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What If There Were a Pandemic in the Middle of Pilot Season? An Overview of Considerations for Claims Under Production and Event Cancellation Insurance

By **Cassandra Franklin and Bruce Friedman** (May 29, 2020, 6:03 PM EDT)

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The coronavirus pandemic has turned people's work and personal lives upside down. Travelers have been grounded by shelter-in-place orders, and social distancing has forced friends and business colleagues alike to connect virtually rather than in person.

The pandemic has sent the global economy into a tailspin — and the entertainment industry has been particularly hard hit. Film and television productions worldwide have shuttered. Thousands of concerts and sporting events have been postponed or cancelled.

As a result, companies in the sports and entertainment industry have asked their legal experts to review their contracts, and explore force majeure and other clauses that may apply due to current circumstances. They are also poring over their insurance policies covering live and filmed entertainment, to evaluate whether these policies will provide coverage for at least some portion of what will almost certainly be significant monetary losses resulting from the pandemic.

In particular, they are turning to two special types of insurance provided for the sports and entertainment industry: production insurance and event cancellation insurance.

Unlike commercial property policies providing business interruption and related coverage on relatively standard forms, the language of production insurance and event cancellation insurance varies widely. Thus, it is critical to review the policy language with an especially careful eye.

Nonetheless, as with business interruption coverage, which has already been written about extensively, there are some common issues that will arise in claims made under these special polices.

Production Policies

Entertainment production policies are written to provide a number of different first-party coverages in connection with both motion picture and television productions. However, as noted above, the wording — and consequently the scope — of such coverage is not standard.

Indeed, it is often "manuscripted," rather than issued on a set form, during the underwriting process, with the needs of particular insureds in mind. The insureds under these policies may be studios, independent production companies or others with a financial interest in the production.

These policies typically contain the following coverages:

- Cast;
- Props, sets and wardrobes;
- Miscellaneous equipment;
- Faulty stock; and
- Negative insurance.

Most production policies also provide coverage for losses sustained by the insured because of damage to or destruction of property or facilities being used in connection with an insured production.

Generally, cast insurance provides coverage for certain financial losses sustained when illness, injury or death prevents a cast member, referred to as an "essential element," from commencing, continuing or completing his or her performance in an insured production. Props, sets and wardrobes coverage indemnifies the policyholder for props, sets, costumes or similar items that are lost, damaged or destroyed while in use on an insured production.

Miscellaneous equipment coverage provides similar coverage for equipment such as cameras, sound and lighting equipment, and grip equipment. The faulty stock and negative coverages, less frequently invoked in the digital era, provide coverage for issues with the film used to record the production.

If a cast member has been infected with the coronavirus and is unable to continue performing on schedule, then in the absence of an applicable exclusion, cast insurance would likely come into play. Similarly, if a crew member had been at the production site before being diagnosed but after being exposed to the coronavirus, there could be extra expense coverage for the time during which the site (and possibly props, sets and costumes) had to be disinfected before proceeding with the production.

However, during the current pandemic, productions far more commonly have been halted in order to avoid the infection of cast and crew members, and/or to comply with local and state shelter-in-place orders. In such circumstances, two coverage extensions may be invoked: civil authority and imminent peril.

Civil Authority

Civil authority coverage generally provides for loss caused by the interruption, postponement or cancellation of an insured production resulting from a civil authority's order impacting access to the site of the production. Notably, however, many production policies do not require physical loss of or damage to property for civil authority coverage to apply.

Depending on the specific language of the policy, coverage may extend to circumstances in which the interruption, postponement or cancellation of the production is the result of the action of either a government authority or a military authority, or it may cover only government authority actions.

Additionally, many policies require that the claimed losses be "directly caused by" the authority's action; others employ wording covering losses that are "consequent upon" the authority's action.

Furthermore, some policies cover both orders revoking permission to use a location and orders prohibiting access to such a location. Other policies cover only prohibitions of access. Still other policies employ different policy wording, establishing a variety of causation requirements and triggers for coverage.

