

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

FILED
2022 FEB 24 10:52 AM
KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE #: 22-2-02731-2 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

UPPER SKAGIT INDIAN TRIBE, a federally
recognized Indian Tribe, d/b/a SKAGIT
VALLEY CASINO RESORT,

Plaintiff,

v.

AFFILIATED FM INSURANCE COMPANY,
a foreign corporation,

Defendant.

Case No.

COMPLAINT FOR RELIEF AND FOR
MONETARY DAMAGES

I. PARTIES

1. Plaintiff Upper Skagit Indian Tribe d/b/a Skagit Valley Casino Resort (“Plaintiff”) is a federally recognized Indian Tribe which owns/operates business properties insured by defendant, which property is physically located on tribal land in Skagit County, and which was insured through insurance sold, issued, and delivered by defendant.

2. Defendant Affiliated FM Insurance Company (“AFM” or “Defendant”) is an insurance company headquartered in Rhode Island with an office in Bellevue, Washington. Defendant is authorized to conduct insurance transactions in the State of Washington, and has conducted insurance transactions within the meaning of RCW 48.01.020 and RCW 48.01.060 in Washington, and more specifically from its Bellevue office in King County. Further, Defendant issued insurance to Plaintiff pursuant to RCW Title 48.

1 “This policy excludes . . . Contamination.”

2 11. By endorsement, Defendant *deleted* the exclusion which read “This policy
3 Excludes . . . Contamination.”

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

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

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

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

13 **C. POLICY LIMIT:**

14 This Company's total limit of liability, including any insured Business Interruption
15 loss, will not exceed the Policy Limit of \$67,500,000 as a result of any one
16 **occurrence** subject to the respective sub-limits of liability shown elsewhere in this
17 Policy.

18 14. The AFM policy also contains a provision called “Sublimits.” That provision
19 provides that losses caused by certain perils are subject to “sublimits” less than the \$67.5 million
20 policy limit:

21 **F. SUB-LIMITS:**

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

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

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

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

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

4 15. On April 17, 2020, Plaintiff made claim for policy benefits to Defendant. Defendant
5 acknowledged Plaintiff’s claim to Defendant for policy benefits related to direct physical loss and
6 property damage initiated by the communicable disease known as Covid-19. Pursuant to RCW
7 48.01.030, WAC 284-30-370, and WAC 284-30-320(11), Defendant had an obligation to conduct a
8 fair and impartial investigation sufficient to determine its own liabilities under its policy under all
9 coverages and Additional Coverages.

10 16. Plaintiff’s claim was eventually assigned to AFM adjuster DiAnna Webber in AFM’s
11 Bellevue office.

12 17. On information and belief, Plaintiff alleges that at all times after Ms. Webber became
13 involved as an adjuster regarding Plaintiff’s claim, it was both the policy of Defendant and
14 Ms. Webber’s own practice to conduct a fair and impartial investigation into Plaintiff’s claim, at no
15 time placing the interests of her company ahead of the interests of the insured.

16 18. From the first day Ms. Webber reviewed the policy Defendant issued to Plaintiff,
17 Ms. Webber was aware of the language on page 2 of 7 of form PRO S-1 4100 (01/17) of the policy
18 providing \$100,000 of “additional coverage” for “Communicable Disease – Property Damage.”
19 From that point on, Ms. Webber knew that the policy considered the peril of “Communicable
20 Disease” as capable of causing “Property Damage.”

21 19. From the first point when Ms. Webber learned that the AFM policy considered
22 “Communicable Disease” as being capable of causing “Property Damage” both Defendant as a
23 company and Ms. Webber as an adjuster realized that AFM had a significant financial interest in
24 *refusing* to recognize what its own policy recognized: that the policy contemplated that
25 “Communicable Disease” was capable of causing “Property Damage” as that term was used in the
26 policy.

1 20. From the first point Ms. Webber reviewed the AFM policy issued to Plaintiff, she
2 knew the policy referred to “Communicable Disease” and “Contamination” as separate terms and as
3 separate perils.

4 21. Plaintiff alleges on information and belief that from the first point Ms. Webber
5 reviewed the list of exclusions (as modified by the Washington Endorsement in the policy issued to
6 Plaintiff) she recognized that “Communicable Disease” was nowhere in the list of exclusions.

7 22. On information and belief, Plaintiff alleges Ms. Webber knew from her experience
8 as a property insurance adjuster that the premium charged to Plaintiff and paid by Plaintiff reflected
9 the fact the AFM policy issued to Plaintiff was an “all risk” policy in which any peril recognized by
10 the policy as a peril capable of causing “Property Damage” was considered a covered peril unless it
11 was in the list of exclusions in the policy.

