

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

**DAVID H. FISHER D/B/A  
THE VISION CLINIC**

**CIVIL ACTION NO.**

**VERSUS**

**JUDGE \_\_\_\_\_**

**STATE FARM FIRE AND CASUALTY  
COMPANY**

**MAGISTRATE JUDGE \_\_\_\_\_**

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**PETITION FOR DECLARATORY JUDGMENT**

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**DAVID H. FISHER D/B/A THE VISION CLINIC** (Plaintiff), for their Complaint against State Farm Fire And Casualty Company, (“Defendant”), states and alleges as follows: the Defendant made herein is State Farm Fire And Casualty Company, a foreign insurance company authorized and licensed to do business in Lafayette Parish, Louisiana and who may be served through the registered agent for service of process, through the Secretary of State of Louisiana.

**PARTIES**

1.

Plaintiff, **DAVID H. FISHER D/B/A THE VISION CLINIC**, is a Louisiana company located in Lafayette, Louisiana. Defendant, State Farm Fire and Casualty Company, is an insurance company with an address of One State Farm Plaza Bloomington, Illinois, 61710.

**JURISDICTION AND VENUE**

2.

Jurisdiction is proper in this Court pursuant to Pursuant to 28 U.S.C. §§ 1332. This Court has subject matter jurisdiction over Plaintiff’s suit under 28 U.S.C. § 1332 because the matter in

controversy exceeds the sum of \$75,000.00, exclusive of interest and costs, and is properly between citizens of different states.

### **NATURE OF ACTION**

3.

According to information published by the Insurance Information Institute, the U.S. insurance industry collected net premiums of \$1.22 trillion in 2018. Premiums recorded by property/casualty insurers accounted for 51% of that amount. Between 2014 and 2018, these insurers wrote net premiums each year of between \$497 billion to \$612.6 billion but only incurred losses of between \$277.7 billion and \$360.9 billion.

4.

The Plaintiff is an optometrist located in Lafayette, Louisiana. Plaintiff specializes in providing services involving Cataracts, Co-management, Comprehensive Eye Exams, Computer Vision, Contact Lenses Diabetic Eye Care, Diabetic Retinopathy, Dry Eye, Glaucoma, Hard To Fit Contact Lenses, Lenses & Frames, Macular Degeneration, Near and Farsightedness and Vision Correction.

5.

Plaintiff purchased an all-risk commercial property insurance policy from Defendant to protect the Plaintiffs business in the event of property loss and business interruption. COVID-19 and the resulting response by state and local governments has caused the physical loss of Plaintiff's property and has interrupted Plaintiff's businesses. Yet, Defendant has refused to honor its promise to provide the protection that the Plaintiff purchased. The Plaintiff in this case is not unique. The insurance industry appears to be taking a uniform approach to the current pandemic, which is to deny coverage even though the policy they drafted and offered to the insured, and the policy paid for

by the insured provides for coverage. The blanket denials being sent out by insurance companies exemplify the broken promises from insurance companies across the country. As a result of governmental orders and state wide shut downs, Plaintiff has been forced to greatly reduce operations and has suffered immense financial losses.

6.

The novel coronavirus - named "severe acute respiratory syndrome coronavirus 2" or "SARS-CoV2" - has spread widely and rapidly across the United States. The illness related to SARS-CoV-2 is "novel coronavirus disease 2019," commonly abbreviated to "COVID-19." Although the virus and related illness are distinct, for purposes of this Complaint, Plaintiff refers to both interchangeably as "COVID-19."

7.

In an effort to ensure that hospitals would not exceed capacity, state and local governments across the country have imposed directives requiring residents to remain in their homes except to perform certain "essential" activities, like shopping for food, going to see a doctor, or getting fresh air. According to the New York Times, at one point nearly 90% of the United States population currently was or is still under one or more state or local directives to stay at home. Multiple states, including Louisiana, have instituted Executive Orders that prohibit any medical procedures that could result in an increase in hospital stays unless medically necessary.

8.

The state and local directives typically require businesses deemed "non-essential" to be closed and in-person work is not permitted. But even businesses classified as "essential" have been severely impacted by governmental orders. Notwithstanding the fact that business' deemed essential could open, the fact remains that a large amount of the income generated by professionals in the

healthcare industry are based off of routine check ups, which in most cases were and still are prohibited by Executive Orders. Businesses in which the virus was never present nor did anyone ever test positive were still forced to close.

9.

