

## TRANSPORTATION

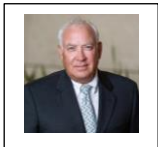
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### IN THIS ISSUE

*This article addresses the situation when no coverage is provided under an insurance policy, the federally required insurance for interstate motor carriers transforms into a surety bond per statutory provision under the Motor Carriers Act (MCA).*

## When Trucker's Insurance Morphs into a Surety Bond

### ABOUT THE AUTHOR



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## Sections 29 and 30 of the Federal Motor Carrier Act (MCA) of 1980

Congress passed the Motor Carrier Act of 1980 which not only deregulated the trucking industry, reduced barriers to entry and addresses safety issues and financial responsibility obligations relating to trucking accidents, its major intent was to make sure that the motor carrier was "adequately insured in order to protect the public from risks created by the motor carrier's operations". The Motor Carrier Act requires "for hire" commercial motor carriers to comply with minimal financial responsibility requirements in order to operate in interstate and foreign commerce. The federal regulations require interstate carriers to maintain insurance or another form of surety to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of a person resulting from the negligent operation, maintenance or use of motor vehicles. At the time of this presentation, the federal regulations require that an interstate motor carrier show proof of financial responsibility either by an MCS-90 endorsement, a surety bond or self-insurance. Most interstate trucking companies obtain the MCS-90 endorsement to their motor carrier auto liability policy. Currently the federal regulations require an MCS-90 in the amount of \$750,000 per vehicle that transports nonhazardous cargo. Hazardous cargo is much more.

## The Statute

MINIMUM FINANCIAL RESPONSIBILITY FOR MOTOR CARRIERS SEC. 30. (a)(1) The Secretary of Transportation shall establish regulations to require minimal levels of financial responsibility sufficient to satisfy liability amounts to be determined by the Secretary covering public liability, property damage, and environmental restoration for the transportation of property for hire by motor vehicle in the United States from a place in one State to a place in another State, from a place in a State to another place in such State through a place outside of such State, or between a place in a State and a place outside the United States. (2) The minimal level of financial responsibility established by the Secretary under paragraph (1) of this subsection for any vehicle shall not be less than \$750,000.

### The Statute calls for financial responsibility for

"... the transportation of hazardous materials (as defined by the Secretary), oil or hazardous substances (as defined by the Administrator of the Environmental Protection Agency), or hazardous wastes (as defined by the Administrator of the Environmental Protection Agency) by motor vehicle in interstate or intrastate commerce.

4 (c) Financial responsibility may be established under this section by any one or any combination of the following methods acceptable to the Secretary: evidence of insurance, guarantee, surety bond, or

qualification as a self-insurer. Any bond filed shall be issued by a bonding company authorized to do business in the United States. The Secretary shall establish, by regulation, methods and procedures to ensure compliance with this section.

**The Statute Sec. 30 MCA  
Violation, determination of penalty  
amount**

4 (d)(1) Any person (except an employee who acts without knowledge) who is determined by the Secretary, after notice and opportunity for a hearing, to have knowingly violated this section or a regulation issued under this section shall be liable to the United States for civil penalty of not more than \$10,000 for each violation, and if any such violation is a continuing one each day of violation constitutes a separate offense.

**The Statute Sec. 30 MCA  
Civil penalty, recovery**

(2) Such civil penalty may be recovered in an action brought by

the Attorney General on behalf of the United States in the appropriate district court of the United States or, prior to referral to the Attorney General, such civil penalty may be compromised by the Secretary. The amount of such penalty, when finally determined (or agreed upon in compromise), may be deducted from any sums owed by the United States to the person charged. All penalties collected under this subsection shall be

deposited in the Treasury of the United States as miscellaneous receipts.

**When is the Endorsement Triggered?**

When there is no coverage under the Policy.

**Terms of an  
Insurance Endorsement**

**Accident** includes continuous or repeated exposure to conditions or which results in bodily injury, property damage, or environmental damage which the insured neither expected nor intended.

**Motor Vehicle** means a land vehicle, machine, truck, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway for transporting property, or any combination thereof.

**Bodily Injury** means injury to the body, sickness, or disease to any person, including death resulting from any of these.

