IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Becky McVay, Plaintiff-Appellant, vs. ALLIED WORLD ASSURANCE COMPANY, INC., and YORK RISK SERVICES GROUP, INC., *et al.* Defendants-Appellees	No. 14-15975 District Court Case No. 3:13–cv–00359–HDM–WGC

On Appeal from the United States District Court
for the District of Nevada

Brief for Becky McVay as Appellant

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellant Becky McVay ("McVay") lives in Fallon, Nevada. On or about August 6, 2009, McVay went to purchase cigarettes at the Fox Peak Station—a gas station, convenience store and tobacco store located in the City of Fallon, held in Trust by the United States government, and owned by the Fallon Paiute Shoshone Tribe's ("the Tribe") Fallon Tribal Development Corporation. (the "FTDC"). First Amended Complaint 7-8 (ER at 75). According to the FTDC, its "primary function is to conduct a variety of economic development activities for the Tribe." http://www.ftdc.us/about/about.html. The FTDC describes Fox Peak Station as "a combination convenience store, gas station, and smoke shop located on the east side of Fallon, NV, along US Highway 50, and has been operational since May 2000. Fox Peak Station is open 24 hours everyday and offers: competitively priced gas and diesel; a variety of convenience and staple goods; a large selection of low cost tobacco products; small camping supplies; a variety of local Native American arts and crafts; and fast and friendly service." Id.

While shopping in the store, McVay slipped and fell on the stores' hard cement floor. Unfortunately, the floor was wet that day and there was no "wet floor" sign anywhere near the area where McVay fell and injured herself. First Amended Complaint at 10-13 (ER 76). As a result of her fall, McVay suffered extensive nerve damage in her back. First Amended Complaint at 17(ER76). Due

to these extensive injuries, McVay incurred, and is continuing to incur, substantial medical costs. First Amended Complaint at 17-18 (ER 76). In addition, McVay has experienced a loss of income as a result of her injury at Fox Peak Station. First Amended Complaint at 19(ER 76).

Appellee Allied was put on notice of McVay's claim, and and Appellee York was notified shortly thereafter. First Amended Complaint at 20-22 (ER 77). From the outset, Allied and York met McVay's claim with indifference, making no offer to settle McVay's claim until she involved the Nevada Department of Insurance. First Amended Complaint at 27 (ER 77). At that point, Allied and York offered McVay $5,000 to settle her claim—a sum woefully insufficient to cover her considerable medical costs. First Amended Complaint at 28 (ER 77).

McVay then filed suit against the FTDC on January 27, 2011 in Churchill County Court. On March 10, 2011, the parties stipulated to dismiss the action in Churchill County and file the action in Fallon Tribal Court ("Tribal Court"). First Amended Complaint at 30 (ER 77). At that time, York's counsel indicated verbally to McVay's counsel that the doctrine of sovereign immunity would certainly protect the FTDC from liability. First Amended Complaint at 25 (ER).

McVay filed an action in Tribal Court on August 5, 2011. First Amended Complaint at 31 (ER 77). The FTDC filed a Motion to Dismiss in Tribal Court, on the basis of sovereign immunity, which was granted on November 28, 2011. First

Amended Complaint at 22 (ER 77). On February 7, 2012, McVay sought permission to amend her complaint in Tribal Court to add the Appellees as parties based on the Policy purchased by the Tribe, issued by Allied, and administered by York. First Amended Complaint at 33(ER 77).

That insurance policy, which is the subject of the instant appeal, is entitled a "Program for Sovereign Indian Nations General Liability Policy" (the "Policy"). (ER 6) The Policy, an umbrella policy that is typical of its kind, provides general liability coverage to the tribe for injuries like those suffered by McVay. (ER11).

Importantly, the policy defines the "insured" as not only the Fallon Paiute Shoshone Tribe, but also:

> …any person, …to whom the Named Insured is obligated by virtue of a written contract or oral agreement to provide insurance such as is afforded by this policy, but only in respect to liability for "personal injuries"… caused, in whole or in part, by the Named lnsured's acts or omissions or the acts or omissions of those acting on the Named lnsured's behalf, in the performance of the Named lnsured's ongoing operations or in connection with premises owned by or rented to the Named Insured.

