

10th Circ. Next Up To Hear If COVID-19 Losses Are Covered

By **Shane Dilworth**

Law360 (November 10, 2021, 3:35 PM EST) -- The Tenth Circuit on Monday will become the latest federal appeals court to hear oral arguments in a suit over denied coverage for COVID-19 business interruption losses, with Goodwill contesting an Oklahoma federal judge's dismissal of its case against Philadelphia Indemnity Insurance Co.

A Goodwill nonprofit affiliate in Oklahoma and the insurer, a Tokio Marine unit, will debate whether the Oklahoma business suffered a covered direct physical loss as a result of government orders that forced the nonprofit to temporarily suspend its operations in March 2020.

The appeals panel will also hear arguments on whether U.S. District Judge David L. Russell properly found that a virus exclusion in Goodwill Industries of Central Oklahoma's "all-risk" commercial general liability policy barred coverage for the losses.

Here's a look at the case and how it fits into the virus coverage litigation landscape.

What's at Stake

The Tenth Circuit could either go with the flow or buck the trend of its sister courts. Of those courts that have addressed the issue so far, all have upheld dismissals of policyholders' suits seeking coverage for business interruption losses caused by the government shutdown orders.

Since the Eighth Circuit's July ruling in a case called *Oral Surgeons*, federal appeals court decisions have come down like dominoes in favor of insurers. The Eleventh, Sixth and Ninth circuits upheld dismissals of COVID-19 business interruption suits in August, September and October. COVID-19 is the respiratory ailment caused by the coronavirus.

The Sixth Circuit recently dealt policyholders a second blow, finding that a communicable disease endorsement did not provide coverage for private preschools that failed to allege that anyone on their properties was diagnosed with COVID-19.

Counsel for policyholders have remained relatively unfazed by the growing list of case law at the federal appellate level, saying that the complaints in what they call "first wave" cases were not as scientifically detailed as later-filed cases. Additionally, early cases, such as the one brought by Goodwill, do not involve allegations that the coronavirus was present at a policyholder's property.

"The policyholder bar's attempt to downplay the significance of what has now become an avalanche of federal appellate court decisions favorable to insurers in the COVID-19 coverage war is weak," Scott Seaman of Hinshaw & Culbertson LLP told Law360.

Seaman, who represents insurers, said the opinions of the federal appeals courts are "well-reasoned and adhere to established principles of state insurance law." He pointed out that even though they "have fared worse in federal courts, policyholders still have lost more than three quarters of the decisions on motions to dismiss in state court."

Although there are less than a handful of active cases in federal courts within states governed by the Tenth Circuit, according to the Law360 Insurance Authority COVID-19 Case Tracker, a win for the industry would continue the trend in favor of insurers.

Bradley Levin of Levin Sitcoff LLP told Law360 that the potential for the Tenth Circuit to follow the majority of other federal appeals courts has some counsel for policyholders wringing their hands.

"While a circuit court may not be that influenced by what district courts are doing, what other circuit courts are doing is going to have a greater impact," said Levin, an attorney for policyholders who is currently representing L'Hostaria Ristorante in a dispute with Cincinnati Insurance Co. that is being appealed to the Tenth Circuit.

For example, Philadelphia wasted no time providing the Tenth Circuit with a copy of the Sixth Circuit's September ruling in a notice of supplemental authority, Levin pointed out.

Lisa Campisi, a partner at Blank Rome LLP who represents policyholders, told Law360 there has been a "snowball effect" among federal district courts that have piggybacked off each other's rulings in favor of insurers.

With regard to the case at the Tenth Circuit, Campisi said she thinks the court "can and should not simply join the bandwagon of some other federal appellate courts that have ruled in favor of the insurers."

"I think this court has some favorable arguments to work with," she said.

Although the Tenth Circuit is considered by legal experts to be conservative, that reputation will not likely play a role in how it decides the case, Levin said.

"I don't think that the court looks at cases through the lens of whether the outcome will be favorable to insurers or insureds," he said.

Seaman said he believes the Tenth Circuit "generally is viewed as a circuit that follows the law and honors contractual requirements."

How We Got Here

Goodwill's dispute with Philadelphia emerged after the insurer rejected a claim for business losses that occurred after Republican Oklahoma Gov. Kevin Stitt issued an order in March 2020 that forced nonessential businesses to temporarily close. The nonprofit complained in its lawsuit that it suffered a physical loss based on its inability to access its property.

