

Managing Risk: Indemnity and Insurance

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***RISK PREVENTION:
Indemnity & Insurance Issues***



by Henry E. Seaton, Esq.

BI and PD

(Bodily Injury and Property Damage)

- A) A Motor Carrier's Liability to Third Parties for Accidents is Determined by Common Law Negligence Under State Law
- B) The Insurer's Liability to Third Party for BI and PD judgments against their insured truckers is matter of Federal Endorsement (MCS-90) and BMC 91X

C) Policy Coverage Indemnity is not Equal to Coverage Under the Endorsement

1. Petition for Clarification

- a) Until recently, several courts held the Endorsement could extend beyond Carrier's legal liability
- b) Clarification limits endorsement to financial security for judgment against truckers as originally intended

2. Important Loopholes

- a) Specified vehicle policy allows insurers to pay claims and sue insured for claims against units not identified in policy
- b) Carriers with specified vehicles must constantly and carefully document and notify insurer with each addition and deletion of units on owner-operators

D) Vicarious Liability/Negligent Entrustment -Liability for BI and PD when it is not your fault

1. Background -

- a) Arises when one carrier hires another to haul freight for its account
- b) Restricted capacity; core carrier concept; in-house brokers increase use of subcontracted services
- c) Plaintiff's bar looks for deeper pockets when losses exceed \$1 million policy limit of small carrier
- d) *Schramm v. Foster*, 2004 U.S. Dist. Lexis 16875 (D.Md. August 23, 2004); *Jones v. D'Souza*, 2007 U.S. Dist. LEXIS 66993 (D. Va. 2007); *Jones v. C.H. Robinson Worldwide, Inc.*, 2008 U.S. Dist. LEXIS 45325 (W.D. Va. June 10, 2008); *Clarendon Nat'l Ins. Co. v. Johnson*, 2008 Ga. App. LEXIS 846 (Ga. Ct. App. July 11, 2008); *Hill Brothers Chemical Co. v. Superior Court*, 123 Cal. App. 4th 1001 (Cal. App. 2d Dist. 2004)

2. Vicarious liability

- a) Prime contractor liable for acts and omissions of subcontractors
- b) Both carriers are “joint venturers” who are jointly and severally liable
- c) Non-delegable duty - California
- d) How to avoid
 - (1) get name off of bill as carrier of record
 - (2) retain subcontracting carrier through your broker affiliate - arrange for transportation, do not hold yourself out to “provide” it

3. Negligent Entrustment

- a) Take care not to hire unlicensed or uninsured carriers and to preclude double brokerage
- b) Don't make representation or warranties besides that you are FMCSA qualified
- c) Schramm v. Foster - SafeStat & assumption of duty (see Exhibit A, "A Different Point of View")

4. Standard Auto/BI and PD does not cover brokered loads

- a) When deep pocket shippers and brokers are involved/plaintiff push for in excess of limits
- b) Contingent BI and PD not readily available

5. Punitive Damages

- a) Not covered under Auto Policy/generally against public policy
- b) Violation of safety regulations used as basis by plaintiff's bar
- c) Retain independent counsel; demand settlement within policy terms!!

Third Party Indemnity/Additional Insured Issues

In Shipper and Broker Contracts:

- 1) "Arising out of" indemnity request
- 2) Shipper or Broker wants indemnity coverage for third party negligence (accident damage caused by lumpers and others)
- 3) Often shippers expect indemnity for their own negligence
- 4) Seek waiver of subrogation and cost of defense

Contracting Issues

- The two-handed pick pocket
 - Indemnity cram-down and additional insured provisions
 - Fault versus “arising out of” and “Buy me insurance”
- It is all in the details

EXAMPLE

Worker's Compensation/ "Arising out of" Indemnity

- When the shipper's dock hand runs over the truck driver
 - Driver collects worker's comp regardless of carrier's factor
 - Worker's comp is "arising out of" statute with caps on liability

- But what happens if the carrier:
 - waived subrogation; and
 - agreed to “indemnify shipper and driver then sues shipper?

