



No. *Court File No.* VLC-S-S-208864  
Vancouver Registry

*In the Supreme Court of British Columbia*

Between

Black Venom Coffee Corporation dba Angelina's

PLAINTIFF

and

The Co-operators General Insurance Company

DEFENDANT

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

**NOTICE OF CIVIL CLAIM**

**This action has been started by the plaintiff for the relief set out in Part 2 below.**

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

**JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.**

**Time for response to civil claim**

A response to civil claim must be filed and served on the plaintiff,

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,

- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

## **THE PLAINTIFF'S CLAIM**

### **Part 1: STATEMENT OF FACTS**

#### Overview

1. This proposed class action arises out of the Defendant's unlawful denial of insurance coverage for business income losses and related costs.
2. The Defendant provided an "all-risks" insurance policy to the Plaintiff and class members for loss of business income. The standard-form policy covers loss of income arising from an interruption or interference with the Plaintiff's and class members' businesses. Such coverage arises where there is direct physical damage to the Plaintiff's and class members' property or where the Plaintiff's and class members' access to their property has been prohibited by order of Civil Authority due to damage to neighbouring premises.
3. Moreover, the Defendant's insurance policies specifically include coverage for loss or damage resulting in the complete or partial interruption of business operations where there is notifiable contagious or infectious disease, as declared by a public health official, that occurs within 25 km of the insured's business.
4. Such "all-risks" commercial insurance contracts provide peace of mind to business owners, including the Plaintiff and class members, because insurers will cover business losses if the unforeseen occurs. Coverage include all risks of physical loss or damage. These broad policies can only be narrowed by specific exclusions and conditions, such as a virus or pandemic exclusion. The policies at issue in this case did not include any such exclusions. On the contrary, the policies specifically included coverage to the Plaintiff and class members for losses due to a notifiable contagious or infectious disease occurring within a 25 km radius of the insured.

5. An unforeseen event occurred in early 2020: COVID-19 spread throughout the world, including Canada, causing a global pandemic. Such a disease outbreak is expressly covered by the terms of the Defendant's insurance policies.

6. On March 17, 2020, the Provincial Health Officer gave notice under s 52(2) of the *Public Health Act*, SBC 2008, c 28 that there was an outbreak of COVID-19 in the province, and that this constituted a "regional event" as defined in s 51 of the *Public Health Act* (the "Emergency Order").

7. The declaration of the Emergency Order by the Provincial Health Officer constitutes a declaration by a public health official of a "notifiable contagious or infectious human disease" within the meaning of the Defendant's insurance policies. Pursuant to s. 54(1)(c) of the *Public Health Act*, SBC 2008, c. 28, the Public Health Officer is permitted to issue orders regarding an emergency/regional event, both orally and in written form, to the same effect. Specific outbreak locations for COVID-19 have been identified by public health officials across the province, including at multiple locations within 25 km of the Plaintiff's and class members' businesses.

8. Pursuant to this Emergency Order, and subsequent orders issued by the Provincial Health Officer, many businesses in British Columbia, including the Plaintiff's and class members' businesses, were ordered closed.

9. The Provincial Health Officer is a Civil Authority within the meaning of the Defendant's insurance policies, and the Emergency Order constitutes an order by the Civil Authority within the meaning of the Defendant's insurance policies. These orders to close businesses were an interruption of the businesses of the Plaintiff and class members which are covered under the Defendant's insurance policies.

10. The Plaintiff and class members were impacted by the Emergency Order as their property could spread the virus. But, when the Plaintiff and class members shuttered their businesses, they did so with peace of mind – they had purchased an "all-risks" insurance policy which did not exclude viruses or pandemics. Rather, the Defendant's policies specifically insured the peril impacting their businesses.

11. The Plaintiff sought the money it was owed under its insurance policy. In breach of contract, the Defendant denied its claim for recovery.

12. Through this suit, the Plaintiff and class members seek to hold the Defendant accountable for its unlawful conduct and to recover damages.

