

# How The Music Industry Can Weather COVID-19

By **Carly Kessler and Lauren Birkenstock** (October 1, 2020)

Several industries have been severely hit by the COVID-19 pandemic, and the music industry is certainly no exception. Although artists have found creative ways to monetize their craft — such as through online streaming — restrictions and outright cancellation of live events have caused artists, touring companies, and in particular, concert venues to face significant financial losses from which there may be no recovery.

A June study by the National Independent Venue Association — an advocacy group for music venue owners and promoters founded in March — found that 90% of independent venue owners, promoters and bookers will have to close permanently within the next few months if they do not receive targeted government funding.[1] And Americans for the Arts said that as of Aug. 3, 94% of artists and creative workers reported income loss.[2]

As more live performances are cancelled or postponed, venues, artists and others are looking for relief from the financial impact caused by the coronavirus crisis. Potential risk allocation or transfer options include force majeure or similar escape clauses in contracts, specialty insurance policies, and financial assistance from government programs.

Insureds may be disappointed and surprised to discover business insurance generally does not cover financial losses suffered during the coronavirus crisis. For example, in March, after South by Southwest was forced to cancel its event, the co-founder and managing director, Roland Swenson, announced that SXSW did not have insurance coverage for the coronavirus and consequently had to lay off about one-third of its employees.[3]

With no end date for the pandemic in sight, it is difficult for artists to reschedule shows, as it is nearly impossible to predict what kind of turnout the event will have at a later date. And government orders limiting large gatherings in most states make it difficult to gauge when sizable events will be allowed again.

But while COVID-19 has in many ways devastated the creative community, the good news is that artists are still entering into recording and publishing deals, and continuing to create and share their music.

In this article, we summarize some potential resources for the industry to reduce or mitigate financial losses caused by COVID-19, discuss current lawsuits by music venues, and provide an overview of what is being done, and can be done, to protect this important industry.

## **Force Majeure in Music Contracts: Does it Excuse Performance?**

First, before considering insurance policies, force majeure provisions in music contracts may help to relieve a party of liability, as they may excuse performance under a contract if an act of God occurs, such as extreme weather, war or other unforeseeable circumstances outside of an artist's control.



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According to the Appellate Division of the Supreme Court of New York, First Department, in *United Equities Co. v. First National City Bank*, "The purpose of a force majeure clause is to limit damages in a case where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties."<sup>[4]</sup>

Usually force majeure clauses only delay the contract rather than negate it, so that the contract can move forward once the force majeure event ends. Prior to COVID-19, force majeure clauses were frequently overlooked, but now parties are more closely reviewing these clauses to determine, for example, if the force majeure clause includes a specific definition impacting coverage or if there is cap on the number of days for delaying an event.

A broad definition, for example, might excuse a party from performing, whereas a narrower definition of force majeure that specifically excludes or does not include pandemics may not excuse performance.

Generally speaking, the requirements of successfully invoking a force majeure clause vary with the particular contract.

Frequently, however, when it comes to COVID-19, a party may point to either the pandemic itself, a government order or the illness of a band member as the force majeure event.

Second, a party must show that steps were taken to try to avoid the effects of the force majeure event, but that it was ultimately outside of the party's control.

Finally, a party must acknowledge that the force majeure event makes it impossible to fulfill contractual obligations.

### **Insurance in the Music Industry: How Does it Work?**

Insurance policies can be dense reads, so it is important to thoroughly review them to determine whether damage or loss is covered. Commercial property insurance policies require physical loss or damage to covered property as a trigger of coverage. Physical damage generally requires a material alteration and insurers consistently deny that the coronavirus causes physical damage.

In addition, most policies contain virus, contamination, microorganism and loss of use exclusions which further preclude coverage.

Some venues, stadiums, concert halls, amphitheater arenas and other businesses holding live events purchase event cancellation insurance. Event cancellation policies are intended to insure unexpected loss resulting from cancellation, abandonment, interruption or postponement of the event.

To be covered, the loss must be caused by something beyond the insured's control such as adverse weather, terrorism, nonappearance, illness or unavailability of the venue due to fire or other damage. Coverage ultimately depends upon the wording of the policy.

Since the 2003 SARS outbreak, insurers generally exclude pandemic and SARS-related losses, but certain policies may nevertheless include limited coverage for COVID-19 losses if an insured purchased an insurance endorsement or rider to add coverage for communicable disease to their policy.

Typical exclusions include event cancellation as the result of communicable disease, civil commotion, financial failure, failure to make necessary arrangement, preexisting conditions and on-site construction.

