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# InterConnect

A PUBLICATION OF BENESCH FRIEDLANDER COPLAN &amp; ARONOFF LLP'S TRANSPORTATION &amp; LOGISTICS GROUP

## More States Adopting Anti-Indemnity Statutes Governing Transportation Agreements

Traditionally, motor carriers, 3PLs and shippers have used contracts to set forth their understandings and govern their business relationships clearly. As part of the contract negotiation process, the goal is often to shift the risk of liability from one party to the other, the degree of which depends upon each party's situation and bargaining strength.

In nearly all cases, one extremely hot-button issue during these negotiations is the indemnity provision, which purports to obligate one party to assume the liability of the other party for specific types of claims arising from the contract. Sometimes, these obligations only kick in to the extent the damages are caused by the indemnifying party's negligence. Oftentimes, however, these obligations are much further-reaching and require one party to assume liability for the other party, even when it is not at fault.

For instance, sometimes motor carriers will agree to indemnify the shipper for any and all claims for injury, death or damage arising out of the performance of the agreement. This is an extremely broad statement, making the motor carrier liable for all claims filed, whether they were caused by the motor carrier's own acts or negligence, or by the shipper's own acts or negligence, or by a combination of the two. Under this scenario, the motor carrier could be liable for damages even if it bears no degree of fault for the claim.

Sometimes, the parties will agree to soften this indemnity provision just a bit, carving out an exception to the motor

carrier's indemnity obligations in cases where the shipper is "solely" at fault. In other words, the shipper only accepts liability for the damages it caused if it is the only party at fault; otherwise, the motor carrier must accept all liability, even if it is only 1% at fault.

The result of these types of indemnity provisions is an often inequitable arrangement, where one party bears all, or nearly all, of the liability, even if the vast majority of the fault lies elsewhere.

Many state legislatures have begun to recognize these contractual inequities, realizing that often one party may not be in a position to fight the inclusion of such a provision. Over the past few years, more and more states have passed anti-indemnification legislation in an attempt to help level the playing field for the parties involved. At least 16 states have passed some form of legislation making specific types of indemnification provisions unenforceable, including: Illinois, Indiana, Kansas, Maryland, Missouri, Nebraska, New Mexico, North Carolina, North Dakota, South Carolina, Tennessee, Texas, Virginia, West Virginia and Wyoming. Two additional states recently passed similar legislation: Alaska's new statute is effective August 26, 2010, while Washington's new law became effective June 10, 2010.

The language of these statutes varies widely. Some states, such as Missouri and Illinois that simply prohibit indemnity provisions in contracts that allow the indemnified party to escape

any liability for damages resulting from its own negligence. Other states have much more specific language. For example, Indiana only permits the motor carrier to indemnify the shipper "to the extent of loss or damage that results directly from the negligence, omission, or intentional act of the motor carrier...." Washington's new statute also has very specific language, which voids any provision that has the effect of indemnifying a party for their sole negligence. Washington does allow indemnification provisions so long as the indemnifying party is only liable to the extent of its own negligence.

Companies should carefully consider which state's law they want to govern their transportation contract. In light of these new statutes, parties entering into transportation agreements would be wise to read the relevant statute thoroughly in order to craft an indemnification provision that encompasses not only the parties' mutual understanding, but also that state's permitted indemnification terms.

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# Making the Case for Global Trade Management Software

Today, companies have many different options for global trade management (GTM) software. Finding the right software is not the challenge as much as creating an effective return on investment proposal that will convince senior management to add GTM software to the annual budget.

Every day we read about more regulations, new fines and increased involvement by other government agencies (OGAs). If you are an experienced importer who needs to automate your import security filings (10+2) or is venturing into exportation for the first time, technology is your answer.

Visionary companies can take software investments and make them catalysts for strategic activities such as new sourcing initiatives. Heading into uncharted territory can produce duty and transit time savings, but at the same time expose your company to increased U.S. Customs (CBP) scrutiny. Companywide access to real-time data and dashboard visibility are major points to highlight on your proposal. However, many other benefits also need to be emphasized.

**System integration:** Integrating internal software can reduce the labor costs of redundant data entry and manual report creation from multiple sources. Sharing real-time supply chain information throughout the company with integrated systems streamlines internal business processes. Ask your GTM software representative if his or her system has been deployed with your enterprise resource planning and warehouse management software. If so, get references to verify how well they actually do integrate.

