

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

PARK AVENUE ORAL AND FACIAL
SURGERY, P.C.,

Plaintiff,

vs.

Case No. _____

**COMPLAINT AND
DEMAND FOR JURY TRIAL**

THE HARTFORD FINANCIAL
SERVICES GROUP d/b/a THE HARTFORD,
HARTFORD UNDERWRITERS
INSURANCE CO., AND
SENTINEL INSURANCE CO., LTD.,

Defendants.

Plaintiff Park Avenue Oral and Facial Surgery, P.C. (“Park Avenue” or “Plaintiff”), by way of its counsel, brings this action against Defendants, and alleges as follows:

NATURE OF THE CASE

1. This is a civil action seeking relief arising from the Plaintiff’s contract of insurance with the Defendants. Hartford’s denial of coverage constitutes a breach of contract.
2. Plaintiff provides dental services and is operated by licensed dentists.
3. Plaintiff’s offices are in New York City, New York.
4. To protect the business in the event that it suddenly had to suspend operations for reasons outside its control, or in order to prevent further property damage, Plaintiff purchased insurance coverage from Defendants, including Business Interruption and other coverage, as set forth in Plaintiff’s policy.

5. Plaintiff was forced, by recent orders issued by the State of New York, to cease most of its operations – through no fault of its own – as part of the State’s efforts to slow the spread of the COVID-19 global pandemic. The State has deemed that elective dental work is not essential, which includes cleaning and various other routine work that affects nearly 90 percent of Plaintiff’s business. The executive orders issued by the Governor of New York that non-emergency or elective dental care that requires Personal Protective Equipment (“PPE”) be postponed indefinitely.

6. Plaintiff’s insurance policy provides coverage for all non-excluded business losses, and thus provides coverage here.

7. As a result, Plaintiff is entitled to declaratory relief that the office is covered for business losses incurred during the pandemic.

THE PARTIES

8. At all relevant times, Park Avenue Oral and Facial Surgery, a New York professional corporation, maintains a dental office at 970 Park Avenue, New York, New York and 1175 Park Avenue, New York, NY.

9. Defendant Hartford Underwriters Insurance Company is a property and casualty company. Defendant is a citizen of Connecticut, being organized under the laws of the State of Connecticut and with its headquarters and principal place of business at One Hartford Plaza, Hartford, Connecticut 06155. On information and belief, Hartford Underwriters Insurance Company is a subsidiary of The Hartford Financial Services Group, Inc.

10. Defendant The Hartford Financial Services Group, Inc. d/b/a The Hartford is a property and casualty company. Defendant is a citizen of Connecticut, being organized under the laws of the State of Connecticut and with its headquarters and principal place of business at One Hartford Plaza, Hartford, Connecticut 06155. On information and belief, The Hartford Financial

Services Group, Inc. is the parent of Hartford Underwriters Insurance Company.

11. Defendant Sentinel Insurance Company, Limited, is a property and casualty company. Defendant is a citizen of Connecticut, being organized under the laws of the State of Connecticut and with its headquarters and principal place of business at One Hartford Plaza, Hartford, Connecticut 06155. On information and belief, Sentinel Insurance Company is a subsidiary of The Hartford Financial Services Group, Inc.

JURISDICTION

12. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 because complete diversity of citizenship exists between Plaintiff and Defendants and the amount in controversy is greater than \$75,000. The amount in controversy necessary for diversity jurisdiction over a declaratory judgment action is measured by the value of those business losses. *Id.* at § 1332(a).

13. Plaintiff is a citizen of New York.

14. Each Defendant is a citizen of Connecticut. Defendants are referred to hereinafter, collectively, as “Hartford.”

15. This Court has personal jurisdiction over Defendants because at all relevant times Defendants engaged in substantial business activities in the State of New York. At all relevant times Defendants transacted, solicited, and conducted business in New York through its employees, agents, and/or sales representatives, and derived substantial revenue from such business in New York.

16. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. §1391(b)(2) because a substantial portion of the acts which gave rise to this lawsuit occurred in this District. Venue is also proper pursuant to 28 U.S.C. §1391(b)(3) because Defendants are subject to this Court’s personal jurisdiction.

FACTUAL BACKGROUND

A. INSURANCE COVERAGE

17. Most businesses purchase all risk commercial insurance to protect against catastrophic events such as the current pandemic and non-essential business closures mandated by Civil Authority Orders.

18. Coverage for such events is known as “business interruption coverage” and is standard in most all-risk commercial property insurance policies.

19. On or about December 3, 2019, Plaintiff purchased insurance from Defendants, policy number 16 SBA PF7696 SB, expecting to be insured against losses, including, but not limited to, business income losses at its dental practices located at in New York City, New York. The policy period is February 12, 2020 to February 12, 2021.

20. Plaintiff’s offices are located at 970 Park Avenue, New York, New York & 1175 Park Avenue, New York, New York (the “Insured Property”).

21. The policy is currently in full effect, providing, among other coverages, business interruption coverage for closure by Order of Civil Authority.

22. Park Avenue’s Hartford Policy included standard ISO forms used by Hartford or all insureds having applicable coverage.

23. Park Avenue did not participate in the drafting or negotiating of its Hartford Policy.

24. Park Avenue possessed no leverage or bargaining power to alter or negotiate the terms of the Hartford Policy.

25. Plaintiff faithfully paid policy premiums to Defendants, specifically to provide, among other things, additional coverages in the event of business interruption or closures by order of Civil Authority.

26. Under the policy, insurance is extended to apply to the actual loss of business income

sustained and the actual, necessary and reasonable extra expenses incurred when access to the Insured Property is specifically prohibited by order of civil authority as the direct result of a covered cause of loss to property in the immediate area of Plaintiffs' Insured Property. This additional coverage is identified as coverage under "Civil Authority."

27. The Hartford Policy is an "all-risks" policy which provides coverage for the Insured Property unless specifically excluded.

28. These types of policies cover all risks of loss except for risks that are expressly and specifically excluded. In the Income Coverage Form provided to Plaintiff, Hartford agreed to "pay for direct physical loss of or physical damage to the Covered Property" that is "caused by or resulting from any covered cause of loss," and defined "Covered Causes of Loss" as "ALL RISK OF DIRECT PHYSICAL LOSS except as excluded or limited" therein. Plaintiff has suffered both direct physical loss of the Covered Property, as well as physical damage to the Covered Property, which triggers coverage.

29. Based on information and belief, the Defendants have accepted the policy premiums with no intention of providing any coverage for business losses or the Civil Authority extension due to a loss and shutdown.

30. Plaintiff's Income Coverage Form, included within the policy, includes Business Interruption, Civil Authority, Extra Expense, and Sue and Labor coverages.

31. These types of policies cover all risks of loss except for risks that are expressly and specifically excluded. In the Income Coverage Form provided to Plaintiff, Hartford agreed to "pay for direct physical loss of or physical damage to the Covered Property" that is "caused by or resulting from any covered cause of loss," and defined "Covered Causes of Loss" as "ALL RISK OF DIRECT PHYSICAL LOSS except as excluded or limited" therein. Plaintiff has suffered both direct physical loss of the Covered Property and physical damage to the Covered Property.

32. In the Income Coverage Form, Hartford did not exclude or limit coverage for losses from viruses. Losses due to COVID-19 are a Covered Cause of Loss under Hartford policies with the Income Coverage Form.

33. In the Income Coverage Form, Hartford agreed to pay for its insureds' actual loss of Practice Income sustained due to the necessary suspension of practice during the "period of restoration" caused by direct physical damage, subject to a Valued Daily Limit. Hartford agreed to "pay for loss of practice income that occurs within 12 consecutive months after the date of direct physical damage."

34. "Practice Income" means net income (or loss) before tax that Plaintiff would have earned and "continuing normal operating expenses, including payroll."

35. The presence of virus or disease can constitute physical 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, 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.

