

HB

366

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

Senate Transportation Committee Hearing

1:00 pm, April 8, 2010

Aves D. Thompson, Executive Director

Alaska Trucking Association

Thank you. Mr. Chairman 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 is an essential element 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, this year, is to achieve tort reform in the area of indemnification agreements in motor carrier transportation contracts.



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

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A motor carrier must generally comply with the Federal Motor Carrier Safety Regulations when 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, language is creeping into motor carrier contracts wherein the shipper is requiring the motor carrier to contractually agree 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

2



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

HB 366 Senate TRA Testimony 20100408.doc

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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.

We have worked with industry groups 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.

Support: BP
Crescent Phillips
AGC
ABE
AMA
AK State Chamber
* OCEMA

Aves Thompson
Executive Director

April 8, 2010

Currently enacted: 12 states
(similar)
Pending: 8 including AK



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

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

— CSHB 366 JUD —

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. This legislation now includes an indemnification clause for the shippers and excludes the parties to the Uniform Intermodal Interchange and Facilities Access Agreements.

26-LS1434S

FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: CSHB 366(TRA)
 () Publish Date: _____

Identifier (file name): HB366CS(TRA)-LAW-CIV-03-12-10 Dept. Affected: LAW
 Title An Act relating to indemnification agreements that relate to motor RDU Civil
carrier transportation contracts Component Commercial and Fair Business
 Sponsor Representative Johnson
 Requester Transportation Component Number 2717

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)

See attached page...

Prepared by: Eileen Donahue, Division Operations Manager
 Division Administrative Services
 Approved by: Daniel S. Sullivan, Attorney General
Department of Law

Phone 465-5427
 Date/Time 3/12/10 3:00 PM
 Date 3/12/2010

FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

BILL NO. CSHB 366(TRA)

ANALYSIS CONTINUATION

HB 366 adds a new section to AS 45.45 that makes "void and unenforceable" any agreement between a motor carrier and a "shipping person" that requires the motor carrier to indemnify the shipper for claims of negligence, intentional acts, or intentional omissions of the shipping person. A "motor carrier" is defined to mean a person engaged in the transportation of property for compensation by motor vehicle. A "shipping person" is defined to mean a person who enters into a transportation services contract to use the services of a motor carrier. The intent of the bill is to prohibit the shifting of liability from a shipper to a motor carrier, and provide an incentive for the shipper to perform its legal obligations and duties.

It is unclear whether the state can be a "shipping person" under this bill. If it is, this bill could restrict the state's ability to require indemnification from motor carriers it does business with. The state's business model, however, does not require the motor carrier to indemnify the state for the state's negligence or intentional acts. For these transactions, the common practice is to accept the terms and conditions stipulated in the contract form provided by the motor carrier. Accordingly, we do not anticipate any fiscal impacts from this legislation.

FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 366
 () Publish Date: _____

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

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 22, 2010

SUBJECT: Sectional summary of CSHB 366(JUD), a bill relating to indemnification agreements that relate to motor carrier transportation contracts (Work Order No. 26-LS1434\S)

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 certain indemnification by motor carriers and shipping persons.

Sec. 45.45.905(a) prohibits a motor carrier and a shipping person from entering into certain indemnification agreements related to transportation services contracts. Prohibits the motor carrier from indemnifying the shipping person from the shipping person's negligence and intentional acts and omissions. Prohibits the shipping person from indemnifying the motor carrier from the motor carrier's negligence and intentional acts and omissions. Covers defending the motor carrier or shipping person. Covers holding the motor carrier or shipping person harmless.

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

Sec. 45.45.905(c) exempts agreements that relate to intermodal equipment.

Sec. 45.45.905(d) 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
10-206.ljw

APPENDIX: State Anti-Indemnification Acts

INDIANA

SECTION 1. IC 8-2.1-26 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS EFFECTIVE JULY 1, 2006:

Chapter 26. Invalidity of Indemnity Agreements in Motor Carrier Transportation Contracts

Sec. 1. This chapter applies to an indemnity provision entered into or renewed after June 30, 2006.

Sec. 2. As used in this chapter, "indemnity provision" means a provision, a clause, a covenant, or an agreement that:

- (1) is contained in, collateral to, or affecting a motor carrier transportation contract; and
- (2) purports to indemnify, defend, or hold harmless, or has the effect of indemnifying, defending, or holding harmless, a promisee against liability for loss or damage resulting from:
 - (A) negligence;
 - (B) intentional acts; or
 - (C) omissions;

of the promisee or an agent, employee, servant, or independent contractor that is directly responsible to the promisee.

Sec. 3. As used in this chapter, "motor carrier transportation contract" means a contract, an agreement, or an understanding covering:

- (1) the transportation of property for compensation or hire by a motor carrier as defined under this article or by 49 U.S.C. 13102(12);
- (2) the entrance on real property by a motor carrier to:
 - (A) load;
 - (B) unload; or
 - (C) transport property for compensation or hire; or
- (3) a service incidental to an activity described in subdivision (1) or (2), including storage of property.

