

AMENDED THIS Nov. 30/2020 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À
 RULE/LA RÈGLE 26.02 (A)
 THE ORDER OF
L'ORDONNANCE DU
DATED / FAIT LE _____

Court File No: CV-20-646789-00CP

REGISTRAR
SUPERIOR COURT OF JUSTICE

GREFFIER
COUR SUPÉRIEURE DE JUSTICE

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

KEVIN LYONS

Plaintiff

- and -

THE TORONTO-DOMINION BANK and
TD HOME AND AUTO INSURANCE COMPANY

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer, or where the Plaintiff does not have a lawyer, serve it on the Plaintiff and file it, with proof of service, in this Court office, **WITHIN TWENTY DAYS** after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another Province or Territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY

LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTRACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$5,000.00 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400 for costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date SEPT 4/2020

Issued by E-Filed
Local Registrar

Address of Court Office:

330 University Avenue
8TH Floor
Toronto, Ontario
M5G 1R8

TO: THE TORONTO-DOMINION BANK
Legal Department
66 Wellington Street West
15th Floor, TD Tower
Toronto, ON M5K 1A2

AND TO: TD HOME AND AUTO INSURANCE COMPANY
2161 Yonge Street
4th Floor
Toronto, ON M4S 3A6

CLAIM

1. The Plaintiff claims on his own behalf and on behalf of other members of the class, as described below, from the Defendants, The Toronto-Dominion Bank and TD Home and Auto Insurance Company (hereinafter collectively referred to as “TD”), the following:
 - a) An order certifying this proceeding as a class proceeding and appointing the Plaintiff as representative Plaintiff for the Class (defined below);
 - b) A declaration that the Plaintiff and the Class are insured persons of TD pursuant to a travel insurance policy bearing Group Policy No. TGV006 (the “Policy”);
 - c) A declaration that TD breached the terms of the Cardholder Agreement (defined below) and Policy by failing to act in accordance with ~~its~~ their terms;
 - d) A declaration that TD breached its duty of good faith in contractual performance and its duty of utmost good faith to the Plaintiff and the Class;
 - e) Damages for TD’s breach of the Policy and the Cardholder Agreement, in an amount to particularized in advance of trial;
 - f) Aggravated, punitive and/or exemplary damages in the sum of \$10 million for the Plaintiff and the Class, or such other sum as this Honourable Court deems just;
 - g) Payment of other sums due and owing to the Plaintiff and the Class pursuant to and in accordance with the terms of the Policy and the Cardholder Agreement;
 - h) In the alternative, a declaration that TD has been unjustly enriched, to the deprivation of the Plaintiff and the Class, in that it received the value of premiums, credit card charges and/or other consideration under the Cardholder Agreement for underwriting and providing the Policy to the Plaintiff and the Class without complying with ~~its~~ their terms, and an order requiring TD to disgorge to the Plaintiff and the Class all amounts withheld by TD in respect of its failure to comply with the terms of the Cardholder Agreement and the Policy;

- i) An order, pursuant to s. 24 of the *Class Proceedings Act, 1991*, directing an aggregate assessment of damages;
- j) Relief from forfeiture pursuant to s. 98 of the *Courts of Justice Act*, R.S.O. 1990, chapter C.43 or s. 129 of the *Insurance Act*, R.S.O. 1990, chapter I.8, in the event that this Honourable Court finds imperfect compliance with respect to the application for coverage or claim for benefits pursuant to the Policy or the Cardholder Agreement;
- k) Pre- and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, chapter C.43;
- l) Costs of this action on a substantial indemnity basis, together with applicable Harmonized Sales Tax, payable pursuant to the provisions of the *Excise Tax Act*, R.S.C., 1985, c. E-15, as amended;
- m) The costs of administering the plan of distribution of recovery in this action; and,
- n) Such further and other relief as this Honourable Court deems just.

