THE INTERSTATE COMMERCE ACT AND THE ALLOCATION OF THE RISK OF LOSS OR DAMAGE IN THE TRANSPORTATION OF FREIGHT

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Common carriers of property, which are now governed by the Interstate Commerce Act,[1] have been subjected to a high standard of care by that statute as well as the common law. Between the shipper and the carrier who has undertaken to carry the goods for compensation, the burden of the risk of loss has been placed on the carrier. Although the carrier's liability is not absolute, the areas of its liability are extensive.[2]

To reduce the effectiveness of this harsh doctrine of liability carriers have historically attempted to limit their liability and to shift or allocate the risk of loss.[3]

The devices utilized have varied and often been ingenious. They have not merely involved the shipper - carrier relationship, but have extended into the relationship between carriers themselves when multiple-carrier service or facilities were involved.

This article will examine the standards of liability and two of the most common and interesting devices utilized to allocate the risk of loss, i.e., "benefit of insurance" and "hold harmless" clauses.

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1. 24 Stat 379 (1887), 49 U.S.C. 1 et seq., hereinafter referred to as "ICA". The law concerning carrier liability for air carriers and carriers of goods by sea have developed independently from carriers governed by the ICA resulting in significant variations in both the allowable exemptions from liability and the limitations of liability applicable to each mode of transportation.

2. For a discussion of the subject of carrier liability see Skulma, "Liability of a Carrier for Loss and Damage to Interstate Shipments", 17 Cleveland Marshall L. Rev. 251 (1968).

3. Shippers have also attempted to make the carrier an absolute insurer of carriage. In *National Tank Truck Carriers, Inc., Petition for Declaratory Order -Hold Harmless Agreement, No. 35501*, 1973 CCH Fed. Car. Cases Par. 36,702, for example, the shipper attempted to condition its tender of freight on the motor carrier's willingness to sign a hold harmless agreement exempting the shipper from any liability for loss or damage to the goods. The agreement was found to violate Section 217(b) of the ICA, 49 U.S.C. 317(b) as a preferential treatment in the form of a concession or rebate.

Liability Under the Common Law

Under the common law, common carriers of property were regarded as insurers of safe carriage except for losses resulting from an act or default of the shipper, or owner of the goods, an act of God, the public enemy, or public authority, or a loss due to a defect or vice in the goods.[4]

To avoid or reduce their liability, the carriers frequently provided in their contract of carriage for an exemption from liability or for the limitation of liability to an agreed value.

Except where the common carrier attempted to exempt itself from liability for its own negligence, limitations such as those above were upheld if they were just and reasonable.[5]

In *Pennsylvania Railroad* v. *Hughes,*[6] however, the Supreme Court held that a state had the right to require a common carrier to be liable for the full value of goods which were lost or damaged despite the existence of a special contract limiting the carrier's liability to a stated amount or agreed value.

The above decision and the diversity of approaches taken by the states on the subject matter[7] ultimately led to the enactment of the Carmack Amendment.[8]

The Carmack Amendment

When the ICA was initially passed in 1887, it contained no provision concerning the liability of carriers for loss or damage to goods and carriers were not prohibited from exempting themselves from or limiting their liability.[9]

4. See *Secretary of Agriculture* v. *United States,* 350 U.S. 162 (1956) and *J&H Flyer, Inc.* v. *Pennsylvania R.R.*, 316 F. 2d 203 (2 Cir. 1963). For a general discussion of common law liability see Lust, *Loss and Damage Claims* (2 Ed. 1919).

5. *Railroad Co.* v. *Lockwood,* 17 Wall (U.S.) 357 (1873). Some early cases even allowed a carrier to contract out of negligence liability. 1 Hutchinson, Carriers Sec. 450-451 (3 Ed. 1906).

6. 191 U.S. 477 (1903).

7. For example, compare *Moulton* v. *St. Paul M.&M. Ry. Co,* 31 Minn. 85, 16 N.W. 497 (1883) with *Kansas City, St. J. & C.B.R. Co.* v. *Simpson,* 30 Kan.645, 2 Pac. 821 (1883).

8. 34 Stat. 595 (1906), 49 U.S.C. 20(11). The Carmack Amendment is expressly applicable to motor carriers and freight forwarders. 49 U.S.C. 319, 1013.

9. For a legislative history of the ICA see Miller, *The Legislative Evolution of The Interstate Commerce Act,* (1930 Ed.) and 1 Knorst, *Interstate Commerce Law and Practice,* 51-200 (1953 Ed.)

