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Industry Activism and Legislation Shifts the Indemnity Burden Both Ways in Motor Carrier Contracts

by Jenifer L. Kienle

The concept of using indemnity language to limit risk is neither novel, nor prohibited – unless your motor carrier contract was drafted in Virginia, West Virginia, Indiana, Nebraska, North Carolina, South Carolina, Texas, Oklahoma or Maryland, and seeks to shift all liability for tort damages caused by your sole or willful negligence to the other party to the contract.

The indemnity provision has historically been a bargained-for commodity in the shipper and carrier relationship. After the deregulation of the trucking industry in 1980, shippers and their brokers took the upper hand in drafting contracts with carriers that addressed the apportionment of risk for claims and losses arising out of carrier activities. In response to increasing transportation accident claims perceived by shippers as “carrier-related” or “carrier-caused” losses, shippers increasingly required carriers to contractually shoulder most, if not all, of the risk for the damages arising out of those claims.^[1]

Until recently, this contractual gamesmanship went unchecked. The indemnity provisions in shipper-carrier contracts began to merit increased attention by the transportation industry. Commonly, when third parties injured in connection with the transportation of goods bring a claim against the shipper, the shipper tenders the claim to the motor carrier, relying on broad-form hold harmless or indemnity provisions. The contracts are often drafted by shippers and routinely require the motor carrier to defend and indemnify the shipper, even where the claim arises solely out of shipper negligence (i.e. improper loading or securement.)

To address the inequitable shift of risk, the transportation industry has successfully educated state lawmakers about the need for a balanced indemnity agreement.

In June 2004, with the approval of U.S. Department of Justice, the American Trucking Associations published the “Model Truckload Motor Carrier/Shipper Agreement” as a template for future contractual relationships between shippers and carriers. The model agreement was the result of collaboration with the National Industrial Transportation League (NITL), and while not intended as a blueprint for all business transactions, reflects a strident effort to clarify the apportionment of risk in a transportation setting.

The model agreement is published on the ATA website in its entirety and contains language whereby the shipper and carrier agree that each party will respectively defend, indemnify, and hold the other harmless for all claims caused by and resulting from (i) the negligence or intentional misconduct of the party or its employees or agents, or (ii) the party’s employees’ or agents’ violation of applicable laws or regulations. ^[2]

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The ATA's model agreement provides the framework for all counsel involved in drafting, negotiating and analyzing motor carrier contracts. In addition, several state legislatures have tacitly approved the model agreement's indemnity provisions in the form of "anti-indemnification" legislation nullifying hold harmless provisions that allow one party to avoid liability for its sole or willful negligence.

Virginia, West Virginia, Indiana, Nebraska, North Carolina, South Carolina and most recently, Maryland, have all enacted statutes that specifically ban motor carrier contracts that provide for one party to contract away its sole negligence. [3]

In addressing the impact of such legislation on small businesses, the Maryland General Assembly noted that the new law could potentially result in shifting the burden of liability for damages caused by the negligence or intentional conduct of shippers away from motor carriers who qualify as small businesses and onto the shippers that committed the negligence or intentional acts. [4]

Such anti-indemnification legislation is one step toward reducing a carrier's risk of doing business in an industry increasingly exposed to tort damages, but the legislation currently has not been applied to indemnity provisions in the Uniform Intermodal Interchange and Facilities Access Agreement. For now, anticipate increased judicial and legislative oversight into the equities of indemnity in the motor carrier contract and rely on mutual indemnity considerations prior to entering into a shipper driven contract.

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[1] Business Finance, Transport Topics, "Shippers Seek Indemnity Clauses to Avoid Liability, Lawyer Says," by Jonathan S. Reskin, Associate News Editor.
[2] <http://www.trucking.com/issues/governmentpolicy/litigationcenter/modelcarriershipmentagreement>.
[3] Virginia House Bill 701; West Virginia legislation can be seen at http://www.legis.state.wv.us/Bill_Text_HTML/2006_SESSIONS/RS/Bills/SB492%20SUB2.htm; Indiana House Bill 1230; North Carolina House Bill 1163; Maryland House Bill 898.
[4] A review of the Maryland General Assembly Session 2007 for House Bill 898 can be viewed at http://mlis.state.md.us/2007RS/fnotes/bil_0008/hb0898.pdf.

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