

1986

Airline Indemnity Agreements: Will the Contracts Shift Your Risks

Stephen C. Kenney

Recommended Citation

Stephen C. Kenney, *Airline Indemnity Agreements: Will the Contracts Shift Your Risks*, 51 J. AIR L. & COM. 613 (1986)

<https://scholar.smu.edu/jalc/vol51/iss3/4>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

AIRLINE INDEMNITY AGREEMENTS: WILL THE CONTRACTS SHIFT YOUR RISKS?

STEPHEN C. KENNEY*

I. INTRODUCTION

UNITED STATES DOMESTIC air carriers provided service to more than 338 million revenue passengers between September 1, 1983 and August 31, 1984.¹ In 1983, these airlines also shipped 4.5 billion ton/miles of freight throughout the country.² Although the safety rec-

* Partner, Fisher & Hurst, San Francisco, California; born Pittsburgh, Pennsylvania, November 18, 1944; B.S., Ohio State University, 1966, J.D., Hastings College of Law, University of California, 1972; Member, Moot Court Board, 1971-1972; Author: "Punitive Damages in Aviation Cases: Solving the Insurance Coverage Dilemma", J. AIR L. & COM., Summer, 1983; "Deregulation of Airline Baggage Tariffs: Will Insurers Get Caught Holding the Bag?" UNDERWRITER'S REP., June, 1982; Member, Panel of Arbitrators, American Arbitration Association, San Francisco Superior Court and United States District Court for Northern District of California; Member, Bar Association of San Francisco; State Bar of California; American Bar Association [Litigation and Torts and Insurance Sections, Aviation and Space Law Committee, Aviation Insurance Subcommittee]; Association of Defense Counsel; Defense Research Institute; Lawyer-Pilots Bar Association; Aviation Insurance Association; 1st Lt. U.S. Army, 1966-1968; Private pilot, single engine, land and sea instrument rating.

I wish to gratefully acknowledge the invaluable efforts of Ken M. Markowitz, Associate, Fisher & Hurst, San Francisco, California; B.A. Northwestern University, 1976; J.D., Golden Gate University, 1982; Member Bar Association of San Francisco, California State Bar and American Bar Association, and Mark T. Hansen, Associate, Fisher & Hurst, San Francisco, California; B.S., University of Santa Clara, 1981; J.D. Hastings College of Law, University of California, 1984; Member Bar Association of San Francisco, California State Bar and American Bar Association, who assisted in the research and preparation of this article. Mr. Markowitz and Mr. Hansen have devoted many hours of their time to this project.

¹ Civil Aeronautics Board, Air Carrier Traffic Statistics 2, 4, 43, 87, 143 (August 1984).

² Figures provided by the Air Transport Association of America. Please note, a ton/mile is a measure of one ton of cargo carried one mile.

ord of commercial aviation is exemplary, the sheer volume of air travel and cargo transit creates a foreseeability that passengers or airline employees will be injured and that consigned goods will be damaged, lost, or spoiled. The relatively few incidents that ultimately result in claims create enormous potential liability for the aviation industry. In order to reduce their individual exposure to potential liability claims, airlines and airport authorities often incorporate indemnification provisions into their agreements with one another. While formal actions for indemnity are not routine within the aviation industry, they appear to be increasing in number and often involve substantial claims. Consequently, the indemnity concept is a matter of considerable importance for airlines, airport authorities, and aviation insurers.

In its simplest form, indemnity can be defined as a right which inures to a person who has discharged a duty owed, but, as between that person and another, the duty should have been discharged by the other.³ For example, if a party who is deemed technically liable for the injuries suffered by another compensates the other party for his injuries, the former may be entitled to recover the amount paid from a culpable third party who is actually responsible for the injuries. Recovery may be based upon express or implied contract, or founded in equity.⁴ Indemnity is a concept distinct from contribution. The doctrine of contribution distributes a loss among joint tortfeasors or obligors by requiring each to pay his proportionate share, while indemnity will, in many cases shift the entire loss from one who has been compelled to pay to another, who should rightfully bear the loss.⁵

This article will examine various indemnity issues that impact upon the aviation industry. It will first discuss in-

³ See, e.g., *Hartford Accident & Indemnity Co. v. R. Herschel Mfg.*, 453 F. Supp. 1375, 1379 (D.N.D. 1978).

⁴ See, e.g., *Araujo v. Wood's Hole*, 693 F.2d 1,2 (1st Cir. 1982).

⁵ See, e.g., *Milai v. Tradewind Industries*, 556 F. Supp. 36, 37 (E.D. Mich. 1982).

demnification concepts in general terms.⁶ The use of indemnity provisions in interline agreements between air carriers⁷ and in airport user agreements⁸ will then be analyzed. Additionally, the effect of indemnity upon aviation insurers will be considered.⁹ Finally, this article will discuss the importance of properly drafting airline indemnification agreements and include proposed language for an "ideal" indemnity clause.¹⁰ This analysis is not intended to provide an exhaustive commentary on the theory of indemnity, however. Rather, its goal is to provide the reader with an overview of the subject of indemnification and its practical effect on the aviation industry.¹¹

II. INDEMNITY IN GENERAL

Indemnification, whether arising out of a contract or by operation of law, allows air carriers and airport authorities to shift some or all of their liability exposure to others. Since air carriers and airport authorities, like individuals, are generally risk averse, it is not surprising that they would want to shift their own liability risks through the use of indemnification concepts.¹²

Although indemnification in the aviation industry most frequently arises in the context of an express agreement between the interested parties, an express agreement is

⁶ *Infra* note 12-40 and accompanying text.

⁷ *Infra* notes 41-61 and accompanying text.

⁸ *Infra* notes 67-84 and accompanying text.

⁹ *Infra* notes 62-64 and accompanying text.

¹⁰ *Infra* notes 85-88 and accompanying text.

¹¹ For more detailed coverage of this topic, treatises such as *American Jurisprudence* and *American Law Reports* should be consulted.

¹² Additionally, these aviation-oriented businesses may seek to shift their exposure in order to avoid incurring additional insurance costs. For example, if one airline (the seller) enters into an agreement to provide ground services to another airline (the buyer), the seller's exposure to liability is likely to increase substantially. If the seller's liability insurance will not cover this additional liability exposure, the seller will undoubtedly wish to shift the risk and the corresponding burden of purchasing additional insurance to the buyer, if it is to keep its own insurance costs from rising. Given the current intense competition within the aviation industry, minimizing operational costs (including insurance expenses) is an important concern for all air carriers and airport authorities.

generally not required to establish a right to indemnity.¹³ Courts in many jurisdictions have held that indemnity may be justified if the evidence establishes an implied contract.¹⁴ A right to indemnification may be implied, for example, when a manufacturer provides a buyer with a warranty on its product in the sales contract. If the buyer subsequently incurs liability as a result of a defect in the product, the ultimate loss may be shifted to the manufacturer under the principles of implied contractual indemnity.¹⁵ Some courts have gone even further and held that an indemnification right may arise through application of equitable principles.¹⁶ For example, in the landmark case of *Herrero v. Atkinson*,¹⁷ the California Court of Appeals de-

¹³ This was not always the case. Indemnity based upon an implied contract, *see infra* notes 14-15 and accompanying text, or equitable principles, *see infra* notes 16-19 and accompanying text, was unknown at common law. The common law rule held that as between joint tortfeasors, there could be no right of contribution or indemnity. This rule can be traced to the decision in *Merryweather v. Nixen*, 8 T.R. 186, 101 Eng. Rep. 1337 (1799). Thus, where two parties were held to be jointly and severally liable for injuries suffered by the plaintiff and recovery was effected from only one of the joint tortfeasors, the party making payment was precluded from recouping all or part of its loss from the other joint tortfeasor. This historical refusal to recognize a right to indemnity was premised upon the idea that the courts were not open to assist wrongdoers in adjusting the burdens of their misconduct. *See id.*

The harsh common law rule has given way to a tort system geared toward just compensation. The theories underlying this system are no longer based upon the assumption that negligence embodies a concept of misbehavior just short of criminal or immoral conduct. Rather, courts have established new criteria so that a person guilty of an active or affirmative act of negligence will not escape liability, while another, whose fault is only technical or passive, is required to assume complete liability. This important shift was noted over three decades ago by the court in *Gulf, Mobile & Ohio R. Co. v. Arthur Dixon Transfer Co.*, 343 Ill. App. 148, 98 N.E.2d 783 (1951).

¹⁴ *See, e.g., In re Oil Spill by Amoco Cadiz Off Coast of France on March 16, 1978*, 699 F.2d 909 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 196 (1983); *Palomba v. City of East Detroit*, 112 Mich. App. 209, 315 N.W.2d 898, 902 (1982); *Hill v. Sullivan Equipment Co.*, 86 Mich. App. 693, 173 N.W.2d 527 (1978); *Card Construction Co. v. Ledbetter*, 16 Cal. App. 3d 472, 94 Cal. Rptr. 570, 574 (1971).

¹⁵ *See, e.g., Huizar v. Abex Corp.*, 156 Cal. App. 3d 534, 541, 203 Cal. Rptr. 47, 51 (1984).

¹⁶ *See, e.g. American and Foreign Ins. Co. v. Allstate Ins. Co.*, 139 Ariz. 223, 677 P.2d 1331 (Ct. App. 1983); *E.L. White, Inc. v. City of Huntington Beach*, 21 Cal. 3d 497, 510, 146 Cal. Rptr. 614, 622, 579 P.2d 505, 513 (1978); *Griggs v. Safeco Ins. Co. of America*, 103 Idaho 790, 654 P.2d 378, 380 (1982).

¹⁷ 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (1964).

clared: "that [t]he duty to indemnify may arise, and indemnity may be allowed in those fact situations where in equity and good conscience the burden of judgment should be shifted from the shoulders of the person seeking indemnity to the one from whom indemnity is sought."¹⁸ It is important to note, however, that vague "equity" standards, such as those enunciated in the *Herrero* decision, may pose considerable problems for parties seeking to establish a right to indemnification based upon equitable principles.¹⁹

One area of the aviation industry where express indemnity agreements are generally not used to shift the risk of liability is in the relationship between air carriers and manufacturers of aircraft and aircraft components. Most purchase agreements between airlines and manufacturers contain no express indemnity provisions running in favor of either the buyer or the seller. Instead, manufacturers frequently include a limited warranty in these agreements. Should the product prove to be defective, then under the terms of the warranty, the manufacturer is obligated only to repair or replace the product.²⁰ Consequently, if an airline chooses to seek indemnification from the manufacturer for liability arising out of a product defect, it is usually necessary for the airline to rely upon theories of implied contract or equitable principles.²¹ However,

¹⁸ 227 Cal. App. at 74, 38 Cal. Rptr. at 493. The Restatement (Second) of Torts has adopted the following rule:

If two persons are liable in tort to a third person for the same harm and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of liability.

