

HB

366

Representative Jay Ramras
Chair, Judiciary
Chair, Economic
Development, Trade &
Tourism
Energy
Military & Veteran Affairs
Joint Armed Service
State Capitol, Room 118
Juneau, Alaska 99801-1182
Phone: (907) 465-3004
Fax: (907) 465-2070
Toll Free: (877) 465-3004

Alaska State Legislature



House of Representatives

Interim:
1292 Sadler Way, Suite 324
Fairbanks, Alaska 99701
Phone: (907) 452-1088
Fax: (907) 456-3346
Toll Free: (877) 465-3004

House District 10

Fax

To: Terry Bannister

Fax #: (907) 465-2029

From: Jane W. Pierson

Date: March 19, 2010

Re: HB366

Number of pages including cover: 1

Today the HJUD Committee heard HB366 (26-LS1434\E) and passed the bill out of committee with amendment E.2. Please amend the bill accordingly and draft a final CS for HJUD.

Thank you!

Representative_Jay_Ramras@legis.state.ak.us

#1
AMENDMENT

OFFERED IN THE HOUSE
TO: CSHB 366(TRA)

offered by: Rep Gruenberg.

1 Page 2, following line 2:

2 Insert a new subsection to read:

3 "(c) This section does not apply to the Uniform Intermodal Interchange and
4 Facilities Access Agreement administered by the Intermodal Association of North
5 America or to another agreement that provides for the interchange, use, or possession
6 of intermodal chassis, intermodal containers, or other intermodal equipment."
7

8 Reletter the following subsection accordingly.

ALASKA STATE LEGISLATURE

Interim:
716 West 4th Avenue, Suite 640
Anchorage, Alaska 99501
Phone (907) 269-0200
Fax (907) 269-0204
Rep.Craig.Johnson@legis.state.ak.us



Session:
State Capitol, Room 126
Juneau, Alaska
99801-1182
Phone (907) 465-4993
Fax (907) 465-3872

REPRESENTATIVE CRAIG JOHNSON
HOUSE DISTRICT 28

HB 366

The purpose of this legislation is to promote safety in the carriage of goods by motor carrier.

A motor carrier must generally comply with the Federal Motor Carrier Safety Regulations while it is transporting goods, and is also subject to additional common law or statutory duties or responsibilities. Likewise, shippers or other parties frequently have legal duties and responsibilities to fulfill when they provide goods for transportation. More and more frequently, however, shippers are pressuring motor carriers to provide transportation under contracts in which the motor carrier contractually agrees to indemnify and hold harmless the shipper for the shipper's own failure to meet its legal duties and responsibilities.

The effect of these indemnification clauses is to eliminate the incentive for the shipper to meet its responsibilities and duties in a prudent and reasonable manner. In essence, such a clause makes the motor carrier the shipper's insurer. Such a shifting of liability through contract completely contradicts sound public policy. One of the primary reasons for assigning legal liability is to persuade the offending party to regulate its behavior. However, where the shipper is at fault but is nevertheless indemnified by the motor carrier, there is nothing the motor carrier can do to change its own behavior to make things safer. That ability lies solely with the shipper.

A similar problem with respect to public construction contracts has already been addressed by the legislature in AS 45.45.900.

This legislation voids contractual provisions in motor carrier transportation contracts that indemnify a shipper for the shipper's own negligent or intentional acts or omissions which lead to claims. It maintains the incentive for a shipper that is a party to a motor carrier transportation contract to perform its legal obligations and duties in a prudent and reasonably safe manner.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101


State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

March 1, 2010

SUBJECT: Sectional summary for HB 366 relating to indemnification agreements that relate to motor carrier transportation contracts (Work Order No. 26-LS1434\R)

TO: Representative Craig Johnson
Attn: Jeanne Ostnes

FROM:  Theresa Bannister
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1. Adds a new provision that prohibits indemnification by motor carriers.

Sec. 45.45.905(a) prohibits a motor carrier and a shipping person from entering into an indemnification agreement related to a transportation services contract. Covers the indemnification of the shipping person, the defense of the shipping person, and the holding of the shipping person harmless from liability for the shipping person's negligence, intentional acts, or intentional omissions.

Sec. 45.45.905(b) states that an agreement that violates (a) is void and unenforceable.

Sec. 45.45.905(c) defines terms used in the section. Defines "motor carrier," "motor vehicle," "shipping person," and "transportation services."

Section 2. States that this Act won't apply to an indemnification agreement unless the agreement is entered into on or after the bill's effective date.

If I may be of further assistance, please advise.

TLB:ljw
10-131.ljw

FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 366(TRA)
(H) Publish Date: 3/12/10

Identifier (file name): HB366-DOT-CO-03-09-10 Dept. Affected: DOT&PF
Title: Motor Carrier Indemnification Agreements RDU: Administration and Support
Sponsor: Rep. Johnson Component: Commissioner's Office
Requester: H TRA Component Number: 530

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information						
		FY 2011	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
OPERATING EXPENDITURES								
Personal Services								
Travel								
Contractual								
Supplies								
Equipment								
Land & Structures								
Grants & Claims								
Miscellaneous								
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES								
-----------------------------	--	--	--	--	--	--	--	--

CHANGE IN REVENUES ()								
-------------------------------	--	--	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts								
1003 GF Match								
1004 GF								
1005 GF/Program Receipts								
1037 GF/Mental Health								
Other Interagency Receipts								
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2010) cost: _____

POSITIONS

Full-time								
Part-time								
Temporary								

ANALYSIS: (Attach a separate page if necessary)

There is no fiscal impact to the department.

Prepared by: Mary Siroky, Legislative Liaison Phone 465-4772
Division: Department of Transportation and Public Facilities Date/Time 3/9/10 6:15 PM
Approved by: Frank Richards, Deputy Commissioner Date 3/9/2010
Department of Transportation and Public Facilities

Jeanne Ostnes

From: Steve Day [DayS@americanfast.com]
Sent: Tuesday, March 02, 2010 7:23 AM
To: Rep. Craig Johnson
Subject: HB 366 An Act relating to indemnification agreements

Dear Representative Craig Johnson,
Alaska State House of Representatives
State Capitol
Juneau, Alaska

Subject: HB 366 An Act relating to indemnification agreements

Dear Representative Johnson,

As a motor carrier, we must comply with the Federal Motor Carrier Safety Regulations as well as while transporting goods, and we are also subject to additional common law or statutory duties or responsibilities. Likewise, shippers or other parties frequently have legal duties and responsibilities to fulfill when they provide goods for transportation. More and more frequently, however, shippers are pressuring motor carriers and other transportation providers to perform transportation services under contracts in which the carrier contractually agrees to indemnify and hold harmless the shipper for the shipper's own failure to meet its legal duties and responsibilities. In essence, such a clause makes the motor carrier the shipper's insurer. Such a shifting of liability through contract completely contradicts sound public policy.