Sec. 4. As used in this chapter, "promisee" means a person that an indemnity provision:

- (1) purports to indemnify, defend, or hold harmless; or

(2) has the effect of indemnifying, defending, or holding harmless.

Sec. 5.

(a) This section does not apply to any of the following:

- (1) An indemnity provision in which a motor carrier indemnifies a promisee for and only to the extent of loss or damage that results directly from the negligence, omission, or intentional act of the motor carrier or an agent, employee, servant, or independent contractor that is directly responsible to the motor carrier.
- (2) An indemnity provision contained in, collateral to, or affecting a motor carrier transportation contract with a regulated public utility, including an energy utility (as defined in IC 8-1-2.5-2) or an affiliate of an energy utility, if the contract relates to a utility product, service, or business operation. For purposes of this subdivision, a contract relates to a utility product, service, or business operation if it involves an activity necessary for or ancillary to the production or delivery of heat, power and light, or a product or service under the jurisdiction of the Indiana utility regulatory commission (as described by IC 8-1-1).
- (3) The Uniform Intermodal Interchange and Facilities Access Agreement administered by the Intermodal Association of North America.

(b) Notwithstanding any other law, an indemnity provision under this chapter is:

- (1) against public policy; and
- (2) void and unenforceable.



Alaska West Express, Inc.
1048 Whitney Road
Anchorage, AK 99501
(907) 279-9515
(800) 478-2655
Fax: (907) 272-8152

March 3, 2010

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

Dear Representative Johnson,

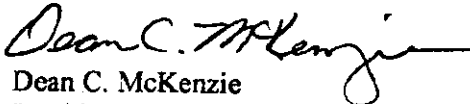
I have read both HB 366 and the comments by Aves Thompson regarding it and want to commend you for what I believe is a very good piece of legislation. In our previous discussions I have mentioned how some of the bigger carriers and contractors in the business have the ability to challenge and push back 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,


Dean C. McKenzie
President

Copy: Aves Thompson
Executive Director ATA

Alaska Trucking Association, Inc.

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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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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.



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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...

From: Steve Day [mailto: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

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,

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.

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.

Thank you.

Sincerely



Frank Monfrey

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.

**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



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



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:

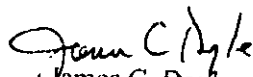
As a motor carrier, we must generally comply with the Federal Motor Carrier Safety Regulations as well as while transporting goods, and we are also subject to additional common law or statutory duties or responsibilities. Likewise, shippers or other parties frequently have legal duties and responsibilities 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,
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) 778-1526

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P.O. Box 2229
Kenai, AK 99611
(907) 782-7057

FAIRBANKS
P.O. Box 60981
Fairbanks, AK 99706
(907) 456-7704

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 Max Gruenberg
State Capitol Room 110
Juneau, AK 99801

Re: URGENT - Alaska HB 366

Dear Representative Gruenberg:

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.

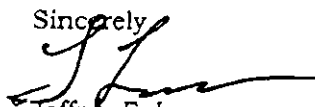
We support your efforts in Alaska as we have in other states. Most recently, we have supported similar legislation in Virginia, Maryland, Kansas, Colorado, Connecticut, Missouri, and Tennessee. By working with legislators in those states we were able to ensure that public policy in this area correctly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

The following states have laws in place that include the exception for 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.

1. Georgia
2. Illinois
3. Indiana
4. Kansas
5. Maryland
6. Missouri
7. New Mexico
8. North Dakota
9. Tennessee
10. Virginia
11. West Virginia
12. Wyoming

The following states have indemnity bills pending. I have indicated the status of the exemption.

1. Alaska – amended to include exception
2. Connecticut – contains exception
3. Iowa – contains exception
4. Kentucky – contains exception
5. Minnesota – contains exception
6. Oregon - bill is pending/working on amendment
7. Washington – amended to include exception
8. Wisconsin – bill is pending/working on amendment

**State Motor Carrier Anti-Indemnification Provisions:
A Comparison and Analysis**

Robert C. Pitcher
Vice President, State Laws
American Trucking Associations
Arlington, Virginia

As of late 2008, a dozen states have enacted statutes that seek to prohibit or to make unenforceable contractual provisions that require a motor carrier to indemnify another party to the contract for that party's own acts or omissions:

Indiana	Nebraska	Tennessee
Kansas	North Carolina	Texas
Maryland	Oklahoma	Virginia
Missouri	South Carolina	West Virginia

The Insurance Task Force of the American Trucking Associations has adopted enactment of such statutes as a specific goal, because of the inequities these contractual provisions involve, because of their potential adverse effect on transportation safety, and because of the growing frequency with which such provisions are being forced on motor carriers by shippers and others.

The existing state statutes in this area are varied, and since additional states may be expected to consider legislation of this sort in the coming years, it is the purpose of this piece to analyze the existing provisions and to compare them, both to each other and to the model anti-indemnification language prepared by ATA and recommended by the Insurance Task Force. Both the ATA model language and the existing state statutes are found in the appendix to the analysis.