### The Parties and the Proposed Class

13. The Plaintiff, Black Venom Coffee Corporation dba Angelina's ("Angelina's"), is a British Columbia corporation that operates a restaurant in New Westminster located at 122-810 Quayside Drive, New Westminster, British Columbia, V3M 6B9. The Plaintiff's restaurant is a family run business which focuses on breakfast and lunch. Its specialties include coffee, pancakes and omelettes. Traditionally, it has not offered take-out or delivery food service. Its business is based on a warm and inviting dine-in experience which includes a scenic view of the waterfront.

14. The Defendant, The Co-operators General Insurance Company, is a company licensed under the *Insurance Act*, RSBC 2012, c 1 to sell insurance in the province of British Columbia and elsewhere in Canada. It has offices throughout Canada, including a corporate office at 1051 Mainland Street, Vancouver, British Columbia, V6B 5P9.

15. The Plaintiff brings this claim on behalf of a proposed class as follows:

"All persons in British Columbia who had insurance policies with the Defendant during the Class Period that included business interruption insurance."

The "Class Period" commences on March 17, 2020 and continues until a date to be fixed by the Court.

### The Insurance Policy

16. The Plaintiff bought a commercial insurance policy from the Defendant with policy number 1076361922 with a period of coverage extending from April 5, 2019 to April 5, 2020 (the "Policy"). The Policy covers Angelina's restaurant location in New Westminster. The Policy includes business interruption insurance.

17. The Policy includes a provision that it extends its duration beyond the regular termination date by up to 120 days in the event that a state of emergency is declared by a Canadian public authority. The Emergency Order constitutes such a declaration and has extended the duration of the Policy beyond April 5, 2020.

18. The Plaintiff paid its premiums owed under the Policy regularly and as required. Indeed, the Plaintiff paid many thousands of dollars in premiums to the Defendant over many years.

#### Denial of Coverage

19. The Plaintiff notified the Defendant that its business had closed due to COVID-19, and that it wished to assert a claim for loss of business income under the Policy.

20. A representative of the Defendant emailed the Plaintiff on May 11, 2020 to inquire about the claim. The Plaintiff and the Defendant spoke about the claim by phone on May 15, 2020. The Plaintiff then sent the Defendant an email, dated May 16, 2020, setting out, in detail, the basis for its claim. Further email exchanges occurred on May 19, 2020.

21. On May 22, 2020, the Defendant issued a formal denial letter to the Plaintiff.

22. The Plaintiff then sought to appeal the decision of the Defendant to its own internal ombudsperson. The appeal was denied by the Defendant's ombudsperson in a letter dated June 9, 2020.

#### COVID-19 in Canada

23. In December 2019, the coronavirus COVID-19 had become a public health concern in China. COVID-19 is a highly communicable disease characterized by delayed symptoms and is capable by transmission by asymptomatic carriers. However, encase symptom onset is delayed, and the virus is capable of transmission by asymptomatic carriers, it is nearly impossible to tell if an individual is infected with COVID-19 or capable of infecting others. Further, the virus may be present on physical premises and tangible property, as the virus lives on surfaces for days while remaining communicable. It is nearly impossible to tell whether the virus is living on property, rendering common-area property unsafe and unusable. There is no vaccine for COVID-19.

24. In January 2020, the virus had spread to different countries including South Korea, the United States and Canada. The first COVID-19 case identified in British Columbia was reported on January 28, 2020.

25. In order to prevent the spread of the virus, provincial governments across Canada began issuing orders in March 2020 requiring many businesses to temporarily close or restrict their operations.

### The Terms of the Policy

26. The Policy covers “all risks” and includes extended coverage for business interruption. There are no exclusions under the Policy for “viruses” or “pandemics”.

27. The Policy states:

“4. Insured Perils:

This form, except as herein excluded, insures against all risks of direct physical loss or damage to the Insured Property.”

