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AFTAB PUREVAL

Clerk of Courts

Hamilton County, Ohio

CONFIRMATION 944404

**THE SCHOOL FOR CREATIVE
TOTS LLC**

A 2001806

vs.

**WEST BEND MUTUAL
INSURANCE CO**

**FILING TYPE: INITIAL FILING (IN COUNTY) WITH NO JURY
DEMAND**

PAGES FILED: 286



VERIFY RECORD

EFR200

**COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

**THE SCHOOL FOR CREATIVE
TOTS, LLC,**

Plaintiff,

v.

**WEST BEND MUTUAL
INSURANCE CO.**

1900 South 18th Avenue West
West Bend, WI 53095

and

**AMY ACTON, MD, MPH, in her
official capacity as Director of
Health for the Ohio Department of
Health**

Ohio Department of Health
246 N. High Street
Columbus, OH 43215

Defendants.

: **Case No.** _____

:
:
: **Judge** _____

: **COMPLAINT FOR
DECLARATORY JUDGMENT**

: ***Electronically Filed***

: **TO THE CLERK:** Please issue a copy
of the Complaint on the Defendants by
Certified Mail, return receipt requested.

: If appropriate, ordinary mail service is
requested per Ohio Civil Rule 4.6.

I. INTRODUCTION

1. This is a lawsuit for declaratory judgment filed pursuant to Section 2721.02, *et seq.*, of the Ohio Revised Code (“ORC”). It arises from a claim for the loss of business income which was sustained by a preschool as a result of a “shutdown order” from the Ohio Department of Health, based upon the airborne and deposited presence of the COVID-19 virus throughout the State of Ohio.

2. As described in more detail hereafter the Plaintiff made a claim for the loss of its business income due to its compliance with the Order of the Ohio Department of Health. Plaintiff’s insurance company, the Defendant West Bend Mutual Insurance Co. (“West Bend” or the “insurance company”), denied the claim. See Exhibit 1.

II. PARTIES

3. The Plaintiff, The School for Creative Tots, LLC, is an Ohio limited liability company that operates a preschool in Mason, Ohio, and has its principal business office in Cincinnati, Hamilton County, Ohio.

4. The Defendant West Bend is a mutual insurer based in West Bend, Wisconsin. It issues business insurance policies throughout the State of Ohio through appointed agents who regularly sell policies in Hamilton County, Ohio. The agency that sold this policy is Clark-Theders Insurance Agency which is located in and sells policies in southwestern Ohio, including the sale of policies in Hamilton County, Ohio.

5. Amy Acton, MD, MPH ("Dr. Acton") is the Director of the Ohio Department of Health. That department issued an Order dated March 24, 2020, which is attached hereto as Exhibit 2 and incorporated herein by reference. She is made a party in her official capacity because the legal effect and the legal interpretation of that order is sought in this action. Dr. Acton and the Ohio Department of Health have a vested interest in the interpretation and enforcement of that Order such that she is a necessary party in this action, in her official capacity.

III. THE INSURANCE POLICY

6. The policy that is at issue in this declaratory judgment action is attached hereto as Exhibit 3. But for a limited amount of information that is placed on declaration pages in the policy it is otherwise substantially a preprinted form document. Most importantly the sections of the policy that are at issue in this declaratory judgment action are preprinted form language and would apply to all similarly situated Ohio insureds of West Bend. This declaratory judgment action may have wide-ranging implications with respect to a large number of insureds in the State of Ohio.

7. The policy provides certain coverages, additional coverages, and coverage extensions. Listed among the additional coverages and coverage extensions is “business income” insurance which insures against the loss of business income from various causes.

8. Listed under the category of “business income” insurance is “Civil Authority” insurance.¹ When there is “damage to property other than property at the described premises” then the insurance company is required to pay the “actual loss of business income you sustain and necessary extra expenses caused by action of civil authority that prohibits access to the described premises”. In other words, the property damage need not be to the insured’s property, but may be damage to property other than the insured’s property if that property damage leads the government to shut down the insured’s business.

9. There are certain other qualifications relating to (a) the area where the damaged property must be located and (b) the presence of a dangerous physical condition that causes the action by the civil authority.²

10. Of significant importance in this declaratory judgment action is the fact that the policy does contain an exclusion for “virus or bacteria”. But, that exclusion does not

¹ The civil authority coverage is described on pages bearing page number NS02030118 and bearing page numbers 6 of 41 and 7 of 41. Because the pages in the policy are not numbered consecutively they are very difficult to locate as the Court will observe when it attempts to find relevant language in the policy. The policy consists of a “hodgepodge” of different coverages and different exclusions prepared by different parties, at different times, and put together in a piecemeal fashion rendering the policy essentially incomprehensible.

² These qualifications are easily satisfied in that the virus is airborne throughout the State of Ohio. When the airborne virus settles on a surface then that property becomes damaged and dangerous. The widespread existence of the virus throughout the State of Ohio is precisely why the order of the Department of Health, Exhibit 2, is exceedingly broad.

apply when the claim is for loss of business income and extra expense.³ Importantly, there is a separate section of the policy entitled “Business Income and Extra Expense Exclusions”. There is no virus or bacteria exclusion that is applicable to a claim for loss of business income.⁴ In other words, there is a virus exclusion in the policy but the virus exclusion does not apply if the claim is based on loss of business income which is exactly the nature of the Plaintiff’s claim in this action.

