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THE MCS-90 ENDORSEMENT

One mechanism for an interstate motor carrier to demonstrate compliance with the minimum financial responsibility requirements established by federal statute and regulations is the MCS-90 endorsement. The endorsement is added to insurance policies, such as truckers, business/commercial auto, motor carrier, or bus coverage forms, covering for-hire interstate transport of goods or passengers. Under federal law, a minimum sum must be available to satisfy the claims of injured plaintiffs, even where the insurance policy would otherwise not apply, e.g., in the common situation where the accident is caused by the operation of a vehicle which is not a "covered auto" under the policy. Thus, the MCS-90 *only* applies where the insurance policy to which it is attached does *not* provide coverage for a judgment against the insured.

This article examines the MCS-90 endorsement in detail, its history, application, and judicial interpretation, as well as other related issues, including bad faith, state endorsements, and insurer insolvency.

Background

Congress enacted the Motor Carrier Act of 1980 to respond to a number of abuses and problems in the commercial trucking industry. Of primary concern for Congress was the use by motor carriers of leased vehicles to avoid financial responsibility for accidents that occurred during the interstate transportation of goods. At that time, motor carriers' use of nonowned vehicles to transport goods often left injured members of the motoring public unsure as to who was financially responsible for a vehicle and without a means to recover for the negligent use of those vehicles.

The Motor Carrier Act allowed the now-defunct Interstate Commerce Commission to issue regulations governing motor carriers' use of nonowned equipment (the regulations are now promulgated and enforced by the Federal Motor Carrier Safety Administration (FMCSA)). Among these regulations is the requirement for a written lease between the authorized motor carrier and the owner of the vehicle. To that end, every lease must now provide that the motor carrier lessee "shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease" [49 C.F.R. § 376.12].

Additionally, motor carriers must comply with certain financial responsibility requirements by maintaining insurance or other form of surety conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles under the carrier's li-

cense. Motor carriers typically establish proof of their compliance with the financial responsibility requirements by: (1) an MCS-90 endorsement; (2) a surety bond; or (3) self-insurance.

The majority of motor carriers choose to establish proof by requesting the addition of an MCS-90 endorsement to the motor carrier, truckers, or business auto policy covering their exposure to liability arising from their vehicles. The pertinent language of the MCS-90 endorsement—language prescribed by federal regulation which cannot be materially altered—is shown in Figure 1.

Coverage

The endorsement may afford primary or excess coverage, as indicated by a checked box on the form itself. Virtually all contemporary MCS-90 endorsements provide primary coverage. The MCS-90 limit is per accident rather than per person or claim. It should be noted, however, that the intent of this provision was to indicate which insurer provided primary coverage **only in the situation where more than one policy was utilized to meet the minimum financial responsibility limit (e.g., $750,000)**, not in situations where more than one policy potentially covers the claim. Thus, the majority of cases hold that the MCS-90 is not applicable to determine priority of coverage between insurers, as discussed further below.

The limit set forth in the endorsement typically corresponds with the policy's per-occurrence liability limits. For example, for motor carriers transporting nonhazardous property for hire in interstate commerce (with a gross vehicle weight rating of 10,000 pounds or more), the minimum financial responsibility limit is $750,000. If the motor carrier is subject to this limit, the MCS-90 endorsement will usually indicate

FIGURE 1
MCS-90 ENDORSEMENT EXCERPT

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

Source: Endorsement for Motor Carrier Policies of Insurance for Public Liability under Sections 29 and 30 of the Motor Carrier Act of 1980, Form MCS-90 (4/2000)

$750,000. If the endorsement in a policy has a limit higher than $750,000, however, that higher limit will apply.

The MCS-90 limit is irrelevant to the policy limit if the policy provides coverage or there has been no final judgment against the insured, and applies on a per-accident basis even where the accident involves more than one injured party. This means that, in a multi-plaintiff accident where damages may far exceed the MCS-90 limit and policy limit, an insurer may tender that limit in an interpleader declaratory judgment action and be excused from any further obligation to the insured.