To determine whether a loss is covered under an event cancellation policy, the insured must first prove the loss resulted from an "unexpected cause beyond [the insured's] control."<sup>[5]</sup> Second, the exclusions in the policy are reviewed to determine if coverage is precluded by an exclusion and/or limited by specific sublimits. For instance, communicable disease or pandemic exclusions would negate coverage.

When determining coverage, insureds should also look to which type of loss is covered. Usually, marketing, organization and other out-of-pocket expenses are covered; for an additional premium, profits and revenue may also be covered. Another common provision, and one that artists and venues should be aware of, are sublimits that limit losses to a set dollar amount. So even if a cancelled event is covered by insurance, it may only be covered up to a certain amount.

Finally, one issue that the music industry may face as a result of COVID-19 is negotiating a renewal of their insurance policies. As music insurance broker Steven Howell explained, "If your house is on fire, you can't then decide to buy insurance."<sup>[6]</sup> The foundation of insurance policies is that a loss must be fortuitous, or unforeseen.

Essentially, insurance has never been meant to provide coverage for a loss certain to occur.<sup>[7]</sup> Now that companies are currently experiencing losses from COVID-19, it is unlikely they will be able to add pandemic coverage when renewing event cancellation insurance.

### **Current Lawsuits: Are Music Venues Covered for Losses Due to COVID-19?**

Starting in March, as the virus spread like wildfire, stay-at-home orders mandated almost all music venues around the country to close, wreaking havoc on live performances and tours.

Although these orders put important safeguards in place to protect American citizens, they have also caused severe financial distress to venues and their employees. These vast closures, with no definite end in sight, threaten the viability of the live music scene overall, which has prompted music venues to file suit against their insurance carriers for failure to cover losses.

#### ***Raven and the Bow v. First Mercury Insurance Company***

After being mandated to shut its doors in March, Raven and the Bow, a San Francisco music venue as known as the Ivy Room, looked to its insurance company, First Mercury Insurance Company, to cover losses stemming from its forced closure.

In a complaint filed in the U.S. District Court for the Northern District of California on May 13, the Ivy Room asserts applicable state and local orders caused "direct physical loss ... in that [the Ivy Room's] property has been made useless and/or uninhabitable; and its functionality has been severely reduced if not completely or nearly eliminated."

First Mercury's denial letter explained that the Ivy Room's income loss "related to COVID-19 entirely arises out of such a virus" and the Ivy Room's insurance plan excludes loss resulting from or caused by virus or bacteria.

The Ivy Room seeks a declaration that its business income losses are covered and not precluded under the insurance policy and asserts breach of contract and breach of implied covenant of good faith and fair dealing claims arising out of First Mercury's alleged failure to provide coverage for its business losses.

In its answer, First Mercury largely denies the Ivy Room's claims.[8] On Sept. 3, the court scheduled a settlement conference for March 2021.[9]

### ***Till Metro Entertainment v. Covington Specialty Insurance Company***

A similar lawsuit followed just weeks later in the U.S. District Court for the Northern District of Oklahoma. On June 4, Till Metro Entertainment d/b/a The Vanguard, a concert venue in Tulsa, Oklahoma, filed a class action suit against Covington Specialty Insurance Company after Covington denied coverage for losses suffered due to COVID-19.[10]

On March 17, the City of Tulsa required the closure of indoor performance venues, including The Vanguard. Although the venue was permitted to reopen on June 1, it was required to follow Oklahoma's state mandate, requiring six feet of physical distance, meaning that they could not operate at full capacity, according to the complaint.[11]

The Vanguard alleges that its losses are recoverable under Covington's business income coverage and its special property coverage, which it argues, "does not include and is not subject to, any exclusion for losses caused by the spread of viruses or communicable diseases."[12]

The Vanguard seeks a declaration that it is entitled to COVID-19-related business losses under the policy, in addition to pre- and post-judgment interest on any amounts awarded, and attorney fees and costs of the lawsuit. Covington has not yet answered the amended complaint filed on July 28.

### **Protecting the Industry: Keeping the Music Alive**

As the number of cancelled live events increases, artists, venues and supporters of the industry are attempting to find ways to keep music alive and flourishing.

On June 18, hundreds of artists, including Billy Joel, Lady Gaga and Billie Eilish, signed onto a letter,[13] calling upon Congress to help club and concert venues struggling during COVID-19.

