WARD AND SMITH, P.A.
ATTORNEYS AT LAW

COVID-19 Cancelled My Event. What Now?

Written By Chris S. Edwards (csedwards@wardandsmith.com)
April 9, 2020

If you're like me, the outbreak of the novel coronavirus—and COVID-19, the disease it causes—has cleared out your social calendar.

Across the country, major events—like Austin's South by Southwest festival ("SXSW") and the NCAA Tournament—were cancelled, upending the expectations of millions. But these cancellations did more than affect social calendars. For many people, the cancellation of these events made worthless their once-valuable tickets or rendered futile venue reservations.

These cancellations have many asking, "Do I have to pay if I cancel my event?" I've fielded this question not only in my professional life but also in my personal one. My best friend cancelled his wedding, and this was the first question he asked me. The answer to this question—one that should be so simple—is often fact-specific. Like many legal questions, the answer is, "It depends." This article outlines three considerations that likely will play a role in determining whether you've got to pay in the face of COVID-19.

I. Force Majeure

Over the last weeks, we have written extensively on the topic of force majeure clauses in written contracts. And with good reason. These clauses, which may excuse contract performance in the event of an "act of God," likely are the easiest to determine your responsibilities, now that COVID-19 has ruined your event.

Many—but not all—contracts contain force majeure clauses. To determine if your contract contains a force majeure clause, you must read the contract. As my colleague Evan Musselwhite explained, force majeure clauses aren't always clearly labeled. Still, these clauses usually have a readily recognizable form. They usually excuse performance under a contract in the event of an "act of God," war, insurrection, or the like. The point is this: force majeure clauses often contain similar language.

A pandemic, like the one caused by COVID-19, may fall within the scope of your force majeure clause. As explained above, these clauses usually follow a formula—they list a series of horrific events that, through the fault of neither party, make performance of the contract impossible. While these clauses follow a pattern, they are not created equal. It is imperative that you read your force majeure clause. Some, for example, may expressly excuse performance in the event of a pandemic. If that is the case, you're in luck; you likely are off the hook. Other clauses are less clear. Some may include the more standard "act of God"

language. There is a decent chance that a cancellation caused by COVID-19 falls within the scope of that phrase. But as of now, the answer is unclear. Because COVID-19 is so new, that theory is untested.

Even if your force majeure clause covers COVID-19, your right to a refund depends on the clause's language. Yes, it's true. Some force majeure clauses allow one or both parties to undo the contract. In that instance, your obligation to pay likely will be excused. But other clauses will hold you to your bargain.

II. Impossibility

What if you have no written contract? Or what if your contract does not contain a force majeure clause? If relying on a force majeure clause isn't an option, an alternative may be the doctrine of impossibility. The Supreme Court of North Carolina has recognized this doctrine.

Impossibility, though, is difficult to prove. In North Carolina, impossibility excuses performance with a contract when "the subject matter of the contract is destroyed without fault of the party seeking to be excused from performance." *Brenner v. Little Red Sch. House, Ltd., 302 N.C. 207, 209 (1981)*.

Because COVID-19 will—at some point—pass, the doctrine of impossibility is probably a poor fit for most COVID-19 related cancellations. To apply the doctrine of impossibility, courts require a showing that the subject matter of the contract was *literally* and *permanently* destroyed. It is not enough that the subject matter of the contract is temporarily unavailable—even if that temporary unavailability might last for years. For example, the North Carolina Court of Appeals has suggested that an easement agreement—one establishing an easement that was used by an apartment's tenants as a loading zone—was not impossible even though the City of Charlotte had since designated the easement a fire lane. The reason: the City might "at some point" determine that the easement no longer needed to be a fire lane. All that is to say: because you could reschedule your wedding, or because the artist could reschedule that concert, the doctrine of impossibility is unlikely to grant you any relief from your requirement to pay.

Even if COVID-19 did destroy the subject matter of your contract, you're still not guaranteed any relief. It's harsh but true. Before courts will apply the doctrine of impossibility, they typically require a showing that the cause of the impossibility was not "reasonably foreseeable." On March 11, 2020, the World Health Organization characterized the outbreak of COVID-19 as a pandemic. If you entered into a contract after March 11, the reality is that the doctrine of impossibility probably is unavailable to you. It is possible that some courts may determine that a COVID-19 outbreak was reasonably foreseeable even before that. Like so many problems created by COVID-19, this is an untested question that will have to make its way through the court system before we have clear answers.

III. Frustration of Purpose

So if you don't have a force majeure clause, and impossibility gets you nowhere, then what? A third option is "frustration of purpose." In North Carolina, the doctrine of "frustration of purpose" protects parties when performance under a contract remains possible, but some unforeseeable event destroys the contract's value. *See Brenner*, 302 N.C. at 211.

Frustration of purpose is a high standard. Before courts will apply frustration of purpose, they require a showing that an unforeseeable event has totally undermined the value of a contract. It is not enough that an

unforeseeable event may make performance under a contract either inconvenient or incredibly expensive. So just because the cost of holding an event during the early days of COVID-19 may have skyrocketed, those increased costs do not frustrate the purpose of your contract. Likewise, frustration of purpose does not apply when the parties have already allocated the risk of loss between themselves. For example, a frustration of purpose argument is unlikely to persuade a vendor to provide a refund if your contract includes "no refund" language.

Frustration of purpose still may provide some relief in the era of COVID-19. In particular, frustratior of purpose is likely to apply to some service contracts. So, for example, if you had contracted with a catering company to provide services at a wedding reception, which you had to cancel due to COVID-19, you likely have no obligation to pay the catering company. That question is less clear when it comes to your wedding venue. Though you rented a venue for your 300-guest wedding, it is unsettled whether something like Governor Roy Cooper's executive order, which limits gathers of more than ten people, frustrates the purpose of your rental contract. After all, your wedding still can go forward. The answer to this problem might depend on how much your venue knew about your wedding plans.

Conclusion

The effects of COVID-19 are widespread, and, in the face of COVID-19, the law is rapidly changing. This article provides insights based only on the law as it exists today. In 12 to 18 months, once these and other legal theories have been tested through the adversarial process, courts may have changed the scope of impossibility or frustration of purpose.

One other important note: every case is fact-specific. While these insights offer a general lay of the land, your case may be different. It is important that you seek the advice of an attorney before determining your rights.

--