11. In summary, the policy provides that:

- There is insurance for loss of “business income” which may occur for several different reasons;
- There is insurance for loss of “business income” if that loss results from the action of a “civil authority” (a government agency);
- The action of the civil authority need not be based upon damage to the insured property, but may be based upon “damage to property other than property” at the insured’s premises;
- The damage to the other property must be in relatively close proximity to the insured property and the action of the civil authority must be based upon a dangerous physical condition;
- There is a virus exclusion in the policy, but the virus exclusion is not applicable to the claim for loss of business income.

IV. THE PREVALENCE OF THE COVID-19 VIRUS IN OHIO AND THE RESPONSE OF THE OHIO CIVIL AUTHORITY

12. As of April 30, 2020, there were over 18,000 confirmed cases of the COVID-19 virus in the State of Ohio resulting in almost 1,000 deaths. These numbers are ever increasing. The airborne virus was so prevalent, throughout the State, that on March 9, 2020, the Governor of the State of Ohio, the Honorable Mike DeWine,

³ The virus or bacteria exclusion is on page 32 of 41 which also bears the page number NS02030118.

⁴ See page 33 of 41 also bearing page number NS02030118.

declared a state of emergency throughout the entire State. As of May 6, 2020, there were over 2,000 confirmed cases of the COVID-19 virus in Hamilton, Butler, and Warren counties in southwest Ohio. The Plaintiff's business is located in Warren County and is in close proximity to Butler County and Hamilton County.

13. As of March 24, 2020, Dr. Amy Acton, the Director of Health for the State of Ohio, recognized that there was an imminent threat with a high probability of widespread exposure to COVID-19, thus ordering the shutdown of many businesses including the Plaintiff's preschool. See Exhibit 2 attached.

14. Dr. Acton's order applied, without exception, to "all individuals currently living within the State of Ohio". It required them to stay home, with certain limited exceptions, and to engage in "social distancing requirements" which included such things as maintaining a six-foot distance from other individuals, frequently washing hands and using hand sanitizer. These requirements applied throughout the State and were necessary because of the widespread prevalence of the virus in the air and on surfaces of property throughout the State.

15. Dr. Acton's order includes a finding that there is "a high probability of widespread exposure to COVID-19 with a significant risk of substantial harm to a large number of people in the general population".

16. Because of the widespread prevalence of the COVID-19 virus in the air and on surfaces throughout the State of Ohio, the proximity requirements of the West Bend policy are met.

V. DECLARATORY JUDGMENT – THE ISSUES

17. Section 2721.02 of the ORC provides that a court of record in Ohio may declare rights, status, and other legal relations whether or not further relief is or could be

claimed. No action may be objected to on the basis that declaratory judgment is requested and the declaration may be either affirmative or negative in form or effect. Once rendered, the declaration has the effect of a final judgment or decree.

18. The Plaintiff respectfully submits to the Court that there are several issues raised by the Plaintiff's claim and the insurance company's denial that are appropriate for a declaratory judgment at this time. Those issues are as follows:

- Whether the order of Dr. Acton is a valid and enforceable order of a civil authority requiring that the Plaintiff cease doing business at the insured premises;
- Whether the airborne presence of the virus and/or the presence of the virus on numerous surfaces and on numerous properties throughout the State of Ohio can, as a matter of law, be considered property damage under the applicable case law and legal authorities;
- Whether the preponderance of the evidence supports the conclusion that it is more likely than not that the virus was present on other property in and around and within one mile of the insured's premises;
- Whether the insurance company can rely upon a "virus exclusion" that appears in another section of the policy but does NOT appear as an exclusion if the insured's claim is for loss of business income.

19. The Plaintiff further submits to the Court that the facts and the case law will support a finding in favor of the Plaintiff on each of the above issues. Thus the Court should render declaratory judgment that the Plaintiff has coverage for the Plaintiff's losses of business income under the civil authority insurance section of the Plaintiff's policy.

VI. DAMAGES

20. Should the Court render declaratory judgment on the coverage issue, in favor of the Plaintiff, the Plaintiff does not seek the Court's determination of damages at this time.

21. The policy issued by the Defendant West Bend contains a form "appraisal" clause. That clause permits each party to select an appraiser and then the two appraisers select an umpire. The persons who act as appraisers are normally an adjuster, acting on behalf of the company, and a public adjuster employed by the insured.

22. Should the Court grant declaratory judgment in the Plaintiff's favor on the coverage issue, the Plaintiff will first seek to negotiate, in good faith, with the insurance company in an effort to arrive at a mutually acceptable figure for the loss of business income. If such good faith negotiation does not produce a result then the Plaintiff will invoke the appraisal process to get a damage determination.

WHEREFORE, in consideration of the foregoing, the Plaintiff requests that the Court grant declaratory judgment in favor of the Plaintiff, and order that the Plaintiff has insurance coverage, to be provided by the Defendant West Bend, for the Plaintiff's loss of business income arising from the action of a civil authority (the Ohio Department of Health). The Plaintiff further requests all other proper and appropriate relief including costs and, if provided by law, its attorneys' fees.

Respectfully Submitted,

/s/ Ronald R. Parry

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