

Moving Beyond Force Majeure: Making the Deal Work in the Evolving World of Live Sports

The ink was still drying on sponsorship agreements this past spring—college basketball teams across the country were starting to gel for their One Shining Moment, the NBA playoff picture was taking shape, baseball clubs were about to trek north from their sun-soaked spring training locales and groundskeepers were diligently rolling the greens at Augusta National.

Then in March, it all came to an abrupt halt as the COVID-19 pandemic forced the shutdown of live sports, leaving leagues, teams and sponsors scrambling to answer: “What now?”

As owners and leagues began to redesign their seasons, it became clear that if sports could be played safely and responsibly, the public would welcome back their favorite teams and stars, and the sponsors would be along for the ride.

Much of the legal focus early in the pandemic centered around interpreting oft-forgotten force majeure clauses and analyzing breach remedies and termination rights. However, as the leagues unveiled their plans to restart, the conversation shifted to a more practical, business-oriented focus: With fewer venues, no live fans and seemingly infinite administrative challenges, how could the leagues, the teams and their sponsors work together to deliver the best possible product while still providing sponsorship value?

No Fans in the Stands Brings Unique Sponsorship Opportunities

Zooming Toward Direct Fan Interaction

For better or worse, the videoconference has taken a central position in nearly everyone’s professional lives



during the pandemic. But videoconferencing is not just a new tool to make business meetings easier in work-from-home settings—it has also created numerous new opportunities for direct fan engagement and “virtual attendance.”

One of the first and probably most prominent examples came from the NBA, which invited more than 300 fans to appear live on 17-foot video boards surrounding the courts at the ESPN Wide World of Sports Complex. The video boards, dubbed the “Michelob Ultra Courtside,” were sponsored by Michelob, the NBA’s new official beer partner. Fans appearing on the Michelob Ultra Courtside boards interacted with each other during the game using Microsoft’s “Together” meeting mode.

Wrestling fans could also virtually attend a live professional wrestling show with the WWE’s new “Thunderdome” multimedia infrastructure, which it erected in partnership with The Famous Group. The Thunderdome presents rows of fans appearing on LED boards for each event, with individuals selected through a first-come, first-served registration process. Much as at a real event, fans could reportedly be removed at any time, including for inappropriate conduct or technical issues.

Attorney Advertising

Earlier this spring, Formula One, IndyCar and NASCAR all had success livestreaming their forays into esports with virtual fan attendance. The three racing series broadcast esports events featuring big-name drivers, some through traditional television media on FOX and ESPN, and fans could also tune in to unique driver or team livestreams through YouTube, Twitch, Facebook and Instagram for more interactive experiences. Fans could listen to team spotters and drivers chatting with their teams or with other drivers, and could also talk live with other fans by using each platform's "chat" function.

Empty Bleachers Brings New Ad Real Estate

Back in the physical realm, empty stands have offered new advertising real estate. Prime real estate in MLB stadiums was made available for advertisers, in addition to the on-deck circle and the batter's eye. Individual teams can decide whether brand logos are physically or virtually displayed during broadcasts, with many stadiums embracing the empty grandstands as a new signage ad unit.

Some teams, like the New York Mets, have used the empty stands to give fans a unique opportunity and to give back to partner charities: Mets fans, for example, can pay for a cardboard cutout of themselves that will appear at Citi Field during games. It also served as a perk to long-time supporters: Season ticketholders who renewed their tickets for the 2021 season received the cardboard cutout for free.

In Europe, EA Sports worked with La Liga, Spain's top soccer league, to include computer-generated sights and sounds of fans in the stands during live broadcasts, with Coca-Cola putting its own stamp on the production. Coke, a new sponsor of the Coppa Italia annual tournament, reportedly paid \$5 million to have the computer-generated fans wear red, Coke's signature color.