Physical loss or damage, however, only occurs when there is a physical alteration that requires a period of restoration, Philadelphia countered.

A virus exclusion in the policy, the insurer said, also barred coverage for Goodwill's losses.

Judge Russell tossed the case in November 2020, ruling that Goodwill was unable to show that the government orders resulted in physical damage to its property. The judge also refused to allow the nonprofit to amend its lawsuit.

Goodwill asked the Tenth Circuit to review the case and requested that the Oklahoma Supreme Court answer questions as to whether policies covering physical loss or damage require physical alteration.

The Policyholder's Stance

Ambiguity in the policy due to its failure to define what constitutes physical loss or damage should be construed in favor of coverage, Goodwill has contended in its briefs. The policy at issue differs from the one in *Oral Surgeons*, which defined the term "loss," Goodwill argues.

"I think the principal argument is that any ambiguities in the policy should be construed in favor of the insured," Levin told Law360.

Levin explained that it is crucial to persuade the Tenth Circuit to find that the policy does not clearly define loss and damage.

"If an insurer is promising that it's going to compensate you for business interruption losses because of property damage and it's going to try to define what constitutes that, you better be pretty darned clear about what it is that you mean," Levin said. "The problem here is that insurers use the terms 'property loss or damage' and if you use disjunctive terms such as 'damage' and 'loss,' those words need to mean something different."

Campisi pointed out that such policy language has been around for decades and that two Oklahoma state courts have issued rulings in favor of policyholders. In one of the rulings, she said, the court "begged" insurers to define the terms, and they have not.

Goodwill has argued that differences in how courts have determined what constitutes physical loss or damage highlight the ambiguities in the policy language, warranting the court's own determination.

"The circuit court needs to look at these cases anew and with a pair of fresh eyes because you're talking about policy interpretation," Levin said.

Campisi told Law360 that in addition to showing that government shutdown orders resulted in a covered loss of use of its property, Goodwill will need to convince the Tenth Circuit that the policy's virus exclusion did not apply. The policyholder contends that the exclusion is inapplicable on grounds that it was unsigned and added without consideration.

The Insurer's Stance

The Tokio Marine unit maintains that physical loss or damage to a property can only be covered when there is physical alteration to the premises that results in the suspension of operations. Government imposed restrictions were not implemented as a result of damage to the property and are thus not covered, the insurer says.

Judge Russell did not err when applying the plain, ordinary meaning of the phrase "direct physical loss" to the terms of the policy and rightfully followed the majority of courts that have decided the issue, Philadelphia contends.

"These are issues on which a large number of federal and state courts have ruled in favor of the insurers, recognizing the importance of giving meaning to the words 'direct' and 'physical,'" Laura A. Foggan of Crowell & Moring LLP told Law360. "These words modify both 'loss' and 'damage' in the policy insuring agreement and make clear that financial losses from governmental restrictions such as those following COVID-19 are not covered by property policies."

"Most of Goodwill's arguments are focused on trying to convince the court that the policy terms are somehow ambiguous, but the terms themselves are straightforward, particularly in their application here," said Foggan. She represents insurers and has authored a number of amicus briefs submitted by the American Property Casualty Insurance Association and National Association of Mutual Insurance Companies.

"The insurer appears to be well-positioned on this appeal," Seaman said. "Judge Russell's ruling is well-reasoned and supported by controlling law and by the overwhelming majority of rulings across the country."

Finally, the insurer says the virus exclusion would apply even if Goodwill could show that its property was physically damaged as a result of the government orders.

Tokio Marine, Goodwill and their counsel did not respond to requests for comment.

According to court records, U.S. Circuit Judges Timothy M. Tymkovich, Scott M. Matheson Jr. and Gregory A. Phillips will sit on the panel for the Tenth Circuit.

Goodwill is represented by Jim T. Priest.

Philadelphia is represented by Phil Richards and Joy Tate of Richards & Connor and Stephen E. Goldman and Wytan M. Ackerman of Robinson & Cole LLP.

The case is Goodwill Industries of Central Oklahoma Inc. v. Philadelphia Indemnity Co., case number 21-6045, in the U.S. Court of Appeals for the Tenth Circuit.

--Additional reporting by Ben Zigterman, Eli Flesch and Shawn Rice. Editing by Aaron Pelc and Neil Cohen.