RECENT DEVELOPMENTS IN MCS-90 ENDORSEMENTS FOR TRUCK INSURANCE

- By -

Martin B. Adams

Kopff, Nardelli & Dopf LLC – www.kndny.com

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Truckers involved in interstate trucking activities are subject to the Federal Motor Carrier Act. Interstate activities can include transport of passengers or property between two states, as well as between two points in the same state where the trip includes passage through another state.[1]

Department of Transportation regulations require that a "for hire" vehicle operated by an interstate motor carrier transporting nonhazardous property carry a minimum coverage of $750,000 in liability insurance.[2] Motor carriers must file with the Department of Transportation an insurance policy with the minimum required coverage limits.[3]

A trip occurring entirely within a municipality, in continuous municipalities, or in a zone that is adjacent to and commercially a part of the municipality or municipalities does not fall within the ambit of the DOT regulations.[4] The commercial zone of New York City encompasses the five boroughs of the City and all points within a line drawn 20 miles beyond the municipal limits of New York City.[5] New York State law requires a $50,000 minimum in insurance coverage.[6]

The MCS-90 Endorsement

Carriers can show that they meet the minimum financial responsibility requirements under federal law by purchasing liability insurance with an MCS-90 endorsement.[7] The MCS-90 is a form endorsement included in an interstate carrier's insurance policy.[8]

The MCS-90 endorsement provides, in pertinent part, as follows:

> … 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… The insured agrees to reimburse the company for any payment made by the company… 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… agreed that, upon failure of the company to pay any final judgment recovered against the insured… the judgment creditor may maintain an action… against the company to compel such payment…[9]

The MCS-90 endorsement makes the insurer liable to third-parties for liability resulting from the negligent use of a motor vehicle by the insured, even if the vehicle is not covered under the insurance policy.[10]

The Form MCS-90 endorsement is a federally-mandated endorsement whose terms are specified by federal regulation.[11] Interpretation of the MCS-90 endorsement is governed by federal law.[12] The prescribed text cannot be changed, although the format (e.g., number of pages, layout of text) can be altered.[13]

An MCS-90 endorsement must be attached to any liability policy issued to a certified interstate carrier.[14] Proof of the motor carrier's financial responsibility must be maintained at the motor carrier's principal place of business.[15]

A motor carrier that retains the same insurance company does not have to obtain a new Form MCS-90 every year. A new MCS-90 form must be completed and attached to the valid insurance policy should the policy number change or the old policy be cancelled.[16]

The endorsement assures that a truck that causes an accident is covered when an insurance policy is written to exclude coverage. The endorsement is triggered when an insurer has a valid defense based upon an unfulfilled condition in the insurance policy.[17]

The MCS-90 endorsement is designed to "assure that injured members of the public are able to obtain judgment[s] from negligent authorized interstate carriers".[18] The MCS-90 creates primary coverage responsibility for an injured party who obtains a judgment.[19]

The MCS-90 Endorsement Is Akin To A Suretyship

The MCS-90 endorsement is not an ordinary insurance provision to protect the insured. Instead, the obligation is one of suretyship.

The MCS-90 endorsement gives a judgment creditor the right to demand payment directly from the insurer. The insurer, in turn, has the right to demand reimbursement from the insured.

The MCS-90 endorsement does not extinguish the debt of the insured. Instead, the endorsement transfers the right to receive the insured's debt obligation from the judgment creditor [the injured victim] to the insurer.

Once an insurer pays an injured victim pursuant to an MCS-90 endorsement, the insurer becomes subrogated to the rights of the injured victim as a creditor. The insurer in that circumstance does not become subrogated to the rights of the insured under the insurance policy.[20]

Who Is The "Insured" On Form MCS-90?

A few recent cases broadly read the term, "insured" to expand coverage under the MCS-90 endorsement to require a carrier's insurer to satisfy judgments against parties other than the carrier named as the insured.[21] Those cases grant the injured party payment under the MCS-90 endorsement regardless of whether the responsible party was the named insured who purchased the policy, as the responsible party either fell within the policy definition of insured or was insured under the policy coverage provisions as modified by Form MCS-90.[22]

The Federal Motor Carrier Safety Administration has now issued regulatory guidance stating that the term, “insured”, as used on Form MCS-90, means only the motor carrier named in the endorsement or surety bond.[23]

The term, “insured and principal”, is defined under federal regulations as the “motor carrier named in the policy of insurance, surety bond, endorsement, or notice of cancellation, and also the fiduciary of such motor carrier”.[24] Form MCS-90 is not intended to require the motor carrier’s insurer or surety to satisfy a judgment against any party other than the carrier named in the endorsement or surety bond or its fiduciary.[25]

Form MCS-90 Does Not Cover An Insured’s Employees

Form MCS-90 “does not apply to injury to or death of the insured’s employees while engaged in the course of their employment…”[26] The term, “employee”, has been defined for purpose of Form MCS-90 as a driver of a commercial motor vehicle, including an independent contractor operating the vehicle.[27]

