

# COVID-19 and Event Cancellation Claims: Post-pandemic Developments

A Practical Guidance® Practice Note by Paul Ferland, Cozen O'Connor



Paul Ferland  
Cozen O'Connor

This practice note examines event cancellation coverage in general to identify the issues that will be at the forefront of legal disputes in the coming years. Further, it also examines how the few reported cases to date may or will affect coverage going forward. Finally, the practice note addresses the future and examines what the event cancellation insurance market might look like post-COVID-19. A general overview of the coverage provided by typical event cancellation insurance policies is also discussed.

For additional information about event cancellation coverage, see [COVID-19 Event Cancellation Claims Pre-Litigation](#), [COVID-19 Event Cancellation Claims Pre-Litigation Checklist](#), [COVID-19 Event Cancellation Claims Litigation](#), [COVID-19 Event Cancellation Claims Litigation Checklist](#), and [COVID-19 Insurance Litigation Resource Kit](#). See also New Appleman Sports & Entertainment Insurance Law § 16.01 (Event Cancellation Insurance Overview) and New Appleman Sports & Entertainment Insurance Law § 16.02 (Event Cancellation Insurance Key Practice Insights).

## Background

It is obvious by now that COVID-19 has significantly affected businesses, perhaps none more so than those businesses who plan and host special events. These types of insureds have seen events of all kinds cancelled because of the pandemic. Many such businesses procured event

cancellation insurance, which they no doubt thought would provide coverage for just this type of situation. In reality, though, many of these businesses have discovered that obtaining coverage under an event cancellation policy is complicated and involves fact-intensive inquiries concerning, among other things, the true cause of the cancellation, and whether the event is actually cancelled or just being rescheduled. The answers to these questions depend largely on the policy language and the facts of each case. Nearly two years after the onset of the COVID-19 pandemic, policyholders have filed lawsuits seeking coverage under event cancellation policies. While some rulings have trickled in, event cancellation case law remains sparse.

For additional information about event cancellation coverage, see [COVID-19 Event Cancellation Claims Pre-Litigation](#), [COVID-19 Event Cancellation Claims Pre-Litigation Checklist](#), [COVID-19 Event Cancellation Claims Litigation](#), [COVID-19 Event Cancellation Claims Litigation Checklist](#), and [COVID-19 Insurance Litigation Resource Kit](#). See also New Appleman Sports & Entertainment Insurance Law § 16.01 (Event Cancellation Insurance Overview) and New Appleman Sports & Entertainment Insurance Law § 16.02 (Event Cancellation Insurance Key Practice Insights).

## Typical Coverage

Businesses seek out event cancellation insurance because the cost of planning and hosting an event is often very expensive. Accordingly, businesses purchase event cancellation insurance to provide coverage for losses arising from the cancellation of such events. Typically, these are major events, such as professional sporting events, concerts, and conventions. Generally, event cancellation policies indemnify the policyholder for losses arising from

the unavoidable cancellation, curtailment, postponement, removal to alternative premises, or abandonment of an event, and for any enforced reduced attendance. Coverage is often written on an all-risk basis, meaning that coverage is triggered if the cancellation is beyond the control of the insured, subject to a list of exclusions. Alternatively, coverage may be provided on a specified perils basis, meaning coverage is triggered only by the happening of certain listed perils. A typical specified perils event cancellation policy may provide coverage for “Cancellation, Interruption or Postponement of the Event which is the sole and direct consequence of any sudden and accidental occurrence beyond the Insured’s control . . . .” Thus, the key coverage-related elements under this language are that:

- Coverage is provided not only for a full cancellation, but also for an “interruption” or “postponement” of an event
- The cancellation, interruption, or postponement must be the “sole and direct consequence of a sudden and accidental occurrence” –and–
- The occurrence must have been beyond the insured’s control

For additional insight, see New Appleman Sports & Entertainment Insurance Law § 16.03 (Assessing the Scope of Event Cancellation Coverage).

From this, we can identify the threshold issue for coverage to apply—identifying the cause of the cancellation, interruption, or postponement. This leads us to our first case analysis.