**Property Damage** means damage to or loss of use of tangible property.

**Environmental Restoration** means restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water, of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measures taken to minimize or mitigate damage to human

health, the natural environment, fish, shellfish, and wildlife.

**Public Liability** means liability for bodily injury, property damage, and environmental restoration.

### **Terms of an Insurance Endorsement**

The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended to assure compliance by the insured, within the limits stated herein, as a motor carrier of property, with Sections 29 and 30 of the Motor Carrier Act of 1980 and the rules and regulations of the Federal Motor Carrier Safety Administration (FMCSA).

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.

### **Terms of an Insurance 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.

### **Business Insurance?**

The MCS-90 is not insurance it is a federally mandated surety bond.

Surety law is applicable.

### **What are the Surety's Obligations?**

For claims arising in the United States, as a result of interstate commerce, on public roadway, for a specific interstate trip (not for general business operations).

The obligation is triggered when a judgment is obtained against the motor carrier

### **No Obligations**

The obligation under the bond excludes claims by employees, statutory employees, independent contractors and shippers.

The purpose of the bond is to protect innocent 3<sup>rd</sup> parties from property damage, personal injury and environmental clean up. It does not cover incidents on private roads or on private property such as when loading or unloading or if the incident occurs on a frolic by the driver.

It does not cover damages outside the US.

It is to protect the public not the motor carrier or the driver.

### **Duty to Defend**

There is no obligation on the part of the surety to defend the motor carrier or its driver.

Although there may be instances where it is in the best interest of the surety to volunteer a defense for both even if they do not cooperate (since there is no duty to defend in the 1<sup>st</sup> place, the MCS-90 surety cannot walk away from the claim on the basis of lack of cooperation).

(Caveat: the retained attorney must keep in mind the possibility of an ethical violation in representing both the surety and the motor carrier or is driver, because of diverging or conflicting interests).

### **Settlement of Claims**

The statute requires the surety to pay only after a judgment is entered against the motor carrier. Keep in mind that the surety has no obligation to pay for a judgment against the driver. In Auto Owners Insurance Company v. Munro, 614 F. 3d. 322, 327 (7<sup>th</sup> Cir. 2010), the court held that there must be an unpaid final judgment against the motor carrier before the surety's obligation is triggered. This case poses a problem when it's beneficial to conclude a lawsuit by settlement. In the case of Harco National Insurance Company v. Bobac Trucking, Inc., 107 F.3d 733 (9<sup>th</sup> Cir. 1997), the court granted the surety's motion for summary judgment against the motor carrier for a settlement payment under the MCS-90. Consequently, the surety can settle and

retain its indemnity rights against the motor carrier.

### **Can the insurer subrogate against its insured?**

The answer to the question is no. This is a seminal rule of insurance law. However, we are not talking insurance because the MCS-90 is a surety bond, so we are talking suretyship. The statute specifically gives the surety the right to seek "indemnification" against the motor carrier.

So what can the surety seek for reimbursement? Only those losses, costs and expenses it was obligated to pay under the statute. For example, if the surety decided to provide a voluntary defense, those costs and expenses are not recoverable in its claim back against the motor carrier. The bond covers property damage, should the surety pay for towing or storage of the equipment, those items are typically not recoverable against the MCS-90. The surety therefore, may not recover these costs and expenses against the motor carrier.

The right to indemnity is only against the motor carrier. There is no written indemnity agreement against individuals.

### **Other Insurance Issues**

The MCS-90 is intended to protect innocent 3<sup>rd</sup> parties when there is no insurance coverage under the primary policy. Therefore, what if another insurance policy may be in effect? This presentation is not to

cover all instances however it is fair to say that if there is other insurance naming the motor carrier as "insured" that may come into play or be primary, only then will the MCS-90 endorsement not be triggered. You should check your states law which may address this issue. If there is insurance afforded by a lessor of the trailer for example you must address whether or not that will eliminate triggering the lessee's MCS-90 in the event that the semi-trailer is not a listed vehicle and the driver is excluded in the lessee's policy. Of course, any other insurance for/of the insured must be in the minimum amount of the federally mandated limits.

