

FILED
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**IN THE DISTRICT COURT OF CHEROKEE COUNTY
STATE OF OKLAHOMA**

CHEROKEE NATION;)
CHEROKEE NATION BUSINESSES, LLC;)
CHEROKEE NATION ENTERTAINMENT, LLC,)

Plaintiff,)

v.)

LXINGTON INSURANCE COMPANY, et al.,)

Defendants.)

LESA ROUSSEY-DANIELS, Court Clerk
CHEROKEE COUNTY

By [Signature] Deputy

Case No. CV-20-150

**THE NATION’S REPLY TO DEFENDANT HALLMARK SPECIALTY
INSURANCE COMPANY’S SUPPLEMENTAL OPPOSITION TO THE
NATION’S MOTION FOR PARTIAL SUMMARY JUDGMENT ON
BUSINESS INTERRUPTION COVERAGE**

Cherokee Nation, Cherokee Nation Businesses, LLC, and Cherokee Nation Entertainment, LLC, (collectively referred to in the singular and as the “Nation”) submits its Reply to Defendant Hallmark Specialty Insurance Company’s (“Hallmark”) Supplemental Opposition to Nation’s Motion for Partial Summary Judgment on Business Interruption Coverage. Additionally, the Nation incorporates by reference each the arguments set forth in its Combined Reply to Defendant Insurers’ Opposition to Nation’s Motion for Partial Summary Judgment on Business Interruption Coverage and Objection to Various Supplemental Authorities Submitted by Defendant Insurers. In support of its Motion and this Reply, the Nation states:

SUMMARY

Despite Hallmark’s characterization of the Nation’s claim, nothing about closing its facilities was voluntary. In March 2020, the COVID Pandemic Disaster was in full swing, and no one had perfect knowledge about the spread of COVID. Consequently, the States, the Country, and the Nation took preventative measures until businesses, like the Nation’s, could implement

mitigation protocols to operate safely. At no point did Hallmark or any other Defendant Insurer argue that it was unnecessary to close the Nation's facilities for that purpose; instead, Defendant Insurers seek to shrug off their obligations through hyper technical readings of their policies. In particular, Hallmark argues that a nuclear, biological, chemical, radiological exclusion (herein "NBCR") within its "excess policy" applies to preclude coverage, while also claiming that it is an "excess carrier" and therefore is not liable at the declaratory phase of litigation. The Court should reject these arguments.

First, Hallmark failed to complete an investigation to show that COVID actual contaminated the property, which is a prerequisite to application of the NBCR exclusion. Absent such investigation, the exclusion lacks the specificity to apply to pandemics generally.

Second, Hallmark fails to show that its NBCR exclusion applies to the circumstances contemplated here, as the exclusion omits any reference to the Nation's claim of losses due to the *pandemic*.

Finally, the question of Hallmark's status as an excess carrier is irrelevant because damages are not currently at issue.

MATERIAL FACTS

In response to Hallmark's Statement of Additional Undisputed Material Facts No. 1, the Nation states: the parties agree that the TPIP Policy is the contract at issue before the Court, and that the Court must assume for purposes of summary judgment that the excess policy exclusions are valid additions to the TPIP Policy; however, the Nation refutes that Hallmark's NBCR exclusion bars coverage as it does not use clear and express language applicable to the Pandemic. Further, the Nation reserves its fact-based defenses to the validity of the excess policy exclusions

for a later date.¹

ARGUMENTS AND AUTHORITIES

I. HALLMARK'S EXCLUSION DOES NOT APPLY.

1. *Hallmark failed to offer proof that a virus "dispersed, applied, was released at, or was exposed to" the Nation's property.*

As the Nation stated numerous times,² under an all-risk policy the burden is on the carrier to prove that an exclusion is applicable. See *Texas E. Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 564 (10th Cir. 1978). To facilitate that proof, Oklahoma law requires a carrier to conduct an investigation of the claim. *Buzzard v. Farmers Ins. Co.*, 1991 OK 127, 824 P.2d 1105, 1109 ("To determine the validity of the claim, the insurer must conduct an investigation reasonably appropriate under the circumstances."). Yet while relying on its NBCR exclusion—which the Nation first received as an attachment to Hallmark's Supplemental Opposition—Hallmark completely skips an essential step in its analysis by failing to offer any proof that COVID was actually "dispersed, applied, was released at, or was exposed to" the Nation's property as required by the exclusions terms. To be sure, Hallmark could have conducted swipes on the Nation's covered properties to confirm their assertion that a virus or COVID-19 was actually present, but it declined to do so.³ Without proof that a virus actually contaminated the Nation's property, the exclusion is inapplicable.⁴

¹ The Nation's Reply to Defendant Insurers' Opposition to Plaintiff's Motion for Partial Summary Judgment on Business Interruption Coverage at 2-4, fn. 3.

