THE MCS-90 ENDORSEMENT: NO COVERAGE? NO PROBLEM

In the late 1970's, Congress, concerned about increased truck traffic and non-conformance with trucking regulations due to the deregulation of the trucking industry by the federal government, began a debate to address these concerns. At this same time, the Department of Transportation conducted a random roadside inspection of commercial motor vehicles traveling on I-80 in Pennsylvania and the results were staggering. More than half of the commercial vehicles were placed out of service due to a variety of safety violations.[1] As a result of congressional debate and the DOT's informal study, Congress passed The Motor Carrier Act of 1980 (hereinafter "the Act").

The Act imposed higher levels of financial responsibility on motor carriers operating under federal permit and intrastate carriers operating under state authority. The chart below, prepared by the Department of Transportation, shows the minimum required financial responsibility as determined by the type of cargo hauled.

DEPARTMENT OF TRANSPORTATION SCHEDULE OF LIMITS-PUBLIC LIABILITY

Type of Carriage	**Commodity Transported**	**Financial Responsibility**
(1) For-hire (in interstate or foreign commerce, with a gross vehicle weight rating of 10,000 or more pounds).	Property (nonhazardous)	$750,000
(2) For-hire and Private (in interstate, foreign, or intrastate commerce, with a gross vehicle weight rating of 10,000 or more pounds).	Hazardous substances, as defined in 49 CFR 171.8, transported in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3500 water gallons.	$5,000,000
(3) For-hire and Private (in interstate or foreign commerce: in any quantity; or in intrastate commerce, in bulk only; with a gross vehicle weight rating of less than 10,000 pounds).	Oil listed in 49 CFR 172.101; hazardous waste, hazardous materials, and hazardous substances defined in 49 CFR 171.8 and listed in 49 CFR 172.101, but not mentioned in (2) above or (4) below.	$1,000,000
(4) For-hire and Private (in interstate or foreign commerce, with a gross vehicle weight rating of less than 10,000 pounds).	Any quantity of Division 1.1, 1.2, or 1.3 material; any quantity of Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A material; or highway route controlled quantities of a Class 7 material as defined in 49 CFR 173.403.	$5,000,000

In an effort to glean the transportation and insurance industries' compliance with the Act's mandated levels of financial responsibility, Congress created the MCS-90 endorsement. The MCS-90 is essentially an endorsement that makes the insurer a surety to the public. The Act requires the MCS-90 endorsement be attached to any liability policy issued to motor carriers operating commercial motor vehicles that are transporting property in interstate or foreign commerce.[2]

Most of these motor carriers meet their financial responsibility by purchasing an insurance policy and attaching Form MCS-90, Endorsement for Motor Carrier Policies of Insurance for Public Liability under Sections 29 and 30 of the Motor Carrier Act of 1980. The endorsement[3], reproduced at Exhibit 1, is attached to a Truckers Coverage Form, Motor Carrier Coverage Form or a Business Auto Policy, depending on the coverage form the insurer utilizes. Usually, when a loss occurs, the motor carrier's tractor-trailer is listed in the declarations or is otherwise covered by the insurance policy issued. As such, the insurance contract itself provides the necessary coverage to protect the public.

Occasionally, as a result of underwriting errors, policy terms, insolvency, or illegal trucking operations, a tractor-trailer will have no coverage and the MCS-90 endorsement is triggered.

POLICY ISSUES

The purpose of the endorsement is to ensure adequate levels of insurance coverage in the event of a trucking accident involving a member of the public or the environment. "Accordingly, the MCS-90 endorsement creates a surety ship by the insurer to protect the public when the insurance policy to which the MCS-90 is attached otherwise provides no coverage to the insured."[4]

> "In effect, the endorsement shifts the risk of loss for accidents occurring in the course of interstate commerce away from the public by guaranteeing that an injured party will be compensated even if the insurance carrier has a valid defense based on a condition in the policy."[5]

COVERAGE DEFENSES DO NOT APPLY

The MCS-90 endorsement states, "[i]n consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 ***regardless of whether or not each motor vehicle is specifically described in the policy*** and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere…. It is understood and agreed that ***no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured.***[6]

