**Sammons Trucking**

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SENATE INDUSTRIES
EXHIBIT NO. 2
DATE 3-7-2013
BILL NO. HB 347

February 4, 2013

Regarding: INDEMNIFICATION CLAUSES IN TRANSPORTATION CONTRACTS

To Whom it May Concern;

Sammons Trucking is a Montana trucking company that currently has over 325 full time contractors leased to us. Over the past 50 years we have had many contracts with shippers throughout the United States and Canada. It is very apparent to us that over the past 10 years, more and more shippers have been adding clauses to their contracts that limit their liability exposures by transferring these to the truckers by using indemnification clauses (sometimes called Hold Harmless agreements) in their contracts.

These clauses, if agreed to, obligate the trucking companies to pay for or reimburse the shipper even for direct actions of the shipper or employees. Example: Shipper's fork lift runs over a trucker in their warehouse. If the trucker sues the shipper for his injuries the shipper would revert to the contract and the trucking company would have to reimburse the shipper for any incurred expenses including in most cases their legal fees.

In many cases the trucking companies are required to sign the contract **as is** to get the business. Many trucking companies sign as they need the work and don't have the means to modify the contract. This problem is much more difficult for smaller trucking companies because they cannot negotiate these contracts on equal terms. For them it is sign **as is** or don't play.

More than 35 states now have laws in place now to void or extremely limit the use of Indemnification clauses and we feel that Montana should be part of this group. Our feeling is that every entity should be responsible for their actions. We should be held accountable for what we do. Our shippers should do the same, even if they are large steel companies, oil companies or manufacturing companies who have the clout to force contract language on potential transportation companies.

Please seriously consider adding Montana to the list of states that consider contract language that passes a company's liability for their own actions, to trucking companies as unlawful. House Bill 347 would go far in fixing this problem.

Sincerely,

Tim Burke

President

## 6.0 INDEMNITY

6.1 It is agreed between Company and Contractor that certain responsibilities and liabilities for personal injuries and property damage arising out of the performance of this Agreement should be allocated between them in order ~~to avoid protracted litigation between Company and Contractor along with~~ the associated legal expenses and so that insurance or self-insurance may be arranged by each party as necessary to protect them against these exposures to loss. The following sets out the specifics of the agreements between Company and Contractor as to the allocation of the responsibilities and liabilities.

6.2 **Contractor agrees to protect, defend, indemnify and hold harmless Company, its officers, directors, employees or their invitees, and any working interest owner or non-operator for whom Company is obligated to perform services, from and against all claims, demands, and causes of action of every kind and character without limit and without regard to the cause or causes thereof or the negligence or fault (active or passive) of any party or parties including the sole, joint or concurrent negligence of Company, any theory of strict liability and defect of premises, or the unseaworthiness of any vessel (whether or not preexisting the date of this Contract), arising in connection herewith in favor of Contractor's employees, Contractor's subcontractors or their employees, or Contractor's invitees on account of bodily injury, death or damage to property.**

6.3 **Company agrees to protect, defend, indemnify and hold harmless Contractor, its officers, directors and employees or their invitees, from and against all claims, demands, and causes of action of every kind and character without limit and without regard to the cause or causes thereof or the negligence or fault (active or passive) of any party or parties including the sole, joint or concurrent negligence of Contractor, any theory of strict liability, any professional liability, and defect of premises, or the unseaworthiness of any vessel (whether or not preexisting the date of this Contract), arising in connection herewith in favor of Company's employees, Company's contractors (other than Contractor herein) or their employees, or Company's invitees on account of bodily injury, death or damage to property.**

6.4 **Contractor agrees to protect, defend, indemnify and hold harmless Company, its officers, directors, employees or their invitees, and any working interest owner or non-operator for whom Company is performing services, from and against all claims, demands, and**

liabilities and obligations arising out of the failure to do so or the shifting or movement for any reason of the load of Products on such motor vehicles. Transporter's liability for risk of loss or damage shall be for the full invoice value of such Products. This liability for risk of loss or damage in no way minimizes or affects Transporter's indemnification obligations set forth in this Master Agreement. Each Party shall notify the other Party of any claims of damage or loss of which it becomes aware pursuant to this Section 10.