The Motor Carrier Safety Act does not require motor carriers to obtain coverage for injury or death to their own employees while engaged in the course of their employment.[28] Form MCS-90 does not require that an insurer pay a judgment that may be rendered against the employer of an employee trucker injured in a motor vehicle accident where the tractor being driven and the trailer being hauled are not otherwise described in the policy.[29]

MCS-90 And Allocation Of Loss Among Insurers

Many federal circuit courts have held that an MCS-90 endorsement does not effect the allocation of loss among insurers.[30]

> …the majority of circuits have held that the MCS-90 endorsement has no application to disputes between insurers because the purpose of the endorsement is solely to protect injured members of the public.[31]

Other courts have noted that an MCS-90 endorsement does not establish primary liability over other policies that are also primary by their own terms.[32]

A recent New York federal district court has ruled that the MCS-90 does not create primary coverage responsibility as between insurers – as opposed to between an insurer and an injured party.[33]

MCS-90 And Umbrella Insurers

An "insurer's responsibilities under the [MCS-90] endorsement are triggered when the policy to which it is attached does not provide coverage to the insured". An MCS-90 endorsement does not trigger coverage in an excess policy where the primary policy provided coverage, that coverage under the primary policy is exhausted, and the only unsatisfied judgment is against a non-insured.[34]

The MCS-90 endorsement does not force an umbrella insurer to cover gaps made by the insolvency of an underlying insurer. The endorsement is not implicated when coverage is provided but not paid by a primary insurer. The umbrella insurer is not forced by the MCS-90 endorsement to act as a surety so long as primary coverage exists at the time of the accident and no insurer has denied coverage.[35]

[1] 49 U.S.C. §13501.

[2] 49 C.F.R. §387.9; *Connecticut Indemnity Co. v. QBC Trucking,* Inc, 2005 WL 1038878 (S.D.N.Y.). "For hire carriage" means the business of transporting, for compensation, goods or property of another. 49 C.F.R. §387.5.

[3] 49 U.S.C. §13906; *Standard Funding Corp. v. Universal Roadmaster, Inc.*, 2005 WL 2511283 (N.J.Super.A.D.)(2005).

[4] 49 U.S.C. §13506(b)(1); *Connecticut Indemnity Co. v. QBC Trucking, Inc.,* 2005 WL 1038878 (S.D.N.Y.)(DOT regulations did not govern the minimum coverage required from alternate insurance sources for a trip that transported goods from Elizabeth, N.J. to Queens, N.Y., which was the site of the truck accident).

[5] *Connecticut Indemnity Co. v. QBC Trucking, Inc.,* 2005 WL 1038878 (S.D.N.Y.)(Citing 49 C.F.R. §372.235).

[6] *Connecticut Indemnity Co. v. QBC Trucking, Inc.,* 2005 WL 1038878 (S.D.N.Y.)(Citing 11 N.Y.C.R.R. §60-1.1[a]).

[7] *Fireman's Fund Ins. Co. v. CNA Insurance Co.*, 177 Vt. 215, 862 A.2d 251 (2004).

[8] *Kline v. Gulf Insurance Company*, 2005 WL 2206458 (W.D.Mich.).

[9] 49 C.F.R. §387.15.

[10] *T.H.E Ins. Co. v. Larson Intermodal Servs., Inc.*, 242 F.3d 667 (5th Cir. 2001).

[11] *Canal Insurance v. A&R Transportation*, 357 Ill.App.3d 305, 827 N.E.2d 942, 293 Ill.Dec. 61 (1st Dist.).

[12] *Minter v. Great American Insurance Co.*, 423 F.3d 460 (5th Cir. 2005).

[13] §387.15 Forms, Questions and Guidance, Question 2, at fmcsa.dot.gov (Federal Motor Carrier Safety Administration).

[14] *Canal Insurance v. A&R Transportation*, 357 Ill.App.3d 305, 827 N.E.2d 942, 293 Ill.Dec. 61 (1st Dist.).

[15] 49 C.F.R. §387.7(d).

[16] §387.15 Forms, Questions and Guidance, Question 4, at fmcsa.dot.gov (Federal Motor Carrier Safety Administration).

[17] *Kline v. Gulf Insurance Company*, 2005 WL 2206458 (W.D.Mich.).

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

[19] *Connecticut Indemnity Co. v. QBC Trucking, Inc.,* 2005 WL 1038878 (S.D.N.Y.).

[20] *Travelers Indem. Co. of Illinois v. Western Amer. Specialized Transportation Services, Inc.*, 409 F.3d 256 (5th Cir. 2005)(Automobile driver was injured in a collision with a truck owned and operated by Barnett, who was employed by Western; Western had leased the truck, and Barnett and Western were insured by Nobel [primary] and Travelers [excess], with the excess policy containing an MCS-90 endorsement; driver won a jury verdict against Barnett, Western, and Nobel, Nobel deposited its policy limits into the court, and the driver attempted to collect the remainder of the judgment from Travelers; Travelers sued Nobel for failure to settle within Nobel's policy limits; the parties agreed that the MCS-90 endorsement was the only basis on which the excess policy covered the accident and resulting judgment; Travelers settled with the driver; the court then dismissed Traveler's claim against Nobel, as the MCS-90 endorsement imposed a suretyship obligation upon Travelers only as to the injured driver).