28. Regarding business interruption, the Policy states:

“1. Indemnity Agreement:

The Insurer agrees to Indemnify the Insured against loss directly resulting from necessary interruption of business, caused by destruction or damage by the Insured Perils to Insured Property at the “Premises”, subject to the provisions, limitations, exclusions, conditions and other terms of this Policy including this Form.”

29. The Policy further provides standing charges protection in the event of a total or partial suspension of business as follows:

“All standing charges are insured unless otherwise specified on an attached Endorsement, in which case only those standing charges so specified are insured.

a. Standing Charges shall mean expenses that continue during a partial or total interruption of business and include but are not limited to:

- i. Salaries of officers, executives and permanent staff;
- ii. Rent;
- iii. Taxes

- iv. Electricity, heating, telephone, maintenance;
- v. Depreciation;
- vi. Auditor's fees;
- vii. Interest on mortgages, loans and debentures;
- viii. Services under contract, advertising, printing, postage, traveling, automobile upkeep, insurance premiums, branch expenses."

30. The Policy further provides payroll protection in the event of a total or partial suspension of business as follows:

"The Insured's entire ordinary payroll expense is insured for a period of time not in excess of the number of consecutive calendar days specified in the "Certificate of Insurance" immediately following the date of loss, which may continue during the total or partial suspension of business, insuring only to the extent necessary to resume the "Normal" business operations of the Insured with the same quality of service which existed immediately preceding the destruction or damage by the Insured Perils, and which would have been earned had no destruction or damage by Insured Perils occurred."

31. The Policy further specifies that it covers business interruption imposed by Civil Authority:

"7. Extensions:

b. The Insurer shall be liable for actual loss sustained insured during the period of time, not exceeding 30 days, while access to the "Premises" is prohibited by order of civil authority but only when such order is given as a direct result of damage to neighbouring "Premises" by an Insured Peril."

32. The Policy also provides coverage for extra expenses arising from interruption by the Civil Authority as follows"

"c. Interruption by Civil Authority

This insurance extends to include the actual loss as Insured hereunder during the period of time, not exceeding 30 days, while access to the "Premises" is prohibited by order of civil authority, but only when such order is given as a direct result of damage to neighbouring premises by an insured peril."

33. Beyond all this, the Policy specifically includes an endorsement for infectious disease and food poisoning as follows, which applies to all previously mentioned items with the Income Loss Form:

“1. Indemnity Agreement

The Loss of Income Insurance provided by this Policy is extended to indemnify loss or damage resulting in the complete or partial interruption of the business operation of the Insured at the “Premises” specified in the “Certificate of Insurance” as a result of”

- a. A notifiable contagious or infectious human disease, as declared by a “Public Health Official” that must be reported and which occurs on the “Premises” or within 25 kilometers of the “Premises” specified in the “Certificate of Insurance”.

34. The Policy goes on define a “Public Health Official” as follows:

“3. B. “Public Health Official” means a person working under the direction and with the authority of a government health organization and includes other governmental authority, political office or official or public safety or law enforcement personnel.”

35. The Provincial Health Officer is a Public Health Official within the meaning of the Policy, as are the regional health authorities within 25 km of the Plaintiff’s restaurant, namely Vancouver Coastal Health and Fraser Health Authority.

36. “Physical loss” and “damage” are not defined in the Policy. Nevertheless, the Policy contains a definition section which defines “Property Damage” as:

“28. Property damage means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that cause it; or

- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.”



37. Taken together, the Policy covers lost business income resulting from the necessary interruption of or interference with the business of the Insured caused by the loss of use of tangible property, whether that property is physically injured or not. The Policy is extended to include interruption or interference orders made by a civil authority given as a direct result of property being unusable.

38. Beyond this, the Policy specifically provides coverage for business interruptions due to infectious diseases, such as COVID-19, which are reported at, or within, 25 km of the Insured's business.

39. The Defendant's policy wording regarding business interruption, coverage for infectious diseases, property damage and civil authority claims are materially the same for all class members.

