

FILED  
COUNTY  
DEC 11 2022

LESA ROUSEY-DANIELS, Court Clerk  
CHEROKEE COUNTY

By \_\_\_\_\_ Deputy

Plaintiff,

LEXINGTON INSURANCE COMPANY, et al.,

**Defendants.**

Despite Landmark'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 how COVID spread. 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 Landmark or any other Defendant Insurer argue it was unnecessary for the Nation to close its facilities for that purpose; instead, Defendant Insurers seek to shrug off their obligations through hyper technical and unintended readings of their policies. In particular, Landmark argues a pathogenic or poisonous biological materials exclusion within its excess policy bars coverage under the TPIP Policy, but the Court should reject Landmark's arguments for at least the following reasons:

*First*, Landmark failed to complete an investigation demonstrating COVID actually contaminated the property, which is a prerequisite for its pathogenic or poisonous biological materials exclusion to apply. Absent such investigation, as here, the exclusion cannot be shown to apply to the Nation's loss.

*Second*, Landmark fails to show that its pathogenic or poisonous biological materials exclusion applies to a pandemic. The failure of Landmark to include a pandemic exclusion within its "excess policy" means that even if the exclusion were valid, coverage for the Nation's sustained losses would still exist under the Nation's policy with Landmark.

#### **MATERIAL FACTS**

Concerning Landmark's Response to the Nation's Material Fact No. 3, and Landmark's Statement of Additional Undisputed Material Facts Nos. 1-3, the Nation states: the parties agree 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 Landmark's Pathogenic or poisonous biological or chemical 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.<sup>1</sup>

### ARGUMENTS AND AUTHORITIES

#### **I. LANDMARK CANNOT SHOW THAT ITS EXCLUSION APPLIES.**

##### **1. *Landmark failed to investigate and offer proof that a virus actually contaminated the Nation's property.***

As the Nation stated numerous times,<sup>2</sup> under an all-risk policy the burden is on the carrier to prove 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 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 pathogenic material exclusion—which the Nation first received as an attachment to Landmark’s Supplemental Opposition—Landmark completely omits an essential step in its analysis by failing to offer any proof that a virus was actually on the premises. To be sure, Landmark could have conducted testing on the Nation’s covered properties to confirm the presence of COVID-19 *and* the cause of loss, but it declined to do so.<sup>3</sup>

To that point, Landmark’s pathogenic exclusion only applies to the “the discharge, dispersal, seepage, migration, release, escape or application of any pathogenic or poisonous biological or chemical materials,” none of which Landmark offers any proof. Because the burden to prove an exclusion is applicable lies with the carrier, Landmark’s pathogenic exclusion is

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<sup>1</sup> 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.

<sup>2</sup> The Nation’s First Motion for Partial Summary Judgment on Business Interruption Coverage at 16-17.

<sup>3</sup> *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.”).

inapplicable without proof of contamination.<sup>4</sup>

2. ***Landmark's exclusion does not exclude suspected/imminent viral contamination.***

Similarly, it is undisputed that Landmark's exclusion omits any reference to the *suspected* or *imminent* presence of a pathogenic material (much less a virus). As other carriers' exclusions have utilized such terms to expand the exclusion to omit coverage for viruses when proof of contamination is absent<sup>5</sup> that omission by Landmark's policy mandates coverage.<sup>6</sup>

II. **LANDMARK'S EXCESS POLICY DOES NOT EXCLUDE PANDEMICS.**

The fact is that Landmark could have employed a pandemic exclusion within the TPIP Policy but failed to do so. Because pandemic exclusions exist in the all-risk market, the absence of such an exclusion within the policy demonstrates an intent to provide pandemic coverage. Undeniably, 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.

<sup>4</sup> 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].

<sup>5</sup> 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].

<sup>6</sup> *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.").

*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 has 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.”<sup>7</sup> 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 utilize exclusion that exist within the market and clearly limit coverage as a carrier desires. *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1002–06 (2d Cir. 1974).<sup>8</sup> By failing to include a pandemic exclusion, Landmark has afforded the Nation coverage that is now owed.

### **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.

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<sup>7</sup> *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.”).

<sup>8</sup> 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).

Respectfully submitted,



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### **CERTIFICATE OF SERVICE**

This is to certify that on this 11<sup>th</sup> 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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