Answer: It is anybody's guess

- (E.g. Condor/TN decision)

C. Horror Stories

- 1) Dog food and tow motors
- 2) Forklifts, mountain roads and glue
- 3) Trailer interchange indemnity, brokered loads and low bridges
- 4) Concentrated solutions and truckstops

How to Limit the Risk

1. Contract Review



Indemnity

Objectionable Language

“It is the express intent of the parties to this agreement that carrier will indemnify the shipper for all loss, damage and claim of any kind arising out of this contract except for shipper’s sole gross negligence.”

Acceptable Language

“Except with respect to cargo damage claims as set forth herein, each party will indemnify and hold harmless the other from all loss, liability or claims to the extent same is caused by a negligent or willful act or omission of their respective employees, agents or subcontractors in the performance of this contract.”

What’s the Difference?

- “Arising out of” language is broader than coverage afforded by additional insured language in new standard ISO endorsement
- Comparative Negligence
- Can Carrier pay for shipper negligence?
- See anti-indemnity statutes of various states

ATA/NITL Section 10

Additional Insured

Objectionable Language

"Shipper shall be included as an additional insured, with respect to the insurance policies required above. All insurance required and provided by Carrier shall be primary and any insurance maintained by Shipper shall be excess and not contributing with Carrier's insurance."

Problems

Most shippers think you are buying them indemnity covering their own negligence; most insurers don't agree. Shippers can outsmart themselves and lose their own coverage.

Acceptable Language

"Carrier warrants that it maintains personal injury and property damage insurance (\$1Mil per occurrence and cargo insurance as required by the Fed. Motor Carrier Safety Admin. (Form BMC-91X and BMC-34 on file). In addition Carrier warrants that it maintains workman's compensation insurance as required by state law and all risk cargo insurance in the amount of not less than ___per occurrence.

Note:

- If shipper insists on "additional insured" for 3rd party liability, you should exercise extreme caution, providing policy and insurers written endorsement warranting nothing about what is covered
- Watch cargo loopholes and Accord exclusions

