


**Whitelaw — Twining**

# **Motor Truck Cargo in the Canadian Marketplace**

**Presented by Whitelaw Twining**



A young child wearing a cap and a jacket is looking at a spotted deer behind a wire fence. The scene is outdoors, possibly at a farm or zoo. The image has a muted, greenish-grey color palette.

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# Covenants to Insure: The Aftermath

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W—T

## What is a Covenant to Insure?

- + Promise in a contract by one party to obtain insurance expressly or implicitly for the benefit of the other contracting party
- + Not only obligates one party to obtain insurance but also relieves the other party of liability for losses subject to the covenant, even if such losses were caused by its own negligence

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## Defence of Tort Immunity

- + If in a contract one party (the promisor) promises to obtain insurance that is intended to benefit the other contracting party (the promisee), and if a loss subsequently occurs due to the promisee's negligence, the promisor and its insurers will not be able to successfully sue the promisee.
- + Promisee has the **defence of tort immunity: complete defence** to a negligence claim by the promisor even if the promisee's negligence caused the loss
- + Rationale: a promise to insure operates as a voluntary assumption of risk of loss or damage caused by the perils to be insured against

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## Factors That Determine if Defence of Tort Immunity Arises

- + A promise by the promisor to insure the promisee
- + A clear indication that the insurance is intended to benefit the promisee
- + A promise that the promisee will be included as an insured under the promisor's insurance policy
- + Whether the provision includes a waiver of subrogation clause in the promisee's favour
- + Whether there is something offered by the promisee in exchange for the benefit of insurance
- + Contract negotiations
- + **Key question: Was the intention of the contracting parties that one party would place insurance that would benefit the other party?**

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## Cargo Example of Tort Immunity

- + An cargo owner contracts with carrier to transport cargo from A to B
- + The contract contains an insurance provision whereby the cargo owner expressly promises to obtain \$1 million insurance policy for cargo damage arising during transport
- + Carrier has its own liability insurance policy with limits up to \$500,000
- + Cargo is damaged in transport due to the carrier's negligence
- + Loss of \$1 million

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## **Cargo Example of Tort Immunity**

- + Can the cargo owner sue the carrier at all?
- + Can the cargo owner sue the carrier for \$500,000?
- + Can the cargo owner sue the carrier for \$1 million?
- + Can insurers for owner of cargo subrogate against the carrier?

**Answer: No to all four questions**

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## Cargo Example – No Tort Immunity

- + *Shooters Production Services Inc. v. Arnold Bros. Transport Ltd.*, 2003 BCSC 92
  - + Shooters contracted with Arnold to transport a mobile broadcast trailer from Toronto to Burnaby
  - + During the contract negotiations, Arnold faxed a customer quotation to Shooters. It included a tariff that stated:
    - + Arnold provided insurance coverage to a maximum of \$2 per pound
    - + "Customer is responsible for insurance for the trailer and contents"
  - + Trailer was delivered damaged
  - + Court held: provision in the quotation addressing insurance was not a covenant to insure that shielded Arnold from liability if it was found to be negligent



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## Breaches of Covenants to Insure – Tort Immunity Still Applies

- + Promisor fails to obtain any insurance coverage at all
- + Promisor obtains insurance coverage but fails to have the promisee named as an additional insured under the policy
- + Does the promisee have any recourse? Yes
  - + The mere promise to insure still operates to preclude the promisor and its insurers from bringing a claim against the promisee
  - + The mere promise to insure will still give rise to the defence of tort immunity

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### What Happens When the Promisee/Carrier is Sued by a Third Party? What Recourse Does Promisee/Carrier Have?

- + No defence of tort immunity because third party was not a party to the contract
- + Promisee/carrier has a **breach of contract claim** against the promisor
- + Promisor is liable for an award of damages reflecting what would have been payable under the policy of insurance had it been obtained (*Amello v Bluewave Energy Limited Partnership*, 2014 ONSC 4040)
- + If promisor failed to add promisee as additional insured, the breach does not create a duty to defend but promisee is entitled to costs of defending the action (*Papapetrou v 1054422 Ontario Ltd*, 2012 ONCA 506)

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### **What Happens When the Promisee is Sued by a Third Party and Its Own Insurer Settles the Claim? Can the Promisee's Insurer Subrogate?**

