

The MCS-90 Endorsement (The Ultimate Monkey Wrench)

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The Federal Motor Carrier Act of 1980 was enacted to impose set levels of required financial responsibility on motor carriers. As a result of this Act, motor carriers who transport goods in interstate commerce must file proof with the applicable government agencies that they have secured adequate financial resources to adhere to the minimum levels of financial responsibility. Motor carriers can satisfy this financial responsibility obligation through three means – a MCS-90 endorsement to an insurance policy; a surety bond, otherwise known as a MCS-82; or self-insurance. Although there are three options available, the vast majority of motor carriers satisfy their obligation through use of a MCS-90 endorsement.

Federally Mandated Minimum Levels of Responsibility

The Motor Carrier Act of 1980 sets forth the federally mandated minimum levels of responsibility that motor carriers involved in interstate transport must maintain. Part 387 of Title 49 of the Code of Federal Regulations (49 C.F.R. § 387.1) sets forth these financial responsibility requirements as follows:

1. For-hire carriage of nonhazardous property in interstate or foreign commerce with a gross vehicle weight rating of 10,000 or more pounds - \$750,000.
2. For-hire and private carriage of hazardous substances as specified in 49 C.F.R. § 387.9 in interstate, foreign, or intrastate commerce with a gross vehicle weight rating of 10,000 or more pounds - \$5,000,000.
3. For-hire and private carriage of oil, hazardous wastes, hazardous materials, and hazardous substances as specified in 49 C.F.R. § 387.9 in interstate or foreign commerce in any quantity or in intrastate commerce with a gross vehicle rating of 10,000 or more pounds - \$1,000,000.
4. For-hire and private carriage of certain types of hazardous materials as specified in 49 C.F.R. § 387.9 in interstate or foreign commerce with a gross vehicle weight rating of less than 10,000 pounds - \$5,000,000.

49 C.F.R. § 387.9.

The rules require that a motor carrier must maintain proof of financial responsibility through either a MCS-90 endorsement, a MCS-82 surety bond, or a written authorization to self insure issued by the Department of Transportation. See 49 C.F.R. § 387.7(d)(1); 49 C.F.R. § 387.7(d)(2); 49 C.F.R. § 387.7(d)(3). A motor carrier must maintain a satisfactory safety rating under the provisions of 49 C.F.R. Part 85 to be eligible for self-insurance.

The MCS-90 Endorsement

Any insurance policy that insures a licensed interstate motor carrier must have what is known as a MCS-90 endorsement attached to it. See 49 C.F.R. 387.15. Even if the endorsement is not physically attached to the policy, a court may impute the terms of the MCS-90 endorsement into the policy as a matter of

law. See *Transport Indemnity Co. v. Carolina Casualty Ins. Co.*, 652 P.2d 134, 145 (Ariz. 1982). The endorsement, however, will typically apply only when no other policy provides coverage.

The MCS-90 endorsement creates an obligation, running to the public, to pay any judgment resulting from negligence in the operations, maintenance or use of motor vehicles, even if the vehicle is not identified or covered under the insurance policy to which the endorsement is attached. See, e.g., *Industrial Indem. Co. v. Truax Truck Lines, Inc.*, 45 F.3d 1986, 1991 (5th Cir. 1995). See also, *Canal Ins. v. First Gen. Ins. Co.*, 889 F.2d 604, 614 (5th Cir. 1989); *National AM. Ins. Co. v. Century State Carriers, Inc.*, 785 F.Supp. 793, 795 (N.D. Ind. 1992). The objective of the MCS-90 endorsement is to afford protection to the public from uncompensated losses by mandating coverage where there would otherwise be no coverage. See *American Alternative Ins. Co. v. Sentry Select Ins. Co.*, 176 F. 2d 550 (E.D. Va. 2001). Consequently, the endorsement is intended to operate as a safety net by creating a suretyship obligating the insurer to pay injured parties regardless of coverage defenses or allocation issues arising under the policy.

