FILED
United States Court of Appeals
Tenth Circuit

December 21, 2021

Christopher M. Wolpert
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**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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GOODWILL INDUSTRIES OF CENTRAL OKLAHOMA, INC., d/b/a Goodwill Career Pathways Institute,

Plaintiff - Appellant,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Defendant - Appellee.

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AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION; NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES

Amici Curiae.

No. 21-6045

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**Appeal from the United States District Court**
**for the Western District of Oklahoma**
**(D.C. No. 5:20-CV-00511-R)**

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Jim T. Priest, Oklahoma City, Oklahoma, for Plaintiff-Appellant.

Stephen E. Goldman, Robinson & Cole LLP, Hartford, Connecticut (Wystan M. Ackerman, Robinson & Cole LLP, Hartford, Connecticut; Phil R. Richards and Joy Tate, Richards & Connor, Tulsa, Oklahoma, with him on the briefs) for Defendant-Appellee.

Laura A. Foggan, Crowell & Morning LLP, Washington, D.C., filed an amicus curiae brief on behalf of Defendant-Appellee for the American Property Casualty Insurance Association and National Association of Mutual Insurance Companies.

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Before **TYMKOVICH**, Chief Judge, **MATHESON**, and **PHILLIPS**, Circuit Judges.

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**MATHESON**, Circuit Judge.

Goodwill Industries of Central Oklahoma, Inc., a nonprofit organization, provides community services and operates retail stores and donation centers in central Oklahoma. It suspended operations on March 25, 2020, to comply with state and local orders regarding the COVID-19 pandemic. After suffering losses due to the shutdown, Goodwill sued its insurer, Philadelphia Indemnity Insurance Company ("Philadelphia"), under its commercial lines policy. The policy provided coverage for "loss of Business Income" when the insured must suspend its operations due to "direct physical loss of or damage to" covered property. App., Vol. 2 at 459.

The district court granted Philadelphia's motion to dismiss. It concluded the policy did not cover Goodwill's loss and that the policy's Virus Exclusion barred coverage. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

## I. BACKGROUND

### A. *Factual History*

On March 15, 2020, the Governor of Oklahoma issued an executive order declaring a state-wide emergency due to COVID-19. Under the order, businesses like Goodwill that were not part of the "critical infrastructure sector" had to close to the public beginning on March 25, 2020. App., Vol. 1 at 44. Mayors in Oklahoma City,

Norman, Moore, Ardmore, Guthrie, Stillwater, and Midwest City also ordered nonessential businesses to suspend operations. In response to the state and local closure orders, Goodwill halted its operations and suffered financial losses as a result.

B. ***The Policy***

Philadelphia insured Goodwill under a commercial lines policy effective from May 1, 2019 to May 1, 2020. Two key policy provisions governed the coverage issue here. First, the "Business Income" provision stated that "[Philadelphia] will 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.'" App., Vol. 2 at 459. A "suspension" "must be caused by direct physical loss of or damage to property at [the covered] premises." *Id.* Second, the "Period of Restoration" clause provided that the restoration period begins "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 "[e]nds 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.* at 467.

The policy also contained a Virus or Bacteria Exclusion. It stated that Philadelphia "will 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.* at 470.

### C. ***Procedural History***

In May 2020, Goodwill sued Philadelphia by filing a petition in the state district court of Cleveland County, Oklahoma. It sought a declaration that the policy "covers Goodwill's losses and expenses related to the state and local mandated closures of Goodwill's stores." App., Vol. 1 at 46. Philadelphia removed the case to the Western District of Oklahoma and moved to dismiss under Federal Rule of Civil Procedure 12(b)(6).[1]

The district court granted Philadelphia's motion to dismiss on two grounds. First, it concluded that coverage for "a direct physical loss unambiguously requires a showing of tangible damage." *Id.* at 14. Because "Goodwill failed to allege it suffered any tangible damage," which at a minimum required that Goodwill "allege that a substance entered its premises or attached to its surfaces," the court determined Goodwill's claim was "subject to dismissal." *Id.* Second, the court held the policy's Virus Exclusion was valid and excluded coverage. Goodwill moved to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), and the district court denied the motion.