RESTATEMENT (SECOND) OF TORTS § 886B(1) (1977)

¹⁹ Specifically, a party seeking to either assert or defend a claim for indemnification under the *Herrero* standard faces a difficult task in evaluating its position, since the result would depend upon a particular court's discretionary interpretation and construction of the phrase, "in equity and good conscience."

²⁰ See, e.g., *Tokio Marine and Fire Insurance Co. v. McDonnell-Douglas Corp.*, 617 F.2d 936, 939 (2d Cir.1980); *Northwest Airlines v. Glenn L. Martin Co.*, 161 F. Supp. 452, 452-54 (D. Md. 1958).

²¹ For example, where an air carrier sustains liability for injury or death arising out of an accident involving its aircraft or ground vehicles, it may attempt to establish an implied right to indemnity based upon alleged negligence or strict

manufacturers often incorporate provisions into their purchase agreements requiring aircraft buyers to waive all rights they may have against the manufacturer, except those under the express terms of the warranty.²² Acceptance of such a provision may preclude the buyer from establishing even an implied right to indemnity from the manufacturer.²³

Today, at least in those jurisdictions which have embraced the concept of implied indemnity, express indemnification agreements are generally not essential to establish a right to indemnity. There are, however, instances where it may be preferable, if not necessary, to have an express indemnity agreement. This is particularly true in business arrangements involving aviation-related activities. For example, a party may seek to be indemnified for its own acts of negligence. As will be discussed more fully below, interline agreements between air carriers commonly focus on indemnification for a party's own negligent acts.²⁴

Although there exists some early authority to the contrary,²⁵ the general rule today allows contracting parties to agree to indemnification for the indemnitee's own acts of negligence.²⁶ Jurisdictions differ, however, as to the

product liability claims against the manufacturer. *See, e.g.,* Tokio Marine and Fire Insurance Co. v. McDonnell-Douglas Corp., 617 F.2d at 939 (holding no implied right to indemnity based upon alleged negligence or strict product liability in that instance).

²² *See, e.g., id.*

²³ *See id.* A manufacturer's ability to insert such language into a particular purchase agreement will depend largely upon the respective bargaining positions of the buyer and the manufacturer. For example, an aircraft manufacturer might be in a superior position to negotiate incorporation of such a waiver provision into a purchase agreement involving the sale of a single aircraft. On the other hand, a major carrier contemplating the purchase of an entire fleet might be able to negotiate more desirable terms for itself.

²⁴ *See infra* notes 45-49 and accompanying text. Indemnity in this context cannot be based upon implied contract or equitable principles, since liability would already rest with the actively culpable party. Instead, if a right to indemnity is to be asserted, it must be based upon an express agreement. *See supra* notes 13-18 and accompanying text.

²⁵ *See, e.g.,* Johnson v. Richmond & D.R. Co., 86 Va. 975, 11 S.E. 829 (1890).

²⁶ *See, e.g.,* Widson v. International Harvester Co., 153 Cal. App. 3d 45, 59, 200

type of contractual language that must be used in order to create viable indemnity rights. The majority rule is that a contract will not be construed to indemnify a party against its own negligence unless such intention is expressed in clear and unequivocal terms.²⁷ Even among jurisdictions following the majority rule, there is a split of authority on how "clear and unequivocal" the language in the contract must be in order to establish an enforceable right to indemnification. In some jurisdictions, explicit reference must be made in the contract to the indemnitee's active negligence if that is to be covered by the indemnity agreement.²⁸ In order to be enforceable in other jurisdictions, the indemnity provision need only refer in some way to the indemnitee's own negligence without differentiating between active and passive negligence.²⁹ Curiously, courts in a few jurisdictions purport to follow the majority

Cal. Rptr. 136, 146 (1984); *Mid-America Sprayers, Inc. v. U.S. Fire Insurance Co.*, 8 Kan. App. 2d 451, 660 P.2d 1380, 1387 (1983); *George R. Hall, Inc. v. Superior Trucking Co.*, 532 F. Supp. 985, 993 (N.D. Ga. 1982).

²⁷ See, e.g., *K/D Weatherbeaters, Inc. v. Gull Lake Industries*, 698 F.2d 954, 956 (8th Cir. 1983); *Widson v. International Harvester Co.*, 153 Cal. App. 3d 45, 60, 200 Cal. Rptr. 136, 147 (1984); *Ging v. Parker-Hunter, Inc.*, 544 F. Supp. 49, 54 (W.D. Pa. 1982). The reason underlying this rule is that contracts of indemnity are usually intended to provide against the loss of liability of one party through the operations of the other, or caused by physical conditions that are under the control of the indemnifying party, rather than indemnified party. See, e.g., *Walter L. Couse & Co. v. Hardy Corp.*, 290 Ala. 134, 274 So. 2d 322, 328 (1973).

²⁸ In California, for example, if the indemnity agreement only refers to the indemnitee's negligence generally and does not expressly mention its "active negligence," the agreement will be deemed to extend only to the indemnitee's acts of "passive negligence." See, e.g., *Armco Steel Corp. v. Roy H. Cox Co.*, 103 Cal. App. 3d 929, 936, 163 Cal. Rptr. 330, 334 (1980).

California courts have defined active negligence as personal participation in an affirmative act of negligence, or connection with negligent acts or omissions by knowledge or acquiescence, or failure to perform a duty which a party has agreed to perform. See *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 13 Cal. 3d 622, 628-30, 119 Cal. Rptr. 449, 453, 532 P.2d 97, 101 (1975). Passive negligence, on the other hand, has been defined as nonfeasance, such as the failure to discover a dangerous condition or to perform a duty imposed by law. *Id.*

²⁹ See, e.g., *George R. Hall Inc., v. Superior Trucking Co.*, 532 F. Supp. 985, 993 (N.D. Ga. 1982); *Weaver-Bailey Contractors, Inc. v. Fiske-Carter Construction Co.*, 9 Ark. App. 192, 657 S.W.2d 209, 210 (Ct. App. 1983). In jurisdictions adopting this approach, an agreement by one party to indemnify the other party for the latter's own negligent acts would likely be enforceable against the indemnitor.

rule, but in fact allow indemnification where the intent to indemnify a party for its own acts of negligence is not clearly expressed in the agreement.³⁰

Express indemnification language may also be advantageous when injured employees bring third party lawsuits. In most states, if an employee suffers injury or death during the course and scope of his employment, worker's compensation statutes provide the exclusive remedy for the employee or his heirs against the employer.³¹ Thus,

³⁰ *Cf.*, e.g., *April v. Sovereign Construction Co.*, 55 N.Y.2d 626, 430 N.E.2d 1305, 446 N.Y.S.2d 252 (1981) (court held that subcontractor was required to indemnify general contractor in view of indemnity clause providing that subcontractor would assume responsibility and liability for injuries to any person, including employees of subcontractor, arising out of any act or omission in connection with any work under the subcontract). In *Manson-Osberg v. State*, 552 P.2d 654 (Alaska 1976), where the trial court had found the State of Alaska liable for the death of an employee of a contractor, the Alaska Supreme Court held the contractor liable for indemnification of the state under the following contractual language:

The contractor shall save harmless the government and all of its representatives from all suits, actions, or claims of any character brought on account of any injuries or damages sustained by any person or property in consequence of any neglect in safeguarding the work, or through the use of unacceptable materials in the construction of the improvement, or on account of any act or omission by the said contractor or his employees, or from any claims or amounts arising or recovered under the workmen's compensation laws or any other law, by law, ordinance regulation, order, or decree. During the prosecution of the work the contractor shall be responsible for all damage or injury to any person or property of any character resulting from any act, omission, neglect or misconduct in the manner or method of executing said work satisfactorily, or due to the non-execution of said work at any time, or due to defective work or materials, and said responsibility shall continue until the date of final inspection . . .

The state had assigned engineering inspectors to live at the sight of the construction project to ensure that the contractor built the bridge to specifications. The plaintiffs decedent was killed in an accident when he fell off of an unrailed scaffold. The trial court found that the death was caused by neglect in safeguarding the work, that the state breached a duty to discover the failure to safeguard, but that the contractor had to indemnify the state under the above quoted indemnity clause.

One New York court held that a promise to indemnify a party for "all losses" included losses resulting from the indemnitee's own negligence. *Levine v. Shell Oil Co.*, 28 N.Y.2d 205, 212, 269 N.E.2d 799, 803, 321 N.Y.S.2d 81, 86 (1971).

³¹ For example, Section 3601 of the California Labor Code, provides in pertinent part: "Where the conditions of compensation . . . set forth in [Labor Code] Section 3600 concur, the right to recover such compensation . . . is . . . the ex-

where an employee's injury or death is caused, at least in part, by the employer's own negligence, the exclusivity of the worker's compensation remedy precludes the injured employee or his heirs from bringing a direct action against the employer. The employee or his heirs can, however, bring an action against other potentially culpable third parties.³²

When an injured employee pursues an action against a third party tortfeasor, the latter may attempt to seek indemnification from the former's employer, particularly if the employer was substantially at fault for the underlying injury or death. Requiring an employer to indemnify a third party tortfeasor under these circumstances, however, would circumvent one of the goals of most worker's compensation statutes—to limit the extent of the employer's liability based upon the purported exclusivity of the worker's compensation remedy. Most jurisdictions that have addressed this potential anomaly hold that indemnification is permissible where an employer has expressly contracted to indemnify the third party tortfeasor.³³ These jurisdictions defer to the intent of the parties and hold that express contractual indemnity is not barred by the exclusive remedy provisions of the state worker's compensation statutes.³⁴

In the absence of an express employer/third party indemnity agreement, jurisdictions differ on if, and when, an employer may be required to indemnify a third party

clusive remedy for injury or death of an employee against he employer. . ." CAL. LAB. CODE § 3601 (West Supp. 1983). See also ARK. STAT. ANN. § 1304 (1976); LA. REV. STAT. ANN. § 23:1032 (West 1985).

