

# INDEMNIFICATION

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Presentation to ISB Agricultural Law Section

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**1. Common law.** Under the common law, a person, who without fault on his part, is compelled to pay damages occasioned by the negligence of another, is entitled to indemnity. *Beitzel v. Orton*, 121 Idaho 709, 827 P.2d 1160 (Idaho 1992) citing *Industrial Indem. Co. v. Columbia Basin Steel Iron Inc.*, 93 Idaho 719, 471 P.2d 574 (1970).

**2. Contractual Indemnity Clause.** Parties may contract for indemnification in most circumstances. See generally, *Barnett v Eagle Helicopters, Inc.*, 122 Idaho 92, 831 P.2d 560 (Ct. App. 1992).

**3. Sole Negligence of the Other Party.** A party may agree to indemnify another party for the latter's party's sole negligence, even in the context of personal injury. *Bonner County v Panhandle Rodeo Assoc., Inc.*, 101 Idaho 772, 620 P. 2d 1063 (1980).

**4.** Clause reviewed in *Panhandle Rodeo Assoc.*:

The tenant shall provide and procure extended insurance liability coverage in an amount of at least \$250,000.00 per person and \$500,000.00 aggregate, and shall present proof of the same by filing a copy of the insurance policy with the landlord at least ten (10) days prior to the rodeo performance dates.

The tenant shall hold harmless the landlord for any liability incurred as a result of the rodeo performances, and the landlord shall have no financial responsibility for any debt or obligation incurred.

**5. Two Statutory Exceptions (industry specific):**

**A. Idaho Code §29-114 – *Indemnification of Promisee for Negligence:***

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<sup>1</sup> This Outline is for general information purposes only and is not and should not be construed to be formal legal advice, the formation of an attorney-client relationship, or the solicitation of professional employment. Law Office of David G. Ballard, PO Box 935, Meridian, Idaho 83680, (t) 208-859-0922, (e) david@lawballard.biz

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, highway, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitees, is against public policy and is void and unenforceable.

**B. Idaho Code §49-1014 – Indemnity Agreement in Motor Carrier Transportation Contracts Void:**

... 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.

6. At last count, 45 states have enacted some type of an anti-indemnification statute relating to transportation agreements.

**7. Sample Clauses:**

**Real Property Leases:**

A. Hazardous Substances. Tenant shall indemnify and hold Landlord harmless from any claim, liability, loss, cost or expense (including but without limitation, attorney's fees) resulting from hazardous or toxic substances placed or used on the property by Tenant. *Section 5(a)(x), page 9, Crop-Share Lease with Security Provisions* (Document III.C.1). Idaho Real Property Forms Book, 2<sup>nd</sup> Ed., 2006.

B. Indemnification for Violation of Law. The Tenant agrees to indemnify the Landlord for any personal liability which may be imposed upon the Landlord or for loss to or confiscation of the Collateral subject to this Lease resulting from any act or omission of the Tenant contrary to any statutes, ordinance, regulation, or

other law applicable to such Collateral, or to the farming of, application of chemicals to, irrigation of, harvesting of, transporting of, or storing said Collateral, or the use thereof. *Section IV(L), page 11, Fixed Cash or Flexible Cash Rent Lease* ((Document III.C.3), Idaho Real Property Forms Book, 2nd Ed., 2006.

**C. Indemnification.**

1. Tenant, during the term of this Ground Lease, agrees to indemnify, defend and hold harmless Landlord from any and all liability, damages, expenses (including reasonable attorney's fees and reasonable attorney's fees on any appeal), causes of action, suits, claims or judgments arising from injury to person or property on the Leased Premises caused by Tenant, except if caused by the willful or negligent act of Landlord or Landlord's tenants (other than Tenant), subtenants, agents, contractors or employees. *Section 9.1, page 7, Ground Lease* (Document III.B.6). Idaho Real Property Forms Book, 2nd Ed., 2006.

2. Landlord, during the term of this Ground Lease, agrees to indemnify, defend and hold harmless Tenant from and against any and all liability, claims, damages, expenses (including reasonable attorney's fees and reasonable attorney's fees on any appeal), judgments, proceedings and causes of action, for injury to or death of any person or damage to or destruction of any property occurring in the portion of the Shopping Center owned by Landlord or its adjoining streets, sidewalks or public rights-of-way (except those occurring in the interior of Tenant's building), unless caused by the willful or negligent act or omission of Tenant, its subtenants, agents, contractors or employees. *Section 9.2, page 7, Ground Lease* (Document III.B.6). Idaho Real Property Forms Book, 2nd Ed., 2006.