Goodwill timely appealed (1) the order granting Philadelphia's motion to dismiss and (2) the order denying Goodwill's Rule 59(e) motion. Goodwill also moved to abate proceedings and certify questions to the Oklahoma Supreme Court related to the meaning

[1] Goodwill brought suit by filing a "Petition for Declaratory Judgment" in Oklahoma state district court. App., Vol. 1 at 39. It did not file a complaint or amended complaint after Philadelphia removed the case to federal district court. The petition is therefore the operative pleading here.

of the term "direct physical loss of or damage to" and the applicability of the Virus Exclusion.

## II. **DISCUSSION**

### A. ***Standard of Review***

"We review de novo the grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim." *Schell v. Chief Just. & Justs. of Okla. Supreme Ct.*, 11 F.4th 1178, 1186 (10th Cir. 2021) (quotations omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

We typically consider "only the contents of the complaint when ruling on a 12(b)(6) motion." *Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141, 1146 (10th Cir. 2013). But we also will consider "documents incorporated by reference in the complaint [and] documents referred to in and central to the complaint, when no party disputes [their] authenticity." *Id.* (quotations omitted).

### B. ***Oklahoma Law***

In this diversity suit, the substantive law of Oklahoma applies. *Edens v. The Netherlands Ins. Co.*, 834 F.3d 1116, 1120 (10th Cir. 2016).

Under Oklahoma law, "[t]he interpretation of an insurance contract and whether it is ambiguous is determined by the court as a matter of law." *Serra v. Estate of Broughton*, 364 P.3d 637, 641 (Okla. 2015). "When [the policy's] terms are unambiguous and clear, the employed language is accorded its ordinary, plain meaning

and enforced so as to carry out the parties' intentions." *Bituminous Cas. Corp. v. Cowen Constr., Inc.*, 55 P.3d 1030, 1033 (Okla. 2002) (emphasis removed). "The test for ambiguity is whether the language is susceptible to two interpretations on its face from the standpoint of a reasonably prudent lay person, not from that of a lawyer." *Am. Econ. Ins. Co. v. Bogdahn*, 89 P.3d 1051, 1054 (Okla. 2004) (quotations and alterations omitted). "[A] split in authority over whether a certain term is ambiguous will not, in itself, establish an ambiguity nor will the fact that the parties disagree." *BP Am., Inc. v. State Auto Prop. & Cas. Ins.*, 148 P.3d 832, 836 (Okla. 2005) (footnote omitted).

If, after application of these rules of construction, there is a "genuine ambiguity," courts construe the insurance contract in a way that is "most favorabl[e] to the insured and against the insurance carrier." *Dodson v. St. Paul Ins. Co.*, 812 P.2d 372, 377 (Okla. 1991). But "neither forced nor strained construction will be indulged, nor will any provision be taken out of context and narrowly focused upon to create and then construe an ambiguity so as to import a favorable consideration to either party than that expressed in the contract." *Id.* at 376.

### C. ***Analysis***

We affirm the district court's determination that (1) the policy's Business Income provision did not cover Goodwill's losses and (2) the Virus Exclusion applied.[2]

[2] In its petition for declaratory judgment, Goodwill alleged that its losses were covered under several of the policy's provisions, including the "business interruption, extra expense, and interruption by civil authority" provisions. App., Vol. 1 at 45. On appeal, Goodwill argues only that the policy's Business Income coverage applies. We therefore only address coverage under that provision.

1. **Business Income Coverage**

Goodwill does not claim "damage to property," but it does claim it suffered a "direct physical loss of" property when it suspended operations in compliance with COVID shutdown orders. It did not. The Business Income provision unambiguously covered only losses stemming from physical alteration or tangible dispossession of property. Neither occurred here. The policy's Period of Restoration clause reinforces this conclusion. So do the decisions of every other circuit and the vast majority of district courts to address this issue.

a. *Business Income Coverage Provision*

The policy does not define "direct physical loss," and the Oklahoma Supreme Court has not construed this term. We may consult dictionaries to supply the words' common meanings. *See Wiley v. Travelers Ins. Co.*, 534 P.2d 1293, 1294 (Okla. 1974); *Combs v. Shelter Mut. Ins. Co.*, 551 F.3d 991, 997 (10th Cir. 2008) (applying Oklahoma law).[3]

Dictionary definitions inform us that "direct physical loss" encompasses only tangible destruction or deprivation of property. The *Oxford English Dictionary Online* (3d ed. 2021) defines

[3] The Oklahoma Supreme Court has consulted the *Oxford English Dictionary* and *Webster's Third New International Dictionary*, among others, to derive the ordinary meaning of statutory terms. *See, e.g.*, *Consol. Grain & Barge Co. v. Structural Sys., Inc.*, 212 P.3d 1168, 1175 (Okla. 2009); *Dean Bailey Olds, Inc. v. Richard Preston Motor Co., Inc.*, 32 P.3d 816, 820 (Okla. 2000).

