

1 FILED
2 2022 FEB 14 03:28 PM
3 KING COUNTY
4 SUPERIOR COURT CLERK
5 E-FILED
6 CASE #: 22-2-02288-4 SEA

7 SUPERIOR COURT OF WASHINGTON
8 FOR KING COUNTY

9 PROFESSIONAL RECREATION
10 ORGANIZATION, INC., a Washington
11 corporation,

12 Plaintiff,

13 v.

14 AFFILIATED FM INSURANCE COMPANY,
15 a foreign corporation,

16 Defendant.

NO.

COMPLAINT FOR RELIEF AND
FOR MONETARY DAMAGES

17 **I. PARTIES**

18 1. Plaintiff Professional Recreation Organization (“Plaintiff”) is a Washington
19 corporation which owns/operates business properties insured by defendant, which property is
20 physically located in King County, and which was insured through insurance sold, issued and
21 delivered in King County by defendant.

22 2. Defendant Affiliated FM Insurance Company (“AFM” or “Defendant”) is an
23 insurance company headquartered in, and a citizen of, Rhode Island. Defendant is authorized
24 to conduct insurance transactions in the State of Washington, and conducted insurance
transactions within the meaning of RCW 48.01.020 and 48.01.060 both in Washington, and

1 more specifically in King County. Further, Defendant issued insurance to Plaintiff pursuant
2 to RCW Title 48.

3 **II. JURISDICTION AND VENUE**

4 3. Defendant does business within King County, conducted “insurance
5 transactions” as defined in RCW 48.01.020 and RCW 48.01.060 at its offices in Bellevue,
6 Washington, and committed acts breaching its contract with Plaintiff and committing tortious
7 acts described herein in King County. The amount in dispute is within the subject matter
8 jurisdictional limits of this court.

9 **III. INSURANCE TRANSACTIONS**

10 4. Defendant issued a contract of insurance to Plaintiff bearing the policy
11 number TO292. Plaintiff fully paid the premium for the policy, and Defendant accepted
12 same.

13 5. The policy insures property including the PRO Sports Club.

14 6. The policy expressly recognized that a peril Defendant called “Communicable
15 Disease” was capable of causing “Property Damage” under the policy. It did so on p. 3 of 14
16 of form PRO S-1 4100 (01/17) of its policy by providing \$100,000 of “additional coverage”
17 for “Communicable Disease---Property Damage”

18 7. The policy was written in a format recognized throughout the insurance
19 industry as an “all risk” policy in which perils recognized in the policy as being capable of
20 causing “direct physical loss or damage,” which are not expressly excluded, are covered. The
21 policy expressly insured “ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as
22 hereinafter excluded...” As of March 16, 2020, the communicable disease known as Covid
23 19 was in fact a “risk of physical loss or damage” in and at Plaintiff’s insured business
24 premises.

1 8. The peril described in the policy as “Communicable Disease” does not appear
2 in any list of exclusions in the policy.

3 9. The policy distinguishes between two separate perils described in the policy
4 as “Communicable Disease” and “Contamination.”

5 10. In the original list of exclusions contained in the policy, the following
6 language preceded a group of exclusions which contained the Contamination exclusion. The
7 original contamination exclusion states:

8 “*This policy excludes... Contamination.*”

9 11. By endorsement, Defendant *deleted* the exclusion which read “*This policy*
10 *excludes...contamination.*”

11 12. Defendant replaced this exclusion with an exclusion stated to apply in only
12 two circumstances:

13 GROUP II This policy excludes loss or damage caused by any of the
14 following excluded events as set forth in 1
15 through 12 below. Loss or damage will be considered to have been caused by
16 an excluded event if that event:

- 15 i. Directly and solely results in loss or damage; or
- 16 ii. Initiates a sequence of events that results in loss or damage, regardless of
the nature of any intermediate or final event in that sequence.

17 13. Defendant’s policy contains the following promise regarding limits of the
18 policy:

19 **C. POLICY LIMIT:**

20 This Company's total limit of liability, including any insured Business
21 Interruption loss, will not exceed the Policy Limit of \$159,774,510 as a result
22 of any one **occurrence** subject to the respective sub-limits of liability shown
23 elsewhere in this Policy.

