

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

**GREATER MOBILE URGENT CARE,
P.C., and GMUC OF LUCEDALE, P.C.,**

Plaintiffs,

v.

**THE CINCINNATI INSURANCE
COMPANY, a corporation,**

Defendant.

*
*
*
*
*
*
*
*
*
*
*
*
*
*
*

CIVIL ACTION NO.: 1:20-cv-378

COMPLAINT

Come now Plaintiffs Greater Mobile Urgent Care, P.C., and GMUC of Lucedale, P.C., and bring the following Complaint against Defendant The Cincinnati Insurance Company:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Greater Mobile Urgent Care, P.C. (“Greater Mobile”), is a professional corporation organized under the laws of the State of Alabama, with its principal place of business located in Alabama.

2. Plaintiff GMUC of Lucedale, P.C. (“GMUC”), is a professional corporation organized under the laws of the State of Alabama, with its principal place of business located in Mississippi.

3. Defendant The Cincinnati Insurance Company (“Cincinnati”) is a corporation organized under the laws of the State of Ohio, with its principal place of business located in Ohio.

4. This Court has subject-matter jurisdiction of this action pursuant to 28 U.S.C. § 1332(a)(1), because the matter in controversy exceeds the sum of \$75,000.00, exclusive of interest

and costs, and the Plaintiffs are citizens of states different from the state of which the Defendant is a citizen.

5. Venue is proper in the Southern District of Alabama pursuant to 28 U.S.C. § 1391(b)(2), because a substantial part of the events or omissions giving rise to the claims asserted occurred in this judicial district. Venue is also proper in the Southern District of Alabama pursuant to 28 U.S.C. § 1391(b)(1), in that Cincinnati is deemed to reside in this judicial district under 28 U.S.C. § 1391(d).

FACTUAL BACKGROUND

6. Greater Mobile owns and operates several walk-in medical clinics in Mobile County, Alabama.

7. GMUC owns and operates a walk-in medical clinic in Lucedale, Mississippi.

8. Cincinnati issued Greater Mobile a commercial property insurance policy, with a policy period of October 13, 2019, to October 13, 2020, bearing policy number ECP 040 93 70.

9. Cincinnati issued GMUC a commercial property insurance policy, with a policy period of October 13, 2019, to October 13, 2020, bearing policy number CAP 525 25 16.

10. Both Plaintiffs' policies are all-risk policies that insure against all risks of direct physical loss unless the loss is specifically excluded by the policy.

11. Greater Mobile's policy has the following Cincinnati coverage forms: Building and Personal Property Coverage Form (Including Special Causes of Loss) FM 101 05 16 and Business Income (and Extra Expense) Coverage Form FA 213 05 16. A copy of Greater Mobile's policy is attached hereto as Exhibit A.

12. GMUC's policy has the following Cincinnati coverage forms: Building and Personal Property Coverage Form (Including Special Causes of Loss) FM 101 05 16, which

includes, under its Coverage Extensions, Business Income and Extra Expense Coverage. A copy of GMUC's policy is attached hereto as Exhibit B.

13. The provisions of the Greater Mobile policy and the GMUC policy identified in paragraphs 11 and 12 above are identical in all material respects.

14. Each Plaintiff's Business and Personal Property Coverage Form provides as follows:

SECTION A. COVERAGE

We will pay for direct "loss" to Covered Property at the "premises" caused by or resulting from any Covered Cause of Loss.

Exh. A, Coverage Form FM 101 05 16, p. 3; Exh. B, Coverage Form FM 101 05 16, p. 3.

15. Greater Mobile's Coverage Form addressing Business Income and Extra Expense provides:

SECTION A. COVERAGE

....

1. Business Income

a. We will pay for the actual loss of "Business Income" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to property at "premises" which are described in the Declarations and for which "Business Income" Limit of Insurance is shown in the Declarations. The "loss" must be caused by or result from a Covered Cause of Loss. . . .

Exh. A, Coverage Form FA 213 05 16 p. 1.

16. GMUC's Coverage Form addressing Business Income and Extra Expense provides:

b. Business Income and Extra Expense

....

1. Business Income

We will pay for the actual loss of “Business Income” and “Rental Value” you sustain due to the necessary “suspension” of your “operations” during the “period of restoration”. The “suspension” must be caused by direct “loss” to property at a “premises” caused by or resulting from any Covered Cause of Loss. . . .

Exh. A, Coverage Form FM 101 05 16 p. 18.

17. Each Plaintiff’s policy defines “suspension” as:

a. The slowdown or cessation of your business activities. . . .

Exh. A, Coverage Form FM 101 05 16, p. 40; Exh. B, Coverage Form FM 101 05 16, p. 40.