The *Carmack Amendment,*[10] passed in 1906 as part of the *Hepburn Act,* specifically prohibited all exemptions from liability by contract or rule and made the receiving carrier liable for any loss or damage caused by it or by any connecting carrier to which the property might be delivered.[11]

Carriers were later made liable for the "full actual loss or damage or injury" to property by the Cummins Amendment[12] enacted in 1915. This legislation also added a proviso for goods hidden from view when the carrier was unable to determine the character of such freight. In such instances, the shipper could be required to state the value of the freight and the carrier was relieved from liability beyond the stated amount or released value.

This exception for released value is no longer limited to goods hidden from view and a carrier can limit its liability if the carrier and shipper have agreed upon a released rate and that rate has been approved by the Interstate Commerce Commission as part of the carrier's tariff.[13]

Except for the limited statutory exclusions discussed above, the originating carrier and delivering carrier on a movement on a thru bill of lading are liable to the lawful holder of the bill of lading or delivery receipt or any party entitled to recover thereon, for the full actual loss, damage, or injury to the property being transported caused by it or any common carrier, railroad, or transportation company on which line the property moved. The statute specially provides that no contract, receipt, rule, regulation or other limitation of any character shall exempt the carriers from such liability.[14]

The bill of lading governing the legal relationship between the carrier and shipper also normally embraces the common law exemptions from liability providing that the carrier shall not be liable for loss of damage cause by an act of God, the public enemy, authority of law, an act or default of the shipper or owner, natural shrinkage, or losses resulting from a defect or vice in the property shipped.[15]

To estsblish liability under the *Carmack Amendment*, a shipper

10. See f.n. 8.

11. Despite this the Supreme Court in *Pierce Co.* v. *Wells Fargo & Co.*, 236 U.S. 278 (1915) permitted to limit its liability to $50.00 on a $15,000.00 carload of automobiles, though the carrier knew what was in the railroad car.

12. 38 Stat 1197 (1915), as amended, 49 U.S.C. 20(11).

13. 39 Stat 441 (1916), as amended, 49 U.S.C. 20(11).

14. ICA Sec. 20(11), 49 U.S.C. 20(11).

15. Miller, Freight Loss and Damage Claims, 32-33 (2 Ed. 1961)

may proceed against either the receiving or delivering carrier[16] and in most instances need prove only that the shipment was tendered in good condition to the initial carrier and either was not delivered, delivered short, or delivered damaged. Such a showing establishes *prima facie* liability.[17]

Insurance As A Method of Allocation

Because carrier liability is not absolute and because the amount of damages sustained is always a potential issue,[18] most shippers are insured against loss or damage to their property while being transported.

Carriers are also required to be insured for cargo losses and furnish evidence of such insurance or evidence of self-insurance to the ICC.[19]

As a result, litigation concerning cargo loss is most frequently carried on between insurers rather than between carriers and shippers.

One area of considerable litigation has involved attempts by carriers to limit their liability to the extent of the amount that a shipper has been compensated for his loss by his insurance carrier.

Carriers have attempted the above by inserting in the bill of lading a provision giving the carrier the benefit of insurance effected upon the shipment.[20]

The validity of such benefit of insurance clauses under the common law was established and if the carrier was given the benefit of the insurance available the shipper, the insurer lost its right of subrogation.[21]

Many insurance companies attempted to counter the practice by

16. See statute cited note 14 *supra*. Under the common law, the initial carrier was not liable for damage not occurring while in its possession. *Goliger Trading Co. of N.Y.* v. *Chicago & N.W. Ry. Co.*, 184 F. 2d 876 (7 Cir. 1950).

17. *Missouri Pac. R. Co.* v. *Elmore and Stahl*, 377 U.S. 134 (1964) reh'g. den., 377 U.S. 984 (1964). The theory behind this principle is that the relationship between the shipper and carrier is basically "bailor-bailee" and the carrier as bailee is in a better position to know the reasons for damage.

18. See Miller, *op cit, supra*, note 15, Chap. V, 522-808.

19. Section 215 ICA, 49 U.S.C. 315. See also Surety Bonds and Policies of Insurance, 49 C.F.R. Part. 1043.

20. A typical clause would read: "Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property."

21. *Phoenix Ins. Co.* v. *Erie and Western Trans. Co.*, 117 U.S. 312 (1886); *Luchenback* v. *McCahan Sugar Ref. Co.*, 248 U.S. 139 (1918); and *Great Lakes Transit Corp.* v. *Interstate SS. Co.*, 301 U.S. 646 (1937).

providing that the insurance would be void if the insured shipper entered into an agreement giving the carrier the benefit of such insurance.

When faced with both provisions, the courts held that both agreements were ineffective with the result that the carrier received nothing and the shipper also failed to receive the insurance proceeds.[22]

The carriers then amended their bills of lading to provide that they would have the benefit of the shippers' insurance "so far as this shall not avoid the policies or contracts of insurance."[23] Thus, if an insurance company neglected to provide that the policy would be void if the carrier received the benefit of the shipper's insurance, the carrier received the benefit of such insurance.