- "direct" as "[e]ffected or existing without intermediation or intervening agency; immediate";
- "physical" as "[o]f or relating to natural phenomena perceived through the senses (as opposed to the mind); . . . natural; tangible, concrete"; and
- "loss" as "[p]erdition, ruin, destruction."

*Webster's Third New International Dictionary* (2002) defines

- "direct" as "marked by absence of an intervening agency, instrumentality, or influence: immediate";
- "physical" as "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary"; and
- "loss" as "failure to keep possession: deprivation" or "destruction, ruin, perdition."

Based on these definitions, a "direct physical loss" requires an immediate and perceptible destruction or deprivation of property.

Goodwill has not alleged it suffered such a loss. Although the COVID orders temporarily restricted Goodwill's use of its property, Goodwill never lost physical control of its buildings or merchandise from its stores. It thus was not deprived of its property. Nor did COVID destroy Goodwill's property. The policy therefore did not cover its loss.

Goodwill contends that the term "direct physical loss" encompasses "intangible loss and/or property rendered unusable for its intended purpose due to orders stemming from the COVID-19 pandemic." Aplt. Br. at 17. We disagree. The words "intangible" and "physical" have opposite meanings. As one leading insurance law treatise explains, "[t]he requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal." 10A Steven Plitt et al., *Couch on Insurance* § 148:46 (3d ed. 2021) (footnotes omitted).

Goodwill also argues that the phrase "direct physical loss of or damage to" encompasses more than physical damage to property because "loss of" and "damage to" would otherwise be redundant. We disagree. The phrase "loss of" refers to dispossession of property—for example, via theft—and therefore has a different meaning from the term "damage to." As the Sixth Circuit explained, "[t]here is no need to read 'physical loss' to include a deprivation of some particular use of a property in order to give the phrase independent meaning. That possibility could occur whenever a policy holder is deprived of property without any damage to it, say a portable grill or a delivery truck stolen without a scratch." *Santo's Italian Cafe LLC v. Acuity Ins. Co.*, 15 F.4th 398, 404 (6th Cir. 2021).

Goodwill's temporary inability to use its property for its intended purpose was not a "direct physical loss." To conclude otherwise would ignore the word "physical" and violate the requirement that every part of a policy be given meaning. *See* 15 Okla. Stat. § 157; *see also BP America, Inc.*, 148 P.3d at 839.

b. *Period of Restoration clause*

The Period of Restoration clause reinforces the conclusion that Goodwill did not suffer a "direct physical loss of or damage" to property. The Business Income provision applied only "during the 'period of restoration,'" which "[e]nds on the earlier of: (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) The date when business is resumed at a new permanent location." App., Vol. 2 at 459, 467.

The policy thus covered only "direct physical loss of or damage to" property that could be remedied by the physical acts of repairing, rebuilding, or replacing the affected property or by relocating the insured's business. "That the policy provides coverage until property 'should be repaired, rebuilt or replaced' or until business resumes elsewhere assumes physical alteration of the property, not mere loss of use." *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021); *see also Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, --- F.4th ----, 2021 WL 5833525, at *4 (7th Cir. Dec. 9, 2021). After suspending business due to COVID restrictions, Goodwill had nothing to repair, rebuild, or replace before it could resume operations. Nothing "physical" happened to its property—Goodwill simply had to wait until the government lifted the restrictions.

Goodwill's attempt to harmonize its loss of use theory with the Period of Restoration clause fails. Turning to the dictionary, Goodwill notes that "repair" means "restore to a sound or healthy state," and "restore" means to be "brought 'back into existence or use.'" Aplt. Reply Br. at 8-9 (quoting *Merriam-Webster*).[4] Relying on this definition of "restore," Goodwill contends the period of restoration ended when it could "once again access and use its property." *Id.* at 9. This argument fails because it ignores the dictionary definition of "repair," the word used in the policy, and instead depends on the definition of "restore," a word that is included in the dictionary definition of "repair" but not used in the policy.