HB 366 provides statutory language that voids contractual provisions in motor carrier transportation contracts that indemnify a shipper for the shipper's own negligent or intentional acts or omissions which lead to claims. HB 366 does not void contractual provisions in which a motor carrier indemnifies a shipper for the motor carrier's own negligent or intentional acts or omissions. Further, HB366 does not establish any new duties or responsibilities for any party and It does not limit the parties' freedom to contract – except to improve safety.

We support HB 366 and request that the bill be heard in committee at the earliest opportunity.

We would like you to consider expanding the bill to cover other transportation providers performing services as a carrier, such as domestic freight forwarders.

Thank you.

Sincerely,

Stephen L. Day

President

American Fast Freight

<http://www.americanfast.com>

450 Shattuck Avenue S., Suite 401

Renton, WA 98055

Phone (253) 926-5000 Fax (206) 624-8334



March 2, 2010

Representative Craig Johnson
Alaska State House of Representatives
State Capitol Room 126
Juneau AK, 99801

Subject: HB 366 – An Act Relating to Indemnification Agreement

Dear Representative Johnson:

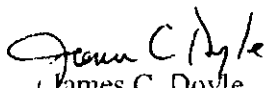
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We support HB 366 and request that the bill be heard in committee at the earliest opportunity.

Thank you.

Sincerely,
Weaver Bros., Inc.


James C. Doyle
Vice-President

Cc: WBI – James H. Doyle, President; ATA – Aves Thomson, Executive Director

ANCHORAGE
2230 Spar Ave
Anchorage, AK 99501
(907) 278-4526

KENAI
P.O. Box 2229
Kenai, AK 99611
(907) 283-7057

FAIRBANKS
P.O. Box 60981
Fairbanks, AK 99706
(907) 456-7701

U NITED FREIGHT & TRANSPORT, INC.

1701 E. FIRST AVENUE
ANCHORAGE ALASKA 99501
907-272-5700 FAX 907-272-4324

Dear Representative Craig Johnson,
Alaska State House of Representatives
State Capitol
Juneau, Alaska

Subject: HB 366 An Act relating to
indemnification agreements...

March 2, 2010

Dear Representative Johnson,

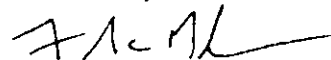
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We support HB 366 and request that the bill be heard in committee at the earliest opportunity.

Thank you.

Sincerely



Frank Monfrey



Alaska West Express, Inc.
1048 Whitney Road
Anchorage, AK 99501
(907) 279-9515
(800) 478-2855
Fax: (907) 272-8152

March 3, 2010

Representative Craig Johnson
716 West 4th Avenue
Anchorage, Alaska 99501

Dear Representative Johnson,

I have read both HB 366 and the comments by Aves Thompson regarding it and want to commend you for what I believe is a very good piece of legislation. In our previous discussions I have mentioned how some of the bigger carriers and contractors in the business have the ability to challenge and push back and end up with contracts that are fair to both parties while smaller ones do not have that same ability. Ideally you end up with a true Knock for Knock document with each party responsible for their own actions.

We have been very successful in getting that type of result over the last few years but there are still major companies operating with the goal of transferring all liability to the carrier regardless of who creates the situation. I am currently in negotiations with a major US based drilling contractor who operates internationally and is trying to do that very thing. Basically indemnify themselves for any and all actions even if caused by their personnel and make the carrier responsible.

I wish you well in your efforts and certainly hope for a successful outcome. If I can be of assistance in any way please don't hesitate to contact me directly at 907-339-5101 or e-mail at deanmc@awe.lynden.com.

Alaska West Express Inc.

Best Regards,

A handwritten signature in cursive script that reads "Dean C. McKenzie".

Dean C. McKenzie
President

Copy: Aves Thompson
Executive Director ATA



2812 70th Ave East
Fife, WA 98424
Tel (253) 926-3292 Fax (253) 926-3161

Dear Representative Craig Johnson,
Alaska State House of Representatives
State Capitol
Juneau, Alaska

Subject: HB 366 An Act relating to indemnification agreements...

Dear Representative Johnson,

As a motor carrier, we must generally comply with the Federal Motor Carrier Safety Regulations as well as while transporting goods, and we are also subject to additional common law or statutory duties or responsibilities. Likewise, shippers or other parties frequently have legal duties and responsibilities to fulfill when they provide goods for transportation. More and more frequently, however, shippers are pressuring motor carriers to provide transportation under contracts in which the motor carrier contractually agrees to indemnify and hold harmless the shipper for the shipper's own failure to meet its legal duties and responsibilities. In essence, such a clause makes the motor carrier the shipper's insurer. Such a shifting of liability through contract completely contradicts sound public policy.

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We support HB 366 and request that the bill be heard in committee at the earliest opportunity.

Thank you.

Sincerely,

Wes Renfrew
Alaska Operations Manager
Pacific Alaska Freightways

**Midnight Sun
TRANSPORTATION SERVICES, INC.
2040 E 79TH
Anchorage, AK 99507**

Dear Representative Craig Johnson,
Alaska State House of Representatives
State Capitol
Juneau, Alaska

Subject: HB 366
 An Act relating to
 indemnification agreements...

Dear Representative Johnson,

As a motor carrier, we must generally comply with the Federal Motor Carrier Safety Regulations as well as while transporting goods, and we are also subject to additional common law or statutory duties or responsibilities. Likewise, shippers or other parties frequently have legal duties and responsibilities to fulfill when they provide goods for transportation. More and more frequently, however, shippers are pressuring motor carriers to provide transportation under contracts in which the motor carrier contractually agrees to indemnify and hold harmless the shipper for the shipper's own failure to meet its legal duties and responsibilities. In essence, such a clause makes the motor carrier the shipper's insurer. Such a shifting of liability through contract completely contradicts sound public policy.

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We support HB 366 and request that the bill be heard in committee at the earliest opportunity.

Thank you.

Sincerely,

R C Onstott
General Manager

Wrightway Auto Carriers, Inc.

101 West Whitney Road
Anchorage, Alaska 99501
(907) 277-4549 Fax (907) 272-7570

MARCH 2, 2010

Representative Craig Johnson
Alaska state house of Representatives
State Capitol
Juneau, Alaska

Subject: HB 366
An Act relating to indemnification agreements

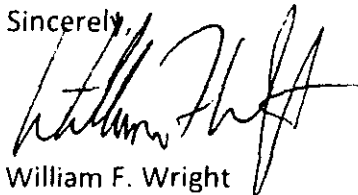
Dear Representative Johnson:

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We support HB366 and request that the bill be heard in committee at the earliest opportunity.

Sincerely,



William F. Wright

Quality Service Since 1950

BIG STATE LOGISTICS, INC.