Policy, Section 1(A) (ER 10).

The contract also contains a "Sovereign Immunity Endorsement", which is at issue in this case. That endorsement provides:

> **In the event of a claim or suit, the "Carrier" agrees not to use the Sovereign Immunity of the "Insured" as a defense, unless the "Insured" authorizes the company to raise such a defense by written notice to**

> **the "Carrier''. Any such notice will be sent not less than 10 days prior to the time required to answer any suit.**

Policy Endorsement # 3 (ER 36).

At the July 9, 2012, Tribal Court hearing on McVay's Motion to Amend, Wes Williams, counsel for FTDC and York, admitted that he did appropriately provide written notice to the insurance carrier pursuant to the Policy, authorizing them to raise the defense of sovereign immunity. At that hearing the following conversation occurred:

> WILLIAMS: …In this case your Honor, this is going beyond what's in the pleas [sic] a little bit but there is an insurance policy that covers this case and there is a writer [sic] to that insurance policy that says that the insurance company is not invoke sovereign immunity in defense unless it's approved by the client, which is the Corporation. And in this case I went before the Corporations [sic] Board and they authorized me to invoke the sovereign immunity defense for the Corporation. So even if we ended up down the road here we are going to end up with the same issue where it is going to be dismissed because sovereign immunity is still going to apply.
>
> JUDGE: And that was done in writing?
>
> WILLIAMS: Of course not done in writing, the writer does say that it needs to be in writing but I was at the Board meeting
>
> JUDGE: The representation based upon?
>
> WILLIAMS: Yes, we didn't do a writing because I am the Corporations [sic] General Counsel and the

> Insurance Company hired me to represent them in this case so I would be writing myself a memo saying invoke the sovereign immunity defense. I can go out hand write one right now and it would have the effect.

First Amended Complaint at 34 (ER 78).

On August 29, 2013, McVay filed an amended complaint alleging that: (1) FTDC was negligent; (2) that she was entitled to recover for the injuries she suffered as a result of FTDC's negligence; (3) that she is a third beneficiary to the Policy between Allied and the FTDC; (4) that Allied breached the Policy when it denied her claim; (5) that Allied and York breached to covenant of good faith and fair dealing implied in every contract and (5) that York is liable to her as the third-party administrator. (ER 74-80).

Both Appellees filed Motions to Dismiss for Failure to state a claim under Fed. R. of Civ. Pro 12(b)(6). McVay filed a Response opposing the motion and also included a request to amend the complaint. On April 18, 2014, the District Court granted Appellee's motions and denied McVay's request to amend her complaint. This appeal followed.

On October 1, 2013, the Tribal Court issued an Order indicating, again, that the Tribe was insulated from suit under the doctrine of sovereign immunity. The Court left open and undecided the question of whether McVay would be permitted to amend her complaint in tribal court to include the Appellees, noting that it was unclear whether McVay could seek damages from the insurer when the Tribe had

already been dismissed from the law suit. (ER 83-86). Notably, the certificate of mailing is dated July 28, 2014—some ninth months after the order was signed by the tribal court, but after the Notice of Appeal was filed in this case. *Id.*[1]

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this matter under 28 U.S.C. § 1332, because the parties in question here are diverse. This Court has jurisdiction under 28 U.S.C. § 1291, because the appeal is from a final order—of the District Court of Nevada granting defendants' motion to dismiss—and disposing of all of the parties' claims. The appeal is timely because the Notice of Appeal was filed on May 19, 2014. (ER 1).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

On appeal, the issues are as follows: (1) The District Court erred when it determined that the tribes activities in this case do not fall under 25 U.S.C. Section 450f(c)--which requires tribes to purchase liability insurance because that mandate

[1] McVay respectfully requests this Court to take judicial notice of the Tribal Court's Order. *See Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680, 686 (N.D. CA 2011) c*iting Omaha Tribe of Neb. v. Miller,* 311 F.Supp.2d 816, 819 n. 3 (S.D.Iowa 2004) (taking judicial notice of tribe's corporate charter as a public record*)* and *Biomedical Patent Mgmt. Corp. v. Cal., Dep't of Health Servs.,* 505 F.3d 1328, 1331 n. 1 (Fed.Cir.2007) (taking judicial notice of court filings from previous litigation between the parties as public records).