[4] Goodwill does not indicate which version or edition of *Merriam-Webster* it quotes.

c. *Other courts*

Other courts have similarly construed the terms at issue here. Every circuit to address the issue has held that identical or nearly identical business income provisions did not cover losses caused by COVID closure orders. *See Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885 (9th Cir. 2021); *Santo's Italian Cafe*, 15 F.4th 398; *Oral Surgeons, P.C.*, 2 F.4th 1141; *Sandy Point Dental, P.C.*, --- F.4th ----, 2021 WL 5833525; *Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co.*, 2021 WL 3870697 (11th Cir. Aug. 31, 2021) (per curiam) (unpublished). And the overwhelming majority of district courts to address the issue have so held. *See, e.g.*, *Image Dental, LLC v. Citizens Ins. Co. of Am.*, 2021 WL 2399988 (N.D. Ill. June 11, 2021); *Michael Cetta, Inc. v. Admiral Indem. Co.*, 506 F. Supp. 3d 168 (S.D.N.Y. 2020); *Till Metro Ent. v. Covington Specialty Ins. Co.*, 2021 WL 2649479 (N.D. Okla. June 28, 2021).

* * * *

Goodwill has not alleged that it suffered a "direct physical loss of or damage to" its property. We therefore affirm the district court's conclusion that Goodwill's losses were not covered under the policy.

2. **Virus Exclusion**

In the alternative, the Virus Exclusion was valid, enforceable, and barred coverage both under its plain language and under the efficient proximate cause doctrine.

a. *The Virus Exclusion was valid and enforceable*

Goodwill alleges the Exclusion was invalid or void because (1) "no consideration was provided in exchange for the addition of this endorsement," and (2) Philadelphia

"failed to obtain consent from Goodwill to add the [Exclusion.]" App., Vol. 1 at 43. We disagree.

i. Lack of consideration

Goodwill did not plead facts demonstrating lack of consideration. Its allegation was therefore a legal conclusion, and the district court was correct to disregard it. *See Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) ("[W]hen legal conclusions are involved in the complaint 'the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to those conclusions.'" (quoting *Iqbal*, 556 U.S. at 663) (alterations omitted)).

Goodwill's argument also fails because the 2019-2020 policy was a valid insurance contract supported by consideration. When an insurer and insured renew a policy containing a reduction in coverage, and the insurer sufficiently "alert[s] the insured to the reduction in coverage," then "the limitations [are] incorporated into the new policy," and "the renewal . . . is a new contract." *Wynn v. Avemco Ins. Co.*, 963 P.2d 572, 574 (Okla. 1998). When Philadelphia issued the 2019-2020 renewal policy, it included an "advisory notice to Policyholders" explicitly alerting Goodwill to the Virus Exclusion. *See* App., Vol. 1 at 70, 138.[5] By renewing the policy, Goodwill and Philadelphia entered a new contract supported by consideration—Goodwill paid a premium, and Philadelphia provided insurance coverage.

[5] To the extent Goodwill's state court petition for declaratory judgment implied that Philadelphia added the Exclusion "[a]t some point" after the parties entered their contract, App., Vol. 1 at 43, the record shows this was not the case, *see id.* at 138.

Philadelphia's contractual promises to insure Goodwill for losses covered by the policy and defend claims brought against Goodwill constituted consideration for the entire policy, which contained the Virus Exclusion. *See* 16 *Williston on Contracts* § 49:71 (4th ed.) (explaining that the consideration received by the insured includes "the dollar amount of protection set forth in the policy" and "the obligation of a liability insurer to defend claims brought against the insured and to indemnify the insured against successful claims"); *see also Thompson v. Bar-S-Foods Co.*, 174 P.3d 567, 574 (Okla. 2007) ("As a general rule, consideration exists as long as there is a benefit to the promisor or a detriment to the promisee.").

ii. Lack of consent

Goodwill also alleges that the Virus Exclusion was invalid or void because Philadelphia "failed to obtain consent from Goodwill to add the [exclusion]." App., Vol. 1 at 43. The district court did not address this allegation. It fails (1) for lack of factual support and (2) because Goodwill was not required to sign the exclusion.

First, Goodwill's petition for declaratory relief did not allege facts that Philadelphia "failed to obtain consent from Goodwill." Eventually, in its opposition to the motion to dismiss, Goodwill said Philadelphia never obtained consent because Goodwill never signed the exclusion. But this allegation was not included in Goodwill's petition. "[W]e will not consider evidence or allegations outside the four corners of the complaint in reviewing the district court's Rule 12(b)(6) dismissal." *Waller v. City & Cty. of Denver*, 932 F.3d 1277, 1286 n.1 (10th Cir. 2019).