ATA/NITL Section 5

2. Insurance Coverage

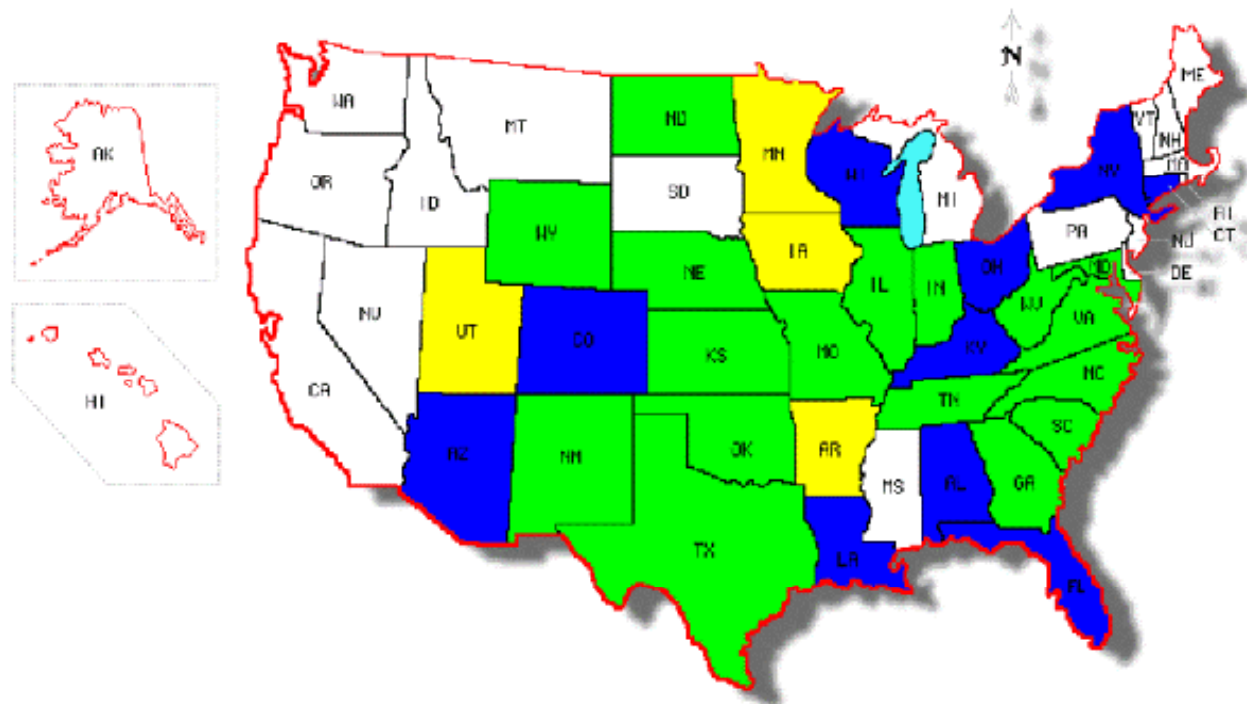
Additional Named Insured Endorsements

- Be careful
 - Does endorsement cover risk?
 - Are you getting coverage independent of your fault?
- It is all in the verbiage
- *Ask your Underwriter!*
- Get it in writing

3. Support Anti-Indemnity Legislation

Status of Anti-Indemnification Legislation

- States with Statutes
- Pursuing 2009/10
- States Considering



6-23-09

Cargo Insurance Loopholes

A. "All Risk" is misnomer - coverage is not coextensive with Carmack

B. Specified Commodity Exclusions

- 1) Traditionally limited to bullion, negotiable instruments, objets d'art and articles of high and unusual value
- 2) Now frequently includes garments, electronics, computers, etc. in broadly described terms

C. Theft Exclusion - Aimed at denying coverage for \$60 billion in annual losses

- 1) Unguarded lot exclusion
- 2) Unattended vehicle exclusion
- 3) Locked truck or guarded lot requirement

D. Temperature damage, rust and moisture exclusions

- 1) Trumps refrigerated damage claims/reefer breakdown coverage of limited help
- 2) Trumps flatbed claims for rusted steel, machines or wet lumber (packaging requirements can also exclude tarped load claim)

E. Upset, Accident, Occurrence Language

- 1) Can limit coverage to accident or rollover
- 2) Shortage or upset in transit without a wreck can be denied

F. Co-insurance Provision

- 1) Operates to deny full policy limits on "under insured loads"
- 2) Under co-insurance a policy with \$100,000 face value will pay only \$20,000 of a \$100,000 partial loss on shipment worth \$500,000
- 3) Release rates and co-insurance - the result is in doubt

Manuscript Policies

1) Standard Endorsements

a) Tarps

b) Refer breakdown

2) Negotiated changes

3) Multiple "forms"

Avoid Contractual Potholes

- Do not waive Carmack
- Do not agree to “shipper’s sole discretion” to mitigate (e.g. Reject it, Crush it and Dump it)
- Do not agree to offset
- Do not agree to “special and consequential damages”
- Insist on released valuation in contracts and rules circulars (e.g. D&M and KLLM)

BEST PRACTICES

- A. Purchase insurance based on quality, not just price
- B. Put insurance out to bid using only qualified agents (agents/brokers owe carriers a duty of expertise and diligence)
- C. Use RFP describing needs and operations and requiring express statement of exclusions at time of presentation from agent addressing issues in RFP

- D. Don't rely on binders or Acord Certificates - they are worthless
- E. Demand specimen policies and review before purchase (require inclusion of all endorsement and riders)
- F. Establish corporate policy on subcontracting with regard to vicarious liability

G. Establish policy on contractual indemnity in contract:

"Except with respect to cargo damage claims as set forth herein, each party will indemnify and hold harmless the other from all loss, liability or claims to the extent same is caused by a negligent or willful act or omission of their respective employees, agents or subcontractors in the performance of this contract."

H. Additional Insured

- 1) Do not inadvertently vitiate coverage
- 2) Do not warrant coverage you do not have
- 3) Responsible insurers will review insurance requirement provision on shipper/broker contract and advise you on coverage issues
- 4) Rely on insurer's written analysis, give shipper what you've got. Any additional coverage purchased to meet particular customer needs should be recoupable in rate increase for term of contract.



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Mr. Seaton writes a monthly column on transportation for Commercial Carrier Journal and is current chairman of the Federal Agency Practice Committee of the Transportation Lawyers Association. He serves as commerce counsel for Compunet Credit Services and the National Association of Small Trucking Companies. He was the Delta Nu Alpha Transportation Professional of the Year in 2001 and is a frequent speaker and lecturer at credit and collection seminars. He can be reached at HESeaton@aol.com. For articles and other information, please see www.transportationlaw.net.