Legal Issues to Consider

The Real Star Emerges: Move Over Force Majeure, Here Comes the 'Make Good' Provision

As the COVID-19 pandemic upended corporate budgets, many brands were left with no choice but to reduce or eliminate their sponsorship spending, throwing contractual agreements into doubt. Sponsors are left

trying to determine the best value they can get for the money they have already committed. And if sponsors can't get their preferred rights and benefits for similar or equal value, they must determine how to allocate the difference between the money spent and the value delivered. Perhaps in some cases parties cannot avoid litigation due to the inability or unwillingness of a party to continue in the face of such a different sports landscape. Indeed, in at least one case so far, a sponsor has found itself being sued for breach of contract. The Regents of the University of California, on behalf of UCLA, recently filed a lawsuit against Under Armour, alleging that the apparel sponsor is attempting to breach its \$280 million, 15-year deal with the Bruins sports teams due to the pandemic.

But for parties more able and willing to see their contracts through the pandemic, the contractual mechanism that allows the parties flexibility in the event of unforeseen circumstances is the "make good" provision. This provision aims to keep sponsors happy and give event operators freedom to make up for benefits that they are not able to provide as originally intended. Both event operators and sponsors should take the time to make sure this crucial provision is sufficiently detailed and clear in light of any new contract benefits or concessions.

While every deal is unique, the following are some issues and scenarios to consider when evaluating a make-good provision:

- What triggers the make-good—the complete lack of benefit or a devalued benefit?
- Who decides whether the contracted-for benefit is fully delivered?
- Can a make-good be offered in conjunction with a refund and/or credit, and how is that determined?
- If a sponsor exercises its right to a make-good, how does that impact the ability to terminate the agreement?
- In a multiyear sponsorship relationship, can a sponsor accept a reduced sponsorship benefit in year one for increased, different or better benefits in subsequent years?
- Is it possible to offer a make-good on a trial basis to preserve the sponsor's right to argue that make-good is no longer sufficient?

Understandably, the value of a make-good likely depends on the type of sponsor and the original contracted-for benefits. Sponsors that have paid for digital or stadium advertisement space may have a better chance of negotiating suitable make-good opportunities than do sponsors that rely on having fans in a stadium. Indeed, sponsors deriving value from more “experiential” elements may need to be more creative in filling the void left by fans.

Brand Safety and Other Digital Media Considerations

By the time fans enter a live event, there’s only so much trouble they can cause from the grandstands in person. They’ve gone through security and been screened for harmful materials or inappropriate signs. Sure, a rogue fan could run onto the field of play in his or her birthday suit (a famous photo of the “19th Hole” stalker running past John Daly and his wife embracing at the 1995 British Open at St. Andrew’s comes to mind), but event security usually takes up the unenviable task of restraining the fan and TV cameras cut to commercial or dump the live feed.

As many digital advertisers know, digital media not only opens doors for unique engagements, but comes with a host of well-documented challenges to brand safety.

Sponsorship agreements negotiated in prior years for in-stadium rights and benefits likely did not contemplate a more prominent user-generated content (UGC)/digital component, such as LED boards broadcasting a live feed of fans in their homes, or address new sponsorship benefits from esports tie-ins or livestreaming.

In reevaluating how a contract addresses these new elements, sponsors should be mindful to define what is important to them from a brand safety standpoint, because every brand has its own risk tolerance and unique considerations. In particular, sponsors should discuss with event owners how UGC is moderated and taken down, if necessary, and what the sponsor’s remedy

will be for content violations. For example, consider what will happen if a virtual fan or livestream talent uses or posts a slur or expletive during a live stream, or evades an event owner’s content moderation.

Additionally, truly digital tie-ins, like livestreaming, may offer more key performance indicators, measurement, analytics and reporting possibilities that aren’t part of a traditional in-stadium sponsorship deal. Sponsors should make sure they avail themselves of the most precise measurement and reporting methods available for the applicable media, and explore the recourse avenues available if certain guarantees are not met.

As the COVID-19 pandemic continues to evolve, all parties to sponsorship agreements must be prepared to reevaluate their contracts and adapt to new challenges. Innovative thinking and flexibility are key to navigating emerging legal considerations while capitalizing on new opportunities..

COVID-19 Resource Center

For information on the business impacts of COVID-19, please visit our [COVID-19 Resource Center](#), which we continue to update as the situation evolves. If you have questions about COVID-19’s impact on your business, please reach out to your Loeb relationship partner or email us directly at COVID19@loeb.com.

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