36. In the Income Coverage Form, Hartford also agreed to pay necessary Extra Expense that its insureds incur during the "period of restoration" "due to damage by a covered cause of loss"

to the Covered Property.

37. “Extra Expense” means expenses necessarily incurred by Plaintiff “during the period of restoration to continue normal services and operations.”

38. Hartford also agreed to pay “the actual loss of practice income” that Plaintiff sustains “caused by action of civil authority that prohibits access to” the Covered Property “due to the direct physical damage to property,” other than at the Covered Property, “caused by or resulting from any covered cause of loss.”

39. Hartford’s Income Coverage Form, under a section entitled “Duties in the Event of Damage” mandates that Hartford’s insured must “[t]ake all reasonable steps to protect the covered property from further damage by a covered cause of loss” and keep a record of “expenses for emergency and temporary repairs, for consideration in the settlement of the claim.”

40. Losses caused by COVID-19 and the related orders issued by local, state, and federal authorities triggered the Business Interruption, Extra Expense, Civil Authority, and Sue and Labor provisions of the Hartford policy.

41. The Hartford Policy provided that the insurance coverage applied to the actual loss of business income sustained and the actual expenses incurred when access to the Insured Premises is prohibited by order of civil authority as the result of a covered cause of loss to property in the area of Plaintiff’s Insured Property. This coverage is identified as “Civil Authority.”

42. The reasonable expectation of the insured, Plaintiff Park Avenue, was that the business interruption coverage included coverage when a civil authority forced closure of the business for an issue of public safety in the immediate area surrounding the insured premises.

43. The Hartford Policy does not exclude the losses suffered by Plaintiff, Park Avenue, and thereby the Policy does provide coverage for the losses incurred by Plaintiff.

44. Plaintiff filed an insurance claim for business losses in March 2020.

45. Defendant, by letter dated March 26, 2020, denied Plaintiff's claim for business losses.

46. Plaintiff suffered direct physical loss or damage within the definition of the Policy.

Loss of use of property, as here, constitutes physical loss or damage.

47. 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 dental practice (the "Closure Orders").

B. CORONAVIRUS PANDEMIC

48. The scientific community, and those personally affected by the virus, recognize the COVID-19 as a cause of real physical loss and damage. It is a highly contagious airborne virus which rapidly spread loss across the world, including the United States. It is clear that contamination of the Insured Property would be a direct physical loss requiring remediation to clean the surfaces of the office.

49. COVID-19 was declared a pandemic by the World Health Organization on January 20, 2020.

50. COVID-19 is a public health crisis that profoundly affected all aspects of society, including the ability of the public to congregate and gather.

51. The Center for Disease Control, on March 16, 2020, issued guidance that gatherings of more than ten (10) people should not occur due to increased risk of contracting the virus.

52. The COVID-19 virus remains stable and transmittable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard and up to two to three days on plastic and stainless steel.¹

¹ See <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces>; see also [who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations](https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations).

53. The global COVID-19 pandemic is exacerbated by the fact that the deadly virus physically infects and stays on surfaces of objects or materials, “fomites,” for up to twenty-eight (28) days.

C. CIVIL AUTHORITY ORDERS

54. On March 7, 2020, New York Governor Andrew Cuomo issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York.

55. On March 20, 2020, Governor Cuomo announced the “New York State on PAUSE” executive order, a 10-point policy to assure safety for New York residents. It included a new directive that all non-essential businesses statewide must close in-office personnel functions effective at 8PM on Sunday, March 22. For dental practices, only emergency procedures could be performed by dental professionals. Emergency procedures make up only a small percentage of our appointments.

