

APPENDIX B: EXHIBITS

EXHIBIT A: BEST'S RATINGS, FINANCIAL PERFORMANCE RATINGS, AND FINANCIAL SIZE CATEGORIES

Best's Ratings

<u>Secure Best's Rating</u>	
A++ and A+	Superior
A and A-	Excellent
B++ and B+	Very Good
<u>Vulnerable Best's Ratings</u>	
B and B-	Fair
C++ and C+	Marginal
C and C-	Weak
D	Poor

Best's Financial Performance Ratings (FPR)

<u>Secure FPR Ratings</u>	
FPR 9	Very Strong
FPR 8 and 7	Strong
FPR 6 and 5	Good
<u>Vulnerable FPR Ratings</u>	
FPR 4	Fair
FPR 3	Marginal
FPR 2	Weak
FPR 1	Poor

Financial Size Category (FSC)

	Capital + Surplus + Reserves
<u>Rating</u>	<u>(\$Millions)</u>
FSC 1	less than 1
FSC II	1 to 2
FSC III	2 to 5
FSC IV	5 to 10
FSC V	10 to 25
FSC VI	25 to 50
FSC VII	50 to 100
FSC VIII	100 to 250
FSC IX	250 to 500
FSC X	500 to 750
FSC XI	750 to 1,000
FSC XII	1,000 to 1,250
FSC XIII	1,250 to 1,500
FSC XIV	1,500 to 2,000
FSC XV	greater than 2,000

EXHIBIT B: RISK MANAGEMENT ANNUAL REPORT

Sample Outline*

I Introduction and Summary

II Insurance and Risk Funding

A. Summary of Coverages and Premiums

B. Summary of Risk Financing Program

1. Gross costs
2. Net costs
3. Maximum / Minimum Possibilities
4. Additional Options

III Crisis Management

IV Losses and Recoveries

V Loss Control Activities

VI Achievements of Special Interest

*This sample format is intended only as a general guide which can be modified to accommodate the unique nature of your organization.

EXHIBIT C: EXPECTED LOSS CALCULATION – PAYROLL BASIS

ABC Corporation Workers' Compensation

Period	Type	Incurred Losses	Development Factor	Adjust to Current Law	Ultimate Losses	Ultimate Combined Losses
95-96	Medical	47,942	X 1.031*	X 1.000	49,428	
	Indemnity	480,213	X 1.531	X 1.002	736,677	786,105
94-95	Medical	74,319	X 1.074*	X 1.000	79,818	
	Indemnity	717,114	X 1.259	X 1.005	907,360	987,178
93-94	Medical	44,077	X 1.132*	X 1.000	49,895	
	Indemnity	552,644	X 1.183	X 0.990	647,240	697,135
92-93	Medical	26,581	X 1.166*	X 1.000	30,994	
	Indemnity	538,901	X 1.148	X 1.017	629,176	660,170
91-92	Medical	25,809	X 1.229*	X 1.000	31,719	
	Indemnity	628,581	X 1.127	X 1.074	760,833	792,552
90-91	Medical	24,903	X 1.299*	X 1.000	32,349	
	Indemnity	646,325	X 1.113	X 1.212	871,864	904,213

*Paid medical claims adjusted for inflation only.

EXHIBIT D: EXPECTED LOSS CALCULATION – PAYROLL BASIS SUMMARY

ABC Corporation
Workers' Compensation

Period	Payroll	Inflation Factor	Adjusted Payroll	Combined Ultimate Losses	Loss Rate Per \$1,000 Payroll
95-96	29,401,134	X 1.029	30,253,767	786,105	25.984
94-95	25,664,265	X 1.057	27,127,128	987,178	36.391
93-94	23,231,901	X 1.081	25,113,685	697,135	27.759
92-93	20,980,234	X 1.103	23,141,198	660,170	28.528
91-92	21,454,615	X 1.128	24,200,805	792,552	32.749
90-91	22,942,315	X 1.165	26,727,796	904,213	33.830
				Best	25.984
				Worst	36.391
				Average	30.873
				Wt. Average	30.716