Big State Logistics, Inc.
P.O. Box 71540
Fairbanks, AK. 99707-1540

Telephone (907) 452-8600
1-800-478-8660
Fax (907) 452-8651

Big State Logistics, Inc.
P.O. Box 63007
Valdez, AK. 99686-3007

Telephone (907) 835-5600
1-800-478-5602
Fax (907) 835-5651

Dear Representative Craig Johnson,
Alaska State House of Representatives
State Capitol
Juneau, Alaska

Subject: HB 366
An Act relating to indemnification
agreements.....

Dear Representative Johnson,

As a motor carrier, we must comply with the Federal Motor Carrier Safety Regulations while transporting goods, we are also subject to additional common law or statutory duties or responsibilities. Likewise, shippers or other parties frequently have legal duties and responsibilities to fulfill when they provide goods for transportation. More and more frequently, however, shippers are pressuring motor carriers to provide transportation under contracts in which the motor carrier contractually agrees to indemnify and hold harmless the shipper for the shipper's own failure to meet its legal duties and responsibilities. In essence, such a clause makes the motor carrier the shipper's insurer. Such a shifting of liability through contract completely contradicts sound public policy.

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We support HB 366 and request that the bill be heard in committee at the earliest opportunity.

Thank you.

Sincerely,



Mervin Gilbertson
President
Big State Logistics, Inc.

Alaska Trucking Association, Inc.

3443 Minnesota Drive · Anchorage, Alaska 99503 · Phone (907) 276-1149 · Fax (907) 274-1946

www.aktrucks.org

The authoritative voice of the trucking industry in Alaska

HB 366

Indemnification Agreements in Motor Carrier Contracts

House Transportation Committee Hearing

1:00 pm, March 11, 2010

Aves D. Thompson, Executive Director

Alaska Trucking Association

Thank you. Madame Chair and members of the committee, I am Aves Thompson, Executive Director of the Alaska Trucking Association. The Alaska Trucking Association is a state wide organization representing the interests of our nearly 200 member companies from Barrow to Ketchikan. Freight movement represents a large chunk of our economy and impacts all of us each and every day. The simple truth is that “if you got it, a truck brought it.”

One of the priorities of the Alaska Trucking Association is to achieve tort reform in the area of indemnification agreements in motor carrier transportation contracts.

Background: A motor carrier must generally comply with the Federal Motor Carrier Safety Regulations while it is transporting goods, and is also subject to additional common law or statutory duties or responsibilities. Likewise, shippers or other parties frequently have legal duties and responsibilities to fulfill when they provide goods for transportation. More and more frequently, however, shippers are pressuring motor carriers to provide transportation under contracts in which the motor carrier



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Alaska Trucking Association, Inc.

3443 Minnesota Drive · Anchorage, Alaska 99503 · Phone (907) 276-1149 · Fax (907) 274-1946

www.aktrucks.org

The authoritative voice of the trucking industry in Alaska

contractually agrees to indemnify and hold harmless the shipper for the shipper's own failure to meet its legal duties and responsibilities.

The Committee Substitute for HB 366 provides statutory language that voids contractual provisions in motor carrier transportation contracts that indemnify either a shipper or the motor carrier for either the shipper's or the motor carrier's own negligent or intentional acts or omissions which lead to claims. We believe that this approach sets a level playing field where each party is responsible for their own actions. HB366 does not establish any new duties or responsibilities for any party and it does not limit the parties' freedom to contract – except to improve safety. This language allows each party to control their own employees or agents to improve any unsafe practices.

A similar problem with respect to public construction contracts has already been addressed by the legislature in AS 45.45.900.

What the legislation does:

- It voids contractual provisions in motor carrier transportation contracts that indemnify a shipper or a motor carrier for negligent or intentional acts or omissions of the other party which lead to claims.
- It maintains the incentive for a shipper and a motor carrier that is a party to a motor carrier transportation contract to perform its legal obligations and duties in a prudent and reasonably safe manner.



If you got it, a truck brought it...

Alaska Trucking Association, Inc.

3443 Minnesota Drive · Anchorage, Alaska 99503 · Phone (907) 276-1149 · Fax (907) 274-1946

www.aktrucks.org

The authoritative voice of the trucking industry in Alaska

What the legislation does not do:

- It does not void contractual provisions in which a shipper or motor carrier indemnifies the other party to the contract for their own negligent or intentional acts or omissions.
- It does not establish any new duties or responsibilities for any party.
- It does not limit the parties' freedom to contract – except to improve safety.

We have worked with industry groups and in particular, BP, who agree that the committee substitute constitutes an equitable condition where both parties to the motor carrier transportation contract are responsible for their own negligent actions or inactions that lead to claims.

The Alaska Trucking Association supports this bill.



Aves Thompson
Executive Director
March 11, 2010



If you got it, a truck brought it...

OCEMA

Ocean Carrier Equipment Management Association

c/o 1850 M Street, N.W., Suite 900, Washington, D.C. 20036

March 15, 2010

VIA E-MAIL

The Honorable Jay Ramras
State Capitol Room 120
Juneau, AK 99801

Re: URGENT - Alaska HB 366

Dear Chairman Ramras:

Please accept these comments regarding House Bill 366 which is now pending before the Judiciary Committee and is set to be considered on March 19, 2010. I am writing on behalf of the Ocean Carrier Equipment Management Association (OCEMA), an organization of 20 ocean-going common carriers that provide intermodal transportation of cargoes in the foreign commerce of the United States. OCEMA's members serve Alaska manufacturers, distribution centers, and retailers by way of rail and motor carriage of international intermodal shipping containers. Many thousands of OCEMA members' containers and chassis are interchanged to truckers annually for over-the-road transport to and from localities in Alaska.

We are concerned that HB 366, as written, could void the indemnity provisions in intermodal equipment interchange agreements and other intermodal transportation contracts which would severely disrupt transportation arrangements to and from Alaska businesses by jeopardizing insurance coverage. This would significantly impact intermodal transportation through and within Alaska. The insurance market for intermodal activity is very limited and coverage is often contingent upon effective risk management arrangements such as the indemnity provisions contained in interchange agreements.

The interchange of intermodal equipment between those who provide the equipment, notably ocean carriers or railroads, and motor carriers is typically achieved by way of private interchange agreements that have been negotiated by representatives of all the modes of transportation, as well as other interested parties such as terminal operators and equipment leasing companies. Currently, the majority, but not all, intermodal interchanges are conducted under the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA) administered by the Intermodal Association of North America (IANA). The UIIA is a standard industry contract that was developed with the participation of ocean, motor, and rail carriers in order to achieve efficiencies and streamline the interchange process. This type of arrangement is essential to the free flow of US export and import containerized goods.

The UIIA covers liability and other issues related to the interchange of intermodal equipment (i.e. containers, chassis, etc.) between the parties. It drastically reduces the paperwork burden for all parties involved by eliminating having to sign individual interchange contracts with each equipment provider that is participating in this agreement. It eliminates repeating these arrangements for each of millions of shipments. It also reduces the number of insurance filings for the motor carrier to provide proof of insurance. Only one certificate must be issued to the UIIA and this information is then disseminated to the individual Equipment Providers by IANA.