ATA Model Language

ATA's model language will form the basis of the analysis here, since it is relatively simple and most of the state provisions resemble it fairly closely. The model language has three parts: it first describes what kind of contractual language the statute is dealing with and provides the remedy that such language is to be unenforceable; it next defines the limiting term "motor carrier transportation contract" to which the provision applies; and last it defines the "promisee" that the prohibited language would benefit.

Stripped of some of the legal phrasing, and separated into its significant sections, the first part says, in effect:

In spite of what any other law may say, // any provision of a motor carrier transportation contract // that would indemnify // a promisee // for any liability for loss or damage // resulting from the promisee's own acts or omissions // is against the public policy of the state // and is void and unenforceable.

The second part similarly reduces to:

A "motor carrier transportation contract" here means // a contract or agreement // that covers transportation for hire by a motor carrier, // entrance onto property by a motor carrier // to load, unload, or transport property for hire, // or a service connected with such transportation or such an entrance, // including property storage.

And the third part says, in effect:

The term "promisee" here includes // not only the promisee, // but all persons that are responsible to the promisee, // including independent contractors, // but it does not include a motor carrier // that is a party to the contract with the promisee // and persons that are responsible to the motor carrier.

In even more condensed language, the provisions as whole mean that the state will not enforce a provision of a contract that would require a motor carrier to assume liability for the acts of another party to the contract. The model language includes no exceptions to the rule.

Many of the existing state provisions are very similar to the model language, but some lack one or more of these particular elements, a few have some additional elements, and nearly all have some exceptions.

State Provisions

Ten of the twelve existing state anti-indemnification provisions are similar to the ATA model, although the statute in effect in Kansas includes some significant additional features, the provision in Tennessee is much more compact than the model, and most of the states have one or more exceptions to the general prohibition against indemnification. Two state statutes, however, those in Oklahoma and Texas, are different enough to warrant separate analysis.

Contracts covered. Nine of the ten state provisions that correspond closely to the ATA model have language to describe the "motor carrier transportation contracts" to which the indemnification prohibition applies that is very similar in wording to that of the ATA model. Three states (Indiana, Maryland, and Nebraska) add a definition of the term motor carrier, either in the provision itself or by reference to another statute. Like the model, all of the states, except Kansas and Tennessee, restrict the coverage of the prohibition to transportation of property by a motor carrier for compensation. The provisions in Kansas and Tennessee may be read to include private carriers in the coverage, and Tennessee's provision can be read to include passenger carriers. Tennessee's provision is the one that does not closely correspond to the model in this

respect; its language merely references "a motor carrier transportation contract" as the subject of the prohibition.

Actions prohibited. All ten of the state statutes that correspond closely to the ATA model have rather similar language to describe the contractual provisions which they make unenforceable. Three differences are perhaps worth noting. The Kansas statute adds a definition of damage for which indemnification might otherwise apply (that is, personal injury, property damage, or economic loss); the Tennessee provision is again notable for its compactness, but adds an indemnitee of the promisee as a party to whom indemnification is unenforceable; and the Virginia law is written so as to prevent either party to the contract from indemnifying the other for the other's own acts.

Remedy. Each of the ten statutes that closely resemble the ATA model provides essentially the same remedy for an offending indemnification clause in a motor carrier transportation contract: such a clause is against public policy (some provisions add "of this state") and is void and unenforceable (Nebraska and South Carolina omit void).

Exceptions. With the exception of Tennessee, whose provision is notable for its exceeding shortness, the other nine existing statutes that are similar to the ATA model add at least one exception to the anti-indemnification coverage, and most have two or three.

All nine of these states except the Uniform Intermodal Interchange and Facilities Access Agreement, which railroads, ocean carriers, and draymen employ to exchange intermodal chassis. The Agreement includes certain anti-indemnification protections of its own.

Five states specifically except a motor carrier's own acts or omissions, although arguably these would be excepted without special mention.

Two states' statutes provide an exception for other motor carriers that are parties to the motor carrier transportation contract with the carrier. (Missouri, North Carolina)

The other exceptions appear in only one state statute apiece: contracts with a public utility (Indiana), agreements to settle disputed claims (Kansas), separately negotiated indemnity provisions supported by adequate compensation and generally accepted industry loss experience (Kansas), separate insurance paid for by the promisee (Kansas), and contracts with rail carriers or their independent contractors (Missouri).

Effective dates. These ten states specify the effective dates of their provisions in two ways: Four states (Indiana, Kansas, North Carolina, and West Virginia) specify that the provisions apply to contracts entered into on or after a particular date. In the other six states, the act itself was effective on a particular date, and its applicability to contracts in existence before that time is unspecified (and would presumably depend on the general contract law or case law in those jurisdictions). The ATA model does not deal with this issue.