#### Closure of the Plaintiff's Businesses

40. On March 16, 2020, Vancouver Coastal Health issued a notification about possible exposure of COVID-19 to the patrons of the Showcase Restaurant in Vancouver. The Showcase restaurant is less than 25 km away from the Plaintiff's restaurant. Both the Vancouver Coastal Health and the Fraser Health Authority have publicly identified multiple outbreak locations of COVID-19 within 25 km of the Plaintiff's premises.

41. At this same time, the Plaintiff's owner and manager, Eric Missouri and his wife, both came down flu like symptoms in March 2020, and were quite sick. They were reasonably concerned that they had COVID-19. They self-isolated out of an abundance of caution, and to protect their employees and customers. They consulted with a doctor at the time but testing kits for COVID-19 were in short supply, and they were not tested.

42. The Emergency Order was issued on March 17, 2020. The Plaintiff closed its business in response to the Emergency Order on March 19, 2020. The Plaintiff suffered business losses, standing charges, and added payroll costs as a result.

43. On March 20, 2020, the Provincial Health Officer issued an order to the owners and operators of premises at which food and/or drink is prepared and served restricting such businesses to take-out or delivery service only. Dine-in service by restaurants in the province was prohibited.

44. The Plaintiff's business was not properly equipped to offer take-out service. Its business model has been based upon a friendly dine-in experience and the scenic waterfront view and patio it offers its patrons. The Plaintiff's restaurant focuses upon breakfast and lunch. Its menu options, such as omelettes and pancakes, are neither typical nor historically popular take-out items. Rather, patrons generally prefer to order such hot breakfast items when dining-in. The Plaintiff does not sell dinner, or fast food items, such as pizza, that may be more traditionally associated with take-out or delivery.

45. The Plaintiff sought to adapt to the guidance of the Provincial Health Officer, and to mitigate its losses. It began offering take-out service on April 18, 2020. It also began offering delivery of breakfast items through online delivery service Uber-Eats.

46. Despite these adaptations, the Plaintiff continued to suffer business losses and ongoing payroll costs. It could not make use of its dining facilities, including its scenic water-side patio, to serve patrons. While it was able to generate some revenue from take-out and delivery, this was but a small fraction of its pre-COVID earnings, and it engaged only limited portions of its actual business premises. Its dining areas remain closed.

47. The Plaintiff incurred extra expenses to comply with the Emergency Order and subsequent guidance by the Provincial Health Officer, and to prepare itself to offer take-out and delivery service. This included added charges levied by delivery services such as Uber-Eats, which charge substantial commissions to participating restaurants.

48. On May 15, 2020, the Provincial Health Officer issued a further order to restaurants, effective May 19, 2020, allowing limited dining service at restaurants, provided that social distancing measures are respected. Subsequent orders by the Provincial Health Officer further modifying and clarifying these requirements were issued on May 22, 2020 and on June 19, 2020.

49. In the wake of these further orders, the Plaintiff partially re-opened for dine-in service on May 20, 2020. This re-opening remains quite limited. Due to social distancing requirements, the

Plaintiff cannot fully seat its dining room or patio. In order to comply with the orders of the Civil Authority there are tables at its restaurant that it must leave empty. The Plaintiff continues to suffer business losses, ordinary payroll, and standing charges costs as a result.

50. Further, the Plaintiff incurred added expenses in re-opening and modifying its dining room to accommodate a limited number of patrons in the wake of COVID-19.

51. Since the date of the Emergency Order and subsequent orders, the Plaintiff has suffered loss of business income and profits, payroll costs, standing charges and extra expenses. These losses added costs and extra expenses are ongoing. The Plaintiff seeks recovery of all these losses, costs and expenses in accordance with the terms of its policy with the Defendant.

