

COMMONWEALTH OF KENTUCKY
OLDHAM CIRCUIT COURT
CIVIL ACTION NO. 20-CI-_____

CRESTWOOD CHILD CARE & LEARNING CTR

PLAINTIFF

v. COMPLAINT

WEST BEND MUTUAL INSURANCE COMPANY

DEFENDANTS

SERVE:

Via Certified Mail
Kentucky Secretary of State
Summons Branch
700 Capital Ave., Ste. 86
Frankfort, KY 40601

AND

ERIC C. FRIEDLANDER, in his Official Capacity as Acting Secretary, Cabinet for Health & Family Services

SERVE:

Via Certified Mail
Eric C. Friedlander
Commonwealth of Kentucky
Cabinet for Health and Family Services
275 East Main Street
Frankfort, Kentucky 40621

* * * * *

Comes Plaintiff, Crestwood Child Care & Learning CTR¹ ("Crestwood Child Care") by counsel and for its Complaint against Defendant, West Bend Mutual Insurance Company ("West Bend"), and Defendant, Eric C. Friedlander, in his official capacity as Acting Secretary of the Cabinet for Health & Family Services of the Commonwealth of Kentucky ("Friedlander"), states and alleges as follows:

¹ Crestwood Child Care & Learning CTR is an assumed name of Pirman Corporation.

I.**PARTIES, JURISDICTION & VENUE**

1. Crestwood Child Care is a Kentucky corporation operating a childcare center licensed by the Commonwealth of Kentucky from premises being in and constituting part of Crestwood, Oldham 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 Crestwood Child Care in Oldham County, Kentucky, West Bend Business Owners Insurance policy number 1432953-8 (the "West Bend Policy"). Pursuant to KRS 304.3-230, the Kentucky Secretary of State is the agent for service of process of West Bend.

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

3. Friedlander, at all times pertinent hereto, was Acting Secretary of the Cabinet for Health & Family Services of the Commonwealth of Kentucky. Friedlander is sued in his official capacity as a government official signing an 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") for reasons including the confirmed cases of the Coronavirus Disease 2019 (COVID-19) in Oldham County, Kentucky and the Coronavirus Disease 2019 (COVID-19) Pandemic in Oldham County, Kentucky the location of Crestwood Child Care's premises. Friedlander is a party hereto in his official capacity because the legal effect and the

legal interpretation of Friedlander's Day Care Closure Order is sought in this action. West Bend denied coverage under the West Bend Policy stating, in part, that Crestwood Child Care's operations must be "temporarily shut down or suspended as ordered by a local, state, or federal board of health or similar governmental board that has jurisdiction over" its operations and "[t]he shutdown or suspension must be due to an out break of a 'communicable disease'...at the insured premises." **Exhibit B** ("West Bend Denial Letter"). It is Crestwood Child Care's contention that Friedlander ordered a shut down and suspension of operations pursuant to and as provided for in the West Bend Policy. Friedlander has a vested interest in the interpretation and enforcement of his order such that he is a necessary party to this action in his official capacity.

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

6. 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 Oldham County and concerns the operations of businesses located and being in Oldham 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

7. Crestwood Child Care operates a licensed, certified and registered (by and with the Commonwealth of Kentucky, Cabinet for Health and Family Services) child care center located at 7018 Hughes Avenue, Crestwood, Kentucky 40014.

8. West Bend is the insurer of Crestwood Child Care under the West Bend Policy

and is therefore bound and liable under the West Bend Policy for the payments due thereunder to Crestwood Child Care.

9. Coronavirus Disease 2019 (COVID-19) is an easily, rapidly and highly contagious communicable disease.

10. Presently there are or have been one hundred and eleventh (111) or more confirmed cases of the Coronavirus Disease 2019 (COVID-19) and five (5) deaths from the Coronavirus Disease 2019 (COVID-19) in Oldham County, Kentucky.

11. 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, which results transmissions of the disease to older adult family members and adults with serious chronic medical conditions with whom those children reside.

12. On or about March 18, 2020, Crestwood Child Care shut down and suspended its operations located at 7018 Hughes Avenue, Crestwood, Kentucky 40014, for reasons including the confirmed cases of the Coronavirus Disease 2019 (COVID-19) in Oldham County, Kentucky, the Coronavirus Disease 2019 (COVID-19) Pandemic in Oldham County, Kentucky, Friedlander's Day Care Closure Order, and the best interests and protections of the children and families served by Crestwood Child Care.

13. Crestwood Child Care's business income losses by reason of the shut down and suspension of its operations at 7018 Hughes Avenue, Crestwood, Kentucky 40014, being a part of Crestwood, Oldham County, Kentucky 40014 are in excess of \$100,000.00.

14. The West Bend Policy provides, in relevant part, business income and extra expense coverage to Crestwood Child Care 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.

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

15. Crestwood Child Care timely submitted a claim under the West Bend Policy, assigned West Bend Claim Number AM45009 ("Crestwood Child Care Business Interruption Claim"), to West Bend, for Crestwood Child Care's business interruption losses occurring from the closure and cessation of its operations of its operations at 7018 Hughes Avenue, Crestwood, Kentucky 40014, by reason of the confirmed cases of the Coronavirus Disease 2019 (COVID-19) in Oldham County, Kentucky, the Coronavirus Disease 2019 (COVID-19) Pandemic in Oldham County, Kentucky, Friedlander's Day Care Closure Order, and the best interests and protections of the children and families served by Crestwood Child Care.

