

IN THE DISTRICT COURT OF CHEROKEE COUNTY
STATE OF OKLAHOMA

FILED
DEC 11 2020

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

Plaintiff,

v.

LEXINGTON INSURANCE COMPANY, et al.,

Defendants.

LESA ROUSEY-DANIELS, Court Clerk
CHEROKEE COUNTY

By _____ Deputy

Case No. CV-20-150

**THE NATION'S REPLY TO DEFENDANT
ARCH SPECIALTY INSURANCE COMPANY'S SUPPLEMENTAL
OPPOSITION TO 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 Arch Specialty Insurance Company's ("Arch") 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 Arch'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 Arch or any other Defendant Insurer argue it was unnecessary to close the Nation's facilities; instead, Defendant Insurers seek to shrug off their obligations through hyper technical readings of their policies. In particular, Arch argues that its pollution and contamination exclusion within its previously undelivered excess policy applies to preclude coverage, while also claiming that as an excess carrier it is immune to the Nation's claim for declaratory relief. The Court should reject these arguments: *First*, Arch fails to show that its pollution and contamination exclusion applies to the Nation's claim as it omits any reference to losses cause by a pandemic and the exclusion only applies to claim for *physical damage*. *Second*, the question of Arch's status as an excess carrier is irrelevant because damages are not currently at issue.

MATERIAL FACTS

In response to Arch's additional Response to the Nation's Material Facts No. 3 and Additional Undisputed Material Facts Nos. 1-3, the Nation states: the parties agree that the TPIP Policy is the contract at issue before the Court, and 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 Arch's pollution and contamination 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. ARCH'S POLLUTION AND CONTAMINATION EXCLUSION DOES NOT APPLY.

It is undisputed that Arch's pollution and contamination exclusion provision omits any reference to a pandemic, rendering it inapplicable to the case at hand. That lack of specificity in

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.

the language makes its exclusion ambiguous when applied to this particular event as mitigation efforts forced by the Pandemic occurred regardless of whether COVID was suspected and actually present at a covered property.² Importantly, when Arch decided not to include an exclusion for pandemics it must have *intended* to provide the Nation coverage, because Oklahoma has long recognized that “if an insurer desires to limit its liability under a policy, it must employ language that clearly and distinctly reveals its stated purpose.” *First United Methodist Church of Stillwater, Inc. v. Philadelphia Indem. Ins. Co.*, 2016 OK CIV APP 59, ¶ 34 (emphasis added). 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. Courts have not been sympathetic to carriers who fail to utilize exclusions that exist in the market to clearly limit liability in an all-risk policy. *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1002–06 (2d Cir. 1974).³ Arch could have excluded pandemics from its excess policy but did not.

Regardless, the pollution and contamination exclusion—which the Nation first received as an attachment to Arch’s Supplemental Opposition—only applies to physical damage alone. Arch “Excess” Policy No. ESP7303916-02, Pollution and Contamination Exclusions Endorsement. Notably, the TPIP Policy provides coverage for both *physical loss* or *physical damage*, and the Nation seeks coverage for the former. There is no reason for this Court to doubt Arch meant the exclusion to only apply to *physical damage*, because they incorporated the Tribal First Policy as

² *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.”).

³ 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).

the basis for its excess policy,⁴ and “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.” *Oklahoma Sch. Risk Mgmt. Tr. v. McAlester Pub. Sch.*, 2019 OK 3, ¶ 24.

II. DAMAGES ARE NOT CURRENTLY AT ISSUE.

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.⁵ Each of the Defendant Insurer’s role as an excess carrier is quite simply a non-issue at this time. These are the same arguments the Court previously rejected in Defendants Hallmark’s and Aspens’ Motion to Dismiss.⁶

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.

⁴ 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. . .”).

⁵ “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).

⁶ Compare Hallmark Specialty Insurance Company’s, Aspen Specialty Insurance Company’s, Aspen Insurance UK, LTD.’s Motion to Dismiss with Defendant Arch Specialty Insurance Company’s Supplemental Opposition to Plaintiff’s Motion for Partial Summary Judgment. 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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CERTIFICATE OF SERVICE

This is to certify that on this 11th day of ~~November~~ ^{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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