³² Under the prevailing view, unless a worker's compensation statute provides to the contrary, an employee may bring an action against a third party not covered by the Act. For a more detailed discussion of this point, see 81 AM. JUR. 2D *Workmen's Compensation* §§ 65-72 (1976). See *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1965).

³³ See, e.g., *Pocatello Industrial Park Co. v. Steel West, Inc.*, 101 Idaho 783, 621 P.2d 399, 406 (1980); *Whittle v. Pagani Bros. Construction Co.*, 383 Mass. 796, 422 N.E.2d 779, 781 (1981); *Artesia v. Carter*, 94 N.M. 311, 610 P.2d 198, 200 (Ct. App. 1980); *Glass v. Stahl Specialty Co.*, 97 Wash. 2d 880, 652 P.2d 948, 951 (1982).

³⁴ See cases cited *supra* note 33.

tortfeasor for an employee's injury or death.³⁵ Accordingly, a third party wanting assurance of indemnity in this situation should enter into an express indemnity agreement with the employer. If this is not done, the third party's right to indemnity becomes uncertain, and may depend largely upon criteria beyond the control of either party. Such criteria include the facts of the particular case and the characteristics of the courts where the claim is adjudicated.

Similarly, parties who want their indemnity arrangement to be governed by their choice of law will find an express indemnity agreement preferable. Generally, in the absence of an express indemnity agreement, the law of the place having the most significant relationship to the transaction or occurrence determines a tortfeasor's right to indemnity.³⁶ Where an express contract of indemnity exists, however, the parties may specify in the agreement

³⁵ Although at least one jurisdiction has permitted indemnity on the basis of common law or equitable principles (*see* *Carlson v. Smogard*, 298 Minn. 362, 215 N.W.2d 615 (1974)), many courts have refused to allow such recoveries. *See, e.g.*, *Paur v. Crookston Marine, Inc.*, 93 F.R.D. 450, 466 (D.N.D. 1979); *Cordier v. Stetson Ross, Inc.*, 184 Mont. 502, 604 P.2d 86, 90 (1979); *Glass v. Stahl Specialty Co.*, 97 Wash. 2d 880, 652 P.2d 948, 951 (1982). Jurisdictions are divided on whether the exclusivity of the worker's compensation remedy precludes indemnity based upon theories of "active-passive negligence" or vicarious liability. For examples of cases which have not allowed indemnity on this basis, *see* *Redwing Carriers, Inc. v. Crown Cent. Petroleum Corp.*, 356 So. 2d 1203, 1204 (Ala. 1978); *Rucker Co. v. M & P Drilling Co.*, 653 P.2d 1239, 1241 (Okla. 1982). For examples of cases allowing indemnity in this instance, *see* *Dulin v. Circle F. Industries, Inc.*, 558 F.2d 456, 464 (8th Cir. 1977); *Brown v. Shipman*, 89 Ill. App. 3d 162, 411 N.E.2d 569 (1980).

Finally, many jurisdictions permit a third party to obtain indemnification from an employer based upon an implied contract theory. *See, e.g.*, *Farrall v. Armstrong Cork Co.*, 457 A.2d 763, 766 (Del. Super. Ct. 1983); *Pocatello Industrial Park Co. v. Steel West, Inc.*, 101 Idaho 783, 621 P.2d 399, 405 (1980); *Harter Concrete Products, Inc. v. Harris*, 592 P.2d 526 (Okla. 1979). There are certain jurisdictions, however, which decline to follow this rule. *See, e.g.*, *Alameda Tank Co. v. Starkist Foods, Inc.*, 103 Cal. App. 3d 428, 162 Cal. Rptr. 924, 926 (1980); *Manson-Osberg Co. v. State*, 552 P.2d 654, 658 (Alaska 1976). In these jurisdictions, the only way for a third party to obtain indemnification from an employer is through an express indemnity agreement.

³⁶ *See, e.g.*, *Forty-Eight Insulations, Inc. v. Johns-Manville Products Corp.*, 472 F. Supp. 385, 391 (N.D. Ill. 1979); *Federated Mutual Ins. Co. v. Gray*, 475 F. Supp. 679 (E.D. Mo. 1979).

which state's law will govern the validity, operation, and effect of the contract.³⁷ Knowing at the outset which law will govern a party's indemnity rights can vitiate disagreements and serve to facilitate settlement of indemnity disputes which might otherwise prove to be quite costly.

An express indemnity agreement may also be preferable, if not necessary, when attempting to determine the time at which indemnity rights become enforceable. Upon execution of an express indemnity agreement, the parties can choose to delineate specifically the time at which the right to indemnification will vest. The right to assert a claim for indemnity may vest when the indemnitee's liability is established, when a claim for damages has been made, or after the indemnitee has made payment or otherwise suffered actual loss or damage.³⁸ Where no express provision exists, however, the issue could potentially become the focus of unpredictable and expensive litigation.

One final matter to consider within the ambit of general indemnification issues involves attorney fees. Although analyses of indemnity claims frequently focus upon liability and damages issues, a good deal of consideration may

³⁷ See, e.g., *Blalock v. Perfect Subscription Co.*, 458 F. Supp. 123, 126 (S.D. Ala. 1978); *Steinke v. Boeing Co.*, 525 F. Supp. 234, 236 (D. Mont. 1981); *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 56 (W.D. Pa. 1980).

³⁸ Although express indemnity provisions frequently and confusingly refer to a variety of different points at which the right to indemnify will become enforceable, a right to indemnity generally will vest either when the indemnitee's liability is established which will be true where the promise is to indemnify against liability or claims for damages, (See, e.g., *Christy v. Menasha Corp.*, 297 Minn. 334, 211 N.W.2d 773 (1973), *rev'd on other grounds*, 281 N.W.2d 848 (1979)), or when the indemnitee has made payment or otherwise suffered actual loss or damage as in the case where the agreement is for indemnification against loss or damage. See, e.g., *Daily Express, Inc. v. Northern Neck Transfer Co.*, 490 F. Supp. 1304, 1307 (M.D. Pa. 1980).

Thus, for example, if Company A expressly promises to indemnify Company B "against all loss or damage" which the latter may suffer as a result of its contract with the former, Company B may not enforce its right to indemnification immediately upon receipt of a claim from an injured third party; instead, Company B must claim and actually sustain an actual loss due to judgment or settlement before it may properly seek indemnity from Company A. See *Daily Express, Inc.*, 490 F. Supp. at 1307.

need to be given to reimbursement of attorney fees. A party defending against a third-party may attempt to seek indemnification from another, not only for the liability it has incurred, but also for the costs associated with the defense of the third-party action. Given the high cost of litigation today, it is not difficult to imagine instances where attorney fees and expenses can equal or exceed the amount of damages recovered by the third-party. Consequently, recovery of attorney fees incurred in the defense of a claim may be as important as the claim for indemnity itself.

As a general rule, unless an indemnity agreement provides to the contrary, an indemnitee, as part of his damages, is entitled to recover from the indemnitor reasonable attorney fees incurred in defending the third-party claim.³⁹ It is important to distinguish between attorney fees incurred in defending against third-party claims and those incurred in establishing the right to indemnification. The former are usually recoverable. In the absence of an express agreement, however, attorney fees incurred in an attempt to establish indemnity rights are generally not recoverable.⁴⁰

The use of indemnity agreements in this context can facilitate resolution of disputes which might arise between parties subsequent to the establishment of their relation-

³⁹ See, e.g., *DeWitt v. Western Pacific R.R. Co.*, 719 F.2d 1448, 1452 (9th Cir. 1983); *Southern Ry. Co. v. Arlen Realty & Dev. Corp.*, 220 Va. 291, 257 S.E.2d 841, 844 (1979). At least one jurisdiction has refused to award attorney fees in the absence of an express agreement therefor. See *United States Fidelity and Guaranty Co. v. Davis Mechanical Contractors*, 15 N.C. App. 127, 189 S.E.2d 553, 554 (1972). However, in many jurisdictions, attorney fees can be recovered where the right to indemnity arises out of an express contract, or by operation of law. See, e.g., *Rabon v. Automatic Fasteners, Inc.*, 672 F.2d 1231, 1239 (5th Cir. 1982); *Miller Yacht Sales, Inc. v. M.V. Vishva Shobha*, 494 F. Supp. 1005, 1014 (S.D.N.Y. 1980).

⁴⁰ See, e.g., *Dillingham Shipyard v. Associated Insulation Co.*, 649 F.2d 1322, 1328 (9th Cir. 1981); *Jones v. Storm Construction Co.*, 84 Wash. 2d 518, 527 P.2d 1115, 1119 (1974). Notwithstanding the prevailing rule, some jurisdictions have allowed recovery for attorney fees incurred in establishing a right to indemnification. See, e.g., *DeWitt v. Western Pacific R.R. Co.*, 719 F.2d 1448, 1453 (9th Cir. 1983).

ship. By reducing their intentions to writing, the parties can establish whether the indemnity agreement will extend to recovery of attorney fees associated with the defense of third-party claims. The agreement can also indicate whether a party can recover any attorney fees incurred in its pursuit of establishing a right to indemnification.

III. INDEMNITY BETWEEN AIRLINES

A. *Generally*

Air carriers are among the most visible business entities in the aviation industry. This visibility, based upon continuous public contact, exposes airlines to substantial liability risks arising from their daily business operations. It is, therefore, not surprising that indemnity can be particularly important when carriers engage in business dealings with one another. For airlines, the topic of indemnity most frequently arises in the context of individual service agreements between carriers, commonly known as interline agreements.⁴¹

Interline agreements are commonly used when one carrier (the buyer) wants to begin or expand service at a location where another carrier (the seller) has already established a fixed base of operations.⁴² Through an in-

⁴¹ There are surprisingly few reported cases dealing with air carrier interline agreements and the indemnity provisions therein. Consequently, much of the analysis in this section will be based upon the discussion in the preceding section concerning indemnity in general. For examples of decisions involving interpretation of air carrier interline agreements and the indemnity provisions contained in those agreements, see *Schachnovsky v. Trans World Airlines*, 16 Av. Cas. (CCH) 18,351 (N.Y. App. Div. 1981) and *Northwest Airlines v. Alaska Airlines*, 12 Av. Cas (CCH) 17,584, 17,585 (D. Alaska 1972).