1997 Payroll Estimate \$32,000,000

	<u>Estimated Losses</u>
Best	831,488
Worst	1,164,512
Average	987,936
Wt. Average	982,912

EXHIBIT E: LOSS DEVELOPMENT FACTORS (AS OF 1997)

Liability, Auto, and Workers' Compensation Incurred to Ultimate

Age in Months	General Liability Including Products	Auto	Workers' Compensation
12	N/A	N/A	1.612
18	3.966	1.154	1.437
24	3.169	1.114	1.261
30	2.625	1.064	1.216
36	2.082	1.045	1.171
42	1.841	1.027	1.151
48	1.600	1.019	1.131
54	1.495	1.012	1.120
60	1.390	1.009	1.109
66	1.340	1.006	1.102
72	1.290	1.005	1.095
78	1.259	1.004	1.089
84	1.228	1.000	1.083
90	1.206	1.000	1.079
96	1.183	1.000	1.075
108	1.160	1.000	1.050
120	1.136	1.000	N/A
132	1.114	1.000	N/A

EXHIBIT F: CUMULATIVE PAYOUT PROFILES (AS OF 1997)

Year	General Liability Including Products	Auto Liability	Workers' Compensation
1	8%	32%	22%
2	18%	63%	47%
3	30%	79%	62%
4	42%	89%	71%
5	54%	94%	77%
6	63%	96%	81%
7	70%	97%	84%
8	75%	98%	86%
9	79%	98%	87%
10	82%	99%	89%
> 10	100%	100%	100%

EXHIBIT "G"

COMMERCIAL AUTO COVERAGE PART BUSINESS AUTO DECLARATIONS

CA 00 03 12 83

Renewal of Number*
Policy No.
ITEM ONE

The Declarations include a second part designated "Part 2."

Named Insured and Mailing Address (No., Street, Town or City, County, State, Zip Code)§

Policy Period*: From _____ to _____ at 12:01 A.M. Standard Time at your mailing address shown above.
Form of Business: Individual Partnership Corporation Other _____

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

ITEM TWO - SCHEDULE OF COVERAGES AND COVERED AUTOS This policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages will apply only to those "autos" shown as covered "autos." "Autos" are shown as covered "autos" for a particular coverage by the entry of one or more of the symbols from the COVERED AUTOS Section of the Business Auto Coverage Form next to the name of the coverage.

COVERAGES	COVERED AUTOS <small>(Entry of one or more of the symbols from the COVERED AUTOS Section of the Business Auto Coverage Form show which autos are covered.)</small>	LIMIT THE MOST WE WILL PAY FOR ANY ONE ACCIDENT OR LOSS	PREMIUM
LIABILITY		\$	\$
PERSONAL INJURY PROTECTION (P.I.P.)**		SEPARATELY STATED IN EACH P.I.P. END. MINUS \$ DED.	\$
ADDED P.I.P. (or equivalent added No-fault cov.)		SEPARATELY STATED IN EACH ADDED P.I.P. ENDORSEMENT	\$
PROPERTY PROTECTION INS. (P.P.I.) <small>(Michigan only)</small>		SEPARATELY STATED IN THE P.P.I. ENDORSEMENT MINUS DEDUCTIBLE FOR EACH ACCIDENT	\$
AUTO MEDICAL PAYMENTS		\$	\$
UNINSURED MOTORISTS (UM)		\$	\$
UNDERINSURED MOTORISTS <small>(When not included in UM Cov.)</small>		\$	\$
P H Y S I C I A L	COMPREHENSIVE COVERAGE	ACTUAL CASH VALUE OR COST OF REPAIR, WHICHEVER IS LESS, MINUS \$ DED. FOR EACH COVERED AUTO, BUT NO DED. APPLIES TO LOSS CAUSED BY FIRE OR LIGHTNING***	\$
	SPECIFIED CAUSES OF LOSS COVERAGE	\$25 DEDUCTIBLE FOR EACH COVERED AUTO FOR LOSS CAUSED BY BURGLARY OR VANDALISM***	\$
	COLLISION COVERAGE	\$ DEDUCTIBLE FOR EACH COVERED AUTO***	\$
	TOWING AND LABOR <small>(Not Available in California)</small>	\$ for each disablement of a private passenger auto	\$
FORMS AND ENDORSEMENTS APPLYING TO THIS COVERAGE PART AND MADE PART OF THIS POLICY AT TIME OF ISSUE*:			
PREMIUM FOR ENDORSEMENTS			\$
ESTIMATED TOTAL PREMIUM			\$