56. COVID-19’s damaging effect on property has been repeatedly noted in emergency executive orders promulgated by New York City Mayor William de Blasio. For example, in Emergency Executive Order (“EEO”) No. 100, dated March 16, 2020, Mayor de Blasio proclaimed that “the virus physically is causing property loss and damage.” This language is repeated in EEO No. 101 (Mar. 17, 2020). In EEO No. 102, dated March 20, 2020, the Mayor noted that “this Order is given because of the propensity of the virus to spread person to-person and also because the actions taken to prevent such spread have led to property loss and damage.” This clause also appears in EEO No. 103 (Mar. 25, 2020); EEO No. 104 (Mar. 30, 2020); EEO No. 105 (Apr. 4, 2020); EEO No. 106 (Apr. 9, 2020); EEO No. 107 (Apr. 14, 2020); and EEO No. 108 (Apr. 19, 2020), clearly highlighting the destructive nature of COVID-19.

57. These Orders, as they related to the closure of all “non-life-threatening businesses” evidence awareness on the part of both state and local governments that COVID-19 causes damage vis-à-vis contamination to property. This is particularly true in dental practices.

58. Moreover, the American Dental Association (“ADA”) issued an advisory opinion telling dentists that elective and routine matters should be postponed during the quarantine period for the sake of patient and staff health.²

59. Due to the ADA’s prominence, it is the industry standard for due care and proper procedure.

60. Dentists who act against the ADA’s guidelines can be sued for not practicing with due care.

61. Additionally, the Center for Disease Control and Prevention (“CDC”) has made the same recommendation.³ The interpretations of these organizations maintain the industry standard of due care.

62. Therefore, due to the orders of the Governor of New York and the COVID-19 pandemic, a dental practice that mostly does routine procedures is effectively shut down during the duration of the crisis. Plaintiff has been forced to halt ordinary operations, resulting in substantial lost revenues.

D. IMPACT ON PARK AVENUE AND DENTAL PRACTICE

63. As a result of these Orders, Plaintiff closed its practice the week of March 16, 2020, and Plaintiff’s business remains closed except to perform a small amount of emergency procedures. As a dental practice, Plaintiff operates in a close environment where patients, staff and doctors are directly next to each other, and are using tools, instruments and surfaces which must be free from contaminants.

64. Dental and oral surgery procedures produce saliva particles which aerosolize, meaning they can become fine and hang in the air for extended periods of time.

² <https://www.ada.org/en/press-room/news-releases/2020-archives/march/ada-calls-upon-dentists-to-postpone-elective-procedures>.

³ <https://www.cdc.gov/oralhealth/infectioncontrol/statement-COVID.html>.

65. Plaintiff's practice is highly susceptible to contamination and damage.

66. Plaintiff's practice is highly susceptible to rapid person-to-person and person-to-property contamination as the virus is carried into the premises from the surrounding area and other contaminated, damaged premises.

67. Dental providers maintain close contact with patients during a dental procedure, placing them at risk of transmission via droplets from dental procedures.

68. Given the nature of Plaintiff's business, Plaintiff and its Insured Premises were physically impacted by the probability of COVID-19 contamination and Civil Authority mitigation efforts.

69. As a result of the civil authority orders, Park Avenue suffered business income, civil authority and other related losses which are covered by the Hartford Policy.

70. Plaintiff specifically sought and paid premiums to Hartford for coverage to ensure the survival of the business due to the business closure ordered by the civil authority.

71. It was Plaintiff's reasonable expectation that if civil authorities forced closure of Plaintiff's business, the loss of income from such civil authority action would be covered under the policy.

72. As a result of the orders, Plaintiff incurred, and continues to incur, a substantial loss of business income and additional expenses covered under the Hartford Policy.

COUNT I: DECLARATORY RELIEF

73. Plaintiff incorporates by reference each paragraph of this Complaint as if fully set forth herein.

74. Pursuant to 28 U.S.C. §2201, a court may "declare the rights and legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

75. Declaratory relief is intended to minimize “the danger of avoidable loss and unnecessary accrual of damages.” 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2751 (3d ed. 1998).

76. The policy is an insurance contract under which Defendants were paid premiums in exchange for their promise to pay Plaintiff’s losses for claims covered by the Policy, such as business losses incurred as a result of the government orders forcing them to close their businesses.