⁴² The terms "Seller" and "Buyer" are commonly used in interline agreements between airlines. In the interest of consistency and confidentiality, the terms "seller" and "buyer" are incorporated into this article rather than specific names of airlines.

Ordinarily, interline agreements are not public record, but rather are private contracts between various airlines. In order to avoid violating the sanctity of these confidential agreements, this article will refer only in general terms to these agreements, and will omit the names of the parties and airports involved where appropriate. A sampling of indemnity provisions from airport user agreements

terline contract, the seller agrees to provide the buyer with particular support services, which the buyer would otherwise have to provide for itself. Such agreements can benefit both carriers. The buyer, on the one hand, minimizes its expenditures for capital and overhead at the new station. It can avoid substantial manpower expenses and potential staffing problems by contracting with the seller for manpower and facility services. The seller, on the other hand, earns additional revenue and makes more efficient use of its existing resources. Individual service agreements can extend to a variety of different services, including de-icing, non-routine maintenance, sanitary disposal, ground handling, catering, and subleases of airport space and equipment.

The focal point of interline agreements, at the formation stage, is usually the price which the seller will receive for its services. Parties frequently give little attention at the bargaining stage of their agreement to "peripheral" terms such as provisions pertaining to indemnification. In fact, express indemnity provisions in many agreements are included as afterthoughts, or simply because the seller's standard form happens to contain such a clause.⁴³ Generally, indemnification issues⁴⁴ do not arise until one

will be included in the appendix, however, since these pacts are a matter of public record.

It should also be noted that this article will not discuss the interline agreement which exists between many air carriers concerning the ability to ticket passengers and ship cargo on other participating carriers.

⁴³ For example, the standard form used by one airline provides in part:

Customer hereby agrees to indemnify and save harmless [Seller] . . . from and against any and all claims (including, but not limited to, attorneys' fees, costs and expenses incident thereto) for loss of or damage to property, freight, or for death of, or injury to, any persons whomsoever, arising out of or connected with this Agreement and/or the performance, or failure to perform services hereunder, unless such claims, loss, damage, death or injury results from the gross negligence of [Seller], its officers, agents or employees.

This agreement has been referred to in only the broadest of terms in order to preserve its confidential nature. For another example of an interline indemnity provision, see *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 12 Av. Cas. (CCH) 17,584 (D. Alaska 1972).

⁴⁴ For a discussion of possible issues that may arise, see *infra* notes 46-66 and accompanying text.

party makes a claim for indemnity under the agreement. At that point, the precise language of the indemnity provision can become very important, for it may well determine who will bear the ultimate liability exposure charged initially to the party seeking indemnity.

B. *Indemnity Provisions in Interline Agreements*

Express indemnity provisions are contained in almost all individual ground service contracts entered into between air carriers. Such clauses generally attempt to provide the seller with a right to indemnity from the buyer for liability arising out of the provision of service under the agreement.⁴⁵ The theoretical premise for such indemnity is the idea that the seller is only shifting to the buyer the risk of liability which the buyer would otherwise bear if it were to provide its own services. One possible basis for this premise is a belief that the seller's employees will perform satisfactorily, as would the buyer's.

The specific language used in interline agreement indemnity clauses can vary significantly, depending upon the parties to the contract, the services to be provided, and even the airport involved. Essentially, however, these clauses share the same tone: the buyer agrees to indemnify the seller for any loss or liability which might arise out of the seller's provision of service under the agreement, except those claims, losses, or liabilities which arise out of the seller's own culpable conduct.⁴⁶

At first blush, most interline indemnity clauses appear to conclusively establish the seller's right to indemnity from the buyer. On closer examination, it is apparent that the language in these provisions is fraught with problems that could hinder and possibly defeat any claim for indemnity asserted under the agreement. For example, under the terms of an agreement between two prominent United States carriers, wherein the seller agreed to provide emer-

⁴⁵ See, e.g., *supra* note 43.

⁴⁶ Such culpable conduct is frequently characterized in indemnity clause language as "gross negligence" or "wilful misconduct." See *supra* notes 38-43.

agency aircraft maintenance to the buyer at a large southwest airport, the indemnity clause provides in part:

Customer hereby agrees to indemnify and save harmless [seller], its officers, agents, and employees from and against any and all claims for loss of, or damages to property, freight or cargo, or for the death of, or injury to, any persons whomsoever, arising out of or connected with this Agreement and/or the performance, or failure to perform services hereunder, unless such claims, loss, damage, death or injury results from the gross negligence or willful misconduct of [seller], its officers, agents or employees.⁴⁷

A hypothetical may serve to illustrate the point. Assume that pursuant to this indemnity agreement, the seller performs repairs on the engines of one buyer's aircraft. After the repairs are completed, the aircraft departs with a full passenger load and crashes due to alleged engine malfunction. Assume further that the alleged engine failure is ultimately attributed to improper repairs by the seller. Will the seller be able to obtain indemnity from the buyer, under the above clause, for the substantial liability the seller is likely to incur as a result of the accident? The answer is not at all clear. Although the indemnity provision purports to cover all of the seller's liability, except for that arising out of the seller's "gross negligence," the buyer is likely to argue, given the magnitude of the liability exposure, that the seller's conduct constituted "gross negligence." The ambiguity inherent in the term "gross negligence"⁴⁸ would almost certainly preclude early set-

⁴⁷ See, *supra* note 42.

⁴⁸ "Gross negligence" is not susceptible of a precise definition. Jurisdictions have defined the term in various ways. For example, in the District of Columbia, gross negligence implies an "extreme departure from the ordinary standard of care." See *Wager v. Pro*, 603 F.2d 1005, 1010 (D.C. Cir. 1979) (citing *W. PROSSER, LAW OF TORTS* § 8 (1971)). In Kentucky, the term is defined as the "absence of slight cares." *McTavish v. Chesapeake & Ohio Ry.*, 485 F.2d 510 (6th Cir. 1972) (applying Kentucky law). In Oregon, gross negligence is characterized as "conscious indifference to or reckless disregard of the rights of others." *Ryan v. Foster & Marshall, Inc.*, 556 F.2d 460, 464 (9th Cir. 1977) (applying Oregon law). In South Carolina, gross negligence has been defined in a variety of ways, including "the intentional, conscious failure to do a thing that is incumbent [sic] upon one to do, or the doing of a thing intentionally that one ought not to do." *Pilot Indus-*

tlement of the seller's claim, with the result that the parties would be forced to resolve the dispute through expensive and time-consuming litigation. Ironically, the outcome of the trial would likely turn on a particular court's interpretation of the unusually imprecise legal term, "gross negligence."⁴⁹

A second example of the latent problems which can arise from the language in interline indemnity agreements is illustrated by a contract between two major U.S. carriers wherein the seller agreed to provide ground services and sanitary disposal to the buyer at a relatively small East Coast airport. The indemnity provision in that contract provides:

[Buyer] agrees to indemnify, defend and hold harmless [seller], its directors, officers, employees, agents and representatives from and against all claims, liability, loss or expense, including legal fees and court costs, arising out of or in connection with this agreement including, but not limited to, claims of employees of [buyer], claims arising out of injury, death or property damage (except property of [seller]), direct and/or consequential, to any person (except employees of [seller]) or entity, unless caused by the gross negligence or willful misconduct of [seller].⁵⁰

Apart from the difficulty of interpreting such imprecise terms as "gross negligence" and "willful misconduct," the above quoted clause is also arguably unclear as to when the seller's right to indemnity becomes enforceable.

The clause speaks of indemnity for "all claims, liability, loss or expense." As noted above, however, the right to indemnity will vest at different times, depending upon

tries v. Southern Bell Telephone & Telegraph Co., 495 F.Supp. 356, 362 (D.S.C. 1979) (applying South Carolina law.)

In addition, some jurisdictions, such as Kansas, do not even recognize degrees of negligence, such as gross negligence. See, e.g., *Holman v. Southwestern Bell Telephone Co.*, 358 F. Supp. 727, 728 n.1 (D. Kan. 1973) (applying Kansas law). It should be noted that Kansas, however, does differentiate between ordinary negligence and reckless, wanton, or willful misconduct. *Id.*

⁴⁹ See *supra* note 48.

⁵⁰ See *supra* note 42.

whether it pertains to exposure or actual loss.⁵¹ If the seller faced exposure to substantial liability arising out of its provision of services to the buyer under the above agreement, the seller would undoubtedly want the buyer to indemnify it as soon as liability was established and before seller had made any payment. The buyer, however, would probably wish to retain its indemnification reserve for as long as possible. Accordingly, the buyer will likely argue that its responsibility to indemnify the seller did not arise until the seller has sustained an actual out-of-pocket loss.⁵² Again, ambiguity in the terms of the indemnity provision could preclude or hinder settlement of the seller's claim. If the parties opted to litigate, a court might well find that the seller could not enforce its indemnity rights under the agreement until after it had sustained actual loss, given that "loss" is expressly mentioned in the agreement. The court could conceivably construe the indemnity terms in that manner, based upon the fact that the agreement was probably drafted by the seller, the party seeking indemnity.⁵³

In addition to indemnity clauses, interline contracts generally contain provisions in which the buyer agrees to obtain and maintain at its expense a specified amount of liability insurance covering the services to be provided by the seller under the agreement. Frequently, the buyer must name the seller as an additional insured under its liability policy. For example, the insurance provision in one carrier's interline agreement provides in part:

Policies of aircraft and comprehensive general liability insurance [shall be procured by Buyer and] shall be endorsed to cover the indemnity and hold harmless obligations of [Buyer] to [Seller] hereunder and shall be

⁵¹ See *supra* note 38 and accompanying text.

⁵² *Id.*

⁵³ As a general rule, express indemnity agreements, when ambiguous, are construed in favor of the indemnitor or strictly against the indemnitee, especially when the latter is the drafter of the instrument. See, e.g., *Marathon Steel Co. v. Tilley Steel, Inc.*, 66 Cal. App. 3d 413, 416, 136 Cal. Rptr. 73, 75 (1977); *Robertson v. Swindell-Dressler Co.*, 82 Mich App. 382, 267 N.W.2d 131, 140 (1978).

further endorsed to name [Seller] as an additional insured.⁵⁴

Through such provisions, sellers are able to shift the cost of insurance for services provided to the buyers.⁵⁵ These additional insurance provisions have special implications for aviation insurers, as will be discussed more fully below.⁵⁶

C. *Practical Problems Associated with Interline Agreements*

There are a number of practical problems which buyers and sellers may experience after they execute interline indemnity agreements. Some of these problems are internal to the airlines, others are external. The buyer may face two significant internal problems. First, and notwithstanding the possible rationale for indemnification, the seller's personnel may not function as effectively in providing service under the agreement as would the buyer's employees due to varying quality control and performance standards within the aviation industry. Thus, the buyer may be exposing itself to greater risk by entering into the interline agreement than it would ordinarily hazard if it utilized its own more qualified manpower resources. Secondly, if the buyer must obtain additional insurance under the terms of the agreement, its insurance costs may increase. Moreover, even if current premiums are not affected, all additional claims will undoubtedly be considered by the insurer in connection with the buyer's long-term risk experience.