ITEM THREE - SCHEDULE OF COVERED AUTOS YOU OWN ** (or equivalent No-fault cov.) *** See ITEM FOUR for hired or borrowed "autos."

Covered Auto No.	DESCRIPTION							PURCHASED			TERRITORY: Town & State Where the Covered Auto will be principally garaged
	Year Model; Trade Name; Body Type Serial Number (S), Vehicle Identification Number (VIN)							Original Cost New	Actual Cost &	NEW (N) USED (U)	
1											
2											
3											
Covered Auto No.	CLASSIFICATION							Code	EXCEPT for towing all physical damage loss is payable to you and the loss payee named below as interests may appear at the time of the loss		
	Trailer or Operation (in Miles)	Business use or service (1=retail 2=comm'l)	Size GVW, GCW or Vehicle Seating Capacity	Age Group	Primary Rating Factor		Secondary Rating Factor				
1					Lib.	Phy. Damage					
2											
3											

Countersigned: *
*Entry optional if shown in Common Policy Declarations. By _____
*Forms and Endorsements applicable to this Coverage Part omitted if shown elsewhere in the policy. Authorized Representative _____
THESE DECLARATIONS AND THE COMMON POLICY DECLARATIONS, IF APPLICABLE, TOGETHER WITH THE COMMON POLICY CONDITIONS, COVERAGE FORM(S) AND FORMS AND ENDORSEMENTS, IF ANY, ISSUED TO FORM A PART THEREOF, COMPLETE THE ABOVE NUMBERED POLICY.

Exhibit "G"

BUSINESS AUTO COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to **SECTION V -DEFINITIONS**.

SECTION I - COVERED AUTOS

ITEM TWO of the Declarations shows the "autos" that are covered "autos" for each of your coverages. The following numerical symbols describe the "autos" that may be covered "autos". The symbols entered next to a cover-age on the Declarations designate the only "autos" that are covered "autos".

A. DESCRIPTION OF COVERED AUTO DESIGNATION SYMBOLS

SYMBOL	DESCRIPTION
--------	-------------

1. = ANY "AUTO".
2. = OWNED "AUTOS" ONLY. Only those "autos" you own (and for Liability Cover-age any "trailers" you don't own while attached to power units you own). This includes those "autos" you acquire ownership of after the policy begins.
3. = OWNED PRIVATE PASSENGER "AUTOS" ONLY. Only the private passenger "autos" you own. This includes those private passenger "autos" you acquire ownership of after the policy begins.
4. = OWNED "AUTOS" OTHER THAN PRIVATE PASSENGER "AUTOS" ONLY. Only those "autos" you own that are not of the private passenger type (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" not of the private passenger type you acquire ownership of after the policy begins.
5. = OWNED "AUTOS" SUBJECT TO NO-FAULT. Only those "autos" you own that are required to have No-Fault benefits in the state where they are licensed or principally garaged. This includes those "autos" you acquire ownership of after the policy begins provided they are required to have No-Fault benefits in the state where they are licensed or principally garaged.
6. = OWNED "AUTOS" SUBJECT TO A COMPULSORY UNINSURED MOTORISTS LAW. Only those "autos" you own that because of the law in the state where they are licensed or principally garaged are required to have and cannot reject Uninsured Motorists Coverage. This includes those "autos" you acquire ownership of after the

policy begins provided they are subject to the same state uninsured motorists requirement.

