

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROCHESTER DRUG CO-OPERATIVE, INC.,

Plaintiff,

v.

HISCOX INSURANCE COMPANY, INC.,

Defendant.

COMPLAINT

INDEX No.: 6:20-cv-6025

The Plaintiff ROCHESTER DRUG CO-OPERATIVE, INC. (“Rochester Drug Co-Op”), by its attorneys, Harter Secrest & Emery LLP, as and for its Complaint against HISCOX INSURANCE COMPANY, INC. (“Hiscox”) respectfully alleges as follows:

THE PARTIES

1. At all relevant times, Plaintiff Rochester Drug Co-Op was and still is a New York corporation with its principal place of business in Rochester, New York. Rochester Drug Co-Op is directed, controlled, and coordinated from New York.

2. At all relevant times, Defendant Hiscox was and still is an Illinois corporation with a principal place of business in Chicago, Illinois. Hiscox is directed, controlled, and coordinated from Illinois.

JURISDICTION AND VENUE

3. This Court has jurisdiction pursuant to 28 U.S.C. § 1332 because the Plaintiff is a citizen of New York and the Defendant is a citizen of Illinois and the matter in controversy exceeds \$75,000, exclusive of interest and costs.

4. Venue is proper under 28 U.S.C. § 1391. Hiscox issued the relevant insurance policy to an insured within this district, the policy was delivered in this district, the insured risk is in this district, the premium on the policy was paid in this district, the cause of action accrued in this district, and all harms were felt by Rochester Drug Co-Op in this district.

5. For these same reasons, and because, upon information and belief, Hiscox is authorized to and does routinely issue insurance policies and transact other meaningful business in this district, this Court has personal jurisdiction over Hiscox.

THE FACTS

6. Rochester Drug Co-Op is a pharmaceutical wholesaler that has been in business for over one hundred years. The company—one of the few remaining drug-distribution cooperatives remaining in the United States—supplies products to thousands of independent pharmacies and health care stores.

A. The Policy

7. On or about March 8, 2017, for good and valuable consideration, Rochester Drug Co-Op procured from Hiscox a Private Company Management Liability Insurance Policy bearing number UVA1901769.17 for the policy period of March 8, 2017 through March 8, 2018 (“the Policy”). A true and correct copy of the Policy is attached as **Exhibit A**. Hiscox agreed under the Policy to pay up to \$6,000,000 for defense costs incurred to defend Rochester Drug Co-Op against covered claims, subject to a \$25,000 retention.

8. Specifically, the Policy states that Hiscox shall pay all defense costs “arising from a **Claim** first made against a **Company** during the **Policy Period** . . . for any actual or alleged **Wrongful Act**” of Rochester Drug Co-Op. The Policy defines **Claim** to include any litigation

and **Wrongful Act** to include “any breach of duty, neglect, error, misstatement, misleading statement, omission or act by” Rochester Drug Co-Op.

9. The Policy also states that Rochester Drug Co-Op “shall have the right to tender the defense of the **Claim** to [Hiscox] . . . pursuant to the notice provisions of Clause VI. of the **General Terms and Conditions**” but that “[f]ailure to timely give notice of a **Claim** shall not invalidate coverage for such **Claim** unless the failure to do so has prejudiced the **Insurer**.”

10. The Policy further states that Hiscox “shall be obligated to assume the defense of the **Claim**, even if such **Claim** is groundless, false or fraudulent.”

11. The Policy’s coverage-grant language requires Hiscox to advance defense costs to Rochester Drug Co-Op for any lawsuit alleging that Rochester Drug Co-Op committed a “breach of duty, neglect, error, misstatement, misleading statement, omission or act.”

12. The Policy also contains one exclusion that is relevant to this dispute. That exclusion states that Hiscox “shall not be liable to make any payment for **Loss** in connection with any **Claim** made against any **Insured** arising out of, based upon or attributable to the committing of any deliberate criminal or deliberate fraudulent act, or any willful violation of any statute, rule or law, if any final adjudication establishes that such deliberate criminal or deliberate fraudulent act, or willful violation of statute, rule or law was committed” (“the Final Adjudication Exclusion”). The Policy does not define “arising out of, based upon or attributable to” or “final adjudication” or “establishes.”

