

CARGO UPDATE NEWSLETTER

A RELEASE IS NOT AN INDEMNITY - March, 2012

We previously discussed the importance of reviewing settlement checks for conditional language and endorsements. Of equal importance is reviewing proposed carrier Releases upon settlement for language that was neither negotiated, discussed, nor anticipated. Specifically, I am referring to the increasing trend of carriers to include indemnity language in cargo claim Releases. Indemnity clauses can take many forms and are also often accompanied by a “duty to defend” and “hold harmless.” What is almost always the case, however, is that such language is included without negotiation or even discussion before receipt of the proposed release from the carrier. What is also almost certain is that such language goes well beyond what you intended in your settlement.

“Release” and “indemnity” are related, but distinctly different legal concepts. A Release is a relinquishment or discharge of a claim or right against the party being released. In the context of a settlement, the Release is given in exchange for consideration, ie., payment. Indemnity, on the other hand, is a contractual provision where one party agrees to be responsible for loss, damage or liability incurred by the party being indemnified. In the context of a Release containing an indemnity agreement, the releasor may unwittingly be agreeing to indemnify the carrier for any actions or claims brought by unknown third parties for unknown amounts potentially far exceeding the amount originally agreed to in settlement.

Although reported decisions on this issue are scant, at least one court has ruled that without more, an agreement to sign a “Release” contemplates only a release from liability and not indemnity for third party claims. In *Frear v. P.T.A. Industries, Inc.*, 103 S.W. 3d 99 (Ky. 2003), the Kentucky Supreme Court found that a letter from the plaintiffs’ attorney to the defendants’ attorneys confirming settlement and requiring payment of the settlement in exchange for a “Release” did not require the plaintiffs to sign a Release prepared by the defendants which included an indemnity agreement. The court found that “release” and “indemnity” are distinct legal concepts and held that because an agreement to release a party from liability does not include an agreement to indemnify the released party unless the parties specifically agree to indemnification, the plaintiffs did not breach the settlement agreement by refusing to sign the Release containing the indemnity language. *Id.*, at 101, 107. The court noted that plaintiffs’ attorney’s invitation for defense counsel to submit a proposed Release “which you desire our clients to sign” did not reflect any agreement that the defendants had carte blanche to include other terms in the Release, including indemnity provisions. *Id.*, 107.

To summarize, a settling party may be at risk of unwittingly undertaking responsibility and liability for actions or claims by third parties by signing a Release containing indemnity language. The responsibility and liability could potentially exceed the amount of the original settlement. The parties should be clear in their communications what it is they are agreeing to so as to avoid surprise and potential problems. Each State’s rules, decisions, and laws are different so professional advice should be sought with regard to which rules, decisions and laws are applicable to your particular State and to your particular circumstances.

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