revenue stream to offer a bonus or other incentive to ticketholders to hold onto individual game tickets. Similarly, among the ticketing businesses, while Live Nation/Ticketmaster will now provide refunds, StubHub will not do the same — notwithstanding the public outcry — due to concerns over whether sufficient liquidity exists to provide mass refunds at this time. The nature of the decisions across all industries will be similar — protect the business, maintain customer relations, and navigate (in some cases) stringent legal boundaries, which themselves carry economic risk.

For more information or assistance navigating these and other issues as this situation continues to evolve, please contact Adam Schlatner, or your contact at the firm.