Benefit of Insurance Clauses Under the ICA

Although benefit of insurance clauses were valid under the common law, there is and has been some question of their validity under the ICA.

In *China Fire Insurance Co.* v. *Davis*[24] the benefit of insurance provision in the bill of lading was held to be void as an unlawful discrimination prohibited by Section 2 of the ICA[25] This provision of the ICA prohibits a carrier from receiving from any person, directly or indirectly, a greater compensation for transportation of property than it receives from any other person for a like and contemporaneous service under similar conditions.

In the *China Fire* case, the insurance company was suing to recover money remitted by the insured shipper to the rail carrier. The shipper and the carrier had entered an agreement whereby the carrier agreed to pay the shipper for its loss if the shipper them filed a claim against its insurer, attempted to collect from the insurer, and remitted the amount collected less the cost of collection to the carrier. This was done without the knowledge of the insurer who paid the claim.

Judge Learned Hand, writing for the Court, found that since the shipper was free to insure the carrier or not, as he chose, the insurance was "compensation" within Section 2 of the ICA since it had a present value aside from whether it cost anything to the shipper.[26]

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22. *Fayerweather* v. *Phenix Ins. Co.*, 118 N.Y. 324, 23 N.E. 192 (1890).
23. See clause set forth in *China Fire Ins. Co.* v. *Davis*, 50 F. 2d 389, 390 (2d Cir. 1931), *cert. den.*, *Mellon* v. *China Fire Ins. Co.*, 284 U.S. 658 (1931).
24. Ibid.
25. 49 U.S.C. 2.
26. *China Fire Insurance Co.* v. *Davis*, 50 F. 2d at 392.

In a somewhat similar factual situation, the Eighth Circuit in *National Garment Co.* v. *New York & St. L.R. Co.*[27] also held that the "benefit of insurance" clause violated Section 2 of the ICA.[28] The case is of interest because the rail carrier attempting to overcome the claim of discrimination which arose in the *China Fire* case inserted a provision in its bill of lading which required the carrier to reimburse the shipper for the cost of the shipper's insurance.[29] The Court, however, decided that this modification did not warrant a change in the *China Fire* finding.

The Court found that insurance for the benefit of a carrier is of value to the carrier from the beginning of the transportation and the value is received irrespective of whether a loss occurs and thus the carrier receives the compensation forbidden by the Act at the expense of the shipper.

Addressing itself to the reimbursement procedure, the Court further stated:[31]

> In the event of loss the carrier, if it so elects, returns to the shipper the cost of the compensation [the premium] which it was forbidden by the Act to receive in the first place, avoids its liability as a carrier, and deprives the insurer of its rights under a valid contract.

The judiciary, however, has not been unanimous in finding benefit of insurance clauses illegal. In *Home Ins. Co.* v. *N.P.R.Co.*,[32] the Supreme Court of Washington refused to follow the *China Fire* case.

The Court found that a carrier did not render service to a shipper at any less rate than the regularly published tariff rate charged all shippers by becoming the beneficiary of any shipper's insurance. The Court noted that the insurance was not given or received as compensation for service, but merely to reimburse the carrier for what it had paid to shipper.[33]

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27. 173 F. 2d 32 (8 Cir. 1949).
28. 49 U.S.C. 2
29. The proviso read ". . . . Provided, that the carrier reimburses the claimant for the premium paid thereon." 173 F. 2d at 33. The clause was the same as provided in the Uniform Bill of Lading adopted by the Interstate Commerce Commission for use in domestic transportation by rail carriers subject to the ICA. See *In re Bills of Lading*, 52 I.C.C. 671 (1919) and 64 I.C.C. 357 (1927)..
30. 173 F. 2d at 38.
31. Ibid.
32. 18 Wash. 2d 798, 140 P2d 507 (1943).
33. 18 Wash. 2d at 809.

The Court felt it logically followed that if a carrier can secure insurance from an insurer to protect itself against loss, it can be the beneficiary of such insurance by contract with the shipper.[34]

The Seventh Circuit, in *United States* v. *Auto Driveaway Company*,[35] has also upheld the validity of benefit of insurance clauses. This case involved a motor common carrier engaged in driveaway services[36] and thus the Court construed such clauses in light of Section 216(d) of the ICA.[37]

Section 216(d) provides that all charges for services rendered by motor common carrier shall be just and reasonable and that every unjust and unreasonable charge for such service shall be unlawful. Similarly, it is unlawful for any such common carrier to make, give, or cause any undue or unreasonable preference or advantage to any person or geographical entity or to subject such person or geographical entity to any unjust discrimination or any undue or unreasonable prejudice or disadvantage.

