W—T

Covenants to Insure: The Aftermath

Prepared by Melissa Santalucia

INTRODUCTION

Commercial contracts often contain "covenants to insure", which are provisions requiring one of the parties to obtain insurance against certain losses that could arise in the course of their dealings. A covenant to insure is defined as a promise by one party to obtain insurance expressly or implicitly for the benefit of the other contracting party. Covenants to insure have powerful implications for the parties involved. As described by Professor Geoff R. Hall,[1] 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. In essence, covenants to insure operate as a voluntary assumption of the risk of loss or damage caused by the perils to be insured against.

Covenants to insure are most common in commercial leases and in construction contexts but can also arise in transportation contracts when one party promises to insure the cargo that is subject of the contract of carriage. For example, a typical motor carriage contract under a bill of lading might provide that cargo is to be transported at the risk of the owner for risks incidental to the transportation. The carrier will typically be liable for loss or damage to the cargo if damaged while in its possession but often up to a limit of $2 per pound, either if the parties contractually agreed to limit liability to $2 per pound or alternatively if the Specified Conditions of Carriage in the Regulations to the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, B.C. Reg. 26/58, are found to apply. Additional insurance coverage, either higher insurance limits on the cargo or liability insurance, can also be negotiated into the contract in the form of a covenant to insure. Depending on what was negotiated, there may be a covenant to insure at play.

Covenants to insure can have far-reaching effects when litigation surrounding a loss arises. A covenant to insure will impact who can be sued when litigation arises. Further, just as easily as a promise can be made, a promise can be broken. Thus, another issue that arises in the context of covenants to insure is what are the implications of a breach of a covenant to insure, that is when the party that promises to obtain insurance for the benefit of another party fails to do so.

This paper will explore the implications of covenants to insure and of breaches of those covenants when litigation arises and will examine a number of different scenarios that can arise in the context of contracts of carriage.

TORT IMMUNITY ARISING FROM A COVENANT TO INSURE

The most important effect of a covenant to insure is that it gives rise to tort immunity on the part of the promisee, the party intended to benefit from the covenant. This principle was first established in the 1970s in a trilogy of cases decided by the Supreme Court of Canada (*Agnew-Surpass Shoes Stores Ltd. v. Cummer-Yonge Investments Ltd.*, [1976] 2 S.C.R. 221, *Ross Southward Tire Ltd. v. Pyrotech Products Ltd.*, [1976] 2 S.C.R. 35, *T. Eaton Co. v. Smith*, [1978] 2 S.C.R. 749). The three cases all concerned an insurer's right to proceed with a subrogated claim in the name of a landlord against a tenant for fire-related loss caused by the tenant's negligence. The trilogy established that where a landlord covenanted to secure insurance from which the tenant was intended to benefit, the landlord and its insurer cannot then claim against the tenant for losses even if those losses are alleged to have been caused by the tenant's negligence.

In *Madison Developments Ltd. v. Plan Electric Co.*, [1997] O.J. No. 4249, the Ontario Court of Appeal provided a succinct summary of the evolution of the trilogy, where Carthy J.A. stated :

> The law is now clear that in a landlord-tenant relationship, where the landlord covenants to obtain insurance against the damage to the premises by fire, the landlord cannot sue the tenant for a loss by fire caused by the tenant's negligence. A contractual undertaking by the one party to secure property insurance operates in effect as an assumption by that party of the risk of loss or damage caused by the peril to be insured against. This is so notwithstanding a covenant by the tenant to repair which, without the landlord's covenant to insure, would obligate the tenant to indemnify for such a loss. This is a matter of contractual law, not insurance law, but, of course, the insurer can be in no better position than the landlord on a subrogated claim. The rationale for this conclusion is that the covenant to insure is a contractual benefit accorded to the tenant, which, on its face, covers fires with or without negligence by any person. There would be no benefit to the tenant from the covenant if it did not apply to a fire caused by the tenant's negligence.

In sum, if in a contract one party promises to obtain insurance that is intended to benefit the other contracting party (i.e. 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. The promisee has the defence of tort immunity because, by promising to insure, the promisor contractually agreed to assume the risk of loss or damage caused by the perils to be insured against.

Additionally, one of the basic principles of subrogation is that an insurer cannot bring a subrogated action against its own insured. Where a contract contains a covenant to insure, the intended effect is that the promisee becomes an insured under the policy obtained by the promisor and, thus, the promisor and the promisee are said to be in the same position vis-à-vis the insurer. Therefore, the promisor's insurers are precluded from bringing a subrogated action against the promisee.

