Blog by Tommy Ruke, The King Pin – Leading Expert in Truck Insurance

ANTI-INDEMNIFICATION/CONTRACTUAL/ADDITIONAL INSURED

I want to again thank Jean Gardner of CAB for providing valuable information in her "Bits & Pieces". These are a must read if you are providing insurance to motor carriers. The website is: thecabadvantage.com.

From the November 29, 2016 issue (Volume 19, Edition 11):

> **ANTI-INDEMNITY STATUTES** – New York joined the majority of states which have impacted the ability of shippers to require indemnity from motor carriers. New York now precludes provisions in contracts that provide for shippers to be indemnified for losses caused by their own negligence and make those provisions void and unenforceable. Affected contracts in New York are defined as "a contract, agreement, or understanding" between a motor carrier and a shipper covering the transportation of property for compensation or hire by the motor carrier, entry on property to load, unload, or transport property. The protection does not apply to intermodal chassis, containers or other intermodal equipment. The new law took effect immediately. To date, 45 states forbid unfair provisions from contracts. New Jersey was added to the list on Nov. 1. The only states yet to adopt protections are Delaware, Mississippi, New Hampshire, Rhode Island and Vermont.

What does this mean? Our insureds sign contracts/agreements with their shippers. Most contracts contain indemnification clauses where the motor carrier agrees to hold the customer harmless if damage is done to the public including employees of the customer and the motor carrier while performing the duties of the contracts.

In the Auto Liability coverage form the definition of "insured contract" would require the insurance provider to comply with the indemnification clause contained in the contracts signed by our insured. The General Liability coverage form would also consider the agreement an "insured contract" unless the insurance provider added an endorsement to remove or modify the broad form contractual provision.

Why are the anti-indemnification laws so important to the insurance provider and the insured? The insured signs contracts with indemnification provisions that agree to hold their customers harmless agreeing to pay for damages even

caused by the customer's negligence while completing the requirements of the contract. The contract would be considered an insured contract under AL and GL (again, if not modified or excluded by endorsement).

Anti-indemnification laws provide protection to the insured and the insurance carrier for the customer's requirement of holding the customer harmless for the negligence of the customer when enforced in one of the 45 states with the law. The insured calls up their insurance agent and says, "I have an opportunity to haul for this customer and they require me to send them proof of my coverage." Meeting the insured's customer's request for proof of insurance is the most use of the policy. (For additional information, there is a White Paper on the transportationriskspecialist.com site.)

Typically, there is something in writing from the customer that outlines their requirements. As the agent, you need to ask for the information from the customer that spells out their insurance requirements. Often, this is in the contract the insured signs to haul for the customer.

When reviewing the contract there are four parts you need to focus on – The first paragraph that says who the parties to the contract are as well as their addresses, the insurance requirements, the hold harmless/indemnification clause and lastly the venue where any dispute in the contract would have to be adjudicated and what state laws it will be enforced under. Note - It is not necessarily the state the contract was signed in or where work would be performed.

If the state law the contract will be enforced under is one of the 45 states, it would still be an insured contract and the insurance coverage would respond to the customer asking the insured to honor the agreement, but there would typically be no exposure because the state anti-indemnification statute would find the agreement against public policy.

The difference between making a customer an insured and the indemnification provision in the contract is often misunderstood. The BACF and the MCCF contain in the Who Is An Insured provision, "anyone liable for the conduct of an 'insured' described above but only to the extent of that liability" qualifies as an insured. This is blanket additional insured. There is no need to add endorsements to the policy to grant customers of our insureds "insured status". ISO's CA2048 – Designated Insured and other additional insured endorsements carriers have developed all have the following wording:

> Each person or organization shown in the schedule is an "insured" for covered auto liability coverage, <u>but only</u> to the extent that person or

organization qualifies as an “insured” under the Who Is An Insured provision.

So all the endorsements do is confirm that the person named in the endorsement is an “anyone”. As our friend, Rob Moseley says, “that person or entity who is named makes no difference – It can be everyone in the universe.” What triggers status as an insured is the customer being held vicariously liable for the actions of the motor carrier and the driver, not the name on the endorsement. An example is the customer has responsibility to load the trailer in a “drop and hook” operation. In other words, the driver has no involvement in loading. After picking up the trailer and while driving down the highway, the trailer turns over. A suit is filed by “someone” that got injured due to the turnover naming the motor carrier, the driver and the customer. If the trailer turned over because the driver was going too fast through a curve, then the customer would be defended and included in any settlement under the policy covering the power unit pulling the trailer because the reason the customer was named was because of the negligence of the driver. But if the reason the trailer turned over was because the customer loaded the trailer wrong and the load shifted causing the trailer to turnover, the customer would not be an insured under the AL policy covering the auto because with these facts the customer was named in the suit not because of the driver’s actions but because of the shipper’s negligence loading the trailer so coverage is denied to the customer. When the customer received the suit from the people that the trailer that turned over because of the improper loading and damaged the plaintiff, the customer then looks at the contract the motor carrier signed and if the contract held the motor carrier harmless even for the customer’s negligence, they would then call on the motor carrier to honor the provision of the contract.

If the contract was to be enforced under one of the state laws in a state with the anti-indemnification, then it would not be enforceable. But if the contract was to be enforced under the state laws of Delaware, Mississippi, New Hampshire, Rhode Island and Vermont, the insurance carrier would have to honor the agreement because it is an insured contract.

When providing insurance to any insured, particularly a motor carrier, it is important to know how the policy being provided addresses the requirements of their customers, to add the customers as additional insureds, to meet the hold harmless or indemnification agreement provisions of the contract the insured enters into to haul for their customers. I often make the statement, “there is more exposure within the contracts our insureds sign than adding a customer as an insured,” but if the contract will be enforced in a state with an anti-indemnification statute, then the exposure has been lessened or completely removed.