

Defendant Insurer argue it was unnecessary to close the Nation's facilities for that purpose; instead, they seek to shrug off their obligations through hyper technical readings of their policies. The Court should reject XL's arguments for several reasons: *First*, XL fails to show that its microorganism exclusion applies to the Nation's claim. *Second*, XL's exclusion omits any reference to pandemics, and is therefore inapplicable.

DEFENDANT XL'S STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS

In Response to XL's Additional Undisputed Fact, 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 Defendant XL's microorganism 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.

ARGUMENTS AND AUTHORITIES

I. XL'S MICROORGANISM EXCLUSION DOES NOT APPLY.

1. XL failed to offer proof of a virus's "presence" on the Nation's property.

As the Nation stated numerous times,¹ under an all-risk policy the burden is on the carrier to prove that an exclusion is applicable to avoid proving indemnity when a loss occurs. *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 the carrier 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 XL failed to offer any proof that COVID-19 was actually present on the Nation's property as required by the

¹ The Nation's First Motion for Partial Summary Judgment on Business Interruption Coverage at 16-17.

exclusions terms. To be sure, XL could have conducted swipes on the Nation's covered properties to confirm their assertion that a virus or COVID-19 was actually present and the cause of loss to the Nation's claim, but it declined to do so.² Without proof that a virus actually contaminated the Nation's property, the exclusion is inapplicable.³

2. XL's exclusion does not exclude suspected/imminent viral presence.

Similarly, it is undisputed that XL's exclusion omits any reference to the *suspected* or *imminent* presence of a virus. As other carriers' exclusions have utilized such terms to expand the exclusion to omit coverage for viruses when proof of contamination is absent⁴ that omission by Landmark's policy mandates coverage.⁵

3. Microorganisms do not include viruses.

While XL argues for a favorable interpretation of the term "microorganism" which would include "virus," XL fails to mention that has previously omitted viruses from its "microorganism" definitions when it includes one. For example, in a builders risk policy, XL's definition for "microorganism" stated was "[a]ny microorganism, including but not limited to bacteria, fungus,

² *Buzzard v. Farmers Ins. Co.*, 1991 OK 127, 824 P.2d 1105, 1112.

³ 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].

⁴ 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].

⁵ *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.").

mold, mildew, yeast, spores, mycotoxins or any substances or gases, products or byproducts of any microorganism.”⁶ Notably, virus is absent from that definition. That is likely due to the fact that viruses are often not considered microorganisms. “Microorganism” is commonly defined as “a living thing that on its own is too small to be seen without a microscope,”⁷ or “an organism (such as bacterium or protozoan) of microscopic or ultramicroscopic size.”⁸ Because viruses are not living, they are not microorganisms.⁹

Undeniably, there are sources that consider viruses microorganisms, but as the *Pan Am* court pointed out: “it is not sufficient for the all risk insurers’ case for them to offer a reasonable interpretation under which the loss is excluded; they must demonstrate that an interpretation favoring them *is the only reasonable reading* of at least one of the relevant terms of the exclusion.” *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1000 (2d Cir. 1974) (emphasis added). Here, because this Court could find that a reasonable definition of “microorganism” does *not* include a virus, then the Nation prevails, as the language at issue here does not answer that description.¹⁰

II. XL’S EXCESS POLICY DOES NOT EXCLUDE PANDEMICS.

⁶ *Ex. 1*, Builders Risk Insurance Policy, X.L. America, Inc. at 19 (2017), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjP8cnf6rnsAhVrlnIEHR7kDEUQFjADegQIAxAC&url=http%3A%2F%2Fserff.disb.dc.gov%2FDownloadPdf.ashx%3Fid%3DXLAM-130920946&usg=AOvVaw0zIcorfSZ2_NQpsZTsa7LM.

⁷ *Microorganism*, CAMBRIDGE DICTIONARY, available at <https://dictionary.cambridge.org/us/dictionary/english/microorganism>.

⁸ *Microorganism*, MERRIAM-WEBSTER DICTIONARY, available at <https://www.merriam-webster.com/dictionary/microorganism>.

⁹ See, e.g., Laura Geggel, Are Viruses Alive?, *Live Science* (Feb. 25, 2017) (“Something that is not alive, such as a virus, does not have self-generated or self-sustaining actions.”) <https://www.livescience.com/58018-are-viruses-alive.html>; *What Are Microorganisms?*, UNIVERSITY OF BERGEN, Centre for Geobiology, Jan. 11, 2010 (“Microorganisms can be bacteria, fungi, archaea, or protists. The term microorganisms does not include viruses and prions, which are generally classified as non-living.”); Luis P. Villarreal, *Are Viruses Alive?*, SCIENTIFIC AMERICAN, Aug. 8, 2008, <https://www.scientificamerican.com/article/are-viruses-alive-2004/> (Viruses “have a certain potential, which can be snuffed out, but they do not attain the more autonomous state of life.”).

¹⁰ *Pan Am* at 1001, “The plausibility of several of these interpretations is convincing evidence to the ambiguity of the exclusion, and a compelling reason for applying *contra proferentem* against the all risk insurers.”

The fact is XL could have employed a pandemic exclusion into the TPIP Policy but failed to do so. Because pandemic exclusions already exist, the absence of such an exclusion within an all-risk type policy would *include* coverage for losses due to a pandemic. Insurers have contemplated such an exclusion and have used them in the past. For example, Defendant Liberty Mutual has previously excluded:

The actual or ***suspected presence or threat of any virus***, organism or like substance that is capable of inducing disease, illness, physical distress or death, whether infectious or otherwise, including but not limited to any epidemic, ***pandemic***, influenza, plague, SARS, or Avian Flu.

Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co., 218 F. Supp. 3d 1034, 1038 (D. Neb. 2016) (emphasis added); *see also* 2020-2021 TPIP Policy, Endorsement Number 5 (Communicable Diseases). Oklahoma courts have long recognized: “if an insurer desires to limit its liability under a policy, it must employ language that clearly and distinctly reveals its stated purpose.”¹¹ And “in cases of doubt . . . words of exclusion are strictly construed against the insurer.” *Max True Plastering Co. v. U.S. Fid. & Guar. Co.*, 1996 OK 28, 912 P.2d 861, 865. And courts have not been sympathetic to insurers who fail to include existing market provisions to limit liability in an all risk policy, as where policy language exists in the marketplace that 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).¹² By failing to include a pandemic exclusion, XL has afforded the Nation coverage that is now owed.

¹¹ *First United Methodist Church of Stillwater, Inc. v. Philadelphia Indem. Ins. Co.*, 2016 OK CIV APP 59, ¶ 34 (emphasis added); *See also Oklahoma Sch. Risk Mgmt. Tr. v. McAlester Pub. Sch.*, 2019 OK 3, ¶ 24. (“When an insurer creates specificity in one clause of a policy and then omits it in a similar context, the omission is considered purposeful and should be given meaning.”).

¹² *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).

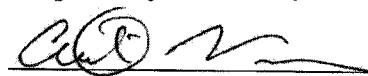
III. THE TPIP POLICY DOES INCLUDE A NEW COMMUNICABLE DISEASE EXCLUSION.

It appears XL is confused by the Nation's argument regarding the new Communicable Disease exclusion added to the TPIP Policy. The Nation does not assert that XL acted alone to add that exclusion to the TPIP Policy for the 2020-2021 term. But regardless of who added the exclusion, it demonstrates that: (1) the fear or threat of communicable disease (like COVID) is considered a physical loss as it had to be excluded, and (2) that the Defendant Insurers failed to use clear and express language to exclude it in the TPIP Policy until a day after the Nation filed its suit. And, XL cannot claim it did not incorporate the TPIP Policy language now, as it already admitted to it in the main opposition filed by Defendant Insurers.¹³

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.

Respectfully submitted,



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¹³ See Defendant Insurers' Opposition to Plaintiff's Motion for Partial Summary Judgment on Business Interruption Coverage at 3, Response to Plaintiff's Material Fact No. 1 ("Policy No. 017471589, like the other policies at issue . . . incorporate the Tribal First Policy Wording. . .").

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XL Insurance America, Inc. is revising 3 forms for the Builders Risk Insurance Policy product: KBM 000 (declarations page), KBM 050 (coverage form), and KBM 400 (endorsement). The revisions include, but are not limited to, revisions to the zones and zone definitions in KBM 050. Please see included redlines showing the changes made in each form as well as a forms directory.

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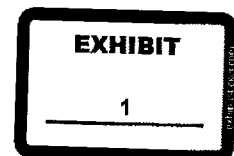
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Filing Fees

Fee Required? No
 Retaliatory? No
 Fee Explanation:



10. Hot Testing Period

That period beginning with the introduction into the "Insured Property" of feedstock, catalyst or similar media for processing and handling or the commencement of supply to a system and continuously thereafter whether or not any "Hot Testing" is continuous or intermittent, and terminating at the end of the number of consecutive days specified for the "Hot Testing" Period in POLICY TERM of the DECLARATIONS or the policy expiration, whichever occurs first.

11. Insured

The Named Insured and Additional Insured(s) described in the DECLARATIONS section of this policy.

12. Insured Project

The project undergoing construction or renovation as described in the DECLARATIONS section of this policy.

13. Insured Property

The "Insured's" interest in Permanent Works and Temporary Works as described in the PROPERTY INSURED section of this policy, located in the Territory, and not otherwise excluded.

14. Insured Value

The total value of all "Insured Property", including but not limited to cost of labor, expenses, materials, supplies, equipment, existing structures (if such coverage is specifically endorsed hereon) and such other charges, all whether provided by the owner, contractors or others, which will (or has) become a part of or will be (or has been) expended in the project.

15. Microorganisms

Any microorganism including but not limited to bacteria, fungus, mold, mildew, yeast, spores, mycotoxins or any substances or gases, products or byproducts of any microorganism.

16. Named Storm

A Named Storm is a weather-related event involving wind that has been assigned a formal name by the National Hurricane Center, National Weather Service, World Meteorological Association, or any other generally recognized scientific or meteorological association that provides formal names for public use and reference. A Named Storm includes hurricanes, tropical depressions, and tropical storms. A Named Storm begins at the time a Watch or Warning is issued by any of the aforementioned entities for the area in which the affected premises are located, and ends seventy-two (72) hours after the termination of the last Watch or Warning issued for that area by the same entity.

17. Occurrence

Any one loss, disaster or casualty, or series of losses, disasters or casualties arising out of one event.

When applying to the perils of tornado, "Windstorm", hail, riot, riot attending a strike, civil commotion, malicious mischief, "Flood" or "Earth Movement", if such perils are covered under this policy, one event shall be construed to be all losses, disasters or casualties arising from such perils during a continuous period of seventy-two (72) hours.