Courts will look at a number of factors to determine whether a covenant to insure exists that triggers the defence of tort immunity. These factors include whether there is 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, and whether there is something offered by the promisee in exchange for the benefit of insurance. For example, in landlord/tenant cases, the fact that the tenant paid for part of the insurance premiums will weigh in favour of a finding of a covenant to insure. This list of factors will vary from case to case. In some cases, courts will look no further than the insurance provision itself. In other cases, courts may look at the contract negotiations that took place between the parties. Ultimately, the key to such a finding is determining what the intention of the parties was at the time the contract was formed.

Cargo Example – Tort Immunity

The following example demonstrates how the defence of tort immunity might arise in the context of a contract of carriage.

An owner of cargo enters into a contract with the carrier. One of the terms of the contract is that the owner promises to obtain a $1 million insurance policy for cargo damage and losses arising out of the carrier's negligence. The carrier has its own liability insurance policy with limits up to $500,000. A loss of $1 million subsequently occurs due to the carrier's negligence. The questions that arise in this scenario are as follows:

1. Can the owner of cargo sue the carrier at all?

2. Can the owner of cargo sue the carrier for $500,000?

3. Can the owner of cargo sue the carrier for $1 million?

4. Can insurers for owner of cargo subrogate against the carrier?

The first level of analysis is to determine whether the contract in fact contained a covenant to insure giving the carrier of the defence of tort immunity. As such it is necessary to examine what the parties' intention were at the time the contract was formed. Factors that weigh in favor of a finding that a covenant to insure exists include whether the language in the provision sufficiently indicates an intention that the owner was to provide insurance for the carrier's benefit, whether the provision expressly states that the carrier was to be named on the owner's insurance policy, whether the provision includes a waiver of subrogation clause, and whether the carrier charged a lower premium for hauling the cargo accounting for the owner's provision of insurance.

Assuming the insurance provision in the contract is indeed a covenant to insure intended to benefit the carrier, the answer to all four questions is that both the owner of cargo and its insurers are precluded from suing the carrier at all. By contractually undertaking to place the insurance, the owner of cargo voluntarily assumed the risk of loss or damage occasioned by the carrier's negligence. As such, the defence of tort immunity arises shielding the carrier from liability allowing the carrier to mount a complete defence to any and all claims by the cargo owner arising from the carrier's own negligence. The fact that the carrier had its own insurance coverage up to $500,000 is moot. The insurers for the owner of cargo cannot subrogate against the carrier.

Cargo Example – No Tort Immunity

Shooters Production Services Inc. v. Arnold Bros. Transport Ltd., 2003 BCSC 92, is an example of case where a carrier claimed the tort immunity defence on the basis of a covenant to insure given by the owner/shipper of the goods. However, the court found there was no covenant to insure in the first instance and, therefore, the carrier was not shielded from liability.

Shooters had contracted with Arnold Bros. to transport a mobile broadcast trailer from Ontario to British Columbia. Arnold Bros. informed Shooters that it would have to obtain its own insurance since only a minimum of insurance would apply on the Arnold Bros.' behalf. Arnold Bros. faxed a customer quotation to Shooters, which included a tariff that stated that Arnold Bros. provided insurance coverage to a maximum of $2 per pound and which also stated that "Customer is responsible for insurance for the trailer and contents".

When the trailer was delivered, Arnold Bros. had Shooters sign a bill of lading. The bill of lading contained a statement that the conditions on the back were accepted by Shooters. Shooters signed the bill of lading before it inspected the trailer, which was later discovered to have been damaged. Shooters commenced the action against Arnold Bros. claiming negligence, breach of duties as bailees for reward and breach of the agreement. Arnold Bros. denied liability alleging that it was a term of the agreement that Shooters would obtain sufficient and adequate insurance coverage for any loss or damage that might have occurred while the trailer and its contents were in Arnold Bros.' custody and that Shooters further agreed that Arnold Bros. would not be liable for any loss or damage to the trailer and its contents regardless of how the loss or damage occurred. Arnold Bros. argued, among

other things, that the insurance provision in the quotation was a covenant to insure that exculpated it from liability in the event of its negligence.