² The Nation's First Motion for Partial Summary Judgment on Business Interruption Coverage at 16-17.

³ *Buzzard v. Farmers Ins. Co.*, 1991 OK 127, 824 P.2d 1105, 1112 ("[T]he insurer must go about the business of investigating and evaluating the claim. . . . However, if the underinsurer does not conduct an investigation, or after investigation, determines that the likely worth of the claim exceeds the liability limits, prompt payment must be offered.").

⁴ The Nation already summarized *Duensing v. Traveler's Companies* in its Motion, where the Supreme Court of Montana found that viral contamination exclusions require proof of actual contamination to apply, and mere suspicion of viral contamination was insufficient. Defendant Insurers failed to refute the application of that case to the exclusions provided. See *Duensing v. Traveler's Companies*, summarized in Plaintiff's Motion for Partial Summary Judgment on Business Interruption Coverage at 14-15 [attached thereto as Exhibit 11].

2. Hallmarks' exclusion does not exclude suspected/imminent biological materials.

Similarly, it is undisputed that Hallmark's exclusion omits any reference to the *suspected* or *imminent* presence of a biological material or agent (much less a virus) within its exclusion. As other carriers' exclusions have utilized such terms to expand exclusions to omit *suspected/imminent* viral contamination,⁵ that omission by Hallmark's policy mandates coverage.⁶

3. Hallmark's NCBR exclusion applies to terrorist attacks, not the pandemic.

Hallmark relies on two separate endorsements within its "excess policy" to preclude coverage—one is a "nuclear, biological, chemical, radiological endorsement" and separate exclusion "asbestos, pollution, and NCBR," both of which adopt the exact same language.⁷ Commonly referred to as "NBCR" endorsements, the nuclear, biological, chemical, radiological endorsement is meant to apply to acts of terrorism involving nuclear, biological, chemical, or radiological materials⁸—*not a pandemic*. Because nuclear exclusions (drafted to address risks from

⁵ See *Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co.*, 218 F. Supp. 3d 1034, 1038 (D. Neb. 2016) (Excluding "[t]he actual or *suspected* presence or threat of any virus. . . ." (emphasis added)); *Ex. A-1* to Defendant Arch Specialty Insurance Company's Supplemental Opposition to Plaintiff's Motion for Partial Summary Judgment (Excluding "actual, *suspected*, alleged or *threatened presence*, discharge, dispersal, seepage, migrations, introduction, release or escape of 'Pollutants or Contaminants. . . ." (emphasis added)); *Pandemic and Epidemic Exclusion*, Hallmark, HP-PA-01-03-20 (Excluding loss "in connection with any Communicable Disease or *threat or fear of* Communicable Disease (*whether actual or perceived*) or *the outbreak of an Epidemic or Pandemic. . . .*" (emphasis added)) [Attached as *Ex. 2* to The Nation's Reply to Defendant Hallmark Specialty Insurance Company's Supplemental Opposition to Plaintiff's Motion for Partial Summary Judgment on Business Interruption Coverage]; *Communicable Disease Exclusion*, TPIP Policy (2020-2021) (Excluding loss due to "*the fear or threat (whether actual or perceived)* of a Communicable Disease." (emphasis added) [Attached as *Ex. 12* to the Nation's First Motion for Partial Summary Judgment on Business Interruption Coverage].

⁶ *Oklahoma Sch. Risk Mgmt. Tr.*, 2019 OK 3, ¶ 24; *Id.* n. 30 (The "burden is on the insurer to use clear and precise language if it wishes to restrict the scope of coverage and exclusions not stated with specificity will not be presumed or inferred.").

⁷ See *Ex. 4* and Subsection (C.) on *Ex. 5* at 2-3 to Defendant Hallmark's Supplemental Opposition.