The government contended that the benefit of insurance clause operated to give an unlawful preference to non-insured owners, since the carrier's insured owners paid the cost of transportation and the premium for insurance if their car was not involved in an accident while the non-insured paid only the transportation cost.

The Court found that no preference was granted uninsured motorists in the wording of the clause. No insurance was required of any shipper and all shippers were charged the same tariff rate. It was also noted that the clause presupposed the customary owner's liability insurance which the owners would carry even if the carrier's services were not used.[38]

The *China Fire* and *National Garment* cases were distinguished. It was noted that, while Section 2 prohibited "greater compensation" to the carrier, Section 216(d) prohibited "unjust and unreasonable"

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34. Ibid.

35. 464 F. 2d 1380 (7 Cir. 1972).

36. Driveaway service consists of the transportation of automotive units under their own power, and also the towing or hauling of additional units by the use of tow-bars, saddle mounts, and full mounts. *George F. Burnett Co., Inc., Ext.-Maine and Other States,* 22 M.C.C. 663, 664, (1940).

37. 49 U.S.C. 316(d). The clause was also challenged as being a device whereby the carrier-defendant sought to avoid liability under Section 20(11) of the ICA, 49 U.S.C. 20(11). This argument was rejected on the basis that the benefit of insurance clause presupposed the carrier's liability for the "full" loss in conformity with Section 20(11) and only became effective on that basis. 464 F. 2d at 1382-1383.

38. 464 F. 2d at 1385.

charges and "undue and unreasonable preferences."[39]

The Court also noted that in *National Garment* and *China Fire* the insurance was purchased primarily to cover the shipping of the lading whereas in the factual situation before it, the shippers purchased insurance primarily to cover the use of the vehicle and not the shipping of the vehicle.[40]

The distinctions made by the Court in the *Auto Driveaway* case might be thought by some as ones without significant differences. In *Salon Service, Inc. v. Pacific & Atlantic Shippers, Inc.*, for example, the New York Court of Appeals found a benefit of insurance clause in a bill of lading of a freight forwarder to be invalid and in violation of Section 1004(b) of the ICA.[41]

Section 1004(b) of the ICA,[42] like Section 216(d), prohibits freight forwarders[43] from giving an unreasonable preference or advantage to any person or to subject such person "to an unjust discrimination or any undue or unreasonable prejudice or disadvantage . . . ."[44]

The Court felt compelled to follow the federal cases in deciding the issue and, based on its interpretation of such cases, found the clause invalid.[45]

The defendants argued that the prior federal decisions only involved the validity of the clause under Section 2 of the ICA and thus were not controlling.

The Court disposed of the argument. After noting that Parts II, III amd IV of the ICA were each added to deal separately with the functional segments of the interstate transportation industry and yet form an integrated and harmonious scheme for the regulation of the entire industry, the Court stated:[46]

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39. Ibid at 1384
40. Ibid.
41. 24 N.Y. 2d 15, 298 N.Y.S. 2d 700, 246, N.E. 2d 509 (1969).
42. 49 U.S.C. 1004(b).
43. A "freight forwarder" may be described as one who specializes in the transportation of less-than-carload and less-than-truckload freight and who undertakes to see to it that freight is carried from a point of origin to a point of destination. It utilizes the services of carriers by rail, water, or motor vehicle, separately or in combination, in order to accomplish the movement economically and expeditiously. See Section 402(a)(5) of the ICA, 49 U.S.C. 1002(a)(5).
44. 49 U.S.C. 1004(b).
45. 24 N.Y. 2d at 20. In *Home Ins. Co.* v. *N.P.R. Co., op cit,* note 32, *supra*, the Washington Supreme Court considered this issue, but declared the rule of that state to be that the construction placed on a federal statute by federal courts other than the Supreme Court is entitled to great weight, but is not binding. 18 Wash. 2d at 808.
46. 24 N.Y. 2d at 20-21.

> Thus, Section 1004(b) of the Act, contained in Part IV and specifically applicable to freight forwarders such as the defendant, parallels Section 2 in the prohibition of discrimination in providing services in interstate commerce. The rationale of the cited cases dealing with the effect of Section 2 on bills of lading used by carriers is therefore similarly applicable to the parallel provisions of Section 1004(b) and defendants' argument in this regard merely presents a distinction without a difference.

Thus, until the Supreme Court of the United States acts, the validity of benefit of insurance clauses will depend upon which Court considers the question, the type of carrier involved, and the factual situation.

Evaluation of the Current Status of the Law On Benefit of Insurance Clauses.

