

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

THE CINCINNATI INSURANCE	)	
COMPANY, an Ohio Corporation,	)	
	)	Case No. _____
Plaintiff,	)	
	)	COMPLAINT
v.	)	
	)	DEMAND FOR JURY TRIAL
APEX ENDODONTICS, P.C., an	)	
Alabama Professional Corporation,	)	
	)	
Defendant.	)	

**COMPLAINT FOR DECLARATORY JUDGMENT**

The Cincinnati Insurance Company for its Complaint for Declaratory Judgment under 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure, states as follows:

1. The Cincinnati Insurance Company (“Cincinnati”), is an Ohio corporation with its principal place of business in Fairfield, Ohio.
2. Apex Endodontics, P.C. (“Apex”), is an Alabama professional corporation with its principal place of business in Birmingham, Alabama. The registered agent for Apex is Trevor M. Kaple DDS, 527 Oaks Drive, Birmingham, AL 35209.
3. This Court has subject matter jurisdiction under 28 U.S.C. § 1332 because the amount in controversy exceeds Seventy-Five Thousand Dollars (\$75,000), exclusive of costs, interest, and attorney’s fees, and there exists complete diversity of citizenship.
4. Venue is proper in the Northern District of Alabama under 28 U.S.C. § 1391(b) because Apex resides in Birmingham, Alabama, and the events giving rise to this lawsuit occurred in this district.

**FACTUAL BACKGROUND**

***The Policy***

5. Cincinnati issued policy number ECP 046 61 82 to Apex Endodontics PC and Trevor M. Kaple DDS (“Kaple”) (the “Policy”). The Policy was effective from November 30, 2017 to November 30, 2020. The Policy insured Apex’s premises (“the Premises”) located at 1932 Laurel Road and 4217 Dolly Ridge Road in Vestavia, Alabama, a suburb of the City of Birmingham.

6. A certified copy of the Policy is attached as Exhibit A, including all of its provisions, terms, conditions, exclusions, and endorsements.

7. The Policy was issued and delivered to Apex through Apex’s insurance agency, Byars Wright, Inc. (“Byars Wright”), located in Gardendale, Alabama.

8. The Policy includes limits of insurance for Business Personal Property of \$300,000 and Business Income and Extra Expense up to 12 months for Actual Loss Sustained (ALS) subject to the terms of the Actual Loss Sustained Business Income Endorsement, Form FCP 206 05 16, subject to a \$1,000 deductible.

***The Claim and Claim Handling To-Date***

9. Apex operates a dental office located at 1932 Laurel Road in Vestavia, Alabama.

10. Apex presented a claim to Cincinnati on April 5, 2020, claiming business interruption due to COVID-19 (“the Claim”) and demanding coverage pursuant to the Policy.

11. On April 6, 2020, Cincinnati contacted Kaple via telephone. The same day, Cincinnati sent Apex a preliminary reservation of rights letter and request for information required to facilitate its coverage investigation. A true and correct copy of Cincinnati’s April 6, 2020 correspondence is attached as Exhibit B.

12. Having not received the requested information, Cincinnati sent follow up correspondence to Apex on April 15, April 28, May 11, and May 29, 2020. In its May 29 letter, Cincinnati requested Apex notify it within 20 days if Apex wished to pursue its Claim. Cincinnati advised that it planned to close its file if it did not hear otherwise from Apex within those 20 days. True and correct copies of Cincinnati's April 15, April 28, May 11, and May 29, 2020 correspondence to Apex are attached as Exhibits C, D, E, and F, respectively.

13. By letter dated June 17, 2020, Kaple, on behalf of Apex, responded to Cincinnati's request for information ("Apex's Letter"). A true and correct copy of Apex's Letter is attached as Exhibit G.

14. According to Apex's Letter, "[t]he proliferation of the coronavirus makes it more likely than not that the coronavirus was present on the property and has caused direct physical loss or damage to the insured property." (See Ex. G, p. 1).

15. According to Apex's Letter, "there has been a direct physical loss of the property because I [Kaple] have been unable to use the property for its intended purpose as a result of government orders prohibiting in-person operations, which has resulted in a complete loss of function or utility." (See Ex. G, p. 1).

16. According to Apex's Letter, "[t]he governor of Alabama and Jefferson County, Alabama issued stay-at-home orders and the governor of Alabama declared a state public health emergency. The stay-at-home orders prohibit access to the insured property or, at the very least, significantly restrict access to the insured property." (See Ex. G, p. 2).

17. According to Apex's Letter, "[t]he government 'shelter in place' orders were issued as a direct result of the physical spread of COVID-19 in [the] community, which was causing physical loss or damage to other properties nearby." (See Ex. G, p. 2).

