



INDEMNIFICATION IN MOTOR CARRIER AGREEMENTS: A PRACTICAL APPROACH

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Intersection of Legal and Business Interests

- Safety and Margins
- Contain Costs
- Regulation
- Avoid Litigation



Scope of Liability Today

- Plaintiff's Bar
- Public Verdicts
- Multiple Defendants
- *Hoffman v. Ryerson*
- *Linhart v. Heyl Logistics*
- Shifting of Risk Exposure Among Logistics Participants

Our Facts: Classic Carrier Corporation

- Chemical Hauler
(100 tractors)
- Headquartered in Chicago
- \$12 - \$15 million in
revenue (slim margins)
- Chemical Corp = 25% of
revenue



Billy Bailey

- VP Sales (20 years)
- In pursuit of Potter Petro Corp.
- Modest base salary and high commission for new revenue



George Bailey

- President of Classic Carriers
- Priority: Legal Risk Management
- Priority: New Revenue
- Insurance Costs



Potter Petro Corporation

- Henry Potter-Owner
- Petro-Chemical Producer
- Multiple Locations
- Unhappy With Current Carriers (CSA)
- Priority: Liability Risks



The Potter Contract

- “Standard Draft”
- 3-Year Term
- Escalating Rates
- Classic’s FSC
- Indemnification



Potter's Indemnification Clause

- Classic shall defend, indemnify, and hold Potter harmless from and against any and all claims, liabilities, suits, loss, cost, or expense (including court costs and reasonable attorneys' fees) (collectively "Losses") including, but not limited to Losses for injury to or death of persons or damage to property arising out of the performance of this Agreement or Classic's presence at Potter's facilities.

- George Bailey: “Should we be concerned with this indemnification language?”



■ Billy Bailey

- “No. It’s only form language and has been around for years.”
- “No. We always sign these.”
- “Old Man Potter says we have to sign.”
- “We need the revenue.”



- George Bailey: “We better give this language a closer look.”
 - Legal
 - Insurance



Indemnity Provisions Are Common Today

- Shipper – Carrier Contracts
- Broker – Carrier Agreements
- Broker – Shipper Contracts
- Access Agreements (Facilities)
- Intermodal
- Contractors

What Is Indemnity?

- When one takes on the obligation to pay for a loss, claim or damages that may be incurred by another.
- Two general types
 - Implied (common law equity)
 - Express (contract)

Express Contractual Indemnity

- Indemnity provisions in a contract allocate the risks of a business transaction between two parties by obligating one party to pay the costs incurred by the other party under certain circumstances.

- An indemnity agreement is an express (contract) promise by one party (the indemnitor or Classic) to pay for the liability of another party (the indemnatee or Potter).
- An indemnity agreement can also include a promise to defend the indemnified party in a claim or litigation.

Check Contract Pre-Requisites

1. A valid, enforceable, and fair motor carrier/shipper contract should be bilateral with mutual obligations and benefits.
2. The contract should contain mutual consideration whereby the shipper pays the motor carrier in exchange for the safe transportation of product.
3. The contract must be clear to be effective.

Theories of Negligence

Direct Negligence: direct causes of action against a party stemming from the party's own conduct.

vs.

Vicarious Liability: direct negligence of one party is imputed to another party (deep pockets).

Examples

Vicarious: Driver ignites product at shipper; driver injures motorists; spills

Direct: negligent selection of carrier; unsafe work-site; improper loading

Scope of Indemnities

- Broad Form:
 - Transporter assumes ***unqualified*** obligation to defend and hold harmless the shipper (agents, etc.) for all risk and liability arising out of performance of the contract, ***regardless of fault***.
- Intermediate Form:
 - Transporter assumes risk and liability as above, except that it does not assume risk as may be caused by the sole negligence of the shipper
- Limited Form:
 - The Transporter and the shipper assume apportioned risk and liability, indemnify each to the extent of each one's fault.
 - Indemnification of shipper for exposure created and caused by motor carrier.