Additional clauses - Kansas. The Kansas statute includes three provisions not found in any of the others. The first provides that contract clauses which require a motor carrier to include the promisee as an "additional insured" on any insurance contract are void and unenforceable in the same manner as the prohibited indemnification provisions. Although the ATA model does not include similar language on additional insureds, this language can be recommended, since additional-insured provisions, depending on how they are interpreted, can easily be extended to provide for the indemnification of a promisee's own negligence.

The second provision included in the Kansas statute provides that the anti-indemnification protection is to be extended to every contract to be performed in Kansas, notwithstanding any choice-of-law provision or other language that may be found in such a contract. This clause may be especially useful since there is essentially no case law yet on the applicability of these anti-indemnification provisions to contracts entered into in one state and to be performed in one or more others.

The third Kansas provision merely states that the anti-indemnification statute is not to be construed to affect the validity of any contract of insurance.

Oklahoma. The Oklahoma anti-indemnification statute is very short, and its approach to the problem is quite distinct from that of the ATA model and all of the other states except Texas. It says only:

A motor carrier shall not be required to sign any statement of liability or enter into any contract for the indemnification of any person for any acts or omissions not arising from damage or loss from a wrongful or negligent act or omission from the motor carrier.

The basic thrust of the model language is surely incorporated here, but, unless Oklahoma has a case-law tradition to the effect that indemnifying a party for its own acts is contrary to public policy, it might be argued that the statute does not cover an instance where a carrier has *voluntarily* provided for the indemnification of the promisee.

The Oklahoma law includes as well an exception for contracts with railroads and ocean carriers, and specifies that its prohibition does not apply to rail intermodal or transload facilities.

Texas. The statute in Texas is rather different in form from the ATA model and the ten states that follow it, but its effect should be quite similar. It begins with "(a) A person may not require indemnification from a motor carrier as a condition to [a motor carrier transportation contract]," and ends with "A provision that is contrary to Subsection (a) is not enforceable."

The remainder of the Texas law includes language describing the contracts to which it applies, in terms almost identical to the ATA model definition of a motor carrier transportation contract; a definition of motor carrier that specifically excludes private

carriers conducting backhauls for hire; and an exception for the contracting motor carrier's own acts or omissions. There are no other exceptions to the protection of the provision. A separate provision of Texas law includes a broad grant of authority to the state department of transportation to enforce all requirements in the chapter of the transportation code in which the anti-indemnification provision is found. This general authority may prove to be of some value, though it is unclear just how the department would make use of it in this connection.

Alaska Stat. § 45.45.900

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2009 First Special Session ***

*** Annotations current through opinions posted on Lexis.com as of January 1, 2010 ***

TITLE 45. TRADE AND COMMERCE
CHAPTER 45. TRADE PRACTICES
ARTICLE 12. MISCELLANEOUS PROVISIONS

Alaska Stat. § 45.45.900 (2010)

Sec. 45.45.900. Indemnification agreements against public policy

A provision, clause, covenant, or agreement contained in, collateral to, or affecting a construction contract that purports to indemnify the promisee against liability for damages for (1) death or bodily injury to persons, (2) injury to property, (3) design defects, or (4) other loss, damage or expense arising under (1), (2), or (3) of this section from the sole negligence or wilful misconduct of the promisee or the promisee's agents, servants, or independent contractors who are directly responsible to the promisee, is against public policy and is void and unenforceable; however, this provision does not affect the validity of an insurance contract workers' compensation, or agreement issued by an insurer subject to the provisions of AS 21, or a provision, clause, covenant, or agreement of indemnification respecting the handling, containment, or cleanup of oil or hazardous substances as defined in AS 46.

HISTORY: (§ 1 ch 155 SLA 1975; am § 6 ch 59 SLA 1986)

NOTES: REVISOR'S NOTES. --Formerly AS 45.47.010. Renumbered in 1980.

OPINIONS OF ATTORNEY GENERAL. --The apparent prohibition on indemnification agreements in construction contracts found in this section will only apply when the promisee is completely negligent and seeks to hold an innocent promisor accountable. February 27, 1986 Op. Att'y Gen.

NOTES TO DECISIONS

LEGISLATIVE INTENT. --The absence in this section of an exemption for limitation of liability clauses indicates that the legislature did not intend to allow an exemption. City of Dillingham v. CH2M Hill N.W., Inc., 873 P.2d 1271 (Alaska 1994).

THE WORD "INDEMNIFY" AS USED IN THIS SECTION MEANS "exempt," and thus this section prohibits limitation of liability clauses; absent legislative action to the contrary, such an interpretation best fulfills the legislature's express intent to prevent a party to a construction contract from bargaining away liability for the party's negligent acts. City of Dillingham v. CH2M Hill N.W., Inc., 873 P.2d 1271 (Alaska 1994).

APPLICABILITY OF SECTION. --This section became effective on September 23, 1975, and governs contracts executed on or after that date. Contracts executed before that date are governed by the rule announced in Burgess Constr. Co. v. State, 614 P.2d 1380 (Alaska 1980), that an indemnity clause is effective to shift responsibility for an accident where the indemnitee is negligent and the indemnitor is not. Stephan & Sons v. Municipality of Anchorage, 629 P.2d 71 (Alaska 1981).

