

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION**

**PATIENTS CARE MEDICAL SUPPLY,
INC.**

CIVIL ACTION NO. 21-637

VERSUS

JUDGE: _____

FEDERAL INSURANCE COMPANY

MAGISTRATE: _____

COMPLAINT

Now into Court, through undersigned counsel, comes the Plaintiff, **PATIENTS CARE MEDICAL SUPPLY**, for its complaint against Defendant, **FEDERAL INSURANCE COMPANY**, states as follows:

I. PARTIES

1. Plaintiff, **PATIENTS CARE MEDICAL SUPPLY, INC.** is a domestic corporation that owns, operates, and manages a medical equipment supply company in Vermillion Parish, State of Louisiana with its domicile address at 8907 Maurice Avenue, Maurice, Louisiana.
2. Defendant, **FEDERAL INSURANCE COMPANY** (hereinafter referred to as “FIC”) is a foreign insurance company domiciled in the State of Indiana, who insures Plaintiff under a commercial insurance policy. Defendant, FIC, is a subsidiary or affiliate of The Chubb Corporation d/b/a Chubb Group of Insurance Companies.

II. JURISDICTION AND VENUE

3. This Honorable Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because the Plaintiff and Defendant are citizens of different states and the amount in controversy exceeds \$75,000.

4. Venue in this case is proper in this Court pursuant to 28 U.S.C. § 1391, because the events or omissions that are the subject of this action occurred in Vermillion Parish, Louisiana, which is completely and entirely within the United States District Court for the Western District of Louisiana. In addition, this case involves a contract of insurance that pertains to a property that is situated entirely within the United States District Court for the Western District of Louisiana.

III. COMPLAINT

A. Insurance Policy

5. PCMS is a durable medical equipment and supply company, supplying items such as hospital beds and diabetic shoes to nursing homes and other establishments. In addition to these items, PCMS also sells items such as ostomy and urological supplies, walkers, rollators and bedside commodes at its store location.
6. FIC, a Chubb Company, sold an Inland Marine Insurance Policy No. 0671-55-05 (“Policy”) to Plaintiff. The Policy has a policy period of December 20, 2019 to December 20, 2020 to the Named Insured, Patients Care Medical Supply Inc., the Plaintiff herein. A copy of the Policy is attached as Exhibit A and is incorporated by reference in its entirety.
7. Plaintiff faithfully paid policy premiums to Defendant, specifically to provide, among other things, additional coverages in the event of business interruption or closures by order of Civil Authority and for business loss for property damage.
8. The Policy is an all-risk policy, meaning that it covers damage to property and lost income from all types of risks unless they are specifically excluded.
9. Defendant is the effective and liable insurer of the Policy.
10. The Policy provides coverage, among other things, for: 1) business interruption; 2) Extra

Expense; and 3) Civil Authority.

11. Under the heading “Coverage,” Defendant agreed to pay for direct physical loss or damage to scheduled miscellaneous articles which are listed or described on the Schedule Of Scheduled Miscellaneous articles caused by or resulting from a peril not otherwise excluded.
12. The Policy extends coverage for direct physical loss or damage to scheduled miscellaneous articles caused by or resulting from actions by a civil authority in an attempt to avoid further loss or damage caused by or resulting from a peril not otherwise excluded.
13. In the Business Income and Extra Expense Coverage Form, Defendant also agreed to pay for Plaintiff’s actual loss of Business Income and Extra Expenses due to the actual impairment of its operations during the period of restoration caused by or resulting from direct physical loss or damage by a covered peril to covered property at Plaintiff’s premises or within 1,000 feet of Plaintiff’s premises.
14. The Policy extends coverage for the actual loss of business income and extra expense Plaintiff incurs due to the actual impairment of Plaintiff’s operations when access to Plaintiff’s premises is prohibited by order of civil authority as the direct result of direct physical loss or damage to property away from such premises by a “covered peril” to property in within one (1) mile of Plaintiff’s insured property. This additional coverage is identified as coverage under “Civil Authority.”
15. The Policy provides additional coverage for Pollutant clean up or removal if the pollutants were part of scheduled miscellaneous articles and the spread or dispersal of the pollutants is caused by or results from a peril not otherwise excluded.
16. The policy defines “pollutants” under the additional coverages form to include “viruses or

other pathogens.”