THE PARTIES

2. The Plaintiff, Kevin Lyons, is an individual who resides in Toronto, Ontario. At all material times, Kevin was a cardholder of a TD Aeroplan Visa Infinite credit card, issued by the Defendant, the Toronto-Dominion Bank, and insured for trip cancellation insurance pursuant under to the Policy, pursuant to the Cardholder Agreement.
3. The Defendant, the Toronto-Dominion Bank, is part of the TD Bank Group, which is headquartered in Toronto, Ontario. It is a Canadian multinational banking and financial services corporation which offers a full range of financial products and services to over 26 million customers worldwide. TD bank reported insurance revenues in Q2 2020 of \$1.13 billion; an increase of 8.9% (or \$92 million) versus the same quarter of 2019, when they were \$1.03 billion.

4. The Defendant, TD Home and Auto Insurance Company, is a subsidiary of the Toronto-Dominion Bank and underwrites travel insurance policies for TD customers, such as the Plaintiff and the Class, including the subject Policy.

THE CLASS

5. The Plaintiff brings this action pursuant to the *Class Proceeding Act, 1992* on his own behalf and on behalf of the following class of persons:

Any person who since March 16, 2018, was an insured under the terms of the Policy and the Cardholder Agreement, who asserted, or was entitled to assert a claim for Trip Cancellation Benefits pursuant to the Policy, and was denied all or some of their claim on the basis of the availability of non-monetary compensation such as credits, coupons and vouchers.

(the “Class” or “Class Members”)

THE POLICY AND CARDHOLDER AGREEMENT

6. The contractual relationship between the Plaintiff and TD is governed by the TD Aeroplan Infinite Cardholder Agreement and Benefit Coverages Guide (the “Cardholder Agreement”), issued by the Toronto-Dominion Bank.
7. The Policy forms part of the Cardholder Agreement.
8. The Plaintiff, his spouse, his children and Class Members are insured for travel insurance with TD, and in particular, trip cancellation insurance, in accordance with the terms of the Cardholder Agreement and the Policy.
9. The Policy was a Group Policy of insurance. Under the Group Policy, and effective September 1, 2010, ~~the defendant TD Home and Auto Insurance Company~~ TD provided insurance under the Policy for Non-Medical Covered Causes for Interruption under the Certificate under Group Policy No. TGV006.
10. At all material times, the Plaintiff was a participant in the Group Policy.
11. The Policy defined a “Covered Trip” as:

Covered Trip means a trip:

- made by an *Insured Person* outside the *Insured Person's* province or territory of residence;
- that does not extend to or past:
 - the date the *Insured Person* no longer meets the eligibility requirements set out in section 3;
 - the date coverage terminates as described in section 4;
- that was booked or reserved prior to departure from the *Insured Person's* province or territory of residence; and
- for which the full cost has been charged:
 - to *Your Account* and/or
 - using *Your Aeroplan Miles*. [Emphasis Original.]

12. The Policy provided a coverage period in respect of a “Covered Trip” for:

SECTION 5 – THE COVERAGE PERIOD

Trip Cancellation Coverage Period (when the Covered Cause for Cancellation occurs **before** *Your* trip)

- The Trip Cancellation *Coverage Period* begins on the date the *Covered Trip* is booked or reserved with the travel agent or other travel supplier and the **full** cost of the *Covered Trip* has been charged to *Your Account* using a TD Aeroplan *Visa Infinite Card* and/or *your Aeroplan Miles*.
- *Dependent Children* are only covered if travelling with *You* or *Your Spouse*. Therefore, for each *Insured Person* who is a *Dependent Child* the Trip Cancellation *Coverage Period* begins on the date set out above **only** if *You* or *Your Spouse* will be travelling with the *Dependent Child* on the *Covered Trip*.

The Trip Cancellation *Coverage Period* ends on the earlier of:

- the date the *Insured Person* departs or plans to depart on the *Covered Trip*; and
- the date this *Certificate* terminates. [Emphasis Original.]