As the cancellation provision refers to the insured rather than to the named insured, it could be argued that if a party such as a permissive user/additional insured was entitled to MCS-90 indemnification, that party would be required to receive notice of cancellation, and, therefore, if the policy was canceled by the insurer with notice to the named but not the additional insured, the cancellation would be ineffective.

Passenger-carrying buses in interstate commerce must also demonstrate compliance with financial responsibility requirements of the Bus Regulatory Reform Act of 1982, and may do so by means of an MCS-90B endorsement, which is identical in all material respects with the MCS-90 endorsement utilized by trucks, except for the limit. The MCS-90B limit is $5 million per accident for busses which can carry more than 15 passengers, and $1.5 million for those carrying 15 or fewer passengers.

Application

For the MCS-90 to apply, the following must have taken place:

- There is a judgment against the insured, but there is no coverage under the insurance policy.
- The judgment is a "final judgment" for "negligence in the operation, maintenance, or use of" a motor vehicle.
- There is no other source of recovery for the injured plaintiff from the insured (and possibly from any other party).
- The claimant is a third party who incurred bodily injury or property damage, rather than the insured itself. (The MCS-90 does not apply to cargo, other first-party claims, or employee injury.)
- The vehicle is being utilized in interstate commerce, and the accident occurs within the United States, even where a trip to Mexico or Canada is part of a regular route.

Thus, when faced with a claim under the MCS-90 endorsement, an insurer should seek to determine the following:

- Did the accident involve a "covered" auto?
- If not, thereby potentially invoking the MCS-90 endorsement, do the circumstances of the claim meet one of the narrow prerequisites making the endorsement inapplicable (e.g., the injured claimant is an employee of the insured)?
- Even though the accident did not involve a covered "auto," should the company defend the insured (pursuant to an appropriate reservation of rights) to avoid a default or consent judgment that the company might be required to pay because of the endorsement?
- If the MCS-90 endorsement is likely to apply, are there parties other than the named insured who may seek protection of the endorsement as "permissive users"?
- Can the claimant be satisfied via the proceeds of other insurance available to the insured in a sum at least equal to the minimum financial responsibility requirement, in which case the MCS-90 should not apply?

What, then, are the typical situations in which there is no coverage, but the MCS-90 will apply? The most common is where the vehicle involved in an accident does not qualify for "covered auto" status because it is not listed in the policy, and is not the type of vehicle set forth in the declarations, e.g., it is not an "owned auto" or does not fall under one of the other categories of vehicles described by the numerical designations on the declarations page. Indeed, the MCS-90 endorsement expressly provides that the insured is to be indemnified "regardless of whether or not each motor vehicle is specifically described in the policy." But the endorsement also provides that it will apply in spite of any "condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof" which would otherwise bar coverage.

Utilizing this broad language, courts have found that violation of conditions by insureds, such as late notice or no notice, that result in a default judgment against the insured, are insufficient to preclude the imposition of MCS-90 liability against the insurer. Indeed, it is to avoid a default judgment that insurers are often well advised to concern themselves with the defense of a party for which there is no coverage, in spite of the fact that the MCS-90 does not require a defense of the insured but only establishes a duty to pay plaintiffs where there is a final judgment against the insured.

As one delves into this topic, however, it is important to be mindful of the fact that the endorsement does not come into play until the insurer determines that coverage is not implicated by the terms of the policy. For example, even if the vehicle involved in the accident is not specifically described in the policy (as required by symbol 7 in the business auto coverage form and symbol 46 in the truckers coverage form), the company may still owe coverage if the insured purchased coverage for hired "autos" (symbols 8 and 47) or nonowned "autos" used in the insured's business (symbols 9 and 50). If, after the insurer's investigation, it is determined the vehicle in the accident is not a covered "auto," the insurer's next consideration will be the MCS-90 endorsement.

Insurers' Predicament

Courts view the MCS-90 endorsement as "surety" meant to protect injured members of the public, rather than the insured. Essentially, the endorsement is a safety net when other coverage is lacking. The language of the endorsement indicates that "whatever limitation a policy expresses regarding coverage extending only to 'covered' or 'specified' autos, this limitation ceases to operate when an injured member of the public seeks indemnification on behalf of the insured."