18. Apex's Letter also advised Cincinnati that Apex had retained Attorney Brett A. Emison of Langdon & Emison, LLC ("Emison") to represent it with respect to the Claim. (See Ex. G, p. 2).

19. On June 19 and June 23, 2020, Cincinnati sent Apex an email attaching copies of a March 19, 2020 Order by the Jefferson County, Alabama Department of Health and an Amended Order of the State Health Officer for the State of Alabama, dated April 3, 2020 (collectively, "the Orders"). Cincinnati asked Apex to confirm those Orders are the same orders referred to in the Apex Letter. True and correct copies of Cincinnati's June 19 and June 23, 2020 correspondence and the Orders are attached as Exhibit H.

20. Contrary to the representations set forth in Apex's Letter, the Orders do not state that COVID-19, or the "physical spread" thereof, "cause[es] physical loss or damage to property." Rather, the Orders state: "the potential of widespread exposure to an infectious agent [ ] poses significant risk of substantial harm to a large number *of people*." (Ex. H, pp. 4, 15) (emphasis added).

21. The Orders required Apex temporarily cease all *elective* dental procedures; the Orders did not require that medically necessary dental procedures cease. (Ex. H, p. 14).

22. On or about June 25, 2020, Emison sent Cincinnati a letter of representation ("the Letter of Representation"). By letter dated July 2, 2020, Cincinnati acknowledged receipt of the Letter of Representation and sent Emison a certified copy of the Policy, pursuant to his request. Additionally, because Apex could not identify the Orders with certainty, Cincinnati requested Emison provide a copy of the Orders upon which Apex relies. On July 6, 2020, Emison confirmed the Orders previously identified by Cincinnati were, in fact, the Orders upon which Apex relies.

True and correct copies of the Letter of Representation and Cincinnati's July 2 correspondence to Emison are attached as Exhibit I.

23. Cincinnati did not receive any further communications from Apex or Emison regarding the Claim. Cincinnati, having considered the Orders and the statements in the Apex Letter in relation to its coverage analysis, sent Apex a supplemental reservation of rights letter on September 2, 2020. In that letter, Cincinnati identified the basis for its preliminary determination that the Policy does not provide coverage for the Claim. However, Cincinnati's September 2 letter continued as follows:

If you have any information that you believe may impact any of the issues raised in this letter, please forward it to us as soon as possible. If you believe that we have misunderstood the facts or are in error regarding any of the statements set forth above, please notify us as soon as possible.

A true and correct copy of Cincinnati's September 2, 2020 letter is attached as Exhibit J.

24. Cincinnati did not receive a response to its September 2 letter. Cincinnati sent a follow up letter to Emison on or about January 25, 2021. In that letter, Cincinnati advised Apex that if it did not receive a response within 20 days, it would understand the lack of a response to indicate Apex no longer wished to continue with the claim process and would close its file for the Claim. The January 25 letter further stated, "If this is not the case, please let us know and indicate you intend to provide additional information in the near future." A true and correct copy of Cincinnati's January 25, 2021 letter is attached as Exhibit K.

25. Emison responded to Cincinnati's January 25 letter on February 12, 2021. Emison's response stated in full as follows:

We are in receipt of your January 25th, 2021 correspondence.

Your September 2, 2020 correspondence reads "If you have any information that you believe may impact any of the issues raised in this letter, please forward it to

us as soon as possible.” We have already provided the requested information available.

Apex wishes to continue with the claim process and obtain coverage for its losses. However, as your September correspondence reads “...coverage is unavailable under the Policy,” we took your September 2, 2020 letter to be as it reads: a denial.

A true and correct copy of Emison’s February 12, 2021 correspondence is attached as Exhibit L.

26. Following Emison’s February 12, 2021 correspondence, Cincinnati issued a coverage position letter based on the information provided by Apex up to that time (“the Coverage Position Letter”). For the reasons described in the Coverage Position Letter and as further set forth in this Complaint, the Policy does not provide coverage for the Claim. A true and correct copy of Cincinnati’s March 4, 2021 Coverage Position Letter is attached as Exhibit M.

***No Coverage for The Claim***

27. There is no coverage for the Claim because there is no direct physical loss or damage to property.

28. The Claim does not satisfy the Policy’s insuring agreement for Business Income, Extra Expense or Civil Authority Coverages.

29. The Claim does not involve direct, physical loss or damage to property at its premises caused by a Covered Cause of Loss. Accordingly, the Policy’s insuring agreement for Business Income Coverage is not met and that coverage is unavailable.