The Court held that the bill of lading did not form part of the contract of carriage as it was not issued until after the trailer was delivered. As such, the contract between the parties consisted only of the quotation and an attached tariff. The provision in the quotation that Shooters was responsible for insurance for the trailer and its contents was not a covenant to insure that exculpated Arnold from liability if it was found to be negligent. The Court appeared to accept Shooters' argument that just because it was "responsible" for insuring the trailer and its contents, it did not follow that it was obliged to obtain insurance at all. The Court was not satisfied that the meaning of the wording in the provision was intended by the parties to be a covenant to insure. Accordingly, the Court held that Arnold Bros. could not limit its liability to $2 dollars per pound.

The significance of the decision in *Shooters* is that often an insurance provision in a contract that may appear to be a covenant to insure does not actually contain sufficient language to show that the party who was to obtain insurance under the contract intended to voluntarily assume the risk of loss or damage caused by the perils to be insured against.

Accordingly, if the carrier enters into a contract of carriage with another party and the contract contains an insurance provision, the carrier should not automatically assume that insurance provision constitutes a covenant to insure to the carrier's benefit. The carrier should carefully negotiate the language of the insurance provision to ensure that it is strong enough to constitute a covenant to insure to its benefit. A prudent carrier will also have its own liability coverage that will respond in the event of loss caused by the carrier's negligence but that insurance coverage might not be sufficient to cover the entire loss. In the alternative, the carrier should consider agreeing to insure the cargo and charging a higher rate under the contract to compensate for the cost of obtaining the insurance.

THE EFFECT OF A BREACH OF A COVENANT TO INSURE

Breaches of covenants to insure can occur in a number of ways depending on what was agreed upon in the covenant. For example, the promisor fails to obtain any insurance coverage at all or obtains insurance coverage but fails to have the promisee named as an additional insured under the policy.

When such a breach occurs and a subsequent loss occurs due to the negligence of the promisee, the promisee might be entirely uninsured or might have its own insurance that will respond to the loss. The question that arises then is what recourse does the promisee have if it is uninsured or, other the hand, if its own insurance responds to the loss, what recourse does the promisee's insurers have against the promisor who breached the covenant to insure. The following section of this paper will explore these various scenarios illustrating the effect of a breach of a covenant to insure.

In some cases, our courts have concluded that the mere covenant to insure, even though no insurance was actually obtained, operates to preclude the promisor and its insurers from bringing a claim against the promisee. This principle was affirmed in *Active Fire Protection 2000 Ltd. v. B.W.K. Construction Co.*, [2005] O.J. No. 2982 (C.A.), where the Ontario Court of Appeal held in a contract between a contractor and subcontractor, a contractor's commitment to obtain the requisite insurance operated as a voluntary assumption of the risk of loss or damage caused by the perils to be insured against and that the contractor assumed the risk of loss caused by the subcontractor's

negligence. Ultimately, the Court held that contractor's contractual obligation to obtain insurance, even though it failed to do so, precluded the contractor from bringing a claim against a subcontractor in relation to a loss that occurred during the construction.

Cargo Example – Tort Immunity Still Applies

L. & B. Construction Ltd. v. Northern Canada Power Commission, [1984] N.W.T.J. No. 19 (S.C.), is an example of a case where the carrier was sued by the owner of cargo with whom it contracted. The owner of the cargo promised to insure the cargo but failed to do so. One of the questions to be decided by the Court was whether the carrier was entitled to benefit from the insurance coverage which was a term of the contract.

The plaintiff, L. & B., sued the defendant to recover costs of services and the defendant, N.C.P.C. counterclaimed for damages due to negligence and breach of contract. N.C.P.C. hired L. & B. to move and unload a heavy transformer. During contract negotiations N.C.P.C. agreed to provide insurance coverage. N.C.P.C. confirmed this by telex when L. & B. complained that the purchase order was silent on the issue of insurance. The telex stated: "this is to confirm insurance coverage by N.C.P.C." However, N.C.P.C. failed to obtain "wrap up" insurance, which would have protected the carrier and its employees in the event of a loss. The transformer was dropped and destroyed during the last unloading. N.C.P.C. argued that L. & B. was negligent or had breached the contract when it let the transformer drop. L. & B. argued that it was entitled to benefit from the insurance coverage to be obtained by N.C.P.C. which was a term of the contract.

N.C.P.C.'s counterclaim was dismissed. L. & B. and those it employed to perform the unloading services were entitled to benefit from the insurance coverage obtained by N.C.P.C. The only reasonable meaning the Court ascribed to the contract negotiations was that the insurance was to be for the benefit of both L. & B. and those it employed. The court further held that when it obtained insurance, N.C.P.C. acted as L. & B.'s agent.