The effect of the endorsement is that the insurer does not have "coverage defenses" available to defeat the implication of the endorsement. Courts very rarely allow an insurer to avoid its indemnification obligations under the endorsement. For example, one court held the MCS-90 endorsement prevented an insurer from interposing its insured's violation of the policy's cooperation clause as a defense to paying the judgment.

Only in certain limited circumstances have courts held that the insurance company was not required to pay under the MCS-90 endorsement. These situations include where the claimant is an injured employee of the insured, as the endorsement explicitly states that the endorsement "does not apply to injury to or death of the insured's employees while engaged in the course of their employment...."

Additionally, the endorsement will become applicable as long as there is a final judgment against the insured for liability

arising out of negligence in the operation, maintenance, or use of any motor vehicle. It is not a requirement that the accident involve one of the insured's own vehicles, or even that the insured's own negligence was the cause. The focus of the endorsement is whether there is a final judgment that satisfies the elements of the endorsement. Ultimately, based on a plain reading of the MCS-90, the insurer owes indemnification as long as the judgment against its insured arises out of someone's negligent operation, maintenance, or use of some vehicle.

While the endorsement does not require the insurer to defend its insured, a gratuitous defense is often the best course of action for the insurance company. For example, if an insured is sued for an accident involving a vehicle that is not covered under its policy, the insurer has the option to refuse to defend the insured. However, the insured may simply not appear in the lawsuit (resulting in a default judgment) or agree with the claimant to a consent judgment. In the event of a default or consent judgment, the insurance company may be required to pay a significant sum under the MCS-90 endorsement if the accident resulted in serious injury or death to the claimant. Moreover, in the event of a default or consent judgment, the insurer may face indemnification obligations under the endorsement even though the insured had very strong liability defenses, as is the case where the insured's vehicle was not the primary cause of the accident.

If the insurer chooses to defend its insured rather than face the payment of a default or consent judgment, the insurer must send the insured a "reservation of rights" letter. Specifically, the letter should let the insured know that: (1) there is no coverage for the lawsuit because the accident did not involve a covered "auto" (e.g., vehicle was not specifically described in the declarations of a policy that provided coverage under symbol 7 or 46); (2) that the insurer is providing a defense solely because of the potential applicability of the MCS-90 endorsement; and (3) that the insurer reserves the right to seek reimbursement from the insured pursuant to the express terms of the MCS-90 endorsement if it is forced to a make payment for public liability by virtue of the endorsement, and to withdraw from the defense if the endorsement is not applicable. If the insurer assumes the defense without a reservation of rights to recoup any payment made under the MCS-90 or a nonwaiver agreement regarding same, such defense could be viewed under state law as a waiver of the right to reimbursement of such MCS-90 payment.

As noted above, the MCS-90 endorsement "grants the insurer the right to seek reimbursement from the insured party for any payment it makes on account of any accident, claim or suit involving a breach of the terms of the policy, and for any payment" that it would not have been obligated to make except for the applicability of the endorsement. The insurer may thus recover from the negligent trucker and/or the firm under whose authority the trucker is operating, after the insurer has paid the claimant or indemnified the insured for such payment. This recovery is in the nature of suretyship, and reflects the difference from insurance, whereby an insured could not subrogate against its own insured. Indeed, a surety bond (using form MCS-82) is an alternative mechanism for demonstrating financial responsibility. The endorsement does not, however, provide an insurer a means to penalize an insured by such mechanisms as encumbering or revoking a Department of Transportation number or commercial driver's license if the insured fails to satisfy payment.

Judicial Interpretation

The MCS-90 endorsement has been extensively litigated, leading at times to inconsistent results between jurisdictions. Al-

though the MCS-90 is a creature of federal law such that its operation and effect are to be determined under federal law, both federal and state courts may construe the endorsement, with state law insurance principles sometimes applied. Cases to interpret the endorsement may be brought in federal court pursuant to Federal Question jurisdiction (28 U.S.C. § 1331), without the need for diversity of citizenship between the insurer and the insured, because the endorsement was created by federal statute and regulation. An example of a recently litigated issue without clear resolution is the situation where the insured's connection to an accident is merely the display of the insured's placards on the commercial vehicle involved in the accident.