7. = SPECIFICALLY DESCRIBED "AUTOS". Only those "autos" described in ITEM THREE of the Declarations for which a premium charge is shown (and for Liability Coverage any "trailers" you don't own while attached to any power unit described in ITEM THREE).
8. = HIRED "AUTOS" ONLY. Only those "autos" you lease, hire, rent or borrow. This does not include any "auto" you lease, hire, rent or borrow from any of your employees or partners or members of their households.
9. = NON-OWNED "AUTOS" ONLY. Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes "autos" owned by your employees or partners or members of their households but only while used in your business or your personal affairs.

B. OWNED AUTOS YOU ACQUIRE AFTER THE POLICY BEGINS

1. If symbols 1, 2, 3, 4, 5 or 6 are entered next to a coverage in ITEM TWO of the Declarations, then you have coverage for "autos" that you acquire of the type described for the remainder of the policy period.
2. But, if symbol 7 is entered next to a coverage in ITEM TWO of the Declarations, an "auto" you acquire will be a covered "auto" for the coverage only if:
 - a) We already cover all "autos" that you own for that coverage of it replaces an "auto" you previously owned that had that coverage; and
 - b) You tell us within 30 days after you acquire it that you want us to cover it for that coverage.

EXHIBIT H: SAMPLE AUTO LIABILITY – ADDITIONAL INSURED ENDORSEMENT

City of Los Angeles

Los Angeles Harbor Department – Risk Management Section

AUTO LIABILITY – ADDITIONAL INSURED ENDORSEMENT

In consideration of the premium charged and notwithstanding any inconsistent statement in the policy to which this endorsement is attached or any endorsement now or hereafter attached thereto, it is agreed as follows:

1. **ADDITIONAL INSURED.** The City of Los Angeles Harbor Department, its officers, agents and employees are included as additional insureds with regard to liability and defense of claims arising from the operations and uses performed by or on behalf of the named insured regardless of whether liability is attributable to the named insured or a combination of the named insured and the additional insured.
2. **CONTRIBUTION NOT REQUIRED.** Any other insurance maintained by the City of Los Angeles Harbor Department shall be excess of this insurance and shall not contribute with it.
3. **SEVERABILITY OF INTEREST.** This insurance applies separately to each insured against whom claim is made or suit is brought except with respect to the company's limits of liability. The inclusion of any person or organization as an insured shall not affect any right which such person or organization would have as a claimant if not so included.
4. **CANCELLATION NOTICE.** With respect to the interest of the additional insured, the insurance shall not be cancelled, changed in coverage, reduced in limits or non-renewed except after thirty (30) days prior written notice by certified mail return receipt requested has been given to both the City Attorney of Los Angeles and the Board of Harbor Commissioners addressed as follows:

City Attorney	Board of Harbor Commissioners
Harbor Division	425 South Palos Verdes Street
425 South Palos Verdes Street	San Pedro, Ca 90731
San Pedro, Ca 90731	Attn: Risk Manager
5. **APPLICABILITY.** This insurance pertains to the operations and/or tenancy of the named insured under all written agreements and permits in force with the City of Los Angeles Harbor Department unless checked below in which case only the following specific agreements and permits with the City of Los Angeles Harbor Department are covered:

Agreement/Permit

Number(s) _____

Except as stated above, nothing herein shall be held to waive, alter or extend any of the limits, conditions, agreements or exclusions of the policy to which this endorsement is attached.