An internal concern peculiar to the seller involves its increased potential exposure to liability under the terms of the interline agreement. While the seller will attempt to shift its increased exposure to the buyer through an indemnity provision, if the indemnity provision is held to be

⁵⁴ See generally *supra* note 42 (stating the confidential nature of actual interline agreements).

⁵⁵ The importance of shifting the cost of insurance for services provided is discussed *supra* at note 12 and accompanying text.

⁵⁶ See *infra* notes 62-64 and accompanying text.

unenforceable, the seller or its insurer may be required to bear the cost of a damage or injury claim that would not have arisen had the seller not agreed to provide services to the buyer. To illustrate this point, assume that two carriers enter into an interline agreement wherein the seller agrees to provide ramp service for the buyer and the buyer agrees to indemnify the seller against liability arising from the agreement, including the liability resulting from the seller's own acts of negligence. Assume further that in its provision of ramp service to the buyer, the seller injures an employee of the buyer, who subsequently prosecutes a successful action against the seller. If the seller is unable to enforce its right to indemnification from the buyer, it will be forced to compensate the employee for his injuries, even though the seller probably would never have incurred such liability if it had not entered into the interline agreement with the buyer.

Interline indemnity agreements may also create a potentially controversial issue for the buyer on the external level. For example, if the seller negotiates a choice of law provision into the contract, the buyer may face enforcement or interpretation of the agreement under state laws that are favorable to the seller.⁵⁷ The seller may have to consider practical problems on the external level for similar reasons. The buyer might attempt to defeat a seller's claim for indemnification if the indemnity provision in the agreement is not drafted with sufficient specificity to comply with the requirements of a particular jurisdiction.⁵⁸ A particular indemnity provision might even withstand a legal challenge in one jurisdiction, yet fail a similar test in another forum.⁵⁹ For example, assume that two airlines enter into an interline catering agreement wherein the buyer agrees to indemnify the seller for any liability the latter incurs arising out of the agreement, including "liability resulting from the seller's own negligence." As-

⁵⁷ See *supra* note 37 and accompanying text.

⁵⁸ See *supra* notes 27-30 and accompanying text.

⁵⁹ *Id.*

sume further that on one occasion, the seller, while delivering meals to the buyer's aircraft, negligently drives its truck into one of the buyer's employees, causing serious injury to the employee. In a suit to obtain indemnity from the buyer for liability arising from this accident, the seller would likely succeed in a jurisdiction such as Arkansas, where general reference in an indemnity agreement to the seller's own negligence is sufficient to create a right of indemnification in the seller for its own "active negligence."⁶⁰ In California, however, the seller would probably be precluded from obtaining indemnity in this instance, since the indemnification agreement does not expressly mention the seller's "active negligence."⁶¹ Since many air carriers operate on a nationwide basis and most operate on a multi-state basis, contracts for indemnification should be drafted with the goal of enforceability in every jurisdiction.

D. *Relationship of Interline Indemnity Contracts to Insurance*

Aviation insurers may ultimately bear the burden of any increase in liability arising out of a seller's performance under an interline agreement. Therefore, the indemnification and insurance provisions in such agreements assume obvious importance. Problems may arise for the insurers of both the buyer and seller when an interline agreement includes an indemnification clause.

One major concern of the buyer's insurer is, of course, whether the interline agreement will create an enforceable claim for indemnification against the buyer if the seller becomes liable to another in performing under the agreement. If the agreement has created a right to indemnity in the seller, the buyer may attempt to look to its own insurer for coverage and reimbursement. It may be possible for the buyer's insurer to avoid the buyer's claim, on the ground that the buyer failed to name the seller as an

⁶⁰ See *supra* note 29.

⁶¹ See *supra* note 28.

additional insured. However, this argument may be closed to the insurer if it has granted the buyer broad powers to accept contractual liability under its insurance policy.⁶² In addition, the insurer may decide to cover the buyer's liability in order to maintain good business relations with the buyer; this is a particularly important consideration for insurers in light of the high level of competition among insurers in the aviation market.

If the buyer's insurer refuses indemnification, additional litigation involving coverage issues may result. For example, assume that in an interline agreement, the buyer has promised to indemnify the seller for liability that the seller incurs arising out of the agreement. While furnishing services pursuant to the terms of the agreement, the seller incurs liability for which it is entitled to be indemnified, and subsequently demands indemnification from the buyer. The buyer, in turn, requests its liability insurer to provide coverage for the loss. If the buyer's insurer refuses, claiming that the buyer failed to name the seller as an additional insured, the buyer may be forced to bring an action against its insurer to establish who must bear the liability incurred by the seller. In order to preserve stable business relations between air carriers and their insurers, such a situation should be avoided.

Another problem for the buyer's insurer arises from the fact that in many interline indemnity agreements, the buyer agrees to require its insurer to waive any rights of subrogation the insurer might have against the seller for any loss or damage resulting from the seller's performance under the agreement. In this situation, if the seller's right to indemnity is upheld, and the buyer's insurance policy covers the incurred liability, the buyer's insurer becomes the entity ultimately burdened by the claim. For

⁶² Certain air carriers are authorized by their insurers to enter into agreements in this manner. These carriers are not required to obtain formal permission or endorsement from their insurers in order to implement coverage for the newly created contractual liability. Compensation may be required in some instances, however, and if the insurer is not immediately notified, the compensation for the additional coverage may be obtained by way of year-end audit procedures.

example, assume that the buyer has promised to indemnify the seller for liability arising out of an interline indemnity agreement for ground handling. In addition, the buyer has agreed to require its insurer to waive any rights of subrogation the insurer might have against the seller based upon the agreement. Assume further that the seller, through its own negligence, injures one of the buyer's passengers while providing the ground handling service, and that such liability is covered by the indemnity agreement. If the buyer has named the seller as an additional insured under its policy, it is likely that the buyer's insurer will be obligated to compensate the injured passenger for the injuries sustained as a result of the seller's negligence. It is also probable that the buyer's insurer will be precluded from recovering against the seller, since the insurer's subrogation rights against the seller were expressly waived in the interline agreement.

One problem for the seller's insurer involves the buyer's obligation to purchase additional insurance covering the seller's performance under the agreement or naming the seller as an additional insured in its present policy.⁶³ At least one jurisdiction has held that where a seller's claim for indemnification from the buyer is unenforceable, and the buyer has failed to obtain insurance naming the seller as an additional insured, the seller or its insurer must bear the liability exposure and may only recover from the buyer those damages resulting from the latter's contract.⁶⁴ In such a situation, the seller's insurer would face exposure up to the limits of the seller's policy. For example, assume that in providing ramp service under an interline agreement, the seller, through its own active negligence, injures one of the buyer's employees. Assume further that the indemnity provision in that agreement does not extend to the seller's active negligence, and that the buyer has breached its contractual ob-

⁶³ See text accompanying note 54 *supra*.

⁶⁴ See *Hollywood Turf Club v. Montgomery Elevator Co.*, 58 Cal. App. 3d 580, 130 Cal. Rptr. 81 (1976).

ligation to name the seller as an additional insured under its liability policy. If the injured employee obtains a judgment against the seller, the seller's insurer would be obligated to pay the entire award as long as the amount was within the seller's policy limits. The seller's insurer would have no direct cause of action against the buyer for its breach, since the insurer had previously agreed to defend and indemnify such losses, and was, therefore, technically not damaged by the breach.

E. *What Effect Would the Elimination of Indemnity Contracts Have Upon Airline Operations?*

Although indemnification clauses are common in interline agreements, it is unlikely that airline operations, as a whole, would be significantly affected by the elimination of such provisions. The elimination of indemnity agreements would, however, promote an increase in the cost of services provided under interline agreements in many instances.

In the absence of express indemnity provisions, it is reasonable to assume that a seller entering into an interline agreement would seek to rely upon implied indemnity, where possible, to shift its increased exposure risk to the buyer. For example, where a third party is injured as a result of the seller's passive negligence and the buyer's active negligence, the seller would probably be successful in its attempts to obtain indemnity from the buyer, based upon an implied indemnity theory.⁶⁵ In this situation, the elimination of express indemnity agreements would have little bearing upon the cost of services provided under the interline agreement.

Where the seller could not rely upon implied indemnity to insulate itself from the risk, however, it is likely that the cost of services would increase. The seller could not avail itself of implied indemnity for liability it might incur as a

⁶⁵ See *supra* notes 13-18 and accompanying text.

result of its own negligence.⁶⁶ Consequently, the seller would probably purchase additional insurance to cover this aspect of its operations under the agreement. It is likely that the seller would then pass the cost of this insurance on to the buyer or future buyers in the form of a higher price for its services.

While cost may be a significant factor in a carrier's decision to purchase service from another carrier, it is not the only criterion. A carrier's desire to establish a foothold in a particular market, for example, might logically support a decision to enter into an interline agreement with another carrier, even though the price of the seller's services might exceed that which would otherwise prevail if the agreement contained an indemnity provision. In other words, marketing considerations can easily relegate contractual indemnity provisions to a position of secondary importance.

IV. INDEMNITY CLAUSES IN AIRPORT USER AGREEMENTS

As a general rule, in the absence of a statute providing otherwise, municipalities and counties are liable for negligent operation of public airports on the ground that ownership and operation of airports are proprietary rather than governmental functions.⁶⁷ Consequently, given the large volume of air traffic which domestic airports handle each year, indemnity is a matter of considerable concern for airport authorities.

Before an air carrier may provide service to a particular location, it must first secure the permission of the local airport authority.⁶⁸ Usually this is done by entering into a "user agreement" with that authority. Such agreements generally set forth the terms and conditions governing the carrier's operating rights at the airport. They frequently include clauses requiring the airline to purchase insurance

⁶⁶ See *supra* note 24.