Plaintiff's practice is located in the parish of Lafayette, Louisiana. Louisiana has issued stay-at-home orders for the entire state through order Proclamation Number 25 JBE 2020 on March 11, 2020 and continued until orders were ended on June 4, 2020 when Louisiana entered into phase 2. However, Phase 2 was not a complete reopening and limitations still existed on what business could reopen and what restrictions were in place.

10.

The Plaintiff, like countless other businesses, prepared in anticipation for an unexpected event like a pandemic by purchasing "all risk" property insurance from Defendant. The Policy purchased by the Plaintiff was supposed to cover all "risks of direct physical loss" unless the loss was explicitly excluded.

11.

As set forth below, the Policy also provides coverage for:

**Loss of Income**

We will pay for the actual "Loss Of Income" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by accidental direct physical loss to property at the described premises. The loss must be caused by a Covered Cause Of Loss. With respect to loss to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of the site at which the described premises are located.

**Extra Expense**

“We will pay necessary "Extra Expense" you incur during the "period of restoration" that you would not have incurred if there had been no accidental direct physical loss to property at the described premises. The loss must be caused by a Covered Cause Of Loss. With respect to loss to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of the site at which the described premises are located.

**Civil Authority.**

(a) When a Covered Cause Of Loss causes damage to property other than property at the described premises, we will pay for the actual "Loss Of Income" you sustain and necessary "Extra Expense" caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and

(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause Of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

12.

On or about November 30, 2020, in response to Plaintiff's notices of claim, Defendant denied coverage and refused to cover Plaintiff's "business loss, extra expenses" losses.

13.

Defendant's denial has caused material harm to Plaintiff by refusing coverage under the Policy.

14.

Plaintiff seeks to recover compensatory damages for breach of contract, as well as declaratory and injunctive relief.

### **FACTUAL BACKGROUND**

15.

The wide spread pandemic and specifically the Governor of Louisiana's Executive Orders in response to the pandemic, have forced Plaintiff to suspend most of their operations and in turn has prohibited access to the Plaintiffs clinic and office.

16.

As of May 11, 2020 all 50 states had reported cases of COVID-19 including Louisiana. There have been at least 406,000 confirmed cases of COVID-19 in the State of Louisiana as of the date of this filing, and as being one of the leading States in the amount of infected it has resulted in more strict Governmental Executive Orders.

17.

In addition, some scientific publications have reported finding COVID-19 in the air. 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. "Aerosols from infected persons may therefore pose an inhalation threat even at considerable distances and in enclosed spaces...."<sup>1</sup>

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<sup>1</sup> <https://www.nejm.org/doi/full/10.1056/NEJMc2009324>

18.

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 in Wuhan, China, leading the authors to conclude that the virus spreads in aerosols in addition to large respiratory droplets. The investigators found evidence of the virus in swabs of floors, computer mice, trash bins, bed handrails, patients' face masks, health workers' personal protective equipment, and air vents.<sup>2</sup>

19.

The authors also surmised that the high rate of positivity for floor samples in the hospital strongly suggest that droplets fall to the ground and then are spread via patients' shoes. For example, every sample tested from the pharmacy floor tested positive for COVID-19 even though no patients were housed there.<sup>3</sup>

20.

Another study conducted in Wuhan indicates that staff movement, floor cleaning, and the removal of personal protective equipment could transmit the virus through the re-suspension of virus-contaminated aerosols.<sup>4</sup>

21.

Aerosol particles are held in the air by physical and chemical forces. The suspended particles remain for hours or more, depending on factors such as heat and humidity. If virus particles can be

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<sup>2</sup> <https://www.cidrap.umn.edu/news-perspective/2020/04/study-finds-evidence-COVID-19-air-hospital-surfaces>

<sup>3</sup> <https://www.cidrap.umn.edu/news-perspective/2020/04/study-finds-evidence-COVID-19-air-hospital-surfaces>

<sup>4</sup> <https://www.biorxiv.org/content/10.1101/2020.03.08.982637v1>

suspended in air for more than a few seconds, like, for instance, the measles virus can, then anyone passing through could become infected by a pathogenic aerosol cloud. And the virus can travel long distances and land on surfaces, only to be stirred back up into the air later by cleaning or other disturbances.

22.

A 2014 analysis published in the journal *Clinical Infectious Diseases* investigated a seemingly puzzling outbreak in a Hong Kong apartment complex whose residents had not been in close contact with each other.<sup>5</sup> The study found that "airborne spread was the most likely explanation, and the SARS, coronavirus could have spread over a distance of 200 meters," or about 600 feet.<sup>6</sup>

23.