17. The Policy defines “Scheduled Miscellaneous Articles” as “property which you own, or which is owned by others and in your care, custody or control.”
18. The Policy defines “Covered Property” as “covered property in the form(s) shown above, applicable to the covered direct physical loss or damage.
19. The Policy does not define “premises” but under the heading “Schedule” applicable to the Business Income and Extra Expense Coverage Form describes the premises as “unless otherwise stated.”
20. The policy does not define the terms “impairment,” “physical,” “loss,” “damage,” or “direct.”
21. “Operations” is defined as Plaintiff’s business activities occurring at its premises, unless otherwise stated, including the tenantability of Plaintiff’s premises.
22. “Period of Restoration” is defined to mean the period of time that begins with the date of direct physical loss or damage and continues until Plaintiff’s operations are restored, with reasonable speed, to the condition that would have existed had no direct physical loss or damage occurred.
23. “Business Income” is defined to mean net income and continuing expenses.
24. The presence of virus or disease can constitute physical loss of or damage to property, as the insurance industry has recognized since at least 2006. When preparing so-called “virus” exclusions to be placed in some policies, but not others, the insurance industry drafting arm—Insurance Services Office, Inc. or “ISO”—circulated a statement to state insurance regulators that included the following:

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building

surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses. Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case.

25. The ISO also created a new “amendatory endorsement” to exclude loss due to virus or bacteria from coverage afforded by certain insurance policies. The ISO amendatory endorsement states that there is “no 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” (the “Virus Exclusion”).
26. Some insurers added the Virus Exclusion to their policies that provide Business Income (also referred to as “business interruption”) coverage. FIC’s Coverage Forms, however, do not include, and are not subject to, any exclusion for losses caused by pandemics, viruses or communicable diseases.
27. Losses due to COVID-19 is a covered peril under Defendant’s Policy with the Business Income and Extra Expense Coverage Form.
28. Losses due to a global pandemic and associated closure orders is a covered peril under Defendant’s Policy with the Business Income and Extra Expense Coverage Form.
29. Plaintiff was required to suspend and/or reduce operations to reduce the spread of COVID-19 and further losses occasioned by its spread on Plaintiff’s premises.
30. Losses caused by COVID-19 and the related orders issued by local, state, and federal authorities triggered the Business Income, Extra Expense, and Civil Authority provisions of Defendant’s policies.

B. COVID-19 and the Covered Losses

31. Coronavirus (COVID-19) is a highly contagious virus that has rapidly spread and continues to spread across the United States. It is a physical substance, human pathogen and can be present outside the human body in viral fluid particles. According to the CDC, everyone is at risk of getting COVID-19.
32. On March 11, 2020, the World Health Organization officially declared COVID-19 a global pandemic.
33. COVID-19 is spread by several methods, including “community spread,” meaning that some people has been infected and it is not known how or where they became exposed. Public health authorities, including the CDC, have reported significant ongoing community spread of the virus including instances of community spread in all 50 states.
34. The CDC has reported that a person can be become infected with COVID-19 by touching a surface or object (like a table, floor, wall, furniture, desk, countertop, touch screen or chair) that has the virus on it, and then touching their own mouth, nose or eyes. COVID-19 can and does live on and/or remains capable of being transmitted and active on inert physical surfaces.
35. More specifically, COVID-19 infections are spread through droplets of different sizes which can be deposited on surfaces or objects.
36. In addition, the New England Journal of Medicine reported finding that experimentally-produced aerosols containing the virus remained infectious in tissue-culture assays, with only a slight reduction in infectivity during a 3-hour period of observations. An April 2020 study published in the journal Emerging Infectious Diseases found a wide distribution of COVID-19 on surfaces and in the air about 13 feet from patients in two hospital wards.

This means there has been a finding of COVID-19 in the air.