18. Each Plaintiff purchased coverage for Extra Expense, which is:

2. Extra Expense

. . . .

b. Extra Expense means necessary expenses you sustain . . . during the “period of restoration” that you would not have sustained if there had been no direct “loss” to property caused by or resulting from a Covered Cause of Loss.

Exh. A, Coverage Form FM 213 05 16 p. 1; Exh. B, Coverage Form FM 101 05 16, p. 19.

19. Each Plaintiff’s policy provides:

3. Covered Causes of Loss

a. Covered Causes of Loss

Covered Causes of Loss means direct “loss” unless the “loss” is excluded or limited in this Coverage Part.

Exh. A, Coverage Form FM 101 05 16, p. 5; Exh. B, Coverage Form FM 101 05 16, p. 5.

20. “Loss” is defined as “accidental physical loss or accidental physical damage.”

Exh. A, Coverage Form FM 101 05 16, p. 38; Exh. B, Coverage Form FM 101 05 16, p. 38.

21. Each Plaintiffs’ policy provides:

b. Exclusions

(1) We will not pay for “loss” caused directly or indirectly by any of the following, unless otherwise provided. . . .

....

(l) Pollutants

Discharge, dispersal, seepage, migration, release, escape, or emission of “pollutants” unless the discharge, dispersal, seepage, migration, release, escape, or emission is itself caused by any of the “specified causes of loss”

....

Exh. A, Coverage Form FM 101 05 16, pp. 5, 10; Exh. B, Coverage Form FM 101 05 16, pp. 5, 10.

22. “Pollutants” is defined by each Plaintiff’s policy as:

12. “Pollutants” means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, asbestos, chemicals, petroleum, petroleum products and petroleum by-products, and waste. Waste includes materials to be recycled, reconditions or reclaimed. “Pollutants” include but are not limited to substances which are generally recognized in industry or government to be harmful or toxic to persons, property, or the environment regardless of whether injury or damage is caused directly or indirectly by the “pollutants”

Exh. A, Coverage Form FM 101 05 16, pp. 39; Exh. B, Coverage Form FM 101 05 16, pp. 39.

23. The states of Alabama and Mississippi, the United States, and the world are in the midst of the novel coronavirus pandemic. The virus causes an illness known as COVID-19. The virus is extremely contagious. To date, Alabama has had over 91,000 COVID-19 cases and over 1,600 deaths from COVID-19, and Mississippi has had over 60,500 COVID-19 cases and over 1,700 deaths from COVID-19.

24. On March 13, 2020, Donald J. Trump, the President of the United States, declared the novel coronavirus pandemic a national emergency.

25. Also on March 13, 2020, Kay Ivey, the Governor of the State of Alabama, declared the novel coronavirus pandemic a state public health emergency. Gov. Ivey directed the appropriate state agencies to exercise their statutory and regulatory authority accordingly.

26. On March 27, 2020, Dr. Scott Harris, the Alabama State Health Officer, entered a statewide order which provided, among other things, that effective March 28, 2020, at 5:00 PM, all non-emergency medical procedures would be postponed until further notice.¹ A copy of Dr. Harris's March 27, 2020, order is attached hereto as Exhibit C.

27. On April 28, 2020, Dr. Harris entered an amended order which provided, among other things, that effective April 30, 2020, at 5:00 PM, non-emergency medical procedures, which had been effectively prohibited under Dr. Harris's March 27, 2020, order, could proceed under certain guidelines cited therein. A copy of Dr. Harris's April 28, 2020, order is attached hereto as Exhibit D.

28. On March 14, 2020, Tate Reeves, the Governor of the State of Mississippi, declared a state of emergency in Mississippi as a result of the coronavirus pandemic.

29. On March 19, 2020, Dr. Thomas Dobbs, the Mississippi State Health Officer, entered an order requiring that medical facilities in Mississippi defer all non-urgent medical appointments and procedures. A copy of Dr. Dobbs's March 19 order is attached hereto as Exhibit E.

30. On April 10, 2020, Governor Reeves issued Executive Order 1470, which required all healthcare facilities to postpone all medical procedures that were not immediately medically necessary. A copy of Governor Reeves's Executive Order 1470 is attached hereto as Exhibit F.

31. On April 24, 2020, Governor Reeves issued Executive Order 1477, which allowed medical facilities to resume performing non-emergent medical procedures under certain guidelines. Also on April 24, 2020, Dr. Dobbs entered an order allowing medical facilities to

¹ The order permitted three categories of immediately necessary medical treatment (Exh. C, §§ 7.a., 7.b.), but they can be referred to in the aggregate as treatment of emergency medical conditions.

resume performing non-emergent and non-urgent medical procedures within certain guidelines set out in his order. Copies of Governor Reeves's Executive Order 1477, and Dr. Dobbs's April 24, 2020, Order are attached hereto as Exhibits G and H, respectively.