has a broader application than that determined by the District Court; (2) The District Court erred when it determined that McVay is not a named beneficiary under the plain language of the Policy; (3) The District Court erred when it determined that defendants did not improperly invoke sovereign immunity; (4) The District Court erred when it determined that McVay's claim for breach of contract lacked merit; (5) The District Court erred when it determined that Ms. McVay's claims for breach of the covenant of good faith and fair dealing lacked merit; (5) The District Court erred when it denied McVay's request to amend her complaint;

STATEMENT OF THE CASE

McVay filed a suit against Appellees in the United States District Court for the District of Nevada, alleging that she was an intended third-party beneficiary of the Policy between Allied and the FTDC, which is administered by York. McVay alleged that Appellees breached the contract when it denied her claims for the damages she sustained when she was injured on the FTDC's property. McVay also alleged that Appellees violated their covenant of good faith and fair dealing under the contract.

Appellees filed a Motion to Dismiss in the District Court arguing that Ms. McVay was not entitled to relief because (1) she was a pre-judgment plaintiff, and (2) she lacked standing to sue as a third party beneficiary to the contract. The District Court agreed and granted Defendants Motion to Dismiss noting that

McVay had not obtained a judgment, that she was not a third party beneficiary to the contract and that she had not alleged any acts that caused her to act in reliance on the Appellees.

RELEVANT STATUTES

The following statutes, which are relevant to the disposition of the case are set forth in the addendum attached to this brief: The Indian Self-Determination and Education Assistance Act codified in 25 U.S.C. §450 et seq. and The Indian Reorganization Act 25 U.S.C. §461 et. seq.

SUMMARY OF THE ARGUMENT

McVay slipped and fell in a gas station owned by the Fallon Tribal Development Corporation, which is an entity of the Fallon Paiute-Shoshone Tribe (the Tribe). The tribe is covered under the Policy issued by Allied and administered by York. McVay sued Appellees seeking to recover damages related to her fall, after she was unsuccessful in her attempts to sue both the Tribe itself in Tribal Court and the United States under the Federal Torts Claims Act. (ER 77, 87).[2]

[2] As Allied pointed out in its Reply below, and contrary to the implications of the District Court otherwise in its Order, McVay cannot ever obtain a judgment (continued on next page)

In this case, the purpose of the Policy is to provide compensation to persons who suffer personal injury for which the Tribe may ultimately be liable. The Policy is mandated under Federal law under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450f et. seq.,, which requires all Tribes who carry out self-determination contracts to purchase insurance—but does not, as Appellees suggest, limit that coverage to activities carried out under the IDSEAA.

Further, the Policy was the result of an agreement set forth in the Tribe's Corporate Charter, which, as Appellee Allied points out was issued to the Fallon Paiute-Shoshone Tribe pursuant to section 17 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 988, as amended by section 3(c) of Public Law 101-301, 104 Stat. 207, and codified in pertinent part at 25 U.S.C.§ 477. See Reply to Plaintiff's Response in Opposition to Allied's Motion to Dismiss, (ER 53-55).[3]

(footnote continued from previous page)
under the Federal Torts Claims Act; In fact, Ms. McVay was denied permission to file a suit against the United States under the FTCA. (ER 87). McVay also moves this Court to take judicial notice of the FTCA's denial of her claim, and the Tribal Court's Order. *See Amerind Risk Management Corp. v. Malaterre*, 633 F.3d at 686 c*iting Omaha Tribe of Neb. v. Miller,* 311 F.Supp.2d at 819 n. 3 (taking judicial notice of tribe's corporate charter as a public record).

[3] McVay moves this Court to take judicial notice of the FTDC's Corporate Charter, which is available online at http://www.ftdc.us/archive/FTDC%20Corporate%20Charter.pdf *Amerind Risk Management Corp. v. Malaterre*, 633 F.3d at 686 c*iting Omaha Tribe of Neb. v. Miller,* 311 F.Supp.2d at 819 n. 3 (taking judicial notice of tribe's corporate charter as a public record).