The point to be taken from the above case is that even where the owner of cargo fails to actually place the insurance as contractually agreed and a loss arises due to the carrier's negligence, the owner of cargo will be barred from suing the carrier as the defence of tort immunity will apply. Even if the owner of cargo had obtained cargo insurance but simply failed to name the carrier on the policy as an additional insured, and the owner of cargo is indemnified by cargo insurers, the cargo insurers will not be able to subrogate against the carrier to recover monies it paid out under the first party cargo damage claim because. The defence of tort immunity still arises to protect the carrier from liability exposure even though the carrier was not named as an additional insured on the policy.

Effect Of A Breach Of A Covenant To Insure On The Promisee And Its Insurers

A further complication that may arise, is what effect does the breach of covenant to insure have if the promisor is sued by a third party who was not a party to the contract between the promisor and the promisee. As outside parties who end up suing the promisee on the loss are not parties to the contract containing a covenant to insure, the tort immunity defence does not arise. In such instances, our courts have held that a breach of a covenant to insure gives rise to a contractual claim by the promisee against the breaching party entitling the promisee to damages flowing from the breach (see *Okanagan Prime Products Inc. v. Henderson*, [2001] B.C.J. No. 684).

If the party who promised to take out the insurance failed to do so but had its own insurance that responds to a loss, the promisee is not able to recover directly against the promisor's insurer, as it was not privy to the contract between the promisor and the insurer. In such circumstances, the promisee has a claim directly against the promisor in breach of the contract for any losses it suffered as a result of the absence of the insurance it had bargained for.

Papapetrou v. 1054422 Ontario Ltd., 2012 ONCA 506, was the first Canadian case to consider the consequences of a named insured breaching a covenant to have another party made an additional insured under the named insured's commercial general liability policy. The promisee in this case was sued by a third party who was not privy to the contract between the promisor and the promisee and, as such, the defence of tort immunity was not available to the promisee. One of the issues for the Court was whether the promisee had any recourse against the promisor resulting from the breach of the covenant to insure.

In *Papapetrou*, the plaintiff had been injured when she slipped and fell on black ice on the stairs of a building. The plaintiff sued the building manager, the owner of the building and the maintenance contractor. The maintenance contract between the building owner and the maintenance contractor contained and indemnity and hold harmless clause in favour of the owner. The maintenance contractor also agreed to obtain commercial general liability insurance naming the owner as an additional insured but it failed to do so. The owner brought a motion to compel the maintenance contractor to indemnify, and assume the defence of the action on its behalf.

Much of the Ontario Court of Appeal's decision addressed whether there was a duty to defend and indemnify under the policy, whether the maintenance contractor should assume the owner's defence and the scope of any coverage that would have been available to the owner had it been added as an additional insured under the maintenance contractor's CGL. Ultimately, the Court held the maintenance contractor liable for failing to have the owner named as an additional insured but that the breach did not create a duty to defend. The Court held that the measure of damages was the promisee's cost of defending an action brought against it by a third party.

In *Amello v. Bluewave Energy Limited Partnership*, 2014 ONSC 4040, the Ontario Supreme Court addressed a similar scenario as in the *Papapetrou* case but in a transportation context. The loss involved an escape of oil from a leak in the plaintiffs' tank, which was maintained by the defendant Bluewave, who was also the oil supplier. Bluewave subcontracted the oil delivery to Daniel Charles Transport Ltd., who was also named as a defendant in the action. The Trucking Services Agreement in place between Bluewave and Daniel Charles provided that Daniel Charles would, among other things, hold harmless and indemnify Bluewave for costs and legal fees arising from an oil spill and that Daniel Charles would take out liability insurance naming Bluewave as an additional insured. Daniel Charles took out liability insurance for itself but failed to add Bluewave as an additional insured.

Bluewave had its own liability insurance, which responded to the plaintiffs' claim against it. Bluewave's insurer brought a partial summary judgment seeking an order that Bluewave's defence costs be paid by Daniel Charles. The Court held that Daniel Charles should not be able to escape its obligation to maintain liability insurance and have Bluewave added as an additional insured on its liability policy. Following the decision in *Papapetrou*, the Court held that when a party has breached a covenant to insure, that party is liable to the party it promised to insure for an award of damages reflecting what would have been payable under the policy of insurance had the insurance been

obtained. The Court ultimately held that Daniel Charles was 50% liable for Bluewave's defence costs.

