

**COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
DIVISION _____
CIVIL ACTION NO. _____**

ELECTRONICALLY FILED

LEXFIT, LLC

PLAINTIFF

v.

COMPLAINT

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

DEFENDANTS

**SERVE: VIA CERTIFIED MAIL
Kentucky Secretary of State
P.O. Box 718
Frankfort, KY 40602**

**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 the Plaintiff, LexFit, LLC ("LexFit") by counsel and for its Complaint against Defendant, West Bend Mutual Insurance Company ("West Bend"), and Defendant, Eric C. Friedlander, as a civil authority and in his official capacity as Acting Secretary of the Cabinet for Health & Family Services of the Commonwealth of Kentucky ("Friedlander"), and states and alleges as follows:

I.
PARTIES, JURISDICTION & VENUE

1. LexFit is a Kentucky limited liability company operating a fitness center from premises being in and constituting part of Lexington, Fayette 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 West Bend Business Owners Insurance policy number A481881 02 to LexFit in Lexington, Fayette County, Kentucky, (the "West Bend Policy"). The Kentucky Secretary of State is the Agent for Service of Process of West Bend.

3. Friedlander at all times pertinent hereto is and was a civil authority and Acting Secretary of the Cabinet for Health & Family Services of the Commonwealth of Kentucky. Friedlander is sued in his official capacity as a civil authority and a government official signing an Order, resulting in the closure of LexFit's operations, a true copy of which is attached hereto and made a part hereof as **Exhibit A** ("Civil Authority Closure Order"). Friedlander is a party hereto in his official capacity because the legal effect and the legal interpretation of Friedlander's Order is sought in this action. Friedlander ordered suspension of operations and prohibited LexFit from permitting access to LexFit's premises by the general public. Friedlander has a vested interest in the interpretation and enforcement of his Civil Authority Closure Order such that he is a necessary party to this action in his official capacity.

4. This lawsuit arises from the errors, omissions, conduct, unfair claims settlement practices, actions and inactions of West Bend in denying LexFit's claims for losses of business income under the West Bend Policy arising from Friedlander's suspension of operations and prohibition of access to LexFit's fitness center being in and as a part of Fayette County, Kentucky.

5. Jurisdiction lies in this Court pursuant to KRS 23A.010 because this matter is not exclusively vested in some other court and LexFit 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 Fayette County and concerns the operations of a business located and being in Fayette 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. LexFit incorporates by reference herein each of the above allegations as if restated in full.

8. LexFit operates a fitness center located at premises being at and located as a part of Lexington, Fayette County, Kentucky at 124 Malabu Drive, Suite 120.

9. West Bend is the insurer of LexFit under the West Bend Policy and is therefore bound and liable under the West Bend Policy for the payments due thereunder to LexFit.

10. LexFit's business income losses by reason of the Civil Authority Closure Order and mandated closure of its operations at 124 Malabu Drive, Suite 120, being a part of Lexington, Fayette County, Kentucky 40503 are in excess of the jurisdictional limits of this Court.

11. The West Bend Policy provides business income and extra expense coverage to LexFit on page 1 of 9 in the policy form CP0030 (1012):

1. Business Income

Business Income means the:

- a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
- b. Continuing normal operating expenses incurred, including payroll. For manufacturing risks, Net Income includes the net sales value of production. Coverage is provided as described and limited below for one or more of the following options for which a Limit of Insurance is shown in the Declarations:
 - (1) Business Income Including "Rental Value".
 - (2) Business Income Other Than "Rental Value".
 - (3) "Rental Value".

If option (1) above is selected, the term Business Income will include "Rental Value". If option (3) above is selected, the term Business Income will mean "Rental Value" only. If Limits of Insurance are shown under more than one of the above options, the provisions of this Coverage Part apply separately to each. We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations.

2. "Operations" means;

- a. Your business activities occurring at the described premises; and
- b. The tenantability of the described premises, if coverage for Business Income Including "Rental Value" or "Rental Value" applies.