While there are over 5000 members of the UIIA, including motor carriers, water carriers, and railroads, not all ocean carriers and not all motor carriers use this agreement. Consequently, there are other interchange agreements in use, similar to the UIIA, which would likewise not be exempted from the scope of the bill. Moreover, should the UIIA be terminated or replaced, there would be no available alternative for intermodal transportation. While we applaud your efforts to improve public policy regarding indemnification agreements, we do not believe this is the intent of HB 366.

We support your efforts in Alaska as we have in other states. Most recently, we have supported similar legislation in Virginia, Maryland, Kansas, Colorado, Connecticut, Missouri, and Tennessee. By working with legislators in those states we were able to ensure that public policy in this area correctly protects all parties.

Accordingly, we would respectfully ask that you include an exception for intermodal transportation in HB 366 such as the following:

This section shall 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, containers or other intermodal equipment."

We believe this is consistent with the objectives and purposes of the bill. Thank you for your consideration of this matter. If there is any way we can be of help in this effort, please do not hesitate to contact the undersigned or Mr. Rob Freeman at (202) 463-2515.

Sincerely,



Jeffrey F. Lawrence

Executive Director

Ocean Carrier Equipment Management
Association

March 19, 2010

Representative Jay Ramras
Chair
House Judiciary Committee
State Capitol Room 120
Juneau, Alaska 99801

Chair Ramras and Members of the Judiciary Committee,

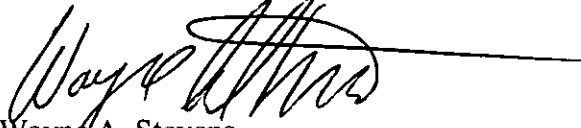
The Alaska State Chamber of Commerce has a long history of supporting tort reform legislation; therefore, we offer our support for CSHB 366, an Act relating to indemnification agreements that relate to motor carrier transportation contracts. The State Chamber firmly believes that CSHB 366 constitutes an equitable condition, where both parties of a motor carrier transportation contract, are held responsible for their own action or inaction regarding negligence.

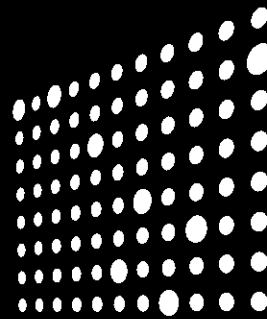
CSHB 366 voids contractual provisions in motor carrier transportation contracts that indemnify a shipper or a motor carrier for negligent or intentional acts or omissions of the other party, which all too often lead to liability claims or court action. Additionally, the bill maintains the incentive for a shipper and a motor carrier to perform their legal obligations and duties in a prudent and safe manner.

More and more frequently, shippers are pressuring motor carriers to provide transportation under contracts in which the motor carrier contractually agrees to indemnify and hold harmless the shipper for the shipper's own failure to meet its legal duties and responsibilities. CSHB 366 attempts to accomplish this for all shippers and all motor carriers. CSHB366 does not establish any new duties or responsibilities for any party and it does not limit the parties' freedom to contract – except to improve safety. This language allows each party to control their own employees or agents to improve any unsafe practices.

Your support and passage from committee of CSHB 366 is appreciated.

Yours in economic prosperity,


Wayne A. Stevens
President/CEO



ALASKA STATE
CHAMBER
OF COMMERCE

Headquarters
217 2nd Street
Suite 201
Juneau
Alaska 99801
(907) 586-2323
FAX 463-5515

Regional Office
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Suite 700
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www.alaskachamber.com

*** This document is current through the 2009 First Called Session ***
*** Federal case annotations: Sept. 30, 2009 postings on Lexis.com ***
*** State case annotations: Dec. 15, 2009 postings on Lexis.com ***

TRANSPORTATION CODE
TITLE 7. VEHICLES AND TRAFFIC
SUBTITLE E. VEHICLE SIZE AND WEIGHT
CHAPTER 623. PERMITS FOR OVERSIZE OR OVERWEIGHT VEHICLES
SUBCHAPTER B. GENERAL PERMITS

Tex. Transp. Code § **623.0155**

§ **623.0155**. Indemnification From Motor Carrier Prohibited

(a) A person may not require indemnification from a motor carrier as a condition to:

- (1) the transportation of property for compensation or hire by the carrier;
- (2) entrance on property by the carrier for the purpose of loading, unloading, or transporting property for compensation or hire; or
- (3) a service incidental to an activity described by Subdivision (1) or (2), including storage of property.

(b) Subsection (a) does not apply to:

- (1) a claim arising from damage or loss from a wrongful or negligent act or omission of the carrier; or
- (2) services or goods other than those described by Subsection (a).

(c) In this section, "motor carrier" means a common carrier, specialized carrier, or contract carrier that transports property for hire. The term does not include a person who transports property as an incidental activity of a nontransportation business activity regardless of whether the person imposes a separate charge for the transportation.

(d) A provision that is contrary to Subsection (a) is not enforceable.

↗**History:**

Acts 1997, 75th Leg., ch. 1061, effective September 1, 1997.

CMA-CGM (America) Inc. v. Empire Truck Lines, Inc., 285 S.W.3d 9

285 S.W.3d 9, *; 2009 Tex. App. LEXIS 1662, **

CMA-CGM (AMERICA) INC., Appellant v. EMPIRE TRUCK LINES INC., Appellee

NO. 01-07-00187-CV

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON

285 S.W.3d 9; 2009 Tex. App. LEXIS 1662

March 5, 2009, Opinion Issued

SUBSEQUENT HISTORY: Released for Publication June 23, 2009.

PRIOR HISTORY: [**1]

On Appeal from the 280th District Court, Harris County, Texas. Trial Court Cause No. 2005-22806.

CMA-CGM (Am.), Inc. v. Empire Truck Lines Inc., 2009 Tex. App. LEXIS 1316 (Tex. App. Houston 1st Dist., Feb. 26, 2009)

COUNSEL: For APPELLANT: F.E. Billings, Billings & Solomon, P.L.L.C., Houston, TX.

For APPELLEE: Brian K. Tully, Kenneth R. Breitbeil, McFall, Breitbeil & Schults, P.C., Houston, TX.

JUDGES: Panel consists of Justices Taft ▾, Keyes ▾, and Alcala ▾.

OPINION BY: Elsa Alcala ▾

OPINION

[*18] SUPPLEMENTAL OPINION ON MOTION FOR REHEARING

This Court issued a supplemental opinion in this case on February 26, 2009. We withdraw that opinion and issue this one in its place.