⁶⁷ See, e.g., *Anderson v. Jackson Mun. Airport Authority*, 419 So.2d 1010, 1012 (Miss. 1982).

⁶⁸ See generally 2 S. SPIESER & C. KRAUSE, *AVIATION TORT LAW*, Ch. 21 (1979).

and to indemnify the airport authority for liability it might incur during the course of its operations.⁶⁹

The specific language found in the indemnity provisions of airport user agreements, like the language in existing interline agreements, varies considerably depending upon the airport authority involved.⁷⁰ Currently, at least three different types of indemnity provisions exist in airport user agreements.⁷¹ In the first type (Type I), the airline agrees to indemnify and defend the airport authority from all claims and actions arising out of the carrier's use of the airport, excepting any liability for injury or damage occasioned by the negligence of the airport authority itself.⁷²

The second type of indemnification provision (Type II) is essentially an expansion of Type I. It usually contains language similar to Type I insofar as the carrier's duty to indemnify the airport authority is concerned, but with a further proviso that the airport authority agrees to indemnify the carrier for possible liability which the carrier may incur arising out of the negligent acts or omissions of the airport authority.⁷³

The third type of indemnity clause (Type III) commonly found in airport user agreements provides that the air carrier will indemnify and defend the airport authority from all claims, liability and judgments arising in any manner from the carrier's operations at the airport.⁷⁴ A Type III clause contains no exclusion for liability resulting

⁶⁹ For examples of indemnity provisions found in airport user agreements, see Appendix. *See also* Verral v. Port Authority, 15 Av. Cas. (CCH) 18,327 (N.Y. 1980); Rogers v. Western Airlines, 15 Av. Cas. (CCH) 17,831, 17,833 (Mont. 1979); North Central Airlines v. City of Aberdeen, 9 Av. Cas. (CCH) 18,350, 18,351 (8th Cir. 1966).

⁷⁰ *See supra* note 69 and the cases cited therein for examples of the variety of provisions used in these agreements.

⁷¹ *See supra* note 69 and accompanying text.

⁷² This type of indemnity provision has been used by airport authorities in Boise, Detroit, Minneapolis-St. Paul, Portland, Sacramento, San Antonio, San Diego, and San Francisco. *See* Appendix.

⁷³ Indemnity provisions to this effect have been employed by airport authorities in Dallas-Ft. Worth, Milwaukee, and San Jose. *See* Appendix.

⁷⁴ An indemnity provision of this type has been used by the airport authority in

from the negligence of the airport authority.⁷⁵

The ambiguities inherent in the language of interline indemnity agreements are also common in the indemnity provisions of airport user agreements. For example, the indemnity provision in the airport user agreement utilized by the Modesto, California airport provides:

Operator [airline] shall indemnify, defend and hold harmless Lessor [airport authority], its officers, agents and employees from and against any and all claims, demands, liabilities, suits, judgments, costs and expenses asserted by any person or persons, including officers, agents or employees of Lessor or Operator, arising in any way from Operator's operations hereunder or as the result of anything claimed to be done or omitted to be done by Operator hereunder.⁷⁶

As in the case of interline indemnity provisions examined earlier, this clause, on first reading, appears to conclusively create a right to indemnity from the carrier in the airport authority. Once again, however, a closer inspection of the terms of this provision reveals problems with the language that could hamper or even preclude the airport authority from enforcing its right to indemnity against the carrier.

For instance, assume for illustrative purposes only that during a takeoff attempt, one of the carrier's aircraft is forced off the runway at the Modesto Airport. Assume further that the aircraft left the runway in part because of pilot negligence, but in greater part because of the airport authority's negligent maintenance of the runway. If an action against the airport authority by injured airline passengers resulted in a judgment for damages against the airport authority, the airport authority would not likely prevail in an attempt to obtain indemnification from the carrier under the terms of the above-quoted indemnity

Modesto, California. The indemnity provision in the Modesto Airport user agreement is set forth in the text accompanying note 76, *infra*.

⁷⁵ See *id.*

⁷⁶ For specific examples of other indemnity provisions, see Appendix.

provision. The carrier could point to the fact that nothing in the agreement specifically mentions indemnification for negligence by the airport authority. Arguably, the language used is vague and ambiguous. In addition, the carrier might argue that the indemnity provision should not be enforced because it constitutes an adhesion contract.⁷⁷ Assuming that the airport authority drafted the clause, and in light of its arguably superior bargaining position, these considerations might well persuade a court to reject the airport authority's claim for indemnification, thus forcing the airport authority to bear all liability for the injured passengers' claims.⁷⁸

It is also important to note that the indemnity clause in the Modesto user agreement makes no specific reference to the "active negligence" of the airport authority. Under California law, an indemnitee may not obtain indemnification for its own "active negligence" unless the indemnity agreement contains an express provision to that effect.⁷⁹ Assuming that the Modesto Airport user agreement was executed in California in the foregoing hypothetical, and assuming that it would be construed under California law, the airport authority could be precluded under the agreement from obtaining indemnity for liability arising out of its own active negligence.⁸⁰

To illustrate this point, assume, as an extension of the above hypothetical, that the airport authority advised the

⁷⁷ The term "adhesion contract" is generally used to describe a standard form printed contract prepared by one party and submitted to the other on a "take it or leave it" basis, where there is frequently no true equality of bargaining power. See *Standard Oil Co. of California v. Perkins*, 347 F.2d 379, 383 n.5 (9th Cir. 1965). A court may refuse to enforce provisions in an adhesion contract if assent was obtained through unequal bargaining positions of the parties. See *M/V American Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1489 (9th Cir. 1983).

⁷⁸ Cf. *M/V American Queen v. San Diego Constr. Corp.*, 708 F.2d 1483 (9th Cir. 1983).

⁷⁹ See, e.g., *Armco Steel Corp. v. Roy H. Cox Co.*, 103 Cal. App. 3d 929, 936, 163 Cal. Rptr. 330, 334 (1980); *Rossmoor Sanitation v. Pylon, Inc.*, 13 Cal. 3d 622, 628, 532 P.2d 97, 100, 119 Cal. Rptr. 449, 452 (1975); *MacDonald & Kruse, Inc. v. San Jose Steel Co.*, 29 Cal. App. 3d 413, 426, 105 Cal. Rptr. 725, 733 (1972).

⁸⁰ See cases cited at note 78, *supra*.

Modesto air traffic controllers that the runway had been repaired and was ready for use, when, in fact, a substantial amount of debris and construction materials had been left on the runway. While attempting to takeoff, the carrier's aircraft had to veer off the runway to avoid contact with the debris and construction materials. The airport authority's negligence in leaving debris on the runway coupled with the affirmative assertion that the runway was safe for use could probably be characterized as actively negligent conduct. The absence of any express language regarding the airport authority's active negligence would probably preclude its claim for indemnification against the carrier under California law.⁸¹

Airport user agreements also frequently require the carrier to purchase additional insurance to cover its operations at the airport.⁸² Often, the airport authority requires that it be named as an additional insured under the carrier's policy.⁸³ Such supplemental insurance requirements are likely to have an impact upon aviation insurers in ways similar to those discussed in the context of insurance requirements in interline agreements.⁸⁴

If express indemnity provisions were to be eliminated from airport user agreements, it is unlikely that airport operations would be significantly affected. As in the case of the seller in an individual ground service agreement, airport authorities would probably rely upon implied indemnity to shift the risk, where possible. Where the law does not support such a shift, the airport authorities

⁸¹ This hypothetical also illustrates how the lack of uniformity among jurisdictions, as to when an indemnitee may obtain indemnification for its own negligent acts, can cause the enforceability of an indemnity agreement to hinge on the forum in which enforcement is sought. For example, although the airport authority in this hypothetical could not obtain indemnification for its active negligence under California law, if a New York airport authority were to seek indemnity for its active negligence under this same agreement, it would likely prevail under New York law. See *supra* notes 25-30 and accompanying text.

⁸² For examples of insurance provisions found in airport user agreements, see Appendix.

⁸³ *Id.*

⁸⁴ See *supra* notes 21-64 and accompanying text for a discussion of interline agreements.

themselves would be in a position to purchase additional insurance to cover their increased liability and pass the cost of such insurance on to the airlines in the form of higher user fees.

V. PROPOSED INDEMNITY LANGUAGE

Inartfully drafted contract language frequently contributes to initiation of costly litigation between all types of business entities. The aviation industry is not exempt. Indemnity provisions in interline agreements and airport user agreements are sometimes not scrutinized carefully by the parties at the time the contracts are created. Yet, the precise terms of an indemnity clause can subsequently become extremely important if one of the parties incurs liability and seeks indemnification from the other. If the clause is poorly drafted, settlement of a claim for indemnity may be impossible, and litigation may become unavoidable. Such litigation can disrupt business relationships in the aviation industry which would otherwise remain harmonious. More importantly, due to the lack of uniformity of the laws regarding indemnity in the various jurisdictions, the ultimate result is largely fortuitous, based upon the idiosyncracies of a particular forum. The actual intent of the parties may be subordinated to legal technicalities, including disputes over contract interpretation, construction and enforceability.

If a court is called upon to resolve the parties' dispute, it will almost certainly construe the indemnity clause according to the rules applicable to contracts generally.⁸⁵ The court will attempt to interpret the clause based upon the intent of the parties.⁸⁶ However, ambiguities are likely to be construed against the indemnitee, particularly

⁸⁵ See, e.g., *Herman Christensen & Sons v. Paris Plastering Co.*, 61 Cal. App. 3d 237, 245-46, 132 Cal. Rptr. 86, 90-91 (1976).