The implications of airborne spread of the virus are extremely serious. Airborne spread means that the virus can travel long distances from any infected person. It can then infect someone who unknowingly walks through a pathogenic cloud. It can also infect someone by settling on a physical surface, which someone touches and later becomes infected. And regardless of the transmission method, the evidence suggests that COVID-19 can be transmitted by shoes even once it reaches the ground.

24.

In order to protect itself against risks like closures from an executive order by the Governor, Plaintiff purchased the at issue Policy from Defendant and even bought additional coverages in the form of Business Income and Extra Expense. These endorsements were not apart of the original

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<sup>5</sup> <https://academic.oup.com/cid/article/58/5/683/365793>

<sup>6</sup> <https://academic.oup.com/cid/article/58/5/683/365793>



policy but were added at an additional cost to the Plaintiff. The Policy was in effect at the time of the outbreak and remains in effect today. Plaintiff paid all premiums required by the Policy.

25.

Plaintiff is the Named Insured under his respective Policy.

26.

Defendant is the effective and liable insurer of the Policy.

27.

Generally, under property insurance policies, similar to the one issued by the Defendant to Plaintiff, the insuring agreements provide coverage for all risks of physical loss or damage to property, unless specifically excluded.

28.

The Policy, purchased by the Plaintiff and that was constructed by the Defendant, is an "all-risk" policy. The Policy covers all "risks of direct physical loss unless is excluded or otherwise limited".

29.

Defendant is obligated to pay for actual loss of "Business Income" sustained due to direct "physical loss of or physical damage" to the Plaintiff's facility. Plaintiff has suffered lost business income because it has reduced the operations of its business due to Proclamation Number 25 JBE 2020 and the subsequent executive orders issued by the Governor of Louisiana.

**Loss of Income**

We will pay for the actual "Loss Of Income" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by accidental direct physical loss to property at the described premises. The loss must be caused

by a Covered Cause Of Loss. With respect to loss to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of the site at which the described premises are located.

30.

Defendant is also obligated to pay for "Extra Expense". Extra Expenses are costs that you reasonably incur during the restoration period. Plaintiff has suffered Extra Expenses because of Proclamation Number 25 JBE 2020 in which Plaintiff's facility had to restrict access as a result and in response:

**Extra Expense**

"We will pay necessary "Extra Expense" you incur during the "period of restoration" that you would not have incurred if there had been no accidental direct physical loss to property at the described premises. The loss must be caused by a Covered Cause Of Loss. With respect to loss to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of the site at which the described premises are located.

31.

Defendant also agreed to provide coverage from an interruption to business caused by an order from a "Civil Authority." Specifically, Defendant agreed to pay for "actual loss of business income" when access to the covered property is prohibited by order of civil authority. Id. Access has been restricted to the Plaintiffs property due to the presence and threat of COVID- 19 as customers have been prohibited from entering the office unless it is medical necessity.

**Civil Authority.**

(a)When a Covered Cause Of Loss causes damage to property other than property at the described premises, we will pay for the actual "Loss Of Income" you sustain and necessary

"Extra Expense" caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and

(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause Of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

32.

Losses caused by the implementation of the Governor Edwards Executive Orders triggered the Business Income and Extra Expense endorsements of the Plaintiffs Policy. Specifically, Plaintiff's full operations have been largely suspended, access to the Plaintiffs office and clinic were restricted and it has lost revenue and business opportunities.

33.

Insurance companies, like the defendant, often argue that the terms "loss" and "damage" are synonymous and can be used interchangeable. The terms 'loss' and 'damage,' as used in insurance policies, are not necessarily synonymous. A 'loss' under the property coverage of a homeowners' policy is incurred by an insured and typically, but not always, follows 'damage' to the insured property. Physical damage is only one cause of 'physical loss' of property; for example, a person can suffer the physical loss of property through theft, without any actual physical damage to the property. *Mangerchine v. Reaves*, 2010 1052 (La. App. 1<sup>st</sup> Cir. 03/25/11), 63 So.3d 1049, 1056, 2011 La. App. LEXIS 354,(emphasis added, internal citations omitted). As stated in *Mangerchine v. Reaves*, loss

and damage do not necessarily mean the same as one can suffer a loss without damage. The plaintiff in this case suffered loss of revenue and loss of access to his building which is covered under the policy he bought from the defendant and which the policy itself was drafted by the defendant using the defendant's own terms.

34.

