

COMMONWEALTH OF KENTUCKY  
MADISON CIRCUIT COURT  
DIVISION \_\_\_\_\_  
CIVIL ACTION NO. \_\_\_\_\_

ABC DAYCARE & LEARNING CENTER

PLAINTIFF

v.

COMPLAINT

WEST BEND MUTUAL INSURANCE COMPANY  
1900 South 18th Avenue  
West Bend, Wisconsin 53095  
Attention: General Counsel

DEFENDANT

SERVE: Kentucky Secretary of State

\* \* \* \* \*

Comes Plaintiff, ABC Daycare & Learning Center<sup>1</sup> ("ABC Daycare") by counsel and for its Complaint against Defendant, West Bend Mutual Insurance Company ("West Bend") states and alleges as follows:

I

PARTIES, JURISDICTION & VENUE

1. ABC Daycare is a Kentucky corporation operating child care centers licensed by the Commonwealth of Kentucky from premises being in and constituting part of Richmond, Madison County, Kentucky.

2. West Bend at all times pertinent hereto was licensed and authorized to, and did, underwrite and issue policies of insurance in the Commonwealth of Kentucky; and did underwrite and issue to ABC Daycare in Madison County, Kentucky, West Bend Business Owners Insurance policy number A440618-8 (the "West Bend Policy"). The Kentucky Secretary of State is the Agent for Service of Process of West Bend.

<sup>1</sup> ABC Daycare & Learning Center is an assumed name of ET II, Inc.

3. This lawsuit arises from the errors, omissions, conduct, unfair claims settlement practices, actions and inactions of West Bend in denying ABC Daycare's claims for losses of business income under the West Bend Policy arising from the shutdown of ABC Daycare's child care center operations being in and as a part of Madison County, Kentucky by reason of the Coronavirus Disease 2019 (COVID-19).

4. Jurisdiction lies in this Court pursuant to KRS 23A.010 because this matter is not exclusively vested in some other court and ABC Daycare has suffered damages herein over the jurisdictional requisite amount of this Court.

5. Venue is proper in this Court pursuant to (a) KRS 452.450 because the insurance contract, which is, in part, the subject matter of this action, was made and/or to be performed in Madison County and concerns the operations of businesses located and being in Madison County, Kentucky; and (b) KRS 454.210(4) permits any suit or action authorized by KRS 454.210 to be brought in the County wherein a plaintiff resides or where the cause of action or any part thereof arose.

## II

### FACTS PERTINENT TO ALL CAUSES OF ACTION

6. ABC Daycare operates licensed, certified and registered (by and with the Commonwealth of Kentucky) child care centers located at premises being at and located as a part of Richmond, Madison County, Kentucky at 205 Churchill Drive and 145 S. Keeneland Drive.

7. West Bend is the insurer of ABC Daycare under the West Bend Policy and is therefore bound and liable under the West Bend Policy for the payments due thereunder to ABC Daycare.

8. Coronavirus Disease 2019 (COVID-19) is an easily, rapidly and highly

contagious communicable disease.

9. Presently there are thirty or more confirmed cases of the Coronavirus Disease 2019 (COVID-19) and one death from the Coronavirus Disease 2019 (COVID-19) in Madison County, Kentucky.

10. The unavoidable proximity of children serviced by child care centers results in the child care centers having increased and higher risks for outbreaks of the Coronavirus Disease 2019 (COVID-19) within the population of children that child care centers serve, and resulting transmissions of the disease to older adult family members and adults with serious chronic medical conditions with whom those children reside.

11. By reasons including the confirmed cases of the Coronavirus Disease 2019 (COVID-19) in Madison County, Kentucky being of which ABC Daycare's premises are a part of, the Coronavirus Disease 2019 (COVID-19) Pandemic in Madison County, Kentucky being of which ABC Daycare's premises are a part of, the Kentucky Order to Close Licensed Child Care Centers by 2 p.m. March 18, 2020, a true copy of which is attached hereto and made a part hereof as Exhibit A ("Day Care Closure Order"), and the best interests and protections of the children and families served by ABC Daycare, ABC Daycare on or about March 18, 2020 closed and discontinued its operations at its premises at 205 Churchill Drive, Richmond, Madison County, Kentucky 40475 and 145 S. Keeneland Drive, Richmond, Madison County, Kentucky 40475.

12. ABC Daycare's business income losses by reason of the closure and discontinuance of its operations at 205 Churchill Drive and 145 S. Keeneland Drive, being a part of Richmond, Madison County, Kentucky 40475 are in excess of \$100,000.00.