In cases where the insurer for the motor carrier has cited a coverage defense, a seasoned attorney will immediately sue the motor carrier, driver and owners of the tractor and trailer. This strategy creates an interesting dilemma for the insurer. Depending on the coverage defense asserted, the insurer is now compelled to either, (1) deny coverage and refuse to defend its insured; or (2) defend the lawsuit under a reservation of rights and initiate a declaratory judgment lawsuit to determine its duties under its policy. Either choice pits the insured's interests against its insurer's interests. This scenario, if used appropriately, can be used to increase case values.

If the insurer chooses to deny coverage and not answer the lawsuit it leaves the insured without representation in the lawsuit and the looming possibility of a default judgment.[7] This choice leaves the insurer open to a variety of bad results, including waiver of coverage defenses, bad faith, and a default judgment against its insured. Once a court issues a final judgment against any insured, the injured plaintiff can invoke the MCS-90 endorsement and request payment from the insurer. If the insurer fails to pay the judgment, "the judgment creditor may maintain an action in any court of competent jurisdiction against the insurance company to compel such payment.[8]

Most prudent insurers choose to defend its insured under a reservation of rights and file a separate declaratory judgment action to determine its duties under the policy. Under this scenario the insurer's costs and expenses increase exponentially. Furthermore, even if they discharge coverage in a declaratory action, the insurer is ultimately on the hook for any final judgment. This choice destroys any working relationship between the insured and insurer. As a result, the insureds rarely cooperate in the defense of the plaintiff's claims. Also, the MCS-90 has been held to trump non-cooperation and notice clauses.[9] In effect, the MCS-90 endorsement forces the insurer to pay a premium to get the case resolved because the alternative route is too costly.

NO DUTY TO DEFEND

The MCS-90 does not create any obligation on the part of the insurer to defend its insured for claims not covered by the policy.

Although the endorsement doesn't require the insurer to defend, as discussed above, a failure to defend may result in a default judgment. Once the judgment is final, the MCS-90 endorsement creates absolute liability on the part of the insurer to satisfy the judgment up to the policy limits listed on the endorsement. A failure of the insurer to satisfy the judgment, gives the judgment creditor a right to pursue a direct action against the insurer for the amount of the judgment. Wouldn't we all enjoy litigating that case? Essentially, the MCS-90 endorsement requires insurers to pay any adverse result of a default hearing, thereby encouraging insurers to choose to defend the underlying tort action or settle the case at a premium.

SUBROGATION ALLOWED

As a general rule, a liability insurer cannot receive reimbursement from its insured for losses paid under the policy by subrogation or other means. However, the MCS-90 endorsement contains a subrogation clause that states, "the insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of said policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in the endorsement."[10]

Although, in theory, this provision may give comfort to the insurer, who is ultimately required to pay a judgment where no coverage exists, practically, the carrier will have a difficult, if not impossible, time realizing a recovery from its own insured. Assuming the insured has potential assets, the insurer cannot commence recovery efforts against its insured until after they make payment, which is often years after the loss occurs. Over this time frame, its insured can file bankruptcy or transfer its assets to avoid paying any judgment the insurer receives. Further, many insureds never read their policies or claim their agents or brokers did not properly explain the coverage when purchased. In response, agents typically argue they explained the coverage to the insured. In the end, exercising subrogation rights under the MCS-90 endorsement becomes an expensive exercise in futility for the insurer and may not be worth pursuing.