The letter, headed by the National Independent Venue Association, asked Congress for federal assistance for independent music venues, including tax relief, unemployment insurance, mortgage and rent forbearance, a business recovery fund and existing debt deferral.[14]

Also, some artists, through their touring companies, have taken advantage of the Paycheck Protection Program, a loan program originating from the Coronavirus Aid, Relief and Economy Security, or CARES, Act which was signed into law on March 27. Artists including the Eagles, Pearl Jam, Guns N' Roses and Green Day have all received federal funding to support their crews for current and future postponed tours.[15]

It was reported that the PPP loan obtained by the Eagles helped the group retain 50 jobs.[16] The PPP expired on Aug. 8, despite arguments that it should be renewed.

However, back in May, the Reviving the Economy Sustainably Towards A Recovery in Twenty-Two, or RESTART, Act<sup>[17]</sup> was introduced in Congress. If passed, the RESTART Act would establish a more flexible loan program with favorable repayment terms to help support performers, songwriters and studio professionals through 2020.<sup>[18]</sup>

On July 14, music's biggest record labels and organizations, including Warner Music Group Corp., Spotify Technology SA and Broadcast Music Inc. sent a letter to Congress in support of the act, declaring that "[k]eeping independent venues alive is a benefit not just for fans, employees, and artists; it's an investment in communities across America."<sup>[19]</sup>

And on Aug. 12, members of the Recording Academy met virtually for District Advocate Day to discuss the initiatives currently being taken in the entertainment industry to help artists and other creators.

David Rothman, manager of artists relations at American Express Co., and a professional member of the Recording Academy, explained:

The HITS Act and RESTART Act would be instrumental in helping performers and those that help them survive through these difficult times because the legislation would give them the financial backing to continue crafting their art.

The Help Independent Tracks Succeed, or HITS, Act, is a bipartisan solution that would allow artists and producers to choose to deduct 100% of their production expenses for records created in the U.S. in the year those expenses are incurred.

If artists still have live performances scheduled and can postpone them rather than cancel them, this might be their best bet, as it will allow them to defer any losses they might incur for cancellation. Artists can also continue entering into publishing and recording deals, which will allow them to create music while live events are on pause. And as the industry adapts to life during COVID-19, livestream events will become the new venues for the time being.

As to current COVID-19 insurance claims, taking a close look at the event cancellation insurance to determine coverage and making sure to comply with notification and mitigation obligations may help an insured to both better understand how postponing or cancelling an event may impact coverage, and to ensure no actions are taken against them in breach of the policy.

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[1] <https://www.npr.org/sections/coronavirus-live-updates/2020/06/09/873196748/americas-independent-music-venues-could-close-soon-due-to-coronavirus>.

[2] <https://www.americansforthearts.org/node/103614>.

[3] <https://www.nytimes.com/2020/03/12/arts/music/coachella-concerts-coronavirus.html>.

[4] [United Equities Co. v. First Natl. City Bank](#), 52 A.D.2d 154, 157, 383 N.Y.S.2d 6 [1st Dept.1976], *affd.* \*482 41 N.Y.2d 1032, 395 N.Y.S.2d 640, 363 N.E.2d 1385 [1977].

[5] *HDMG Entm't, LLC v. Certain Underwriters at Lloyd's of London Subscribing to Policy No. L009082*, 355 F. Supp. 3d 373, 380 (D.S.C. 2018).

[6] <https://www.theguardian.com/music/2020/mar/09/its-a-case-of-holding-your-nerve-festivals-face-coronavirus-insurance-disaster>.

[7] *HDMG Entm't, LLC v. Certain Underwriters at Lloyd's of London Subscribing to Policy No. L009082*, 355 F. Supp. 3d 373, 380 (D.S.C. 2018).

[8] <https://ecf.cand.uscourts.gov/doc1/035119419880>.

[9] <https://ecf.cand.uscourts.gov/doc1/035119681329>.

[10] <https://www.crowell.com/files/Till-Metro-Entertainment-v-Covington-Specialty-Insurance.PDF>.

[11] *Id.*

[12] *Id.*

[13] <https://www.nivassoc.org/artists-letter-to-congress>.

[14] <https://thehill.com/business-a-lobbying/business-a-lobbying/503614-artists-join-call-to-congress-to-help-club-and>.

[15] <https://www.rollingstone.com/pro/news/eagles-pearl-jam-guns-n-roses-ppp-loans-1025111/>.

[16] *Id.*

[17] The RESTART Act stands for "Reviving the Economy Sustainably Towards A Recovery in Twenty-twenty Act."

[18] <https://www.grammy.com/advocacy/news/academy-endorses-new-legislation-support-creators-venues-small-music-businesses>.

[19] <https://static1.squarespace.com/static/5e91157c96fe495a4baf48f2/t/5f0dc4586a8632767c2df7e6/1594737752236/Letter+In+Support+of+NIVA+%2B+RESTART.FINAL.pdf>.