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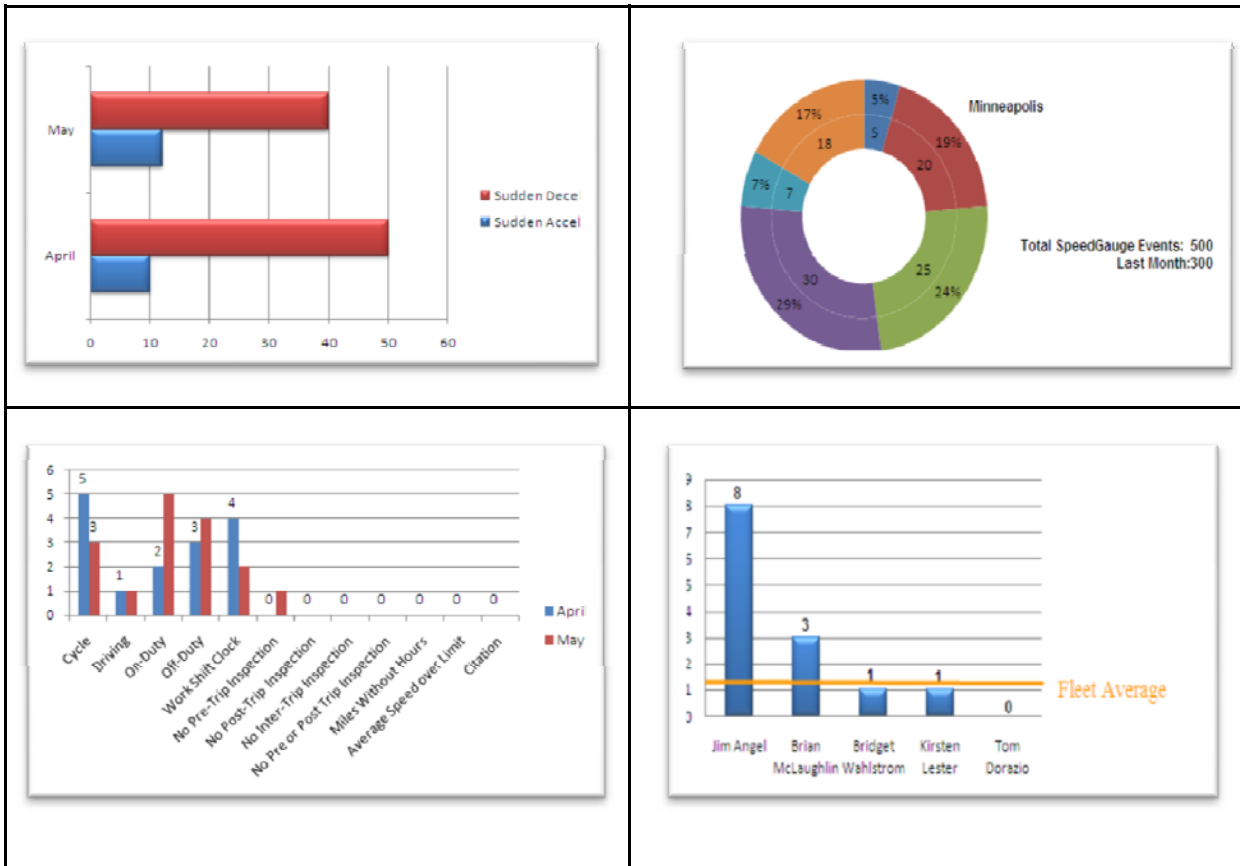
Coaching and Monitoring Driver Behavior to Avoid Risk is a “Have To” In Tough Economic Times

“To change behavior you have to change the way they think”

(How to Change Mass Behavior by Harnessing Our True Nature by Mark herd)

- Key modules include, HOS, Onboard event recording, Over Speed, Over RPM, GPS Location (secure parking), Speed Events vs Posted Speed Limit,
- Using data collection validates continued improvement in all risk areas
- You have to show the driver the areas of needed improvement to ask them to change
- Driver Quote: “Nobody ever told me what they needed me to do”

Putting It All Together; Safety Dashboard



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