This particular case is not uncommon to the Louisiana Court systems and Court systems throughout the nation as hundreds of cases have been filed against insurance agencies in exactly the same scenarios as in this case. This is an issue that will continue to arise as the insurance agencies continue to issue blanket denials with boilerplate reasons listed.

**COUNT I:**  
**DECLARATORY AND INJUNCTIVE RELIEF - LOSS OF INCOME**

35.

The preceding paragraphs are incorporated by reference as if fully alleged herein.

36.

Louisiana Code of Civil Procedure Articles 1871, et seq, entitles this Court to declare the rights and other legal relations of the parties to this dispute.

37.

An actual controversy has arisen and now exists between the Plaintiff, on the one hand, and Defendant, on the other hand, concerning the respective rights and duties of the parties under the Policy. The Plaintiff requested coverage related losses they sustained because of Proclamation Number 25 JBE 2020 . Specifically, the Plaintiff is asserting a claim through the policy provided by the Defendant which contains recovery options through Business Income Loss and Extra Expenses provisions. The Defendant was sent a letter asserting a claim through its registered agent.

Defendant responded with a letter denying coverage. Moreover, upon information and belief, Defendant has refused other similar claims, claiming that these types of claims for Business Income are not covered by this Policy.

38.

Plaintiff contends that Defendant has breached the Policy in the following respects:

- a. Plaintiff has Suffered Losses covered by the Business Income coverage.
- b. Defendant is obligated to pay Plaintiff for those losses.
- c. Defendant has failed to pay Plaintiff for those losses.

39.

Plaintiff therefore seeks a declaration of the parties' respective rights and duties under the Policy and request the Court declare the aforementioned conduct of Defendant unlawful and in material breach of the policy so that future controversies may be avoided.

40.

Pursuant to a declaration of the parties' respective rights and duties under the policy, Plaintiff further seeks an injunction enjoining Defendant:

- (1) from continuing to engage in conduct in breach of the Policy in regards to coverage decisions under the Business Income Coverage Extension; and
- (2) ordering Defendant to comply with the terms of the Policy in regards to coverage decisions.

**COUNT II:**  
**BREACH OF CONTRACT - LOSS OF INCOME**

41.

The preceding paragraphs are incorporated by reference as if fully alleged herein.

42.

Plaintiff purchased property coverage policy from Defendant.

43.

The Policy is valid and enforceable contracts between the Defendant and Plaintiff.

44.

Louisiana Code of Civil Procedure Articles 1871, et seq, entitles this Court to declare the rights and other legal relations of the parties to this dispute.

45.

Plaintiff has sustained a loss under the Business Income coverage in the Policy arising from Executive Orders issued by the Governor of Louisiana.

46.

Defendant has not agreed to pay the claim for Business Income or requested a proof of loss and has denied coverage.

47.

Defendant has denied claims for Business Income related to executive orders issued by the governor of Louisiana , which is in breach of the policy

48.

As a direct and proximate result of Defendant's breaches, Plaintiff has sustained damages in an amount to be determined at trial.

**COUNT III:**  
**DECLARATORY AND INJUNCTIVE RELIEF - EXTRA EXPENSE**

49.

The preceding paragraphs are incorporated by reference as if fully alleged herein.

50.

Louisiana Code of Civil Procedure Articles 1871, et seq, entitles this Court to declare the rights and other legal relations of the parties to this dispute.

51.

An actual controversy has arisen and now exists between Plaintiff, on the one hand, and Defendant, on the other hand, concerning the respective rights and duties of the parties under the Policy.

52.

Plaintiff contend that Defendant has breached the Policy in the following respects:

- a. Plaintiff has suffered losses covered by the Extra Expense coverage in the Policy.
- b. Defendant is obligated to pay Plaintiff for those losses.
- c. Defendant has failed to pay Plaintiff for those losses.

53.

Plaintiff has sustained a loss under the Extra Expense coverage in the Policy arising from Executive Orders issued by the Governor of Louisiana

54.

Pursuant to a declaration of the parties' respective rights and duties under the policy, Plaintiff further seeks an injunction enjoining Defendant (1) from continuing to engage in conduct in breach of the Policy in regards to coverage decisions under the Extra Expense coverage in the Policy; and (2) ordering Defendant to comply with the terms of the Policy in regards to coverage decisions.

**COUNT IV:**  
**BREACH OF CONTRACT - EXTRA EXPENSE**

55.

The preceding paragraphs are incorporated by reference as if fully alleged herein.

56.

Louisiana Code of Civil Procedure Articles 1871, et seq, entitles this Court to declare the rights and other legal relations of the parties to this dispute.