13. The Policy provided that it would respond to pay a “Trip Cancellation Benefit” where a “Covered Trip” was cancelled for a “Covered Cause for Cancellation”, which included both “Non-Medical Covered Causes for Cancellation” and “Medical Covered Causes for Cancellation”.

14. Included within “Non-Medical Covered Causes for Cancellation” was the following clause:

[A] written formal notice issued by the Department of Foreign Affairs and International Trade of the Canadian government after the Insured Person's Covered Trip is booked, advising Canadians not to travel to a country, region, or city originally ticketed for the Covered Trip for a period that includes an Insured Person's Covered Trip.

15. The Policy provided that the defendants would pay Eligible Trip Cancellation Expenses, consisting of both (a) reimbursement for unused travel expenses which were paid in advance, non-refundable on the date the Covered Cause for Cancellation arose and forfeited as a result of the Covered Cause for Cancellation; and (b) travel point administration cancellation fees.
16. The maximum benefits payable for eligible trip cancellation expenses to an insured person under the Policy was \$1,500 per "Covered Trip", and \$5,000 total per "Covered Trip" for all insured persons on the same "Covered Trip".
17. Nowhere ~~in~~ does the Policy ~~did the defendants~~ provide that Eligible Trip Cancellation Expenses would be denied or reduced in the event that a credit or other non-monetary compensation was offered to the Plaintiff.

CIRCUMSTANCES GIVING RISE TO THIS ACTION

18. In September 2019, the Plaintiff booked a 12-day trip for himself, his wife and two children. They were scheduled to depart to Italy via Air Canada on March 6, 2020, and board a one-week Mediterranean cruise departing from Civitavecchia (Italy) on March 8, 2020. The trip was fully paid for by the Plaintiff by December 2019.
19. The Plaintiff paid for the trip in full using his TD Aeroplan Visa Infinite credit card and/or the related Aeroplan Miles.
20. The Plaintiff's trip was insured under the Policy, pursuant to the Cardholder Agreement.
21. On or about March 2, 2020, the Government of Canada issued a travel advisory against all non-essential travel to Northern Italy due to COVID-19.
22. On or about March 5, 2020, a day prior to his family's departure on their trip, the Plaintiff notified TD that he would be cancelling his family's trip due to news reports of the global

spread of COVID-19 and the issuance of a travel advisory by the Government of Canada regarding travel to Italy.

23. On or about April 19, 2020, the Plaintiff filed a claim with TD, in accordance with the terms of the Policy, for reimbursement of non-refundable travel expenses relating to his family's cancelled trip. Included with the Plaintiff's claim sent to TD was a letter from his family's doctor who noted that the family was advised, prior to the trip, to cancel it due to COVID-19. Moreover, the family doctor indicated that because the Plaintiff's 16-year-old daughter is a cancer (Leukemia) survivor, she should not travel due to medical reasons related to COVID-19.
24. The amount the Plaintiff sought for compensation from TD was \$6,673.36.

BREACH OF CONTRACT BY TD

25. On or about May 29, 2020, TD denied the Plaintiff's claim. In so doing, TD breached the terms of the Cardholder Agreement and the Policy.
26. In explaining its refusal to pay the Policy benefits, TD stated as follows:

AT THE TIME OF YOUR TRIP CANCELLATION, GLOBAL AFFAIRS CANADA HAD NOT ISSUED A LEVEL 3 OR 4 ADVISORY FOR YOUR TICKETED DESTINATION. SINCE AN ADVISORY HAD NOT BEEN ISSUED AT THE TIME OF YOUR CANCELLATION, THE COVERED REASON PERTAINING TO GOVERNMENT ADVISORIES CANNOT BE APPLIED TO YOUR CLAIM.

27. This statement, of course, was false, and TD subsequently did agree that the COVID-19 pandemic, and various government warnings related to travel, did constitute a travel advisory. Nevertheless, TD took the position that, out of the total claimed amount of \$6,673.36, only \$78.97, representing the non-refundable portion of the Plaintiff's Airbnb booking, would be payable under the Policy.
28. TD advised the Plaintiff that none of the other amounts claimed, which included \$2,483.04 for the cruise, and \$4,110.32 for the Air Canada flights, would be payable because,

according to TD, a future credit was available to the Plaintiff for both the cruise and flights.