Don't Forget the Defense Obligation

- The Duty to Defend may be broader...and more costly
- Allegations versus Ultimate Facts
- Allegations are never clear-cut; amendment
- Claims or Lawsuit or Both?



Update: Recent Motor Carrier Initiatives

- A perceived inequitable shift of the risk of liability exposure from shipper to carrier = push for more balanced approach
- Shipper perspective is: legitimate risk management; and freedom of contract

A Two Part Approach for Initiative

1. Model Agreements (Contractual)
 - Clarify apportionment of risk in a transportation setting
2. Anti-Indemnity Statutes (Legislative)
 - Reduce a carrier's risk of doing business in a litigious industry

Anti-Indemnity Statutes

- Many jurisdictions have enacted legislation that invalidates indemnity provisions in contracts in which an entity seeks indemnification for its own negligence, omissions, or intentional acts (direct)

Public Trend Toward Statutes

- The public sentiment is that each party should bear its own burden with respect to liability
- Often times a motor carrier is not in a position to remove the provision from the contract

Illinois Motor Carrier Anti-Indemnity Statute

Sec. 18c-4105.

Indemnity agreement in motor carrier transportation contracts void.

(a) Notwithstanding any other provision of law, a provision, clause, covenant, or agreement contained in, collateral to, or affecting a motor carrier transportation contract that purports to indemnify, defend or hold harmless, or has the effect of indemnifying, defending or holding harmless, the promisee from or against any liability for loss or damage resulting from the negligence or intentional acts or omissions of the promisee is against the public policy of this State and is void and unenforceable.

(b) As used in this Section:

(1) "Motor carrier transportation contract" means a contract, agreement or understanding covering:

(A) The transportation of property for compensation or hire by the motor carrier;

(B) Entrance on property by the motor carrier for the purpose of loading, unloading, or transporting property for compensation or hire; or

(C) A service incidental to activity described in (i) or (ii) above, including, but not limited to, storage of property.

(2) "Promisee" means the promisee and any agents, employees, servants, or independent contractors who are directly responsible to the promisee except for motor carriers party to a motor carrier transportation contract with promisee, and such motor carrier's agents, employees, servants or independent contractors directly responsible to the motor carrier.

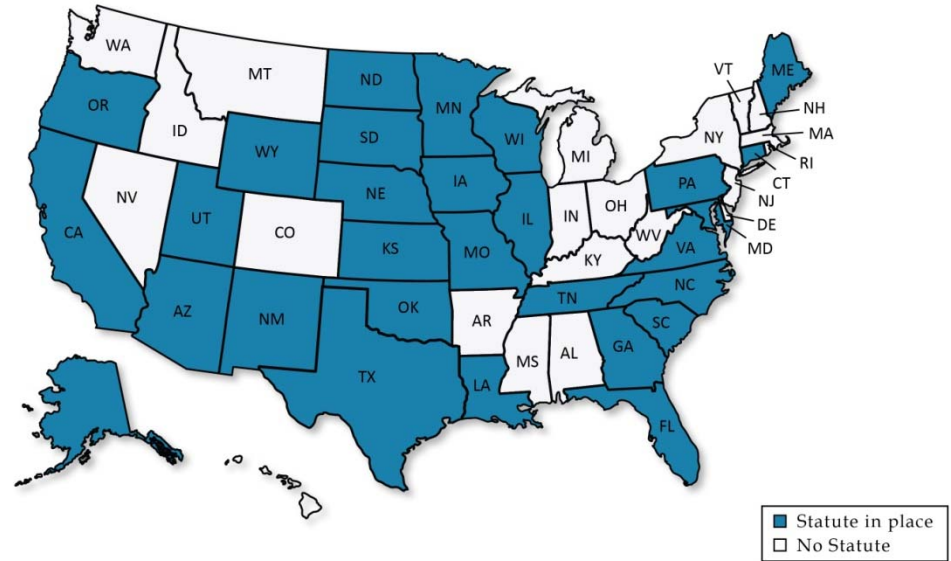
(c) This Section does not apply to the Uniform Intermodal Interchange and Facilities Access Agreement administered by the Intermodal Association of North America or other agreements providing for the interchange, use, or possession of intermodal chassis or other intermodal equipment.


