

The Issue is Joined: Whether Losses Incurred Due to the Coronavirus Constitute Direct Physical Loss or Damage

By

While there is much uncertainty about the extent and scope of the coronavirus' impact, one thing is certain: insurers and policyholders are sure to clash over whether their policies provide coverage for losses related to the coronavirus pandemic. In fact, that clash has begun.

Two Oklahoma Tribes that operate casinos and other businesses have filed suit against their insurers, seeking declarations that their insurance policies cover their losses and expenses related to coronavirus. In their straightforward and nearly identical Petitions, the Oklahoma Tribes allege:

"The United States of America became infected by COVID 19 resulting in a pandemic. **As a result of this pandemic and infection, the Nation's Property sustained direct physical loss or damage and will continue to sustain direct physical loss or damage covered by the policies** including but not limited to business interruption, extra expense, interruption by civil authority, limitations on ingress and egress, and expenses to reduce loss. **As a direct result of this pandemic and infection, the Nation's Property has been damaged**, as described above, **and cannot be used for its intended purpose.**"

Chickasaw Nation v Lexington Ins. Co. et al. (District Court of Pontotoc County, Oklahoma, CV-20-35); Choctaw Nation v Lexington Ins. Co. et al. (District Court of Bryan County, Oklahoma, CV-20-42). Emphasis added.

Keep it Simple. The insurance industry has staked out its position that business losses attributable to viruses generally and the coronavirus specifically do not trigger coverage on the premise that there is **no physical loss or damage**. So, the two Tribal Petitions have taken the correct approach: initiate a declaratory judgment action that sets out their position. As our preeminent mentor, *Gene Anderson*, told us when we started our careers as coverage lawyers under his guidance: **we don't lose or decide disputed issues at our desks - that's why we have judges and juries.** The main disputed coverage issue for losses related to coronavirus is clear, discreet and precise. We should turn to the courts to decide the issue, or at least set in motion a process that can lead to some form of resolution.

Another Red Herring—Foreseeability v Non-Foreseeability. We have written extensively about another existential threat: potential losses attributed to climate change. In that context, the insurance industry is staking out a position that such losses are and were foreseeable. To that end, the insurance industry argues, **allegedly foreseeable risks are uninsurable.** Contrast that with coronavirus. Now the insurance industry argues that **coverage for coronavirus is the type of risk that is so unforeseeable that it cannot be priced or subjected to their actuarial methodology.** The insurance industry's positions on these two issues are difficult to reconcile, other than through the lowest common denominator: both existential risks pose significant financial exposure. So, it's really not a question of **foreseeability or non-foreseeability, it's purely economics.** *Gene Anderson's admonition was quite prescient.*

If you have questions regarding how to handle insurance recovery in the wake of Coronavirus, please contact an attorney in Paley Rothman's insurance recovery group.



Robert Shulman (Insurance Recovery Chair) and Cristen Rose (Principal)