Appellee, Empire Truck Lines Inc., ▾ filed a motion for rehearing asserting for the first time that section 623.0155 of the Texas Transportation Code renders the indemnification provision of the Uniform Intermodal Interchange and Facilities Access Agreement unenforceable. See TEX. TRANSP. CODE ANN. § 623.0155 (Vernon 1999). In its motion for rehearing, Empire acknowledges that section 623.0155 "was not raised by either parties's brief to this Court, or in the summary judgment papers below." As a general rule, we do not address new arguments presented in a rehearing. See Tex. Mut. Ins. Co. v. Ruttiger, 265 S.W.3d 651, 658 n.8 (Tex. App.--Houston [1st Dist.] 2008, pet. filed).

In our opinion and judgment issued December 4, 2008, we reversed the trial court's order and remanded the cause for further proceedings consistent with this opinion. We determined that, **[**2]** under the terms of the Agreement, the Agreement provided that Maryland law shall govern the validity, construction, enforcement, and interpretation of the Agreement. We also held that the Agreement is enforceable under Maryland law. Other than the instruction that the trial court must conduct proceedings that are consistent with our opinion, we have not limited the issues that may be presented upon remand to the trial court. The implications, if any, of section 623.0155 have never been addressed by us or the trial court, and, upon proper presentation, may be addressed by the trial court upon remand. We therefore do not address the new argument concerning section 623.0155. See Port Neches-Groves Indep. Sch. Dist. v. Pyramid Constructors, L.L.P., 201 S.W.3d 679, 681 (Tex. 2006) (declining to review issue that was not presented to trial court because parties can **[*19]** develop record as they deem necessary upon remand to trial court).

We deny Empire Truck Lines Inc. 's motion for rehearing.

Elsa Alcalá

Justice

Panel consists of Justices Taft, Keyes, and Alcalá.

285 S.W.3d 9, *; 2008 Tex. App. LEXIS 9032, **

CMA-CGM (AMERICA) INC., Appellant v. EMPIRE TRUCK LINES INC., Appellee

NO. 01-07-00187-CV

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON

285 S.W.3d 9; 2008 Tex. App. LEXIS 9032

December 4, 2008, Opinion Issued

SUBSEQUENT HISTORY: Rehearing denied by CMA-CGM (Am.), Inc. v. Empire Truck Lines Inc., 2009 Tex. App. LEXIS 1316 (Tex. App. Houston 1st Dist., Feb. 26, 2009)

PRIOR HISTORY: [1]**

On Appeal from the 113th District Court, Harris County, Texas. Trial Court Cause No. 2005-22806.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant trucking company challenged an order of the 113th District Court, Harris County, Texas, which dismissed its crossclaim for **indemnification** against appellee equipment provider in a case concerning the terms of the parties' Uniform Intermodal Interchange and Facilities Access Agreement that provided that the laws of Maryland would govern over the interpretation of the agreement.

OVERVIEW: An independent contractor for the trucking company was sent to transport cargo in a storage container leased by the equipment provider. The cargo was to be transported on an adjustable-length chassis, but the chassis broke apart while its length was being adjusted, causing the contractor to be injured. The court held that the agreement was enforceable under Maryland law, which was the law to be applied under the terms of the agreement. Applying Maryland law to the dispute did not violate the public policy of Texas because both Maryland and Texas allowed **indemnification** for a party's own negligence. The court concluded that the agreement was enforceable as an insurance contract. The terms of the agreement expressly provided that the trucking company would indemnify the equipment provider against any and all claims arising out of or related to the trucking company's use or maintenance of the equipment. The agreement was effectively an insurance contract, which was the exception to the general rule that contracts would not be construed to indemnify a person against his own negligence unless an intention to do so was expressed in those very words or in other unequivocal terms.


OUTCOME: The court reversed the trial court's order dismissing the equipment provider's crossclaim and remanded the cause to the trial court for further proceedings consistent with the court's opinion.


CORE TERMS: indemnification, indemnify, provider, indemnity, insured, interchange, enforceable, summary judgment, unequivocal, spoliation, chassis, general rule, own negligence, insurance contract, public policy, addendum, insurance policy, insurance


coverages, performing, asterisk, cargo, hirer, cross-claim, asserting, own acts, matter of law, legal liability, liability insurance, liability policy, indemnity agreement

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[Contracts Law](#) > [Contract Conditions & Provisions](#) > [Indemnity](#) 

^{HN1} Under Texas procedural law, parties may express in their agreement their choice that  the law of a specified jurisdiction will apply to their contract. When the parties reside or expect to perform their respective obligations in different jurisdictions, they may be uncertain about which jurisdiction's law will govern the construction and enforcement of the contract. In an attempt to avoid this uncertainty, they may express in their agreement their choice that the law of a specified jurisdiction will apply to their contract. Judicial respect for their choice promotes the policy of protecting their expectations. Texas procedural law allows parties to choose the law to be applied in interpreting the substantive terms of an indemnity agreement. [More Like This Headnote](#)


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^{HN2} In Texas, a party may be indemnified for its own negligence if the **indemnification**  agreement meets the "express negligence" test. [More Like This Headnote](#)


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^{HN3} In Maryland, the general rule is that contracts will not be construed to indemnify a  person against his own negligence unless an intention to do so is expressed in those very words or in other unequivocal terms. However, the general rule does not apply to an insurance contract. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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^{HN4} A party must obtain a ruling on a motion to preserve error. [More Like This Headnote](#) 

COUNSEL: For APPELLANT: [F. E. Billings](#) ✓, [Billings & Solomon, P.L.L.C.](#), Houston, TX.

For APPELLEE: [Keith M. Remels](#) ✓, [Dow, Golub, Berg & Beverly, LLP](#), [Kenneth R. Breitbeil](#) ✓, [McFall, Breitbeil & Shults, P.C.](#), Houston, TX.

JUDGES: Panel consists of Justices [Taft](#) ✓, [Keyes](#) ✓, and [Alcala](#) ✓.

OPINION BY: Elsa Alcala ✓

OPINION

[*11] This appeal concerns the terms of an Uniform Intermodal Interchange and Facilities Access Agreement ("the Agreement") that provides that the laws of Maryland shall govern over the interpretation of the agreement. Appellant, CMA-CGM (America), Inc., appeals the trial court's dismissal of its claims for **indemnification** against appellee, Empire Truck Lines Inc. ✓ In three issues, CMA contends that the trial court erred by (1) applying Texas law to the Agreement; (2) ruling that the Agreement was not enforceable; and (3) finding that CMA spoliated evidence by losing the chassis made the subject of this suit. We conclude the Agreement is enforceable under Maryland law, which is the law to be applied under the terms of the Agreement. We also conclude that the issue concerning spoliation instruction is not preserved for appeal because **[**2]** the sanctions order was in favor of a person who is not a party to this appeal and the trial court did not rule on the motion for summary judgment pertaining to the spoliation instruction. We reverse and remand.

Background

Hector Aguirre was an independent contractor truck driver for Empire. Empire sent Aguirre to transport cargo from Longview, Texas to the Port of Houston. The cargo was in a storage container leased by CMA. The cargo was to be transported on an adjustable-length chassis, but the chassis broke apart while its length was being adjusted, causing Aguirre to be injured. Aguirre sued Empire and CMA, as well as other defendants, alleging various causes of action.

