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Tribal Property Insurance Found To Cover COVID-19 Business Interruption Losses

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Matthew B. O'Hanlon
Partner

In an apparent first for tribal policyholders, an Oklahoma court recently granted summary judgment in favor of the Cherokee Nation on its claim for business interruption losses caused by COVID-19 in *Cherokee Nation et al. v. Lexington Insurance Company et al.*

The Cherokee Nation was insured under an all-risk Tribal Property Insurance Program policy. It argued that it reasonably and responsibly closed its properties due to the risk of direct physical loss or damage from COVID-19. The Nation also maintained that direct physical loss or damage occurs when a covered property is rendered unusable for its intended purpose, and that COVID-19 caused the Nation to shut down covered properties, engage in disinfection efforts, and implement protective measures before reopening.

The Nation argued that coverage for such protective measures was required under the policy, since the policy required that the Nation protect covered property from suspected or imminent harm like COVID-19. The Nation also argued that the policy contained no exclusion for pandemics, despite containing 52 other exclusions. The Nation noted further that the insurance carrier amended the renewal policy to add a specific communicable disease exclusion, thereby indicating that the policy in place during the pandemic did not contain such an exclusion.

In opposition to the Nation's motion for summary judgment, the insurers argued that the Nation had not demonstrated direct physical loss or damage

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—*i.e.*, arguing that there was no physical damage to covered property—and contended that contamination, pollution, and other similar exclusions applied. The insurers also argued that the Nation's efforts to preserve covered property from loss were not covered in the absence of a covered loss.

In granting summary judgment in favor of the Nation, the Oklahoma court determined that it is plausible that fortuitous direct physical loss could mean that property is uninhabitable, inaccessible, or dangerous to use because of intangible or non-structural sources, and that no applicable exclusions applied. Accordingly, the court granted summary judgment in favor of the Cherokee Nation on its claim for business interruption coverage.

Although other lawsuits under similar policies remain ongoing, this summary judgment ruling in favor of the Cherokee Nation represents a positive first ruling for policyholders who are part of the Tribal Property Insurance Program.