- + No answer in Canadian law
- + US cases offer guidance (*Borough of Wilkinsburg v Trumbull-Denton Joint Venture*, 568 A2d 1325 (Pa Super Ct 1990) and *PPG Industries v Continental Heller Corp*, 603 P2d 108 (Ariz Ct App 1979))
  - + Subrogated claim was allowed
  - + Promisor cannot be relieved of liability for providing primary insurance to promisee merely because promisee had taken the precaution of insuring itself with excess coverage

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## Cargo Example - Carrier Contracts With Shipper

- + Carrier has contract with the shipper of cargo to transport a specialized shipment worth \$1 million
- + Shipper contractually agrees to obtain cargo and liability insurance of \$1 million for perils incidental to the transportation but fails to do so
- + A loss subsequently occurs due to the carrier's negligence
- + The carrier is then sued in negligence by the owner of the cargo who was the consignee for \$1 million
- + Carrier has its own liability insurance coverage in the amount of \$400,000 which settles the claim

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## Cargo Example - Carrier Contracts With Shipper

- + No defence of tort immunity
- + Carrier has breach of contract claim against the shipper for the uninsured portion of the claim (\$600,000)
- + Carrier may be entitled to an award of damages that flow from the breach of the promise to insure
- + Carrier's insurer might be able to bring a subrogated claim against the shipper to recover the \$400,000 paid out (if U.S. law is followed)

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## **Cargo Example – Freight Forwarder Contracts With Carrier as Principal**

- + Freight forwarder has a head contract with owner of cargo
- + Freight forwarder then contracts with carrier as principal to move cargo worth \$1 million
- + Freight forwarder agrees to obtain both cargo and liability insurance for risks incidental to transportation in the amount of \$1 million
- + Freight forwarder breaches covenant to insure
- + Carrier has liability insurance policy in the amount of \$200,000

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## **Cargo Example – Freight Forwarder Contracts With Carrier as Principal**

- + Loss subsequently occurs due to the carrier's negligence
- + Freight forwarder has no insurance and no assets
- + Owner of the cargo then sues the carrier for \$1 million
- + Carrier has an insured loss of \$200,000 and an uninsured loss of \$800,000
- + Carrier will have a direct breach of contract claim against freight forwarder for damages flowing from the breach (\$800,000 + defence costs)

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## **Cargo Example – Freight Forwarder Contracts With Carrier as Principal**

- + Carrier's liability insurer settles the insured portion of the claim in the amount of \$200,000
- + Carrier's liability insurer may be able to subrogate against freight forwarder in the amount of \$200,000
- + BUT carrier and insurers will face obstacle recovering from freight forwarder



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## **Cargo Example – Freight Forwarder Contracts With Carrier As Agent**

- + Freight forwarder contracts with carrier as agent for cargo owner to move cargo worth \$1 million
- + Freight forwarder agrees to obtain both cargo and liability insurance for risks incidental to transportation in the amount of \$1 million
- + Freight forwarder breaches the covenant to insure
- + Carrier has liability insurance policy in the amount of \$200,000
- + Loss subsequently occurs due to the carrier's negligence

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## **Cargo Example – Freight Forwarder Contracts With Carrier As Agent**

- + Can the cargo owner sue the carrier in the amount of \$1 million?
- + Answer: No. Freight forwarder was agent for cargo owner
- + The contract is between cargo owner and carrier
- + The promise to insure was effectively made by the freight forwarder on behalf of the cargo owner
- + Carrier has complete defence

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## In Summary...

- + Covenants to insure not only obligate one party to obtain insurance but also relieve the other party of liability for losses subject to the covenant, even if such losses were caused by its own negligence
- + If covenant to insure is breached and loss occurs due to carrier's negligence, carrier still has a complete defence against claims from promisor and insurers
- + If covenant to insure is breached and carrier is sued by a third party, no defence of tort immunity but the carrier has direct breach of contract claim against the promisor

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## In Summary...

- + However, if promisor has no insurance or assets, carrier will suffer a loss anyways because cannot recover
- + If covenant to insure is breached, carrier's insurers may have a subrogated claim against the promisor

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## Takeaways

- + Obtain all contracts, email exchanges and communications that are evidence of a contract
- + Insurance provisions in contracts should be carefully negotiated and clearly worded if the intention is that one party will provide insurance for the benefit of the other party
- + For brokers and underwriters: insurance provision in a contract can create unanticipated obligations – are you insuring just the cargo or the carrier too?
- + For claims examiners: if loss arises, whether you are defending a carrier or trying to bring a subrogated claim against a carrier, carefully examine the insurance provisions in the contract to identify if there is a promise to insure because there could be a complete defence to the claim!

# Whitelaw—Twining

**Thank you.**

For more information, please visit our website at

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