CMA filed a cross-claim against Empire asserting the Agreement required Empire **[*12]** to insure, defend, and indemnify CMA for CMA's own legal fault.

The Agreement contains the following definitions:

4. Equipment: Equipment . . . includ[es] . . . chassis

5. Equipment Owner: The holder of beneficial title to the Equipment, regardless of the form of the title.

. . . .

8. Indemnitees: Provider, Equipment Owner and/or Facility Owner, as their interest may appear.

. . . .

11. **Motor Carrier:** The Party being granted access to the **[**3]** Provider's facilities and/or having physical possession of the Equipment for the purpose of road transport or its designated agent or contractor.

. . . .

14. Provider: the Party authorizing delivery and/or receipt of physical possession of Equipment with a **Motor Carrier**.

Applying the definitions in the Agreement, Empire is the "Motor Carrier" and CMA is the "Equipment Provider," as well as an "Indemnitee."

Inserting the names of the companies in place of the general terms, Section F.4, "Liability, Indemnity, and Insurance," of the Agreement states,

4. Indemnity: **[EMPIRE] AGREES TO DEFEND, HOLD HARMLESS AND FULLY INDEMNIFY [CMA], AGAINST ANY AND ALL CLAIMS, SUITS, LOSS, DAMAGE OR LIABILITY, FOR BODILY INJURY, DEATH, AND/OR PROPERTY DAMAGE . . . ARISING OUT OF OR RELATED TO [EMPIRE'S] USE OR MAINTENANCE OF THE EQUIPMENT DURING AN INTERCHANGE PERIOD; THE PERFORMANCE OF THIS AGREEMENT; AND/OR PRESENCE ON THE FACILITY OPERATOR'S PREMISES.**

....

6. Insurance: to the extent permitted by law, [Empire] shall provide the following insurance coverages in fulfillment of its legal liability and obligations contained in this Agreement:

a. A commercial automobile liability policy with a combined single **[**4]** limit of \$ 1,000,000 or greater, insuring all Equipment involved in Interchange including vehicles of its agent or contractors; said insurance policy shall name [CMA] as additional insured.

b. A commercial general liability policy with a combined single limit of \$ 1,000,000 or greater[.]

c. [Empire] shall have in effect, and attached to its commercial automobile policy, a Truckers Uniform Intermodal Interchange Endorsement (UIIE-1), which includes the coverages specified in Section F.4. . . .

The Agreement also expressly states, "If it is determined that, at the time of the interchange, [Empire] was not insured in accordance with Section F.6. of this Agreement, [Empire] shall have been in material breach of this Agreement . . ." The Agreement also provides, "This Agreement, including its Addendum, but only to the extent that its terms do not conflict with this Agreement, contain[s] the entire Agreement of the Parties hereto." Finally, the Agreement states, "Governing Law: The laws of the state of Maryland, the location at the principal place of business of the Intermodal Association of North America shall govern the validity, construction, enforcement and interpretation **[*13]** of this Agreement **[**5]** without regard to conflicts of law principles."

Before Aguirre settled his claims with Empire and CMA, he obtained an order from the trial court granting his motion for sanctions due to CMA's failure to produce the chassis and chassis documentation. The order was entitled, "Order on Plaintiff, Hector Aguirre's Motion for Sanctions Against CMA . . ." The order provided that CMA would be prohibited from entering evidence of maintenance or repairs done to the chassis, other than as reflected in documents that were produced. The order further decreed that at the time of trial the jury would be given an instruction to presume that CMA "intentionally or negligently destroyed evidence that is harmful to their case and that the jury should presume that the missing evidence would have been harmful" to CMA's case.

When Aguirre settled with Empire and CMA, the only remaining controversy was CMA's cross-claim for **indemnification** from Empire. Empire filed a motion for summary judgment, asserting "[CMA] cannot maintain a claim against Empire." Empire also filed a supplemental motion for summary judgment asserting that, as a matter of public policy, it could not be liable for **indemnification** to CMA **[**6]** for evidence spoliated by CMA. CMA filed a cross-motion for summary judgment asserting that it established all elements of its breach of contract action against Empire as a matter of law. At the hearing on the motions

for summary judgment, the trial court stated that it was not ruling on the motions for summary judgment, but only construing the Agreement as a matter of law. The trial court did not expressly state that it was applying Maryland law, but, immediately before making its ruling, it referred to a case where Maryland law was applied. The trial court announced its decision by stating, "I agree with Empire. I do not think that the contract requires them to indemnify CMA for their own liability." After the hearing, the trial court entered an order stating,

On the 6th day of November, 2006, came on to be heard the motion of [Empire] to dismiss the cross-claim of [CMA] for indemnity because the indemnity agreement . . . was not enforceable, . . . the court being of the opinion that said indemnity agreement is not enforceable, it is

ORDERED that the claims of defendant/cross-plaintiff [CMA], against defendant/cross-defendant [Empire], are dismissed with prejudice to the re-filing **[**7]** of same.

Choice of Law

In its second issue, CMA contends that Maryland law should be applied to interpret the terms of this Agreement. CMA's second issue is premised on the assumption that the trial court applied Texas substantive law to the Agreement. The trial court did not specify whether it was applying Texas or Maryland law to the Agreement, although it appears from the trial court's comments that it was considering Maryland law. Empire responds that indemnity is a procedural issue that should be controlled by the law of the state of Texas, rather than a substantive issue to which the terms of the contract would apply. Empire also responds that applying Maryland law would violate the public policy of Texas because the public policy of the state of Texas limits the rights of parties to contract for indemnity.

HN1 ¶ Under Texas procedural law, parties "may express in their agreement their choice that the law of a specified jurisdiction will apply to their contract." Nexen, Inc. v. Gulf Interstate Eng'g Co., 224 S.W.3d 412, 419 (Tex. App.--Houston [1st Dist.] 2006, no pet.) (quoting Chase Manhattan [*14] Bank, N.A. v. Greenbriar N. Section II, 835 S.W.2d 720, 723 (Tex. App.--Houston [1st Dist.] 1992, no writ)). **[**8]** When, as here, "the parties reside or expect to perform their respective obligations in different jurisdictions, they may be uncertain about which jurisdiction's law will govern the construction and enforcement of the contract." *Id.* (citing Chase Manhattan, 835 S.W.2d at 723). "In an attempt to avoid this uncertainty, they may express in their agreement their choice that the law of a specified jurisdiction will apply to their contract." *Id.* (citing Chase Manhattan, 835 S.W.2d at 723). "Judicial respect for their choice promotes the policy of protecting their expectations." *Id.* (citing Chase Manhattan, 835 S.W.2d at 723) (internal citations omitted). Texas procedural law allows parties to choose the law to be applied in interpreting the substantive terms of an indemnity agreement. See *id.* at 419-20.

