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Insurance Lessons In The Wake Of Fyre Festival

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Law360, New York (May 8, 2017, 11:06 AM EDT) -- April 27, 2017, was scheduled to be the first day of the Fyre Festival. Guests were promised that the island of Great Exuma would be converted into an extravagant two weekends of music, “first-class culinary experiences and a luxury atmosphere.” Supermodels, artists and celebrity influencers plastered social media with their excitement about the event and their intent to attend.

However, it was promptly and widely reported that the festival lacked basic necessities such as food, water, shelter and medical care, and certainly did not provide the luxury accommodations promised for which attendees paid between $1,000 and $125,000. Guests reported fighting for mattresses inside tents used for disaster relief and cheese sandwiches being the closest thing to "cuisine." Within days, a class action lawsuit was filed claiming $100 million in damages and alleging that the entire production was a "scam." The experience — one likened to "The Hunger Games" — only worsened for both attendees and organizers after reports that guests could not board flights off the island and were then forbidden from leaving the airport.

Event Cancelation Insurance

Although it is too early to measure the economic fallout from this event, it will certainly be significant. Promoters and sponsors surely incurred considerable out-of-pocket expenditures organizing, advertising and promoting the event. Equally likely is that promoters, sponsors and local businesses on the island will report significant losses in projected revenue and profits.

This event and the negative attention it continues to receive is the most recent reminder of the significant economic risks posed by live events. To combat these risks, many insureds with a financial stake in such events — including promoters, advertisers, broadcasting organizations, venues, teams, leagues and concessionaires — rely on event cancelation insurance. This important risk management tool can protect an insured’s bottom line against the financial losses that accompany event cancelations and postponements, and insureds should take steps to familiarize themselves with the scope of coverage provided by their event cancelation policies.

Event cancelation coverage insures against loss arising out of the cancelation, interruption or postponement of a covered event, so long as the source of the cancelation or postponement is covered under the insured's policy. Coverage is potentially available for cancelations and postponements stemming from a wide variety of perils, including earthquakes, floods, fires, power failure, damage to the leased or rented venue, and problems associated with public transportation or roads leading to the venue. See, e.g., HDMG Entertainment LLC v. Certain Underwriters at Lloyd's of London, 2017 WL 367967 (D.S.C. Jan. 25, 2017) (cancelation of the Swamp Fox Biker Bash); MediaTec Pub. Inc. v. Lexington Insurance Co., 2011 WL 841245 (N.D. Ill. Mar. 8, 2011) (alleging lost revenue from two conferences due to 2008 financial crisis); New Orleans Dental Ass'n Inc. v. North American Insurance Co., 2007 WL 1302552 (E.D. La. May 3, 2007) (cancelation of annual meeting due to Hurricane Katrina).

However, event cancelation policies are generally nonstandard, meaning that terms and conditions vary widely from policy to policy. An insured must therefore carefully review its policy to determine the scope of coverage provided. The forms of financial loss covered under an event cancelation policy will likewise depend on the particular terms of the insured's policy.

Policies will frequently cover the out-of-pocket costs incurred by the insured prior to the cancelation, interruption or postponement of the event. Coverage might also be available for any contractual guarantees that the insured is obligated to pay. Lost profits and revenues may also be covered under an event cancelation policy, provided of course that the insured can establish with reasonable certainty the amount of the loss. This coverage could apply to, among other things, lost advertising or broadcasting revenue, lost ticket sales, or amounts paid to reimburse individuals who had already purchased tickets. Depending on the particular terms of the event cancelation policy at issue, the costs associated with rescheduling a postponed or interrupted event could potentially be covered as well. For instance, coverage might be available for the costs of organizing and marketing the rescheduled event, and the same is potentially true of costs incurred to transfer equipment and supplies to a new venue. An insured may also be able to recover the cost of renting or leasing a new venue for the rescheduled event.

Like all forms of insurance, event cancelation policies will typically contain a number of exclusions designed to limit coverage. For instance, cancelations or postponements stemming from weak ticket sales or lack of advertising interest are generally not covered, unless the lack of sales or advertising interest can be attributed to an otherwise covered cause. The same is generally true of canceled or postponed events resulting from a lack of funding. Furthermore, these policies may have exclusions for cancelations and postponements resulting from labor strikes or lockouts. Because they are often nonstandard, many common exclusions can be reworded or eliminated, sometimes without an additional premium. For instance, although some event cancelation policies contain exclusions for weather-related cancelations and postponements, such exclusions are commonly absent from event cancelation policies and can often be narrowed or eliminated. Consequently, an insured should carefully examine the proposed coverage and, if necessary, explore the possibility of negotiating for more favorable terms or purchasing supplemental coverages.

Event cancelation policies also typically require the insured to take all reasonably practical steps to minimize (or mitigate) financial losses resulting from the cancelation, postponement or interruption of a covered event. This requirement may lead an insured to reschedule a postponed or interrupted event rather than cancel it altogether. From a practical standpoint, contractual obligations may effectively require an insured to reschedule. Even absent such obligations, it may still make financial sense to reschedule an event — even one that is not likely to net the insured substantial profits. Insureds should consult with the insurer prior to rescheduling a covered event, if only to confirm that the insurer supports the decision to reschedule.