### **Ethics Issues**

The attorney hired by the MCS-90 surety must be very careful not to represent the motor carrier or its driver in the event that the surety decides to interplead funds. You should check your states law 1<sup>st</sup> to determine whether or not the insured and driver must be named in the interpleader suit.

Of course if several claimant's sue the motor carrier and its driver and the surety decides to voluntarily provide a defense for them and hire you to do so, there is no way you can represent the surety in its reimbursement or indemnity action. You should be prepared for this.

### **Punitive Damages**

The MCS-90 is intended to cover acts of negligence, not intentional or willful acts

therefore punitive damage is repugnant to the statute and the purpose of the statute. However, check your state law on whether punitive damages can be covered by the underlying policy.

### Summary

The Motor Carrier Act of 1980 created levels of financial responsibility in order for interstate and intrastate carriers to operate, for example, carrier must post financial responsibility of \$750,000 for non-hazardous property for a vehicle of 10,000 lbs. or more. For higher interstate or intrastate hiring or transporting hazardous substances as defined in the CFR must post financial responsibility of \$5 million. For certain oil commodities, an extra \$1 million must be posted.

In addition, Congress created the MCS 90 Endorsement to a motor carrier's liability insurance requirement.

The MCS 90 is a surety bond for the protection of the public.

It must be attached to any liability policy issued to motor carriers who operate commercial motor vehicles, transporting property in interstate commerce.

MCS 90 is an endorsement to a trucker's coverage form, motor carrier form, or a business auto policy.

The MCS 90 becomes effective when a carrier becomes insolvent, if there are illegal trucking operations, or if there is no

coverage due to policy exclusions – in other words, if there is no coverage.

The law and the bond itself permits the insurer to seek indemnity directly against the carrier (and obviously, indemnity is worthless if the carrier is insolvent).

There is no duty to defend.

It only insures the acts of the carrier and not the driver.

Does not require payment unless a judgment is obtained against the carrier.

In practical terms, MCS 90 requirement places the insurer and the insured in an adverse position, especially in instances where there is no coverage and the possibility of insolvency of the insured. It places the insurer in a "Catch-22" because it may force the insurer, when it has no legal duty, to defend the carrier in litigation.

The MCS 90 may even cover punitive damages if the underlying policy calls for this coverage. (Check your state insurance laws).

An MCS-90 endorsement should not be interpreted to provide primary insurance coverage for motor carriers. Its purpose is to "protect members of the public injured by interstate motor carriers from uncompensated losses – by mandating coverage where there would otherwise be no coverage. Where there is adequate coverage, this purpose is not implicated and the MCS-90 endorsement should not operate to amend a policy". An Alternative

Ins. Co. v. Sentry Select Ins. Co., 176 F. Supp. 2d 550, 557 (E.D. Va. 2001) “[A]n insurers obligation under MCS-90 and the federal regulatory scheme is that of a surety, providing a safety net to protect the public in the event other insurance coverage is lacking, and not as true insurance coverage.” Great W. Cas. Co. v. Gen. Cas. Co. of Wisconsin, 734 F. Supp. 2d 718, 735 (D. Minn 2010)

An “insurers obligation under the MCS-90 endorsement 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) that carrier’s other insurance coverage is either insufficient to meet the federally-mandated minimums or non-existent”. Carolina Cas. Ins. Co. v. Yeates, 584 F. 3d 868 (10<sup>th</sup> Cir. 2009) (en bane). See also: Canal Ins. Co. v. Underwriters at Lloyd’s London, 435 F.3d 431 (3d Cir. 2006); Minter v. Great American Ins. Co. of New York, 423 F.3d 460 (5<sup>th</sup> Cir. 2005); McComb v. National Casualty Company, 994 F. Supp. 2d 918 (N.D. Ill. 2013); Zurich American Ins. v. Grand Ave. Transport, 2010 WL 682530 (N.D. Cal. 2010); Westchester Surplus Lines Inc. Co. v. Keller Transport, Inc., 2016 MT 6, 382 Mont. 72, 365 P.3d 465 (2016)

Keep in mind that “other insurance” means available liability coverage for the negligent motor carrier. However, self insurance may qualify as “other insurance”. See: United Financial v. Bountiful Trucking, 2018 WL 5921010 (D.C. Minn.)



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