29. As of the date of this claim, the Plaintiff has received no confirmation from Expedia, with whom he booked his flights, that there are credits available. The cruise line has advised that its credits are only valid until the end of 2021.
30. In any event, credits are irrelevant to the insuring agreement under the Plaintiff's Policy and the Cardholder Agreement.
31. The Policy does not exclude payment of Eligible Trip Cancellation Expenses if non-monetary compensation such as a credit is offered to the insured person.
32. The basis of the Policy was to provide insured persons, such as the Plaintiff and Class Members, with "peace of mind" that they would be reimbursed for non-refundable expenses upon cancellation of a trip for a covered cause.
33. A future credit is not equivalent to cash reimbursement. It is, by its very nature, a significantly less preferable alternative than cash reimbursement and constitutes, at best, speculative non-monetary compensation, especially for the foreseeable future.
34. The Defendants did not properly apply the terms of the Cardholder Agreement and the Policy when assessing the Plaintiff's insurance claim. Any ambiguity in their terms or provisions ~~of the Policy~~ must be interpreted against the Defendants, in favour of the Plaintiff, in accordance with the doctrine of *contra proferentem*.
35. Notwithstanding the availability of a credit, any amounts claimed for non-refundable expenses pursuant to the Policy amount to a cancellation penalty, and are payable by TD in accordance with the terms of the Policy and the Cardholder Agreement.
36. To date, TD continues to wrongfully withhold payment of insurance monies owing to the Plaintiff and Class Members pursuant to the provisions of the Policy and the Cardholder Agreement.

37. TD is contractually obligated to compensate the Plaintiff and Class Members for any loss or damages referred to in the Policy, pursuant to the Cardholder Agreement. By failing to do so, TD has breached the corresponding contractual obligations owed to the Plaintiff and Class Members under the Policy and the Cardholder Agreement.
38. The Plaintiff and Class Members entered the Cardholder Agreement, and paid TD premiums, credit card charges, interest, and/or other consideration, on the basis of and in exchange for the benefits outlined in the Cardholder Agreement, including the underwriting and provision of the Policy to the Plaintiff and Class Members.
39. The Plaintiff and Class Members entered the Cardholder Agreement and paid their consideration with the understanding and expectation that TD would honour its contractual obligations in good faith. Due to TD's breach of contract, the Plaintiff and Class Members have suffered losses and damages.
40. Further, by refusing to honour its contractual obligations, TD has failed to deliver the "peace of mind" that the Plaintiff and Class Members relied upon when they paid for same and when they paid for their trips.

BREACH OF DUTY OF CARE AND GOOD FAITH BY TD

41. At all material times, TD owed a duty of *uberrima fides* to the Plaintiff and Class Members to treat them with utmost good faith. The Plaintiff pleads that TD has breached this duty and that TD has behaved with arrogance and high-handedness and has shown a callous disregard and complete lack of care for the Plaintiff and Class Members in that:
 - a) TD took an adversarial and hostile approach to the Plaintiff and Class and their claims for trip cancellation in accordance with the provisions of the Policy under to the Cardholder Agreement, treating them with suspicion and contempt from the outset of the claim;
 - b) TD pre-judged the Plaintiff's and Class' trip cancellation claims and failed to consider fully and fairly all of the evidence with respect to the circumstances surrounding their claims;

- c) TD's denial was made strategically and in bad faith in that it was driven not by a determination that the claims were not covered but rather by TD's knowledge of how many of such claims would be made and its desire to avoid paying them; and
 - d) TD interpreted the provisions of the Policy in a vague and arbitrary manner and without regard to a plain reading of the Policy.
42. TD has equally breached its duty of good faith in contractual performance of the Policy and the Cardholder Agreement.

