

Legally Thinking

by **Lew Bricker and Sandra Engelking**

This column is an effort to discuss items of interest in the law for Traffic Club members. Every two months we will write about a topic or current legal issue and offer some commentary. We invite Traffic Club members to suggest topics or questions involving the commercial transportation industry, and at the end of this column you will find an e-mail address to send in your ideas.

Killing Me Softly – The End of Indemnification in Motor Carrier Transportation Contracts (Almost)

Two months ago, we discussed what happens when courts and juries go beyond normal circumstances and impose liability on unsuspecting parties unaccustomed to high risk exposures. (See “Legally Thinking – An Expansion at Broker Liability” in the August 2009 issue). This month we examine one method companies and their lawyers have used to try and limit risk – indemnification. Imagine that Big Blue Cartage gets into an accident while delivering Mrs. Greatpart’s bicycle parts. The accident occurred because Mrs. Greatpart’s employees improperly loaded Big Blue’s trailer, sealed the load and the load shifted while in transit. Greatpart’s could very well be on the hook here, but isn’t because Big Blue agreed to indemnify the Mrs. for her own mistakes and negligence. Does that seem fair?

Risk transference has been going on for hundreds of years. Why take on a potential expense when it can be passed off onto someone else? In business agreements, particularly transportation contracts, indemnity provisions are used to alter obligations and responsibilities for when something goes wrong. Who receives the benefit of these provisions often depends upon who has the position of strength. Though not always successfully enforced, the stronger (ok, bigger) party to the deal uses its leverage to shift its risk to the weaker party – often the one more desperate for the service – because the weaker party wants the business. This may or may not be bargained for in the deal by adjusting costs, but regardless, the obligation, which often far exceeds profits, remains. Then, something bad happens and, regardless of fault, the party that receives the benefit of the indemnification provision looks to the other party for protection.

Another way of putting this is that your company may be legally responsible for something it never actually did!

On August 25, 2009, Illinois Governor Pat Quinn amended the Illinois Motor Vehicle Code and signed into law Illinois House Bill 3832 which essentially renders void and unenforceable indemnity clauses in motor carrier transportation contracts that permit an entity to shift responsibility for its own negligence to another. 625 ILCS 5/18c. The provision is limited in its scope and does not cover all transportation agreements. For example, this bill specifically “does not apply to the Uniform Intermodal Interchange and Facilities Access Agreement or other agreements providing for the interchange, use or possession of intermodal chassis or other intermodal equipment.” It does include contracts involving “(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 . . . (c) unloading or transportation of property for compensation . . . and (d) services incidental to these activities.”

We have seen this type of law enacted previously. Similar anti-indemnity clauses found within construction contracts are unenforceable under Illinois law. Typically, if a construction contract contains an indemnification provision that permits a party to transfer responsibility for its negligence to another the contract survives, just without the offending section. By the way, this construction statute already applies to commercial transportation that involves the “moving” of material that is connected to a construction activity, too.

As with any new law many questions are created. Three that come to mind immediately are: When does the law apply, how does the law affect agreements made outside of Illinois, and what in the world are “services incidental to these activities”? We do not know, with certainty answers to these questions, but if we look to our friends in the construction industry we might receive some guidance.

The construction anti-indemnification act has been interpreted by Illinois courts to apply to contracts agreed to in any state if the construction activity occurred in Illinois regardless of the place of execution of the agreement and regardless of the state the parties selected as the controlling law for the agreement because the shifting of responsibility of one’s own negligence is against

Illinois public policy. The motor carrier version notes that these provisions are against Illinois public policy, as well. So, we believe it will apply to all motor carrier contracts regardless of locations of creating.

The construction statute specifically applies only to contracts or agreements entered into after its effective date. The new motor carrier anti-indemnity act does not address this issue directly. We suspect that it will only apply to indemnity agreements that have not yet vested – meaning the contract has not yet been entered into, but this is not clear. We have no doubt that this will be left to the Courts to interpret.

As for what incidental services are; frankly, we do not know. As written, this could theoretically include everything from maintenance to brokerage services. Any motor carrier or company offering services to a company engaged in carriage for hire would be wise not to rely solely on a contractual indemnification provision for protection. Given these and other uncertainties we will keep a close eye on the courts as they interpret the new statute and report to you on significant developments.

At last count, more than a quarter of the states have adopted similar anti-indemnification legislation. A number of states have rejected them, and of course, a number of proposed bills are pending around the nation.

Indemnification is only one tool that can be used to transfer and mitigate risk. Other methods exist. In coming months we will talk about other, and some say far better, options that can be used to transfer risk.

Please submit any questions or comments regarding legal issues pertaining to the transportation industry to trafficclubquestions@salawus.com. A discussion of your submitted question could be included in the next Waybill.

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