⁸⁶ See, e.g., *Chicago & N.W. Transp. Co. v. V & R Sawmill, Inc.*, 501 F. Supp. 278, 281 (D.S.D. 1980); *Moore v. Chesapeake & Ohio Ry. Co.*, 493 F. Supp. 1252, 1269 (S.D.W.Va. 1980).

if the indemnitee drafted the contract.⁸⁷

If express indemnity provisions are to continue to be incorporated into interline agreements, they should be carefully drafted so that claims for indemnification may be resolved quickly and amicably by the parties without the need for costly and potentially harmful litigation. To this end, the following model indemnity language is proposed:

Buyer agrees to indemnify Seller, its officers, directors, employees and agents against all liability, including but not limited to attorney's fees, costs and related expenses, which Seller, its officers, directors, employees or agents incur arising out of or in connection with the subject matter of this agreement, regardless of the negligence, active, passive, or any other type, of Seller, its officers, directors, employees, or agents, provided, however, that Seller's right to indemnification from Buyer will not extend to any liability resulting from the intentional misconduct or illegal act of Seller, its officers, directors, employees or agents. [Optional Clause] [Buyer retains the right to assume and control the defense of any claim against Seller for which Buyer agrees to indemnify Seller under the terms of this Agreement, whenever Buyer determines that it is in its best interests to control the defense. In the event Buyer chooses not to assume or control the defense, Buyer agrees to reimburse Seller for all costs and expenses associated with Seller's defense of the claim in all instances where Seller is indemnified by Buyer pursuant to the terms of this Agreement.]⁸⁸

The recommended language in this indemnity provision avoids many of the pitfalls found in indemnification clauses presently in use. For example, there is no ambiguity as to when the seller's right to indemnification becomes enforceable. The seller is entitled to indemnifi-

⁸⁷ See *supra* note 53.

⁸⁸ It should be noted that the proposed indemnity language has been drafted stylistically to resemble the format of current interline indemnity clauses. The language can easily be modified for application in airport user agreements and other aviation-related contracts for indemnification.

cation only after it has actually incurred liability. In addition, the seller's right to indemnity extends to all liability arising out of seller's performance under the agreement, except liability caused by the seller's intentional misconduct or illegal acts. Consequently, problems surrounding the definition of imprecise terms such as "gross negligence" and "willful misconduct," and disagreements regarding the distinction between "active" and "passive" negligence will be eliminated.

Utilization of the optional clause mentioned above might also serve to facilitate cost-effective handling of the defense of claims arising under interline or airport user agreements. The initial provision in the optional clause provides the buyer with the option of controlling the defense of any claim against the seller for which the buyer concedes that it will indemnify the seller. This promotes a number of desirable results. First, in a situation where the buyer knows that it will be obligated to indemnify the seller in connection with a particular claim, the buyer is immediately able to step in and control the defense, in whatever manner seems most propitious. Secondly, and perhaps more importantly, the buyer's ability immediately to assume the defense avoids a serious potential conflict of interest between the buyer and seller. Specifically, in a situation where the seller is convinced that it will ultimately be indemnified by the buyer, the seller might not pursue the defense of the claim as aggressively as it would if it were actually at risk. The optional clause language allows the parties to avoid this potential conflict of interest.

The second part of the suggested optional clause can also serve to promote effective claims handling. If the buyer chooses not to assume or control the defense of a claim against the seller, believing perhaps that the seller is not entitled to indemnification, the seller will nonetheless be encouraged to actively defend the claim, under the express terms of the optional clause. Specifically, the clause states that the seller will be entitled to recover all of its

defense costs and related expenses if it is ultimately indemnified by the buyer. Accordingly, if the seller is convinced that it will obtain the requested indemnification, there is little doubt that the seller will be entitled to recover the costs associated with its defense of the claim. Conversely, if the claim is one which is not ultimately indemnified by the buyer, the seller will have been motivated to conduct an aggressive defense of the claim, in an effort to minimize its loss.

VI. CONCLUSION

The magnitude of potential liability in the aviation industry will increase in proportion to the continued expansion of passenger and cargo transportation. Accordingly, indemnification is likely to remain an important concern for air carriers, airport authorities, and aviation insurers as claims increase. If express indemnity provisions are to be used to shift the risk of liability, careful scrutiny should be given to the drafting of such clauses. The language used should be clear and unambiguous, and sufficient to withstand legal challenge, so that claims for indemnity under the agreement may be settled quickly and harmoniously. The use of appropriate language will minimize unnecessary litigation, and cooperative business relations will be facilitated. Most importantly, the intent of the parties to shift a particular risk will be embodied in clear and unequivocal terms, thus satisfying the parties' original expectations.

APPENDIX

This appendix contains examples of indemnity and insurance provisions set forth in airport user agreements by airport authorities throughout the United States.

I

THE WILLIAM B. HARSFIELD
ATLANTA INTERNATIONAL AIRPORT
ATLANTA, GEORGIA
AIRPORT USE AGREEMENT
INDEMNITY

The Airline shall indemnify and hold harmless the City against any and all claims of every kind or character growing out of the negligent acts or omissions of the Airline, its agents or employees, in the exercise of the rights and privileges granted to it hereby, whether such claims shall arise from or be based upon injuries to persons (including death), or damages to property; provided, the City shall give the Airline prompt notice of any claim, damage or loss, or action in respect thereto, and an opportunity reasonably to investigate and defend against any such claim or action.

INSURANCE

The Airline shall carry public liability insurance with responsible insurance underwriters having duly designated agent or agents in Georgia upon whom process in any suit or action or other proceedings in courts of the State of Georgia or of the United States may be served, insuring the Airline against liability for injuries to persons (including wrongful death) and damages to property caused by the Airline's negligent acts or omissions in the exercise of the rights and privileges granted hereby, or otherwise caused by the negligence of the Airline in or about the said runways and taxiways, the policy limits thereof to be in the amount of not less than Two Hundred Thousand Dollars (\$200,000.00) for any one person and in the

amount of not less than One Million Dollars (\$1,000,000.00) for any one accident involving injury (including wrongful death) to more than one person and in the amount of not less than Two Hundred Thousand Dollars (\$200,000.00) for property damage resulting from any one accident. The Airline shall furnish the City with certificates of insurance issued by the insurance underwriters evidencing the existence of valid policies of insurance as aforesaid. Such certificate shall state that the coverage will not be amended so as to decrease the protection below the limits specified there or be subject to cancellation without adequate advance notice to the City.

II
BOISE AIR TERMINAL
GOWEN FIELD
BOISE, IDAHO
AGREEMENT OF LEASE AND USE
INDEMNITY AND INSURANCE

LESSEE shall indemnify and save and hold harmless CITY from and for any and all losses, claims, actions, or judgments for damages or injuries to persons or property and losses and expenses caused by or arising from the use and occupancy of the exclusive leased premises by LESSEE, its officers, contractors, agents and employees and not caused by or arising from the negligence of CITY, its officers, agents and employees and for LESSEE negligence in the space leased jointly or in common with other LESSEE. To secure the foregoing Agreement of Indemnification, LESSEE shall secure and maintain throughout the term of this Lease and Use Agreement, public liability and property damage insurance to which CITY shall be a named additional insured in accordance with the foregoing indemnity provision in a minimum amount not less than \$10,000,000.00 for damage or injuries to persons or property for any single occurrence or incident. The minimum limit of insurance described above shall not be deemed a limitation of LESSEE's Agreement to Indem-

nify and save and hold harmless CITY. A Certificate of Insurance evidencing such coverage shall be filed with the Airport Manager.

III
DALLAS-FT. WORTH AIRPORT
DALLAS, TEXAS
AIRPORT USE AGREEMENT
INDEMNITY

Board and Airline shall each indemnify the other, their directors, officers, agents and employees, against and hold the other harmless from all claims and demands by third persons arising out of damage or injury to persons (including death) or property, resulting from the tortious acts or omissions of the indemnifying party or its employees or resulting from any breach or default by the indemnifying party of any of the obligations or duties assumed by or imposed upon such party by this Agreement.

INSURANCE BY AIRPORT BOARD

(a) Board shall insure or cause to be insured at all times during the term of this Agreement, with a responsible insurance company, companies or carriers authorized and qualified under the laws of the State of Texas to assume the risk thereof, to the extent insurable, all of the Board's buildings, structures, fixtures and equipment on the Airport (unless such are insured by others under the terms of Special Facilities Lease Agreements or other agreements) against direct physical damage or loss from fire and against the hazards and risks covered under so-called extended coverage in an amount not less than ninety percent (90%) of the replacement value of the property so insured; provided, however, if at any time the Board shall be unable to obtain such insurance to the extent above required, Board shall maintain such insurance to the extent reasonably obtainable.

(b) Additionally, Board shall at all times during the term of this Agreement maintain reasonably obtainable li-

ability insurance in amounts reasonably necessary to protect it from the normal insurable liabilities that may be incurred in the operations of an airport the size of the Airport (except to the extent that such insurance is required to be carried by sovereign immunity). Said insurance shall include, to the extent reasonably obtainable, coverage of the Board's indemnity obligation under Section 8.5 hereof.

(c) If necessary to comply with Board's extended coverage insurance policies, Airline shall conduct reasonable and appropriate tests of the fire extinguishing system and apparatus which constitute a part of Airline's Terminal Structure as reasonably required by Board. Airline shall notify Board prior to conducting such tests and, if required by Board's extended coverage policies, shall furnish Board with written reports of such tests.

(d) Airline shall be named an additional insured under the coverage required in Section 8.1(a) above.

INSURANCE BY AIRLINE

As of the Effective Date and during the balance of this Agreement, Airline shall maintain reasonably obtainable liability insurance in amounts reasonably necessary to protect it from the normal insurable liabilities that may be incurred in its operation at the Airport.

IV MINNEAPOLIS-ST. PAUL INTERNATIONAL AIRPORT WOLD-CHAMBERLAIN FIELD MINNEAPOLIS, MINNESOTA *AIRPORT TERMINAL BUILDING LEASE* INDEMNITY

Lessee hereby covenants and agrees to indemnify and hold harmless MAC and keep free and demised premises and the airport from any mechanic's, tax or other liens which shall accrue during the term of this lease in connection with the demised premises or the use thereof by

Lessee pursuant hereto; and Lessee further covenants and agrees to indemnify and hold harmless MAC from any and all liability or claim of liability on account of injury to person, including death, or destruction or damage to property occurring on the demised premises and arising out of the negligent use of the Lessee of the demised premises or from negligent act or omission of the Lessee elsewhere on the airport, and to pay any judgment entered against MAC on account of any such injury or damage, and to reimburse MAC for any expense incurred by it by reason of any claim, account or suit at law or in equity brought against MAC or in which MAC is made a party, arising out of the negligent occupancy or use by the Lessee of the demised premises or arising out of the negligent act or omission of Lessee elsewhere on the airport, provided, however, Lessee shall not be liable for injury or death to person or damage to or loss of property occasioned by negligence of MAC, its employees or agents, whether separate or concurrent with negligence of others including Lessee, and, provided further, that no settlement of any claim, action or suit shall be made by MAC without the written consent of Lessee; and it is further agreed that MAC will promptly notify Lessee of any matter covered hereby and shall forward to lessee every demand notice, summons or other process or paper received in connection with any claim or legal proceeding covered hereby. For the purpose of this paragraph the term "expense" shall be construed to include all costs incurred by MAC in the defense or settlement of any claim for which Lessee is required to indemnify MAC hereunder incurred after refusal of Lessee to undertake the defense thereof, including attorney's fees, filing fees and salaries and expenses of any official or employee of MAC while engaged in the settlement or defense of any such claim, action or suit.