<p>I _____ (print/type name), warrant that I have authority to bind the below-listed insurance company and by my signature hereon do so bind this company.</p> <p>Signature: _____ Authorized Representative (ORIGINAL SIGNATURE required on copy furnished to the Board of Harbor Commissioners.) Title: _____</p> <p>Organization: _____</p> <p>Address: _____ _____</p> <p>Telephone: _____ (____) _____</p>	<p>Report claims pursuant to this insurance to:</p> <p>Name: _____</p> <p>Address: _____</p> <p>City _____ State _____ Zip _____</p> <p>Telephone _____ (____) _____</p> <hr/> <p>Includes: (check as applicable)</p> <p><input type="checkbox"/> Owned automobiles <input type="checkbox"/> Hired automobiles</p> <p><input type="checkbox"/> Non-owned automobiles _____</p>								
<table border="0" style="width: 100%;"> <tr> <td style="width: 33%;">Type of Coverage</td> <td style="width: 33%;">Limits of Liability</td> <td style="width: 34%;">Policy Period</td> </tr> <tr> <td></td> <td></td> <td> <input type="checkbox"/> Deductible \$ _____ <input type="checkbox"/> Self-insured Retention \$ _____ </td> </tr> <tr> <td></td> <td></td> <td> From _____ To _____ For _____ (Coverage) <input type="checkbox"/> Per Claim <input type="checkbox"/> Per Occurrence </td> </tr> </table>	Type of Coverage	Limits of Liability	Policy Period			<input type="checkbox"/> Deductible \$ _____ <input type="checkbox"/> Self-insured Retention \$ _____			From _____ To _____ For _____ (Coverage) <input type="checkbox"/> Per Claim <input type="checkbox"/> Per Occurrence
Type of Coverage	Limits of Liability	Policy Period							
		<input type="checkbox"/> Deductible \$ _____ <input type="checkbox"/> Self-insured Retention \$ _____							
		From _____ To _____ For _____ (Coverage) <input type="checkbox"/> Per Claim <input type="checkbox"/> Per Occurrence							

Other Conditions:

Named Insured and Address			
Insurance Company	Policy Number	Endorsement Number	Effective Date of Endorsement

Form 10 (10/96)

EXHIBIT I: MARINE TERMINAL DEFINITION DISCUSSION

To underscore the complexity of the legal system, a good example of the interplay between legal requirements that can lead to uncertainty to everyday activity is the legal treatment of a marine terminal. The law deals with the terminal at various times, and, occasionally, at the same time, as different legal entities. The uncertainty created by different liability concepts can be viewed as an administrative obstacle to implementing a risk management plan. For example, a marine terminal can be viewed as one of eight different legal entities, depending upon the facts:

1. A Surface Transportation Board (STB)¹ common carrier (assuming the terminal performs functions that subject it to the jurisdiction of the STB, such as a freight forwarder under §13102(8)² of the Interstate Transportation Act,³ in which case the terminal may obtain the protection of the inland contract of carriage even though the inland bill of lading contains no Himalaya clause);⁴

¹ The Interstate Commerce Commission (ICC) was replaced by the STB by the ICC Termination Act of 1995 (Pub.L. 104-88, 109 Stat. 803), effective January 1, 1996. Under 49 U.S.C. §§13501, 13521, and 13701 jurisdiction over water carriers operating in the noncontiguous domestic trade was transferred to the STB. The STB is part of the U.S. Department of Transportation.

² To be a freight forwarder the terminal must hold itself out to provide transportation for compensation and, in the ordinary course of business, (1) provide for assembling and consolidating or distributing of shipments; (2) assume responsibility for the transportation; and (3) use an ICC common carrier for part of the transportation. This is a recodification of former 49 U.S.C. §10102(9).

³ 49 U.S.C. §§10101-16106, which is a recodification of former 49 U.S.C. §§10101-11901 (the Interstate Commerce Act of 1887). Of relevance here is Part B - Motor Carriers, Water Carriers, Brokers, and Freight Forwarders, 49 U.S.C. §§13101-14914.