Specifically, under Article 9, Section 9.6 the Tribe agreed that, "[f]ire and casualty insurance on property owned by the Corporation and on property in which the Corporation has an insurable interest, general liability insurance, Directors and Officers liability insurance, and other appropriate insurance, shall be maintained in such reasonable amounts and with such reasonable deductibles as the Board may determine. http://www.ftdc.us/archive/FTDC%20Corporate%20Charter.pdf Thus, under the plain language of the policy, McVay is a named beneficiary, since she is a party that the Tribe agreed to insure pursuant to its own Corporate Charter.

Further, under the specific circumstances of this case, requiring McVay to obtain a judgment before seeking redress from Defendants is untenable since McVay has been prevented under the doctrine of sovereign immunity from ever having her day in court. To begin with, McVay readily admits that she understands that the doctrine sovereign immunity serves the laudable purpose of protecting Tribal governments and their treasuries against potentially ruinous litigation. See Katherine J. Florine, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, Boston Coll. Law Rev. Vol. 51, 595, at 628 (2010) (noting that sovereign immunity protects the fragile treasuries of tribes from the dangers of costly litigation). As discussed in more detail below, the protection of tribal governments and promotion of tribes' economic growth is the reason Congress mandated that tribes purchase insurance.

Thus, the only protection afforded to McVay is as a beneficiary under the Policy—a Policy that exists for the specific purpose of protecting both the Tribe and injured parties like McVay, who do not fall within the scope of the FTCA and its coverage. To conclude otherwise, would mean that tribal insurance in Nevada, as it relates to tort litigants like McVay, is a scam where both Tribes and their insurance carriers are protected from liability under the doctrine of sovereign immunity, but the insurance carriers who provide coverage, and, more importantly, collect millions of dollars in premiums from the tribes, pay on very few claims because most are paid under the Federal Torts Claims Act.[4] Surely this is a conclusion supported neither by law nor by public policy considerations.

[4]Indian lawyers Gabriel S. Galanda and James L. Robenalt have alluded to such a practice, arguing in favor of tribes entering into their own self-insurance businesses. In an article published on the Indian Country Today Media Network in June of 2009, they noted "that private insurers that tribes pay $250 to $300 million in insurance premiums annually for financial 'protection.'" Galanda and Robenalt also noted that, "while tribes receive an insurance 'product' in return for the $250 to $300 million they pay annually, the premium costs for some tribes are grossly disproportionate to their actual losses." *Galanda and Robenalt: Holding Big Insurance Captive* Available at http://indiancountrytodaymedianetwork.com/2009/05/11/galanda-and-robenalt-holding-big-insurance-captive-83614.

ARGUMENT

I. STANDARD OF REVIEW

This Court "review[s] de novo a district court's order granting a motion to dismiss under Rule 12(b)(6)." *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011).

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed specificity, the plaintiff does have an obligation to provide the facts that support his claims for relief and this "requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1159 (9th Cir. 2012).

The plaintiff must set forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). And, factual allegations need only raise a right to relief above speculation to be sufficient. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir.2008) (quoting *Bell Atl. Corp.*, 550 U.S. at 555, 127 S.Ct. 1955). Further, the court must accept "all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029–30 (9th Cir.2009) (quoting *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir.2005))

II. THE DISTRICT COURT ERRED WHEN IT DETERMINED THAT THE INSURANCE POLICY IN THIS CASE DOES NOT FALL UNDER 25 U.S.C. SECTION 450F(C)--WHICH REQUIRES TRIBES TO PURCHASE LIABILITY INSURANCE BECAUSE THAT PROVISION HAS A

BROADER APPLICATION THAN DETERMINED BY THE DISTRICT COURT.

At the outset, it is necessary to provide this court with a brief history of the Congressional debate concerning how to protect those harmed on tribal lands and businesses, while still encouraging tribal economic growth and independence and self-determination by protecting the doctrine of sovereign immunity, which insulates tribal governments and treasuries from the potentially devastating costs of litigation.