30. There has been no physical alteration or structural damage to property at Apex’s property or premises, or to other property or premises that would potentially trigger the availability of coverage under the Policy.

31. The Policy defines “Covered Causes of Loss” to mean “direct ‘loss’ unless the ‘loss’ is excluded or limited in this Coverage Part.”

32. The Policy defines “loss” as “accidental physical loss or accidental physical damage.”

33. There is no coverage for the Claim pursuant to the provisions, terms, and conditions of the Policy’s Coverage for Business Income and Extra Expense.

34. The Business Income and Extra Expense coverages require that a suspension of operations be caused by direct physical loss or damage to Covered Property at the premises or within 1,000 feet of those premises.

35. There is and was no direct physical loss or damage to Apex’s property or premises. Accordingly, the Business Income and Extra Expense coverages’ terms, conditions, provisions, and requirements are not satisfied and coverage is unavailable under the Policy.

36. Even assuming that there was direct physical loss or damage to Apex’s property or premises, coverage would be excluded by one or more of the Policy’s exclusions, including the exclusions for Ordinance or Law, Government Actions, Delay or Loss of Use, Acts or Decisions, Neglect, and Pollutants. Because of the Policy’s provisions, terms, and definitions concerning the Ordinance or Law, Government Actions, Delay or Loss of Use, Acts or Decisions, Neglect, and Pollutants exclusions, there is and was no Covered Cause of Loss.

37. There is no coverage pursuant to the provisions, terms, and conditions of the Policy’s coverage extension for Civil Authority.

38. The Orders did not address or cause direct physical loss or damage to property at other locations or dangerous physical conditions at other locations.

39. The Orders do not prohibit or prevent access to Apex’s premises, or the area immediately surrounding Apex’s premises.

40. The provisions, terms, and conditions of the Civil Authority coverage have not been fulfilled, and Civil Authority Coverage is unavailable under the Policy.

41. There is no provision, term, or condition of the Policy that provides coverage to Apex.

42. The Policy, including its Building and Personal Property Coverage Form and Business Income (and Extra Expense) Coverage Form, only provides coverage when there has been direct physical loss or damage to property which does not exist in the claim presented by Apex.

43. There exists an actual controversy of a justiciable nature between Cincinnati and Apex concerning the rights and obligations of the parties to the insurance contract.

44. Cincinnati has complied with all terms, conditions and provisions of the insurance Policy and specifically reserves any and all rights and defenses it has or may have under the Policy, including additional rights and defenses that may become apparent throughout the course of discovery in this case.

45. By virtue of the foregoing, a declaratory judgment is both necessary and proper in order to set forth and determine the rights, obligations, and liabilities that exist between the parties in connection to the aforementioned Policy.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff The Cincinnati Insurance Company prays that this Court enter judgment in its favor and against Defendant Apex Endodontics, P.C. declaring:

- A. That there is no coverage under the Policy for Apex Endodontics, P.C.'s claimed loss;
- B. That The Cincinnati Insurance Company is not in any manner liable to Defendant Apex Endodontics, P.C. under the Policy for the claimed loss;



- C. That there was no direct physical loss or damage to Apex Endodontics, P.C.'s property or premises;
- D. That Apex Endodontics, P.C. is not entitled to property insurance coverage for its Claim for losses allegedly sustained as a result of COVID-19 and/or related Orders;
- E. That Apex Endodontics, P.C. is not entitled to coverage for its Claim pursuant to terms and conditions of Civil Authority Coverage;
- F. That, even if there were direct physical loss or damage to property, Apex Endodontics, P.C.'s claimed loss would be excluded by the terms and conditions of the Policy, including but not limited to the Ordinance or Law, Government Actions, Delay or Loss of Use, Acts or Decisions, Neglect, and Pollutants exclusions; and
- G. For such other and further relief as the Court deems just and equitable under the circumstances.

Respectfully submitted,

/s/ Augusta S. Dowd

Augusta S. Dowd (ASB-5274-D58A)

W. Chambers Waller IV (ASB-5424-X15S)

Attorneys for Plaintiff

The Cincinnati Insurance Company

**OF COUNSEL:**

**WHITE ARNOLD & DOWD P.C.**

2025 Third Avenue North, Suite 500

Birmingham, AL 35203

Telephone: (205) 323-1888

Facsimile: (205) 323-8907

[adowd@whitearnolddowd.com](mailto:adowd@whitearnolddowd.com)

[cwaller@whitearnolddowd.com](mailto:cwaller@whitearnolddowd.com)

**Please serve the Defendant as follows:**

**Apex Endodontics, P.C.**

**c/o Trevor M. Kaple**

**527 Oaks Drive**

**Birmingham, AL 35209**