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**Supply chain visibility:** Global real-time visibility, combined with event management, alerts associates to potential problems, allowing them to take corrective action. Management can

access exception reporting to analyze supplier and service provider performance. In the event of catastrophic disasters such as

tsunamis and volcanoes, you can quickly identify shipments in jeopardy. Creating a financial report for monthly inventory in-transit can be a simple task versus a several hour project.

**Internet collaboration:** Your vendor base can securely access your purchase order information, providing a simple vehicle for data exchange instead of relying on e-mail communications. E-mails will require the reader to take action with a manual process. Purchase order revisions and price reductions for delivery delays or quality can be completed at the point of origin, and an auto e-mail alert can be sent to required parties notifying of the change. This process will reduce manual error on documentation, which will limit the potential of liquidated damages on import security filings (10+2).

**Intelligent sourcing:** During the sourcing process, companies must consider factors such as accurate landed costs (including duties, fees, transportation expenses, assists and royalties). Some programs can determine qualification for trade preference programs based on your bill of material costs and country of origin. GTM software will provide product databases where you can include specifications, photographs, carton sizes, harmonized tariff number and any details.

**Process automation:** Today's volume of information and the speed of your supply chain make it impossible for companies to continue achieving cost-effectiveness and accuracy by relying on manual procedures and spreadsheets. The most innocent error in a single document can cause far-reaching consequences. Automating manual processes, especially trade compliance, is a necessity with the changing export and import requirements.

## **Simplified recordkeeping:**

Recordkeeping regulations require exporters and importers to retain documentation for five years. GTM software simplifies electronic internal controls and optical document retention procedures. Liquidated penalties from CBP can range from \$10,000 to \$100,000 per entry. With digital technology, finding documents requested by CBP can be relatively easy with built-in audit trails and document imaging storage.

Your challenges in global sourcing can be addressed by both process improvements and the application of the right technology. The appropriate solution can provide global companies with software applications that automate, streamline and manage the export and import process. Even if you are a small or mid-sized company, most systems are modular, so you can start small and build on your GTM investment.

Benesch can assist your company with the selection, procurement and implementation of your global trade software investment.

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## Self-reporting Strategies

Most of us have been taught that coming forward and “telling” when you have done something wrong is good. U.S. Customs has developed a Prior Disclosure Provision. The provision relates to self-reporting by an importer who has become aware that it has violated import laws and regulations. The key is that the importer must disclose the violation before Customs discovers and notifies the company that they are investigating the violation. Therefore, if you learn of a materially false statement or omission on your importation documentation, it is important to report the error as quickly as possible.

For example, if there has been an inadvertent undervaluation of merchandise, self-reporting will serve to reduce or eliminate the penalties resulting from the error, so long as the self-reporting takes place before a formal

investigation of the violation begins. Penalties can even be reduced to “zero” if the importations involve unliquidated entries and there is no evidence that the error was really the result of fraud.

If the entries are liquidated and no fraud is involved, the penalty is the interest on the loss of duties. If a fraudulent violation is disclosed, the penalty is reduced from the normal assessment of the domestic value of the goods at one (1) times the duty loss; or if the violation involves no duty loss, the penalty is reduced to 10% of the dutiable value of the merchandise.

Customs' Prior Disclosure Provision can be used in the event that the misreporting resulted in an incorrect duty assessment, even if the error comes to light based on a notice from Customs *as long as the notice relates to a single shipment and does not relate to multiple entries.*

The Prior Disclosure Provision can still apply to other earlier shipments not then under investigation. Accordingly, after receiving a notice from Customs, an importer should immediately research all prior importation of the product and determine when and how the error first surfaced. As an importer, you will want to include all prior instances in your report with specificity, so it is clear that any penalties will be governed by the Prior Disclosure Provision. In addition, you will need to calculate the effect of the error, including any increase on duties and/or interest, so the increased amount can be tendered at the time self-disclosure is made. Just remember, time is of the essence, and once you are notified of an investigation, you can no longer benefit from self-disclosure—so investigate and prepare your self-disclosure quickly.

For more information please contact Mary Bianchi at [mbianchi@beneschlaw.com](mailto:mbianchi@beneschlaw.com) or (239) 985-9776.

## Recent Events

Martha Payne and Eric Zalud attended the **Air Cargo Conference** in Orlando, FL, on March 14–15, 2010.