16. Crestwood Child Care has fully cooperated and provided West Bend with all information requested of it at all times.

17. On May 18, 2020, West Bend unjustly rejected the Crestwood Child Care Business Interruption Claim, disclaimed coverage and denied liability for the Crestwood Child Care Business Interruption Claim as set forth in the West Bend Denial Letter attached hereto and made a part hereof as **Exhibit B** without limitation on the purported basis that there has been no "outbreak of a communicable disease at the insured premises."

18. 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.

19. Crestwood Child Care had and has a reasonable expectation under the West Bend Policy that the Crestwood Child Care Business Interruption Claim would be and constitute a covered claim under the West Bend Policy.

20. The applicable language and provisions of the West Bend Policy relied upon by West Bend in denying the Crestwood Child Care 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 Crestwood Child Care, 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 Oldham 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 Crestwood Child Care.

21. Crestwood Child Care has satisfied all material conditions precedent and complied with all the West Bend Policy provisions triggering coverage for the Crestwood Child Care Business Interruption Claim.

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

23. West Bend's decision in the West Bend Denial Letter is an error; there is coverage for the Crestwood Child Care Business Interruption Claim and West Bend must reverse its position.

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

25. West Bend had not conducted a reasonable investigation of the Crestwood Child Care Business Interruption Claim or the circumstances thereof in good faith.

26. 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.

27. Crestwood Child Care 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.

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

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

30. Crestwood Child Care has been damaged in the amount of the West Bend Policy limits for the Crestwood Child Care 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

31. Actual controversies exist between and among Crestwood Child Care, West Bend

and Friedlander pursuant to KRS 418.040 and CR 57 regarding the parties' respective rights and duties under the Day Care Closure Order and the West Bend Policy.

32. Crestwood Child Care demands and is entitled to declaratory relief pursuant to KRS 418.040 and CR 57 that (i) Friedlander's Day Care Closure Order is a valid and enforceable order requiring shut down and suspension of Crestwood Child Care's operations, and (ii) Crestwood Child Care's 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

33. 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.

34. 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.

35. At all times relevant hereto, 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.

36. West Bend has violated the Kentucky Unfair Claims Settlement Practices Act (KRS 304.12-230) resulting in Crestwood Child Care 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.

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

38. West Bend has failed to pay the Crestwood Child Care 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).

39. West Bend's failure to pay Crestwood Child Care on the Crestwood Child Care Business Interruption Claim within 30 days entitles Crestwood Child Care to interest at the rate of 12% per annum for the unpaid Crestwood Child Care 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

40. Crestwood Child Care is entitled to indemnification from West Bend on the Crestwood Child Care Business Interruption Claim.

41. West Bend is obligated to provide coverage and pay the Crestwood Child Care Business Interruption Claim claims and West Bend's actions in denying the Crestwood Child Care 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 Crestwood Child Care Business Interruption Claim, or acted with reckless disregard to Crestwood Child Care, as its insured's interests or whether such a basis existed.

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

43. 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 Crestwood Child Care.

44. Crestwood Child Care has been damaged by the unreasonable acts of West Bend.

COUNT IV
BREACH OF INSURANCE CONTRACT

45. The West Bend Policy constitutes a contract.

46. Crestwood Child Care has substantially complied with and satisfied all of its obligations and material conditions precedent to the application of coverage for the Crestwood Child Care Business Interruption Claim under the West Bend Policy.

47. The West Bend Policy requires West Bend to pay Crestwood Child Care for the Crestwood Child Care Business Interruption Claim.

48. West Bend has refused to pay and indemnify Crestwood Child Care for the Crestwood Child Care Business Interruption Claim as covered under the West Bend Policy.

49. 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 Crestwood Child Care.

50. Crestwood Child Care 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

51. 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.

52. In engaging in the acts described hereinabove, West Bend expected and intended, or should have expected, for injury and damages to result to Crestwood Child Care such injury and damages did occur, as alleged hereinabove.

53. 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 Crestwood Child Care, Crestwood Child Care 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 Crestwood Child Care & Learning CTR 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 Crestwood Child Care & Learning CTR that Friedlander's Day Care Closure Order is a valid and enforceable order requiring the shut down and suspension of Crestwood Child Care & Learning CTR's operations.

2. For the declaration in favor of Plaintiff Crestwood Child Care & Learning CTR and against Defendant West Bend Mutual Insurance Company that the Crestwood Child Care 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).

3. For judgment in favor of Plaintiff Crestwood Child Care & Learning CTR and against Defendant West Bend Mutual Insurance Company for and in the amount of One Hundred Thousand Dollars (\$100,000.00).

4. For judgement in favor of Plaintiff Crestwood Child Care & Learning CTR and against Defendant West Bend Mutual Insurance Company for punitive damages in an amount sufficient to punish Defendant West Bend Mutual Insurance Company 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.

5. For judgment in favor of Plaintiff Crestwood Child Care & Learning CTR and against Defendant West Bend Mutual Insurance Company for Plaintiff Crestwood Child Care & Learning CTR's reasonable costs, expenses and attorneys' fees incurred herein.

6. For prejudgment interest and post-judgment interest on all judgement amounts.
7. For a trial by jury on all issues so triable
8. For such other and further relief to which Plaintiff Crestwood Child Care & Learning CTR may appear properly entitled.

Respectfully submitted,

/s/ Robert E. Maclin, III

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