It is felt that the *China Fire* approach to the problem is not a reasonable one in the absence of any evidence that the carrier is requiring the shipper to carry insurance for the carrier's benefit. No *per se* discrimination results from benefit of insurance clauses as all shippers pay the same rate and receive the same service. Shippers have legitimate reasons for carrying such insurance and a carrier receiving the benefits of it is a mere incidental beneficiary. In most instances, the carrier would not even know whether the shipment was insured or not.

Although the insurance may have a value ascertainable by acturial calculation,[47] it is clearly a highly theoretical one and is not compensation paid or received for the transportation service.

If the theory of the Court in *China Fire* were carried to an extreme, many of the actions of the shippers could be construed as violations of the ICA.

For example, a shipper who did not press a damage claim, settled such a claim more favorably than another, or collected from its insurer rather than suing the carrier, could be accused of granting the carrier a preference or additional compensation.

Carried to a further extreme, a shipper who used better protective containers to ship its products and minimize or eliminate damage would, under the theory expressed in *China Fire,* be granting a preference to the carrier over a shipper who used the minimal quality

47. *China Fire Ins. Co.* v. *Davis, supra,* f.n. 23 at p. 392.

containers required under the carrier's tariff.

The above actions have not been considered as illegal acts and should not be so considered. A carrier should not be precluded from receiving incidental benefits from a shipper or shippers so long as the benefits received do not result in one party being favored to the detriment of the other. This is the actual objective of the various statutory provisions.[48]

The present system of compensating shippers for cargo loss is unduly costly because of the overlapping duplication of insurance. The duplication of coverage increases the cost of the shipment of goods and must be borne by the carrier and/or shipper.

The shipper's insurance company is actually the most logical party upon whom the ultimate economic burden of the risk of loss of damage should be placed. The insurer receives its compensation specifically for assuming that risk. A carrier, on the other hand, is compensated primarily on the cost of transportation.

Inter-Carrier Liability

Two types of situations are most prevalent in respect to the allocation of risk of loss or damage between carriers.

In the first type of situation a carrier will lease its equipment to a second carrier for the duration of one trip, all of which is conducted via the operating authority of the second carrier.[49] This practice can arise because the lessor-carrier desires to move its equipment to the destination point of the trip or in the general direction of the destination. In some instances, the lessee-carrier might desire to utilize the equipment under lease because it does not have its own equipment available to handle the load or could not handle the freight as efficiently or economically on its own equipment. In some instances, trip leasing is done between carriers on a regular and reciprocal basis merely to allow each to improve the efficiencies and economies of their operations.[50]

The second situation involves interchange service. Interchange

48. See *Fleetlines, Inc. v. Northern Transp. Co.* 54 M.C.C. 575, 580 (1952).

49. This type of situation is referred to in transportation parlance as a "trip lease". The trip must be in the direction of a point which lessor is authorized to serve and a written lease must be executed. *Lease and Interchange of Vehicles,* 49 C.F.R. 1057.3(a).

50. A vehicle cannot be "trip leased" on successive movements. A vehicle which is "trip leased" may only again be trip leased following its usage in the authorized service of the lessor carrier. Booth, *Motor Carrier Leasing Regulations of The Interstate Commerce Commission.* (Common Carrier Conference-Irregular Route, Inc. 1961), p.8.

service involves the movement of freight via the combined operating authority of two or more carriers. One of the carriers participating in the joint movement will lease its equipment to the other carrier to be utilized on the portion of the movement conducted via the second carrier's operating authority.[51] This practice allows[52] carriers jointly to expand the scope of the service they hold out to the shipping public, and by eliminating the necessity to transfer lading from one vehicle to another at the common point of service, they can provide a service more closely emulating single line service. This latter consideration is extremely important in soliciting and securing business since shippers frequently avoid the use of interchange service because of the real or alleged delays and damage to or loss of freight when and if lading is physically transferred between vehicles at the interchange point.

Both lease situations are govermed by federal regulations[53] which deal in part with the question of lessee's liability to third parties. Because of the silence of such Regulations on inter-carrier liability relationships, considerable litigation has evolved on the issue.

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51. *Motor Haulaway Co. Contract Carrier Appln.*, 27 M.C.C. 19, 23-24 (1940). Sometimes the word "interchange" and "interline" are used interchangeably. "Interline", however, is a practice whereby the freight is physically transferred between carriers at the common point of service whereas "interchange" contemplates the freight moving from initial oriqin to ultimate destination in the same vehicle. See *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 121 (1962).

