

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

GOODWILL INDUSTRIES OF)	
CENTRAL OKLAHOMA, INC.)	
d/b/a GOODWILL CAREER)	
PATHWAYS INSTITUTE,)	
)	Case No. 21-6045
<i>Plaintiff/Appellant,</i>)	
)	(On Appeal from W.D. Okla.
v.)	Case No. 20-cv-511-R)
)	
PHILADELPHIA INDEMNITY)	
INSURANCE COMPANY,)	
)	
<i>Defendant/Appellee.</i>)	

**APPELLANT'S MOTION FOR CERTIFICATION
TO THE OKLAHOMA SUPREME COURT**

Plaintiff/Appellant Goodwill Industries of Oklahoma, Inc. d/b/a Goodwill Career Pathways Institute (“Goodwill”), pursuant to 10th Cir. R. 27.4 and 20 O.S. § 1602, moves this Court to certify certain questions to the Oklahoma Supreme Court. Pursuant to Fed. R. App. P. 27 and 10th Cir. R. 27.1, Defendant/Appellee Philadelphia Indemnity Insurance Company (“PIIC”) has stated its opposition to this Motion. In support of this Motion, Goodwill states as follows:

I. PROCEDURAL BACKGROUND

This case presents the question of whether an all-risk insurance policy issued to Goodwill by PIIC (the “Policy”) provides liability coverage for the multi-million dollar losses incurred by Goodwill as a result of governmental closure orders issued

by State of Oklahoma and its cities in response to the COVID-19 pandemic. The district court summarized the status of the case as follows:

After state-wide orders prompted Goodwill to close its doors, Goodwill sought a declaratory judgment in state court on May 6, 2020 that “[it] sustained a ‘direct physical loss’ and/or ‘risk of direct physical loss’” from the mandated closures. On June 1, 2020, PIIC removed the action to this Court. PIIC then moved to dismiss the claims against it on the grounds that Goodwill failed to allege a “direct physical loss” under the Policy and because the Virus Endorsement precluded coverage.

On November 9, 2020, the Court granted PIIC’s motion to dismiss in its entirety for two reasons. First, the Court explained that “[a]lleging a direct physical unambiguously requires a showing of tangible damage.” Further, because Goodwill did not allege any tangible damage to its property, it failed to state a claim of a “direct physical loss” under the Policy. *Id.* Second, the Court explained that “[e]ven if [it] applied a more expansive definition of direct physical loss, its claim [was] still subject to dismissal because the Virus Endorsement expressly excludes coverage.”

R. 20-21 (internal citations omitted). As a result of the district court’s Order dismissing Goodwill’s claim for declaratory relief [*R. 7-17*], its entry of Judgment in favor of PIIC [*R. 18*], and its Order denying Goodwill’s Motion to Alter or Amend Judgment [*R. 19-30*], Goodwill filed its Notice of Appeal to this Court [*R. 31-32*].

II. ISSUES TO BE CERTIFIED

Goodwill respectfully requests the Court abate the present proceeding and certify the following questions to the Oklahoma Supreme Court:

1. Under Oklahoma law, does the ordinary meaning of the phrase “direct physical loss of or damage to” property require a tangible, physical alteration to the property, or does the phrase include

intangible losses, such as the inability to utilize or possess something in the real, material, or bodily world?

2. Is there an ambiguity in the phrase “direct physical loss of or damage to” where the Policy does not define the term such that it must be construed most favorably toward the insured and most strictly against the insurer?
3. Does the Policy’s Virus Endorsement bar coverage when government-ordered closures triggered by the spread of COVID-19 cause a business to close its doors and suffer financial losses?

As set forth below, because the questions presented in this appeal are distinctively state-law issues and their resolution may have broad implications, certification to the Oklahoma Supreme Court is warranted.

III. STANDARD FOR CERTIFICATION

Under Oklahoma law, this Court may certify a question to the Supreme Court of Oklahoma “if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling decision of the Supreme Court..., constitutional provision, or [Oklahoma] statute...” 20 O.S. § 1602. Certification is within the “sound discretion of the federal court” and “is appropriate when it will conserve the time, energy, and resources of the parties as well as of the court itself.”

Hartford Ins. Co. v. Cline, 427 F.3d 715, 716-17 (10th Cir. 2005) (internal citations omitted).

