CURTIS THAXTER

ATTORNEYS AT LAW

ONE CANAL PLAZA, P.O. BOX 7320, PORTLAND, MAINE 04112/ TEL 207 • 774 • 9000/ FAX 207 • 775 • 0612/ WWW.CURTISTHAXTER.COM

MEMORANDUM

TO: Maine Summer Camps
FROM: Rebecca Klotzle and Jack Erler
DATE: April 1, 2020
RE: Corona Pandemic – Issues Concerning Return/Retention of Camp Tuition

---

IMPORTANT REMINDER: This information is being provided for your general educational purposes only. You should always consult your attorney or other advisors for advice on how the law applies to specifics at your camp.

We've been receiving questions from many of you about legal issues relating to the COVID-19 pandemic and the possibility that Maine's youth camps may not be able to open this summer. Specifically, we've been asked questions like:

- What if camps don't open this summer – can camps keep prepaid summer 2020 tuition payments?
- What if camps are required by state or federal mandate to remain closed this summer?
- What if they are not ordered to remain closed but are unable to open for camp-specific reasons?
- What if camps are open but a camper doesn't come because the family doesn't want to risk the camper getting sick?
- What if camps are open but a camper is coming from a "danger zone" state so a camp doesn't allow the camper to come?

As you can see, there are numerous "What ifs" that we are all asking and it is impossible to answer every "what if" scenario, and the answers to many of the questions will vary based on the facts of the individual camp. Not to mention that there are still so many unknowns in the larger world. But we've tried in this memo to address the general legal principles that could apply to camps as they work through these issues.

Turning to the overarching question – in what circumstances can/should camps keep some or all prepaid tuition if they don't open this year? – the answer (as always with complex legal issues) is an unsatisfactory "it depends." There are three general legal issues that come into play: (a) interpretation of the camp's contract terms; (b) a doctrine called "force majeure"; and (c) whether retention of prepayments constitutes liquidated damages.

Terms of Camper Contracts. The first thing camps should do is look at the provisions in their camper agreements concerning tuition, deposits, and prepayments. Usually what a camp's contract says is what will determine whether a camp may keep some or all of a camper's prepaid tuition in a given situation.

At minimum, the basic agreement between camps and parents is – parents agree to pay the camp and, in return, camps agree to provide their children with a service, the experience of a Maine camp summer. Camps' written contracts with their camper families – whether on paper or through their online forms and website – set out that agreement in more detail. The exact language used will vary by contract and dictates the parties' obligations, including what happens if things don't go as the parties expected.

If COVID-19 forced a camp to be closed this summer, the camp would technically be in breach of its agreement with parents because it would not be able to fulfill its contract obligations. The camp promised a Maine summer camp experience and the parent paid for that experience, but the camper is now not going to get it so the camp has failed to perform under the contract. Under those circumstances, without any additional contract language to the contrary, the parents would be entitled to get their money back.

But the contract might contain terms around the refundability of tuition prepayments, in which case those terms will control what a camp is permitted to do. Does the contract say parents get a refund only if the camper/parent cancels the contract or for any reason? Does it say all deposits are nonrefundable? Does it provide a date certain by which parents must request a refund? [1] Note that it's unlikely that many (if any) contracts say "in the event of a global pandemic and potential government-mandated shutdown order, Camp X may keep all prepaid amounts received." Our experience suggests that most non-refund provisions in camp contracts are directed at scenarios where the signer of the camper attendance contract is responsible for the camper's failure to attend camp, not the camp. For example, a provision that states if the camper gets sent home early for misbehavior or the parents change their minds about enrollment after May 1st, the parents are not entitled to a refund. Whether camps have any right to retain payments will depend on what the language in their contracts say.

If there's room for interpretation in a camp's refund terms, think back to the big picture – the parent has upheld its end of the bargain by paying the camp but the camp is not upholding its end of the bargain because it's not holding camp. We suggest camps approach their decision-making through this legal lens, while keeping in mind the importance of maintaining camps' relationships with their camper families.

That is the default scenario under Maine contract law. But the following additional legal issues might also come into play that could excuse the camp's non-performance under the contract or govern the camp's keeping of camper prepayments.

[1] What if a camp's contract has no language about refunds? We are not aware of any case in Maine where keeping prepayments is acceptable if the contract is completely silent on the issue. Thus, the camp would not be permitted to retain those payments because, as stated above, it is not performing on its end of the bargain by providing a camp season.