57.

The Policy are valid and enforceable contracts between the Defendant and Plaintiff.

58.

Plaintiff therefore seeks a declaration of the parties' respective rights and duties under the Policy and requests the Court declare the aforementioned conduct of Defendant unlawful and in material breach of the policy so that future controversies may be avoided.

59.

Plaintiff has sustained a loss under the Extra Expense coverage in the Policy arising from Executive Orders issued by the Governor of Louisiana.

60.

Defendant has not agreed to pay the claim for Extra Cost coverage or requested a proof of loss.

61.

Defendant has denied claims for recovery under the Extra Cost coverage in the Policy related to the Executive Orders issued by the Governor of Louisiana on a uniform basis, in breach of the Policy.



62.

As a direct and proximate result of Defendant's breaches, Plaintiff has sustained damages in an amount to be determined at trial.

**COUNT V:**  
**DECLARATORY AND INJUNCTIVE RELIEF - CIVIL AUTHORITY**

63.

The preceding paragraphs are incorporated by reference as if fully alleged herein.

64.

Louisiana Code of Civil Procedure Articles 1871, et seq, entitles this Court to declare the rights and other legal relations of the parties to this dispute.

65.

Plaintiff contend that Defendant has breached the Policy in the following respects:

- a. Plaintiff has suffered losses covered by the Civil Authority coverage in the policy.
- b. Defendant is obligated to pay Plaintiff for those losses.
- c. Defendant has failed to pay Plaintiff for those losses.

66.

Plaintiff therefore seek a declaration of the parties' respective rights and duties under the Policy and requests the Court declare the aforementioned conduct of Defendant unlawful and in material breach of the policy so that future controversies may be avoided.

67.

Pursuant to a declaration of the parties' respective rights and duties under the policy, Plaintiff further seek an injunction enjoining Defendant (1) from continuing to engage in conduct in breach of the Policy in regards to coverage decisions under the Civil Authority coverage in the Policy; and

(2) ordering Defendant to comply with the terms of the Policy in regards to coverage decisions.

**COUNT VI:**  
**BREACH OF CONTRACT- CIVIL AUTHORITY**

68.

The preceding paragraphs are incorporated by reference as if fully alleged herein.

69.

Louisiana Code of Civil Procedure Articles 1871, et seq, entitles this Court to declare the rights and other legal relations of the parties to this dispute.

70.

The Policy are valid and enforceable contracts between the Defendant and Plaintiff.

71.

Plaintiff therefore seek a declaration of the parties' respective rights and duties under the Policy and requests the Court declare the aforementioned conduct of Defendant unlawful and in material breach of the policy so that future controversies may be avoided.

72.

Plaintiff has sustained a loss under the Civil Authority coverage in the Policy arising from the COVID-19 virus and associated state and local Stay-at-Home Orders.

73.

Defendant has not agreed to pay the claim for Civil Authority or requested a proof of loss. Instead, Defendant has requested information not necessary to determine coverage.

74.

Defendant has denied claims for recovery under the Civil Authority coverage in the Policy related to COVID-19 and the "Stay-at- Home-Orders" on a uniform basis, in breach of the Policy.

75.

As a direct and proximate result of Defendant's breaches, Plaintiff has sustained damages in an amount to be determined at trial.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff requests relief and judgment against Defendant as follows:

- a. For a judgment against Defendant for the causes of action alleged against it;
- b. For compensatory damages in an amount to be proven at trial;
- c. For a declaration that Defendant's conduct as alleged herein is unlawful and in material breach of the Policy;
- d. For appropriate injunctive relief, enjoining Defendant from continuing to engage in conduct related to the breach of the Policy;
- e. For pre-judgment and post-judgment interest at the maximum rate permitted by law;
- f. For Plaintiff' attorney's fees;
- g. For Plaintiff' costs incurred; and
- h. For such other relief in law or equity as the Court deems just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiff hereby demands a trial by jury on all issues so triable.

Respectfully submitted by:

BY: */s/ Joseph F. Gaar, Jr.*  
JOSEPH F. GAAR, JR. (#16927)  
LUCAS S. COLLIGAN (#31671)  
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**ATTORNEYS FOR PLAINTIFF,  
DAVID H. FISHER D/B/A THE VISION  
CLINIC**

**PLEASE SERVE:**  
**STATE FARM FIRE AND CASUALTY COMPANY**  
Through its Registered Agent of Process:  
Louisiana Secretary of State  
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