Insurers and their policyholders may well have different views on the meaning of these various phrases and terms in the context of the current pandemic. For example, they may differ as to whether a location shutdown has been directly caused by, or is even consequent upon, a government authority's order or action. They may also differ regarding whether an order requiring sheltering in place effectively prohibits access to (or revokes permission to use) a production location.

Imminent Peril

Imminent peril coverage is not predicated on action by government authorities. Rather, its provisions generally turn on protecting production property and/or people working at the production location from a risk of harm that is imminent. This coverage also is not cookie-cutter.

Most policies cover both additional production costs incurred as a result of the imminent peril and the cost of the protective steps undertaken by the policyholder in the face of the peril, so long as these steps were necessary to protect persons or property at a production location from imminent direct physical loss or damage. Policies also generally require that the policyholder's claimed additional expenses are reasonable.

Significantly, however, some policies do not define what constitutes imminent peril. And those that do may still be subject to differences of opinion between insurer and policyholder.

For example, a policy may define imminent peril as "certain, immediate and impending danger of such probability and severity to persons or property that it would be unreasonable or unconscionable to ignore." But policyholders and insurers will almost certainly have different perspectives on whether and/or when the coronavirus presented such a risk.

Potential Exclusions

The exclusions contained in production policies also vary widely. Some policies may specifically exclude coverage for loss stemming from a specified virus. Other policies may more broadly exclude losses arising out of a specific virus and other similar viruses, or some variation of this.

Still others more broadly exclude coverage for losses arising out of perils such as biological agents or diseases. And most policies contain more generic exclusions barring coverage for loss or damage caused by or resulting from pollutants, which may refer only to traditional environmental pollution, or may be broader in scope, depending on their wording and the applicable law(s) under which they are construed.

In short, there are more questions than answers regarding coverage for the current pandemic under these policies. Given the potentially significant losses involved, semantic differences regarding the meaning of the varied language in these policies may give rise to serious disputes regarding whether a claimed loss falls within the coverage grant — and, if it does, the extent of coverage and the applicability of exclusions.

Event Cancellation Insurance

Event cancellation insurance policies are written to insure a wide range of live events, from theatre productions, concerts and music festivals, to sporting events, to fashion shows, to conferences such as Comic-Con International. The insureds under these policies include sponsors, promoters, venue owners and others with a financial interest in the event.

These policies vary to a slightly lesser degree than production insurance policies, which, as noted above, are often manuscripted to meet the needs of particular insureds. However, event cancellation policies are far from standardized, and the language of each policy must be examined closely to assess coverage.

There are also highly specialized policies that are expressly written to cover event cancellations due to pandemics. The cost of such coverage can be high.

For example, the All England Lawn Tennis & Croquet Club, which organizes the Wimbledon tennis tournament, reportedly paid $31.7 million in premiums for such coverage over a number of years. Nonetheless, Wimbledon's pandemic insurance is already reportedly slated to cover roughly $141 million of the association's reportedly $290 million in losses. Thus, some analysts have judged this a wise investment.

However, most event cancellation policies do not mention pandemics or communicable diseases in their coverage grants. Instead, event cancellation insurance policies generally sweep more broadly, providing coverage for losses incurred due to the necessary cancellation, interruption or postponement of an event. Some policies also cover curtailment of an event.

Covered risks may be specified in the policy, or the policy may be written to cover all risks except those specifically excluded from coverage. However, virtually all policies provide that the reason for the cancellation or postponement of the event must be beyond the insured's control.

Coverage may extend to lost revenue or sunk expenses incurred prior to the cancellation or postponement of the event. Many policies also cover extra expenses incurred as a result of the cancellation or postponement, such as costs incurred in rescheduling the event.