52. Motor common carriers of property are not now obligated, but rather are permitted, under Section 216(c), of the Act, 49 U.S.C. 319(c) to establish through routes and joint rates with each other covering the provision of interline service. However, once such interline arrangements or concurrences are established and published in their tariffs pursuant to Section 217(a) of the Act, 49 U.S.C. 317(a), the concurring carriers are under a legal duty to provide the interline service described in their tariffs. A motor common carrier has the obligation to accept and transport all freight (including interline freight) tendered in accordance with the provisions of its published tariffs. See *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.* 73 M.C.C. 617 (1957); and *Burlington Truck Lines, Inc. v. I.C.C.*, 194 F. Supp. 31, 56-57 (S.D. Ill., N.D. 1961), reversed on other grounds *sub nom Burlington Truck Lines v. United States*, 371 U.S. 156 (1962). This obligation has been characterized as an almost absolute duty, and for the adequate protection of the public, motor common carriers of property are held strictly accountable for its performance. *Braswell Motor Frt. Lines, Inc.-Investigation*, 118 M.C.C. 392, 411 (1973).

53. *Lease and Interchange of Vehicles*, 49 C.F.R. Part 1051. Hereinafter referred to as the "Regulations".

Trip Leases

Under the Regulations, a lessee-carrier in a trip lease situation is specifically made responsible for damages to third parties.[54]

Because the Regulations are silent as to the liability between the lessee and lessor carriers, it has been contended that the common law rule of indemnification should be applicable or, if the carriers contracted on the issue, that their private agreement should control.[55]

A lessee-carrier is anxious to contract for indemnification because in the normal trip lease situation the equipment is leased with the driver of the lessor, and thus the lessee-carrier feels it often has minimal control over the operations under lease. Likewise, the inspection called for under the Regulations[56] is often done by agents who are frequently gas station or truck stop attendants. Lessee-carriers often feel this becomes a prefunctory task which will not result in the discovery of all defects in the equipment being leased. Thus, the lessee-carrier assumes considerable liability even though the lessor-carrier receives substantial compensation under the lease. Lessor-carriers are willing to assume the liability arising in a lease situation because they normally already are insured against the loss or adequately compensated under the lease to assume the risk.

The very reasons which have prompted lessee-carriers to shift liability, however, has led to considerable litigation and, despite such litigation, the question of the validity and enforceability of hold-harmless provisions[57] in trip leases, or the application of common law indemnification principles in such a situation has just recently begun to be resolved.

In some instances the hold-harmless clauses were held to be void and unenforceable as against public policy. This position, for example, was espoused in *Alford* v. *Major*.[58]

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54. 49 C.F.R. 1057.3(a).

55. *E.g. Newsome v. Surratt*, 237 N.C. 297, 74 S.E. 2d 732.

56. 49 C.F.R. 1057.4(c).

57. Part of the difficulties in resolving the issue in this area of the law may result from the failure of the courts to consider hold harmless clauses in terms of the clear distinction between an exculpatory clause and an indemnity contract. In the latter, a risk of damage or injury to third persons is shifted to the indemnitor. With an exculpatory clause, the person who would have to carry the risk of his own negligence attempts to shift it onto the person who would be injured by his negligence. See *Northern Pac. Ry. Co.* v. *Thorton Bros. Co.*, 206 Minn. 193, 287 N.W. 226 (1939).

58. 314 F. Supp. 979 (N.D. In. 1970), *aff'd*, 470 F. 2d 132 (7 Cir. 1972). But see *General Expressways, Inc.* v. *Schreiber Freight Lines, Inc.*, 377 F. Supp. 1159 (N.D.

In that case, a lessee-carrier seeking indemnification under a contractual provision in a trip lease admitted that its compliance with the Regulations was a mere formality and that it had never assumed actual control over the vehicle-with-driver being leased.

The lessee-carrier advanced the argument that the Regulations were designed merely to assure that if a third party was injured the responsible carrier would be financially able or have the requisite insurance to meet the obligations.[59]

The trial court rejected the argument, however, and found that the Regulations were promulgated to insure that the regulated carriers would be responsible in fact, as well as in law, for the maintenance of leased equipment and the supervision of drivers of such equipment. The Regulations were found to involve broader policy considerations than mere financial responsibility to an injured party.[60] The Seventh Circuit affirmed the decision emphasizing these public policy considerations.[61]

The decision was also grounded, in part, on the principle that the lessor and lessee carriers, by violating the Regulations, became joint wrongdoers and forfeited any right to recover from each other.[62]

The *Alford* view was adopted in *Denver Midwest Motor Freight, Inc.* v. *Busboom Trucking, Inc.*[63] In this case, the Supreme Court of Nebraska found the following disadvantages could flow as a result of hold-harmless clauses in trip leases:

1. The clauses might adversely affect the safety of operations.
2. The clauses would inject an element of uncertainty into lease negotiations and blur lines of responsibility to the public by lessor and lessee.
3. The clauses would increase the prospect of litigation between carriers or their insurers without any corresponding benefit to the public.
4. The clauses might adversely affect the insurance coverage of carriers.