Illinois Motor Carrier Anti-Indemnity Statute

- Became effective August 25, 2009
- Certain types of indemnity agreements in motor carrier transportation contracts against public policy
- Access (loading and unloading)
- Incidental Services
- Does not apply to Uniform Intermodal Interchange and Facilities Access Agreement

A Majority of States Have Similar Statutes

- 31 other states have also enacted Anti-Indemnity Statutes
- Alabama, Hawaii, Mississippi this year





Anti-Indemnification laws are only part of the solution to over-broad indemnification. Why?

Other Considerations

1. Choice of Governing Law in Contract
2. Law of Contracting Forum
3. Law of Performance Forum
4. Significant Contacts Analysis

For Example

- Potter and Classic headquartered in Illinois
- Potter Contract entered into in Illinois
 - Broad indemnity
 - No Choice of Law
- Performance in Illinois
- Result = Illinois law will likely be applied (void)

On the Other Hand

- Potter and Classic headquartered in Illinois
- Contract made in Illinois
 - Ohio Choice of Law Provision (state without statute)
- Performance in Illinois
- Result = ? Perhaps, Ohio (enforced)

Other Considerations, Statute of Limitations:

- Indemnification provision may survive for many years, depending on the jurisdiction
- That means that a breach of contract claim could potentially arise after the service has been performed

Will My Insurance Cover This?

- Ask Underwriting
- Insurance Contract
- Be wary of “additional insured” status



Additional Indemnification

- Brokers
- Leases
- Contractors
- Are you asking for indemnity?
- Facilities Access (loading and unloading)

RECAP: Due Diligence for Contractual Indemnity



- Is there a written contract?
- Do the terms of the contract include language relating to indemnity?
- Does the indemnity provision comply with the applicable statute(s)?
- What is the scope of the indemnity provision? Does it require defense?
- Is it Broad, Intermediate or Limited?

Applied to Potter Contract

- Yes, it is a written contract.
- Yes, it includes an indemnity provision.
- Does it comply with governing statute? Depends.
- Too Broad: performance and presence.
- Defense Requirement.

Conclusion

- The Potter contract is overbroad and perhaps unenforceable under statute. Now what?