Marc Blubaugh presented the inaugural Webinar for the **Transportation Lawyers Association** on *Enforceability of Limitations of Liability in Transportation Contracts* on March 26, 2010.

Martha Payne and Eric Zalud attended the **Transportation Intermediaries Association Conference** in Tucson, AZ, on April 8–10, 2010. Eric spoke on a panel on *Logistics CEO Concerns*.

Martha Payne was on the panel *Transportation & Logistics Contracts Best Practices* and Eric Zalud spoke on a panel on *Food Transport Security and Salvage* at the **Transportation Loss Prevention/Transportation and Logistics Council Annual Conference** in San Diego, CA, on April 18–20, 2010.

Teresa Purtiman attended the **National Private Truck Council 2010 Annual Education Management Conference and Exhibition** in Cincinnati, OH, on April 18–20, 2010.

Marc Blubaugh moderated and spoke on a panel on *Loss and Damage Claims—Best Practices* at the **Transportation Logistics Council's 36th Annual Conference** in San Diego, CA, on April 21, 2010.

Eric Zalud, Marc Blubaugh, who attended as the Educational Program Chair, and Martha Payne attended the **Transportation Lawyers Association Conference** on Hilton Head Island, SC, on April 27–May 1, 2010. Marc was elected Secretary/Treasurer of the TLA and received the Distinguished Service Award. Eric also attended the Executive Committee meeting of the TLA.

Mary Bianchi attended the **American Apparel & Footwear Association Conference** in Miami, FL, on May 5–7, 2010.

Mary Bianchi attended the **American Association of Exporters & Importers 89th Annual Conference & Expo** in New York, NY, on June 6–8, 2010.

Eric Zalud attended the **Terralex European, Middle East and African Conference** in Rome, Italy, on June 9–12, 2010.

Teresa Purtiman attended the **Eyefortransport 2010 3PL Summit** in Atlanta, GA, on June 21–23, 2010.

Marc Blubaugh presented *Brokering Freight: Do's and Don'ts* at the **International Warehousing & Logistics Association's Annual Legal Symposium** in Chicago, IL, on June 23, 2010.

Eric Zalud and Marc Blubaugh attended the **ATA Motor Carrier General Counsel Forum** in Monterey, CA, on July 26–28, 2010.





## Benesch/Ahern Transportation Conference

On May 25, 2010, **Benesch and Ahern & Associates** hosted a **Transportation & Logistics Conference** in Phoenix, Arizona. Attendees obtained practical tips and recommendations regarding mergers, acquisitions, recapitalization and restructuring in the transportation and logistics industry. Benesch attorneys moderated and participated in a variety of panels on various transportation topics.

## On the Horizon

**Richard Plewacki** will be presenting *Essential Concepts for Protecting Your Independent Contractors Status* at the **Independent Contractors Division Meeting** in Dallas, TX, on August 26 and 27, 2010.

**Eric Zalud** will be attending the **Arkansas Trucking Conference** in Fogelsville, AR, on September 15–17, 2010.

**Marc Blubaugh** will be speaking at the **2010 Freight Claims Management Webinars, Recent Developments in Freight Claims Law & Reality** on September 23, 2010.

**Eric Zalud** and **Martha Payne** will be attending the **Canadian Transportation Lawyers Association Annual Conference** in Vancouver, Canada, on September 23–25, 2010.

**Eric Zalud** will be attending the **Terrelex Annual General Meeting** in Washington, D.C., on September 29–October 3, 2010.

**Marc Blubaugh** will be presenting a legal update to the **International Warehouse Logistics Association** at a Regional Conference in Columbus, OH, on October 14, 2010.

**Marc Blubaugh** and **Eric Zalud** will be attending the **Transportation Law Institute** in Kansas City, MO, on October 22, 2010, where Eric will speak on *Ethical Considerations and Conflicts of Interest*.

**Eric Zalud** will be speaking at the **Trucking Industry Defense Association (TIDA) Conference** in Orlando, FL, on November 8–10, 2010 on the *Expansion of Carrier Selection Personal Injury Liability*.

**Eric Zalud** will be attending the **TIA/NITL/IANA Conference** in Fort Lauderdale, FL, on November 13–16, 2010, and speaking on *Logistics Industry Problems and Solutions*.

For further information and registration, please contact Megan Pajakowski, Client Services Manager at [mpajakowski@beneschlaw.com](mailto:mpajakowski@beneschlaw.com) or (216) 363-4639.

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### Help us do our part in protecting the environment.

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