77. Plaintiff has complied with all the applicable provisions of the Policies, including payment of premiums in exchange for coverage under the Policies.

78. Defendants have arbitrarily and without justification refused to reimburse Plaintiff for any losses incurred by Plaintiff in connection with the covered business losses related to the Closure Orders and the necessary interruption of its business stemming from the COVID-19 pandemic.

79. An actual case or controversy exists regarding Plaintiff’s rights and Defendant’s obligations under the Policies to reimburse Plaintiff for the full amount of losses incurred by Plaintiff in connection with Closure Orders and the necessary interruption of its business stemming from the COVID-19 pandemic.

80. Pursuant to 28 U.S.C. § 2201, Plaintiff seeks a declaratory judgment from this Court declaring the following: (a) Plaintiff’s losses incurred in connection with the Closure Orders and the necessary interruption of its business stemming from the COVID-19 pandemic are insured under the Policy; (b) Defendants have waived any right they may have had to assert defenses to coverage or otherwise seek to bar or limit coverage for Plaintiff’s losses by issuing blanket coverall denials without conducting a claim investigation; and (c) Defendants are obligated to pay Plaintiff for the full amount of the losses incurred and to be incurred in connection with the covered business losses related to the Closure Orders during the necessary interruption of their businesses stemming from the COVID-19 pandemic.

COUNT II
BREACH OF CONTRACT - COMPENSATORY RELIEF

81. Plaintiff incorporates by reference each paragraph of this Complaint as if fully set forth herein.

82. At all times relevant hereto, Park Avenue was an insured under the Hartford Policy.

83. Park Avenue purchased, elected and paid premiums to Defendants for the property, business income and extra expense, civil authority and additional coverages applicable to the losses claimed in this action between the period of March 16, 2021 to present.

84. All the information regarding the insured's business and risks thereof was known to the Defendants when the Policy was issued.

85. Plaintiff is entitled to recover all losses caused by COVID-19 and/or civil authority orders.

86. Defendants were advised of Plaintiff's claims and demand for coverage under the Hartford Policy.

87. Plaintiff complied with all requirements of the Policy.

88. Defendants are duty bound and obligated under the Hartford Policy to make fair and reasonable efforts and offers to resolve Plaintiff's claim.

89. Defendants breached the terms and provisions of the Hartford Policy by denying the claims of Plaintiff for all losses caused by COVID-19 and the civil authority orders.

90. The breach of the indemnification obligations under the Hartford Policy by Defendants has caused Plaintiff to suffer loss and harm.

91. Defendants are required to pay Plaintiff all covered losses caused by COVID-19 and civil authority orders including business income, extra expense, contamination civil authority and other coverages under the Hartford Policy.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff herein prays for a declaration for each of the following:

- A. For a declaration that:
 - 1. The civil authority orders prohibit access to Plaintiff's Insured Premises.
 - 2. The civil authority order "prohibits access" as defined in the Hartford Policy.
 - 3. The Hartford Policy civil authority coverage applies to Plaintiff due to physical loss or damage at the insured premises or other premises in the immediate area of the Insured Premises.
 - 4. The Plaintiff is entitled to coverage for business income loss caused by the referenced orders.
 - 5. The inability to use the insured premises are a physical loss or damage as defined in the policy.
- B. For an Order requiring Defendant to pay Plaintiff all covered losses caused by loss of access to the Insured Premises including business income, extra expense, contamination, civil authority and other coverages under the Hartford Policy.
- C. Such other relief as the Court deems appropriate.

Dated: July 14, 2020
New York, New York

GITLIN, HORN AND VAN DE KIEFT LLP

/s/ Christopher M. Van de Kieft

Christopher M. Van de Kieft
2095 Broadway, Suite 411
NY, NY 10023
T: 212-514-5437 / F: 212-584-0799
cvandekieft@ghvlaw.com

Steven Kent
MESSNER REEVES LLP
733 Third Avenue
Suite 1619
New York, NY 10017
T: 646-663-1860 / F: 646-663-1895
Counsel for Plaintiff