INSURANCE

Lessee at its cost and expense shall procure and main-

tain throughout the full term hereof liability insurance insuring Lessee and MAC against liability on account of injury to person, including death, or destruction of or damage to property to which Lessee is required to indemnify MAC under paragraph A next above. Without limiting Lessee's liability to MAC under paragraph A next above, of this Article VIII, such insurance shall be on a current basis in the sum not less than One Hundred Thousand Dollars (\$100,000) for injury or death to any one person and subject to the same limits per person in an amount of not less than One Million Dollars (\$1,000,000.00) for any one accident and in respect to property damage shall be on an accident basis in a sum of not less than One Million Dollars (\$1,000,000.00). Such insurance shall be written in a company or companies satisfactory to MAC and MAC shall be furnished with evidence through a duplicate copy of such policy or policies or insurance certificate in the usual form evidencing such insurance. Policies shall not be subject to cancellation or termination nor shall coverage limits be reduced below the specified limits unless MAC shall be given ten days written notice thereof, and Lessee covenants and agrees that such insurance shall be maintained throughout the full term of this lease.

V

SAN ANTONIO INTERNATIONAL AIRPORT
SAN ANTONIO, TEXAS

AIRLINE AIRPORT USE AND LEASE AGREEMENT
INDEMNITY

Airline agrees to indemnify, save, hold harmless, and defend City, its agents and employees, its successors and assigns, individually or collectively, from and against all claims and actions and all expenses incidental to the investigation and defense thereof, in any way arising out of or resulting from any acts, omissions or negligence of Airline, its agents, employees, licensees, subtenants and assigns, in, on or about Airline Premises or upon Airport

Premises; or in connection with its use and occupancy of Airline Premises or use of Airport; provided, however, that Airline shall not be liable for any injury, damage or loss occasioned by the sole negligence or willful misconduct of the City, its agents or employees. Airline and City shall give prompt written notice of any such claim or action known to it.

Airline shall indemnify, save, hold harmless and defend City, its agents, and its employees against claims of liability arising from or based upon the violation of any Federal, State, City or Municipal laws, statutes, ordinances, or regulations by Airline, its agents, employees, licensees or those under its control.

INSURANCE

Without limiting Airline's obligation to indemnify City, as provided under Section 10.1 hereof, Airline shall provide, pay for, and maintain in force at all times during the term of this Agreement, a policy of comprehensive general liability insurance to protect against bodily injury liability and property damage in an aggregate amount of not less than \$10,000,000.00 per occurrence, a policy of property insurance for physical damage to the property of Airline, including improvements and betterments to Airline Premises in an amount representing at least 80% of the actual cash value of the property, a policy of comprehensive automobile liability insurance in a combined single limit of not less than \$300,000.00, statutory Worker's Compensation insurance and any other policies of insurance as reasonably required by City. The companies providing the insurance herein shall be authorized to do business in the State and to be served notice therein.

The aforesaid insurance amounts and types of insurance shall be reviewed from time to time by City and may be adjusted by City if City reasonably determines such adjustments are necessary to protect City's interest. Airline shall furnish City no later than ten (10) days following the execution of this Agreement or prior to commencement

of any improvements or occupancy by Airline, whichever shall be earlier, and continuing throughout the term of this Agreement hereof a certificate or certificates of insurance as evidence that such insurance is in force. City reserves the right to require a certified copy of such certificates upon request. Airline shall name City as an additional insured under all required insurance policies. Said policies shall be in form and content satisfactory to City and shall provide for thirty (30) days written notice to City prior to the cancellation of or any material change in such policy or policies.

VI
SAN DIEGO INTERNATIONAL AIRPORT
SAN DIEGO, CALIFORNIA
LANDING PERMIT
INDEMNITY

District shall not be nor be held liable for any damage to goods, properties, or effects of Airline or any of Airline's representatives, agents, employees, guests, licensees, invitees, or of any other person whatsoever upon the premises covered by this Permit, nor for personal injuries to or deaths of them caused by or resulting from Airline's use or occupancy of the premises covered by this Permit, or from any defect in any part thereof caused by airline. Airline agrees to indemnify and save District and its authorized agents, officers, and employees free and harmless from any of the foregoing liabilities and any costs and expenses incurred by District on account of any claim or claims therefor, including reasonable attorney's fees. Nothing herein is intended to exculpate District from its own negligence.

INSURANCE

Airline shall obtain public liability insurance from an insurance carrier satisfactory to District to protect against loss from liability imposed by law for damages on account of bodily injury, including death resulting therefrom, suf-

ferred or alleged to be suffered by any person or persons whatsoever resulting directly or indirectly from any act or activities of Airline or any person acting for it or under its control or direction, or any person authorized by it to use the above-described premises, and also to protect against loss from liability imposed by law for damage to any property of any person caused directly or indirectly by or from the acts or activities of Airline or any person acting for it or under its control or direction, or any person authorized by it to use the above-described premises.

Such public liability and property damage insurance shall be maintained in full force and effect during the entire term of this Permit in the amount of not less than Ten Million Dollars (\$10,000,000) combined single limit.

Provisions of this paragraph as to maintenance of insurance shall not be construed as limiting in any way the extent to which Airline may be held responsible for the payment of damages to persons or property resulting from its activities or the activities of any person or persons for which it is otherwise responsible.

Certificates in a form acceptable to District evidencing the existence of the necessary insurance policies shall be kept on file with District during the entire term of this Permit. All insurance policies will name District as an additional insured to the extent of the liability assumed by Airline pursuant to the "Hold Harmless" paragraph above, protect District against any legal costs in defending claims and will not terminate without written notice to District. All insurance companies must be satisfactory to District and licensed to do business in California.

VII
SAN JOSE INTERNATIONAL AIRPORT
SAN JOSE, CALIFORNIA
SCHEDULED AIRLINE OPERATING AGREEMENT
INDEMNITY

Airline agrees to defend, indemnify, and hold harmless City from any and all damages, claims, demands, obliga-

tions, suits, judgments, penalties, causes of action, losses, or liabilities at any time received, incurred, or accrued by City as a result of or arising out of the acts, omissions, use, occupancy, or operations of Airline on, about, or related to the Airport during the term of this Agreement for which Airline (but not City) is liable to any person by law.

City agrees to defend, indemnify, and hold harmless Airline from any and all damages, claims, demands, obligations, suits, judgments, penalties, causes of action, losses, or liabilities at any time received, incurred or accrued by Airline as a result of or arising out of the acts, omissions, use, occupancy, or operations of City on, about, or related to the Airport during the term of this Agreement for which City (but not Airline) is liable to any person by law.

As used in this Indemnification paragraph, the references to "Airline" and "City" shall include their respective officers, employees, and agents.

If either of the parties hereto receives a claim, demand, suit or judgment for which the other party has hereinabove agreed to indemnify it, then the indemnitee shall promptly notify the indemnitor of such claim, demand, suit, or judgment, and the indemnitor shall have the right to investigate, settle, compromise, satisfy, or defend same.

The parties hereto expressly agree that no provision of this Indemnification paragraph shall in any way limit, modify, diminish, or otherwise affect the rights, claims, suits, judgments or causes of action that either party may at any time have (or have had) against the other party (whether for contribution, indemnity, or otherwise) arising out of, resulting from, or related to Airline's noise, smoke, or vibration.

To the extent that allocation of loss or liability between the parties hereto is for any reason not covered by the provisions thereof, the parties agree that the rights of implied indemnity and contribution provided by law shall be fully applicable to the relationship of the parties under this Agreement.

INSURANCE

Airline shall, at its expense, maintain insurance in full force and effect during the term of this Agreement, which shall name City, its officers, and employees as additional insureds and shall be in such amounts as to meet the minimum limits of liability specified below. The insurance shall be placed with companies or underwriters reasonably satisfactory to City. The insurance policy or policies shall provide not less than that coverage provided by the standard comprehensive general liability form, with aircraft exclusions deleted, covering all operations of Airline and shall include, but not by way of limitation, coverage for bodily injury including personal injury, property damage, products liability, and automobile and contractual liability. The policy (or policies) shall contain a cross-liability or severability-of-interest clause providing that the inclusion of one insured thereunder shall not affect the rights of any other insured as respects any claim, demand, suit or judgment made, brought, or recovered by or in favor of any other insured and providing that the policy (or policies) shall protect each insured in the same manner as though a separate policy had been issued to each insured. Airline shall promptly, after execution of this Agreement, furnish the City appropriate Certificates of Insurance evidencing coverage effected in compliance with the requirements of this Agreement and to be maintained for the term of this Agreement. Coverage shall be no less than \$25,000,000.00 Combined Single Limit or at Airline's sole option not less than (a) \$5,000,000.00 with respect to claims for injury or death to any one person; (b) \$25,000,000.00 with respect to claims for injury or death to two or more persons in any one occurrence; and (c) \$10,000,000.00 with respect to claims (including consequential loss) for damage or destruction of property. Coverage shall be subject to periodic review and adjustment by the parties to maintain comparable exposure protection. The insurance policies shall not be subject to cancellation or material change except after notice to the

City by registered mail at least thirty (30) days prior to the date of such cancellation or material change. Where any policy(ies) has (have) normal expiration(s) during the term of this Agreement, Airline shall provide written evidence of continued coverage prior to such expiration.

The City shall, during the term of this Agreement, procure and maintain liability and fire and extended coverage insurance for the Airport, Terminal Buildings, and other facilities at the Airport in such amounts and for such insured coverages as the City may determine as being reasonably required in the prudent operation of the Airport.

* * * * *

Although the underlying purpose of these provisions is very similar, i.e., to reduce the airport authority's exposure to liability arising out of a carrier's operations, it is clear that the language employed to achieve this end varies considerably. The effectiveness of the language selected in shifting the increased risk of liability from the airport authority to the airline will obviously depend upon the law of the jurisdiction in which enforcement of the agreement is sought.

Casenotes and Statute Notes