Although parties may express in their agreement their choice that the law of a specified jurisdiction will apply to their contract, they may not "thwart or offend the public policy of the state whose law would otherwise apply." *Id.* (citing Chase Manhattan, 835 S.W.2d at 723). The Texas Supreme Court has noted that "application of the law of another state is not contrary to the fundamental **[**9]** policy of the forum merely because it leads to a different result than would obtain under the forum's law." DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 680 (Tex. 1990). "Moreover, the fact that the law of another state is materially different from the law of this state does not itself establish that application of the other state's law would offend the fundamental policy of Texas." *Id.*

Applying Maryland law to this dispute does not violate the public policy of Texas because both Maryland and Texas allow **indemnification** for a party's own negligence. ^{HN2} ¶ In Texas, a party may be indemnified for its own negligence if the **indemnification** agreement meets the "express negligence" test. See Storage & Processors, Inc. v. Reyes, 134 S.W.3d 190, 192 (Tex. 2004) (citing Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 707 (Tex. 1987)). Maryland also allows such provisions to be enforced if they are "clear and unequivocal." See Mass Transit Admin. v. CSX Transp., Inc., 349 Md. 299, 708 A.2d 298, 308 (Md. 1998) (citing Heat & Power Corp. v. Air Prods. & Chems., Inc., 578 A.2d 1202, 1206-07, 320 Md. 584 (Md. 1990)). Here, neither party disputes that if the Agreement meets the appropriate test ("express negligence" in Texas **[**10]** or "clear and unequivocal" in Maryland), then the indemnity provision of the Agreement is enforceable. Texas and Maryland have the same general rule, but the states differ in that Maryland recognizes an exception to the general rule, as explained more fully below. Although Maryland law is not identical to Texas law, the application of Maryland law would not "thwart or offend the public policy of" Texas because Texas and Maryland have the general policy to allow **indemnification** for one's own negligence. See Nexen, 224 S.W.3d at 419.

Because parties "may express in their agreement their choice that the law of a specified jurisdiction will apply to their contract," we hold that, in accordance with the terms of the Agreement entered into by the parties, Maryland law shall govern the validity, construction, enforcement and interpretation of this Agreement. See *id.* ¹

FOOTNOTES

- ¹ We also note that parties may not "require that their contract be governed by the law of a jurisdiction which has no relation whatsoever to them or their agreement," but no one here challenges this Agreement on that ground. See Nexen Inc. v. Gulf Interstate Engineering Co., 224 S.W.3d 412, 419 (Tex. App.--Houston [1st Dist.] 2006, no pet.) **[**11]** (quoting Chase Manhattan Bank, N.A. v. Greenbriar N. Section II, 835 S.W.2d 720, 723 (Tex. App.--Houston [1st Dist.] 1992, no writ)) .

We sustain CMA's second issue.

[*15] Enforceability of the Indemnity Provision Under Maryland Law

In its first issue, CMA contends the trial court erred by dismissing the suit on the grounds that the Agreement was not enforceable. We conclude that this Agreement is enforceable as an insurance contract.

^{HN3} ¶ In Maryland, the general rule is that "contracts will not be construed to indemnify a person against his own negligence unless an intention to do so is expressed in those very words or in other unequivocal terms." Mass Transit, 708 A.2d at 308 (quoting Heat & Power, 578 A.2d at 1206-07). However, the general rule does not apply to an insurance contract. *Id.* (citing Heat & Power, 578 A.2d at 1208).

In Mass Transit, the Maryland Supreme Court upheld an indemnity provision by concluding that the Mass Transit Administration (MTA) provided **indemnification** for the liability of

CSXT for CSXT's own acts and omissions in "unequivocal terms." *Id.* at 304. The contractual language in the contract between MTA and CSXT stated,
(b) **Indemnification** by [MTA]

(1) [MTA] agrees to indemnify, **[**12]** save harmless, and defend CSXT from any and all casualty losses, claims, suits, damages or liability of every kind arising out of the Contract Service under this Agreement, up to a maximum amount of One Hundred Fifty Million Dollars (\$ 150,000,000), per occurrence, during the term of this Agreement, as excepted or limited by the terms of subsections (a), (c), (d), and (e), *infra*. This maximum **indemnification** amount shall include any expenses for outside manpower, for legal representation and for other extraordinary expenses of handling individual claims for [MTA].

Id. at 300. MTA agreed "to self-insure Five Million Dollars (\$ 5,000,000) per occurrence of any casualty claim or loss for which it is responsible" under the contract. *Id.* MTA agreed, at its cost and expense, to procure and maintain "excess liability insurance coverage commonly provided by Railroad operations liability insurance" in the amount of \$ 145 million in excess of the \$ 5 million "self-insured retention." *Id.* The contract further provided: "This insurance shall cover liability assumed by [MTA] under this [contract] . . . and shall name the State of Maryland and [MTA] as insured. Such insurance policies shall **[**13]** name CSXT as an additional insured for CSXT's operation of the Contract Service" *Id.*

The terms of the Agreement here are similar to the terms in the contract in *Mass Transit* by stating "[Empire] agrees to defend, hold harmless and fully indemnify [CMA], against any and all claims, suits, loss, damage or liability, for bodily injury, death, and/or property damage . . . arising out of or related to [Empire's] use or maintenance of the equipment" See *id.* We conclude that the terms of the Agreement expressly provide that Empire will indemnify CMA against any and all claims arising out of or related to Empire's use or maintenance of the equipment. See *id.*

[*16] We also determine, based on an examination of the purpose of the Agreement, that the Agreement here is similar to the contract in *Mass Transit*. See *id.* In *Mass Transit*, the court examined whether the party giving the **indemnification** was the hirer or the party performing the service. *Id.* at 303-04. The court noted that the party performing the service would more likely indemnify the party that hired it to perform the service to protect the hirer from vicarious liability. *Id.* The court explained, *Heat & Power* involved a promise **[**14]** by one who was hired to perform a service to indemnify the person for whom the service was to be performed. In that relationship the person for whom the service is to be performed incurs a risk that the conduct of the person providing the service will create vicarious liability on the part of the hirer, or that the conduct may involve a non-delegable duty. Consequently, we require that there be no ambiguity and that the **indemnification**, if intended to embrace the sole negligence of the indemnitee, be unequivocal. The **indemnification** provision in the instant matter, however, reverses the direction of the **indemnification** from that more commonly encountered. Here, the hirer of the service gives the indemnity, and the party performing the service is indemnified.

Id. (citations omitted). As in *Mass Transit*, this Agreement provides that Empire, the party performing the service and using the equipment, is to indemnify CMA, the party who is providing the equipment, in order to cover the risk of vicarious liability to CMA stemming from Empire's use of the equipment. See *id.*

In *Mass Transit*, the court also noted that the terms of the contract required self-insurance and excess liability insurance **[**15]** to cover any claim or loss for which MTA was responsible under the contract. See *id.* at 300. Like the contract in *Mass Transit*, this

Agreement requires Empire to provide "insurance coverages in fulfillment of its legal liability and obligations contained in this Agreement."