32. Between March 28, 2020, and April 30, 2020, Greater Mobile's business operations underwent a "suspension," as that term is defined in its policy, because it was prohibited from performing medical procedures that comprised the vast majority of its medical practice.

33. Between March 19, 2020, and April 24, 2020, GMUC's business operations underwent a "suspension," as that term is defined in its policy, because it was prohibited from performing medical procedures that comprised the vast majority of its medical practice.

34. The aforesaid orders of Gov. Ivey and Dr. Harris in the State of Alabama, and Gov. Reeves and Dr. Dobbs in the State of Mississippi, were valid exercises of each government's executive police power.

35. Greater Mobile and GMUC suffered substantial losses of business income due to these suspensions, and submitted claims for their losses to Cincinnati under the business-income and extra-expense provisions of their insurance policies.

36. Greater Mobile submitted a claim for these losses to Cincinnati on March 27, 2020. Cincinnati responded to Greater Mobile's claim with a reservation-of-rights letter. In this letter, Cincinnati set out certain coverage provisions of Greater Mobile's policy it deemed applicable to the claim. Also, Cincinnati requested that Greater Mobile provide certain information regarding its claim. A copy of Cincinnati's March 27, 2020, letter is attached hereto as Exhibit I.

37. One of Cincinnati's requests sought information concerning the presence of coronavirus at Greater Mobile's premises:

Please describe any direct physical loss or damage to your premises or property at your premises by the coronavirus. Additionally, please specify these details and supply these documents:

- The reason or reasons why you believe there was direct physical loss or damage to your premises or to property at your premises.
- Copies of all inspection reports and test reports referring or relating to actual or suspected presence of coronavirus at your premises or on property at your premises.
- Documents referring or relating to the presence of coronavirus at your premises, including among employees, customers or other visitors to the premises. Exh. E, pp. 7-8.

38. Cincinnati also requested information concerning the orders which led to the shutdown of Greater Mobile's business operations:

Please state whether you have been ordered by a civil authority, such as a governmental official, to close, or restricted access to, your premises. If so, please specify these details and supply these documents:

- Identify the civil authority that issued the order or orders.
- Identify the date and nature of the order or orders.
- Supply a copy of the order or orders. Exh. E, p. 8.

39. On June 2, 2020, Greater Mobile, through counsel, responded to Cincinnati's March 27, 2020, letter and the requests for information therein. Also included in the June 2, 2020, response was a claim on behalf of GMUC under the business-income and extra-expense coverage

provisions of its policy. A copy of the June 2, 2020, letter and the attachments included with the letter are attached hereto as Exhibit J.

40. In the June 2, 2020, response, Greater Mobile provided clear evidence that coronavirus was present at its premises, and at GMUC's premises:

As to your request for documentation of the presence of coronavirus at the insureds' business premises we are providing the following herewith:

1. Documentation of patients who tested positive for coronavirus at each of the insureds' business premises (redacted to comply with HIPPA privacy requirements);
2. The confidential affidavit of the insureds' administrative employee Lisa Creech verifying that in the course of her employment duties she visited each of the insureds' business premises, and that shortly thereafter she tested positive for coronavirus; and
3. Documentation that coronavirus testing was performed by the insureds' employees outside of two of their business premises. Exh. F, p. 2.

41. By separate letters dated June 8, 2020, Cincinnati denied the claims made by Greater Mobile and GMUC because, it said, there was no direct physical loss to the insureds' business premises, and that in any event coverage was excluded under the policies' Pollution Exclusion. The June 8, 2020, letters denying Greater Mobile's and GMUC's claims are attached hereto as Exhibits K and L, respectively.

42. Plaintiffs did, however, sustain direct physical loss to their business premises because the governmental authorities issued orders which limited Plaintiffs' clinics to performing only emergency procedures, effectively ending the clinics' usability of their physical premises for routine business operations. These orders, combined with the physical presence of the coronavirus in Plaintiffs' premises, created a direct physical loss of those premises because the premises were thereby rendered physically unusable for their intended purpose. The loss was

direct because the orders were expressly directed to medical facilities such as Plaintiffs', the coronavirus was actually present in Plaintiffs' premises, and the orders, as well as the physical presence of coronavirus, were the direct cause of Plaintiffs' losses of the usability of their business premises.

43. The governmental orders combined with the physical presence of the coronavirus created the loss of the usability of Plaintiffs' premises—a direct physical loss of property—which caused the suspension of Plaintiffs' business operations.