Considerations in the Contracting Process

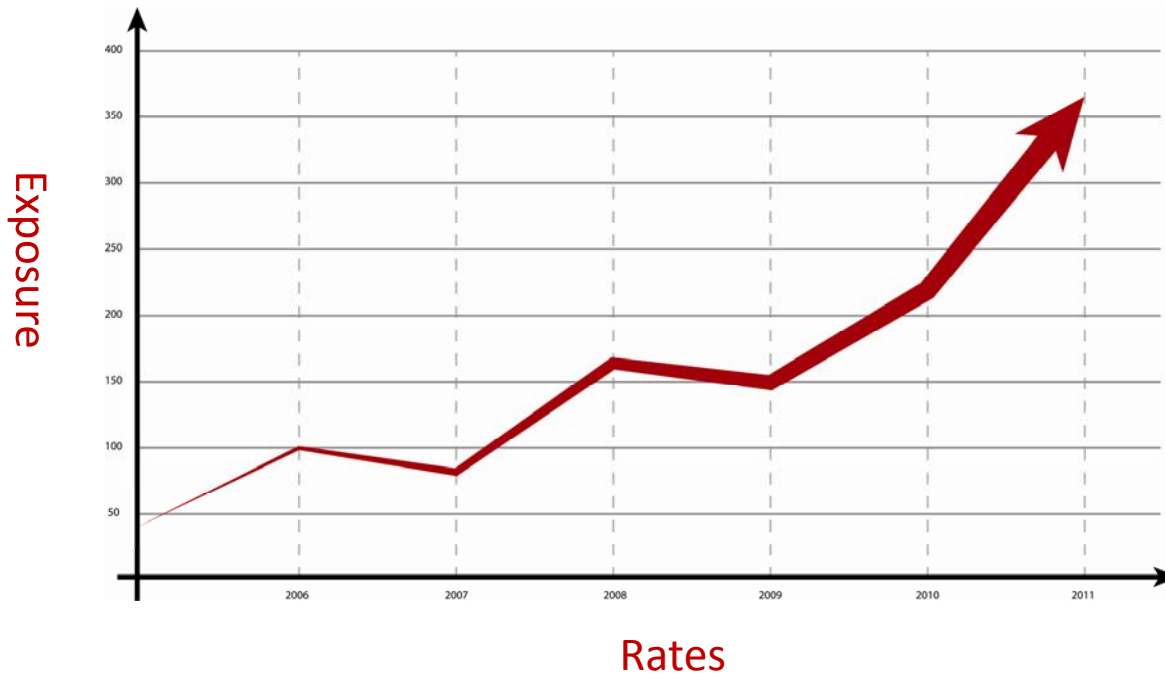
1. Question any indemnity provision to the extent it requires you hold another party harmless





2. Offer a favorable and relevant governing law forum in the contract

3. Frame indemnity issue in economic and business terms (increased exposure versus rates)



4. Note the trend in Anti-Indemnity Legislation



5. Reference Model Agreements

- ATA/NITL Motor Carrier/Shipper Agreement
- NITL/TIA Model Contract
- NTTTC Model Agreement

Model Agreement

Indemnification.

- (a) Carrier shall **defend, indemnify**, and hold **Shipper** and its employees and agents harmless from and against all **claims**, liabilities, losses, damages, fines, penalties, payments, costs, and expenses (including, without limitation, reasonable legal fees) caused by and resulting from (i) the **negligence or intentional misconduct of Carrier** or its employees or agents, or (ii) Carrier's or its employees' or agents' **violation of applicable laws** or regulations.
- (b) Shipper shall defend, indemnify, and hold Carrier and its employees and agents harmless from and against all Claims caused by and resulting from (i) the negligence or willful misconduct of Shipper, its employees, or agents, or (ii) the inherent vice or nature of the commodities being transported, including but not limited to, any and all product liability claims related to such commodities, or (iii) the violation of any applicable law or regulation by Shipper or its employees or agents.
- (c) In the event such claims, liabilities, losses, damages, fines, penalties, payments, costs, and expenses (including, without limitation, reasonable legal fees) are **caused by the joint and concurrent negligence of the Parties, or the Parties and a third party, the indemnity obligations for such claims, liabilities, losses, damages, fines, penalties, payments, costs, and expenses (including, without limitation, reasonable legal fees) shall be borne by each Party in proportion to its degree of fault.**
- (d) In no event shall either Party be liable to the other under this Section to the extent damages are incidental, consequential, special, punitive, or exemplary. Any indemnified party under this Section shall promptly tender the defense of any claim to the indemnifying Party.

Operating Practices

1. Educate Sales, Operations, and Risk Personnel

Operating Practices

2. Adopt Corporate Policy on Acceptable Indemnification

Operating Practices

3. Engage Counsel Early and Often

Operating Practices

4. Partner With Insurance Underwriting

Operating Practices

5. Review and Negotiate Contracts Regularly

Operating Practices

6. Review Files for Pending, Expired, Existing, and Unfavorable Contracts

Operating Practices

7. Turn Over Requests for Claim Indemnification to Insurer and Counsel Immediately

Operating Practices

8. Negotiate Fair Contracts Now; Avoid Multiple Claims or Lawsuits Later.



Questions & Answers

THANK YOU



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