MCS-90 INTERPRETATIONS

The MCS-90 endorsement has been in use for over 20 years and its terms have been repeatedly litigated. The following is a summary of some of the decisions affecting the MCS-90 endorsement and its application:

- The Department of Transportation administers safety regulations and therefore the exempt nature of the commodity being hauled has no bearing on the application of the MCS-90 endorsement[11]

- A commodity is deemed interstate or intrastate by examining the facts surrounding the shipment and the "essential character" of the shipment.[12]

- The motor carrier who purchased the insurance need not have been negligent; all that is required is that the accident resulted from negligence and that a judgment was entered implicating the coverage provisions of the policy and the endorsement.[13]

- This rule of law has been upheld when there was a judgment against the employee truck driver and recovery from employer's policy,[14] a judgment against the driver and recovery from the trailer lessee's policy,[15] judgment against the uninsured tractor owner and the uninsured truck driver and recovery from the trailer owner's policy,[16] and judgment against the tractor-trailer driver and the owner of the tractor and recovery from the trailer owner's policy.[17]

- The MCS-90 creates a duty to indemnify an insured for non-covered autos operated under the motor carrier's authority.[18]

- Required indemnification of the insured for judgment based on a theory of vicarious liability.[19]

- Without a lease between an owner/lessor and motor carrier/lessee, an insurer will not be required to indemnify the motor carrier for any judgment against the owner/lessor.[20]

- The obligations of an insurer to indemnify its insured also extend to any liability deductibles or self-insured retentions the insured may carry.[21]

- Whether or not the MCS-90 covers punitive damages turns on whether the underlying policy provides coverage for same.[22]

CONCLUSION

The government's system for ensuring compliance with financial responsibility laws has proven to be an effective program. The courts, in coming to some of their far reaching decisions regarding MCS-90 enforcement, have strongly upheld the public policy behind the endorsements creation to ensure that members of the public are protected when injured by members of the transportation industry. However, not surprisingly, the insurance industry is, once again, fighting back and proposing new rules for the MCS-90 to limit the endorsement's reach. Stay tuned!

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[1] Motor Carrier Act of 1980 (PL 96-296), House Report No. 96-1069 dated June 3, 1980, p. 43
[2] See 49 C.F.R. §§ 387.3, 387.7. When not physically attached to the policy, the terms of the endorsement may be imputed by law. *Transport Indem. Co. v. Carolina Cas. Ins. Co.*, 133 Ariz. 395, 652 P.2d 134 (1982); *Hagans v. Glens Falls Ins. Co.*, 465 F.2d 1249 (10th Cir. 1972); *Travelers Ins. Co. v. Transport Ins. Co.*, 787 F.2d 1133, 1139 (7th Cir. 1986).
[3] 49 C.F.R. §387.15.
[4] *Canal Ins. Co. v. Distribution Servs., Inc.*, 242 F.3d 667, 672 (5th Cir. 2001).
[5] *Pierre v. Providence Wash. Ins. Co.*, 784 N.E.2d 52, 53-54 (2002).
[6] 49 C.F.R. §387.15 (emphasis added).
[7] For a good example of how this plays out in the real world see *Century Indemnity Co. v. Carlson*, 133 F.3d 591 (8th Cir. 1998)
[8] 49 C.F.R. §387.15.
[9] *Campbell v. Bartlett*, 975 F.2d 1569 (10th Cir. 1992).
[10] 49 C.F.R. §387.15
[11] *Century Indemnity Co. v. Carlson*, 133 F.3d 591 (8th Cir. 1998)
[12] *Roberts v. Levine*, 921 F.2d 804 (8th Cir. 1990)
[13] *Pierre v. Providence Washington Ins. Co.*, 99 N.Y.2d 222, 231, 78 N.E.2d 52, 57 (2002).
[14] See 2 DAVID N. NISSENBERG, THE LAW OF COMMERCIAL TRUCKING: DAMAGES TO PERSONS AND PROPERTY § 14.07 AT 789 (3RD ED. 2003)
[15] See 2 DAVID N. NISSENBERG, THE LAW OF COMMERCIAL TRUCKING: DAMAGES TO PERSONS AND PROPERTY § 14.07 AT 789 (3RD ED. 2003).
[16] See 2 DAVID N. NISSENBERG, THE LAW OF COMMERCIAL TRUCKING: DAMAGES TO PERSONS AND PROPERTY § 14.07 AT 790 (3RD ED. 2003).
[17] Id.
[18] *John Deere Ins. Co. v. Nueva*, 229 F.3d 853 (9th Cir. 2000) *cert. denied*, 534 U.S. 1127, 122 S. Ct. 1063, 151 L.Ed. 2d 967 (2002).