11. Indemnity.

(a) TO THE FULLEST EXTENT ALLOWED BY LAW, TRANSPORTER SHALL DEFEND [redacted], INDEMNIFY AND HOLD HARMLESS [redacted] ITS SUBSIDIARIES, AFFILIATES, JOINT VENTURE PARTNERS, AND EACH OF THEIR RESPECTIVE DIRECTORS, OFFICERS, REPRESENTATIVES, AGENTS, AND EMPLOYEES (COLLECTIVELY, [redacted] INDEMNIFIED PARTIES") FROM AND AGAINST ALL CLAIMS, DAMAGES, LIABILITIES, LOSSES, COSTS AND EXPENSES (INCLUDING, BUT NOT LIMITED TO, REASONABLE ATTORNEYS' FEES AND EXPENSES, INCLUDING ANY REASONABLE ATTORNEYS' FEES AND EXPENSES INCURRED BY A [redacted] INDEMNIFIED PARTY IN ENFORCING TRANSPORTER'S INDEMNIFICATION OBLIGATIONS HEREUNDER) (COLLECTIVELY, "DAMAGES"), SUSTAINED BY [redacted] BY REASON OF: (I) BODILY INJURY, SICKNESS OR DEATH TO THIRD PARTIES (INCLUDING [redacted] AND ANY TRANSPORTER OR END CARRIER EMPLOYEES OR AGENTS) OR ANY DAMAGES TO THE PROPERTY OF [redacted], TRANSPORTER, END CARRIER, OR THIRD PARTIES (INCLUDING NUCOR AND ANY TRANSPORTER OR END CARRIER EMPLOYEES OR AGENTS), TO THE EXTENT ARISING OUT OF, RELATED TO OR IN ANY MANNER OCCASIONED BY ANY NEGLIGENCE OR WILLFUL MISCONDUCT OF TRANSPORTER OR ANY END CARRIER, OR ANY OF THEIR RESPECTIVE OFFICERS, EMPLOYEES, AGENTS, OR AFFILIATES, CONTEMPLATED BY, OR TAKEN PURSUANT TO, THIS MASTER AGREEMENT, AND REGARDLESS OF WHETHER OR NOT A [redacted] INDEMNIFIED PARTY WOULD OTHERWISE BE LIABLE FOR SUCH DAMAGES UNDER A STATUTORY OR COMMON LAW STRICT LIABILITY STANDARD, OR (II) ANY BREACH BY TRANSPORTER OF, OR FAILURE OF ANY END CARRIER TO COMPLY WITH THE OBLIGATIONS CONTAINED IN, THIS MASTER AGREEMENT. THE PARTIES ACKNOWLEDGE AND AGREE THAT NOTWITHSTANDING THE FOREGOING, IN THE EVENT A COURT OF COMPETENT JURISDICTION HOLDS THAT A STATUTE LIMITING THE SCOPE OF TRANSPORTER'S INDEMNIFICATION OBLIGATIONS HEREUNDER IS APPLICABLE TO THE PERFORMANCE OF TRANSPORTER UNDER OR PURSUANT TO THIS MASTER AGREEMENT, TRANSPORTER'S INDEMNIFICATION OBLIGATIONS HEREUNDER SHALL ONLY EXTEND TO THE EXTENT PERMITTED BY SUCH STATUTE. TRANSPORTER ACKNOWLEDGES THAT ITS INDEMNIFICATION OBLIGATIONS HEREUNDER SHALL EXTEND AND APPLY TO DAMAGES RESULTING FROM DIRECT CLAIMS BY ANY [redacted] INDEMNIFIED PARTY AS WELL AS ANY DAMAGES A [redacted] INDEMNIFIED PARTY SUFFERS AS A RESULT OF ANY THIRD-PARTY CLAIMS (INCLUDING BUT NOT LIMITED TO ANY CLAIMS BY ANY END CARRIER). TRANSPORTER COVENANTS NOT TO SETTLE ANY MATTER UNDER THIS INDEMNITY WITHOUT OBTAINING [redacted] PRIOR WRITTEN CONSENT.

accounting practices. All records and documentation, including but not limited to packing lists, proof of delivery forms and all contracts and any amendments relating to SHIPPER'S shipments and activities will be maintained in good condition, easily accessible by both CARRIER and SHIPPER for a period of not less than three (3) years.

6. ~~SHIPPER will make payment within thirty (30) days of receipt of CARRIER'S freight bill and~~ signed bill of lading or similar proof of delivery. However, no consequences shall attach to the failure of SHIPPER to make payment within thirty (30) days and such shall not be considered a breach of this Agreement.

7. CARRIER shall be an independent contractor and shall have exclusive control and direction of the employees operating vehicles or otherwise engaged in such transportation services. CARRIER assumes full responsibility for the payment of local, state, and federal payroll sales, income and other taxes or contributions or taxes for unemployment insurance, old age pensions, workers' compensation, or other social security and related protection with respect to the employees engaged in the performance of such transportation services and agrees to comply with applicable rules and regulations promulgated under such laws. CARRIER hereby expressly waives any and all rights and remedies that CARRIER may have under Part B of Subtitle IV (49 U.S.C. Sec. 13101 through 14914) that are contrary to the specific provisions of this Agreement. The fact that CARRIER may provide common carrier services as part of its overall operations, and maintain schedules, rules, rates and charges relative thereto, shall have no applicability to the contract relationship between the parties created hereunder.