There has not been much guidance by Canadian courts on the issue of whether insurers for the promisee can bring a subrogated action against a promisor based on a breach of a covenant to insure. American cases do, however, offer guidance on this point.

In *Borough of Wilkinsburg v. Trumbull-Denton Joint Venture*, 568 A.2d 1325 (Pa. Super. Ct. 1990), Borough and the general contractor had entered into a contract requiring the latter to add Borough as an additional insured on its insurance policy. After a court action by a third party was brought against Borough, it was discovered that the general contractor had failed to name Borough as an additional insured. Borough had its own liability insurance and its insurers defended and settled the action. Borough's insurer then commenced an action against the general contractor to recovery what it had paid out. The general contractor argued that Borough did not sustain a loss because its liability insurer paid the claim and incurred the expenses and that this was not a true subrogation case. The Court stated that subrogation is not limited to actions against tortfeasors and rejected the argument that the general contractor should be excused of its obligations under the contract merely because an insurance company was the ultimate payor of the general contractor's obligation. Ultimately, the Court held that the general contractor had breached the contract with Borough and that it was liable for the entire amount that was awarded against Borough in the action against it.

Another American case, *PPG Industries v. Continental Heller Corp.*, 603 P.2d 108 (Ariz. Ct. App. 1979), is illustrative. PPG failed to meet its contractual obligation to name the other party, Continental, as an additional insured. During the construction project, a person was injured and sued Continental at which time PPG's failure to add Continental to its policy was discovered. Continental's own insurer defended the claim and paid the judgment awarded against Continental. Its insurer then filed a subrogated action against PPG for its failure to add Continental as an additional insured. PPG denied liability in the subrogated action by arguing that Continental did not suffer a loss as a result of PPG's breach of the covenant to insure because Continental's insurer paid the judgment. The Court rejected this argument stating that PPG could not be relieved of is unquestioned liability for providing primary insurance to Continental merely because Continental had taken the precaution of insuring itself with excess coverage.

Cargo Example – Carrier Contracts With Shipper

One scenario that might arise in the context of a contract of carriage is where the carrier has contracted with the shipper of cargo to transport a specialized shipment worth $1 million. The shipper contractually agrees to obtain cargo and liability insurance of $1 million for perils incidental to the transportation but fails to do so. The carrier has its own liability insurance coverage in the amount of $500,000. 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. In this scenario, the carrier does not have the defence of tort immunity because the consignee, who sues the carrier, was not a party to the contract between the shipper and carrier and, therefore, the shipper's breach of covenant to insure does not affect the owner/consignee's claim against the carrier.

What happens if the carrier's own liability insurer responds to the loss and settles the claim for $500,000? Can the carrier's liability insurer turn around and sue the shipper? While the American cases referenced above are not binding in Canada, they offer guidance on how a court may treat this

scenario. If our Canadian courts opt to follow these American decisions, then the carrier's liability insurer will be able to turn around and sue the shipper who breached the covenant to insure to recover the $500,000 it paid to settle the claim.

What about the remaining $500,000 over and above what the carrier's insurer paid out? The carrier is uninsured for this amount as a result of the shipper's breach of the covenant to insure. Does the carrier have any recourse against the shipper for the uninsured claim of $500,000? The answer is yes. The carrier would have a direct breach of contract claim against the shipper for breach of the covenant to insure. The carrier might also be entitled to an award of damages that flow from the breach of the covenant to insured measured as what would have been paid out by the insurance policy the shipper had promised to obtain. Therefore, the carrier's damages might include any judgment against the carrier for the uninsured amount of $500,000 and the carrier's defence costs in the lawsuit brought by the owner/consignee.

Cargo Example – Freight Forwarder Contracts With Carrier As Principal

Another scenario that might arise in the context of a contract of carriage is where a freight forwarder has a head contract with owner of cargo. The freight forwarder then contracts with the carrier to move cargo worth $1 million. The freight forwarder contracts with the carrier as principal, not as agent for the owner of cargo. The freight forwarder agrees to obtain both cargo and liability insurance for risks incidental to transportation in the amount of $1 million. The freight forwarder breaches the covenant to insure. The carrier has its own liability insurance policy in the amount of $200,000. A loss subsequently occurs due to the carrier's negligence. The owner of the cargo then sues the carrier for $1 million because the carrier has insurance and assets but the freight forwarder has none.