12. The West Bend Policy also provides business income and extra expense coverage to LexFit on page 2 of 9 in the policy form CP0030 (1012) as a result of Civil Authority:

5. Additional Coverages

a. Civil Authority

In this Additional Coverage, Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations.

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the follow apply:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but not more than one mile from the damaged property; and

(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

13. LexFit timely submitted a claim under the West Bend Policy, assigned West Bend Claim No. AM32295 (“Business Income Claim”), to West Bend, for LexFit’s business income losses occurring from the closure and cessation by reason of the Civil Authority Closure Order of its operations at LexFit’s premises at 120 Malabu Drive, Suite 120, being a part of Lexington, Fayette County, Kentucky 40503, by reason of the Civil Authority Closure Order.

14. LexFit has fully cooperated and provided West Bend with all information requested of it at all times.

15. On March 19, 2020, West Bend unjustly rejected the LexFit Business Income Claim, disclaimed coverage and denied liability for the LexFit Business Income 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 policy form CP 0140 07 06, “Exclusion of Loss Due to Virus or Bacteria”, precluded coverage. Section **B** of policy form CP 0140 07 06, states;

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium, or microorganism that induces or is capable of inducing physical distress, illness or disease.

16. LexFit’s loss of business income was not a result of any virus or bacteria on the premises of LexFit. LexFit’s loss of business income was the result of the forced closure of LexFit’s premises by reason of the Civil Authority Closure Order.

17. The Civil Authority Closure Order resulted in the forced closure of the businesses surrounding LexFit as well as the closure of properties located in the commonly known area “The Venue”, a shopping center located near the corner of Nicholasville Road and Malabu Drive, Lexington, Kentucky 40503, where LexFit’s premises are also located. The Venue consists of

multiple storefronts, which includes; La Petite Day Care, Everybody Fights, Floyd’s 99 Barbershop, Jason’s Deli, Club Pilates, Eye Care Center and Brewed. The Civil Authority Closure Order forced the closure of the area’s surrounding LexFit due to the dangerous physical conditions.

18. The Civil Authority Closure Order prevented the general public from being able to access the property surrounding LexFit’s premises as well as the LexFit premises and resulted in a taking of the LexFit property. LexFit has suffered and will continue to suffer damages by reason of the Civil Authority Closure Order by, including, but not limited to, losing revenue from the forced cessation of operations of the LexFit premises and the loss of goodwill built by LexFit with its patrons by reason of the forced closure as a result of the Civil Authority Closure Order. These injuries are the direct and proximate result of the Civil Authority Closure Order.

19. 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 term “direct physical loss” is not clearly, conspicuously or unequivocally defined; and
- b. The sentence “[w]e will not pay for loss or damage caused by or resulting from any virus . . .” does not clearly, conspicuously or unequivocally reference an insured’s premises.

20. LexFit had and has a reasonable expectation under the West Bend Policy that the LexFit Business Income Claim would be and constitute a covered claim under the West Bend Policy.

21. The applicable language and provisions of the West Bend Policy relied upon by West Bend in denying the LexFit Business Income Claim are injurious to the public good, void as against public policy and unenforceable.

22. LexFit has satisfied all material conditions precedent and complied with all the West Bend Policy provisions triggering coverage for the LexFit's Business Income Claim.

23. LexFit has timely demanded West Bend to provide indemnity for the LexFit Business Income Claim in an amount in excess of this Court's jurisdictional limits.

24. West Bend's decision in the West Bend Denial Letter is an error; there is coverage for the LexFit's Business Income Claim and West Bend must reverse its position.

25. West Bend has not made a reasonable interpretation of the West Bend Policy and has no reasonable basis for its coverage determination.

26. West Bend had not conducted a reasonable investigation of the LexFit Business Income Claim or the circumstances thereof in good faith.

27. 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.

28. LexFit 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.

29. As a result of the actions of West Bend, LexFit has been damaged in an amount in excess of this Court's jurisdiction.