Recently, in his dissent in the case of *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2050-51 (2014), Justice Clarence Thomas noted that tribal economic activity had increased dramatically and that now, "tribal businesses extend well beyond gambling and far past reservation borders," and involves extraordinarily diverse businesses ranging from "sell[ing] cigarettes and prescription drugs online; engage in foreign financing; [to] operat[ing] greeting cards companies, national banks, cement plants, ski resorts, and hotels." *Id.* Justice Thomas further correctly observed that, "these manifold commercial enterprises look the same as any other—except immunity renders the tribes largely litigation-proof." *Id.*

Notably, it was this growth that Federal Indian Policy hoped to spur under both the Indian Reorganization Act of 1934 and the Indian Self-Determination and

Education Assistance Act of 1975 (the "ISDEAA"). The Indian Reorganization Act of 1934 (the "IRA") "represented the first comprehensive attempt to incorporate Indian tribes as political entities within the legal and political systems of the United States, embodying the endorsement of a policy to promote tribal self-government and a government-to-government relationship between Indian tribes and the United States." Ann K. Wooster, J.D., Annotation, *Application of Indian Reorganization* Act, 30 A.L.R. Fed. 2d 1 (2008). The Indian Self-Determination and Education Assistance Act was adopted in 1975 for the purpose of encouraging independence, self-rule, and economic development among Indian tribes by assuring maximum Indian participation in the management of federal programs and services for Indians. See 25 U.S.C. §§450, 450a (1994).

In order to protect tribal treasuries from harm, Congress also enacted 25 U.S.C. § 450(f)(c), which requires the Secretary of the Interior to procure insurance policies, like the one at issue here, for tribes who carry out self-determination contracts under the IDSEAA. That statute directs the Secretary of the Interior to obtain or provide "liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this subchapter." Significantly, while it mandates the procurement of insurance for that tribes carrying out such contracts, it does not limit the

procurement of that insurance only those damages that may be sustained when tribes are carrying out the contracts, grant agreements or cooperative agreements set out in 25 U.S.C. § 450f. Common sense dictates that this is likely because such activities are already protected under the FTCA. Instead, the plain language of the statute directs the Secretary of the Interior to consider "the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act," when obtaining insurance coverage.[5] Certainly this language indicates that the purpose of the Congressional insurance mandate is to provide protection for claims that fall outside of the coverage of the FTCA—claims like the one at issue in this case.

This conclusion is also supported by the enactment of Indian Tribal Tort Claims and Risk Management Act of 1998, which was adopted by Congress as a note to 25 U.S.C. § 450f. In that statute, proposed in a bill drafted by Senator Ben Campbell, himself a Native American, *See* Thomas Scholsser, *Sovereign Immunity: Should the Sovereign Control the Purse*? 24 Am. Indian L. Rev. 309, 310 (2000), Congress made the following findings in mandating a study to

[5] Congress amended the ISDEAA in 1990 to provide that "any civil action or proceeding" against "any tribe, tribal organization, Indian contractor or tribal employee" involving claims resulting from the performance of self-determination contract functions shall fall under the "the full protection and coverage of the Federal Tort Claims Act." 25 U.S.C. § 450f; see also 25 U.S.C. § 2804.

"facilitate relief for a person who is injured as a result of an official action of a tribal government:"

> (1) Indian tribes have made significant achievements toward developing a foundation for economic self-sufficiency and self-determination, and that economic self-sufficiency and self-determination have increased opportunities for the Indian tribes and other entities and persons to interact more frequently in commerce and intergovernmental relationships;
>
> "(2) although Indian tribes have sought and secured liability insurance coverage to meet their needs, many Indian tribes are faced with significant barriers to obtaining liability insurance because of the high cost or unavailability of such coverage in the private market;
>
> "(3) as a result, Congress has extended liability coverage provided to Indian tribes to organizations to carry out activities under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.); and
>
> "(4) there is an emergent need for comprehensive and cost-efficient insurance that allows the economy of Indian tribes to continue to grow and provides compensation to persons that may suffer personal injury or loss of property.

The studies goals were to eliminate the provision of duplicative and costly insurance policies under 25 U.S.C. § 450f. In so concluding, Congress clearly recognized that the procurement of insurance under 25 U.S.C. §450f should not be limited to acts carried out pursuant to self-determination contracts already covered by the FTCA. Instead, it was the goal of Congress to help facilitate the procurement of insurance coverage to protect against those activities, like the ones carried out by the FTDC, that are not within the scope of the protection of the United States government.