37. The global pandemic is exacerbated by the fact that the deadly virus physically adheres to and stays on the surface of objects or materials, “fomites,” for up to twenty-eight days. Indeed, the Center for Disease Control has noted the fact that COVID-19 attaches to surfaces on a molecular level, interacting with property's surfaces.
38. COVID-19 has been transmitted by way of human contact with surfaces and items of physical property located at premises in Louisiana.
39. COVID-19 has been transmitted by human-to-human contact and interaction with premises in Louisiana.
40. COVID-19 has been transmitted by way of human contact with airborne COVID-19 particles emitted into the air at premises in Louisiana.
41. COVID-19 is a cause of real physical loss and damage to Covered Property.
42. COVID-19 is a physical substance.
43. The presence of any COVID-19 particles renders items of physical property unsafe and the premises unsafe.
44. The presence of any COVID-19 particles on physical property results in contamination, impairs its value, usefulness and/or normal function.
45. The presence of any COVID-19 particles causes direct physical harm, direct physical damage and direct physical loss to property.
46. The presence of people infected with or carrying COVID-19 particles renders physical property in their vicinity unsafe and unusable, resulting in direct physical loss to that property.
47. The presence of people infected with or carrying COVID-19 particles at premises renders

the premises, including property located at that premises unsafe, resulting in direct physical loss to the premises and property.

48. Plaintiff's premises likely have been infected with COVID-19 and it has suffered direct physical loss to the property. The incubation period for COVID-19 is at least 14 days. Current evidence shows that the first death from COVID-19 occurred as early as February 6, 2020 – weeks earlier than previously reported, suggesting that the virus has been circulated in the United States far longer than previously assumed. It is likely customers, employees and/or other visitors to the insured property over the last year were infected with COVID-19 and thereby infected the insured property with COVID-19.
49. To reduce the spread of the disease, the CDC has recommended that businesses clean and disinfect all surfaces, prioritizing the most frequently touched surfaces.
50. The presence of COVID-19 has caused civil authorities throughout the country to issue orders requiring the suspension of business at a wide range of establishments, including civil authorities with jurisdiction over Plaintiff's business.

C. Closure Orders

51. On March 11, 2020, Governor John Bel Edwards declared that a statewide public health emergency existed in Louisiana.
52. On March 13, 2020, Governor Edwards in his official capacity as Governor of Louisiana, issued a statewide Civil Authority Order, Proclamation Number JBE 2020-27, banning gatherings of 250 or more people in a single space.
53. On March 16, 2020, Governor Edwards issued additional measures for COVID-19 public health emergency. Proclamation Number JBE 2020-30 banned gatherings of 50 or more people in a single space. This Order was issued due to “the ability of the COVID-19 virus

to spread via personal interactions and **because of physical contamination of property** due to its propensity to attach to surfaces for prolonged periods of time....”

54. The Order conferred emergency powers upon state and local law enforcement officers to promulgate orders to protect life and property.

55. On March 22, 2020, Governor Edwards entered a statewide “Stay At Home” Order restricting public access to non-essential businesses. Louisiana Proclamation Number JBE 2020-33 stated:

“[T]hese measures relating to closure of certain businesses and to limit the operations of non-essential businesses are necessary because of the propensity of the COVID-19 virus to spread via personal interactions and **because of physical contamination of property due to its ability to attach to surfaces for prolonged periods of time....”**

56. Civil Authority Orders across the nation, including those in New York City, San Francisco, Atlanta, and Houston, similarly provide that the cause of the Order in part is the dangerous property condition created by COVID-19's adherence on surfaces, which causes a loss of property.

57. The ability of the deadly virus to physically infect and remain on surfaces of objects or materials, i.e. “fomites,” for up to twenty-eight (28) days has prompted health officials in countries like the United States, China, Italy, France and Spain to disinfect and fumigate public areas before reopening them.

58. It is undisputable that the Orders affecting Plaintiff were issued in part because of COVID-19's attachment to surfaces and the dangerous property condition it creates.

59. COVID-19 is known to have been in and on properties within a one-mile radius from the insured premises, contaminating the immediate area surrounding the insured premises.