But litigation over the MCS-90 endorsement has produced rulings on several of the more common issues which can provide guidance on claims. While certain issues concerning the MCS-90 endorsement receive consistent treatment by the courts, other issues have resulted in divergent rulings among a number of jurisdictions. Some of the significant issues include the following.

Permissive Users. Courts are divided over whether the MCS-90 endorsement is meant to indemnify only the named insured on the policy, or whether permissive users of a vehicle (e.g., owner-operators of a vehicle leased by the insured) are entitled to the protection of the endorsement. Several courts have held that, to effectuate the intended purpose of the endorsement and ensure a source of recovery to members of the public injured because of the negligence of an authorized motor carrier, permissive users are entitled to indemnification under the endorsement. However, the trend among a number of jurisdictions is that the use of the term "the insured" in an MCS-90 endorsement refers only to the named insured in the policy to which the endorsement is attached.

One court noted that "the MCS-90 can only be interpreted in the context of the statutory and regulatory provisions from which it emerged," and therefore the "insured," for purposes of an MCS-90 endorsement, is determined solely by virtue of the named insured on the declarations page of the policy.

On September 28, 2005, the FMCSA issued revised regulatory guidance regarding the extent to which an MCS-90 endorsement provides indemnification coverage. Specifically, the FMCSA was asked, "Does the term 'insured,' as used on the form MCS-90, Endorsement for Motor Carrier Policies of Insurance for Public Liability, or 'Principal,' as used on Form MCS-82B, Motor Carrier Public Liability Surety Bond, mean the motor carrier named in the endorsement or surety bond?" The FMCSA answered, "Yes" [70 Fed. Reg. 58065–66].

Since the FMCSA provided this regulatory guidance, a number of courts have declined to designate any party other than the named insured as the "insured" for purposes of the MCS-90 endorsement. The courts in these recent decisions noted that the regulatory guidance was not available when courts began interpreting "insured" to include permissive users.

This split among jurisdictions leaves an insurer unsure as to whether a party other than the named insured is entitled to indemnification under an MCS-90 endorsement. Given the state of flux on this issue, the FMCSA regulatory guidance and recent caselaw may provide an insurer with a good-faith argument that the older caselaw extending the protection of the endorsement to permissive users be overruled, where the insurance company's obligations would be determined by a jurisdiction applying that framework.

Other Insurance. A majority of courts find that the MCS-90 endorsement is not applicable if the motor carrier's other insur-

ance coverage is sufficient. For example, if a motor carrier maintains two insurance policies, one of which contains an MCS-90 endorsement, the endorsement alone does not implicate that insurer. Instead, if the other policy provides coverage and meets the federally mandated financial responsibility limits, the MCS-90 endorsement does not implicate the second policy. But in a recent case, a court held that if there is other insurance available to *another* motor carrier implicated in the accident, that other insurance does *not* operate to satisfy the federal minimum financial responsibility requirement applicable to another motor carrier, such that the MCS-90 obligations of one insurer of each motor carrier are implicated.

Only a limited number of jurisdictions deviate from this approach. Further, within those minority jurisdictions, the framework for determining the priority of insurance when a policy carries an MCS-90 endorsement is fractured. For instance, the Second Circuit Court of Appeals held that the MCS-90 endorsement makes the policy in which it is contained primary as a matter of law, regardless of the terms of the underlying insurance policy. The Sixth Circuit, however, held that the endorsement negates limiting provisions in the policy and, therefore, the policy may be primary when compared to the other policies under traditional state insurance and contract law principles.

Nonetheless, most jurisdictions follow the general rule that the MCS-90 endorsement does not control the allocation of loss among insurers. According to the majority view, the surety obligation of the endorsement "is triggered only when (1) the underlying insurance policy to which the endorsement is attached does not otherwise provide coverage, *and* (2) no other insurer is available to satisfy the federally prescribed minimum levels of financial responsibility."