[19] *Integral Ins. Co. v. Lawrence Fulbright Trucking, Inc.*, 930 F.2d 258, 261 (2d. Circ. 1991).
[20] *See Jackson v. O'Shields*, 101 F.3d 1083 (5th Circ. 1996).

[21] See 2 DAVID N. NISSENBERG, THE LAW OF COMMERCIAL TRUCKING: DAMAGES TO PERSONS AND PROPERTY § 14.07 AT 791 (3RD ED. 2003).
[22] Id. *See also Hartford Accident and Indemnity Co. v. American Red Ball Transit Co.*, 262 Kan. 570, 938 P.2d 1281 (10th Cir. 1997); *Boyd v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 536, 424 S.E.2d 168 (1993).

EXHIBIT 1

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ENDORSEMENT FOR MOTOR CARRIER POLICIES OF INSURANCE FOR PUBLIC LIABILITY UNDER SECTIONS 29 AND 30 OF THE MOTOR CARRIER ACT OF 1980

Issued to _____ of _____

Dated at _____ this _____ day of _____, 20 _____

Amending Policy No. _____ Effective Date _____

Name of Insurance Company

_____

Countersigned by

_____

Authorized Company Representative

The policy to which this endorsement is attached provides primary or excess insurance, as indicated by "[X]," for the limits shown:

[ ] This insurance is primary and the company shall not be liable for amounts in excess of $_____ for each accident.

[ ] This insurance is excess and the company shall not be liable for amounts in excess of $_____ for each accident in excess of the underlying limit of $_____ for each accident.

Whenever required by the Federal Motor Carrier Safety Administration (FMCSA), the company agrees to furnish the FMCSA a duplicate of said policy and all its endorsements. The company also agrees, upon telephone request by an authorized representative of the FMCSA, to verify that the policy is in force as of a particular date. The telephone number to call is: _____.

Cancellation of this endorsement may be effected by the company of the insured by giving: (1) thirty-five (35) days notice in writing to the other party (said 35 days notice to commence from the date the notice is mailed, proof of mailing shall be sufficient proof of notice), and (2) if the insured is subject to the FMCSA's registration requirements under 49 U.S.C. 13901, by providing thirty (30) days notice to the FMCSA (said 30 days notice to commence from the date the notice is received by the FMCSA at its office in Washington, D.C.).

U.S. Department of Transportation
Federal Motor Carrier
Safety Administration
Form Approved:
OMB No.: 2126-0008

DEFINITIONS AS USED IN THIS ENDORSEMENT

Accident includes continuous or repeated exposure to conditions or which results in bodily injury, property damage, or environmental damage which the insured neither expected nor intended.

Motor Vehicle means a land vehicle, machine, truck, tractor, trailer, or semi-trailer propelled or drawn by mechanical power and used on a highway for transporting property, or any combination thereof.

Bodily Injury means injury to the body, sickness, or disease to any person, including death resulting from any of these.

Property Damage means damage to or loss of use of tangible property.

Environmental Restoration means restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water, of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measures taken to minimize or mitigate damage to human health, the natural environment, fish, shellfish, and wildlife.

Public Liability means liability for bodily injury, property damage, and environmental restoration.

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The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended to assure compliance by the insured, within the limits stated herein, as a motor carrier of property, with Sections 29 and 30 of the Motor Carrier Act of 1980 and the rules and regulations of the Federal Motor Carrier Safety Administration (FMCSA).

In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. Such insurance as is afforded, for public liability, does not apply to injury to or death of the insured's employees while engaged in the course of their employment, or property transported by the insured, designated as cargo. It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

It is further understood and agreed that, upon failure of the company to pay any final judgment recovered against the insured as provided herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the company to compel such payment.

The limits of the company's liability for the amounts prescribed in this endorsement apply separately to each accident and any payment under the policy because of any one accident shall not operate to reduce the liability of the company for the payment of final judgments resulting from any other accident.

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