Force Majeure. Given the COVID-19 pandemic and resulting emergency orders, one thing that might excuse camps from performing under their contracts with campers is a common contract provision called a force majeure clause. A "force majeure" is an unanticipated and uncontrollable event, like an act of nature such as a fire, flood, hurricane, etc. Many contracts contain a variation of a force majeure clause, which is a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event that the parties could not have anticipated or controlled. If camps are required to be closed this summer as a result of the COVID-19 pandemic or a federal, state, or municipal shutdown order, such an event would likely qualify as a force majeure excusing camps' non-performance of their contracts with campers because performance is now impossible.

Again, whether a force majeure clause covers a pandemic such as COVID-19 (and emergency orders issued because of it) will depend on the language of the contract. Camps should again look at the language in their particular contracts to determine if there is a force majeure clause and what it covers.[2] If pandemic or epidemic or similar language is included, then the camp may be relieved from performance and can't be found liable for breaching its agreement with the campers. Even if the contract does not specifically list pandemic as a force majeure event, it might fall under the category of "act of God" as a force majeure or the contract may contain catch-all language, listing examples but specifying that the list is not exhaustive (i.e., "including, but limited to . . ."). [3] In addition, often the clause will contain requirements that the party invoking force majeure (in this case, the camp) must establish, such as notice to the other party by a certain time. It may also include a duty to mitigate the damages (in other words, the camp can't make the situation worse by, say, requesting additional tuition payments after the camp knows that the pandemic will require them to close) and a duty to reasonably try to resume performance as soon as practicable.

Doctrine of Impossibility. Even if a camper contract does not include a force majeure provision, camps may still be excused from performance under Maine law if it is impossible

---

[2] The same advice applies to vendor or other third-party contracts camps have entered into for the upcoming season.

[3] An example of one such force majeure clause states:

> If performance of this Agreement or any obligation under this Agreement is prevented, restricted, or interfered with by causes beyond either party's reasonable control ("Force Majeure"), and if the party unable to carry out its obligations gives the other party prompt written notice of such event, then the obligations of the party invoking this provision shall be suspended to the extent necessary by such event. The term Force Majeure shall include, without limitation, acts of God, fire, explosion, vandalism, storm or other similar occurrence, heating system failures, orders or acts of military or civil authority, or by national emergencies, insurrections, riots, or wars, or strikes, lock-outs, work stoppages and disease or blight. The excused party shall use reasonable efforts under the circumstances to avoid or remove such causes of non-performance and shall proceed to perform with reasonable dispatch whenever such causes are removed or ceased.

Note that camp closure based on the COVID-19 orders would likely be covered for several reasons under this particular clause because it includes disease, acts of civil authority, and acts of God.

for them to fulfill their contractual obligations. The doctrine of impossibility generally excuses performance when a supervening event that the parties assumed would not occur destroys the subject matter of the contract or the means of performance, effectively making performance objectively impossible. For example, if the day before a camp was scheduled to open, a forest fire burned down all the camp buildings, it would have destroyed the camp property, which was the subject matter of the contract, neither the camp nor the parents expected that to happen, and it would be impossible for the camp open and hold camp that summer. So, the doctrine of impossibility would kick in to excuse the camp from having to perform its obligations. The same theory could apply to the COVID-19 pandemic if it makes it impossible for camps to open and host campers as usual. There does not need to be a contract provision for the doctrine of impossibility to apply and Maine courts have previously held that a local outbreak of a contagious disease (cholera) excused performance under a contract.

* * *

As we wait to see what happens in the next month and camps try to make decisions about camper tuition payments, we first suggest they start with a look at their contracts. In order for a camp to have any right to keep payment for a service that won't be given, there needs to be a written contractual provision allowing that retention. Without one, the presumption under the law would be that the campers get <u>all</u> prepayments back. Camps will also need to determine if they have force majeure clauses in effect that would cover this pandemic. If camps make their own individual decision to not open this summer because the ongoing pandemic renders conditions too dangerous to safely open, such a clause might provide them cover for retaining some or all of their camper prepayments.

If camps are ordered to be closed by federal, state, or municipal mandate, it then becomes impossible for them to live up to the contract. Because of the unknown duration of the pandemic and the short-term, short-notice timing of these governmental shutdown orders, it is very likely and reasonable that camps may already be using some of the funds from prepayments to make camp preparations so some camps may be unable to give full refunds. There are arguably legal grounds for the camp to not return all such amounts if they meet the requirements to invoke force majeure or the doctrine of impossibility.