⁴ For example, terminals may stuff containers, sort cargo, and transport containers within the confines of their facilities, but to bring themselves within the jurisdiction of the STB, a terminal probably would have to provide transportation of the cargo using a STB common carrier. Relying upon ICC cases, one way to do this would be to establish a wholly owned subsidiary to conduct the actual transportation of cargo as a STB common carrier, and thereby fit within the protection of inland bills of lading (see Puerto Rico Maritime Shipping Auth. v. Valley Freight Sys., 856 F.2d 546 (3rd Cir. 1988)).

In another setting, being associated with railroad terminal services can subject a terminal to STB jurisdiction. Again, looking to ICC cases, this is because of the public policy to encourage a national transportation policy, rather than partial state regulation, and thus grants STB jurisdiction over intrastate operations of interstate railroad carriers, Interstate Commerce Commission v. Texas, 479 U.S. 450, 452, 455-461 (1987). The Texas case involved a suit by a railroad that provided intrastate carriage of containers or trailers on flatcars. The railroad argued that under the provisions of the Staggers Rail Act of 1980, 49 U.S.C. § 10505(b) (1982), and ICC regulations issued thereunder, the trucking portion of a continuous multimodal carriage was exempt from state regulation. In that case, although intrastate transportation by motor carriers generally is not subject to ICC regulation, railroads are not motor carriers even during the truck portion of a multimodal movement. Further, although the Texas case involved an intrastate shipment, the shipments were held to fall within the purview of ICC authority because the railroad was ultimately involved in interstate commerce. This same reasoning should apply to the STB regime.

Texas followed Union Stock Yard Co. v. United States, 308 U.S. 213, 216 (1939), where the Supreme Court held that a terminal engaged solely in the loading and unloading of livestock at stockyards was a common carrier subject to the Interstate Commerce Act pursuant to 49 U.S.C. §§10102 and 10105 (since recodified at 49 U.S.C. §13102). To avoid ICC jurisdiction the Union Stock Yard leased in perpetuity to an unrelated company all its railroad facilities except the tracks and chutes used in loading and unloading livestock. In a proceeding to remove its tariff filed with the ICC, Union Stock Yard argued that because it divested itself of all control and operation of the railroad, and held itself out to the public only as a terminal, it was exempt from ICC regulation. The Supreme Court reasoned that under the jurisdictional provisions and the definitions contained in the Interstate Commerce Act, the terminal was a "carrier engaged in the transportation of property wholly by a railroad." Again, these legal principles should apply to the STB.

Finally, a terminal that serves various rail carriers has been held to be a common carrier subject to ICC regulation because it engages in "a public or common calling," United States v. Brooklyn E. Dist. Terminal, 249 U.S. 296 (1919). Since the STB still applies the same statutory definition of a common carrier, this should continue to be good law.

2. An agent for a STB common carrier (in which case the terminal has less protection);⁵
3. A warehouse (where, unless the element of storage is merely incident to a maritime contract, the terminal is subject to State statutory or Common Law or Article 7 of the Uniform Commercial Code (UCC), and is liable without limitation for loss of the goods (UCC §7-204);⁶
4. A Common Law bailee (where any liability limitation must be contractually agreed upon between the original bailee and bailor);
5. An agent of an ocean carrier (where the agent will be "protected" by any liability limitation which protects the carrier, most likely a Himalayan clause); the issue here usually concerns delivery terms;⁷
6. An agent of a cargo shipper (where the agent will be bound by any liability limitation provisions which the shipper has afforded to the carrier, most likely a Himalayan clause);
7. An agent of a cargo consignee (where the duties as to receipt of the goods will be determined by the terms negotiated by the consignee's principal); and