13. The West Bend Policy provides business income and extra expense coverage to

ABC Daycare on page 8 due to the outbreak of a communicable disease as follows:

### G. Definitions

#### g. Communicable Disease Business Income and Extra Expense Coverage

You may extend this insurance to apply to the actual loss of Business Income or Extra Expense that you sustain as the result of your "operations" being temporarily shut down or suspended as ordered by a local, state, or federal board of health or similar governmental board that has jurisdiction over your "operations". The shutdown or suspension must be due to an outbreak of a "communicable disease" or a "waterborne pathogen" at the insured premises as described in the Declarations. We will pay any loss of Business Income or any necessary Extra Expense costs (other than the expense to repair or replace property) you incur arising from the shutdown or suspension of your "operations", including but not limited to:

- (1) The cost of cleaning your equipment or disinfecting the insured premises in accordance with the jurisdictional board's requirements;
- (2) The cost of replacing consumable goods declared by the jurisdictional board to be contaminated;
- (3) The cost of testing the insured premises to confirm the elimination of the "communicable disease" or "waterborne pathogen";
- (4) The cost of necessary medical tests, doctor's care, hospitalization, blood work or vaccines for infected persons as required by the jurisdictional board;
- (5) The extra advertising costs to restore your business reputation;
- (6) The cost to evacuate the insured premises;
- (7) To avoid or minimize the suspension of business and to continue "operations" at the described premises or at replacement or temporary locations, including relocation expenses and costs to equip and operate the replacement or temporary locations; and
- (8) To minimize the suspension of your "operations" if you cannot continue your "operations".

The most we will pay under this Additional Coverage for loss in any one occurrence is \$50,000. The most we will pay for all losses in a policy period is \$100,000.

The coverage for Business Income and Extra Expense will begin 24 hours after the jurisdictional board shuts down or suspends your "operations" and will end within 30 days after the jurisdictional body certifies that the described premises are habitable and that you may fully or partially resume your "operations".

2. "Communicable disease" means an illness, sickness, condition or an interruption or disorder of body functions, systems or organs that is transmissible by an infection or a contagion directly or indirectly through human contact or

contact with human fluids, waste or similar agent, such as but not limited to Meningitis, Measles, or Legionnaire's Disease.

14. "Operations" means your business activities occurring at the described premises.

14. ABC Daycare timely submitted a claim under the West Bend Policy, assigned West Bend claim no. AM33296 ("ABC Daycare Business Interruption Claim"), to West Bend, for ABC Daycare's business interruption losses occurring from the closure and cessation of its operations at ABC Daycare's premises at 205 Churchill Drive, and 145 S. Keeneland Drive, being a part of Richmond, Madison County, Kentucky 40475, by reason of the confirmed cases of the Coronavirus Disease 2019 (COVID-19) in Madison County, Kentucky of which ABC Daycare's premises are being a part of, the Coronavirus Disease 2019 (COVID-19) Pandemic in Madison County, Kentucky of which ABC Daycare's premises are being a part of, the Day Care Closure Order, and the best interests and protections of the children and families served by ABC Daycare.

15. ABC Daycare has fully cooperated and provided West Bend with all information requested of it at all times.

16. On April 1, 2020, West Bend unjustly rejected the ABC Daycare Business Interruption Claim, disclaimed coverage and denied liability for the ABC Daycare Business Interruption Claim as set forth in the correspondence attached hereto and made a part hereof as **Exhibit B** ("West Bend Denial Letter") without limitation on the purported basis that there has been no "outbreak of a communicable disease at the insured premises".

17. The applicable language and provisions of the West Bend Policy are vague, confusing and ambiguous and not unequivocally clear and conspicuous. For example and without limitation:

a. The word "exclusively" is not clearly, conspicuously or unequivocally utilized in

references to the “insured premises”

b. The sentence “[y]ou may extend this insurance to apply to the actual loss of Business Income or Extra Expense that you sustain as the result of your "operations" being temporarily shut down or suspended as ordered by a local, state, or federal board of health or similar governmental board that has jurisdiction over your "operations". . . .” does not clearly, conspicuously or unequivocally reference an insured’s premises.

c. The sentence “[w]e will pay any loss of Business Income or any necessary Extra Expense costs (other than the expense to repair or replace property) you incur arising from the shutdown or suspension of your ‘operations’ . . . .” does not clearly, conspicuously or unequivocally reference or impose the insured’s premises as any qualification or limitation on coverage as set forth in that sentence.

18. ABC Daycare had and has a reasonable expectation under the West Bend Policy that the ABC Daycare Business Interruption Claim would be and constitute a covered claim under the West Bend Policy.