12 23. On information and belief, Plaintiff alleges that from the first time Ms. Webber
13 reviewed the “Sublimits” provision of the policy issued to Plaintiff, she knew that the peril described
14 elsewhere in the policy as “Communicable Disease” was not in the list of perils identified in the
15 section entitled “Sublimits.”

16 24. On information and belief Plaintiff alleges that from the first time Ms. Webber
17 reviewed the Additional Coverages section in the policy, she saw the words “Additional Coverages”
18 and recognized each of those coverages to be “additional” to the \$67,500,000 million of property
19 and business interruption coverage provided previously in the policy issued to Plaintiff.

20 25. At all times before Ms. Webber began writing Plaintiff’s representative concerning
21 the Plaintiff’s claim, Ms. Webber was extremely familiar with the AFM property insurance form
22 issued to Plaintiff, and had adjusted and investigated many, many claims containing that form and
23 also containing the “Washington Amendatory” Endorsement. She knew from this experience that
24 the list of “Group Three” exclusions in the policy (which contain the phrase “This policy excludes”
25 and an exclusion entitled “Contamination”) had been *deleted* by the Washington Amendatory
26 Endorsement.

1 26. On July 6, 2020, Ms. Webber wrote to Plaintiff disclaiming coverage for losses
2 involving the coronavirus pursuant to a contamination exclusion she knew had been deleted from
3 the policy by the Washington Amendatory Endorsement:

4 Please note that the Policy excludes coverage for contamination. The presence of a
5 virus, pathogen or disease causing or illness causing agent such as COVID-19 is a
6 form of contamination as defined in the Policy, which is excluded. The relevant
7 provisions, in part, are set forth below: **Group III:** This Policy excludes:

8 * * *

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

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

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

20 27. When Defendant refused coverage for all benefits except the “Additional Coverage”
21 for Communicable Disease, it breached its obligation to conduct a good faith investigation by failing
22 to investigate the scientific probability that a communicable disease was present in and around
23 Plaintiff’s insured business premises throughout the period from March 17, 2020 to the date of this
24 suit. Defendant further breached its obligation to determine whether Plaintiff had suffered a physical
25 deprivation of its insured business premises due to the communicable disease known as Covid-19,
26 so as to trigger the \$67,500,000 limits of insurance coverage promised under the policy. This was

1 because “Communicable Disease” is not an excluded peril under the policy, and because its \$100,000
2 limits for the “Additional” coverage for “Communicable Disease---Property Damage” and
3 “Communicable Disease—Business Interruption” were not in the list of “Sublimits” under the
4 policy.

5 28. The portion of Ms. Webber’s July 6, 2020 letter excerpted above constitutes breach
6 of AFM’s insurance contract with Plaintiff, and further constitutes an unreasonable denial of
7 coverage under the \$67,500,000 amount of coverage promised under the policy, as provided in RCW
8 48.30.015 (1) and a violation of WAC 284-30-330 (1).

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

16 30. At no point following Ms. Webber’s issuance of its July 6, 2020 letter did AFM make
17 any attempt to inform Plaintiff that AFM’s reliance on the Group III exclusions was inadvertent.
18 Neither did AFM ever make any effort to rely on the much narrower “Contamination” exclusion
19 contained in its Washington Amendatory Endorsement, nor would it now be permitted to do so
20 pursuant to *Vision One, LLC v. Philadelphia Insurance*, 174 Wn.2d 501, 276 P.3d 300 (2012).

21 31 Throughout AFM’s investigation of Plaintiff’s claim for policy benefits, AFM was
22 motivated by its own financial interests in avoiding coverage for property damage and direct physical
23 loss or damage caused by a communicable disease, both under policies issued to Plaintiff, and under
24 similar or identically worded policies issued to other insureds throughout Washington State. AFM’s
25 investigation was neither fair nor impartial, and its denial of coverage for property damage and direct
26 physical loss caused by Covid-19 (and ensuing business interruption) was a result of its one sided

1 investigation and its strong desire not to pay Covid related business interruption claims.

2 **CAUSES OF ACTION**

3 **FIRST CAUSE OF ACTION—BREACH OF CONTRACT**

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

5 33. The conduct of Defendant constitutes a breach of the policy it issued to the Upper
6 Skagit Indian Tribe. Plaintiffs have been damaged directly and consequentially in an amount to be
7 proven at trial.

8 **SECOND CAUSE OF ACTION—NEGLIGENCE**

9 34. Plaintiffs reallege paragraphs 1-33 as though fully set forth herein.