There is no indication in the text of this section itself that would indicate that the statute is intended to ban only indemnification clauses that would benefit a public promisee at the expense of a private promisor. City of Dillingham v. CH2M Hill N.W., Inc., 873 P.2d 1271 (Alaska 1994).

This section applies to a clause that is questioned under this statute regardless of whether indemnification has been sought. City of Dillingham v. CH2M Hill N.W., Inc., 873 P.2d 1271 (Alaska 1994).

SECTION APPLICABLE TO EQUIPMENT LEASES. --This section should be applied to void indemnity clauses in equipment lease agreements if such a legal rule would advance the purposes of the anti-indemnity statute by inducing careful inspection and use of the leased equipment. Aetna Cas. & Sur. Co. v. Marion Equip. Co., 894 P.2d 664 (Alaska 1995).

WHEN STATE IS SOLELY NEGLIGENT. --This section should come into effect only when it is determined, as between the state and contractors, that the state is solely negligent. Rogers & Babler v. State, 713 P.2d 795 (Alaska 1986).

"WILFUL MISCONDUCT" DOES NOT REQUIRE INTENT TO HARM. --Wilful misconduct means volitional action taken either with a knowledge that serious injury to another will possibly result, or with wanton and reckless disregard of the possible results. Aetna Cas. & Sur. Co. v. Marion Equip. Co., 894 P.2d 664 (Alaska 1995).

Because the insured was found by a jury to have acted with reckless disregard of the plaintiff's interests and safety, the insured's injurious behavior is properly termed wilful misconduct. Consequently, this section forbids the indemnity the insurer seeks. Aetna Cas. & Sur. Co. v. Marion Equip. Co., 894 P.2d 664 (Alaska 1995).

INDEMNITY CLAUSE NOT INVALIDATED. --This section only invalidates an indemnity clause if the clause purports to indemnify the indemnitee for the indemnitee's sole negligence, and where neither part of the indemnity clause purported to indemnify the general contractor for the hospital's sole negligence, this section did not invalidate the indemnity clause in the contract between the general contractor and the hospital work site. Hoffman Constr. Co. of Alaska v. U.S. Fabrication & Erection, Inc., 22 P.3d 464 (Alaska 2001).

CITED IN Deaver v. Auction Block Co., 107 P.3d 884 (Alaska 2005).

NOTES APPLICABLE TO ENTIRE TITLE

REVISOR'S NOTES. --The provisions of this title were redrafted in 1986 to remove personal pronouns pursuant to § 4, ch. 58, SLA 1982 and in 1986, 1994, and 2006 to make other, minor word changes. In 1980, the provisions of the Uniform Commercial Code formerly set out in AS 45.05, were renumbered as AS 45.01 -- AS 45.09 so that the numbering now corresponds to the numbering of the official text of the Uniform Commercial Code. To determine the disposition of sections formerly numbered within AS 45.05, or to determine the prior numbering of sections now numbered within AS 45.01 -- AS 45.09, see the Table of Sections Amended, Etc., in Volume 11.

COLLATERAL REFERENCES. --Theodore Eisenberg, Debtor-Creditor Law (Matthew Bender).
Peter J. Bestos, Modern UCC Litigation Forms (Matthew Bender).
Duesenberg and King, Sales and Bulk Transfers Under the UCC (Matthew Bender).
Cohen, McLaughlin, and Zaretsky, Commercial Law Report (Matthew Bender).
Frederick M. Hart, Forms and Procedures Under the UCC (Matthew Bender).
Willer and Hart, UCC Reporter-Digest (Matthew Bender).
Zaretsky, McLaughlin, Commercial Law and Practice Guide (Matthew Bender).
Charles L. Knapp, Commercial Damages: A Guide to Remedies in Business Litigation
(Matthew Bender).
Charles K. Knapp, Commercial Damages Reporter (Matthew Bender).
Howard Ruda, Asset Based Financing: A Transactional Guide (Matthew Bender).

Re
HB
366

KANSAS

HOUSE Substitute for SENATE BILL No. 379

AN ACT concerning contracts; relating to indemnification provisions and additional insured parties; amending K.S.A. 16-121 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 16-121 is hereby amended to read as follows: 16-121.