Here, the Tribe is required to obtain an insurance policy like the one at issue in this case when carrying out contracts or functions covered under the IDSEAA.[6] As the Defendants themselves pointed out, and the District Court acknowledged, the policy coverage here is very broad, covering a broad range of tribal activities—which also include activities covered under the IDSEAA as well as activities carried out by tribal businesses, like those organized under the FTDC's corporate charter. For that reason, it is undisputed that the Policy in question here was purchased as a result of the Congressional mandate set forth in 25 U.S.C. § 450f. Thus, because the Policy is the result of an agreement with Congress to obtain insurance to protect persons who suffer personal injury or loss of property, McVay is a third party beneficiary who is permitted to sue Appellees under Nevada law for breach of contract and breach of the covenant of good faith and fair dealing. And as set forth above, that agreement to procure insurance is not limited to those acts carried out pursuant to 25 U.S.C. 450f. Instead, Congress has indicated that the Secretary of the Interior must consider the need for coverage that applies specifically to those claims that are not covered by the FTCA.

[6] To the extent it is unclear why the Tribe purchased this policy, Appellant contends that the granting of the motion to dismiss was premature, since McVay has not yet had the opportunity to conduct discovery concerning the policy or concerning Appellees payment of claims under similar circumstances.

Because Ms. McVay cannot sue under the FTCA, and cannot obtain a judgment in tribal court, state court, or federal court against the tribe, due to the Tribe's insulation from suit under the doctrine of sovereign immunity, the Policy in question in this case is the only avenue that provides even a modicum of protection to innocent parties like McVay, who suffer injuries tribal properties like Fox Peak.

This is precisely what Congress intended such insurance policies to do. Further, this conclusion is consonant with Congressional intent to protect tribes against the cost of litigation because it does not endanger tribal resources or put tribal assets at risk—it merely requires Allied and York to protect against the risks contemplated in Policy and in the Tribe's Corporate Charter to the extent of the coverage limits set forth in the Policy. Specifically, 25 U.S.C. § 450f(c)(3)(A) requires the insurance carrier to waive sovereign immunity as a defense but only to the extent ". . .of "coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance."

As a result, any plaintiff like McVay, who brings a lawsuit against an insurance carrier providing coverage pursuant to the Congressional mandate is necessarily limited to only that recovery that is within the scope of the coverage provided by the Policy. To conclude otherwise leaves an entire class of persons, namely any patron who is injured or suffers harm when patronizing tribal

businesses like Fox Peak, without any recourse or access to justice and calls into question the wisdom of continuing the provision of the defense of sovereign immunity in cases like the one at bar.

III. MS. MC VAY IS A NAMED BENEFICIARY UNDER THE CONTRACT AND IS NOT A PRE-JUDGMENT PLAINTIFF.

Pursuant to Nevada law, a contractual relationship with an insurer is required to assert a claim of bad faith refusal to settle a claim, unless a third party is a specific intended beneficiary to the insurance contract. *Vignola v. Gilman*, 804 F.Supp.2d 1072 (Nev. 2011). As the District Court poignantly observes, "[w]hether an individual is an intended third party beneficiary depends on the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered." *Canfora v. Coast Hotels & Casinos, Inc.*, 121 P. 3d 599, 605 (Nev. 2005).

Importantly, the policy defines the "insured" as not only the Fallon Paiute Shoshone Tribe, but also:

> …any person, …to whom the Named Insured is obligated by virtue of a written contract or oral agreement to provide insurance such as is afforded by this policy, but only in respect to liability for "personal injuries"… caused, in whole or in part, by the Named lnsured's acts or omissions or the acts or omissions of those acting on the Named lnsured's behalf, in the performance of the Named lnsured's ongoing operations or in connection with premises owned by or rented to the Named Insured.

Policy Part 1, Section 1(A) (ER 10).

Here, the Tribe made two agreements to provide coverage under the policy to plaintiffs like McVay. The first agreement, as set forth fully above, is the one mandate set forth in 25 U.S.C. §450f(c), which requires tribes to obtain insurance in exchange for being allowed to carry out self-determination contracts under 25 U.S.C. § 450f. Congress specifically intended the Tribes to purchase insurance for the purpose of obtaining coverage for acts that fall outside of the scope of the FTCA, which serves the dual purpose of protecting both the tribe and those who suffer personal injuries on tribal properties as a result of the Tribe's commercial activity. Appellee Allied admitted below that the Tribe had obtained the Policy, among other reasons, to meet the requirements set forth in 25 U.S.C. § 450f to enable the Tribe to carry out self-determination contracts. Allied's Reply at 4 (ER 52).