B. The Lawsuits

13. Rochester Drug Co-Op provided notice and tendered its defense to Hiscox for twenty-nine opioid-related litigations filed in New York. **Exhibit B** is a list of these litigations, which are collectively referred to as the “NY Opioid Litigations.”

14. All of the NY Opioid Litigations are currently pending and assert claims covered under the Policy—including negligence and public nuisance claims—against Rochester Drug Co-Op.

15. In addition to the NY Opioid Litigations, Rochester Drug Co-Op was also named as a defendant in *United States of America v. Rochester Drug Co-operative, Inc.*, Case No. 1:19-cr-00290 filed in the United States District Court for the Southern District of New York (the “SDNY Criminal Action”).

16. On April 22, 2019, as part of the SDNY Criminal Action, Rochester Drug Co-Op entered into a Deferred Prosecution Agreement with the Office of the United States Attorney for the Southern District of New York (“the Government”). In entering into the Deferred Prosecution Agreement, Rochester Drug Co-Op waived indictment and consented to the filing of criminal charges in the form of an Information charging Rochester Drug Co-Op with three counts.

17. Rochester Drug Co-Op then pleaded not guilty to all three counts.

18. In accordance with the terms of the Deferred Prosecution Agreement, the Government “recommend[ed] to the Court that the prosecution of [Rochester Drug Co-Op] on the Information be deferred for five years from the date of the signing of [the] Agreement.” The court granted that motion and agreed to defer prosecution.

19. If Rochester Drug Co-Op complies with the terms of the Deferred Prosecution Agreement, then the Government will, at the conclusion of the deferral period, move to dismiss the Information with prejudice. No judgment has been entered against Rochester Drug Co-Op in the SDNY Criminal Case.

20. Rochester Drug Co-Op has also been named as a defendant in *United States of America v. Rochester Drug Co-operative, Inc.*, Case No. 1:19-cv-03568 filed in the United States District Court for the Southern District of New York (the “SDNY Civil Action”).

21. On April 23, 2019, as part of the SDNY Civil Action, Rochester Drug Co-Op and the Government entered into a “Stipulation and Order of Settlement and Dismissal” (“the Stipulation”). The Stipulation provides that no judgment will be entered against Rochester Drug Co-Op unless Rochester Drug Co-Op defaults on its duties under the stipulation. No judgment has been entered against Rochester Drug Co-Op in the SDNY Civil Action.

C. The Coverage Correspondence

22. Rochester Drug Co-Op timely provided notice and requested payment of defense costs in the NY Opioid Litigations in accordance with the provisions of the Policy.

23. On March 22, 2018, Hiscox sent Rochester Drug Co-Op correspondence stating that, subject to a general reservation of rights, the Policy provides coverage for the NY Opioid Litigations. Hiscox re-iterated this position in its August 24, 2018 and February 19, 2019 correspondence.

24. Rochester Drug Co-Op also sought and received authorization from Hiscox to hire the law firm Allegaert Berger & Vogel LLP (“the ABV law firm”) to defend it in the NY Opioid Litigations. Rochester Drug Co-Op then hired the ABV law firm, which sent its invoices directly to Hiscox for payment. Hiscox received and approved a litigation budget prepared by the ABV law firm then reviewed and agreed to pay the invoices sent to Hiscox by the ABV law firm.

25. On August 5, 2019, Hiscox changed its mind. Contrary to its prior position—that Hiscox would pay the defense costs incurred by the ABV law firm in excess of the \$25,000

retention—Hiscox sent draft correspondence to counsel for Rochester Drug Co-Op stating that Hiscox planned to decline coverage for the NY Opioid Litigations under the Policy’s Final Adjudication Exclusion.

26. On August 29, 2019, counsel for Rochester Drug Co-Op issued correspondence to Hiscox challenging the applicability of the Final Adjudication Exclusion. A true and correct copy of this letter is attached as **Exhibit C**.

27. The challenge letter explained that, under New York law, the Deferred Prosecution Agreement and Stipulation do not constitute “final adjudications.” After all, Rochester Drug Co-Op has not entered any guilty plea. There has been no judgment against Rochester Drug Co-Op in any of the NY Opioid Litigations, nor in the SDNY Criminal Case or SDNY Civil Case. No judgment will even be filed by the parties unless Rochester Drug Co-Op defaults on the Deferred Prosecution Agreement or Stipulation. Declining coverage based on the Final Adjudication Exclusion is therefore improper; in fact, the exclusion may never apply if Rochester Drug Co-Op continues to comply with the Deferred Prosecution Agreement and Stipulation.

