Committee News

Winter 2013

Commercial Transportation Litigation Committee

A PRIMER ON THE MCS-90

By: Richard M. Kuntz

I. INTRODUCTION

The MCS-90 endorsement to insurance policies covering for-hire interstate transport of goods or passengers (*e.g.* Truckers, Business/Commercial Auto, Motor Carrier, Inland Marine or Bus coverage forms), is one mechanism for demonstrating compliance by the motor carrier with the minimum financial responsibility requirements established by Federal statute and regulations. Under this Federal law, a minimum sum (*e.g.* $750,000 in the typical case of transport of non-hazardous cargo; $5 million for bus transport of passengers) 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. Moreover, recent case law discussed below holds that if a judgment against the insured can be satisfied by another insurance policy such that the plaintiff can receive at least the minimum financial responsibility

Continued on page 13

IN THIS ISSUE:

Uniting Plaintiff, Defense, Insurance, and Corporate Counsel to Advance the Civil Justice System

A PRIMER ON THE MCS-90…

Continued from page 1

from that other policy, there is no need for the MCS-90 to apply.

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

1) there is no coverage under the insurance policy, but
2) there is a judgment against the insured;
3) the judgment is a "final judgment for negligence in the operation of a motor vehicle";
4) there is no other source of recovery for the injured plaintiff from the insured (and possibly from any other party);
5) the claimant is a third party which incurred bodily injury or property damage, rather than the insured itself; *i.e.* the MCS-90 does not apply to cargo, employee injury or other first-party claims; and
6) 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.[1]

What 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 violations of conditions by insureds, such as late notice or no notice resulting in a default judgment against the insured, are insufficient to preclude the imposition of MCS-90 liability against the insurer.[2] 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[3] but only establishes a duty to pay plaintiffs where there is a final judgment against the insured, as discussed below.

II. BACKGROUND

Under the Motor Carrier Act of 1980, 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 license."[4] 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.[5]

III. THE ENDORSEMENT

The majority of motor carriers choose to establish proof by purchasing an MCS-90 endorsement as part of their Truckers Coverage Form or Business Auto Policy. The MCS-90 endorsement language is prescribed by Federal Regulation and cannot be materially altered.

The endorsement includes a box that is marked with an "x" to indicate whether the endorsement provides primary or excess insurance. Virtually all contemporary MCS-90 endorsements contain an "x" in the first box, *United States Fire Insurance Co. v. Fireman's Fund Insurance Co.*, 461 N.W.2d 230, 233 n.2 (Minn. App. 1990), which indicates that the insurance "is primary and the company shall not be liable for amounts in excess of _____ for each accident."[6] 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. *Fireman's Fund Ins. Co. v.*

1 *See Lincoln General Ins. Co. v. Garcia*, 501 F.3d 436 (5th Cir. 2007). But there is authority that a MCS-90 applies to a purely intrastate trip if the motor carrier was subject to Federal financial responsibility requirements and engaged in interstate commerce on other occasions. *See Heron v. Transp. Cas. Ins. Co.*, 274 Va. 534 (2007) and cases cited therein.

2 *Cf. Green v. Royal Indem. Co.*, 1994 WL 267749 (S.D.N.Y. 1994), with *Hawthorne v. Lincoln General Ins. Co.*, 2009 WL 304742 (E.D. Mich. April 16, 2009).

3 *Harco Nat'l Ins. Co. v. Bobac Trucking Inc.*, 107 F.3d 733 (9th Cir. 1997).

4 *Prestige Cas. Co.*, 99 F.3d at 1343.

5 *Carolina Cas. Co. v. Yeates*, 584 F.3d 868, 874 (10th Cir. 2009 (en banc)).

6 The MSC-90 limit is per accident rather than per person or claim. *See Carolina Cas. Co. v. Estate of Karpov*, 559 F. 3d 621 (7th Cir. 2009).

CNA Ins. Co., 177 Vt. 215, 232 n. 7 (2004). 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 $750,000 in the blank space above. If the endorsement in a policy has a limit higher than $750,000, however, that higher limit will apply. *Hamm v. Canal Ins. Co.*, 10 F. Supp. 2d 539 (M.D.N.C. 1998); *see also Lincoln General Ins. Co. v. Pacheo*, No. EP-11CV-482-DB (W.D. Tex. March 2, 2012) ($5 bus million limit applicable to van crash even though van should have been subject to $1.5 million limit for vehicles with less than 16 seating capacity).

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, *Auto Owners Ins. Co. v. Munroe*, 614 F. 3d 322 (7th Cir. 2010), and applies on a per-accident basis even where the accident involves more than one injured party. *Carolina Cas. Ins. Co. v. Estate of Karpov*, 559 F. 3d 621, 625 (7th Cir. 2009). 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. *Hamm v. Canal Ins. Co.*, 178 F. 3d 1238 (4th Cir. 1999).

IV. JUDICIAL INTERPRETATION OF THE MCS-90 ENDORSEMENT

The MCS-90 endorsement has been extensively litigated, leading at times to inconsistent results between jurisdictions. Although the MCS-90 is a creature of Federal law such that its operation and effect are to be determined under Federal law, *Kline v. Gulf Ins. Co.*, 466 F.3d 450, 453 (6th Cir. 2006), both Federal and state courts may construe the endorsement with state law insurance principles sometimes applied, and cases to interpret the endorsement may be brought in Federal court pursuant to Federal Question jurisdiction (28 U.S.C. § 1331).