[21] idtrucking.org, *"FMCSA Clarifies "Insured" On MCS-90 Form"*.

[22] *Pierre v. Providence Washington Ins. Co.*, 99 N.Y.2d 222, 754 N.Y.S.2d 179, 784 N.E.2d 52 (2002)(Pierre was injured when his vehicle was struck by a tractor-trailer driven by Harris; Harris' employer, Preston Conquest, owned the tractor cab but the trailer was owned by Blue Hen Lines, a federally-registered motor carrier; Preston Conquest leased the tractor to Blue Hen and agreed to provide Blue Hen with a driver; Blue Hen had liability insurance from Providence, and the parties agreed that Harris and Preston Conquest met the policy definition of "insured"; Providence had issued a trucker's liability policy to Blue Hen to cover losses from motor vehicle accidents occurring in the course of Blue Hen's business; after plaintiff obtained a judgment against Harris and Preston Conquest, plaintiff demanded payment by Providence under Blue Hen's policy; Providence argued that MCS-90 is triggered only if the injured party obtains a judgment against the named insured who purchased the policy [Blue Hen]; Court held that, because Harris and Conquest fell within the policy definition of insured, a final judgment against Harris and Conquest constituted the requisite "final judgment recovered against the insured" referenced in the MCS-90 endorsement).

[23] Federal Register: October 5, 2005 (Volume 70, Number 192), Page 58065-58066).

[24] 49 C.F.R. §387.5.

[25] Federal Register: October 5, 2005 (Volume 70, Number 192), Page 58065-58066).

[26] 49 C.F.R. §387.15.

[27] *Perry v. Harco National Insurance Co.*, 129 F.3d 1072 (9th Cir. 1997).

[28] *Consumers County Mutual Ins. Co. v. P.W. & Sons Trucking, Inc.*, 307 F.3d 362 (5th Cir. 2002).

[29] *Canal Insurance v. A&R Transportation*, 357 Ill.App.3d 305, 827 N.E.2d 942, 293 Ill.Dec. 61 (1st Dist.)(Driver contracted to haul freight owned by A&R using a trailer provided by A&R was injured while he was driving a tractor rented from O'Neal; Driver sued A&R, and Canal, as insurer for A&R, refused to defend because neither the tractor nor trailer was described in the policy declarations or schedules; Form MCS-90 did not require Canal to pay any judgment that may be rendered against A&R, as the driver was for purpose of Form MCS-90 an employee of A&R).

[30] *Connecticut Indemnity Co. v. QBC Trucking, Inc.,* 2005 WL 1038878 (S.D.N.Y.)(Citing various federal circuits).

[31] *Fireman's Fund Ins. Co. v. CNA Insurance Co.*, 177 Vt. 215, 862 A.2d 251 (2004)(Form MCS-90 to trailer lessor's liability insurance policy did not have any effect as to whether lessor's or truck tractor's owner's insurer provided primary liability coverage).

[32] *Connecticut Indemnity Co. v. QBC Trucking, Inc.,* 2005 WL 1038878 (S.D.N.Y.)(Citing various federal circuits).

[33] *Connecticut Indemnity Co. v. QBC Trucking, Inc.,* 2005 WL 1038878 (S.D.N.Y.)(Form MCS-90 of an insurance policy provided by the primary insurer [Progressive] for the lessee of a truck did not affect the allocation of loss with the lessee's insurer [Eagle] that covered "non-owned autos" and "hired autos", and because Eagle provided coverage for the accident, Progressive did not have a primary coverage obligation; Eagle agreed that the Progressive policy provided no coverage except to the extent its federal filings require).

[34] *Minter v. Great American Insurance Co.*, 423 F.3d 460 (5th Cir. 2005)(Lessee of truck involved in an accident had a primary commercial automobile insurance policy and an excess policy whose excess coverage became effective upon the primary's limits being exhausted; the primary but not the excess policy had an MCS-90 endorsement; plaintiff settled with the lessee's primary insurer for the $1 million primary coverage limit of liability, and then sued the excess insurer for recovery of the part of a state court judgment against the truck driver [who worked for the lessor of the truck] which had not been satisfied by the settlement

with the primary insurer; since the primary policy provided coverage and that policy exhausted its coverage limit, coverage did not exist under the MCS-90 endorsement, and the endorsement did not provide any coverage under the excess policy).

[35] *Kline v. Gulf Insurance Company*, 2005 WL 2206458 (W.D.Mich.)(Automobile collided with a truck; the first $2 million of any loss remained with the truck owner [now bankrupt], the next $1 million was insured by Reliance, and losses after $3 million were Gulf's responsibility; the existence of an MCS-90 endorsement in the Gulf policy did not trigger Gulf's responsibility to act as a surety, as neither Gulf, Reliance, nor the owner denied coverage).