In *Pino v. United States*, 507 F.3d 1233 (10th Cir. 2007), Judge (now Supreme Court Justice) Gorsuch opined on the considerations affecting certification, stating in pertinent part:

A motion for certification may be brought independently and anew to the court of appeals. *See* 10th Cir. R. 27.1. Such a motion requires us to determine whether certification is appropriate as a de novo matter without regard to the district court's assessment. *See Soc'y of Lloyd's v. Reinhart*, 402 F.3d 982, 1001-02 (10th Cir. 2005); *Copier v. Smith & Wesson Corp.*, 138 F.3d 833, 838-40 (10th Cir. 1998)

* * *

The standards governing our independent analysis stem from both state and federal law. Under Oklahoma law, the Oklahoma Supreme Court has the power to answer a question certified to it by any federal court "if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling decision of the Supreme Court or Court of Criminal Appeals, constitutional provision, or statute of this state." Okla. Stat. tit. 20, § 1602.

* * *

While we apply judgment and restraint before certifying, however, we will nonetheless employ the device in circumstances where the question before us (1) may be determinative of the case at hand and (2) is sufficiently novel that we feel uncomfortable attempting to decide it without further guidance. *Delaney v. Cade*, 986 F.2d 387, 391 (10th Cir. 1993); *see Lehman Bros. v. Schein*, 416 U.S. 386, 391, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974) (finding certification particularly appropriate where the legal question is novel and the applicable state law is unsettled); 17A Wright & Miller et al., *supra*, § 4248. In making the assessment whether to certify, we also seek to give meaning and respect to the federal character of our judicial system, recognizing that the judicial policy of a state should be decided when possible by state, not federal, courts. *See Lehman Bros.*, 416 U.S. at 391, 94 S. Ct. 1741 (noting federal certification of state law questions "helps build a cooperative judicial federalism"); *Delaney*, 986 F.2d at 391 (certifying because of "our judicial policy that matters of state law should first be decided by state courts").

Id. at 1236-37 (internal footnote omitted). Based on the considerations set forth by Justice Gorsuch, certification is warranted in this case.

IV. CERTIFICATION OF THE ISSUES IS PROPER

Both considerations for certification are met here. First, an opinion of the Oklahoma Supreme Court on the questions presented may be determinative of the case at hand. It is highly probable the Oklahoma Supreme Court's answer to the questions will determine the outcome of this case in much the same way as its opinion did in the *Pino* case.

In *Pino v. United States*, 273 F. App'x 732 (10th Cir. 2008), after the Oklahoma Supreme Court addressed the certified question posed by this Court, Judge Gorsuch wrote an opinion reversing the summary judgment granted by the trial court:

As our certification order explains in greater detail, Michael and Amy Pino appealed to us the district court's grant of summary judgment in favor of the United States on their wrongful death claim brought under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and 2671, *et seq.*, asking us to certify to the Oklahoma Supreme Court the following question: As of September 1-2, 2003, did the Oklahoma Wrongful Death Statute, Okla. Stat. tit. 12, § 1053, afford a cause of action for the wrongful death of a nonviable, stillborn fetus?

For reasons explained in our certification order we did so, and the Oklahoma Supreme Court subsequently answered our certified question in the affirmative, holding that the state's wrongful death statute did afford a cause of action for the wrongful death of a nonviable, stillborn fetus as of September 1-2, 2003. See *Pino v. United States*, 183 P.3d 1001, 2008 OK 26, ¶ 24 (Okla. 2008). The court

explained that the Oklahoma legislature's 2005 amendment to the wrongful death statute, which expressly allowed claims like the Pinos', was a clarification and not a change in the law, and that the existence of a cause of action before this amendment was "consistent with the purposes of [the wrongful death statute], our decisions in *Evans* [v. *Olson*, 550 P.2d 924 (Okla. 1976)], *Graham* [v. *Keuchel*, 847 P.2d 342 (Okla. 1993)], and *Nealis* [v. *Baird*, 996 P.2d 438 (Okla. 1999)], and with Oklahoma public policy." *Id.*

This answer is definitive and dispositive of the Pinos' summary judgment appeal. The district court granted summary judgment for the United States specifically and only because it held no such cause of action existed under Oklahoma law as of September 1-2, 2003. D. Ct. Order at 2-3. With the Oklahoma Supreme Court now having concluded otherwise, we are obliged to reverse the district court's grant of summary judgment and remand the case for further proceedings not inconsistent with this court's orders or the opinion of the Oklahoma Supreme Court.

Id. at 733.