60. By December 16, 2020, COVID-19 had infected at least 85 residents of a long-term care

nursing home located within one mile of Plaintiff's premises.

61. COVID-19 has caused a property loss or damage covered under the policy within a one-mile radius of the insured premises, resulting in a prohibition of access to the insured premises by a civil authority order triggering coverage under the policy.
62. Beginning in March of 2020, Plaintiff was forced to end or dramatically reduce all operations because of actual contamination by COVID-19, as well as related restrictions imposed by the Stay Home Orders that prohibited the public from accessing Plaintiff's covered premises.
63. Like most businesses, the COVID-19 pandemic and ensuing government mandated shutdown orders severely affected Plaintiff's operations, the operations of its customers, and its customers' ability to make payments and purchase necessary supplies.
64. Specifically, the inability of Plaintiff and Plaintiff's customers to conduct normal operations due to the Governor's and Department of Health's orders led to a sharp decline and/or total elimination of revenue that PCMS customers were able to generate. Without such revenues, Plaintiff has suffered and will continue to suffer a substantial financial hardship.

D. Plaintiff's Losses/Claims under the All-Risk Insurance Policy

65. Plaintiff has suffered and will continue to suffer a direct physical loss of and damage to its property. During the policy period, Plaintiff sustained, and continues to sustain, losses due to the issues created by the COVID-19 and the Pandemic, including but not limited to, governmental closure orders/restrictions, as well as the physical spread and/or contamination of COVID-19 at, in, and/or around Plaintiff's premises and to Plaintiff's property.

66. Since the beginning of the COVID-19 pandemic, several employees of Plaintiff tested positive for COVID-19 and contaminated Plaintiff's property.
67. COVID-19 contaminated a significant portion of medical equipment and/or supplies owned by Plaintiff or within its care, custody and control requiring Plaintiff to destroy or dispose of the property.
68. The governmental closures orders and the presence of COVID-19 forced Plaintiff to suspend or reduce business at their covered premises in order to take necessary steps to prevent further damage and minimize the suspension of business and continue operations.
69. The rampant spread of COVID-19, as it adheres to surfaces for extended periods of time, creating a dangerous property condition and preventing the use of property is a direct physical loss to property.
70. COVID-19 has contaminated Plaintiff's property, rendering the property harmful, unsafe and unusable for ordinary use, which is a "direct physical loss" under FIC's policy that triggers business income and civil authority order coverage.
71. Louisiana Courts have found that where property has been rendered unusable or uninhabitable, a physical loss has occurred. (*Widder v. Louisiana Citizens Prop. Ins. Corp.*, 2011-0196 (La. App. 4 Cir. 8/10/11); 82 So. 3d 294, 296.)
72. Courts have further determined that whether property is intact and functional is irrelevant because physical damage is not necessary to define physical loss. (*Id.*; *see also Ross v. C. Adams Const. & Design, L.L.C.*, 10-852 (La. App. 5 Cir. 6/14/11); 70 So. 3d 949, 952.)
73. The presence of COVID-19, and the closure orders resulting from the COVID-19 pandemic, caused direct physical loss of and/or damage to the covered premises under the Policy by, among other things, damaging the property, denying access to the property,

preventing customers and workers from physically occupying the property, causing its function to be nearly eliminated or destroyed, and/or causing a suspension of business operations on the premises.

74. As a direct result of the property loss from COVID-19 and/or the pandemic, Plaintiff has suffered a suspension of business operations, incurred losses from contamination to its products, sustained losses of business income and incurred extra expenses.
75. The business income loss, extra expenses Plaintiff sustained, and other insured losses were caused by a peril covered by the insurance policy issued by Defendants FIC.
76. These losses and expenses are not excluded from coverage under the Policy. Since the Policy is an umbrella all-risk policy, and Plaintiff has complied with its contractual obligations, Plaintiff is entitled to payment for these losses and expenses.
77. Plaintiff has performed all post-loss duties required of it, requested of it, and/or not waived by Defendants, including but not limited to, giving notice of the property damage and resulting loss of income and extra expense, cooperating with Defendants in its investigation of the property damage and resulting loss of business income claims, and timely filing suit against Defendants.
78. Contrary to the plain language of the Policy, and to Defendant's corresponding promises and contractual obligations, Defendants have refused to pay for Plaintiff's losses and expenses.