19. The applicable language and provisions of the West Bend Policy relied upon by West Bend in denying the ABC Daycare Business Interruption Claim are injurious to the public good, void as against public policy and unenforceable, without limitation by requiring the insured, in this case ABC Daycare, in order to qualify for loss of Business Income coverage under the West Bend Policy, to remain open and operational in the face of the Coronavirus Disease 2019 (COVID-19) Pandemic in Madison County, Kentucky such that a confirmed case of the Coronavirus Disease 2019 (COVID-19) occurred in a child or his or her family served by ABC Daycare.

20. ABC Daycare has satisfied all material conditions precedent and complied with

all the West Bend Policy provisions triggering coverage for the ABC Daycare Business Interruption Claim.

21. ABC Daycare has timely demanded West Bend to provide indemnity for the ABC Daycare Business Interruption Claim in the aggregate amount of One Hundred Thousand Dollars (\$100,000.00).

22. West Bend's decision in the West Bend Denial Letter is an error; there is coverage for the ABC Daycare Business Interruption Claim and West Bend must reverse its position.

23. West Bend has not made a reasonable interpretation of the West Bend Policy.

24. West Bend had not conducted a reasonable investigation of the ABC Daycare Business Interruption Claim or the circumstances thereof in good faith.

25. West Bend did not attempt to comply with West Bend's duties under the West Bend Policy or Kentucky laws and regulations in good faith.

26. ABC Daycare has substantially complied with the terms and conditions of the West Bend Policy and has not waived any of its joint or several rights thereunder.

27. As a result of the actions of West Bend, ABC Daycare has been damaged in the amount of not less than One Hundred Thousand Dollars (\$100,000.00).

28. ABC Daycare has incurred attorneys fees and expenses that continue to increase due to West Bend's denial of the ABC Daycare Business Interruption Claim and this litigation, which sums are due and payable by West Bend to ABC Daycare.

29. ABC Daycare has been damaged in the amount of the West Bend Policy limits for the ABC Daycare Business Interruption Claim and the amount it has incurred for attorneys fees as a result of being forced to prosecute the present action.

#### COUNT I

**DECLARATION OF RIGHTS**

30. An actual controversy exists between ABC Daycare and West Bend pursuant to KRS 418.040 and CR 57 regarding the parties' respective rights and duties under the West Bend Policy.

31. ABC Daycare demands and is entitled to declaratory relief pursuant to KRS 418.040 and CR 57 that the ABC Daycare Business Interruption Claim is a covered claim under the West Bend Policy for and in the amount of One Hundred Thousand Dollars (\$100,000.00).

**COUNT II**

**VIOLATION OF KENTUCKY INSURANCE CODE AND KENTUCKY  
UNFAIR CLAIMS SETTLEMENT PRACTICES ACT**

32. The Kentucky Insurance Code regulates the insurance industry by conditioning insurers' right to do business in Kentucky upon compliance and provisions of the insurance code.

33. The Kentucky Insurance Code prohibits unfair claim settlement practices under KRS 304.12-230, including, but not limited to:

- (1) Misrepresenting pertinent facts or insurance policy provisions relating to coverage;
- (2) Failing to adopt and implement reasonable standards for the prompt investigation of Claims arising under insurance policies;
- (3) Refusing to pay claims without conducting reasonable standards for the prompt investigation of claims arising under insurance policies;
- (4) Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims in which liability has become reasonably clear; and
- (5) Compelling an insured to institute or defend litigation to recover amounts due under an insurance policy by offering substantially less than the policy.

34. At all times relevant, West Bend conducted business in the Commonwealth of Kentucky, and as part of its right to do business therein, West Bend is required to comply with



Kentucky law, administrative regulations and the lawful orders of the Commissioner of Insurance for Kentucky.

35. West Bend has violated the Kentucky Unfair Claims Settlement Practices Act (KRS 304.12-230) resulting in ABC Daycare incurring damages in excess of the jurisdictional minimum limitation of this Court by without limitation:

- (1) Misrepresenting pertinent facts or insurance policy provisions relating to coverage;
- (2) Failing to adopt and implement reasonable standards for the prompt investigation of Claims arising under insurance policies;
- (3) Refusing to pay claims without conducting reasonable standards for the prompt investigation of claims arising under insurance policies;
- (4) Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims in which liability has become reasonably clear;
- (5) Compelling an insured to institute or defend litigation to recover amounts due under an insurance policy; and
- (6) Enforcing a provision of an insurance policy that is injurious to the public good and is void as against public policy.

36. West Bend violated KRS 304.12-290 by West Bend's collecting of premiums for coverages and then contending that ABC Daycare is not entitled to the coverage for which a substantial premium was paid.

37. West Bend has failed to pay the ABC Daycare Business Interruption Claim under the terms of the West Bend Policy within 30 days of notice as required under KRS 304.12-235(1) (time for payment of claims).

