March 6, 2019

Expert Analysis: Gov't Shutdown Can Trigger Event Cancellation Insurance

By Sergio F. Oehninger and Latosha M. Ellis

Published in Law360

The country's longest government shutdown in history is over, but many companies and organizations are still feeling the impact. In particular, many government contractors and other organizations suffered multimillion-dollar losses as a result of having to postpone or cancel events during the shutdown.

For instance, groups had to cancel receptions and events at national parks, museums and other federally owned properties because they were not open. Conventions were impacted because government speakers were forced to cancel their appearances. Conferences with attendees consisting primarily of government and defense industry employees were impacted. Even the Air Force Academy had to cancel home and away intercollegiate athletic events for men and women's basketball, swim and dive teams, and the men's ice hockey team because of the shutdown.

Such event postponements or cancellations resulted in significant financial losses related to attendee registrations, tickets, concessions, vendors, parking, hotel bookings, tour companies' reservations and other lost revenues.

The shutdown serves as a reminder of the importance of securing event cancellation and business interruption insurance coverage for all of your organization's events and promptly pursuing coverage in the event of any such cancellation or interruption. Many insurers, including Lloyd's of London insurers and major U.S. insurers, offer event cancellation insurance policies promising to:

> Indemnify the insured against any loss occurring during the policy period and causing the unavoidable … cancellation, curtailment, postponement, removal to alternative premises, or abandonment of the event.

Some insurers also offer contingent business interruption insurance for reimbursement of lost profits and extra expenses from an interruption of business resulting from a suspension of or delay in a third party's or distributor's operations that directly affect the policyholder.

Event cancellations are frequent and certainly not limited to the government shutdown. For example, entertainer Kanye West's touring company planned a tour consisting of over 38 performances. The touring company purchased nonappearance and cancellation insurance policies from Lloyd's of London to protect against the financial losses associated with canceling a concert or West being unable to perform during the tour.

After West became ill and was hospitalized, the remainder of the tour was canceled. The touring company issued full refunds for all tickets for the canceled shows and incurred other associated expenses. The touring company sued the insurer, Lloyd's, for withholding almost $10 million in coverage for the cancelled shows. Lloyd's counterclaimed alleging that the loss was due to the touring company's failure to abide by policy conditions and "irregularities" in West's medical history. The parties eventually settled in February 2018.

As another example, a long list of college football games were canceled due to Hurricane Irma in 2017. Georgia Tech and Central Florida; Florida State and Louisiana Monroe; Miami and Arkansas State; South Florida and Connecticut; and Florida and Northern Colorado are some that had to scratch their contests. As college football generates huge sums of money via box office, concession, televised broadcasts and merchandise sales, cancellations can be extremely costly. The appropriate event cancellation insurance can help defray the expenses and lost income resulting from canceled games and other events held in professional or college sports teams' stadiums.

Insurance recovery, however, may present certain challenges. Insurers may attempt to disclaim coverage for various reasons, including failing to disclose details at the policy application stage or failing to satisfy certain conditions after the loss. For example, after Michael Jackson's death in 2009, Lloyd's sought a declaration of no coverage under an event cancellation insurance policy for a series of canceled concerts featuring Jackson. Lloyd's alleged that misrepresentations in the insurance application made before Jackson's death voided the policy.

Similarly, policyholders should be cognizant of timing-related policy terms that may require notice of loss within a specific timeframe — which could be as soon as 30, 60 or 90 days following the claimed loss. Insurers may also require certain other conditions be met after the loss, such as a sworn statement that the canceled event was not rescheduled.

Insurers may also attempt to disclaim coverage by contending that an exclusion that bars coverage for financial default, insolvency or failure to pay applies to the policyholder's attempt to recover financial losses associated with the canceled event. For instance, many event cancellation insurance policies exclude coverage for losses arising as a result of:

> financial default, insolvency or failure to pay any person, firm corporation or entity whether a party to this insurance or otherwise.

Understandably, this exclusion intends to prevent coverage where the insured intentionally fails to pay a vendor, becomes insolvent and fails to pay vendors, or otherwise financially defaults. The exclusion is not intended to bar financial losses incurred due to an unavoidable event cancellation. However, insurers have misinterpreted and misapplied this exclusion to attempt to disclaim coverage.

Causation is another reason an insurer may attempt to disclaim coverage under an event cancellation policy. After the Sept. 11 terrorist attacks, insurers denied a number of claims for event cancellation because of questions related to the remoteness of the attacks. A number of businesses located a considerable distance from where the actual attacks occurred were forced to cancel events for various reasons, including the closing of or restrictions on a number of airports. Insurers contended that there was no causation between canceled events in New Orleans, for example, related to the terrorist attacks — despite the fact that thousands of flights were grounded for days or weeks after Sept. 11. Most of the insurance claims settled without litigation.

Policyholders should promptly notify their insurers of any event cancellation or business interruption-related losses and pursue claims under such coverages for financial losses resulting from event cancellation — including amounts paid or profits lost for events such as conventions, conferences, symposiums, concerts, fundraisers or any similar events.

Consulting experienced insurance recovery counsel is recommended to help policyholders best position and present the claim to maximize coverage and avoid pitfalls and exclusions often raised by insurers under event cancellation policies. Organizations that do not have event cancellation insurance would be well advised to procure such insurance for any future event cancellations caused by another government shutdown or any other covered cause of loss. Working with knowledgeable insurance coverage counsel and insurance brokers during the policy application and procurement process will help ensure the most favorable policy language and limits to avoid the pitfalls discussed in this article.

Sergio F. Oehninger *is counsel and* ***Latosha M. Ellis*** *is an associate in the insurance coverage group in the Washington, DC office of Hunton Andrews Kurth.*

Sergio represents companies in complex insurance coverage disputes nationally and internationally. He can be reached at (202) 955-1854 or soehninger@HuntonAK.com.

Latosha Ellis helps corporate policyholders facing large losses recover from their insurers. She can be reached at +1 202 955 1978 or lellis@HuntonAK.com.