44. As for the “accidental” requirement, “accidental” is defined as “occurring unexpectedly or by chance.” *Merriam-Webster.com/dictionary*. For insurance purposes, whether an occurrence is accidental is determined from the viewpoint of the insured. From Plaintiffs' viewpoint, the entry of the various governmental shutdown orders occurred unexpectedly or by chance. The entire coronavirus pandemic occurred unexpectedly or by chance. From Plaintiffs' viewpoint, the physical presence of the coronavirus in Plaintiffs' premises occurred unexpectedly or by chance, because Plaintiffs did not know whether (and if so, how or when) the coronavirus would be introduced into their premises. Whether and when governmental orders imposing or modifying a shutdown would be entered, and what they would provide, were unexpected from Plaintiffs' viewpoint because such orders and their contents depended on the status of the pandemic, which was a matter of chance, and upon the opinions of the State Health Officer, which were unknown to Plaintiffs.

45. Cincinnati's reliance on the policies' Pollution Exclusion is misplaced. Neither the coronavirus pandemic, nor the physical presence of the coronavirus in Plaintiffs' premises, constituted a “[d]ischarge, dispersal, seepage, migration, release, escape or emission of

‘pollutants.’” Moreover, despite Cincinnati’s contention otherwise, a virus is not a “pollutant” as that term is defined in the policies.

46. Based on the foregoing, Cincinnati improperly denied Plaintiffs’ claims.

COUNT I
DECLARATORY JUDGMENT

Plaintiffs allege as follows against Cincinnati:

47. Plaintiffs reallege Paragraphs 1 through 46 hereof.

48. There is an actual, substantial, and justiciable controversy between Plaintiffs on the one hand, and Cincinnati on the other, regarding whether Plaintiffs’ losses of business income and any extra expenses are covered losses under the coverage forms specified above.

49. A judgment declaring the rights of Plaintiffs will serve a useful purpose in settling and clarifying the legal relations at issue, and will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to this request for a declaratory judgment.

50. Plaintiffs are entitled to a judgment declaring that their losses of business income and any extra expenses are covered losses under the specified coverage forms. For each Plaintiff, those covered losses exceed the sum of \$75,000.00, exclusive of interest and costs.

COUNT II
BREACH OF CONTRACT

Plaintiffs allege as follows against Cincinnati:

51. Plaintiffs reallege Paragraphs 1 through 46 hereof.

52. There are valid contracts of insurance binding Plaintiffs on one hand and Cincinnati on the other.

53. Plaintiffs have performed their obligations under the contracts of insurance. Plaintiffs have filed claims with Cincinnati for their lost business income.

54. Cincinnati has not performed its obligations under the insurance contracts, in that it has denied coverage for Plaintiffs' losses of business income when those losses are covered losses under the coverage forms specified above.

55. Plaintiffs have been damaged by Cincinnati's denial of coverage, in the amount of their lost business income, and any extra expenses they sustained.

56. Plaintiffs are entitled to a judgment against Cincinnati in the amount of their lost business income and any extra expenses. The judgment to which each Plaintiff is entitled exceeds the sum of \$75,000.00, exclusive of interest and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs ask that the Court:

- (a) Declare the rights of Plaintiffs as follows: declare that Plaintiffs' losses of business income and any extra expenses are covered losses under the specified coverage forms.
- (b) Enter judgment awarding Plaintiffs monetary damages for Cincinnati's breach of their insurance contracts, in the amount of their lost business income and any extra expenses;
- (c) Award Plaintiffs prejudgment interest and post-judgment interest as provided by law;
- (d) Award Plaintiffs the costs of this action; and
- (e) Provide such further relief as may be just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury on all issues so triable.

Dated: August 3, 2020

Respectfully submitted,

By: /s/ Richard H. Taylor
RICHARD H. TAYLOR (TAYLR8925)

By: /s/ W. Lloyd Copeland
W. LLOYD COPELAND (COPW3831)

By: /s/ Steven A. Martino
STEVEN A. MARTINO (MARS7433)
P.O. Box 894
Mobile, Alabama 36601
Phone: (251) 433-3131
Fax: (251) 433-4207
Email: richard@taylormartino.com
lloyd@taylormartino.com
stevemartino@taylormartino.com

ATTORNEYS FOR PLAINTIFFS

OF COUNSEL:

John W. "Don" Barrett (pro hac vice application to be filed)
David McMullan (pro hac vice application to be filed)
BARRETT LAW GROUP, P.A.
404 Court Square North
Lexington, Mississippi
Phone: (662) 834-9168
Fax: (662) 834-2628
Email: donbarrettpa@gmail.com
dcmullan@barrettlawgroup.com

DEFENDANT TO BE SERVED BY CERTIFIED MAIL:

The Cincinnati Insurance Company
c/o Scott Tyra, Agent for Service of Process
Park Place Tower
2001 Park Place North, Suite 200
Birmingham, Alabama 35203