⁸ See Aspen NCBR Coverage Fact sheet at 2 ("Coverage: We cover the U.S. and First World Countries, offering up to US\$25 million of coverage against property damage, business interruption and clean-up costs (including decontamination) resulting from a NCBR attack occurring within a 500 meter radius of an insured's premises.") https://www.aspen.co/globalassets/flyers-and-brochures/aspen_ins/2017-regional/asp206-aspen_nbr_insurance_factsheet_us.pdf (last visited Oct. 19, 2020); see also Ingrid Sapon, *Terrorism Risk and Insurance*, INSURANCE INSTITUTE OF CANADA ("Coverage for NCBR (nuclear, chemical, biological, and radiological risks) – the coverage is for incidents like anthrax and ricin attacks, viruses, and so-called dirty bombs, for example, where someone gets their hands on radioactive material and exposes others to radiation. Coverage for NCBR incidents is usually limited to a prescribed area, for example, a central business district, or perhaps within a 5-15 km (3-10 mile)

nuclear plants or nuclear energy accidents) and pollution exclusions (drafted to address hazardous environmental contamination) were not drafted explicitly for NCBR events, the need for an exclusion to address terror risks yielded a specific exclusion for NCBR.⁹

The words “dispersal, application or release of, or exposure to” within the NCBR exclusion strongly implicate volitional acts causing contamination to covered properties. Considering the intent behind the drafting of the NCBR exclusion, Hallmark’s attempt to tie together two unrelated risks (exposure to NCBR toxins and a pandemic) through an OSHA bulletin’s definition of “biological agent” in arguing for a broad interpretation is misplaced. Within the context of the NCBR exclusion, “biological materials or agents” refers to weaponized materials—which is an argument Hallmark has no proof of.

Hallmark knows how to exclude damage due to a virus from its commercial policies if it intended to do so, as a policy it issued in 2019 contained an exclusion for “**Loss Due to Virus or Bacteria,**” which states in Section B: “We will not pay for loss or damage caused by or resulting from any *virus*, or bacterium, or other microorganism that induces or is capable of inducing physical distress, illness or disease.” (emphasis added).¹⁰ Because Hallmark chose not to include its virus or bacteria endorsement within the policy issued to the Nation, it cannot now take the position that the language of its NCBR exclusion was meant to include losses caused by viruses,

radius of a specific location. The coverage is very expensive and not many insurers write it, according to Aon’s Gregory.”) <https://www.insuranceinstitute.ca/en/cipsociety/information-services/advantage-monthly/0217-terrorism-risks> (last visited Oct. 19, 2020); AON, *Terrorism Risk Insurance* (2019) (“Potential attackers who possess nuclear, chemical, biological or radiological (NCBR) weapons and detonate one in a densely populated commercial urban center could render a large area uninhabitable, resulting in significant loss of life, property and revenue. . . .”), <https://www.aon.com/getmedia/bed54cb7-ee1f-4cb1-875d-042b3f90df91/2019-Terrorism-Risk-Insurance-Report.aspx>.

⁹ See American Institute of Marine Underwriters, *BACKGROUND EXPLANATION FOR AIMU’S EXTENDED RADIOACTIVE CONTAMINATION EXCLUSION CLAUSE*, <http://www.aimu.org/forms/radioexcusionexp.html> (last visited Oct. 19, 2020) (“Since the events of September 11, 2001, marine and non-marine reinsurance markets in the United States and abroad have been made aware and have grown concerned over the impact of “NBC” terrorist events: losses which may arise from Nuclear, Chemical or Biological means.”).

¹⁰ See *Ex 1, Exclusion of Loss Due to Virus or Bacteria*, Hallmark.

as that would render its clear and express exclusion purposeless.¹¹

II. PANDEMICS WERE COVERED AND NOT EXCLUDED.

The fact is Hallmark could have included a pandemic exclusion into the TPIP Policy, but it simply failed to do so. Undeniably, insurers have contemplated such an exclusion and have used them in the past. Indeed, Hallmark cannot explain how its “NBCR exclusion” unambiguously applies to preclude the Nation’s losses from the pandemic, when it now issues a Pandemic and Epidemic exclusion in its policies:¹²

PANDEMIC AND EPIDEMIC EXCLUSION

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Notwithstanding any provision to the contrary within this policy or any endorsements thereto, it is understood and agreed,