In this scenario, the carrier has an insured loss of $200,000 and an uninsured loss of $800,000. The same result as the first scenario applies. The carrier will have a direct breach of contract claim against the freight forwarder for damages flowing from the breach, which would include an $800,000 judgment and the carrier's defence costs. Unfortunately, however, the carrier will be faced with a recoverability issue as the freight forwarder has no insurance and no assets against which to collect. While the carrier would be able to obtain a judgment against the freight forwarder, the carrier will be left with a loss after all if it cannot actually recover on the judgment.

The carrier's liability insurer settles the insured portion of the claim in the amount of $200,000. Again, if the above-reference American cases are followed, the carrier indeed is considered to have a loss and, therefore, the carrier's liability insurer will be able to bring a subrogated claim against the freight forwarder in the amount of $200,000. However, as with the carrier, the carrier's insurer will be faced with a recoverability problem as the freight forwarder has no insurance and no assets.

Cargo Example – Freight Forwarder Contracts With Carrier As Agent

A third scenario to be considered is where a freight forwarder is acting as agent-only freight forwarder. The freight forwarder then contracts with the carrier to move cargo worth $1 million. The freight forwarder contracts with the carrier as agent for the owner of the cargo. The freight forwarder agrees to obtain both cargo and liability insurance for risks incidental to transportation in the amount of $1 million. The freight forwarder breaches the covenant to insure. The carrier has its

own liability insurance policy in the amount of $200,000. A loss subsequently occurs due to the carrier's negligence.

The key question that arises in this scenario is whether the owner of the cargo can sue the carrier in the amount of $1 million. The answer is likely no. As the freight forwarder contracted with the carrier as agent of the owner of the cargo, the owner of the cargo is deemed to have contracted directly with the carrier. Therefore, the carrier has a strong argument that the freight forwarder's covenant to insure and subsequent breach thereof should be impugned on the owner of the cargo. If a court accepts that argument, then the defence of tort immunity arises, thus protecting the carrier from liability exposure in the lawsuit by the owner of the cargo.

CONCLUSION

Covenants to insure have far-reaching effects when litigation arises. They 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.

The take away from this paper are as follows:

- 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.

- To determine whether a covenant to insure exists that triggers the defence of tort immunity, it necessary to determine the intention of the parties at the time the contract was formed. Factors that weight in favour of a finding of tort immunity include: 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, the provision includes a waiver of subrogation clause in the promisee's favour, and there is something offered or given up by the promisee in exchange for the benefit of insurance.

- A mere covenant to insure, even though no insurance was actually obtained, operates to preclude the promisor and its insurers from bringing a claim against the promisee.

- Where the promisor breaches a covenant to insure given to a carrier, the carrier still has the defence of tort immunity giving it a complete defence against any claims arising from its own negligence brought by the promisor and its insurers.

- When a party other than the carrier has breached a covenant to insure, the carrier will have a direct breach of contract claim against the breaching party. The carrier's damages will reflect what would have been payable under the policy of insurance had the insurance been obtained.

- However, if no insurance was ever placed and the promising party has no assets, the carrier might have a judgment against the breaching party, but one it will not be able to realize on. Therefore, the carrier will effectively suffer a loss regardless of having a contractual claim and judgment against the breaching party.

- When a party other than the carrier has breached a covenant to insure and the carrier's own liability insurance responds to a loss, the carrier's insurers may be able to subrogate against the breaching party despite not being privy to the underlying contract and despite the fact that, technically, the carrier did not suffer a loss as it was indemnified under its own liability policy.

- Carriers should closely consider any insurance provisions in contracts in enters into. If someone else is promising to insure, the carrier should ensure that the language sufficiently expresses the intention that carrier is intended to benefit from that contemplated insurance coverage.

- It is always important to identify any covenant to insure whether you are defending a carrier or trying to bring a subrogated claim.

- If you are defending a case, a covenant to insure may trigger tort immunity and offer a complete defence even if your insured was negligent or should otherwise be held liable in bailment or as common carrier for reward.

- If you are subrogating against a party, it is important to identify if the underlying contract contains a covenant to insure because it may result in a weak claim and, as such, you will want to carefully consider whether the claim should be pursued at all.

For more information, please visit our website at www.whitelawtwining.com or contact:

Melissa Santalucia
Associate
D. (604) 891-7254
E. msantalucia@wt.ca

---

[1] Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2d ed. (Markham: LexisNexis Group), at 263.