The second agreement to obtain insurance is set forth in FTDC's Corporate Charter itself. Under Article 9, Section 9.6 of its Corporate Charter, which was approved by the Tribe, and signed and approved by the Secretary of the Interior under 25 U.S.C. §477, the Tribe agreed that, "[f]ire and casualty insurance on property owned by the Corporation and on property in which the Corporation has an insurable interest, general liability insurance, Directors and Officers liability insurance, and other appropriate insurance, shall be maintained in such reasonable

amounts and with such reasonable deductibles as the Board may determine." http://www.ftdc.us/archive/FTDC%20Corporate%20Charter.pdf. Because the Tribe agreed to insure plaintiffs like McVay, who may be injured when patronizing tribal businesses like Fox Peak, McVay is a specific intended beneficiary under the Policy. Accordingly, the District Court erred when it determined that no there was no contract that covered the tribe's activities under the FTDC and McVay should be permitted to pursue her claims for breach of contract and breach of the covenant of good faith and fair dealing under Nevada law as a specific intended beneficiary, without first obtaining a judgment against the Tribe, which is under the circumstances presented here, impossible for McVay to achieve.

IV. APPELLEES HAVE BREACHED THE COVENANT OF GOOD FAITH AND FAIR DEALING BY REFUSING TO PROVIDE COVERAGE TO MCVAY, A SPECIFIC INTENDED BENEFICIARY TO THE POLICY

In this case, the Tribe purchased the Policy at issue for the purposes of protecting itself against liability. The Policy specifically makes any party, who, by virtue of an agreement, the Tribe is obligated to provide insurance coverage, a specific beneficiary of the Policy. Both the Policy itself, and the limited waiver set forth in 25 U.S.C. § 450f(c)(A)(3), prohibit Appellees from raising the defense of Sovereign Immunity unless the insured authorizes the carrier to raise such a defense by providing written notice to the carrier within 10 days of receiving notice of the claim. Policy at 32. (ER 36). Even then, the defense may only be

raised to the extent that the liability set forth in the claim exceeds the coverage limits set forth in the Policy. 25 U.S.C. § 450f(c)(A)(3).

All of that notwithstanding, both Appellee and the District Court dismissed McVay's argument that it was bad faith for the carrier to rely on the defense of sovereign immunity to relieve itself of its duties to perform under the Policy without first obtaining a written notice from the Tribe permitting it to do so. In so doing the District Court rendered that portion of the Policy perfunctory at best and meaningless at worst. As a result, under *Wohler v. Bartgis*, 969 P.2d 949, 114 Nev. 1249 (1998), should not be able to assert the defense of sovereign immunity to avoid paying a claim covered under the Policy it drafted but admittedly failed to follow. Accordingly, the District Court erred when it determined that Appellees did not breach the covenant of good faith and fair dealing when it asserted the defense of sovereign immunity without the Tribe's express written permission to do so.

CONCLUSION

McVay is a specific intended beneficiary to the Policy under both applicable federal law and under the FTDC's Corporate Charter. As such, she may sue Appellees, pursuant to Nevada law, for breach of contract and breach of the covenant of good faith and fair dealing. For these reasons, the District Court's decision should be reversed and McVay should be permitted to pursue her claims against Appellees below. Any conclusion to the contrary deprives McVay of her

Due Process rights to have her day in court. Further, to the extent deficiencies her in complaint may be cure through amendment, the District Court's determination that amendment would be futile should be reversed and McVay should be permitted to amend her complaint.

DATED: September 24, 2014 Respectfully submitted,

By: s/La Donna J. Childress
LA DONNA J. CHILDRESS

By s/Nicole Harvey
NICOLE HARVEY

Attorneys for Plaintiff/Appellee

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionally double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on September 24, 2014.

La Donna Childress

By: s/La Donna J. Childress
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 24, 2014.