### **Is It Even a Covered Loss – What Is the Proximate Cause of the Loss?**

The threshold issue facing insurers and policyholders pertaining to COVID-19 and event cancellation insurance is identifying the proximate cause of the loss. Identifying the proximate cause of the loss is critical because, generally, coverage is only triggered if the loss is solely and directly caused by an accidental event beyond the insured’s control. Just a few months ago, the California Superior Court addressed this issue in a case involving the rock band Metallica and the cancellation of several South American concerts. In particular, the court refused to dismiss Metallica’s claim against its insurance carriers for alleged pandemic-related concert cancellations. [Frantic, Inc. v. Certain Underwriters at Lloyd’s et. al.](#), Case No. 21STCV21403 (Cal. Super. 2021). The court held that it could not dismiss the claim, where the “proximate cause” of the loss was not established. Metallica claimed that it cancelled a set of six South American shows, scheduled to start on April 15, 2020, due to the pandemic, and

submitted a claim to Certain Underwriters at Lloyd’s (“Underwriters”) under its all-risk cancellation, abandonment, and nonappearance policy. Underwriters refused to provide coverage for the postponements, and Metallica sued, alleging breach of contract, as well as tortious breach of the implied covenant of good faith and fair dealing.

Underwriters filed a motion to dismiss Metallica’s complaint based on application of the policy’s virus exclusion, which Underwriters relied upon to deny the claim. Metallica argued that the exclusion was inapplicable because Underwriters could not establish that the pandemic was the efficient proximate cause of the cancellations. To that end, Metallica relied upon the allegations in its complaint, citing travel restrictions, the duty to mitigate damages, the need to “flatten the curve,” and widespread stay-at-home orders as the cause of the show cancellations. To bolster their argument that it was not COVID-19 alone that caused the cancellations, Metallica argued that “COVID-19 and SARS-CoV-2 ‘still exist but travel restrictions and restrictions on social gatherings have lifted and eased . . . [and thus,] it was something more than just the virus/disease that caused the cancellations.’”

Addressing the issue of efficient proximate cause, the court held that when a loss is “caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss, or the excluded risk was the efficient proximate, or predominate cause.” Accordingly, the court found that Underwriters did not adequately investigate plaintiff’s claim, and that the complaint sufficiently alleged that COVID-19 was not the efficient proximate cause of the show cancellations.

*Frantic, Inc.* provides valuable guidance for insurers and policyholders alike in determining whether coverage applies. Establishing the proximate cause of the loss is a threshold issue in every coverage analysis. While insurers will want to rely upon virus exclusions to the extent possible, the burden to establish that the virus itself was the proximate cause of the loss will not be easy, particularly in light of government orders, travel restrictions, etc. It is important to note that the *Frantic* decision was not a final decision on the merits of the case, but rather simply a determination that Metallica had asserted allegations sufficient to defeat Underwriters’ motion to dismiss. It will be interesting to follow this case as it proceeds to determine whether the court is ultimately called upon to determine the proximate cause of the loss, and how that determination affects the application of virus exclusions in event cancellation insurance.

For more information about assessing the components of loss under event cancellation insurance, see New Appleman Sports & Entertainment Insurance Law § 16.03[2].

For guidance on assessing causation issues in the context of event cancellation coverage, see New Appleman Sports & Entertainment Insurance Law § 16.05.

### **Past the Threshold – Is It Excluded?**

While it is the insured's burden to prove coverage exists in the first instance, once that is established, event cancellation policies typically contain an array of exclusions, which may apply to preclude coverage. For purposes of this practice note, it is important to point out that one of those exclusions is usually a communicable disease exclusion, which typically reads as follows:

The Company will not pay for Cancellation, Interruption or Postponement which results directly or indirectly from:

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**Communicable Disease** or the threat or fear (whether actual or perceived) of **Communicable Disease**.

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For more information about examining exclusions from event cancellation coverage, see New Appleman Sports & Entertainment Insurance Law § 16.04.