Because the mitigation requirement is meant to minimize an insured's losses (as well as the amounts paid out by the event cancelation insurer), an insured should be able to recover reasonable mitigation costs incurred in connection with a rescheduled event. For example, expenses associated with the planning, marketing and organization of the rescheduled event might be viewed as covered costs of mitigation. An insured should include these mitigation costs in its claim for coverage under an event cancelation policy. Of course, the mitigation requirement is not designed to force an insured to reschedule an event where doing so will only add to the insured's loss, nor should it obligate an insured to reschedule an event where doing so is neither practical nor commercially reasonable. For instance, in the case of the canceled New York City Marathon in 2012, weather conditions and other scheduled events in the area precluded any theoretical attempts and desire to reschedule that event.

As soon as it becomes clear that a scheduled event might be canceled, postponed or otherwise interrupted, an insured should carefully review its policy and strive to satisfy all terms and conditions. In particular, insureds should pay close attention to timing-related policy terms. Most event cancelation policies will require that the insured provide notice of a loss within a specified timeframe — sometimes as little as 30 days (or even less) following the loss. Because failure to comply with these notice requirements can complicate the pursuit of coverage, insureds should make every effort to provide formal notice within the required timeframe. This is true even if a particular cancelation or postponement receives significant media attention, as is certainly the case with the Fyre Festival. Many event cancelation policies will also require that the insured submit a detailed "proof of loss" within some specified timeframe following the loss. This gives the insured the opportunity to document its claim and describe the losses. Because an insured's claimed lost profits are generally judged against profits earned for prior events, an insured may need to turn over historical financial records to support its claim. Thus, insureds should maintain detailed and comprehensive records for all events.

The insured should also be aware of timing-related limitations concerning the right to initiate litigation against the insurer. The timeframe in which an insured can file suit may be dictated by the express terms of the policy, or by statute or regulation. Regardless, insureds should be mindful of the governing timeframe to ensure that its rights to pursue coverage is preserved.

Finally, when making a claim for coverage following an event's cancelation or postponement, insureds should not make any assumptions about what is covered under their policies. As noted above, the scope of coverage provided by event cancelation policies can vary widely, so insureds should carefully review their policies prior to making a claim to ensure that they frame their claim in a way that maximizes recovery and takes full advantage of the coverage provided.

Crisis Management Insurance

Attendees of the Fyre Festival specifically and attendees of festival/destination events generally rely on the promises an assurances advertised before investing the time and resources necessary to attend. Whether it be the artists scheduled to perform, the celebrity guests and/or a first-class experience, the festival and entertainment industry relies on the public perception that these events will deliver on their often unique promises (for which a premium is typically paid). As much as event organizers want to avoid legal battles stemming from a past event, they surely need to avoid a public relations disaster going forward. See, e.g., Cytosol Laboratories Inc. v. Federal Insurance Co., 536 F. Supp. 2d 80 (D. Mass. 2008) (involving product recall claim by pharmaceutical manufacturer).

All companies and organizations must be zealous about protecting their public image, both before and after a crisis. Crisis management insurance provides the financial flexibility to respond appropriately to a public relations issue. It generally obligates the insurer to advance the costs associated with responding to an event such as a man-made disaster or contamination event. This coverage is available regardless of fault and generally includes those occurrences that the insured believes will result in damages if crisis management services are not utilized (and any related negative media coverage). Crisis management services are those performed by a crisis management firm, including advising the insured on how to minimize potential harm, and maintain or restore public confidence in the insured. The policy also covers medical and funeral expenses, psychological counseling, travel and temporary living expenses, expenses to secure the scene and any other expenses preapproved by the insurer. The future success of the Fyre Festival may depend on how quickly the public forgets the images of tent cities and cheese sandwiches.

As with any type of insurance, the scope of this coverage depends on the terms of the particular policy. Insureds should review their policies — both when purchasing and making a claim. Finally, keep the following tips in mind to get the most out of your crisis management coverage:

- The policy must meet your needs so communicate expectations to your broker.
- Negotiate a broad definition of “crisis.” Since the concept of “crisis” is subjective, the policy should be tailored to define that term broadly enough to capture any event that may insured believes may damage its reputation. In addition, the insurer may attempt to limit or pre-select the crisis management and/or public relations firms available to the insured. If the insured also has a preferred firm or representative, it should be communicated to the insurer before the coverage is purchased.
- When making a claim for coverage, strive to satisfy all conditions in your policy. Carefully assess all policy conditions-particularly timing-related conditions that may purport to impose deadlines on when your company must give notice of a claim, submit a proof of loss, or initiate litigation against the insurer. Also be aware of conditions requiring certain individuals to become aware of the coverage-triggering occurrence that gives rise to the crisis event.

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