

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN

LEO DELUCA ENTERPRISES INC. and
KOOLINI'S ITALIAN CUISINI INC.

Plaintiffs

and

LOMBARD GENERAL INSURANCE COMPANY OF CANADA

Defendant

Proceeding under the *Class Proceedings Act, 1992*

Amended **AMENDED FRESH STATEMENT OF CLAIM**
(Notice of action issued on August 13, 2004)

DEFINED TERMS

1. The following definitions apply for the purpose of this statement of claim:

- (a) "Act" means the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as amended;
- (b) "Blackout" means the electric power blackout that commenced on Thursday, August 14, 2003 at or about a few minutes after 4:00 p.m. Eastern Daylight Time across large portions of Ontario and the Midwestern and Northeastern United States;
- (c) "Class" or "Class Members" means all persons in Ontario insured by Lombard on August 14, 2003 with coverage for business interruption loss

Amended this 26th day of August 2004 pursuant to Rule 26.02(A) of the Rules of the Superior Court of Ontario
[Signature]
Registrar at Windsor Reg.

Amended this 31st day of August 2008 pursuant to Rule 26.02(A) of the Rules of the Superior Court of Ontario
[Signature]
Registrar at Windsor Reg.

and/or consequential stock loss caused by off-premises power interruption;

- (d) “**CJA**” means the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (e) “**DeLuca**” means Leo DeLuca Enterprises Inc.;
- (f) “**Koolini’s**” means Koolini Italian Cuisini Inc. located at 1250 Tecumseh Road East in Windsor, Ontario;
- (g) “**Lombard**” means Lombard General Insurance Company of Canada;
- (h) “**Policy**” means Lombard policy number CBP 0869795 under which DeLuca and Koolini’s were named insureds; and
- (i) “**Report**” means the report submitted by the U.S.-Canada Power System Outage Task Force entitled Final Report on the August 14, 2003 Blackout in the United States and Canada: Causes and Recommendations dated April 2004.

2. DeLuca and Koolini’s claim on their own behalf and on behalf of the

Class:

- (a) an order pursuant to the *Act* certifying this action as a class proceeding and appointing it as the representative of the Class;
- (b) a declaration that the cause of the Blackout falls within the definition of an insured peril under the Policy and the policies of other Class Members;
- (c) a declaration that the plaintiffs and other Class Members are entitled to recover their business losses sustained as a result of the Blackout under their respective insurance policies with Lombard;
- (d) special damages and general damages for breach of contract and the costs of administering the plan of distribution of the recovery in this action in the sum of ~~\$50,000,000.00~~ \$5,000,000.00, or such other sum as the court may award;
- (e) punitive damages in the sum of ~~\$5,000,000.00~~ \$1,000,000.00, or such other amount as the court may award;

- (f) an order directing a reference or giving such other directions as may be necessary to determine the issues not determined at the trial of the common issues;
- (g) prejudgment and postjudgment interest pursuant to ss. 128 and 129 of the *CJA*;
- (h) costs of this action on a substantial indemnity basis, plus applicable taxes; and
- (i) such further and other relief as to this Honourable Court seems just.

THE PARTIES

3. DeLuca and Koolini's are corporation organized and existing under the laws of Ontario with registered offices in Windsor, Ontario. At all material times, DeLuca and Koolini's were named insureds in good standing under the Policy which provided indemnification for business interruption loss and consequential loss of stock caused by off-premises power interruption.

4. Lombard is an insurance company organized and existing under the laws of Canada with its head office in Toronto, Ontario and operating pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8. At all material times, Lombard provided, among other things, commercial business insurance.

NATURE OF THE ACTION

5. The Blackout occurred on Thursday, August 14, 2003. Power was not restored to some parts of the affected area including Ontario for four days and Ontario suffered rolling blackouts for more than one week before full power was restored.

6. Because of the Blackout, the plaintiffs and other Class Members suffered business interruption losses due to the closure of their operations following the Blackout. The plaintiffs and other Class Members also lost significant stock that perished as a result of the Blackout.

7. The plaintiffs, common with other Class Members, have been advised by Lombard that their losses sustained as a result of the Blackout will not be covered under Lombard's commercial insurance policies. Lombard breached its contracts of insurance with the plaintiffs and other Class Members. The plaintiffs' losses were covered under the Policy and they now seek to recover those losses caused by the Blackout.

BLACKOUT LOSSES

8. As a result of the Blackout, DeLuca and/or Koolini's lost approximately \$52,163.49 in frozen and refrigerated food stored at Koolini's. DeLuca and/or Koolini's also suffered a business interruption loss of approximately \$4,600.00 because of the closure of Koolini's on Friday, August 15, 2003.