1 14. The AFM policy also contains a provision called “Sublimits.” That provision
2 provides that losses caused by certain perils are subject to “sublimits” less than the
3 \$159,774,510 million policy limit:

4 **F. SUB-LIMITS:**

5 Unless otherwise stated below or elsewhere in this Policy, the following sub-
6 limits of liability, including any insured Business Interruption loss, will be the
7 maximum payable and will apply on a per **occurrence** basis.

8 The sub-limits stated below or elsewhere in this Policy are part of and not in
9 addition to the Policy Limit.

10 When a limit of liability applies to a **location** or property, such limit of
11 liability will be the maximum amount payable for all loss or damage.

12 The peril identified in the policy as “Communicable Disease” does not appear anywhere in
13 the section of the policy entitled “Sublimits.”

14 **IV. PLAINTIFF’S CLAIM FOR POLICY BENEFITS**

15 15. On April 6, 2020, Plaintiff made claim for policy benefits to Defendant.
16 Defendant acknowledged Plaintiff’s claim to Defendant for policy benefits related to direct
17 physical loss and property damage initiated by the communicable disease known as Covid
18 19. Pursuant to RCW. 48.01.030, WAC 284-30-370 and WAC 284-30-320(11), Defendant
19 had an obligation to conduct a fair and impartial investigation sufficient to determine its own
20 liabilities under its policy under all coverages and Additional Coverages.

21 16. Plaintiff’s claim was assigned to AFM adjuster Guilherme Ferreira dos
22 Santos.

23 17. On information and belief, Plaintiff alleges that at all times after Mr. dos
24 Santos became involved as an adjuster regarding Plaintiff’s claim, it was both the policy of
25 Defendant and Mr. dos Santos’ own practice to conduct a fair and impartial investigation into

1 Plaintiff's claim, at no time placing the interests of her company ahead of the interests of the
2 insured.

3 18. From the first day Ms. Dos Santos reviewed the policy Defendant issued to
4 plaintiff, he was aware of the language on p. 3 of 14 of form PRO S-1 4100 (01/17) of the
5 policy providing \$100,000 of "additional coverage" for "Communicable Disease---Property
6 Damage." From that point on, Mr. dos Santos knew that the policy considered the peril of
7 "Communicable Disease" as capable of causing "Property Damage."

8 19. From the first point when Mr. dos Santos learned that the AFM policy
9 considered "Communicable Disease" as being capable of causing "Property Damage" both
10 Defendant as a company and Mr. dos Santos as an adjuster realized that AFM had a
11 significant financial interest in *refusing* to recognize what its own policy recognized: that the
12 policy contemplated "Communicable Disease" was capable of causing "Property Damage" as
13 that term was used in the policy.

14 20. From the first point Mr. dos Santos reviewed the AFM policy issued to
15 Plaintiff, he knew the policy referred to "Communicable Disease" and "Contamination" as
16 separate terms and as separate perils.

17 21. Plaintiff alleges on information and belief that from the first point Mr. dos
18 Santos reviewed the list of exclusions (as modified by the Washington Endorsement in the
19 policy issued to Plaintiff) he recognized that "Communicable Disease" was nowhere in the
20 list of exclusions.

21 22. On information and belief, Plaintiff alleges Mr. dos Santos knew from his
22 experience as a property insurance adjuster that the premium charged to Plaintiff and paid by
23 Plaintiff reflected the fact the AFM policy issued to Plaintiff was an "all risk" policy in
24

1 which any peril recognized by the policy as a peril capable of causing “Property Damage”
2 was considered a covered peril unless it was in the list of exclusions in the policy.

3 23. On information and belief, Plaintiff alleges that from the first time Mr. dos
4 Santos reviewed the “Sublimits” provision of the policy issued to Plaintiff, he knew that the
5 peril described elsewhere in the policy as “Communicable Disease” was not in the list of
6 perils identified in the section entitled “Sublimits.”

7 24. On information and belief Plaintiff alleges that from the first time Mr. dos
8 Santos reviewed the Additional Coverages section in the policy, he saw the words
9 “Additional Coverages” and recognized each of those coverages to be “additional” to the
10 \$159,774,510 million of property and business interruption coverage provided previously in
11 the policy issued to Plaintiff.

12 25. At all times before Mr. dos Santos began writing Plaintiff’s representative
13 concerning the Plaintiff’s claim, Plaintiff alleges on information and belief he was familiar
14 with the AFM property insurance form issued to Plaintiff, and had handled claims containing
15 that form and also containing the “Washington Amendatory” Endorsement. He knew from
16 this experience that the list of “Group Three” exclusions in the policy (which contain the
17 phrase “This policy excludes” and an exclusion entitled “Contamination”) had been *deleted*
18 by the Washington Amendatory Endorsement.