(a) When used in this section:

- (1) "Construction contract" means an agreement for the design, construction, alteration, renovation, repair or maintenance of a building, structure, highway, road, bridge, water line, sewer line, oil line, gas line, appurtenance or other improvement to real property, including any moving, demolition or excavation, except that no deed, lease, easement, license or other instrument granting an interest in or the right to possess property shall be deemed to be a construction contract even if the instrument includes the right to design, construct, alter, renovate, repair or maintain improvements on such real property. "Construction contract" shall not include any design, construction, alteration, renovation, repair or maintenance of: (A) Dirt or gravel roads used to access oil and gas wells and associated facilities; or (B) oil flow lines or gas gathering lines used in association with the transportation of production from oil and gas wells from the wellhead to oil storage facilities or gas transmission lines.
- (2) "Contract" means any construction contract, motor carrier transportation contract, dealer agreement or franchise agreement.
- (3) "Damages" means personal injury damages, property damages or economic loss.
- (4) "Dealership agreement" means an oral or written agreement of definite or indefinite duration between an equipment manufacturer or service provider and an equipment or service dealer which provides for the rights and obligations of the parties with respect to the purchase or sale of such equipment or services.
- (5) "Franchise agreement" means any contract or franchise or any other terminology used to describe the contractual relationship between manufacturers, distributors and dealers, by which: (A) A right is granted one party to engage in the business of offering, selling or otherwise distributing goods or services under a marketing plan or system prescribed in substantial part by the other party, and in which there is a community of interest in the marketing of goods or services at wholesale or retail, by lease, agreement or otherwise; and (B) the operation of the grantee's business pursuant to such agreement is substantially associated with the grantor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the grantor or an affiliate of the grantor.
- (6) "Indemnification provision" means a covenant, promise, agreement, clause or understanding in connection with, contained in, or collateral to a contract that requires the promisor to hold harmless, indemnify or defend the promisee or others against liability for loss or damages.
- (7) "Motor carrier transportation contract" means, with respect to a motor carrier as defined in K.S.A. 66-1,108, and amendments thereto, a contract, agreement or understanding covering: (A) The transportation of property by a motor carrier; (B) the entrance on property by the motor carrier for the purpose of loading, unloading or transporting property; or (C) a service incidental to activity described in clause (A) or (B) including, but not limited to, storage of property.

"Motor carrier transportation contract" shall not include 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.

(8) "Mutual indemnity obligation" means an indemnity obligation in a contract in which the parties agree to indemnify each other and each other's contractors and their employees against loss, liability or damages arising in connection with bodily injury, death and damage to property of the respective employees, contractors or their employees, and invitees of each party arising out of or resulting from the performance of the agreement.

(9) "Promisee" shall include an agent, employee or independent contractor who is directly responsible to the promisee.

(10) "Unilateral indemnity obligation" means an indemnity obligation in a contract in which one of the parties as promisor agrees to indemnify the other party as promisee with respect to claims for personal injury or death to the promisor's employees or agents or to the employees or agents of the promisor's contractors but in which the promisee does not make a reciprocal indemnity to the promisor.

(b) An indemnification provision in a contract which requires the promisor to indemnify the promisee for the promisee's negligence or intentional acts or omissions is against public policy and is void and unenforceable.

(c) A provision in a contract which requires a party to provide liability coverage to another party, as an additional insured, for such other party's own negligence or intentional acts or omissions is against public policy and is void and unenforceable.

(d) This act shall not be construed to affect or impair:

(1) The contractual obligation of a contractor or owner to provide railroad protective insurance or general liability insurance;

(2) an agreement under which an owner, a responsible party or a governmental entity agrees to indemnify a contractor directly or through another contractor with respect to strict liability under environmental laws;

(3) an indemnification agreement that is an integral part of an offer to compromise or a settlement of a disputed claim, if: (A) The settlement is based on consideration; (B) the dispute relates to an alleged event that is related to a construction contract and that occurred before the settlement is made; and (C) the indemnification relates only to claims that have arisen or may arise from the past event;

(4) the validity of any insurance contract, construction bond or other agreement lawfully issued by an insurer or bonding company;

(5) a separately negotiated provision or provisions whereby the parties mutually agree to a reasonable allocation of risk, if each such provision is: (A) Based on generally accepted industry loss experience; and (B) supported by adequate consideration; and

(6) an agreement that provides for indemnity if the parties agree in writing that the indemnity obligation will be supported by liability insurance coverage to be furnished by the promisor subject to the following limitations: (A) With respect to a mutual indemnity obligation, the indemnity ob-

ligation is limited to the extent of the coverage and dollar limits of insurance or qualified self-insurance each party as promisor has agreed to obtain for the benefit of the other party as promisee. (B) With respect to a unilateral indemnity obligation, the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance the promisor has agreed to

obtain for the benefit of the other party as promisee. Such indemnity obligation shall be at the promisee's expense and shall be a separate liability insurance policy.

(e) Notwithstanding any contractual provision to the contrary, the laws of the state of Kansas shall apply to and govern every contract to be performed in this state. Any litigation, arbitration or other dispute resolution proceeding arising from such contract shall be conducted in this state. Any provision, covenant or clause in such contract that conflicts with the provisions of this subsection shall be void and unenforceable.

(f) This section applies only to indemnification provisions and additional insured provisions entered into after January 1, 2009.

Sec. 2. K.S.A. 16-121 is hereby repealed.

Sec. 3. This act shall take effect and be in force on and after January 1, 2009, and its publication in the statute book.

MARYLAND

§ 5-401. Indemnity agreements regarding construction barred

Effective October 1, 2007

(a) A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relating to the construction, alteration, repair, or maintenance of a building, structure, appurtenance or appliance, including moving, demolition and excavating connected with it, purporting to indemnify the promisee against liability for damages arising out of bodily injury to any person or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable. This section does not affect the validity of any insurance contract, workers' compensation, or any other agreement issued by an insurer.

