Rights, remedies, and strategies for commercial defendants to civil actions in the presence of a standard service agreement: A 3-in-1 approach

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Civil litigation lawyers are no strangers to slip-and-fall claims. As insurance defence counsel, many of our clients' insureds are commercial entities whose customers turned into plaintiffs. These insureds may include the owner or lessee of the premises (often a retail store), and/or a third party service provider. This article is from the perspective of a retail store as occupier.

Often, commercial parties with ongoing matters with one another will have the foresight to enter into a service contract governing an agreed-upon response to legal disputes. Such service contracts generally include the following terms:

- **definition of the scope of the service provider's services or operations**;

- **hold harmless & indemnity clause** (an agreement that the service provider will not assert a claim against the store for incidents arising out of the services, and will indemnify the store for any expenses incurred in responding to claims related to or arising out of the services); and

- **covenant to insure** (an agreement to obtain certain insurance coverages and add the store as a named insured under the policy.)

Consider the following scenario: the insured, Rogers Mart, owns and operates a retail store, and owns an adjacent parking lot. A plaintiff trips and falls in the parking lot. She commences a civil action, and pleads that she tripped on uneven pavement.

Rogers Mart was party to a service contract with a litter pick-up company, Pick-It-Up Inc. Pick-It-Up contracted to keep the parking lot free from garbage and debris, and to regularly inspect the parking lot and alert Rogers Mart of any hazards.

The service contract contains a hold harmless clause and a covenant to insure in favour of the store.

The plaintiff names the store and the service provider as co-defendants in the statement of claim, alleging negligence and breach of the *Occupier's Liability Act*. Particulars of negligence (against both) include failure to inspect the parking lot, failure to maintain the parking lot, failure to report the uneven pavement, and failure to repair the uneven pavement.

This one fairly typical factual context gives rise to three separate potential rights and remedies to a commercial occupier. The first is a fairly standard negligence based analysis which turns first on which entity is responsible (at common law or assumed by contract) for the area where the plaintiff fell.

The second arises from the terms in the standard service agreement which may include contractual remedies for breach of a hold harmless/indemnity or covenant to insure provision. The third arises when the covenant to insure is complied with and the store finds itself as an additionally named insured on the contract of insurance policy with corresponding rights and potential remedies.

This article takes a high level look at these three available approaches and remedies.

Issue no. 1 - Claims in negligence and/or under the *Occupier's Liability Act*

We first must consider whether the insured store may ultimately be liable to the plaintiff for her injuries, in either negligence or for breach of the duty of care under the *Occupier's Liability Act*.[1] Liability will ultimately depend on whether the trier of fact finds that Rogers Mart owed a duty of care, breached the duty of care, and the breach caused the plaintiff some compensable injury.

In the above example, both Rogers Mart and Pick-It-Up exercised a level of care and control over the parking lot. At first blush, both entities appear to be properly named defendants.

Both may well be liable to the plaintiff. Pick-It-Up may be liable for failing to inspect, and the store may be liable for failing to inspect and repair. Ultimate legal responsibility will depend on the facts as found at trial based on evidence developed throughout the action and properly adduced at trial.

Unless altered by other considerations (in contract or insurance), the store would be well advised to institute a crossclaim as against the co-defendant contractor to ensure and preserve the store's rights of contribution and indemnity as against the contractor.

[1] Section 3(1) of the *Occupier's Liability Act*, R.S.O. 1990, c. O.2, provides that an occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

Issue no. 2 - Claims in insurance: The contractor's insurer's duty to defend the store

Assume that Pick-It-Up obtain the required insurance and named Rogers Mart as an insured. Given that Pick-It-Up complied with its contractual obligations, Rogers Mart would most likely look to the insurer for defence coverage.

An insurer's duty to defend is triggered when the pleadings allege facts that, if true, require the insurer to indemnify the insured.[2] The "mere possibility" that a claim falls within the policy triggers the duty to defend.[3] Relevant documents include the pleadings, the service contract, and, of course, the insurance policy as informed and restricted by the certificate of insurance.[4] The outcome at trial is irrelevant.[5]

If the insurer breaches the duty to defend, available remedies, depending on the timing and context of the duty to defend determination, could include a defence, damages, or both.

An insurer may be required to fund the entire defence, or only a portion. If the statement of claim raises only covered claims, an insurer would logically be required to cover all defence costs.

When a statement of claim raises both covered and uncovered claims, the insurer may be required to cover all or only a portion of defence costs.

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[2] *The Corporation of the City of Markham v. Intact Insurance Company*, 2017 ONSC 3150, at para 26. See also: *Carneiro v. Durham (Regional Municipality)*, 2015 ONCA 909; *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49, [2001] 2 S.C.R. 699 (S.C.C.), at para. 28.
[3] *City of Markham, supra* note 2, at para 28.
[4] See: *Sinclair v. Markham (Town)*, 2014 ONSC 1550, at para 12-14; *City of Markham*, *supra* note 2, at para 31.
[5] *City of Markham, supra* note 2, at para 28; *Carneiro*, *supra* note 2, at para 26.

The Court of Appeal noted in *Hanis v. University of Western* that if defence costs do not increase simply because the defence of covered claims assisted in the defence of an uncovered claim, then an insurer will be required to fund the entire defence. [6]

The statement of claim may raise uncovered claims that are entirely distinct from covered claims, and defence of same would incur costs that are exclusively related to the uncovered claims. If so, courts may order that defence costs be split among the parties and their insurers.