Our decision is in line with the courts that have analyzed *Mass Transit* to determine that the terms used in the Uniform Intermodal Interchange and Facilities Access Agreement provide for **indemnification** for the equipment provider's own acts or omissions. See *Garcia v. Maersk, Inc.*, No. 03-CV-5697 FB RML, 2005 U.S. Dist. LEXIS 12357, 2005 WL 1492380, at *4 (E.D.N.Y. June 24, 2005); *Lopez v. Louro*, No. 01 CIV 2490(JSM), 2002 U.S. Dist. LEXIS 1020, 2002 WL 91273, at *1 (S.D.N.Y. Jan. 23, 2002). Moreover, another federal court interpreting an agreement with language identical to the Agreement in this case determined that the agreement was one of insurance, stating,

First, although the Interchange Agreement is not an insurance contract or policy, *per se*, it is an agreement pursuant to which [**Motor Carrier**] agreed to indemnify [Equipment Provider], defend [Equipment Provider] and procure insurance which would include [Equipment Provider] as an additional insured for claims, suits, [****16**] losses, damages or liabilities for bodily injury or death arising out of [**Motor Carrier**]'s use of the chassis or container owned by [Equipment Provider]. These obligations and the terms of art invoked therein are typically part of an insurance contract with an insurance company. Accordingly, the scope of the various obligations has been examined and interpreted by courts and agencies as a part of a body of "insurance law". Therefore, reference to decisions involving these same obligations as they arise in insurance policies is appropriate, as the clear intent of Section F of [****17**] the Interchange Agreement is to sort through the insurance related obligations of the signatories. Indeed, Section F is titled "Liability, Indemnity and Insurance" and as provider of the indemnity, short of passing that obligation off to an insurance company, [**Motor Carrier**] is for all practical purposes an insurer and [Equipment Provider] the insured.

NYK Line v. P. B. Industries, Inc., No. TH02-0074-C-T/H, 2004 U.S. Dist. LEXIS 13956, 2004 WL 1629613, at *4 (S.D. Ind. Apr. 20, 2004) (footnote omitted). This Agreement is effectively an insurance contract, which is the exception to the *Mass Transit* general rule that "contracts will not be construed [****17**] to indemnify a person against his own negligence unless an intention to do so is expressed in those very words or in other unequivocal terms." See *Mass Transit*, 708 A.2d at 303 (quoting *Heat & Power*, 578 A.2d at 1206-07).

Empire nevertheless contends *Mass Transit* is distinguishable and that the New York Federal District Court cases are in error because the agreement in the *Mass Transit* case "includ[ed] the requirement that MTA insure CSXT and a specific requirement that MTA add CSXT as an insured under MTA's insurance policy." See *id.* at 301. Empire contends the Agreement here did not require Empire to provide insurance for CMA. To support this contention, Empire refers to the addendum to the Agreement, a "Certificate of Liability Insurance" that includes an "Equipment Provider List." On this list, certain equipment providers have either a single or double asterisk next to their names. The addendum provides, "The [****18**] companies above indicated with a single asterisk require that you make them additional insured on your General Liability Policy. The companies above indicated with a double asterisk require that you make them additional insured on your Cargo and/or Trailer Interchange coverages." Empire asserts that because CGA does not have an asterisk by its name, it did not have to be named an additional insured and that *Mass Transit* therefore does not apply. As noted above, the Agreement provides that the addendum is part of the Agreement, "but only to the extent that its terms do not conflict with this Agreement." The plain language of the Agreement requires Empire to provide "insurance coverages in fulfillment of its legal liability and obligations contained in this Agreement." Under the *Mass Transit* analysis, this indicates a clear and unequivocal intention to indemnify CMA for its own acts or omissions. To the extent that the addendum conflicts with that clear and unequivocal intent, the

Agreement provides that it is not binding upon the parties.

We hold that the Agreement is enforceable under Maryland law and that the trial court erred by dismissing the suit on the grounds that the Agreement **[**19]** was not enforceable.

We sustain CMA's first issue.

Spoliation

In its third issue, CMA challenges the trial court's order imposing a spoliation instruction as a discovery sanction. CMA contends that the trial court erred by deciding that at the time of the trial of Aguirre's claims, it would prohibit CMA from entering certain evidence and instruct the jury that the missing evidence should be presumed to be harmful to CMA's case. However, Aguirre and CMA settled the case without a jury trial, and they asked the trial court to accept the settlement. To the extent that CMA is challenging the spoliation order granted in favor of Aguirre, CMA has waived any complaint because the case settled without **[*18]** a jury trial. See Baker v. Fed. Exp. Corp., 224 S.W.3d 390, 394 (Tex. App. -Houston [1st Dist.] 2006, no pet.) (finding party waived complaint concerning spoliation instruction where trial court did not instruct jury and parties asked court to accept settlement agreement); see also Psych. Inst. of Am., Inc. v. O'Neill, 819 S.W.2d 805, 806 (Tex. 1991) (orig. proceeding) (holding mandamus concerning discovery dispute was rendered moot by settlement of underlying case).

In this appeal, CMA also asserts **[**20]** that the spoliation ruling affects whether we should apply Texas law or Maryland law. That argument was raised in Empire's motion for summary judgment. However, the trial court expressly stated, and the parties agreed, that the trial court was only construing the Agreement as a matter of law and the court was not ruling on any of the issues raised in the motions for summary judgment. Because the trial court never ruled on the matter of whether the spoliation of evidence would affect which law should be applied, nothing is preserved for our review. See TEX. R. APP. P. 33.1(a)(2)(A); De Mino v. Sheridan, 176 S.W.3d 359, 373 (Tex. App.--Houston [1st Dist.] 2004, no pet.) (holding ^{HNA} party must obtain ruling on motion to preserve error). Finding nothing preserved for our review, we overrule CMA's third issue.

Conclusion

We reverse the trial court's order dismissing CMA-CGM (America) Inc.'s cross-claim and remand this cause to the trial court for further proceedings consistent with this opinion.

Elsa Alcalá

Justice

Jeanne Ostnes

From: Robert Freeman [rfreeman@sherblackwell.com]
Sent: Thursday, March 18, 2010 11:56 AM
To: Jeanne Ostnes
Cc: Aves Thompson
Subject: RE: List of state with laws and pending bills

Jeanne,

E.2

The first one works best from our point of view as it is the same as what has been included in other states. This in our view will lead to less confusion down the road and insure consistency in maintaining insurance coverage as equipment moves from state to state. However, either amendment will work as both make clear that the new section does not apply to an agreement that provides for the interchange, use or possession of intermodal chassis, intermodal containers, or other intermodal equipment.

Again, thanks you your assistance on this and please let me know if you have additional questions.

Regards.

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Director Government Relations
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