Tenth Circuit Holds That COVID Closure Orders Do Not Trigger Business Interruption Coverage

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Insight — January 20, 2022

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In *Goodwill Industries of Central Oklahoma v. Philadelphia Indemnity Insurance Co.*, — F.4th –, 2021 U.S. App. LEXIS 37802 (Dec. 21, 2021), the U.S. Court of Appeals for the Tenth Circuit joined other circuits in holding that government closure orders due to the COVID-19 pandemic do not trigger insurance coverage for loss of business income. The court reasoned that the temporary inability to use property caused by COVID shutdown orders doesn't involve a covered physical loss of property, and in any event, the policy's virus exclusion applied.

The Closure Order and the Insurance Policy

In March 2020, Oklahoma's Governor issued an executive order requiring businesses that were not considered part of the "critical infrastructure sector" to close to the public on March 25, 2020, due to the COVID-19 emergency. Id. at *2. Local closure orders followed. Id. In response, Goodwill halted its operations and suffered resulting losses. Id.

Philadelphia Indemnity insured Goodwill under a commercial lines policy. Goodwill's losses potentially implicated two policy provisions: the "Business Income" and "Period of Restoration" clauses. Under the Business Income clause, Philadelphia Indemnity agreed to "pay for the actual loss of Business Income [Goodwill] sustain[s] due to the necessary 'suspension' of [Goodwill's] 'operations' during the 'period of restoration.'" Id. at *3. A '"suspension"' '"must be caused by direct physical loss of or damage to property at [the covered] premises.'" Id.

Under, the Period of Restoration clause, the restoration period began "72 hours after the time of direct physical loss or damage … caused by or resulting from any Covered Cause of Loss at the [covered] premises" and ended "on the earlier of: (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable and similar quality; or (2) The date when business is resumed at a new

permanent location." Id.

The policy also contained a Virus or Bacteria Exclusion. It stated that Philadelphia Indemnity would not "pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Id.

The District Court Proceedings

Goodwill sued Philadelphia Indemnity seeking a declaration that the policy covered its losses related to the state and local shutdown orders. Id. at *4. The district court dismissed Goodwill's petition on two grounds. First, it ruled that coverage for a "direct physical loss" unambiguously required "a showing of tangible damage." Id. Second, it held that the Virus Exclusion excluded coverage. Id. After the court denied Goodwill's Rule 59(e) motion, Goodwill appealed the orders dismissing its petition and denying its post-trial motion.

The Tenth Circuit's Ruling on Business Income Coverage

The Tenth Circuit affirmed. Beginning with the clause providing coverage for loss of Business Income, the circuit court noted that Goodwill didn't allege "damage to" property but did claim "direct physical loss of" property. Id. at *6. The court rejected this claim. Consulting dictionary definitions, it observed that "'direct physical loss' encompasses only tangible destruction or deprivation of property." Id. at *7. But Goodwill had not alleged that its property had been destroyed or that it had lost physical control of it. Id. at *8. And Goodwill's temporary inability to use its property was not a "direct physical loss," because to hold otherwise would ignore the word "physical." Id. at *9. Therefore, the policy didn't cover its loss. Id. at *8-*9.

The circuit court then turned to the Period of Restoration clause. It ruled that the clause reinforced its conclusion that Goodwill suffered no "direct physical loss of or damage" to property. Id. at *9-*10. It noted that business income coverage lasted only during the "'period of restoration,'" which ended when the property "'should be repaired, rebuilt or replaced'" or when the business "'resumed at a new permanent location.'" Id. at *10. The court reasoned that coverage that lasts until property is repaired, rebuilt, or replaced "assumes physical alternation of the property, not mere loss of use." Id. (quoting *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021)). Here, Goodwill had nothing to repair, rebuild, or replace before resuming operations; it simply had to wait for the shutdown orders to be lifted. Id.

The court finally observed that its ruling comported with the decisions of every federal circuit court to have addressed insurance coverage for business interruptions caused by COVID closure orders. This included decisions by the Sixth, Seventh, Ninth, and Eleventh Circuits, as well as the "overwhelming majority" of federal district courts. Id. at *11 (collecting cases).

The Circuit Court's Interpretation of the Virus Exclusion

As an alternative basis for its decision, the Tenth Circuit examined the Virus Exclusion and held that the exclusion applied and barred coverage for Goodwill's loss. Id. at *12. The court first rejected Goodwill's contention that the exclusion lacked consideration, both because Goodwill never pled lack of consideration, and because Philadelphia Indemnity had expressly notified Goodwill of the new exclusion when the policy was renewed. Id. at *12-*13. The court likewise swept aside Goodwill's argument that Philadelphia Indemnity never obtained its consent to the exclusion. Id. at *14.

Finally, on the merits, the circuit court ruled that the Virus Exclusion unambiguously barred coverage. The exclusion disallowed coverage "for loss or damage caused by or resulting from any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness or disease.'" Id. As Goodwill conceded in its petition for declaratory relief, the Governor issued the shutdown order to address "'the impending threat of COVID-19 and/or the COVID pandemic'"; therefore, COVID-19 *caused* the restrictions imposed on Goodwill. Id. And it was undisputed that COVID was capable of causing physical disease or illness. Id. Thus, by its plain language, the exclusion precluded coverage. Id. at *16.

Stephen Masciocchi and Tina Van Bockern are attorneys in Holland & Hart's Denver office. Steve leads the appellate group at Holland & Hart and assists clients with high-stakes federal and state appeals and class actions. Tina helps clients appeal federal agency regulations, decisions, and orders, as well as unfavorable trial court judgments in a variety of substantive areas.

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