When relying on either force majeure or impossibility, camps will also likely have to grapple with issues like:

- Foreseeability – was the pandemic and its camp-closing effects foreseeable? When did it become foreseeable that camp would not open?
- Causation – was the closure event beyond the camp's control? If directly related to a virus outbreak or a shutdown order, then it was obviously beyond the camp's control. But if every other camp in Maine opens and one camp chooses not to, then that camp arguably caused its camp closure.
- Avoidability – could the camp have avoided the situation through reasonable efforts? Were the outlays that the camp made during the spring to ready camp for the season avoidable or necessary?
- Notice – did the camp let the parents know in a reasonable amount of time?

- Mitigation – did the camp keep spending money even after it knew that it likely would be opening this summer?

Therefore, during this springtime period of uncertainty, camps need to (1) watch for signs that camp closure becomes foreseeable, (2) immediately inform camper families if it becomes clear that camp will likely not open, and (3) begin taking steps to reduce the avoidable damages, which would include not accepting any further prepayments or making any further purchases of goods and services for the operation of the camp's summer program.

What are the options available to camps with respect to tuition prepayments?

As camps make decisions, one thing to keep in mind is that there are alternatives available beyond the "keep all" and "refund all" approach. As noted above, even if the camps' closures are excusable due to force majeure or impossibility, camps have an obligation to minimize the damages caused by camp closure. For some camps, that might mean returning all of the payments already received regardless of whether the camp has already expended some of that income in preparation for opening. For other camps, minimizing damages might need to take the form of a partial refund or applying the prepayment as a credit towards the 2021 season.[4]

Camps that are refunding a portion – but not all –of their prepaid tuition amounts should only retain what is reasonable and proportionate to what they have committed or spent to prepare camp for the summer, keeping in mind foreseeability and avoidability. For example, if a camp requests and has already received a nominal deposit that covers the administrative work of enrolling the camper, keeping that prepayment would be proportionate to the efforts the camp has expended for that camper. By contrast, if a parent has already paid 100% of the tuition for the 2020 camp season, keeping all of that prepayment likely would not be proportionate because the majority of that tuition covers summer expenses (room and board, staffing, programming, etc.) that the camp would not be expending if closed.

Further, Maine law tells us that it is not permissible to keep 100% of tuition when a parent requests a refund in advance of the camp season.[5] So camps that withhold any prepayments

[4] There is no law on the permissibility of "rolling over" 2020 tuition payments to the 2021 season, but if it is impossible for a camp to open in 2020, then 2021 would be the earliest that a camp could "make good" on its promise to provide the summer camp experience, and both parties could voluntarily agree to this 2021 credit arrangement. Camps considering this option should consult their accountants or tax attorneys for potential tax implications.

[5] Keeping 100% of prepaid tuition has been held to be excessive and disproportionate liquidated damages, even if the contract permits it. Liquidated damages are an amount that the parties pre-agree to by contract that one party must pay to the other party if it breaches the contract, and they're meant to be a reasonable estimation of the loss to the non-breaching party. In a 1985 Maine case involving a camp, the state's highest court held that withholding a parent's nonrefundable prepaid tuition constituted unenforceable liquidated damages. In that case, the parent prepaid $3,100 for his son's summer camp to take advantage of an early discount. The contract included a provision stating that if a refund request was made after May 1st, the camp would keep the whole amount paid to date. The parent asked for a refund on June 14 (after learning his son had failed a class and would need to attend summer school instead of camp), the camp refused to give back any money, and the parent sued. The court held that, because the camp failed to demonstrate what actual damages were anticipated or

under nonrefundable contract clauses should be mindful that they do not keep the entire tuition amount (which has been held to be excessive if not a reasonable approximation of the damage done) and should instead work to calculate their actual loss to determine what would be reasonable and fair.

What other considerations should camps be thinking about?

Obviously, camps rely heavily on the relationships they've formed with their camper families, staff, and vendors so camps should be mindful of the public relations piece of the camps' decisions concerning tuition payments. That is especially true now because the established culture of the COVID-19 pandemic seems to be to do no further economic harm. Because there is no one "right answer," the best course would be working with camp parents to find an agreed-upon solution.

actually sustained by the camper's cancellation and because the amount of liquidated damages was 100% of the contract price, the damages were "excessive" and "disproportionate" so the camp had to repay the parent the entire $3,100.