10 35. It was reasonably foreseeable to AFM that its failure to conduct a fair and impartial
11 investigation and to timely pay benefits due under the policy would harm and damage the plaintiffs.
12 The failure of AFM to use reasonable care in providing a fair and impartial investigation led directly
13 to its failure to honor its policy obligations to Plaintiff, proximately resulting in damages in an
14 amount to be proven at trial, expected to be in the tens of millions of dollars.

15 **THIRD CAUSE OF ACTION—VIOLATION OF CONSUMER PROTECTION ACT**

16 36. Plaintiff realleges paragraphs 1-35 as though fully set forth herein.

17 37. Each of the acts and omissions described herein were committed in the course of trade
18 and commerce conducted within the State of Washington.

19 38. The acts and omissions pled herein include per se and/or non per se unfair and
20 deceptive acts or practices pursuant to the Washington Consumer Protection Act, and/or had the
21 capacity to deceive. In particular, the specific acts and omissions committed by AFM include
22 violations of WAC 284-30-330(1), (3), (4), (6), (7), (13), WAC 284-30-360(1), (3) (4), and 370.

23 39. Each of the acts or omissions described herein impacts the public interest.

24 40. The acts or omissions described herein have caused injury/damage to Plaintiff in its
25 business/property.

26 41. Plaintiffs are entitled to recover trebled damages up to the statutory maximum against

1 Defendant.

2 **FOURTH CAUSE OF ACTION—DECLARATORY RELIEF**

3 42. Plaintiffs reallege Paragraphs 1-41 as though fully set forth herein.

4 43. There is an actual and justiciable controversy between Plaintiff and Defendant
5 concerning certain respective rights and obligations inter se. Pursuant to RCW 7.24, Plaintiff seeks
6 declaratory judgment as more specifically pled herein.

7 44. Plaintiffs herein seeks declaratory relief including but not limited to the following:

8 A. An adjudication of whether Defendant committed breaches of WAC 284-30-
9 330(1), (3), (4), (6), (7) and/or (13);

10 B. Whether Defendant, either individually, collectively, and/or through their
11 members or agents, breached RCW 48.01.030;

12 C. Whether Defendant, either individually, collectively or through their
13 members or agents, violated WAC 284-30-360 (1), (3) and or (4);

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

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

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

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

23 H. Whether the “Additional Coverages” under the policy are “additional” to the
24 \$67,500,000 million of coverage for business interruption resulting from non-excluded direct
25 physical loss or damage;

26 I. Whether “Contamination” as defined in the Washington Amendatory

1 Endorsement can legally cause itself without having been initiated by some other non-excluded or
2 excluded peril;

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

4 K. Whether Plaintiff's denial of benefits for losses initiated by Covid-19 is
5 unreasonable within the meaning of RCW 48.30.015 (1);

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

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

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

12 **Reservation of Claim Pursuant to RCW 48.30.015**

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

17 **IX. PRAYER FOR RELIEF**

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

20 i. For money damages in an amount to be proven at trial;

21 ii. For declaratory relief as requested herein, and expedited trial pursuant to CR 57;

22 iii. For prejudgment interest authorized by statute and law;

23 iv. For treble damages as allowed by statute;

24 v. For attorney's fees and other costs, as allowed under applicable law, statute, and/or
25 recognized grounds of equity;

26 vi. For such other and further relief as the court may deem just and equitable.

1 DATED this 24th day of February, 2022.

2 HARRIGAN LEYH FARMER & THOMSEN LLP

3 By: s/ Arthur W. Harrigan, Jr.

4 By: s/ Tyler L. Farmer

5 By: s/ Bryn R. Pallesen

6 Arthur W. Harrigan, Jr., WSBA #1751

7 Tyler L. Farmer, WSBA #39912

8 Bryn R. Pallesen, WSBA #57714

9 999 Third Avenue, Suite 4400

10 Seattle, WA 98104

11 Telephone: (206) 623-1700

12 Facsimile: (206) 623-8717

13 Email: arthurh@harriganleyh.com

14 Email: tylerf@harriganleyh.com

15 Email: brynp@harriganleyh.com

16 UPPER SKAGIT INDIAN TRIBE

17 By: s/ David S. Hawkins

18 David S. Hawkins, WSBA # 35370

19 General Counsel

20 25944 Community Plaza Way

21 Sedro-Woolley, WA 98284

22 Telephone: (360) 854-7090

23 Email: dhawkins@upperskagit.com

24 ASHBAUGH BEAL LLP

25 By: s/ Richard T. Beal, Jr.

26 Richard T. Beal, Jr., WSBA #9203

701 5th Ave., Suite 4400

Seattle, WA 98104

Telephone: (206) 386-5900

Email: RBeal@ashbaughbeal.com

Attorneys for Upper Skagit Indian Tribe