28. Despite being confronted with facts and case law that clearly demonstrated that Hiscox’s declination was unsupported, on September 13, 2019 Hiscox denied coverage for all the NY Opioid Litigations based on the Final Adjudication Exclusion. A true and correct copy of this letter is attached as **Exhibit D**.

29. In its September 13, 2019 correspondence, Hiscox also listed additional Policy terms which it believed “may limit or preclude coverage” for the NY Opioid Litigations. Hiscox has never disclaimed coverage based on these provisions and none of these provisions could support a disclaimer of coverage.

30. For example, Exclusion A.(i) (exclusion for “gaining of any profit or advantage to which any final adjudication establishes the **Insured** was not legally entitled”) also requires a final adjudication. Exclusion B. (notice under a prior policy) is inapplicable because Rochester Drug Co-Op did not report or seek coverage under prior policies. Exclusions J and Q—which govern coverage for bodily injury/property damage, unfair trade practices, contractual liability, professional services, and fines/penalties/non-monetary relief—would not justify Hiscox’s disclaimer of coverage for the NY Opioid Litigations. Even if these exclusions applied to certain causes of action alleged in the NY Opioid Litigations, as long as there is coverage for one claim Hiscox is obligated to fund Rochester Drug Co-Op’s defense costs.¹

31. To date, Hiscox has failed to reimburse Rochester Drug Co-Op for its defense costs incurred in the NY Opioid Litigations.

CAUSE OF ACTION

32. Plaintiff repeats, reiterates, and realleges each and every allegation contained in the above paragraphs inclusively with the same force and effect as though more fully set forth at length herein.

33. Plaintiff entered into a contract with Hiscox in the form of the Policy.

34. Plaintiff complied with all terms of the Policy, including any and all prerequisites for coverage. Plaintiff provided Hiscox with notice of the NY Opioid Litigations and sought Hiscox’s approval in a manner consistent with the requirements set forth in the Policy. Between the time it provided notice and September 9, 2019, the date of Hiscox’s disclaimer, Plaintiff did

¹ The Policy states that, in the event a **Claim** includes both covered and non-covered matters, it provides coverage for “[o]ne hundred percent (100%) of **Defense Costs**.” Every litigation in the NY Opioid Litigations contains at least one covered claim.

not take any action, or fail to take any required action, that prejudiced the rights of Hiscox or Rochester Drug Co-Op with respect to the NY Opioid Litigations.

35. Every complaint in the NY Opioid Litigations alleges a “breach of duty, neglect, error, misstatement, misleading statement, omission or act by” Rochester Drug Co-Op.

36. For over a year, Hiscox represented that it would fund Rochester Drug Co-Op’s defense costs in the NY Opioid Litigations. Then, in late 2019, Hiscox denied coverage on one basis—the Final Adjudication Exclusion. That exclusion, however, is inapplicable to the NY Opioid Litigations.

37. The Policy requires Hiscox to pay Plaintiff’s defense costs in the NY Opioid Litigations.

38. By declining coverage for the NY Opioid Litigations, Hiscox breached its contract with Rochester Drug Co-Op.

39. As a result, Rochester Drug Co-Op has been funding its own defense by the ABV law firm without any payment or reimbursement from Hiscox, resulting in hundreds of thousands of dollars in damages.

WHEREFORE, Plaintiff demands judgment as follows:

(a) A preliminary and permanent injunction enjoining Hiscox from violating its duty to pay Rochester Drug Co-Op’s defense costs in the NY Opioid Litigations;

(b) A declaration that Hiscox has a duty to reimburse Rochester Drug Co-Op for defense costs (up to \$6,000,000) expended in the NY Opioid Litigations in excess of the Policy’s \$25,000 retention;

(d) Damages in the amount that Rochester Drug Co-Op has spent to fund its defense against the NY Opioid Litigations in excess of the Policy's \$25,000 retention, as determined by this Court; and

(e) All other relief as the Court deems necessary and proper.

DATED: January 10, 2020
Rochester, New York

HARTER SECREST & EMERY LLP

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