8. To the fullest extent permitted by law, CARRIER shall indemnify, defend and hold harmless SHIPPER, its officers, employees, agents and representatives from and against any and all claims, causes of action, damages, claims for damages, liability, loss or expense, including attorney's fees and expenses of litigation, arising out of or in any way related to the performance of this Agreement unless such claims, causes of action, loss, or damages result from SHIPPER's negligent acts or omissions. CARRIER further agrees to indemnify, defend and hold harmless SHIPPER, its officers, employees and representatives from any and all such claims, including but not limited to claims for property damage, bodily injury, emotional distress or death, and including but not limited to claims, injuries or damages caused or alleged to be caused in whole or in part by any negligent or willful act or omission of CARRIER or anyone for whose acts CARRIER may be liable, except to the extent (but only to the extent) that such claims, causes of action, loss, or damages result from SHIPPER's negligent acts or omissions.

9. CARRIER shall, during the term of this contract, have in effect no less than the SHIPPER'S minimum insurance requirements and Worker's Compensation requirements as shown in **Exhibit D**. CARRIER shall provide SHIPPER with a Certificate of Insurance to evidence CARRIER'S insurance companies (with an A.M. Best rating of A -, VII or better) coverage's and limits specified in **Exhibit D** prior to SHIPPER'S execution of this Agreement. Such Certificate will provide that SHIPPER be given thirty (30) days prior written notice of cancellation, material change or non-renewal and indicate the following: effective and expiration dates of policies, disclosure of any deductibles or self retentions, any exclusions which are not part of the standard form of Certificate, and that SHIPPER has been named as an additional insured under the Commercial General Liability Policy and the Auto Liability Policy, and loss payee under the Motor Truck Cargo Policy. CARRIER shall provide SHIPPER with a new Certificate meeting the requirements herein within ten (10) days of normal renewal of CARRIER'S insurance.

MOTOR CARRIERS of Montana

501 NORTH SANDERS #201 HELENA MT 59601 406-442-6600 FAX 406-443-4281 www.mttrucking.org

HB 347

The MCM and The Insurance Task Force of the American Trucking Associations has adopted state enactment of such statutes as a specific goal, because of the inequities these contractual provisions involve, their potential adverse effect on transportation safety, and the growing frequency with which such provisions are being forced on motor carriers by shippers and others.

As of September 1, 2012, thirty-five states had enacted statutes that prohibit or make unenforceable provisions in a contract for motor carrier transportation that require a motor carrier to indemnify another party to the contract for that party's own acts or omissions:

HB 347 uses the model language from ATA to use as a starting point for this provision. The provisions as a whole mean that the state will not enforce a provision of a contract that would require one party to a transportation contract (whether that party is a motor carrier or another entity) to assume liability for the acts of another party to the contract. The model language includes no exceptions to the rule. It might be emphasized that by the use of the neutral term "promise," the model language effectively prohibits contract clauses that serve to shift liability *away from* a motor carrier that is a party to a transportation contract, as well as those that would shift liability *to* a motor carrier.

Basically this legislation prohibits a shipper from making a carrier liable for the shippers own negligence. Motor carriers are seeking a level playing field; we have no issue with being responsible for our own negligence.

These indemnification provisions are becoming more often than not part of the contract that the shipper requires if you want to do business with them. While many larger companies are big enough to tell them they will not sign a contract with such a provision, smaller independents are being forced to sign them to stay in business, and many times just hoping that nothing happens and they do not become liable.

If the smaller carrier tries to insure the prospect of a loss many insurance companies will not look at them or the cost becomes prohibitive, and thus adds cost to the contract which in some cases can't be passed on.

MCM and its member companies would appreciate your favorable consideration of HB 347.