A federal court recently ruled on the application of a similar communicable disease endorsement in connection with a COVID-19 claim. In *Radiological Soc'y of N. Am., Inc. v. Certain Underwriters at Lloyd's of London*, 2021 U.S. Dist. LEXIS 127306, the United States District Court for the North District of Illinois found the relevant exclusion to be poorly worded, but applicable, and granted the insurers' motion to dismiss. *Radiological* is an Illinois not-for-profit corporation, which hosts an annual conference for the radiological community, which is apparently the largest of its kind in the world. "The conference focuses on updates in radiological science and research, as well as best practices and techniques. Attendees include physicians, researchers, allied health professionals, and students in the field from around the world." *Radiological Soc'y of N. Am., Inc.*, 2021 U.S. Dist. LEXIS 127306, at \*2. The 2020 conference was to be held from November 17 to December 4 in Chicago, and would host more than 50,000 attendees. The plaintiff had purchased an event cancellation insurance policy from the defendant-insurers covering the period of January 29, 2020, to December 4, 2020. Significantly, the policy contained a communicable disease exclusion, and the

plaintiff elected not to purchase the optional additional communicable disease coverage. In May of 2020, the plaintiff was forced to cancel the 2020 conference due to COVID-19. The plaintiff submitted a claim to the defendant-insurers, who subsequently denied the claim based on the policy's communicable disease exclusion.

The plaintiff then filed a lawsuit against the insurers seeking a declaration that the insurers owed a duty to indemnify the plaintiff as a result of the cancellation and alleging damages for breach of contract. The insurers filed a motion to dismiss plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. The insurers' motion was based on the communicable disease exclusion, which read as follows:

#### **COMMUNICABLE DISEASE EXCLUSION**

THIS ENDORSEMENT CHANGES THE POLICY.

PLEASE READ IT CAREFULLY.

This insurance does not cover loss arising directly or indirectly as a result of any communicable disease or the threat or fear of communicable disease (whether actual or perceived)

This exclusion shall not apply unless prior to or simultaneously with the loss arising, the communicable disease is declared an epidemic or pandemic by the World Health Organization (WHO) or by Federal or Local Government Agency. However, any threat or fear of communicable disease, whether actual or perceived, is excluded.

ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED

*Radiological Soc'y of N. Am., Inc.*, 2021 U.S. Dist. LEXIS 127306, at \*5.

The court succinctly stated each side's arguments as to the application of the exclusion as follows:

According to defendant, this provision is capable of only one reasonable interpretation: the Policy does not provide coverage for, (i) losses arising as a result of any communicable disease that has been declared an epidemic or pandemic prior to or simultaneously with the loss arising, or (ii) losses arising as a result of threat or fear of a communicable disease, whether actual or perceived. Because plaintiff concedes that it cancelled the Event as a result of travel and gathering restrictions that were in effect after COVID-19 was declared a pandemic by the WHO, defendant argues

that plaintiff's claims are barred by the plain language of the policy.

Plaintiff, on the other hand, argues that the language is ambiguous and capable of being interpreted as providing coverage for cancellation as a result of a communicable disease that has been declared a pandemic. According to plaintiff, the first paragraph of the exclusion broadly denies coverage for a loss caused by a communicable disease whatsoever. Plaintiff then argues that the second paragraph is an exception to the first, and "allows coverage in the rare instance that a loss is caused by a communicable disease that had been declared an epidemic or pandemic," and that the exclusion and exception both make clear that the threat or fear of a communicable disease is excluded from coverage.

Id.

Although the court criticized the exclusion as "poorly written in the negative," it found in favor of the insurers, and granted the motion to dismiss. The court held that the exclusion was clear, unambiguous, and subject to only one reasonable interpretation—to exclude losses caused by a communicable disease that had been declared a pandemic. *Radiological Soc'y of N. Am., Inc.*, 2021 U.S. Dist. LEXIS 127306, at \*8. Further, the court held that plaintiff's interpretation was inconsistent with the plain wording of the exclusion:

To reach plaintiff's interpretation would require the court to substitute the word "if" for the word "unless" so that the operative language would read: "This exclusion shall not apply [if] prior to or simultaneously with the loss arising, the communicable disease is declared an epidemic or pandemic by the World Health Organization (WHO) or by Federal or Local Government Agency." But "unless" does not mean "if."

Id.

Accordingly, even where communicable disease exclusions are written poorly, courts will enforce them to bar coverage in connection with event cancellation insurance claims. Of course, not all communicable disease exclusions are written the same way, and each case must be viewed through the lens of the applicable policy's specific language. For instance, another typical exclusion precludes coverage for losses:

Directly or indirectly arising out of, contributed to by, or resulting from . . . any communicable disease

which leads to (a) the imposition of quarantine or restriction in movement of people or animals; (b) any travel advisory or warning being issued by a national or international body or agency; and in respect of a. or b. above, any fear or threat thereof (whether actual or perceived).