Just as Pinos' loss in the trial court was reversed by virtue of the Oklahoma Supreme Court's answer to a certified question, so too may Goodwill's loss in the trial court be reversed by the Oklahoma Supreme Court's answers to the proposed certified questions. The district court dismissed Goodwill's claim for declaratory relief because Goodwill failed to allege a "direct physical loss of or damage to its property," finding that such language requires allegations of tangible, physical alteration of property. If the Oklahoma Supreme Court finds that the phrase also encompasses intangible loss (Question No. 1) or that its meaning is ambiguous (Question No. 2), the district court's ruling should be reversed. Similarly, if the Oklahoma Supreme Court finds that a Virus Endorsement or Exclusion is

inapplicable to losses stemming from government-ordered closures (Question No. 3), the district court's ruling would not stand.

On January 19 of this year, a federal court in the Northern District of Ohio certified similar questions to its state Supreme Court in *Neuro-Commc'n Servs., Inc. v. Cincinnati Ins. Co.*, No. 4:20-cv-1275, 2021 WL 274318 (N.D. Ohio, Jan. 19, 2021), *certified question accepted*, 162 Ohio St. 3d 1427 (2021), stating:

Dozens, if not hundreds, of cases seeking coverage for losses related to the pandemic under policies similar or identical to that at issue in this case have been filed in both federal and state courts in Ohio.... As these cases wend through the various court systems, differing interpretations of Ohio contract law by different courts threaten to undermine the uniform application of that law to similarly situated litigants.... The certification procedure invoked here will allow the Supreme Court of Ohio to decide these questions and bring uniformity to the application of state law to these policies.

Id. at *1-2. This same approach should be adopted by the Tenth Circuit in this case.

Second, the issues presented in this case are indisputably novel, and the Court would benefit from the guidance of the Oklahoma Supreme Court on a topic that is inherently a matter of state law. In fact, the Oklahoma Supreme Court has two cases currently pending which involve similar issues, *i.e.*, whether a liability policy with “business interruption insurance” provides coverage for a closure of a business due to COVID-related government orders: (1) *Choctaw Nation of Oklahoma v. Lexington Ins. Co., et al.* Oklahoma Supreme Court Docket 119359; and (2) *Cherokee Nation v. Lexington Ins. Co.*, Oklahoma Supreme Court Docket

119413.¹ These (now consolidated) cases are already on the Oklahoma Supreme Court's docket and raise insurance policy issues comparable to the ones raised in this case. It would work a great injustice to Goodwill if the Oklahoma Supreme Court issued an order in its pending cases finding for the policyholders while this Court rendered a ruling against Goodwill without availing itself of the Supreme Court's guidance on the state law.

In *Branch v Farmers Ins. Co.*, No. 00-6385, 2001 WL 1028385 (10th Cir. Sept. 4, 2001), *certified question answered*, 55 P.3d 1023 (Okla. 2002), this Circuit did something similar in addressing issues of insurance coverage, acknowledging insurance contract interpretation is a matter of state law, stating:

...(w)e certify the above questions to the Oklahoma Supreme Court on our own motion pursuant to 10th Cir. R. 27.1 because **there is a burgeoning number of similar cases and the core question—the requirements of Oklahoma insurance law in construing these insurance contracts—is a matter of state law likely to be finally resolved by the state’s highest common law court.** Because we do not find the current Oklahoma case law dispositive and because the answers may be determinative of important issues in this and other cases, we certify these questions for instructions based on the facts as developed in the cases discussed above.

Id. at *3 (emphasis added); see also *Morgan v. State Farm Mut. Auto Ins. Co.*, 819 F. App'x 614, 617 (10th Cir. 2020), *certified question answered*, --- P.3d ---, 2021 WL 2099602 (Okla. May 25, 2021) (certifying novel issues of Oklahoma law

¹ The Orders on appeal from these cases can be found at *Aplt. App. Vol. 4* at 858-72 and *Aplt. App. Vol. 3* at 837, respectively.

regarding insurance contracts to the Oklahoma Supreme Court, recognizing “the importance of allowing [state courts] to decide questions of state law and policy, and thus define state law”) (quoting *State Farm Mut. Auto. Ins. v. Fisher*, 609 F.3d 1051, 1058-59 (10th Cir. 2010)).

V. CONCLUSION

Therefore, because the issues presented in this case are novel and the Court would greatly benefit from the guidance of the Oklahoma Supreme Court on issues determinative of the pending case, Goodwill urges the Court to certify these questions and abate the appeal pending disposition by the Oklahoma Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2021, I electronically filed the foregoing using the Court's CM/ECF system which will send notification of such filing to the following:

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