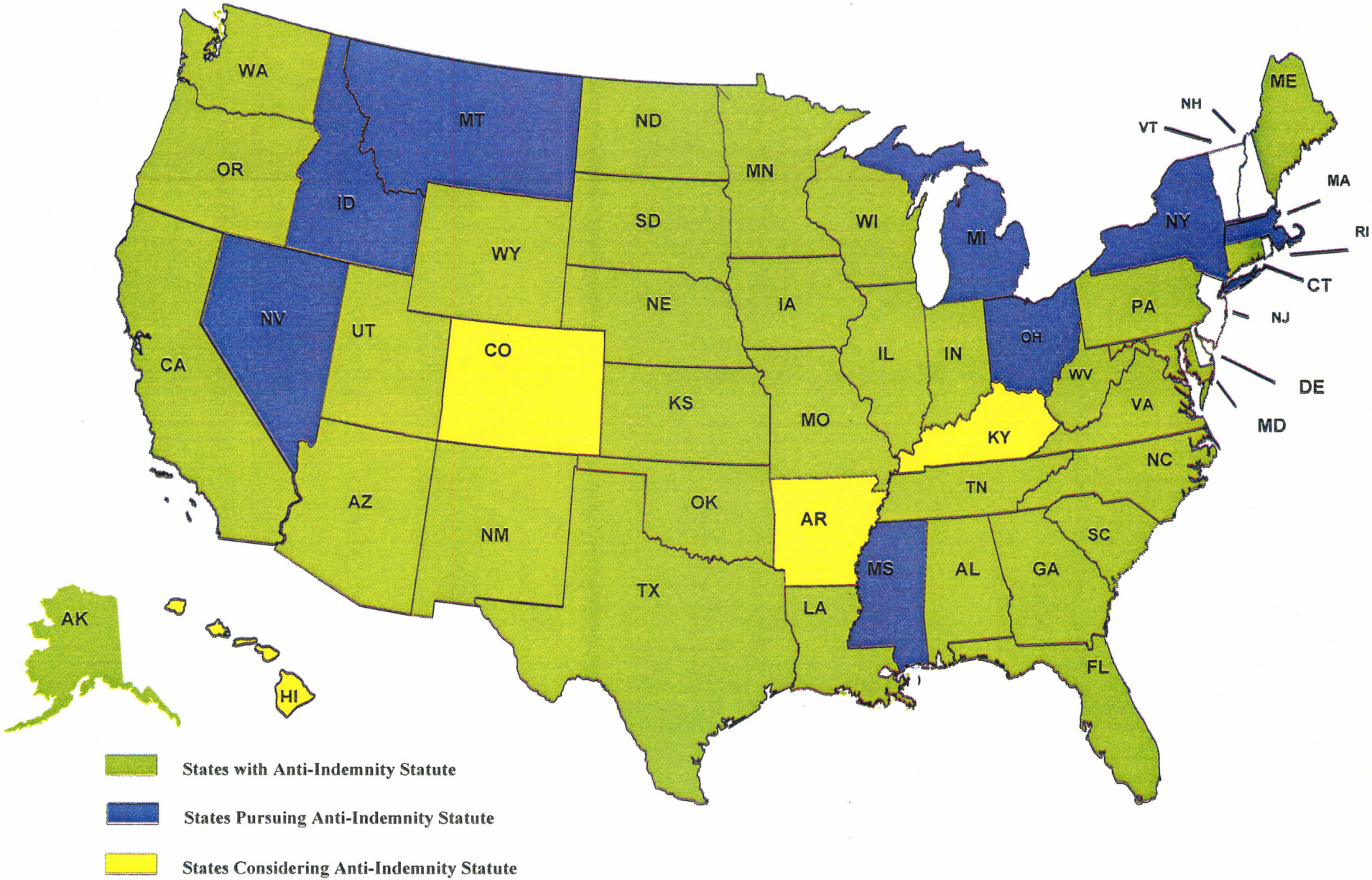
Examples:

1. Under general law, a shipper is liable for damages caused by improper loading where the improper loading is not detectable by ordinary observation by the motor carrier. Without this legislation and with the common type of contractual indemnification clause referred to above, a shipper could knowingly or negligently load a trailer in such a manner that it leads to an accident, yet the motor carrier would be contractually obligated to cover the damages. Since the shipper would only be liable if the improper loading was not ordinarily observable by the carrier, there is nothing the carrier could do to transport goods more safely in the future. And since the shipper would not be out of pocket, it would have no incentive to ensure it properly loaded the trailer in the future.

2. By law, a shipper is required to notify the carrier when the cargo the shipper is offering for transportation contains hazardous materials. Without this legislation and with the common type of contractual indemnification clause referred to above, a shipper could simply fail to notify the carrier of the presence of hazardous materials, which would probably result in a lower cost for the transportation. Failure to notify the carrier that it will be hauling hazmats also means that the carrier will be unable to provide adequate information to emergency responders in the case of an accident. But, under the contract, the motor carrier would be still obligated to cover the damages resulting from the accident or a spill. Again, there would be nothing the motor carrier could do to change its own behavior to be safer in the future.

If you have any questions, please contact _____

# Status of Anti-indemnification Legislation – May 30, 2012




May 30, 2012