COUNT 1 - *Breach of Contract*

79. Each section below containing a cause of action fully incorporates all facts and allegations set forth in each section previously set forth herein.
80. Plaintiff's Policy is an insurance contract under which Defendant was paid a premium in

exchange for promises to pay losses for claims covered by the Policy.

81. In the Policy, Defendant promised to pay for losses of business income and extra expense incurred as a result of perils not excluded under the Policy. Specifically, Defendant promised to pay for losses of business income sustained as a result of a suspension of operations during the Period of Restoration and for those expenses incurred in restoration.
82. Defendant further promised to pay for direct physical loss or damage to property owned by Plaintiff or within its care, custody, or control.
83. Plaintiff notified Defendant of its losses and made a claim under the all-risk Policy.
84. Plaintiff submitted proof of the damages for which Defendant is obligated to reimburse Plaintiff.
85. Although requested to do so, Defendant has failed and refused to pay Plaintiff for its property losses, which failure and refusal constitutes a breach of the insurance policy.
86. Although requested to do so, FIC has failed and refused to pay Plaintiff for the loss of business income and extra expense resulting from the property damage and civil authority closure orders, which failure and refusal constitutes a breach of the insurance policy.
87. Defendants' breach of the insurance policy was and is the direct and proximate cause of damage to Plaintiff in an amount in excess of \$75,000.

COUNT 2 - Declaratory Judgment

88. Each section below containing a cause of action fully incorporates all facts and allegations set forth in each section previously set forth herein.
89. 28 U.S.C. § 2201(a) provides that in “a case of actual controversy within its jurisdiction...any court of the United States...may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is

or could be sought.”

90. There is a genuine dispute and actual controversy, over which this Honorable Court has jurisdiction, between PCMS and FIC concerning their respective rights, duties and obligations for which PCMS requests a declaration of rights and obligations under the Policy. Speedy relief is necessary in order to preserve the rights of the parties which may otherwise be impaired or lost.

91. Plaintiff prays for a declaration as follows:

- a. Plaintiff’s Business Income losses incurred in connection with COVID-19 contamination, the Closure or Stay-at-Home Orders and the necessary suspension and interruption of its business operations stemming from the COVID-19 pandemic are covered losses under the Policy.
- b. FIC is obligated to pay Plaintiff for the full amount of the Business Income Losses incurred in connection with COVID-19 and the Closure and Stay-at-Home Orders during the period of restoration and the necessary interruption and suspension of its business stemming from the COVID-19 pandemic.
- c. The Policy does not contain any provision or exclusion which would bar coverage for Plaintiff’s losses resulting from COVID-19, the pandemic and associated closure orders.
- d. The Policy provides coverage for damages to property owned by PCMS or within its care, custody or control arising from contamination by COVID-19.
- e. Whether the COVID-19 civil authority closure orders restricting the operations of Plaintiff’s business and nearby businesses triggered Civil Authority Coverage pursuant to the Policy issued to Plaintiff.

IV. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief and demands judgment against the Defendant as follows:

- (1) Issuing a Declaratory Judgment declaring the Parties' rights and obligations under the Policy;
- (2) Rendering Judgment against Defendant, condemning Defendant to pay Plaintiff a sum set by this Honorable Court, together with interest and costs, and all other equitable relief; and
- (3) Legal interest from the date of judicial demand until paid, all costs of these proceedings, all expert witness fees, all costs of medical reports, and all other just and equitable relief to which Plaintiff is entitled.

Respectfully Submitted:
GALLOWAY JEFCOAT, L.L.P.

/S/ Robert Doggett

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that a copy of the foregoing has been uploaded to the CM/ECF Filing System for the Western District of Louisiana on this 11th day of March, 2021.

/S/ Robert Doggett

ROBERT DOGGETT