The communicable disease exclusion is now commonplace in event cancellation policies, but it is far from the only exclusion that may apply. Typical policies also exclude for things like the nonappearance of performer to appear at an event, withdrawal or lack of financial support for the event, and lack of public support (low ticket sales), all of which could theoretically arise from the COVID-19 pandemic. One other typical exclusion that is likely to result in litigation arising from COVID-19 reads as follows:

Circumstances which existed prior to the inception of this policy and which threatened to result in a covered loss if the Insured knew or should have known of such circumstances and failed to make them known to the Company in writing prior to inception.

One can envision a myriad of COVID-19-related (and non-COVID-19-related) scenarios where this exclusion could be applied. It will be important to monitor how these types of exclusions are being interpreted by courts as the pandemic continues.

### **If It Is Covered, What Exactly Is Covered?**

Once the threshold requirement for coverage is met, and if there are no applicable exclusions, the next question is what exactly is covered by an event cancellation insurance policy. There are two methods by which event cancellation coverage is valued. Coverage may be calculated based on an examination of the expenses incurred. Under this analysis, the insurer will examine the expenses incurred to date, and then subtract the gross revenue retained after refunds, and any savings the insured obtained through mitigation efforts. The second method by which event cancellation coverage is valued is through an examination of the net profit that would have been earned assuming the event actually took place. Either of these two methods requires significant cooperation from the insured. Further, it is possible that a particular policy may have an alternative method for calculating the loss. Thus, careful examination of each policy is required.

For insight on submitting a proof of loss under an event cancellation policy, see *New Appleman Sports & Entertainment Insurance Law* § 16.07.

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# What Is Next? Event Cancellation Developments in Response to COVID-19

It is clear that COVID-19 will continue to affect the event cancellation insurance market in both the short term and long term. In the short term, due to the sheer amount of claims, insureds can expect claim investigations to take longer, and for policy premiums to increase. In the long term, the majority of (if not all) event cancellation policies will continue to include exclusions for communicable diseases generally but will also likely contain a specific COVID-19 exclusion. Further, policies will offer optional coverage for such losses at significantly higher premiums. It is also possible that as the medical field continues to learn about the virus, insurance companies begin to charge higher premiums for COVID-19 event cancellation coverage for events that take place at times of the year when COVID-19 is more prevalent and lesser premiums for when the virus may prove to be less prevalent. No matter what the future holds for event cancellation coverage, COVID-19 will continue to affect the work of event planners. Potential insureds will be forced to identify new and unique ways to approach the event planning process, and to prepare themselves for potential cancellations or postponements due to COVID-19 in the event traditional insurance is not available to them.

Although it seems like it has been with us forever at this point, COVID-19 is relatively uncharted territory for insurers. As a result, insureds will continue to endure more lengthy claims processes for claims related to cancellation or postponement of events. Prior to the pandemic, claims for losses due to event cancellation or postponement occurred less frequently than they have since the onset of COVID-19. As such, insurance companies simply did not have the same capacity to handle these types of claims as they did for claims for property damage, automobile accidents, etc. This has led to an increase in the duration of claims investigations. Further, claims for coverage under an event cancellation policy due to COVID-19 or related lockdowns, mandated closures, etc. have inevitably led to disagreement between insurers and insureds as to the availability of coverage, which, in turn, results in litigation that will further lengthen the claims process.

Insureds currently seeking to procure event cancellation insurance will begin to find that most policies will contain specific exclusions for communicable diseases and COVID-

19-related cancellations and postponements. The amount of litigation that has accompanied COVID-19-related claims since the beginning of the pandemic has prompted insurers to revise existing communicable disease exclusion language to make it more specific, and to now directly exclude losses related to COVID-19. If an insurer does choose to offer such coverage, it will be an optional/additional part of the policy and insureds can expect to pay a hefty premium for inclusion. This is evident by the fact that in response to the growing number of claims related to COVID-19, insurers began to raise premiums early in 2020. It is likely that these rising premiums will continue in the short term.