This Contract shall exclude any loss, damage, liability, cost or expense or any other amount incurred by the (re)insured directly or indirectly arising out of, originating from, resulting from, caused by and or contributed to and or a consequence of and by, regardless of any other cause contributing concurrently or in sequence to the loss or otherwise, in connection with any Communicable Disease or threat or fear of Communicable Disease (whether actual or perceived) or the outbreak of an Epidemic or Pandemic, whether declared as such or not by any person or entity, including foreign and domestic governments and their representatives, agencies, and courts, the United Nations and its representatives and agencies, and similar persons and entities responsible for managing public health, or any action taken by any party, person, entity, company, agency, and/or government to treat or prevent the spread thereof.

To that point, courts have held that such changes in a policy give rise to an inference of vagueness, because “[changes] made in the revised policy pervasively illustrates ambiguity.” *Orren v. Phoenix Ins. Co.*, 288 Minn. 225, 229-30 (1970). And where policy language exists in the marketplace that

¹¹ *Pan Am World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1001 (2nd Cir., 1974); see also *McMillan v. State Mut. Life Assur. Co. of Am.*, 922 F.2d 1073, 1076-77 (3d Cir. 1990) (“If State Mutual desired to limit its liability...to only those felonious assaults committed during a period identified by the most restrictive understanding of ‘on authorized business,’ it was certainly at liberty to adopt more precise language to accomplish that purpose.”)(emphasis added).

¹² See Ex. 2, Pandemic and Epidemic Exclusion, Hallmark, form HP PA 01 03 20.

makes limits on coverage clear and an insurer does not utilize similar language, the insurer *cannot later argue that the limiting language applies to its policy*. *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1002–06 (2d Cir. 1974).¹³ By failing to include a pandemic exclusion, Hallmark has afforded the Nation coverage that is now owed.

III. DAMAGES ARE NOT CURRENTLY AT ISSUE.

Hallmark's role as an excess carrier is not relevant to the Nation's Motion. As discussed in the Nation's Motion and Reply to Defendant Insurers' Opposition, the issue before the Court is the question of coverage, not damages.¹⁴ Hallmark presents the same arguments the Court previously rejected in its Motion to Dismiss.¹⁵

CONCLUSION

The Nation respectfully requests the Court find the TPIP Policy issued by Defendant Insurers requires the Nation be indemnified for fortuitous losses related to the COVID-19 Pandemic Disaster under its business interruption coverage.

¹³ See also *McMillan v. State Mut. Life Assur. Co. of Am.*, 922 F.2d 1073, 1076-77 (3d Cir. 1990) (“*If State Mutual desired to limit its liability...to only those felonious assaults committed during a period identified by the most restrictive understanding of ‘on authorized business,’ it was certainly at liberty to adopt more precise language to accomplish that purpose.*”)(emphasis added).

¹⁴ “The Nation respectfully requests the Court find the TPIP Policy issued by Defendant Insurers requires the Nation be indemnified for fortuitous losses related to the COVID-19 Pandemic Disaster under its business interruption coverage.” The Nation's First Motion for Partial Summary Judgment on Business Interruption Coverage at 19; The Nation's Reply to Defendant Insurers' Opposition to Plaintiff's Motion for Partial Summary Judgment on Business Interruption Coverage at 14-15; “An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.” 12 O.S. § 2056 (D).

¹⁵ Compare Hallmark Specialty Insurance Company's, Aspen Specialty Insurance Company's, Aspen Insurance UK, LTD.'s Motion to Dismiss with Defendant Hallmark's Supplemental Opposition to Plaintiff's Motion for Partial Summary Judgment on Business Interruption Coverage. See also the Nation's Response to Hallmark Specialty Insurance Company's, Aspen Specialty Insurance Company's, Aspen Insurance UK, LTD.'s Motion to Dismiss at 10-12.