(b)(1)(i) In this subsection the following words have the meanings indicated.

(ii) "Motor carrier" has the meaning stated in § 11-134.2 of the Transportation Article.

(iii) 1. "Motor carrier transportation contract" means a contract, agreement, or understanding concerning:

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

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

(C) A service incidental to an activity described in item (i) or (ii) of this paragraph, including storage of property.

2. "Motor carrier transportation contract" does not include:

(A) The Uniform Intermodal Interchange and Facilities Access Agreement administered by the Intermodal Association of North America, as amended by the Intermodal Interchange Executive Committee; or

(B) Other agreements providing for the interchange, use, or possession of intermodal chassis, containers, or other intermodal equipment.

(iv) "Promisee" includes an agent, employee, servant, or independent contractor who is directly responsible to the promisee, other than a motor carrier that is a party to a motor carrier transportation contract with the promisee, and an agent, employee, servant, or independent contractor directly responsible to that motor carrier.

(2) 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 against liability for loss or damage resulting from the negligence or intentional acts or omissions of the promisee is against public policy and is void and unenforceable.

MISSOURI

390.372. 1. Notwithstanding any provision of law to the contrary, 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.

2. For the purposes of this section, the following terms shall mean:

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

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

(b) The 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 paragraphs (a) and (b) of this subdivision, including but not limited to, storage of property; "Motor carrier transportation contract" shall not include 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;

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

NEBRASKA

LB 1007, Sec. 21

Effective March 6, 2006

- (1) A provision, a clause, a covenant, or an 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 motor carrier transportation contract's promisee from or against any liability for loss or damage resulting from the negligence or intentional acts or omissions of the motor carrier transportation contract's promisee or any agents, employees, servants, or independent contractors who are directly responsible to the motor carrier transportation contract's promisee, is against the public policy of this state and is unenforceable.
- (2) Nothing contained in this section affects a provision, a clause, a covenant, or an agreement in which a motor carrier indemnifies or holds harmless a motor carrier transportation contract's promisee against liability for damages to the extent that the damages were caused by and resulting from the negligence of the motor carrier or its agents, employees, servants, or independent contractors who are directly responsible to the motor carrier.
- (3) As used in this section:
 - (a) Motor carrier means any person who or which owns, controls, manages, operates, or causes to be operated any motor vehicle used to transport goods over any public highway in this state, whether in intrastate or interstate commerce;
 - (b) Motor carrier transportation contract means a contract, agreement, or understanding covering:
 - (i) The transportation of property for compensation or hire by a motor carrier;
 - (ii) The entrance on property by a motor carrier for the purpose of loading, unloading, or transporting property for compensation or for hire; or
 - (iii) A service incidental to activity described in subdivision (i) or (ii) of this subdivision, including, but not limited to, storage of property.

A motor carrier transportation contract does not include provisions of the Uniform Intermodal Interchange and Facilities Access Agreement administered by the Intermodal Association of North America or any other provision, clause, covenant, or agreement providing for the interchange, use, or possession of intermodal chassis, containers, or other intermodal equipment; and

- (c) Promisee means the party to a motor carrier transportation contract who or which is not a motor carrier or, if the promisee is a motor carrier, is not the motor carrier actually doing the transporting.

NORTH CAROLINA

"This act becomes effective October 1, 2005, and applies to contracts entered into on or after that date."

§ 62-212. Indemnity agreements in motor carrier transportation contracts

- (a) 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 omission of the promisee is against the public policy of this State and is void and unenforceable.
- (b) The following definitions apply in this section:
 - (1) Motor carrier transportation contract. -- A contract, agreement, or understanding covering at least one of the following:
 - (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.
 - (c) A service incidental to activity described in sub-subdivision a. or b. of this subdivision, including storage of property.
 - (2) Promisee. -- The person with whom the motor carrier enters into a motor carrier transportation contract and any agents, employees, servants, or independent contractors who are directly responsible to that person, except for motor carriers party to a motor carrier transportation contract with the person, and the motor carrier's agents, employees, servants, or independent contractors directly responsible to the motor carrier.
 - (c) Nothing contained in this section effects [affects] a provision, clause, covenant, or agreement where the motor carrier indemnifies or holds harmless the contract's promisee against liability for damages to the extent that the damages were caused by and resulted from the negligence of the motor carrier, its agents, employees, servants, or independent contractors who are directly responsible to the motor carrier.
 - (d) Notwithstanding the other provisions contained in this section, the term "motor carrier transportation contract", as defined in this section, shall not include 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, trailers, or other intermodal equipment that

contain substantially the same indemnity provision as the provision contained in the Uniform Intermodal Interchange and Facilities Access Agreement.