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STATUTORY ADDENDUM

§ 450f. Self-determination contracts, 25 USCA § 450f
Pub.L. 105–277, Div. A, § 101(e) [Title VII], Oct. 21, 1998, 112 Stat. 2681–335 (25 § 450f note)
"This title [enacting this note] may be cited as the 'Indian Tribal Tort Claims and Risk Management Act of 1998'.

"Sec. 702. Findings and Purpose.

"(a) Findings.--Congress finds that--

"(1) Indian tribes have made significant achievements toward developing a foundation for economic self-sufficiency and self-determination, and that economic self-sufficiency and self-determination have increased opportunities for the Indian tribes and other entities and persons to interact more frequently in commerce and intergovernmental relationships;

"(2) although Indian tribes have sought and secured liability insurance coverage to meet their needs, many Indian tribes are faced with significant barriers to obtaining liability insurance because of the high cost or unavailability of such coverage in the private market;

"(3) as a result, Congress has extended liability coverage provided to Indian tribes to organizations to carry out activities under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.); and

"(4) there is an emergent need for comprehensive and cost-efficient insurance that allows the economy of Indian tribes to continue to grow and provides compensation to persons that may suffer personal injury or loss of property.

"(b) Purpose.--The purpose of this title [this note] is to provide for a study to facilitate relief for a person who is injured as a result of an official action of a tribal government.

"Sec. 703. Definitions.

"In this title [this note]:

"(1) Indian tribe.--The term 'Indian tribe' has the meaning given that term in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

"(2) Secretary.--The term 'Secretary' means the Secretary of the Interior.

"(3) Tribal organization.--The term 'tribal organization' has the meaning given that term in section 4(l) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(l)).

"Sec. 704. Study and Report to Congress.

"(a) In general.--

"(1) Study.--In order to minimize and, if possible, eliminate redundant or duplicative liability insurance coverage and to ensure that the provision of insurance to Indian tribes is cost-effective, the Secretary shall conduct a comprehensive survey of the degree, type, and adequacy of liability insurance coverage of Indian tribes at the time of the study.

"(2) Contents of study.--The study conducted under this subsection shall include--

"(A) an analysis of loss data;

"(B) risk assessments;

"(C) projected exposure to liability, and related matters; and

"(D) the category of risk and coverage involved, which may include--

"(i) general liability;

"(ii) automobile liability;

"(iii) the liability of officials of the Indian tribe;

"(iv) law enforcement liability;

"(v) workers' compensation; and

"(vi) other types of liability contingencies.

"(3) Assessment of coverage by categories of risk.--For each Indian tribe, for each category of risk identified under paragraph (2), the Secretary, in conducting the study, shall determine whether insurance coverage or coverage under chapter 171 of title 28, United States Code [28 U.S.C.A. § 2671 et seq.], applies to that Indian tribe for that activity.

"(b) Report.--Not later than June 1, 1999, and annually thereafter, the Secretary shall submit a report to Congress that contains legislative recommendations that the Secretary determines to--

"(1) be appropriate to improve the provision of insurance coverage to Indian tribes; or

"(2) otherwise achieve the purpose of providing relief to persons who are injured as a result of an official action of a tribal government.

§ 450f. Self-determination contracts

. . .

(c) Liability insurance; waiver of defense

(1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this subchapter. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act.

(2) In obtaining or providing such coverage, the Secretary shall, to the greatest extent practicable, give a preference to coverage underwritten by Indian-owned economic enterprises as defined in section 1452 of this title, except that, for the purposes of this subsection, such enterprises may include non-profit corporations.

(3)(A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

(B) No waiver of the sovereign immunity of an Indian tribe pursuant to this paragraph shall include a waiver to the extent of any potential liability for interest prior to judgment or for punitive damages or for any other limitation on liability imposed by the law of the State in which the alleged injury occurs.

§477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal,

including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

(June 18, 1934, ch. 576, §17, 48 Stat. 988; Pub. L. 101–301, §3(c), May 24, 1990, 104 Stat. 207.)

Amendments

1990—Pub. L. 101–301 substituted "by any tribe" for "by at least one-third of the adult Indians", "by the governing body of such tribe" for "at a special election by a majority vote of the adult Indians living on the reservation", and "twenty-five years any trust or restricted lands" for "ten years any of the land".