38. West Bend's failure to pay ABC Daycare on the ABC Daycare Business Interruption Claim within 30 days entitles ABC Daycare to interest at the rate of 12% per annum for the unpaid ABC Daycare Business Interruption Claim including its reasonable attorneys fees

incurred in this action pursuant to KRS 304.12-235(1) and to punitive damages pursuant to KRS 446.070, 411.184, *et. seq.* and common law.

### COUNT III

#### BAD FAITH – DENIAL OF COVERAGE

39. ABC Daycare is entitled to indemnification from West Bend on the ABC Daycare Business Interruption Claim.

40. West Bend is obligated to provide coverage and pay the ABC Daycare Business Interruption Claim claims and West Bend's actions in denying the ABC Daycare Business Interruption Claim lack a reasonable basis in law and in fact. West Bend knew or should have known that there was and is no reasonable basis for its actions, including denial of the ABC Daycare Business Interruption Claim, or acted with reckless disregard to ABC Daycare, as its insured's interests or whether such a basis existed.

41. West Bend's actions in denying the ABC Daycare Business Interruption Claim were made with reckless disregard to the interests of ABC Daycare and constitute bad faith entitling ABC Daycare to punitive damages under KRS 446.070, 411.184, *et seq.*, and common law.

42. West Bend's violations of the Kentucky law were made with the malicious intention of evading its insuring agreements and endorsements to benefit its own economic interests without regard to the injury it could cause to ABC Daycare.

43. ABC Daycare has been damaged by the unreasonable acts of West Bend.

### COUNT IV

#### BREACH OF INSURANCE CONTRACT

44. The West Bend Policy constitutes a contract.

45. ABC Daycare has substantially complied with and satisfied all of its obligations and material conditions precedent to the application of coverage for the ABC Daycare Business Interruption Claim under the West Bend Policy.

46. The West Bend Policy requires West Bend to pay ABC Daycare for the ABC Daycare Business Interruption Claim.

47. West Bend has refused to pay and indemnify ABC Daycare for the ABC Daycare Business Interruption Claim as covered under the West Bend Policy.

48. As a result of West Bend's failure to indemnify, West Bend has breached the West Bend Policy contract of insurance and West Bend is responsible and obligated for all injury and damage to ABC Daycare.

49. ABC Daycare is entitled to recover compensatory civil damages in the amounts to be established at trial resulting from West Bend's breach of the West Bend Policy.

## COUNT V

### PUNITIVE DAMAGES

50. The conduct of West Bend as set forth herein constitutes gross negligence, oppression, fraud, malice, or bad faith, with willful and wanton disregard for the life, health, and rights of persons within the meaning of KRS 411.184, KRS 411.186 and Kentucky common law.

51. In engaging in the acts described hereinabove, West Bend expected and intended, or should have expected, for injury and damages to result to ABC Daycare such injury and damages did occur, as alleged hereinabove.

52. As a result of these acts of deceit, oppression, malice, fraud and/or gross negligence and bad faith by West Bend which has resulted in damages and losses to ABC Daycare, ABC Daycare is entitled to recover punitive damages as that term is defined in KRS 411.184(1)(f) and

applicable common law, in an amount to be determined at trial and not less than three times the economic damages recovered herein from West Bend to deter West Bend from engaging in similar conduct in the future.

**WHEREFORE**, Plaintiff, ABC Daycare & Learning Center respectfully requests this Court to enter judgment in its favor and against Defendant, West Bend Mutual Insurance Company as follows:

1. For the declaration in favor of Plaintiff, ABC Daycare & Learning Center and against Defendant, West Bend Mutual Insurance Company that the ABC Daycare Business Interruption Claim is a covered claim under the West Bend Policy for and in the amount of One Hundred Thousand Dollars (\$100,000.00).

2. For judgment in favor of Plaintiff, ABC Daycare & Learning Center and against Defendant, West Bend Mutual Insurance Company for and in the amount of One Hundred Thousand Dollars (\$100,000.00).

3. For judgement in favor of Plaintiff, ABC Daycare & Learning Center and against Defendant, West Bend Mutual Insurance Company for punitive damages in an amount sufficient to punish West Bend from further bad faith acts and not less than three times the economic damages and losses recovered herein from Defendant, West Bend Mutual Insurance Company.

4. For judgment in favor of Plaintiff, ABC Daycare & Learning Center and against Defendant, West Bend Mutual Insurance Company for Plaintiff, ABC Daycare & Learning Center's reasonable costs, expenses and attorneys fees incurred herein.

5. For prejudgment interest and post-judgment interest on all judgement amounts.

6. For a trial by jury on all issues so triable

7. For such other and further relief to which Plaintiff, ABC Daycare & Learning Center may appear properly entitled.

Respectfully submitted,

/s/ Robert E. Maclin, III

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