19 26. On May 12, 2020 Mr. dos Santos wrote to Plaintiff disclaiming coverage for
20 losses involving the coronavirus pursuant to the contamination exclusion he knew had been
21 deleted from the policy by the Washington Amendatory Endorsement:

22 Please note that the Policy excludes coverage for contamination. The presence
23 of a virus, pathogen or disease causing or illness causing agent such as
24 COVID-19 is a form of contamination as defined in the Policy, which is

1 excluded. The relevant provisions, in part, are set forth below: **Group III:**
2 This Policy excludes:

3 * * *

4 **8. contamination**, and any cost due to **contamination** including the inability
5 to use or occupy property or any cost of making property safe or suitable for
6 use or occupancy. If **contamination** due only to the actual not suspected
7 presence of **contaminant(s)** directly results from other physical damage not
8 excluded by this Policy, then only physical damage caused by such
9 **contamination** may be insured. This exclusion does not apply to radioactive
10 contamination which is excluded elsewhere in this Policy.

11 The Policy defines contamination under DEFINITIONS on Page 42:
12 **contamination** means any condition of property due to the actual or suspected
13 presence of any foreign substance, impurity, pollutant, hazardous material,
14 poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease
15 causing or illness causing agent, fungus, mold or mildew.

16 Consequently, based on the limited information provided at this time, the
17 coverage potentially available under our Policy for losses arising from
18 COVID-19 is found in our Communicable Disease coverages, assuming the
19 conditions of those coverages are satisfied.

20 27. When Defendant refused coverage for all benefits except the “Additional
21 Coverage” for Communicable Disease, it breached its obligation to conduct a good faith
22 investigation by failing to investigate the scientific probability that a communicable disease
23 was present in and around Plaintiff’s insured business premises throughout the period from
24 March 17, 2020 to the date of this suit. More probably than not, Covid 19 was in fact
physically present in and around plaintiff’s insured businesses in that time frame. Defendant
further breached its obligation to determine whether Plaintiff had suffered a physical
deprivation of its insured business premises due to the communicable disease known as
Covid 19, so as to trigger the limits of insurance coverage promised under the policy. This
was because “Communicable Disease” is not an excluded peril under the policy, and because
its \$100,000 limits for the “Additional” coverage for Communicable Disease---Property

1 Damage and “Communicable Disease—Business Interruption” were not in the list of
2 “Sublimits” under the policy.

3 The portion of Mr. dos Santos’ letter excerpted above constitutes breach of AFM’s
4 insurance contract with Plaintiff, and further constitutes an unreasonable denial of coverage
5 under the \$159,774,510 amount of coverage promised under the policy, as provided in RCW
6 48.30.015 (1) and a violation of WAC 284-30-330 (1).

7 28. By at least March 25, 2021, Defendant was notified by another policyholder
8 that AFM’s denial of coverage under the direct physical loss portion of the policy based upon
9 the “Group III” exclusion was improper and that the Group III exclusions had been deleted
10 by Defendant’s Washington Amendatory Endorsement. Defendant nevertheless made no
11 effort to inform Plaintiff or other policyholders that it had erroneously relied on a set of
12 exclusions (the “Group III” exclusions) which AFM had deleted from its policy. The failure
13 to do so constituted an unfair and deceptive trade practice under RCW 19.86.020, as well as a
14 violation of RCW 48.01.030.

15 At no point following Mr. dos Santos’ issuance of his May 12, 2020 letter did AFM
16 make any attempt to inform Plaintiff that AFM’s reliance on the Group III exclusions was
17 inadvertent. Neither did AFM ever make any effort to rely on the much narrower
18 “Contamination” exclusion contained in its Washington Amendatory Endorsement, nor
19 would it now be permitted to do so pursuant to *Vision One, LLC v. Philadelphia Insurance*,
20 174 Wash.2d 501 (2012).

21 29. Throughout AFM’s investigation of Plaintiff’s claim for policy benefits, AFM
22 was motivated by its own financial interests in avoiding coverage for property damage and
23 direct physical loss or damage caused by a communicable disease, both under policies issued
24

1 to Plaintiff, and under similar or identically worded policies issued to other insureds
2 throughout Washington State. AFM's investigation was neither fair nor impartial, and its
3 denial of coverage for property damage and direct physical loss caused by Covid 19 (and
4 ensuing business interruption) was a result of its one sided investigation and its strong desire
5 not to pay Covid related business interruption claims.