52. Other class members have similarly suffered loss of revenue and profits, payroll costs, standing charges, and extra expenses due to business closures and restrictions as a result of property damage caused by COVID 19, and as result of orders by Civil Authority, and declarations by public health officials of the existence of a notifiable disease within 25 km of the Plaintiff's businesses.

## **Part 2: RELIEF SOUGHT**

53. An order certifying this action as a class proceeding;

54. A declaration that the Defendant has breached its contractual obligation to the Plaintiff and class members;

55. A declaration that the Plaintiff and class members have coverage under the Defendant's policies;

56. General damages for breach of contract;

57. Punitive damages;

58. Pre and post judgment interest;

59. Costs of this proceeding; and

60. Such further and other relief as this Honourable Court may deem just.

### **Part 3: LEGAL BASIS**

#### **Breach of the Contract**

61. On a plain meaning interpretation of the Policy, the business interruption losses, payroll costs, standing charges, and added expenses sustained by the Plaintiff and class members are insured losses because they are not specifically excluded, and indeed, are expressly included in the Policy under the extension of infectious diseases, interruption due to civil authority order, and further, they constitute property damage as defined in the Policy. The losses are the exact type of losses covered within the meaning of the Policy.

62. The Policy covers infectious diseases. The Plaintiff is a restaurant. Such businesses are particularly vulnerable to losses due to infectious diseases. Among the first business to be infected by the COVID-19 outbreak in the Province was the Showcase Restaurant, not far from the Plaintiff's establishment.

63. The Plaintiff reasonably bargained for protection for losses due to infectious diseases and he is entitled to coverage for those losses under the Policy.

64. The *reported presence* of COVID-19 within 25 km of the Plaintiff's business is an insured peril under the infectious disease extension in the Policy. The government declared a province-wide outbreak with the Emergency Order on March 17, 2020. The Plaintiff's business was interfered with and closed as a result of the Emergency Order and reported occurrences of COVID-19 within 25 km of its business. Reported occurrences of COVID-19 were also confirmed at Royal Columbian Hospital, which is 3.6 km from the Plaintiff's business. As early as March 5, 2020, the BC Center for Disease control reported the confirmed presence of COVID-19 on flights arriving at Vancouver International Airport, which is a 21.2 km from the Plaintiff's business.

65. The *presence* of COVID-19 at the Plaintiff's business or at neighbouring businesses is an insured peril because it is direct physical damage. The Plaintiff's tangible property was damaged because of the presence of a deadly, communicable virus. The property was in an altered state. Just as structural damage to a property may render a property unsafe to use, the presence of a virus, although not as visible, physically injured the property and rendered it similarly unsafe to use.

66. The *risk* of COVID-19 at the Plaintiff's business or a neighbouring business is an insured peril because it presents a risk of direct physical damage rendering property unfit for use. This risk is recognized in the Defendant's coverage for interruption by Civil Authority. Property and equipment cannot be used for their respective intended purposes without substantial risk. The property is unsafe to use.

67. The loss of use of property is itself a recoverable loss under the Policy, regardless of whether the property is physically injured. The Policy covers not just the actual property itself, but also the "loss of use of tangible property".

68. The Plaintiff and class members lost access to the premises as a necessary result of the Civil Authority mandated shutdown. The government imposed the shutdown for two concurrent reasons: (1) due to physical injury to properties – the actual presence of COVID-19 living on the tangible properties; and (2) due to the risks of direct physical loss of or damage to the properties – the risk that COVID-19 could be transmitted and live on tangible properties. The government made a declaration of uninhabitability due to direct physical injury. As noted above, these risks are "insured perils" as defined in the Policy.

69. Overall, the business losses claimed by the Plaintiff are covered under the Policy, whether COVID-19 was physically present on the property or only may have been present on the property.

70. The Plaintiff is entitled compensation under the Policy. The Plaintiff upheld its obligations under the Policy – it is in good standing, made payments on time, and made a claim with the Defendant in accordance with the terms of the Policy.