Given that so many live entertainment and sporting events have been cancelled or postponed due to the coronavirus, the initial question will be whether those cancellations were necessary and beyond the insured's control. In the context of the current pandemic, depending on the timing of the cancellation, insurers may view the cancellation as unnecessary.

However, when the timing of the cancellation coincides with an announcement by a global health organization that people should shelter in place, and/or a government order requiring that people stay at home except to obtain essential goods and services, this issue may be less open to dispute.

More importantly, however, event cancellation policies — like most insurance policies — contain a number of exclusions and coverage extensions. Generally, losses stemming from weak ticket sales or lack of funding are excluded from coverage.

Thus, even if the current pandemic is deemed a covered reason for cancellation, insurers will want to assess whether excluded causes of loss may also have contributed to the cancellation and, if so, whether that may exclude or diminish the extent of coverage.

Additionally, while some policies specifically provide coverage for cancellations based on a pandemic, since the 2003 SARS outbreak, many policies contain exclusions for diseases. These exclusions could apply in the absence of an endorsed coverage extension specifically amending or removing the exclusion.

Nonetheless, like exclusions found in production policies, the wording of exclusions in event cancellation policies may vary significantly. Some policies exclude bacteria or specific viruses such as SARS or H1N1. Others exclude viruses or communicable diseases more broadly.

Both insurers and policyholders are no doubt combing through these policies to assess the meaning of the language found in both coverage grants and exclusions. As with production policies, insurers and policyholders are likely to differ as to the meaning of such language.

The Extent of Covered Losses

Furthermore, even when the parties are in agreement regarding the extent of coverage, loss valuation under these policies can be particularly challenging. Often, valuation turns on minute questions regarding the causation not just of the cancellation or postponement itself, but also of the specific types of loss and expense for which coverage is sought.

Once productions get back up and running and events are rescheduled, these valuation questions may present especially thorny issues. Additionally, insurer and policyholder should (in an ideal world) work together, but they may well differ as to how best to move forward while minimizing the losses stemming from the pandemic.

Indeed, insurance coverage issues in connection with business losses in the wake of the pandemic are likely to create a whole new landscape. As one of our colleagues put it, "It's the Wild, Wild West."

Both federal and state legislatures have jumped in to draft legislation seeking to extend coverage for policyholders affected by the shutdown. Some local authorities have specifically drafted their shelter-in-place orders to reference a causal connection to physical damage to property.

And across the country, businesses are already filing lawsuits against insurers that have challenged their claims for business interruption coverage. But these lawsuits may take years to work their way through the court system.

However, in the entertainment world, the parties generally prefer to negotiate the resolution of their differences with regard to coverage. When those negotiations fail, they tend to resort to more efficient private alternative dispute resolution methods, such as mediation and arbitration.

While the losses resulting from the current pandemic may eclipse those of prior cataclysmic events, such as 9/11 and Hurricane Katrina, all parties that have an interest in resolving their disputes without engaging in full-blown litigation can attempt to resolve their differences through negotiation or ADR. These methods of dispute resolution continue to offer greater confidentiality, thus eliminating any potential bad press for either party.

Additionally, especially given the expected backlog in the courts, the streamlined procedures of ADR allow for a more expeditious and less expensive means of reaching resolution. With ADR, the parties are also able to choose neutral facilitators and/or decision makers who have specific subject matter expertise. In this manner, both insurers and policyholders can avoid creating negative precedent, and can maintain control over the crafting of a resolution that best meets the parties' needs and interests.

So there actually was a pandemic during pilot season — with huge financial consequences. In addition to looking at the applicability of force majeure clauses, risk managers are turning to their insurers for help. There are a number of questions, but few clear-cut answers that apply across the board to claims under production and event cancellation insurance.

Rather, these claims will be addressed case by case, policy by policy. Through careful reading of the policy language, ongoing discussions and, if necessary, ADR, insurers and insureds can reach a reasonable understanding regarding the meaning of that language during these unprecedented times.

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