OKLAHOMA

§ 169.7 Statements of liability or indemnity agreements not required—Exceptions

A motor carrier shall not be required to sign any statement of liability or enter into any contract for the indemnification of any person for any acts or omissions not arising from damage or loss from a wrongful or negligent act or omission from the motor carrier.

The provisions of this section shall not apply to railroad intermodal or transload facilities or to contracts with railroads or ocean carriers.

SOUTH CAROLINA
Effective April 19, 2005

§ 58-23-110. Motor carrier transportation contracts; definition; hold harmless provisions; exception.

- (A) Notwithstanding another 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 contract's promisee from or against any liability for loss or damage resulting from the negligence or intentional acts or omissions of the contract's promisee, or any agents, employees, servants, or independent contractors who are directly responsible to the contract's promisee, is against the public policy of this State and is unenforceable.
- (B) As used in this section "motor carrier transportation contract" means a contract, agreement, or understanding covering:
 - (1) the transportation of property for compensation or hire by the motor carrier;
 - (2) the entrance on property by the motor carrier for the purpose of loading, unloading, or transporting property for compensation or for hire; or
 - (3) a service incidental to activity described in items (1) or (2) including, but not limited to, storage of property.
- (C) Nothing contained in this section affects a provision, clause, covenant, or agreement where the motor carrier indemnifies or holds harmless the contract's promisee against liability for damages to the extent that the damages were caused by and resulting from the negligence of the motor carrier, its agents, employees, servants, or independent contractors who are directly responsible to the motor carrier.
- (D) Notwithstanding the other provisions contained in this section, a "motor carrier transportation contract" shall not include the Uniform Intermodal Interchange and Facilities Access Agreement administered by the Intermodal Association of North America, as that agreement may be amended by the Intermodal Interchange Executive Committee.

TENNESSEE

AN ACT to amend Tennessee Code Annotated, Title 12; Title 47, Chapter 18 and Title 65, Chapter 15, relative to motor carrier transportation contracts.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 65, Chapter 15, Part 1, is amended by adding the following language as a new section thereto:

65-15-1__.

A covenant, promise, agreement or understanding in or in connection with or collateral to a motor carrier transportation contract purporting to indemnify the promisee against liability for damages resulting from the negligence of the promisee, the promisee's agents or employee's, or indemnitee, is against public policy and is void and unenforceable.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it.

TEXAS

§ 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.

VIRGINIA

§ 11-4.5. Certain indemnification provisions in motor carrier transportation contracts declared void.

A. As used in this section:

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

- (1) The transportation of property for compensation or hire by the motor carrier;
- (2) The entrance on property by the motor carrier for the purpose of loading, unloading, or transporting property for compensation or for hire; or
- (3) A service incidental to activity described in subdivision 1 or 2 including, but not limited to, storage of property.

For the purposes of this section, the term "motor carrier transportation contract" shall not include the Uniform Intermodal Interchange and Facilities Access Agreement administered by the Intermodal Association of North America, as that agreement may be amended by the Intermodal Interchange Executive Committee, or other agreements providing for the interchange, use, or possession of intermodal chassis, containers, or other intermodal equipment.

B. A provision, clause, covenant, or agreement contained in, collateral to, or affecting a motor carrier transportation contract that purports to indemnify, or hold harmless, or has the effect of indemnifying, or holding harmless, either party from or against any liability for loss or damage resulting from the negligence or intentional acts or omissions of other party, or any agents, employees, servants, or independent contractors who are directly responsible to the other party, is against the public policy and is void and unenforceable.

C. Nothing contained in this section affects a provision, clause, covenant, or agreement where the motor carrier indemnifies or holds harmless the other party against liability for damages to the extent that the damages were caused by and resulting from the negligence of the motor carrier, its agents, employees, servants, or independent contractors who, in whole or in part are directly responsible to the motor carrier.

WEST VIRGINIA
Effective July 1, 2006.

S.B. No. 492

MOTOR CARRIERS--TRANSPORTATION--CONTRACTS

AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated § 24A-6-7, relating to providing that indemnity agreements in motor carrier transportation contracts are void and unenforceable as against public policy; and effective date.

Be it enacted by the Legislature of West Virginia: That the code of West Virginia, 1931, as amended, be amended by adding thereto a new section, designated § 24A-6-7, to read as follows:

ARTICLE 6. DUTIES AND PRIVILEGES OF MOTOR CARRIERS SUBJECT TO REGULATION OF THE COMMISSION.

§ 24A-6-7. Indemnity agreement in motor carrier transportation contracts void.

- (a) Notwithstanding any provision of law to the contrary, a provision, clause, covenant or agreement contained in, collateral to or affecting a motor carrier transportation contract entered into on or after the first day of July, two thousand six, 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) 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 paragraph (A) or (B), 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 such motor carrier.

- (3) The term "motor carrier transportation contract" shall not include the Uniform Intermodal Interchange and Facilities Access Agreement administered by the Intermodal Association of North America, as that agreement may be amended by the Intermodal Interchange Executive Committee, or other agreements providing for the interchange, use or possession of intermodal chassis, containers or other intermodal equipment.