71. By denying claims properly owed to the Plaintiff and class members, the Defendant is breaching the insurance contracts. The Defendant is failing to perform its contractual duty to compensate the Plaintiff and Class Members under the terms of the Policies. The Defendant has done this in a bad faith attempt to illegally retain as much profits as it can.

72. The Policy must be interpreted in accordance with the principles of *contra proferentum*. The Defendant drafted the Policy. If there are ambiguities in the Policy, then such ambiguities must be resolved in favour of the Plaintiff.

73. Other infectious diseases such the SARS pandemic in 2003 had previously caused harm and disruption to businesses in Canada. If the Defendant had wanted to exclude coverage for business interruption due to pandemics, then it could have done so before issuing the Policy. The Defendant clearly turned its mind to the possibility of such an event as it included coverage for infectious diseases as determined by public health officials. If the Defendant had wanted to exclude pandemics, it could have specified, for example, that its express coverage for infectious diseases within 25 km of the insured had some geographical outer-limit. Notably, the Policy does not say that the infectious disease coverage under the Policy applies to diseases found only within a 25 km limit, and nowhere outside of that boundary.

74. From the Plaintiff's perspective, plainly it understood that it had coverage for the losses that it suffered, including that it was protected as a restaurant against losses due to infectious diseases. Indeed, the Plaintiff emailed its broker shortly after the Emergency Order went into effect, to assert a claim.

75. The Defendant is in breach of its contractual undertakings in an identical manner against all class members. The business interruption portions of the Policy quoted above are identical, or materially similar, in all of the insurance policies with class members at issue in this action.

#### Punitive Damages

76. The Defendant's misconduct, as described above, is oppressive and high-handed, and in direct violation of the *uberrimae fidei* with which insurance contracts must be approached. The Defendant's actions are part of a pattern of willful disregard for the insureds' rights. Many businesses will not survive the economic impacts of COVID-19 and the economic shutdown. The Defendant is taking advantage of the Plaintiff and class members when they were suffering extreme business income loss.

77. The Defendant owed a duty of utmost good faith to the Plaintiff and to class members. This included a duty to assist them with reasonable claims, and to properly investigate such claims. The Defendant has breached these obligations.

78. The Defendant's actions offend the moral standards of the community and warrant the condemnation of the Court such that an award of punitive damages should be made against them.

Suspension of Limitation Periods

79. The Plaintiff pleads on its behalf and the behalf of class members that limitation periods have been temporarily suspended in the province due to COVID-19 pursuant to Order of the Minister of Public Safety and the Solicitor General, Ministerial Order, dated March 26, 2020, made under the *Emergency Program Act*, R.S.B.C., c.111, s.10.

Jurisdiction

80. Pursuant to section 9 of the *Insurance Act*, RSBC 2012, c. 1, the insurance contracts at issue are deemed to have been made in British Columbia because the Plaintiff is domiciled in British Columbia and because the subject matter property is located in British Columbia.

Plaintiff's address for service:

**Klein Lawyers LLP**  
1385 W 8th Ave #400  
Vancouver, BC V6H 3V9

Place of trial: Vancouver, BC

The address of the registry is:

800 Smithe Street  
Vancouver, BC  
V6Z 2E1

Date: AUGUST 19, 2020



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Signature of lawyer for plaintiff  
**Douglas Lennox and Darren Sall**  
Counsel for the Plaintiff  
**Klein Lawyers LLP**

## Appendix

*[The following information is provided for data collection purposes only and is of no legal effect.]*

### **Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:**

This is a claim for damages arising out of the Defendant's abusive franchise employment clauses.

### **Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:**

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here



**Part 3: THIS CLAIM INVOLVES:**

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

**Part 4:**

*Class Proceedings Act*, RSBC 1996, c. 50

*Court Order Interest Act*, RSBC 1996, c. 79

*Emergency Program Act*, RSBC 1996, c.111

*Public Health Act*, S.B.C. 2008, c.28

*Insurance Act*, RSBC 2012, c. 1