⁵ If a terminal is found to act as an agent for a STB common carrier but it itself not considered a STB common carrier, the terminal will not be protected by a Himalaya clause because the inland bill of lading probably will have no Himalaya clause. The terminal may very well be relegated to the status of a Common Law bailee. In that case unless the terminal can persuade a court to apply the Lerakoli theory of sub-bailee rather than the Herd theory of limiting the contract terms to "intended beneficiaries" and not extending the carrier's protection to the carrier's agents. Thus, unless the terminal has obtained an indemnity agreement from its principal, the terminal would find itself defenseless and liable without limitation. See Stein Hall & Co. v. S.S. CONCORDIA VIKING, 494 F.2d 287 (2d Cir. 1974); David Crystal, Inc. v. The Cunard S.S. Co., 339 F.2d 295 (2d Cir. 1964), cert. denied, 380 U.S. 976 (1965).

⁶ However, if the terminal's activities were incident to the maritime contract of carriage, the UCC will not apply and the terminal will be accorded the same law that applies to all other participants in the contract of carriage (i.e., limitation of liability. In Moore-McCormack Lines v. International Terminal Operating Co., 619 F. Supp. 1406, 1409 (S.D.N.Y. 1985) the Court set forth the standards to demonstrate that a terminal was not acting solely as a warehouse and its activities were "incident to the maritime contract of carriage" in that they were functions traditionally performed by or for an ocean carrier of goods -

To supply clerical personnel to record delivery and receipt of cargo; to sort and stack cargo; to make repairs to cooerage, rebag goods, etc.; to receive and tier outbound cargo; to break down cargo according to lot designations; to load and unload trucks and harborcraft; and to perform cleaning and general housekeeping on the piers.

⁷ Delivery issues stem from involvement of negotiable bills of lading as opposed to non-negotiable ones. If the cargo was carried pursuant to a negotiable bill of lading, the cargo cannot be delivered by the terminal until the holder of a negotiable bill of lading has surrendered it, usually to the ocean carrier. The basic rule is that the terminal should not release the cargo unless and until the ocean carrier has given permission to do so. Failure to observe this crucial step could force the ocean carrier to pay the value of the cargo plus damages to the actual holder of a negotiable bill of lading, in accordance with the Pomerene Bills of Lading Act, 49 App. U.S.C. §§ 89-91. In violating this rule the terminal probably would be held to have breached its implied warranty of workman-like service to the ocean carrier and could very likely be required to pay the ocean carrier for the damages it was forced to pay plus the ocean carrier's attorneys fees and costs, David Crystal, Inc. v. Cunard S.S. Co., 339 F.2d 295 (2d Cir. 1965), cert. denied, 380 U.S. 976 (1965) and Morse Electro Prod. Corp. v. S.S. GREAT PEACE, 437 F. Supp. 474 (D.N.J. 1977).

On the other hand, if the cargo is shipped under a straight, or non-negotiable, bill of lading, and if United States law governs the shipment, the ocean carrier may only require the terminal to identify the consignee named on the bill of lading and obtain a receipt from the consignee. The terminal probably will want strict instructions from its principals in this regard.

8. An ocean carrier (*i.e.*, the terminal usually receives the protection of the ocean carrier's bill of lading because of the inclusion of a "Himalaya clause,"⁸ which specifically extends its protection to the terminal⁹ – United States law is unclear¹⁰, but the weight of authority appears to back the Himalaya clause approach¹¹).

⁸ The term "Himalaya clause" stems from the court case Adler v. Dickson (THE HIMALAYA), 1 Q.B. 158, 183, 184 (1955), in 2A Benedict on Admiralty §169 (1995). The HIMALAYA involved a personal injury suit brought by Mrs. Adler, a widow, shopkeeper, and first-class passenger on the S.S. HIMALAYA. When she had returned to the vessel from a shore visit in Trieste, Italy, and was climbing the vessel's gangway, the gangway suddenly moved. The sudden motion threw Mrs. Adler sixteen feet from the gangway to the wharf. Mrs. Adler was prevented from suing the vessel or the vessel's owner by the almost unconscionable language in her passenger ticket. Instead, she sued the vessel's master and boatswain. The vessel owner argued that the defenses in its passenger ticket should be extended to its servants, the master and boatswain.