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This is to certify that on this 11th day of December 2020, a true and correct copy of the foregoing instrument was served by electronic mail and/or U.S. Mail upon the following:

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COMMERCIAL ADVANTAGE POLICY
CBP 059 01 07

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA
(INCLUDING FOOD CONTAMINATION
BUSINESS INCOME EXCEPTION)**

This endorsement modifies insurance provided under the following:

COMMERCIAL ADVANTAGE POLICY

The following provisions apply to **Section I – Property**:

- A. The exclusion set forth in Paragraph **B.** applies to all coverage under **Section I – Property** in all forms and endorsements that comprise this Policy, except as provided in Paragraph **C.** This includes but is not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.
- C. However, the exclusion in Paragraph **B.** does not apply to the following:
 - 1. Loss or damage caused by or resulting from "fungi," wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Policy; or
 - 2. Coverage otherwise provided under the Food Contamination Additional Coverage in Enhanced Coverages for Food Specialty Shops **CBP 005** (if that endorsement is attached to this Policy).
- D. With respect to any loss or damage subject to the exclusion in Paragraph **B.**, such exclusion supersedes any exclusion relating to "pollutants."
- E. The following provisions, if included in any form or endorsement in this Policy, are hereby amended to remove reference to bacteria:
 - 1. Exclusion of "Fungi," Wet Rot, Dry Rot And Bacteria; and
 - 2. Additional Coverage – Limited Coverage For "Fungi," Wet Rot, Dry Rot And Bacteria.
- F. The terms of the exclusion in Paragraph **B.**, or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Policy.



PANDEMIC AND EPIDEMIC EXCLUSION

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Notwithstanding any provision to the contrary within this policy or any endorsements thereto, it is understood and agreed,

This Contract shall exclude any loss, damage, liability, cost or expense or any other amount incurred by the (re)insured directly or indirectly arising out of, originating from, resulting from, caused by and or contributed to and or a consequence of and by, regardless of any other cause contributing concurrently or in sequence to the loss or otherwise, in connection with any Communicable Disease or threat or fear of Communicable Disease (whether actual or perceived) or the outbreak of an Epidemic or Pandemic, whether declared as such or not by any person or entity, including foreign and domestic governments and their representatives, agencies, and courts, the United Nations and its representatives and agencies, and similar persons and entities responsible for managing public health, or any action taken by any party, person, entity, company, agency, and/or government to treat or prevent the spread thereof.

For the purposes of this Contract, "Communicable Disease" shall mean:

illnesses due to infectious agents or their toxic products, which may be from a reservoir to a susceptible host either directly as from an infected person or animal or indirectly through the agency of an intermediate plant or animal host, vector, or the inanimate environment;

any disease that spreads from one human to another or from animal to human by either transmission of bacteria, viruses or other pathogen between the carrier and the infected person, or through any vector;

diseases, illnesses and/or infections that may be transmitted, directly or indirectly, from a person, animal, or inanimate environment and/or object; or

diseases, illnesses and/or infections that can be spread from person to person, animal to person, animal to animal, person to animal, and object to person.

For the purposes of this Contract, "Epidemic" shall mean an increase, often sudden, in the number of cases of a disease above what is normally expected in that population in that area.

For the purposes of this Contract, "Pandemic" shall mean an Epidemic that has spread over several countries or continents, usually affecting a large number of people.

This Exclusion precludes any and all loss, injury or damage arising out of or related to the presence of, suspected presence of, or exposure to Communicable Diseases and precludes any loss, damage, cost or expense arising out of the testing for, monitoring of, cleaning up of, removal of, containment of, treatment of, detoxification of, neutralization of, remediation of, disposal of, or any other response to or assessment of, the effects of Communicable Diseases.

This Exclusion applies whether or not the insured has sustained direct physical loss or damage to its building, property or premises, whether or not the insured has sustained a loss of functionality, whether or not the Communicable Disease is actually present in the insured's building, property or premises, whether or not the Policy contains civil authority coverage, whether or not a federal, state, or local government order prevents access to the insured's building, property or premises, whether or not the Policy otherwise contains any coverage for business interruption, contingent business interruption, extra expense, or coverage similar to those coverages, and whether or not any person employed at the building, property or premises sustained physical or personal injury due to a Communicable Diseases, whether or not any persons present at the building, property or premises sustained physical or bodily injury due to a Communicable Disease, and whether or not any person in contact with a person employed or present at the building, property or premises sustained physical or bodily injury.

The terms of this Exclusion or the inapplicability of this Exclusion to a particular loss do not serve to create coverage for any loss that would otherwise be excluded under this Policy. The Exclusion supersedes all other policy forms and endorsement which would otherwise provide coverage for the items excluded by the Endorsement.

All other terms and conditions remain unchanged.