Second, the Virus Exclusion was valid without Goodwill's signature. The Oklahoma Administrative Code requires the insured to sign an endorsement that eliminates or restricts coverage when it is "issued during the policy term." Okla. Admin. Code § 365:15-1-3(b)(20). But here the Virus Exclusion was included at the outset of the policy term, not added during it. The code provision therefore does not apply.

b. *The Virus Exclusion applied to Goodwill's alleged losses*

Goodwill contends that the Virus Exclusion did not bar its claim because the provision only applied when a virus was physically present at a covered property, which was not the case here. But under the policy's plain language and the efficient proximate cause doctrine, the Virus Exclusion applied to Goodwill's losses and excluded them from coverage.

i. Plain language

The Virus Exclusion unambiguously precluded 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." App., Vol. 2 at 316. "[A] reasonable business person would plainly contemplate that an exclusion for losses 'caused by or resulting from any virus' would extend to losses caused by immediate efforts to mitigate a viral outbreak." *100 Orchard St., LLC v. Travelers Indem. Ins. Co. of Am.*, 2021 WL 2333244, at *2 (S.D.N.Y. June 8, 2021).

As Goodwill conceded in its petition for declaratory relief, "the impending threat of COVID-19 and/or the COVID pandemic" led the Governor to issue the shutdown order. App., Vol. 1 at 44. Thus, COVID-19 "caused" the restrictions that forced

Goodwill to suspend its operations. No one disputes that COVID-19 is a virus "capable of inducing physical distress, illness or disease." The plain language of the Virus Exclusion therefore applied to and barred coverage of Goodwill's losses incurred due to the COVID shutdown orders.

Goodwill counters that the Virus Exclusion did not apply because its claim "was for losses due to the pandemic-related Orders—not the presence of the virus itself." Aplt. Br. at 33. This argument assumes that the Virus Exclusion applied only when the virus was physically present at an insured's property. But the Exclusion's text "in no way suggests that the virus must be present at the insured property for the exclusion to apply." *Causeway Auto., LLC v. Zurich Am. Ins. Co.*, 2021 WL 486917, at *5 (D.N.J. Feb. 10, 2021). Under its plain language, the Virus Exclusion was not limited to instances where the virus was physically present at or on Goodwill's property.

ii. Efficient proximate cause doctrine

Even if the government COVID restrictions and the virus itself could be viewed as distinct causes of loss, the efficient proximate cause doctrine would still exclude Goodwill's claim. Under this doctrine, embraced by the Oklahoma Supreme Court in *Shirley v. Tri-State Ins. Co.*, 274 P.2d 386, 388-89 (Okla. 1954), the cause "of a loss for the purpose of fixing insurance liability when concurring causes of the damage appear . . . is the dominant or efficient one that sets the other causes in operation," *Duensing v. State Farm Fire & Cas. Co.*, 131 P.3d 127, 133 (Okla. Civ. App. 2005) (quotations omitted).

Here, the dominant cause of Goodwill's losses—the efficient proximate cause—was the outbreak and spread of COVID-19. Goodwill acknowledges as much in its petition for declaratory relief. *See* App., Vol. 1 at 44 (stating that "the impending threat of COVID-19 and/or the COVID pandemic" was the impetus for the shutdown orders). Even if Goodwill's claims were "for losses due to the pandemic-related Orders," Aplt. Br. at 33, the spread of the virus triggered the orders. Thus, the Virus Exclusion applied under the efficient proximate cause doctrine. *See Mudpie, Inc.*, 15 F.4th at 894 (concluding an identical virus exclusion applied under the efficient proximate cause doctrine because COVID triggered the downstream forces that produced the plaintiff's claimed losses); *Mashallah, Inc. v. W. Bend Mut. Ins. Co.*, 2021 WL 5833488, at *4-5 (7th Cir. Dec. 9, 2021) (same).

## III. CONCLUSION

We affirm the district court's orders (1) granting Philadelphia's motion to dismiss and (2) denying Goodwill's motion to alter or amend the judgment. We deny Goodwill's motion to certify questions of law to the Oklahoma Supreme Court and grant amici's motion for leave to file an amicus curiae brief.