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The Increasing Role of Indemnity Agreements in Allocating Insurance Proceeds and its Effect on the Transportation Industry

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Determining the number of carriers that may owe coverage for an accident, and how that coverage is to be allocated amongst those carriers, can often be a difficult and complicated task. This is because there may be truckers or other business auto policies issued to the hauler, and there may also be policies in place that have been purchased by the driver and the agent under whose authority the hauler is operating. While determining how to allocate insurance proceeds amongst concurrent insurers is generally determined by comparing the applicable policies' "other insurance" clauses, there is an increasing trend, both in Missouri and around the country, towards an allocation scheme that gives effect to indemnity provisions in contracts between the insureds, even where to do so would contradict the provisions of the applicable "other insurance" clauses.

Consider the following example: Company A is a moving and storage business that, per an agency agreement, is given the authority to operate under the name and authority of Company B, whose name has national recognition. The drivers of the vehicles are usually independent contractors. All likely have liability insurance covering accidents involving the vehicle subject to the agency agreement. In the most common scenario, the agency agreement will require Company A, the moving and storage business, to indemnify the nationally recognized company, Company B, which is allowing Company A to operate under its name and authority. More importantly, these agency agreements will almost always require that Company A carry a specified amount of "truckers" or other relevant liability insurance that adds Company B as an additional insured.

Based on this arrangement, when an accident occurs and Company A and B are both named in the lawsuit, Company B naturally looks to Company A and its insurer to provide Company B with defense and indemnity. The issue of whether Company B (the "indemnitee") is in fact an additional insured and entitled to coverage under the policy issued to Company A (the "indemnitor") depends on the terms and provisions of the insurance policy at issue. Where such coverage does exist, courts have been increasingly willing to look to the indemnity provisions in the parties' agency agreements in deciding how the existing coverage should be allocated. In other words, there is a clear trend in Missouri and other jurisdictions towards finding that the "indemnitor's" coverage provides insurance that is "primary" to the policy or policies insuring the "indemnitee." Indeed, even an "excess" or umbrella policy issued to the indemnitor may be triggered before even the primary layer of the indemnitee's coverage is implicated.

Of great importance to this analysis is to make an early determination of which state's law applies. Transportation agreements, of course, envision travel through many states. Frequently, the agreements between the parties will mandate the application of a particular state's law. If no state's law is specified, a "most significant contacts" analysis must be performed. After a determination of which state's law will control, it is important to consider whether that state has a transportation Anti-Indemnity Statute.[1] For example, Missouri's Anti-Indemnity Statute, Section 390.372, R.S.Mo., provides as follows:

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

[1] The following states have transportation anti-indemnity statutes: Alaska, California, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Missouri, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, and Wyoming.

> carrier transportation contract, and such motor or rail carrier's agents, employees, servants, or independent contractors directly responsible to such motor or rail carriers.

If an anti-indemnity statute is in place, the following analysis may be unnecessary. However, in the absence of such a statute, the parties' indemnity agreements may well be dispositive in determining the priority of coverage. This will be especially true in contexts in which anti-indemnity statutes have no application.

The decision of the United States Court of Appeals for the Eighth Circuit in *Wal-Mart Stores, Inc. v. RLI Ins. Co.,* 292 F.3d 583 (8th Cir. 2002), illustrates how courts have treated this issue in the context of a product liability claim. In *Wal-Mart*, one of Wal-Mart's suppliers agreed to indemnify Wal-Mart and provide $2 million in coverage to Wal-Mart as an additional insured. An accident occurred involving the product provided by the supplier and resulted in an $11 million settlement. Wal-Mart had a $10 million policy, and the supplier had $11 million in coverage, though $10 million of that coverage was through an "excess" policy. The issue in *Wal-Mart* was which of the two carriers was responsible for the remaining $10 million of the settlement proceeds after the supplier/indemnitor's $1 million primary policy had been exhausted.