We should also consider how coverage will be impacted as knowledge of the disease grows. For example, as the medical community continues to learn more about COVID-19 and its transmission, it is possible that the availability and cost of COVID-19 coverage under an event cancellation policy will depend upon the time of the year the particular event is to be held. With continued prevalence of COVID-19 vaccines and booster shots and their apparent ability to protect against significant effects of the virus, in the years to come there is a possibility that COVID-19 begins to have its own "season" similar to the flu. Should that point ever be reached, it is possible that insurers offer more available and less expensive COVID-19 event cancellation coverage for events held in the "off-season" and refuse coverage or charge higher premiums when the virus appears to spread more. Such a scenario will obviously affect an insured's decision-making process when planning an event and seeking coverage.

While aspects of the future of COVID-19-related event cancellation coverage may be uncertain, what is clear is that insureds will need to formulate new and unique ways to insure against the cancellation or postponement of planned events. For example, earlier this year, British rock band Marillion had trouble procuring insurance for the costs of its United Kingdom concert tour as insurers either refused to provide coverage in light of COVID-19 or demanded significantly higher premiums to provide coverage. [Insurance Crisis Sees Rock Band Ask Fans to Back Tour, FORBES ADVISOR \(Oct. 7, 2021\)](#). As such, the band sought the assistance of its fan base to help underwrite £150,000 of costs. The band asked fans "to pledge money that will be held on secure deposit and returned to them if the tour goes ahead as planned. " However, in the event the tour needed to be cancelled due to COVID-19, the fans' "money [would] be used to pay unavoidable expenses." This is an example of one avenue a potential insured has already taken to protect against losses due to COVID-19 related

event cancellations and strategies such as this may prove to be necessary in the years to come.

## Conclusion

The COVID-19 pandemic has had a profound impact on event cancellation insurance coverage, and brought to light many coverage issues never before analyzed in a new factual context. While it is too early to make any sweeping generalizations about how courts will handle these issues in the future, the cases making their way through the courts now will hopefully provide much needed guidance to policyholders and insurers alike. Further, the fact that many new event cancellation insurance policies will include specific COVID-19 exclusions, which will require further interpretation and analysis, only adds to the confusion. There are, however, a few consistent points to keep in mind when analyzing event cancellation insurance coverage:

- Regarding coverage for COVID-19 claims, it is imperative to identify the proximate cause of the loss.
- For coverage to be triggered in the first instance, the loss must have been beyond the control of the insured.
- For an insurer to rely on a communicable disease exclusion, it must be able to establish that the disease itself caused the cancellation of the event.
- Other exclusions might also apply, so a thorough reading and analysis of the policy is critical.

In the future, we can expect:

- More litigation on event cancellation issues
- More applicable exclusions to be included in policies, such as specific exclusions for COVID-19 –and–
- A significant increase in premiums should an insured choose optional communicable disease coverage, where offered

As we have seen with COVID-19 claims in the property insurance context, policyholders will continue to challenge coverage denials, even where it appears their prospects are bleak. We should expect that event cancellation insureds will bring the same relentless energy and vigor to coverage denials.

For more insight about continuing coverage litigation in the business interruption context, see [Business Interruption Insurance: Post-Pandemic Litigation Developments](#).

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### Practice Notes

- [COVID-19 Event Cancellation Claims Pre-Litigation](#)
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**Paul Ferland, Member, Cozen O'Connor**

Paul concentrates his practice in civil litigation involving first-party property insurance coverage. Paul has successfully represented clients in litigation, mediations, and arbitrations. He has significant experience successfully advising clients with regard to the multifaceted issues that arise out of damage to property including, but not limited to, natural disasters, explosions, fires, equipment failures, and collapses. He is also skilled at handling the difficult issues that can accompany property damage claims, such as business interruption claims, allegations of bad faith, and various contract and tort-based issues as well. Significantly, Paul has developed strong relationships in the London Market. To that end, Paul, has represented carriers and syndicates in connection with large energy losses, hurricanes, builder's risk losses, and extracontractual claims. Paul also frequently conducts seminars and workshops with London insurers to advise of recent trends and issues in U.S. law that may impact London Market members.

Paul earned his bachelor's degree from State University of New York – Brockport and his law degree, *cum laude*, from Seattle University School of Law.

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