

Force Majeure and Society Events

With appreciation to Susan Lutzker, J.D., Senior Partner, Lutzker & Lutzker LLP

We at BioOne know that this is a terrible time for nonprofit organizations that depend on annual fundraising events for a significant part of their revenue. The widespread postponement or cancellation of events has embroiled many organizations in complicated legal issues as to nonrefundable deposits, payments due, and refunds to be issued. Here are a few thoughts that might be helpful as you navigate the current environment and look to the future.

The Current Landscape

If you are in the position of having to cancel or postpone a major event, you will want to look carefully at your contracts with venues and vendors to see if they contain a force majeure provision. Such provisions address what happens between the parties in the event of certain unforeseeable events (such as acts of God, natural disasters, or government acts) that arise from matters outside the control of the parties to the contract. These provisions are usually not the subject of much attention in negotiating the contract, but are far from uniform. How a particular situation is resolved depends on the specific language of the clause. In certain situations, even absent a force majeure clause, there may be a frustration of purpose or impossibility of performance argument that could be used to invalidate obligations.



The facts on the ground will have a major impact on the interpretation of the provision. Federal, state or local governmental closures and stay-at-home orders will clearly bolster your case. Assess the best time to postpone or cancel or and avoid making risky and hasty rescheduling plans.

Beyond a force majeure clause in your contracts, you will want to examine all of your insurance policies. If you were prescient enough to purchase event cancellation insurance that is the first place you will look. Those policies vary widely as well, and any policy issued after mid-January will undoubtedly exclude coverage for event cancellation because of the pandemic. It is also worth looking at business interruption coverage that you may have as part of a property or business liability policy.

Your organization may be eligible for relief under the newly-enacted Coronavirus Stimulus law. There are two potentially important sources of funds:

Economic Injury Disaster Loans (EIDL). These loans are available directly from the Small Business Administration (SBA) and can be used to pay payroll and other bills that can't be paid due to the epidemic's economic impact. There is a special interest rate of 2.75% for non-profits (as compared with 3.75% for for-profit businesses). While the loans need to be repaid, there is an option to establish a long term and a one-year deferment on the first payment. There is also a possibility of converting the loans to PPP loans (see below), which can be partially forgiven. *Note that there is a provision for an emergency advance of up to \$10,000 while the loan application is being processed. The obligation to repay the advance is forgiven if the loan is not approved.*



Paycheck Protection Program (PPP). This program, for which nonprofits are also eligible, provides loans that are SBA-guaranteed but made available by private lenders. Borrowers can apply for partial or full forgiveness of the loans so they can essentially be a source of grant money.

The Future Landscape: A Few Thoughts

- When entering into contracts with venues or vendors for events, negotiate the broadest force majeure clause that you can and don't automatically accept the boilerplate. Make sure the clause includes disease as a triggering event and a catch-all phrase such as "*and other similar events.*" Try to include language that excuses performance if it would be "commercially unwise or impractical" (rather than "impossible") to hold the event. Tie the force majeure clause in contracts with venues into the "attrition" clause so that attrition penalties can be waived or reduced if you proceed with an event in a force majeure situation. State the purpose of the event in the contract to help with a future "frustration of purpose" argument.
- Consider purchasing event cancellation insurance. There will now be an exception for Covid 19, but it may be possible to purchase an endorsement that eliminates the exception. Some policies cover enforced reduced attendance as well as cancellation. And talk with your insurance broker about any other possibly applicable coverages.