**D. Compliance with Laws.** Tenant agrees not to violate any law, ordinance, rule or regulation of any governmental authority having jurisdiction of the Leased Premises. Tenant may contest the validity of any such law, ordinance, rule or regulation but shall indemnify and hold Landlord harmless against the consequences of any violation thereof by Tenant. *Section 13.1, page 9, Ground Lease* (Document III.B.6). Idaho Real Property Forms Book, 2nd Ed., 2006.

## 8. Transportation Agreements:

**A. Authorized Passenger.** I further hereby AGREE TO INDEMNIFY AND HOLD HARMLESS the RELEASEES from any loss, liability, damage, or costs, including court costs and attorneys' fees that RELEASEES may incur due to my participation in said activity, WHETHER CAUSED BY NEGLIGENCE OF RELEASEES or otherwise, to the fullest extent allowed by the law. *Commercial Motor Vehicle Authorized Passenger.* David G Ballard, 2022.

**B. Broker-Shipper Agreement.** The Broker will defend, indemnify and hold Shipper, its employees, and agents harmless from and against any and all Claims arising out of the Broker's performance under these Conditions to the extent such Claim is directly and proximately caused by (1) the negligence or intentional misconduct of the Broker; (2) the Broker's or its employees' or agents' violation of applicable laws or regulations; or (3) the Broker's or its employees' or agents' failure to comply with the conditions of this Agreement. *Common Fallacies of Shipper-Broker-Carrier Contracting*, January 7, 2023, by Paul Stewart, Logistics Law Firm, 1984 Cottage Glen Circle W., Germantown, TN 38138.

**C. Broker-Shipper Agreement.** BROKER shall indemnify, defend, and save SHIPPER, its employees, and agents harmless from and against, and shall pay and reimburse, any and all liability, claims, loss, costs, fines, penalties, expenses (including attorney's fees), judgments, or demands on account or damage of any kind whatsoever, including but not limited to personal injury, property damage (other than loss or damage to cargo, which is addressed elsewhere in this Agreement), or any combination thereof, suffered or claimed to have been suffered by any person or persons, arising out of BROKER's services provided in connection with this Agreement (emphasis mine). *Common Fallacies of Shipper-Broker-Carrier Contracting*, January 7, 2023, by Paul Stewart, Logistics Law Firm, 1984 Cottage Glen Circle W., Germantown, TN 38138.

**9. Case Study: *Diamond Transportation Logistics, Inc. V. the Kroger Co., Inc.***, No. 2: 19-cv-5448 (S.D. Ohio Jan. 4, 2023).

A. Shipper → Motor Carrier → Subcontractor → Plaintiff

B. Plaintiff sued Motor Carrier.

C. Plaintiff added Shipper as a party 16 months later alleging that Shipper was negligent in hiring the Motor Carrier.

D. Motor Carrier did not take up the defense of Shipper.

E. Shipper set off payments to the Motor Carrier.

F. Shipper settled with the Plaintiffs and then demanded to be indemnified.

**10. The Indemnification Provision:**

The undersigned, (Motor Carrier) ... does hereby expressly agree to indemnify, defend and hold harmless (Shipper) ... from and against any and all suits, actions, liabilities, judgments, claims, demands, or costs or expenses of any kind (including attorney's fees) resulting from (1) damage or injury (including death) to the property or person of anyone, whomsoever they may be, arising or resulting at any time or place from any operation hereafter performed either by the undersigned, its agents, employees or subcontractors in performing services for (Shipper) or (ii) the negligence, willful misconduct or violation of law by the undersigned, its agents, employees or subcontractors except to the extent such liability is caused by the sole negligence or willful conduct of (Shipper). *Schedule C – Motor Carrier Indemnity Agreement attached to Non-Dedicated Contract Carrier Transportation Agreement.*

**11. Outcome:** The Motor Carrier agreed to indemnify the Shipper as to any claim or liability arising from the accident.

**12. Arguments:**

**A. Not void – not against public policy.** As applied to the facts, the Agreement was not subject to a later enacted anti-indemnification statute that voids an agreement that would indemnify the promisee from its negligence, intentional acts or omissions.

**B. All Claims – not limited to sole negligence.** The indemnification applies to all claims arising from or resulting from the operations of the Motor Carrier and the “sole negligence” carve-out did not apply to concurrent liability.

**C. Payment:** Under Ohio law, a voluntary payment does not negative the right to

indemnity provided that: (1) timely and proper notice was given to the promisor / indemnitor; (2) the payor was legally liable to respond; and (3) the settlement was fair and reasonable.

**13. Holding.** The language obligates the Motor Carrier to indemnify and defend regardless of whether the Shipper is ultimately found liable and in advance of any finding of liability.

**14. Take-aways.**

A. The decision is not based upon the Motor Carrier having been found negligent in any manner, but rather on the agreement to defend and indemnify the Shipper for any claim or liability involving the Motor Carrier.

B. There is a difference between an agreement to indemnify for negligent performance and one to indemnify for just being a party to a transactions.