DAMAGES

43. As a result of the Defendants' wrongful conduct the Plaintiff has suffered and continues to suffer damages pertaining to the claimed expenses under the provisions of the Policy and the Cardholder Agreement which, to date, have not been paid by TD.
44. TD's irresponsible refusal to provide the coverage and benefits to which the Plaintiff and Class Members are entitled has caused financial hardship and has failed to deliver the "peace of mind" that the Plaintiff and Class Members relied upon when they paid for insurance, which warrants and award of non-pecuniary general damages.
45. By denying the Plaintiff payment for trip cancellation pursuant to the Policy, the Defendants acted callously, in a high-handed manner, flagrantly and without regard to his health and well-being, and without proper regard to and/or consideration of the available information and documentation that he provided. As a result of such conduct, the Plaintiff pleads that he is entitled to aggravated, exemplary and punitive damages. A financial consequence beyond simply ordering the defendants to pay the claims is needed to deter insurers from making such strategic, bad faith denials in the future.

UNJUST ENRICHMENT

46. TD has been unjustly enriched. It has received the value of premiums, credit card charges, interest, and/or other consideration under the Cardholder Agreement, including for underwriting and providing the Policy to the Plaintiff and the Class, without complying

with its the Cardholder Agreement and the Policy's terms. The Plaintiff and the Class have suffered a corresponding deprivation for which there is no juristic reason.

CLASS PROCEEDING

47. The Plaintiff pleads that the Cardholder Agreement and Policy was were broadly made available to other insureds, and as such the Class Members are similarly situated in respect to the breaches of law, and harm caused.

48. The Plaintiff pleads that this action should be certified as a class proceeding.

LEGISLATION AND JURISDICTION

49. The Plaintiff pleads and relies upon s. 6, 11, 12, 24 and 25 the *Class Proceedings Act*, 1992, S.O., c.6, as amended; the *Insurance Act*, *supra*; and, the *Courts of Justice Act*, *supra*.

50. The Plaintiff proposes that the trial of this action take place at the City of Toronto, in the Province of Ontario.

Date:

SAMFIRU TUMARKIN LLP
Barristers & Solicitors
350 Bay Street, 10th Floor
Toronto, Ontario
M5H 2S6

Sivan Tumarkin (51437G)
Email: sivan.tumarkin@stlawyers.ca

James Fireman (51021H)
Email: james.fireman@stlawyers.ca

Tel: 1-855-821-5900
Fax: 416-361-0993

ADAIR GOLDBLATT BIEBER LLP
95 Wellington Street West
Suite 1830, P.O. Box 14
Toronto ON M5J 2N7

Jordan Goldblatt (50755H)

Email: jgoldblatt@agblp.com

Gord McGuire (58364S)

Email: gmcguire@agblp.com

Alex Fidler-Wener (68408M)

Email: afidlerwener@agblp.com

Tel: 416.499.9940

Fax: 647.689.2059

Lawyers for the Plaintiff

Plaintiff

Defendants

Court File No. CV-20-646789-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
TORONTO

AMENDED STATEMENT OF CLAIM

SAMFIRU TUMARKIN LLP

Barristers & Solicitors
350 Bay Street, 10th Floor
Toronto, Ontario
M5H 2S6

Sivan Tumarkin (51437G)

Email: sivan.tumarkin@stlawyers.ca

James Fireman (51021H)

Email: james.fireman@stlawyers.ca

Tel: 1-855-821-5900

Fax: 416-361-0993

ADAIR GOLDBLATT BIEBER LLP

95 Wellington Street West
Suite 1830, P.O. Box 14
Toronto ON M5J 2N7

Jordan Goldblatt (50755H)

Email: jgoldblatt@agblp.com

Gord McGuire (58364S)

Email: gmcguire@agblp.com

Alex Fidler-Wener (68408M)

Email: afidlerwener@agblp.com

Tel: 416.499.9940

Fax: 647.689.2059

Lawyers for the Plaintiff