



The Show Must Go On: COVID Liability Concerns as Concerts Resume

Reduced state restrictions and an increase in COVID-19 vaccinations spurred a sense of the return to normalcy. It is no surprise that any resemblance of “normalcy” in Music City includes live entertainment. As the musicians that make this city so great are eager to get back to work, they are now confronted with the question of how they can limit liability while welcoming large crowds¹ to a much anticipated and long overdue show.

Prior to hitting the road, it is paramount to know the available defenses to a Covid-19 exposure claim. Tennessee provides civil immunity for COVID-19 exposure under the Tennessee Covid-19 Recovery Act² (the Act). The Act does not apply to instances of gross negligence or willful misconduct, provided that the claimant has clear and convincing proof that the grossly negligent or willful misconduct proximately caused the loss.³ In addition to the protections afforded by the Act, we recommend adding a second layer of protection to ensure that a concertgoer expressly assumes the risk of Covid-19 exposure. This measure is important because primary express assumption of the risk⁴ is an affirmative defense that stands independent from the Act.

If neither the Act nor primary express assumption of the risk applied, then a claim would be assessed using Tennessee’s paradigm of comparative fault.⁵ Under this standard, a plaintiff can recover so long as he/she is less at fault than the defendant(s). Case law is unclear whether a plaintiff would be found less at fault for attending a large-crowd event compared to a defendant hosting said event. Thus, it is prudent to hope that the Act would be applicable but to *plan* as if it would not by including a valid exculpatory clause and waiver at the point of purchase, on the back of the ticket, and at the point of entry.

Booking the Gig

When planning a tour, or even a single show, it is important to examine the ever-changing local orders and regulations. Local protocols should be followed to avoid instances of gross negligence and/or willful misconduct. For example, Nashville⁶ requires submission of a site plan and safety protocol to obtain written approval before an event can occur.⁷ Capacity limits vary depending on the venue. Ticket sales may be limited to a total of 3,000, or to 33% capacity at Bridge-

(continued on page 24)

stone Arena, or at 40% capacity for outside venues.⁸ A court would likely find that refusal to adhere to a capacity limit or to other provisions of a local order obviates application of the Act.

Certain venues also require adherence to their reopening plans which may include thermal temperature measurements, mask mandates, limited concessions, sanitation requirements, and party size restrictions.⁹ A trending measure, keeping both safety and profit in mind, includes outdoor events featuring socially distanced pods.¹⁰

The next concern arises at the point of ticket sale. Since Tennessee recognizes exculpatory agreements,¹¹ a strong exculpatory clause and/or waiver should be included in the ticket purchase. For online ticket sales, a pop-up window should be used to require the purchaser to affirmatively agree to the terms of the agreement by clicking “I agree.” The agreement should include express assumption of the risk language.¹² The agreement should also include a hold harmless for all entities and groups involved—including the artist¹³ in an individual capacity. Some vendors even redirect the purchaser to the CDC guidelines to ensure the concertgoer is fully aware of current risks and suggested protective measures.

Similar language should be placed on the back of each tangible ticket or included in the virtually formatted ticket. This protects the artist and venue when someone other than the original purchaser attends the event, such as when tickets are purchased for a group or when tickets are purchased from a third party.

Covid-19 warning signs should also be posted at the venue—especial-



ly at points of entry—and again convey that the concertgoer assumes the risk of exposure by attending the event. While this does not require an express agreement from the concertgoer, it plays into the overall comparative fault analysis should a suit arise.

Hitting the Road

Of course, all the above concerns must be continually assessed once the tour extends past Tennessee. We have conducted a 50-state survey and have found that not all states provide for civil immunity. Of the states that do, the statutes require different protocol and/or specific compliance measures for immunity to apply. Each state also has different requirements for exculpatory clauses and waivers, including specific language and/or font sizing, and public policy concerns. Each state has its own liability analysis scheme and recovery threshold. Local orders, restrictions, and venue plans certainly vary too.

Encore

Legally sound and safe live entertainment events can occur amidst a pandemic. But careful planning with an eye towards liability defense strategies

should be implemented to ensure that the show goes off without a hitch. ■

Endnotes

¹ This article addresses concerns with concertgoers and does not cover workers compensation issues or legal consideration for employees, contractors, or other workers.

² TENN. CODE ANN. § 29-34-802.

³ TENN. CODE ANN. § 29-34-802(b).

⁴ See *Smid v. St. Thomas Hosp.*, 883 S.W.2d 632 (Tenn. Ct. App. 1994).

⁵ See *Perez v. McConkey*, 872 S.W.2d 897, 905 (Tenn. 1994).

⁶ Davidson County has a private health department: Metropolitan Public Health Department. As of April 29, 2021, it is unclear whether Davidson County will rescind mask mandates and other restrictions based on Governor Lee's request to do so by May 31, 2021. See Tenn. Exec. Order No. 80 (Apr. 27, 2021).

⁷ Metro. Pub. Health Dep't. Order No. 14 Section 7 (Apr. 16, 2021).

⁸ *Id.*

⁹ *Nissan Safe Stadium Plan*, The Tennessee Titans; *Health and Safety Policies*, Bridgestone Arena; *We Set the Stage for Safety*, Ryman Auditorium; *Additional Safety Procedures*, Marathon Music Works; *Covid-19 Protocol*, 3rd and Lindsley (all last visited Apr. 29, 2021).

¹⁰ *The Caverns Above Ground Amphitheater*, The Caverns (last visited Apr. 29, 2021).

¹¹ *Copeland v. Healthsouth/Methodist Rehab. Hosp., LP*, 565 S.W.3d 260, 273 (Tenn. 2018).

¹² Requiring a signature for purchase would bolster a defense. It is unlikely, however, that this is feasible. An affirmative click or checking the box should suffice where a signature cannot be implemented.

¹³ See generally, *Strickland v. Stefani*, 358 F. Supp. 3d 516 (W.D.N.C. 2018) (holding that Gwen Stefani could be held liable for negligence in an individual capacity for her role of encouraging people to rush the stage).



Raven.

MARISA GARCIA is an associate at Neal & Harwell, whose practice focuses on civil litigation. She previously served in the US Air Force as a Security Forces Phoenix



and entertainers to major corporations.

MARIAM STOCKTON is a Member at Neal & Harwell. She is an experienced litigator and trial attorney who represents a diverse range of clients—from artists, labels,