In *Wal-Mart*, the Eighth Circuit held the "other insurance" clauses of the two policies were not determinative of the case. Rather, the court held the parties' "indemnity agreement controls the outcome." *Id*. at 587. Significant to the court's holding was its requirement that the supplier/indemnitor indemnify the entire $11 million settlement even though it noted the supplier's insurance obligation under its vendor's agreement with Wal-Mart was only $2 million. The court also noted this was the majority rule among states that have considered the issue, and further found no significance in the fact that the supplier's $10 million policy was characterized by that insurer as an "excess" policy.

In *Federal Ins. Co. v. Gulf Ins. Co.*, 162 S.W.3d 160 (Mo. App. E.D. 2005), the Missouri Court of Appeals adopted the same reasoning as the Eighth Circuit did in *Wal-Mart* and also found this approach to be the majority rule. In deciding whether the "exception" to the general rule for indemnity agreements applies, the court in *Federal* identified three factors to be considered: (1) the validity of the indemnification agreement; (2) an insurance policy that covers the settlement; and (3) the parties' intentions and relationships and the absence of unfair prejudice to the insurers. Also significant was the court's refusal to afford the indemnitee's excess insurance a remedy through equitable contribution, despite the fact that the amount of the settlement and the amount of the indemnitor's excess policy, as in *Wal-Mart*, exceeded the amount of insurance that the indemnitor was required to obtain. Hence, when the exception applies, recent cases make relatively clear that an indemnitor's *entire* policy may be deemed to be primary even in excess of the amount of insurance that the indemnitor contracted to provide. *See also Hertz Equip. Rental Corp. v. Ammon Painting Co.*, 2009 WL 2365578 (Mo. App. W.D.) (vacated by the Missouri Supreme Court upon acceptance of transfer and before the case's settlement while pending before the Missouri Supreme Court on post-opinion review).

Finally, we note this rule has not been applied in every case involving an indemnity agreement. In an unpublished decision, one Missouri appellate court declined to compel an indemnitor's excess carrier to provide coverage before the exhaustion of the indemnitee's primary insurance. *See East End Transfer & Storage, Inc. v. Travelers Indem. Co. of Illinois*, 211 S.W.3d 103 (Mo. App. E.D. 2006). The court's decision may have turned on the fact that the indemnitor was also an additional insured under the primary policies purchased by the indemnitee, which allowed the indemnitor's excess carrier to successfully argue that the indemnitor was entitled to satisfy its indemnity obligations through the primary policies under which the indemnitor qualified as an additional insured. Again, this decision was an unpublished one; therefore, it has no precedential effect and may not call into question the relatively clear holding of the Missouri Court of Appeals in the *Federal* case discussed above.

Based on these decisions and the prevalence of indemnity agreements in the transportation industry, insurers need to be aware of this developing trend because it could affect how their policies are allocated. Under this new majority rule, policies are subject to allocation under a scheme different than that which would result from the traditional application of competing "other insurance" clauses. In addition, insurers should undertake to learn more about their insureds' contracts, contracts that may include a specific obligation to procure insurance for an indemnitee. Finally, insurers should be mindful of choice-of-law issues and whether an anti-indemnity statute may be applicable.

Moreover, as courts have shown a willingness to hold the indemnitor's insurance primary beyond the amount of the insurance obligation in the insured's contract with its indemnitee, insurers may want to consider appropriate ways to address this issue in their policies, such as including language in either the "other insurance" clause or the "additional insured" endorsement that limits the amount of available coverage, or the amount of primary coverage, to the amount of insurance that the named insured is contractually obligated to provide for an additional insured.

While this is obviously a developing area of the law – one in which there are still more questions than answers – such a policy addition might serve to curtail the possibility of an indemnitor's excess carrier being required to exhaust its entire policy limits despite its named insured's insurance obligation being much smaller than that, as was the result in both the *Wal-Mart* and *Federal* cases discussed above.