In what appears to be dicta, the Court maintained that all defenses in the contract of carriage would extend to all participants in its performance: "the master, the stevedores and any other persons who may be engaged in carrying out the services provided for by the contract." In other words, the participants are protected by the contract even though they are not parties to it; they could rely on the contract even though they might be guilty of negligence and are sued in tort. Although the contract protections were not made expressly for the benefit of stevedores and other participants in the contract, the Court suggested the protections were extended to them by "necessary implication."

An example of a simple Himalaya clause is:

All defenses of the carrier shall inure also to the benefit of the carrier's agents, servants and employees and of any independent contractors performing any of the carrier's obligations under its contract of carriage or acting as bailee.

Taken from Secrest Mach. Corp. v. S.S. TIBER, 450 F.2d 285, 286 (5th Cir. 1971).

⁹ The rule is best stated as follows: even though there was only one contract (*i.e.*, the contract evidenced by the bill of lading), the reason why the stevedores and others are protected is because they participated in the performance of it, and the exception or Himalaya clause was made for their benefit while they were performing that contract, even though the stevedores and others were not parties to the contract. So, while the clause was not made expressly for their benefit, it was to benefit them "by necessary implication," which has the legal effect of protecting them. Therefore, they have a sufficient interest in the contract, and specifically in the Himalaya clause, to entitle them to enforce it. Their interest lies in the fact that they participated in so far as the contract affected them and thus they can take those benefits of the contract which relate to their interest. It is therefore one of those "third party beneficiary" cases, which are by no means rare, where a third person is entitled to enforce a contract made between other parties but for the third party's benefit.

¹⁰ Some earlier United States law follows the same rule - A.M. Collins & Co. v. Panama R.R., 197 F.2d 893, 1952 AMC 2054 (5th Cir.), *cert. denied*, 344 U.S. 875, 1952 AMC 2086 (1952). Likewise, the Second Circuit, in Lerakoli, Inc. v. Pan American World Airways, 783 F.2d 33, 36 (2d Cir. 1986), *cert. denied*, 479 U.S. 827 (1986), used a sub-bailee theory rather than upon a formalistic "Himalaya" extension of contractual protections to participants in the contract of carriage (it is established Common Law doctrine that a sub-bailee may take advantage of a liability limitation contractually agreed upon between the original bailee and bailor). Lerakoli involved the loss of diamonds by Pan American World Airways from registered mail carried for the United States Postal Service (USPS). Plaintiff's recourse against the USPS was limited by Article 44(3) of the United States Postal Union Convention to "40 francs (\$15.76) per item," 27 U.S.T. 345, 396 (July 5, 1974). The plaintiff proceeded instead against Pan Am in an attempt to recover the entire value of the diamonds.

However, the Supreme Court of the United States specifically overruled the English approach in Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297, 305 (1959). In Herd, a stevedore, while attempting to load a nineteen-ton press onto a ship, dropped the press into the water. The bill of lading had been issued, and the stevedore attempted to take advantage of the \$500 per package limitation. The District Court refused to extend the package limitation to the stevedore, and the Fourth Circuit affirmed, specifically declining to follow the Fifth Circuit's decision in A.M. Collins & Co. v. Panama Railroad, and the Supreme Court likewise affirmed.

¹¹ Generali v. D'Amico, 766 F.2d 485, 487 (11th Cir. 1985); Rupp v. International Terminal Operating Co., 479 F.2d 674, 676-78, (2d Cir. 1973); Secrest Mach. Corp. v. S.S. TIBER, 450 F.2d 285, 286 (5th Cir. 1971); EM Chem. v. S.S. SLOMAN NAJADE, 670 F. Supp. 87 (S.D.N.Y. 1987).