

## TRANSPORTATION

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*The MCS-90 Endorsement responds to judgments against motor carriers whose insurance coverage is limited or has been disclaimed. A working knowledge of its operation is needed to properly defend the trucking industry.*

## THE MCS-90 Endorsement

### ABOUT THE AUTHOR



**Floyd G. Cottrell** was born in the Bronx, New York and attended Fordham College and Fordham Law School. He is the founder and managing partner of a 7 attorney firm active in New York and New Jersey in transportation, premises liability, construction defect, and nursing home litigation. He is Certified as a Civil Trial Attorney by the New Jersey Supreme Court and the National Board of Trial Advocacy. He is on faculty of the CLM Claims College, School of Transportation; a member of the Trucking Industry Defense Association (“TIDA”); Past President of the Brennan-Vanderbilt Inns of Court; and currently on the Board of Directors of the National Retail & Restaurant Defense Association (“NRRDA”). He can be reached at [FCottrell@cs-njnylawfirm.com](mailto:FCottrell@cs-njnylawfirm.com).

### ABOUT THE COMMITTEE

This IADC Committee was formed to combine practices of aviation, rail, maritime with trucking together to serve all members who are involved in the defense of transportation including aviation companies (including air carriers and aviation manufacturers), maritime companies (including offshore energy exploration and production), railroad litigation (including accidents and employee claims) and motor carriers and trucking insurance companies for personal injury claims, property damage claims and cargo claims. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org).



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

The MCS-90 Endorsement is required for all commercial vehicle liability policies issued to motor carriers operating in interstate commerce under the Federal Motor Carrier Safety Regulations, 49 C.F.R. §387.15.

A lawyer representing a motor carrier or an insurer for a motor carrier needs to understand the features of the MCS-90 Endorsement for both the insurer and the motor carrier when handling trucking liability claims.

While the MCS-90 is an endorsement to a primary and excess commercial vehicle liability policies, don't think of the endorsement as liability insurance or as an excess policy.

The MCS-90 endorsement takes effect only when there is a verdict against a motor carrier for personal injuries and when the underlying insurance policies do not meet Federal minimums or, more commonly, when the commercial vehicle liability policy does not provide coverage. Examples of the latter include disclaimers due to late notice of the claim or due to non-cooperation by the insured, or in accidents involving a non-scheduled vehicle in a policy insuring only specifically-identified tractors. The endorsement is not a separate insurance policy and triggers only in the absence of insurance. It has often been characterized as a surety bond. See e.g., *Carolina Cas. Ins. Co. v. Yeates*, 584 F.3d 868, 871 (10<sup>th</sup> Cir. 2009). To the extent a disclaimer is based on a breach of a policy condition or assertion of

an exclusion, the Courts frequently formulate the principle as, "The MCS-90 'negates any inconsistent limiting provisions in the insurance policy to which it is attached.'" *John Deere Ins. Co. v. Nueva*, 229 F. 3d 853, 859 (9<sup>th</sup> Cir. 2000), cert. denied, 534 U.S. 1127, 122 S. Ct. 1063, 151 L.Ed.2d 967 (2002), citing *Empire Fire & Marine Ins. Co. v. Guaranty Nat'l Ins. Co.*, 862 F. 2d 357, 362 (10<sup>th</sup> Cir. 1989).

The purpose of the MCS-90 Endorsement is to protect of the public when the underlying policy does not provide coverage. "It is well-established that the primary purpose of the MCS-90 is to assure that injured members of the public are able to obtain judgment from negligent authorized interstate carriers". *John Deere Ins. Co.*, 229 F. 3d at 857.

The minimum limit on an MCS-90 endorsement for a commercial vehicle carrying non-hazardous cargo is \$750,000. The minimum limit for a commercial vehicle carrying oil or hazardous waste is \$1,000,000 and the minimum limit for a commercial vehicle carrying portable tanks of more than 3,500 gallons is \$5,000,000.

The Endorsement is long, but straightforward and should be understood. Here is the pertinent part of the endorsement.

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.

The MCS-90 Endorsement has several features that are important to understand. First, in most jurisdictions, the MCS-90 Endorsement is only effective in accidents involving the operations of the motor carrier in interstate commerce. The Endorsement is "trip specific." An accident in purely intrastate operation will not trigger the Endorsement, even if the motor carrier otherwise operates nationwide. See e.g., *Lyons v. Lancer Ins. Co.*, 681 F.3d 50 (2d Cir. 2011), cert. denied, 568 U.S. 1157, 133 S. Ct. 1242, 183 L.Ed 2d 178 (2013); *Lyles v. FTL, Ltd., Inc.*, 339 F. Supp. 570 (S.D.WV., 2018). Second, the insurer is not under a duty to defend a claim that arises only under the MCS-90 Endorsement. However, insurers frequently extend "gratuitous defenses" rather than allow claims to be driven higher by the lack of a defense. "Best practices" by the insurer should include a non-waiver agreement if a gratuitous defense is provided, especially if a claim for reimbursement of amounts paid under the MCS-90 is contemplated. See *Liberty Mut. Ins. Co. v. Penske Truck Leasing Corp.*, 2004 U.S. Dist. LEXIS 9168 (E.D. La. 2004), where the insurer was held to have waived its rights to reimbursement from its insured of amounts paid under the MCS-90 after defending the lawsuit without reservation of rights for 16 months.

Third, the Endorsement only applies to final judgments rendered against the motor carrier. However, settlements are often reached in order to limit MCS-90 exposure.

Fourth, the MCS-90 Endorsement is not worker's compensation insurance, because it does not cover injuries suffered sustained by the motor carrier's employees. This carve-out applies to "statutory employees" such as "owner-operators" under lease to the motor carrier and operating under the motor carrier's authority, who are nominally independent contractors but construed as employees under 49 U.S.C.A. §31132 and 49 C.F.R. §390.5. See, *Perry v. Harco Nat'l Ins. Co.*, 129 F. 3d 1072 (9<sup>th</sup> Cir. 1997)

Fifth, the MCS-90 does not apply to cargo damage.

Sixth, the judgment must be against the motor carrier, even though the motor carrier may not necessarily be the negligent party. Thus if the stars align wrongly, defense counsel may be in the uncomfortable position of explaining to a driver the prospect of an uninsured judgment against him or her.

Seventh, unlike a traditional liability policy, the insurer making payment under the MCS-90 Endorsement has a right of recovery from its insured. From a practice perspective, the attorney handling the "gratuitous defense" extended by the insurer to the motor carrier solely under the Endorsement must navigate the insured's exposure to the reimbursement claim and potentially, the divergent views of insurer and motor carrier

on the defensibility and value of the claim. See, Rabinovich, *The MCS-90 Endorsement and the Tripartite Relationship*, For the Defense, December 2020.

With the MCS-90 Endorsement, the insurer's disclaimer may not be the final word on a plaintiff's ability to recover from the insurer and payment by the insurer may not entirely resolve the matter for the insured motor carrier. An awareness of the MCS-90 Endorsement and its implications for both the insurer and the motor carrier is necessary when handling trucking liability claims.

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