The MCS-90 states in relevant part:

...the insurer (the company) agrees to pay ... any financial judgment recovered against the insured for public liability resulting from the negligence in the operation, maintenance, or use of motor vehicles...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...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.

A. No Duty to Defend Under the MCS-90

The MCS-90 endorsement does not, in and of itself, require the insurer to defend the insured motor carrier, but it also does not negate a separate duty to defend which exists under the terms of the policy. In other words, although the MCS-90 endorsement requires insurers to pay judgments, it does not create a duty to defend if no such duty exists under the policy. See *Harco National Ins. Co. v. Bobac Trucking, Inc.*, 107 F.3d 733, 736 (9th Cir. 1997); *National Am. Ins. Co. v. Central States Carriers, Inc.*, 785 F. Supp. 793, 797 (N.D. Ind. 1992); *T.H.E. Ins. Co. v. Larsen Intermodal Services*, 242 F.3d 667 (5th Cir. 2001).

A demonstrative example is *Harco National Ins. Co. v. Bobac Trucking*, 107 F.3d 733 (9th Cir. 1996). Harco paid \$225,000 on behalf of Bobac as part of the settlement of the underlying tort case and then sought reimbursement from Bobac. It was undisputed that, but for the MCS-90 endorsement, there would have been no coverage under the policy. Bobac argued, however, that the failure of Harco to defend the underlying case was a breach of the policy, relieving it of its obligation to reimburse Harco. The court rejected this argument. The court noted that the purpose of the MCS-90 was to protect the public, not to give a windfall to the insured. Once the member of the public had been paid, the purpose

of the endorsement was satisfied. The endorsement did not affect the rights of the insurer and the insured as between each other. Moreover, the court noted, the MCS-90 is not really an insurance policy, rather than a financial responsibility method. Thus, the endorsement did not create a duty to defend, meaning that Harco's failure to defend could not be considered breach of Harco's obligations.

B. Right to Reimbursement Under the MCS-90

The MCS-90 endorsement gives the insurer the right to seek reimbursement from the insured carrier for "any payment 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 insurer] would not have been obligated to make under the provisions of the policy except for the agreement contained in" the endorsement. If an insurer is required to pay a judgment only by reason of the endorsement which the insurer would not otherwise be obligated to pay under the policy, the insurer has a right of reimbursement against the motor carrier. See *Harco Nat. Ins. Co. v. Bobac Trucking, Inc.*, 107 F.3d 733 (9th Cir. 1997). The insurer may seek reimbursement for both judgments and settlements prior to the entry of a judgment. An insurer should reserve his right to seek reimbursement by giving written notice to the insured motor carrier that coverage may not exist under the policy and that the insurer will seek to recoup from the insured any amounts expended to resolve the case under the MCS-90.

C. The MCS-90 May Obligate an Insurer to Pay Judgments Not Otherwise Covered by the Policy

The most important feature of the MCS-90 endorsement is that it will obligate an insurer to pay judgments on behalf of the insured that are not otherwise covered by the policy, because the endorsement will negate a number of limiting aspects of the policy. See *Prestige Cas. Co. v. Michigan Mut. Ins. Co.*, 99 F.3d 1340 (6th Cir. 1996) (Michigan law); *Adams v. Royal Indem. Co.*, 99 F.3d 964 (10th Cir. 1996) (federal law). Thus, the operation and use of the MCS-90 endorsement has caused considerable debate often resulting in a highly expanded definition of coverage not contemplated by the underlying policy.

In reaching a ruling, the cases typically scrutinize the overriding public policy considerations behind the protection provided by the MCS-90 endorsement. Indeed, the endorsement had its origins in the idea that the public must be protected when a licensed motor carrier uses interchanged, leased or substitute vehicles to transport goods under federal operating authority. See *Empire Fire & Marine Ins. Co. v. Guardian National Ins. Co.*, 868 F.2d 357, 362-63 (10th Cir. 1989). Thus, the MCS-90 endorsement was created to preclude the possibility that, through inadvertence or otherwise, some vehicles may be left off a policy to the detriment of the public. See *Adams v. Royal Indem. Co.*, 99 F.3d 964, 968 (10th Cir. 1996). With this purpose in mind, the courts have extended coverage through the MCS-90 endorsement for leased or non-owned vehicles, as well as for permissive users of non-covered vehicles. *John Deere Ins. Co. v. Nueva*, 229 F.3d 853, 857 (9th Cir. 2000); *Adams v. Royal Indem. Co.*, 99 F.3d 964 (10th Cir. 1996); see also *Pierre v. Providence Washington Ins. Co.*, 784 N.E.2d 52 (N.Y. 2002).