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

31. LexFit has been damaged in an amount in excess of the West Bend Policy limits for the LexFit's Business Income 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

32. LexFit incorporates by reference herein each of the above allegations as if restated in full.

33. Actual controversies exist between and among LexFit, West Bend and Friedlander pursuant to KRS 418.040 and CR 57 regarding the parties' respective rights and duties under the Civil Authority Closure Order and the West Bend Policy.

34. LexFit demands and is entitled to declaratory relief pursuant to KRS 418.040 and CR 57 that (i) Friedlander's Civil Authority Closure Order is a valid and enforceable order requiring shut down and suspension of LexFit's operations, and (ii) LexFit's Business Income Claim is a covered claim under the West Bend Policy for and in an amount in excess of this Court's jurisdictional limit.

COUNT II
VIOLATION OF KENTUCKY INSURANCE CODE AND KENTUCKY UNFAIR CLAIMS SETTLEMENT PRACTICES ACT

35. LexFit incorporates by reference herein each of the above allegations as if restated in full.

36. 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.

37. 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.

38. 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.

39. West Bend has violated the Kentucky Unfair Claims Settlement Practices Act (KRS 304.12-230) resulting in LexFit 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.

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

41. West Bend has failed to pay the LexFit Business Income Claim under the terms of the West Bend Policy within thirty (30) days of notice as required under KRS 304.12-235(1) (time for payment of claims).

42. West Bend's failure to pay LexFit on the LexFit Business Income Claim within thirty (30) days entitles LexFit to interest at the rate of 12% per annum for the unpaid LexFit Business Income Claim including its reasonable attorney's 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

43. LexFit incorporates by reference herein each of the above allegations as if restated in full.

44. LexFit is entitled to indemnification from West Bend on the LexFit's Business Income Claim.

45. West Bend is obligated to provide coverage and pay the LexFit Business Income Claim and West Bend's actions in denying the LexFit's Business Income 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 LexFit's Business Income Claim, or acted with reckless disregard to its insured, LexFit's interests or whether such a basis existed.

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

47. 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 LexFit.

48. LexFit has been damaged by the unreasonable acts of West Bend in amount in excess of the jurisdictional limits of this Court.

COUNT IV
BREACH OF INSURANCE CONTRACT

49. LexFit incorporates by reference herein each of the above allegations as if restated in full.

50. The West Bend Policy constitutes a contract.

51. LexFit has substantially complied with and satisfied all of its obligations and material conditions precedent to the application of coverage for the LexFit Business Income Claim under the West Bend Policy.

52. The West Bend Policy requires West Bend to pay LexFit for the LexFit Business Income Claim.

53. West Bend has refused to pay and indemnify LexFit for the LexFit Business Income Claim as covered under the West Bend Policy.

54. 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 LexFit.

55. LexFit 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

56. LexFit incorporates by reference herein each of the above allegations as if restated in full.

57. 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.

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

59. 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 LexFit, LexFit 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, LexFit, LLC 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, LexFit, LLC that Friedlander's Civil Authority Closure Order is a valid and enforceable order requiring the shut down and suspension of LexFit's operations.

2. For the declaration in favor of Plaintiff, LexFit, LLC and against Defendant, West Bend Mutual Insurance Company that the LexFit Business Income Claim is a covered claim under the West Bend Policy for and in an amount in excess of this Court's jurisdictional limit.

3. For judgment in favor of Plaintiff, LexFit, LLC and against Defendant, West Bend Mutual Insurance Company for and in an amount in excess of this Court's jurisdictional limit.

4. For judgment in favor of Plaintiff, LexFit, LLC 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.

5. For judgment in favor of Plaintiff, LexFit, LLC and against Defendant, West Bend Mutual Insurance Company for Plaintiff, LexFit, LLC's reasonable costs, expenses and attorneys' fees incurred herein.

6. For prejudgment interest and post-judgment interest on all judgment amounts.

7. For a trial by jury on all issues so triable; and

8. For such other and further relief to which Plaintiff, LexFit, LLC may appear properly entitled.

Respectfully submitted,

/s/ Robert E. Maclin, III

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