Carriage of Exempt Commodities. A provision of the Motor Carrier Act (49 U.S.C. § 13506) exempts the haulage of certain agricultural commodities from the requirement to demonstrate financial security via an MCS-90 endorsement or otherwise. Courts have held, however, that where a carrier hauling exempt goods has an MCS-90 endorsement because it is also registered to haul nonexempt goods, the fact that an accident took place while the carrier was hauling exempt goods does not excuse the insurer from honoring the MCS-90 obligation.

Other Issues

Other ancillary issues surround the MCS-90 endorsement, some of which are discussed below.

Bad Faith. Since there is no duty to defend claims for which there is no coverage but only a duty to indemnify pursuant to an MCS-90 endorsement, there is no basis for a bad faith claim based on improper claims handling against an MCS-90 insurer. Similarly, there should not be a basis for a claim of bad faith failure to settle, as the duty to pay the injured claimant does not arise until a final judgment has been entered, under the express terms of the endorsement. Nonetheless there is some authority that an MCS-90 insurer in the position of a surety must settle claims when presented with an opportunity to do so.

In the unreported *National RRd Passenger Corp. (Amtrak) v. TIG Ins. Co.*, 178 Fed. Appx. 695 (9th Cir. 2006), the court held that a California Public Utility Commission (PUC) endorsement, which has similarities to the MCS-90 but is utilized for in-state transportation in California, was incorporated into the policy and therefore made the insurer subject to California bad faith law for failure to accept a reasonable settlement offer within policy limits, even where there was no coverage, and the policy was in effect solely due to the PUC endorsement's reimbursement obligation. While *Amtrak* was unreported per Ninth

Circuit Rule 36-3 and has not been cited by any reported decision in any jurisdiction, claims handlers and practitioners in California should be aware of the holding.

Mechanisms To Litigate MCS-90 Applicability. As the duty to indemnify the insured does not arise under the endorsement unless and until there is a final judgment against the insured, it is not generally appropriate to litigate the applicability of the endorsement until a judgment is entered, because, without the terms of the judgment, the applicability of the endorsement cannot be determined. Therefore, courts have precluded such causes of action as anticipatory breach or declaratory judgment. In addition to a coverage action between the insured and insurer (or between insurers) after judgment, the endorsement itself provides that an underlying claimant may maintain a judgment creditor action against the insurer if the insurer does not indemnify the judgment per the MCS-90 endorsement.

State Endorsements. Since the MCS-90 endorsement applies only to interstate transport, purely in-state routes do not require evidence of minimum levels of financial responsibility under the federal regulations. While states cannot impose additional regulatory authority on interstate trucking, many states do have a similar mechanism in place for in-state transportation. California and Pennsylvania, for example, require PUC endorsements for in-state carriers, and these states, along with Florida, Illinois, Texas, New York, and South Carolina, impose policy cancellation notice requirements on intrastate carriers, which can operate to void policy cancellations that do not comport with the state statute.

Insurer Insolvency. When an insurer becomes insolvent, state insurance guaranty funds will assume responsibility for defending and indemnifying claims that were covered by the insolvent insurer's policies, up to the limits of the state funds (typically $300-$500,000 per covered claim), subject to qualifying conditions in the state fund statutes, such as lack of other available insurance. In the case of a judgment that would have been payable by an MCS-90 endorsement of an insolvent insurer, however, such claim is not within coverage of the policy, but is payable only via the MCS-90 endorsement as a surety. As such, state insurance guaranty funds may not assume responsibility for such claims, because their enabling statutes provide fund applicability only for claims within coverage of the insolvent insurer's policy. While the wording of such statutes had not been widely litigated, it is unlikely that a fund would accept a claim based on an insolvent insurer's MCS-90 endorsement, leaving the claimant able to proceed only against the assets of the insured in such situation.

Conclusion

Some of the major issues arising from commercial trucking claims involving the MCS-90 endorsement are discussed above. The complexity and jurisdictional reach of these claims make them inherently difficult, and certain to remain fodder for U.S. courts for the foreseeable future.

Note: Footnotes and citations for this articles are available from the author.

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