In addition, although the motor carrier is considered the insured under the MCS-90 endorsement, some courts have nevertheless expanded coverage to include persons other than the named insured. See, e.g., *Cambell v. Bartlett*, 975 F.2d 1569 (10th Cir. 1992) (expanded to the employee driver from the employer's policy); *Adams*, 99 F.3d 964 (expanded to the driver under the trailer lessee's policy); *Nueva*, 229 F.3d 853 (expanded to the uninsured tractor owner and driver under the trailer's owner policy); *Lynch v. Yob*, 768 N.E.2d 1158 (expanded to tractor driver under the trailer owner's policy); *Pierre*, 784 N.E.2d 52 (expanded to tractor driver under the trailer owner's policy). In response to these decisions,

however, the Federal Motor Carrier Safety Administration (FMCSA) has issued regulatory guidance indicating that the term "insured" as used in the MCS-90 is defined as the motor carrier named in the policy of insurance and surety bond. The FMCSA made it clear that these endorsements were not intended to satisfy judgments against any party other than the motor carrier named in the endorsement or surety bond, or its fiduciary. A few recent cases have followed this regulatory guidance, and it certainly calls into serious question the validity of prior precedence like *Nueva*. See, e.g., *Ooida Risk Retention Group, Inc. v. Williams*, 579 F.3d 469 (5th Cir. 2009); *Sentry Select Ins. Co. v. Thompson*, 655 F.Supp.2d 561 (E.D.Va. 2009); *Armstrong v. United States Fire Ins. Co.*, 606 F.Supp.2d 794 (E.D.Tenn. 2009).

D. Some Court Have Expanded the Stated Purpose of the MCS-90

The varying interpretations regarding the application of the MCS-90 has caused much concern over the years, and not only for the insurance company on the risk, but also for the named insured who has an obligation to reimburse any amounts paid under the MCS-90. This is because court decisions can, and have, altered the true intent and purpose of the MCS-90, and some courts have established liability solely because of the existence of a MCS-90. Two cases that demonstrate this follow:

- In *John Deere Ins. Co. v. Nueva*, 229 F.3d 853 (9th Cir. 2000), the Ninth Circuit applied MCS-90 liability to the permissive user of a non-scheduled auto, who would not otherwise qualify as an insured under the insurance policy. The named insured leased a non-scheduled trailer to a motor carrier who was involved in an accident. The motor carrier was uninsured. The injured party sought a declaration that the motor carrier and its driver were "insureds" pursuant to the trailer owner's MCS-90 endorsement. The trailer owner's insurer argued that liability under a MCS-90 endorsement applied only to the named insured. The insurer further argued that the policy extended permissive user insured status only to persons using scheduled autos with the insured's permission. The Ninth Circuit disagreed and extended "coverage" under the endorsement to the motor carrier and its driver. The court held that the MCS-90 endorsement "negates the limitation that only permissive users of 'covered autos' are 'insureds.'" *Id.* at 859.
- In *Lynch v. Yob*, 768 N.E.2d 1158 (Ohio 2002), the Ohio Supreme Court allowed a plaintiff to recover under a MCS-90 endorsement from a second insurance company that did not otherwise provide coverage even though recovery from the first insurance company under its policy terms exceeded the federally mandated minimums. The plaintiff in *Lynch* was injured in a tractor-trailer accident and recovered \$1 million from the tractor's insurer. The Ohio Supreme Court then allowed the plaintiff to recover additional monies against the trailer's insurer under the MCS-90 even though the driver of the tractor was not covered under the trailer's insurance policy.