(A) Basic Concepts

- Courts will view the endorsement as "suretyship" by the insurance carrier meant to protect injured members of the public rather than the insured; essentially, the endorsement is a safety net when other coverage is lacking.[7] The language of the policy 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."[8]
- The effect of the endorsement is that the insurance company does not have "coverage defenses" available to defeat the implication of the endorsement. Because the express language of the endorsement removes impediments to ensuring injured members of the public are afforded protection, 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.[9]

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. It should be noted that whether an MCS-90 insurer is responsible for indemnifying a consent or default judgment of which it had no notice, has been addressed by courts considering whether such

7 *Canal Ins. Co. v. Carolina Cas. Ins. Co.*, 59 F.3d 281, 283 (5th Cir. 1995).

8 *John Deere Ins. Co. v. Nueva*, 229 F.3d 853 (9th Cir. 2000).

9 *Campbell v. Bartlett*, 975 F.2d 1569, 1581 (10th Cir. 1992); *Nat'l Ins. Co.*, 868 F.2d 357, 362 (10th Cir. 1989).

judgment is "on the merits" under state law. *Cf.* Green v. Royal Indem. Co., 1994 WL 267749 (S.D.N.Y. 1994), with Hawthorne v. Lincoln General Ins. Co., 2009 WL 304742 (E.D. Mich. 2009), and Herrod v. Wilshire Ins. Co., 737 F.Supp.2d 1312 (D. Utah 2010).

(B) Disputed Application of the MCS-90 Endorsement

- 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 answered "yes" to the following question: "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?[10]
- Since the FMCSA provided the above 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.[11] The courts in these recent decisions noted that the regulatory guidance was not available when courts began interpreting "insured" to include permissive users.
- A majority of courts find that the MCS-90 endorsement is not applicable if the motor carrier's other insurance coverage is sufficient.[12] 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.[13] But in recent cases, courts have 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. Herrod v. Wilshire Ins. Co., 737 F.Supp.2d 1312 (D. Utah August 5, 2010); Green v. Royal Indem. Co., 1994 WL 267749 (S.D.N.Y. 1994); Fairmont Spec. Ins. Co. v. Ontario, 2011 WL 3651333 (N.D. Ind. August 19, 2011); *but see* Casper v. American International South Ins. Co,, 323 Wis. 2d 80 (App. 2009) (satisfaction by insurer for a co-defendant sufficient); *Zurich, supra* n. 22. This remains a hotly contested topic and *Herrod* is on appeal to the 10th Circuit.

V. 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 upon improper claims-handling against an MCS-90 insurer. But see National R.R. Passenger Corp. (Amtrak) v. TIG Ins. Co., 178 Fed. Appx. 695, (9th Cir. 2006).

VI. STATE ENDORSEMENTS

As noted, 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, *see* Nat. Ass'n of Regulatory Util. Comm'rs v. I.C.C., 41 F. 3d 721, 723 (D.C. Cir. 1994), many states do have a similar mechanism in place for in-state transportation. *See, e.g.,* Transamerica Ins. Co. v. TAB Transp., Inc., 12 Cal. 4th 389 (1995); Fireman's Fund Ins. Co. v. All State Ins. Co., 234 Cal. App. 3d 1154 (1991); Metro Transp. v. North Star Reins. Co., 921 F. 2d 672 (3d Cir. 1990). The state endorsements should apply only when the vehicle was on a purely in-state trip at the time of the accident. Canal Ins. Co. v. Perchak Trucking, Inc., 2009 WL 959596 (M.D. Pa. 2009). ⚖

Richard M. Kuntz is a partner at Ruberry, Stalmack and Garvey in Chicago, where he handles commercial trucking and bus coverage as well as other matters including inland marine and multi-jurisdictional/ multi-modal cargo claims, and the defense and coverage of hazardous materials releases, as well as general liability coverage and bad faith. Richard has litigated MCS-90 matters in many courts, and is admitted in Pennsylvania and Texas as well as Illinois. Richard worked for the U.S. Environmental Protection Agency in its Chicago and Washington, D.C. offices, and practiced environmental law and coverage. His law degree is from George Washington University, and undergraduate from West Virginia University.

Richard is a ranked tennis player, and lives in Evanston, IL. He can be reached at Richard.Kuntz@rsg-law.com

10 70 *Fed. Reg.* 58065-01.

11 *Sentry Select Ins. Co. v. Thompson*, 665 F. Supp. 2d 561, 565 (E.D. Va. 2009); *OOIDA Risk Retention Group v. Williams*, 579 F. 3d 469, 477 (5th Cir. 2009); *Lancer Ins. Co. v. Hitts*, 2010 WL 5351842, * 6-7 (M.D. Ga. 2010); *Illinois Nat. Ins. Co. v. Temian*, 779 F.Supp.2d 921 (N.D. Ind. March 23, 2011).

12 *Carolina Cas. Co. v. Yeates*, 584 F.3d 868 (10th Cir. 2009).

13 *Id.*; *Zurich Am. Ins. Co. v. Grand Ave. Transport*, 2010 WL 682530 (N.D. Cal. Feb. 23, 2010); *Great West Cas. Co. v. Gen Cas. Co.*, 734 F.Supp.2d 718 (D. Minn. Aug. 16, 2010).