9. Shortly after the Blackout, DeLuca on its own behalf and on behalf of Koolini's contacted its insurance broker to determine whether it could recover its Blackout losses under the Policy. DeLuca was advised that there would be no coverage for its business interruption or inventory losses suffered as a result of the Blackout.

10. In April, 2004, the U.S. – Canada Power System Outage Task Force submitted the Report in which it concluded that *“deficiencies in corporate policies, lack of adherence to industry policies, and inadequate management of reactive power and voltage caused the blackout, rather than lack of reactive power.”*

11. The plaintiffs plead and rely upon the Report.

12. The plaintiffs state that their loss and/or damages were caused ~~of the~~ Blackout falls within the definition of by an insured peril as defined under the Policy. In the alternative, their loss and/or damages were covered by the “Consequential Loss (Including Off-Premises Power Failure)” and “Off-Premises Heat, Power, Gas, Water or Communication Services” Extensions of the Policy. Some of the relevant terms of the Policy are set out hereunder.

13. On or about August 10, 2004, DeLuca on its own behalf and on behalf of Koolini's complied with their obligations under the Policy by filing a proof of loss with Lombard seeking recovery of inventory and business interruption losses in the total amount of \$56,763.49.

14. By letter dated September 3, 2004, Lombard rejected the proof of loss for technical deficiencies. As a result, DeLuca on its own behalf and on behalf of Koolini's filed an amended proof of loss to remedy the deficiencies.

15. By letter dated September 7, 2004, Lombard rejected the claim for the following reason:

Our investigation into this loss revealed that the cause of the power blackout, which caused this loss, was not as a result of any perils insured under our insured's commercial policy.

THE POLICY

16. The plaintiffs plead that at the time of the Blackout they and all other Class Members had a valid and subsisting insurance policy with coverage for business interruption losses and consequential loss of stock caused by off-premises power interruption such as the Blackout.

17. The Policy contains the following provisions:

***Part I
Comprehensive Business Policy
Commercial Property Broad Form***

- 1. Indemnity Agreement***
In consideration of the Insured named on the Declaration Page of this Policy (hereinafter called the Insured) having paid or agreed to pay to the Insurer the premium for this insurance, and subject to the terms and conditions hereof, the Insurer in the event that any of the property insured be lost or damaged by the perils insured against will indemnify the Insured against the direct loss so caused to an amount not exceeding, whichever is the least of:

- a. *the replacement cost value of the property at the time of loss or damage, as defined and limited in Section 21 of this form, unless otherwise shown in the Schedule of Part I as actual cash value;*
- b. *the interest of the Insured in the property;*
- c. *the limit(s) of liability provided by Section 3 of this form in respect of property lost or damaged.*

Provided, however, that where the insurance applies to the property of more than one person or interest, the Insurer's total liability for loss sustained by all such persons and interests shall be limited in the aggregate to the specified limit or limits of liability.

2. Property Insured

This form insures:

- a. *the building(s) described in the Schedule of Part I and for which an amount of insurance is shown;*
- b. *equipment and/or stock and/or contents at a location described in the Schedule of Part I and for which an amount of insurance is shown in respect of equipment and/or stock and/or contents;*
- c. *property of every description at a location described in the Schedule of Part I and for which an amount of insurance is shown in respect of property of every description.*

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6. Perils Insured

This form insures against all risks of direct physical loss of or damage to the property insured except as herein excluded.

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8. Extensions of Coverage

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v. Consequential Loss (Including Off-Premises Power Failure)

If this form insures contents, it also insures subject to all its terms and provisions, consequential loss or damage to such contents caused directly by change of temperature or humidity resulting directly from damage by a peril insured against under this form to:

- 1) *equipment used for refrigerating, cooling, humidifying, dehumidifying, air conditioning, heating or converting power, including their connection and supply transmission lines and pipes, furnishing heat, light, power or gas to the premises, and situated on the described premises; or*
- 2) *off-premises public utility plants, transformers or switching stations, substations, transformers or pumping stations, including underground*

transmission lines and pipes, furnishing heat, light, power or gas to the premises.

The Insurer's maximum liability under this extension for consequential loss of contents resulting directly from damage by a peril insured under this form to property described in paragraph 1) above is the amount of insurance shown in the Schedule of Part I for contents or as otherwise indicated in the Schedule of Part I as "Consequential Loss Sublimit" in any one occurrence.

The Insurer's maximum liability under this extension for consequential loss of contents resulting directly from damage by a peril insured under this form to property described in paragraph 2) above is the amount of insurance indicated in the Extension of Coverage Summary as "Off-Premises Consequential Loss Sublimit" in any one occurrence.