Assume that the statement of claim in our example alleges that the plaintiff entered the store after falling in the parking lot, slipped on a wet floor, and sustained further injuries. Pick-It-Up's business operations do not extend beyond the parking lot and so the allegations regarding the in-store incident are uncovered claims. Pick-It-Up's insurer would not likely be required to fund the store's defence as it relates to the in-store incident, as defending the in-store incident would incur costs exclusively related to an uncovered claim.

The claims against the store, however, regarding the failure to inspect and remedy any defects in the parking lot would likely all be covered.

It is also important to be aware of the potential for overlapping coverage arguments to be raised. If the store is already defended pursuant to a policy containing defence costs, coverage or priority disputes may arise regarding which insurer (the policy on which the store is the named insured, versus the contractor's policy upon which the store is an additionally named insured) is primary.

[6] *Hanis v. University of Western,* 2008 ONCA 678.

Priority of liability coverage in such circumstances will likely turn on a comparison of the 'excess or other insurance' clauses in the two policies.

A detailed analysis of the priority issue is beyond the scope of this paper, but available outcomes include: one insurer as primary with the other as excess, or the mutual excess clauses effectively cancelling each other out and the insurers being required to share the store's defence costs on a pro-rata basis.[7]

Issue no. 3 – Claims in contract and the breach of the covenant to insure

Assume now that that Pick-It-Up obtained the required insurance, but failed to name Rogers Mart as an additional insured as required. Rogers Mart would thus have a valid claim against Pick-It-Up for breach of contract. What, then, is the appropriate remedy?

The answer lies in the pleadings and the terms of the service contract. Evidence of liability or damages is irrelevant. If the claim as pled arises out of Pick-It-UP's contractually defined services, this would likely have triggered the insurance coverage that Pick-It-Up was required to provide.

Here, the plaintiff's claim arises out of the defined services and business operations of Pick-It-Up. Pick-It-Up was required to inspect the parking lot and notify Rogers Mart of any hazard, which reasonably includes uneven pavement. The plaintiff pled that Pick-It-Up failed to notify Rogers Mart of the hazard, causing or contributing to her fall.

[7] See generally: *Mackenzie v. Dominion*, 2007 ONCA 480 (leave to appeal to SCC denied); *Family Insurance Corp. v. Lombard Canada Ltd.*, 2002 SCC 48; *State Farm Fire & Casualty Co. v. Royal Insurance of Canada*, [1998] O.J. No. 4465, [1999] I.L.R. I-3696 (ONCA); and *McGeough v. Stay 'N Save Motor Inns Inc.*, 46 B.C.A.C. 219, 75 W.A.C. 219, 92 B.C.L.R. (2d) 288 (BCCA).

The appropriate remedy for breach of a covenant to insure is an award of damages equal to the value of the insurance that would have been in place, absent the breach of contract. Generally, this equates to the costs of the defence of the action, save for any costs incurred exclusively to defend claims that do not arise from the performance or non-performance of the service contract.[8]

If Pick-It-Up did not breach the covenant to insure (*i.e.*, the obtained the requisite insurance), Rogers Mart may still look to Pick-It-Up for indemnification pursuant to the hold harmless and indemnity clause.

In *Pagé v. Rogers*, the defendant cable company, Rogers, retained a third party subcontractor, Forefront, to install and place a temporary cable on the plaintiff's property, pursuant to a standard service contract.[9] The plaintiff tripped over the cable and sued Rogers and Forefront. Forefront had taken out the appropriate insurance and named Rogers as an additional insured.

Rogers nevertheless brought an action against Forefront seeking full defence costs pursuant to Forefront's contractual obligations to hold harmless and indemnify Rogers. The Superior Court noted that while Rogers could have demanded that Forefront's insurer fulfill its duty to defend, Forefront still had a contractual obligation to pay the reasonable costs of defending claims arising out of the performance of the contract with Rogers, and Rogers had a right to indemnification for same.

Damages equal to the defence costs for claims that were considered covered by the hold harmless and indemnity provision (which the court held would likely have been 50% of total defence costs) to date, as well as a declaration that 50% of ongoing defence costs would also be covered (if reasonable) were awarded.

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[8] *Papapetrou v. 1054422 Ontario Ltd.*, 2012 ONCA 506.
[9] *Pagé v. Rogers*, 2017 ONSC 2341.

Conclusion

In the face of a civil action against commercial defendants that are party to a service contract for a retail store, at least three issues must be considered.

First, what is the likelihood that the insured store will be liable to the plaintiff in negligence or under the *Occupier's Liability Act*? This requires consideration of the material facts (including identification of the occupier and responsibility for the area where the plaintiff fell), availability of admissible evidence regarding same, and the likely outcome at trial.

Second, if insurance is obtained, is a duty to defend triggered? The answer lies in the pleadings, service contact, certificate of insurance, and the terms of the applicable policy. If the insurer breaches the duty to defend, appropriate remedies may include a defence, funding defence counsel of the insurer's choice, or damages, depending on the timing of a coverage application.

Third, has the service provider fulfilled their contractual obligation to obtain insurance and name the store as an additional insured? Again, the answer lies in the pleadings, terms of the service contract, and the certificate of insurance. If there has been a breach of contract, an appropriate remedy is an award of damages equal to the value of the defence, if any, that would have been provided by an insurer.

With respect to both the insurance and contractual considerations, much can turn on the certificate of insurance and whether the plaintiff's claims arise out of the business operations of the named insured (contractor).

It is important to consider all three aspects, negligence; breach of contract; and claims against a contractor's insurer, when determining the appropriate response to claims made against an insured store.

The available remedies may overlap (*i.e.*, breach of hold harmless agreement and/or defence obligations on a contractor's insurer) and so strategic consideration much be given to the most cost effective and efficient approach for your insured/client.

We, of course, would be pleased to assist in the determination of the best approach in all of the circumstances.