Ill. 1974), where an indemnity agreement was held not to be unenforceable as against public policy.

59. 314 F. Supp. at 982.

60. 314 F. Supp. at 982-983.

61. 470 F. 2d 132 (7 Cir. 1972).

62. 470 F. 2d at 135. See also *Carrier Insurance Exchange* v. *Truck Insurance Exchange*, 310 F. 2d 653 (4 Cir. 1962).

63. 190 Neb. 231, 207 N.W. 2d 368 (1973). See also *Gordon Leasing Co.* v. *Navajo Freight Lines*, 130 N.J. Super. 290, 326 A2d 114 (1974).

5. The clauses would enable lessees effectively to circumvent the requirements of the Regulations.

The Court concluded that if such clauses were unenforceable, the uncertainties mentioned above would be removed, statutory and regulatory provisions could be fully enforced, and public policy could be best served.

Other courts, however, were not unanimous in the adoption of the *Alford* view.

In *S & N Freight Line, Inc.* v. *Bundy Truck Lines, Inc.*[64] a clearly opposite result was reached. A hold-harmless clause was enforced even though actual control over the vehicles was retained by the lessor-carrier. The Court found that the Regulations were applicable only to the lessee's liability to consignors,[65] consignees,[66] and third parties generally and that they did not apply to the rights or liabilities between the lessor and lessee carriers. The same conclusion was reached in *Cooper-Jarrett, Inc.* v. *J. Miller Corp.*[67]

Courts of Appeal in the Fourth,[68] Fifth,[69] and Sixth Circuits[70] have also upheld the validity of hold-harmless clauses in trip leasing situations. In each case the Court found that the lessee-carrier had full and actual control over the leased vehicle and the driver, and thus there was no violations of the Regulations. Based on the absence of any statutory violations, the *Alford* decision was distinguished, and the Courts held that the Regulations did not prohibit the two contracting carriers from determining as between themselves which party would ultimately bear the cost of damages to third parties.

In *Transamerican Freight Lines* v. *Brada Miller Freight System*,[71]

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64. 3 N.C. App. 1, 164 S.E. 2d 89 (1968).

65. A consignor is one who tenders freight for shipment. Owens, *A Glossary of Traffic Terms*, (The Traffic Service Corp. 1972) p. 8.

66. A consignee is one who receives the freight being tendered, *Ibid.*

67. 70 Misc. 2d 88, 332 N.Y.S. 2d 177 (1972).

68. *Carolina Freight Carriers Corp.* v. *Pitt County Transp. Co.* 358 F. Supp. 1177 (E.D. Va. 1970), *rev'd.*, 492 F. 2d 243 (4 Cir. 1974), cert. pending, No. 73-1750.

69. *Allstate Insurance Co.* v. *Alterman Transport Lines, Inc.*, 465 F. 2d 710 (5 Cir. 1972).

70. *Jones Truck Lines, Inc.* v. *Ryder Truck Line, Inc.* 507 F. 2d 100 (6 Cir. 1974), cert. pending, No. 74-973. See also *Indiana Insurance Co.* v. *Parr Trucking Service*, 510 F. 2d 490 (6 Cir. 1975), and *Indiana Refrigerator Lines, Inc.* v. *Dalton*, 516 F. 2d 795 (6 Cir. 1975) cert. pending No. 75-211. In the *Jones* case, the court appears to treat the case as one involving a trip lease situation. The facts of the case, however, suggest an interline or interchange situation was involved.

71. ___ U.S. ___, 46 L. Ed. 2d 169, 96 S. Ct. 229 (1975).

the U.S. Supreme Court found that an indemnification clause in and of itself does not conflict with the control and responsibility requirements or the safety provisions in the Regulations. The Court indicated an indemnification agreement violates the Regulations only if accompanied by other indicia demonstrating that the lessor was in control of the service provided as well as the physical operation of the vehicle. In *Transamerican* it was determined that control over the vehicle had remained in the lessee; in *Alford,* "other indicia" had been present.

Common Law Indemnification

In *Newsome* v. *Surratt,*[72] the lessee-carrier sought indemnification against the lessor-carrier under the common law rule[73] as well as under a contractual provision in the lease. Although it is not clear from the printed decision on which specific basis indemnification was allowed, the Court accepted the validity of the common law rule in the context of a trip lease.

The opposite view was expressed in *Cooper-Jarrett, Inc. v. J. Miller Corp.*[74] In this case, in which a contractual provision was enforced, the Court specifically indicated it would not permit *common law* indemnification because of the ". . . statutory nondelegable active liability imposed on a lessee pursuant to the I.C.C. rules and regulations."[75]

Since the leasing of equipment is covered by regulation under statute, it would appear that the view expressed in the *Cooper-Jarrett*[76] case is the more logical one and the result which would be reached in the majority of cases.