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20. Definitions

Wherever used in this form

...

b) "Equipment" means:

- 1) *furniture, furnishings, fittings, fixtures, machinery, tools, utensils, appliances and generally all contents other than*
 - a. *stock as herein defined;*
 - b. *permanent fixtures and fittings attached to and forming part of any building or structures;*
 - c. *growing plants, lawns, trees, shrubs or flowers in the open;*
 - d. *materials and supplies intended for use in construction, alteration, maintenance or repair of any building(s) or structures;*
 - e. *equipment used for the maintenance or service of any building(s) or structures.*

...

c) "Stock" means:

- 1) *merchandise of every description;*
- 2) *packing, wrapping and advertising materials;*
- 3) *similar property belonging to others which the Insured is under obligation to keep insured or for which he is legally liable.*

...

Part II
Business Income
(Profits Form)

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3. Perils Insured

- a. *With respect to EDP Equipment, Data and Media, the perils insured against under this form are those applicable to EDP Equipment, Data and Media Coverage as defined and limited in Part I of this Policy, subject to any further limitations set forth herein. The Insurer is liable for the amount by which the loss or damage caused by the peril of "breakdown" exceeds 24 hours, or any other amount shown against "EDP breakdown deductible" in the Schedule of Part II, in any one occurrence.*
- b. *With respect to all other property, the perils insured against under this form are those applicable to Building coverage as defined and limited in Part I of this Policy, subject to any further limitations set forth herein.*

...

7. Extensions of Coverage

...

d) Off-Premises Heat, Power, Gas, Water or Communication Services Extension

The Insurer agrees to indemnify the Insured for loss of Gross Profits as defined and insured under Part II of this Policy, resulting from damage to or destruction of off-premises public utility plants, transformer or switching stations, sub-stations, transformers, including underground power transmission and communication lines, which furnish heat, light, power, gas, water or communication services to the premises of the Insured. Damage to above ground power transmission and communication lines is not covered under this form.

Such damage must be due to a peril insured against under Part I of the Insured's Policy. Such property shall not be located on the premises of the Insured nor under the control of the Insured.

The Liability of the Insurer as respects to each interruption of business whether whole or in part under this extension shall not attach until the period of suspension exceeds 12 consecutive hours.

The most that the Insurer will pay under this coverage is \$25,000.

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14. Definitions

Wherever used in this form

- a. *"Gross Profit" means the sum produced by adding to the Net Profit the amount of the Insured Standing Charges, or if there be no Net Profit, the amount of the Insured Standing Charges less such a proportion of any net*

trading loss as the amount of the Insured Standing Charges bears to all the Standing Charges of the business.

- b. *"Net Profit" means the net trading profit (exclusive of all capital receipts and accretions and all outlay properly chargeable to capital) resulting from the business of the Insured at the premises after due provision has been made for all Standing and other charges including depreciation, but before the deduction of any taxation chargeable on profits.*

18. The plaintiffs further plead that they complied with their obligations under the Policy by paying Lombard the premium for the insurance and by appending a schedule of losses to the proof of loss. The plaintiffs' losses were caused by off-premises power failure and, under the terms of the Policy, the plaintiffs are entitled to indemnity pursuant to the Policy for the business interruption loss and loss of stock, as are other Class Members with losses caused by the Blackout.

DAMAGES

19. Lombard has refused to pay to the plaintiffs and other Class Members their losses caused by the Blackout in accordance with the Policy and it is therefore in breach of the Policy.

20. Lombard is obliged to act in good faith in determining whether to pay a claim. The plaintiffs plead that the decision to deny coverage to them and other Class Members with business interruption losses or and/or consequential loss of stock caused by the Blackout was made in bad faith. Lombard made a deliberate corporate decision to systematically deny coverage for losses caused by the Blackout under its commercial insurance policies before all facts concerning the cause of the Blackout were known.

Further, it failed to reconsider its decision once the facts concerning the cause of the Blackout became known with the release of the Report.

21. The plaintiffs plead that Lombard's conduct and the manner in which it refused to pay losses from the Blackout to the plaintiffs under the Policy and other Class Members under their Lombard commercial insurance policies, as particularized above, was vindictive, malicious, reprehensible, high-handed, intentional, outrageous, deliberate, callous, disgraceful, willful, in disregard of the plaintiffs' contractual rights and the contractual rights of each member of the Class indifferent to the consequences and motivated by economic considerations, and as such renders Lombard liable to pay punitive damages.

22. The plaintiffs propose that the action be tried in the City of Windsor.

September 13, 2004

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LEO DELUCA ENTERPRISES INC. et al.

vs. LOMBARD GENERAL INSURANCE
COMPANY OF CANADA

Plaintiffs

Defendant

Court File No. 04-CV-3339

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDINGS COMMENCED AT WINDSOR

**AMENDED AMENDED FRESH
STATEMENT OF CLAIM**

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FILE: 12-110-000

REF: HTS/sp