In response to cases like *John Deere* and *Lynch*, in 2005 the FMCSA issued regulatory guidelines indicating that the term "insured" in the MCS-90 endorsement is defined as the motor carrier named in the insurance policy. While several cases have followed these guidelines, as recent as 2010 the United States District Court for the Northern District of California, which is in the Ninth Circuit, has alluded to the fact that *John Deere* is still good law in that jurisdiction. See *Zurich American Ins. v. Grand Ave. Transport*, 2010 U.S. Dist. LEXIS 15582, *25-26 (February 23, 2010) (explicitly stating that its decision that MCS-90 liability is not triggered once the federally mandated minimum has been satisfied is not in conflict with *John Deere*).

E. The Effect of the MCS-90 on the Priority of Coverage

Because authorized carriers commonly use leased vehicles to haul goods, most of the reported cases - not surprisingly - involve such leased vehicles and disputes concerning the applicability of "other insurance" clauses. Unfortunately, the MCS-90 and its effect on coverage have caused a great deal of confusion and debate. Consequently, there are numerous conflicting judicial decisions regarding the effect the MCS-90 has on the determination of primary coverage in accidents involving leased vehicles which may be insured by multiple policies. Simply stated, the issue is does the existence of the MCS-90 endorsement in a policy make that policy primary as a matter of law? What about when, as often is the case, the other policy involved is a commercial automobile policy purchased by a leased driver which does not have a MCS-90 endorsement, yet states it is to be primary?

The struggle between the insurers regarding the effect the MCS-90 endorsement has on determining who is primary versus excess coverage has not yet been addressed by the United States Supreme Court. Consequently, we are left with various interpretations to consider when presented with the problem. These are as follows:

Interpretation 1: The MCS-90 endorsement makes the policy primary over all other policies that lack the endorsement. If more than one policy contains the MCS-90 endorsement, then liability attaches to the policy covering the carrier under whose authority the truck was being operated at the time of the accident. See e.g., *Integral Ins. Co. v. Lawrence Fulbright Trucking, Inc.*, 930 F.2d 258 (2d Cir. 1991).

Interpretation 2: The MCS-90 endorsement simply negates the limiting provisions such as excess clauses in the policy to which it is attached. It does not make the policy primary over other policies that by their own terms provide primary coverage. See, e.g., *See Transport Indemnity Co. v. Carolina Casualty Ins. Co.*, 652 P.2d 134 (Ariz. 1982).

Interpretation 3: The MCS-90 endorsement is meant to protect members of the public and shippers only. It is not meant to protect the interests of other insurance carriers. Consequently, disputes among insurance carriers regarding the allocation of coverage should be decided based upon the contractual arrangements of the parties and applicable state law. See, e.g., *T.H.E. Ins. Co. v. Larsen Intermodal Services*, 242 F.3d 667 (5th Cir. 2001).

The trend of courts today appears to follow the third interpretation and to apply MCS-90 liability only if the federally mandated coverage minimums cannot otherwise be met. In *Carolina Cas. Ins. Co. v. Yeates*, 584 F.3d 868 (10th Cir. 2009), widely followed since issued, the Tenth Circuit opined that the MCS-90 endorsement is intended to impose a surety obligation on the insurance company. According to Yeates, an insurer's obligation under MCS-90 is not triggered unless (1) the underlying insurance policy to which the endorsement is attached does not provide liability coverage for the accident, and (2) the motor carrier's other insurance coverage is either insufficient to meet the federally mandated minimums or non-existent. *Id.* at 871. Once the federally mandated minimums have been satisfied by any means, the MCS-90 endorsement does not apply. *Id.* at 879. Despite this recent trend, negative precedent still remains in many jurisdictions.

Conclusion

The MCS-90 is not insurance. It is simply a safety net for innocent parties injured by the negligence of the named insured motor carrier. However, sympathetic courts have expanded the protection beyond

its stated intent and purpose. Consequently, understanding how the MCS-90 endorsement is designed to work should allow the transportation industry to better appreciate and manage their risk.