6 CAUSES OF ACTION

7 FIRST CAUSE OF ACTION—BREACH OF CONTRACT

8 30. Plaintiffs reallege paragraphs 1-29 as though fully set forth herein.

9 31. The conduct of Defendant constitutes a breach of the policy it issued to the
10 Upper Skagit Indian Tribe. Plaintiffs have been damaged directly and consequentially in an
11 amount to be proven at trial.

12 SECOND CAUSE OF ACTION—NEGLIGENCE

13 32. Plaintiffs reallege paragraphs 1-31 as though fully set forth herein.

14 33. It was reasonably foreseeable to AFM that its failure to conduct a fair and
15 impartial investigation and to timely pay benefits due under the policy would harm and
16 damage the plaintiffs. The failure of AFM to use reasonable care in providing a fair and
17 impartial investigation led directly to its failure to honor its policy obligations to Plaintiff,
18 proximately resulting in damages in an amount to be proven at trial.

19 THIRD CAUSE OF ACTION—VIOLATION OF CONSUMER PROTECTION ACT

20 34. Plaintiff realleges paragraphs 1-33 as though fully set forth herein.

21 35. Each of the acts and omissions described herein were committed in the course
22 of trade and commerce conducted within the State of Washington.

1 D. Whether certain policy provisions constitute a deliberate violation of
2 the rule of *Safeco v. Hirschmann* that an insurer may not “contractually circumvent” the rule
3 of efficient proximate cause;

4 E. Whether “Communicable Disease,” and “Contamination,” are
5 contractually distinct perils under the AFM policy;

6 F. Whether “Communicable Disease” is an excluded peril under the
7 AFM policy;

8 G. Whether “Communicable Disease” is contained on the list of perils
9 subject to the “Sublimits” section of the policy;

10 H. Whether the “Additional Coverages” under the policy are “additional”
11 to the \$159,774,510 million of coverage for business interruption resulting from non-
12 excluded direct physical loss or damage;

13 I. Whether “Contamination” as defined in the Washington Amendatory
14 Endorsement can legally cause itself without having been initiated by some other non-
15 excluded or excluded peril;

16 J. Whether Defendant breached its contract of insurance with Plaintiff;

17 K. Whether Plaintiff’s denial of benefits for losses initiated by Covid 19
18 is unreasonable within the meaning of RCW 48.30.015 (1);

19 L. Whether Defendant’s attempt to deny coverage to Plaintiff on the
20 ground of a deleted exclusion constitutes an unfair or deceptive act or practice pursuant to
21 RCW 19.86.020;

1 M. Whether Defendant's failure to notify Plaintiff that it had erroneously
2 relied upon a "Group III" exclusion which it had deleted from the policy, constitutes an
3 unfair or deceptive act or practice pursuant to RCW 19.86.020;

4 N. For such other declaratory relief as the Court may find appropriate.

5 **RESERVATION OF CLAIM PURSUANT TO RCW 48.30.015**

6 Contemporaneously with the filing of this complaint, Plaintiff is serving notice on
7 Defendant as required under RCW 48.30.015 (8) of its intent to make claim under
8 Washington's Insurance Fair Conduct Act. Plaintiff therefore reserves the right to join such a
9 claim upon the expiration of the statutory period.

10 **IX. PRAYER FOR RELIEF**

11 WHEREFORE, having stated its Complaint for monetary damages and declaratory
12 relief, plaintiffs pray for relief as follows:

- 13 1. For money damages in an amount to be proven at trial;
- 14 2. For declaratory relief as requested herein, and expedited trial pursuant to CR
15 57;
- 16 3. For prejudgment interest authorized by statute and law;
- 17 4. For treble damages as allowed by statute;
- 18 5. For attorney's fees and other costs, as allowed under applicable law, statute,
19 and/or recognized grounds of equity;
- 20 6. For such other and further relief as the court may deem just and equitable.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

DATED: February 14, 2022.

ASHBAUGH BEAL LLP

By: s/ Richard T. Beal, Jr.
Richard T. Beal, Jr., WSBA #9203
rbeal@ashbaughbeal.com
Khalid Aziz, WSBA #57409
kaziz@ashbaughbeal.com
Attorneys for Plaintiffs