Interchange Situations

Under the ICA, either the initial or delivering carrier in an interchange situation is liable to the claimant-shipper for loss or damage

72. 237 N.C. 297, 74 S.E. 2d 732 (1953). See also *Continental Insurance Co. v. Daily Express, Inc.*, 68 Wis. 2d 581, 229 N.W. 2d 617 (1975).

73. Umder the common law rule, a party whose liability results solely from a nondelegable duty is entitled to indemnification, even in the absence of contract, from the person whose wrongdoing was the actual cause of the injury. See *McClish v. Niagara Machine & Tool Works*, 266 F. Supp. 987, 990 (N.D. Ind. 1967).

74. See f.n. 67.

75. 332 N.Y.S. 2d at 179.

76. See f.n. 67.

to freight. This includes any loss or damage caused by connecting carriers.[77] The initial or originating carrier, however, has a cause of action against the carrier at fault.[78]

Since it is often difficult to determine the actual responsibility for loss or damage, many rail and many motor carriers have established claims organizations which attempt to allocate the responsibility for loss.[79]

Despite such voluntary attempts to resolve the problem, resort to the judicial system by carriers is still quite common. Since the Regulations do not specify where responsibility in an interchange situation lies,[80] questions regarding ultimate inter-party liability similar to those as in trip lease situations have arisen.

The Commission has held that the carriers under whose operating authority the equipment is operated shall be considered the owner of the equipment while moving to ultimate destination or for return to the lessor-carrier.[81]

In *Watkins Motor Lines* v. *Zero Refrigerated Lines*,[82] the Seventh Circuit, which had handed down the *Alford* decision, upheld an indemnity provision on the basis that the Regulations covering interchange arrangement did not require complete assumption of responsibility by the lessee as do the Regulations covering triplease situations. As such, *Alford* was deemed inapposite and indemnification was allowed.

Other circuits have not ruled on this issue. However, there is little, if any, reason, to believe that their viewpoints would differ from those expressed in their opinions involving triplease situations. In view of the Supreme Court's decision in *Transamerican*, the same policy and legal considerations would appear to be present in each situation.

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77. 49 U.S.C. 20(11). The statutory provision is expressly applicable to motor carriers, 49 U.S.C. 319 and ground freight forwarders, 49 U.S.C. 1013.

78. ICA, Section 20(12), made applicable to motor carriers, 49 U.S.C. 312.

79. The American Association of Railroads and the National Freight Claims Council of the American Trucking Association, Inc. have attempted by voluntary established rules to simplify the allocation among its members of responsibility for loss or damage. See Sigmon, *Miller's Law of Freight Loss and Damage Claims*, 4th Ed. 1974.

80. 49 C.F.R. 1057.5.

81. 49 C.F.R. 1057.5(d). It should be noted that the Regulations are not clear as to whether the term "owner" applies universally or merely to third parties.

82. ___ F. 2d ___ (7 Cir. 1975), 1975 CCH Fed. Car. Cases, Par. 82,565.

Conclusions

A fair reading of the legislative history of the ICA as it applies to loss or damage to freight indicates that the legislators desired to assure that carriers were financially stable and responsible to shippers and the general public and that simplified procedures existed to facilitate recovery for such losses or damages.

To the extent that the statute itself or administrative regulations assure such results, it would appear that the business relationship between carriers themselves is of little import and not the concern of public regulation.

Many of the periphery objectives, such as safety of operations, which the regulations might achieve can be accomplished by other means, the prime of which is an effective enforcement program. Furthermore, monetary liability, particularly in view of insurance coverage, may not be the only or most important means of achieving such periphery objectives.[83]

It is unfortunate that uncertainty and confusion still exist in the two major areas discussed. The decision of the Supreme Court in *Transamerican* and its anticipated decisions in the *Carolina* and Jones cases should resolve the issue of inter-carrier liability. The "benefit of insurance" issue may be subject to more protracted litigation.

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83. Factors other than tort liability may be of equal force in encouraging safe conduct. Professor James has suggested that danger to the negligent party, disruption of normal business routine, destruction of the negligent party's property, and bad public and labor relations are some considerations of this nature. James, "Accident Liability Reconsidered: The Impact of Liability Insurance," 57 Yale L.J. 594 (1948). Professor James was primarily concerned with personal injury liability rather than damage to property. The same reasons could appear to apply in each instance. Furthermore, no distinction can be made in terms of inducing carelessness between an exculpatory clause and a contract of liability insurance. See, for example, *Griswold* v. *Illinois Central Ry. Co.*, 90 Iowa 265, 57 N.W. 843, (1894).