

TRANSPORTATION

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In this edition, first learn the basics about the MCS-90 Endorsement and the responsibilities it imposes on motor carriers in an article from David Wilson and Drew Feeley. Second, read about an interesting recent federal court decision in a trucking case in which one of our IADC Transportation Committee members has the personal injury suit tossed out for the plaintiff's failure to disclose his extensive medical history of treatment for chronic back and joint pain.

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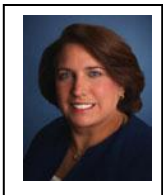
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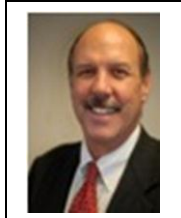


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The MCS-90 Endorsement: Protecting the Public from Motor Carrier Negligence in the Absence of Insurance Coverage

ABOUT THE AUTHORS



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For almost thirty-two years, the MCS-90 Endorsement ("MCS-90") has been a federally-mandated requirement for every interstate motor carrier seeking to satisfy its financial obligations. Nonetheless, there is still much confusion about its nature and purpose and the rights and responsibilities of a motor carrier and its insurer when the MSC-90 attaches to an insurance policy. This article is meant to provide some background on this important, yet often misunderstood, requirement.

The MCS-90 was created under the Motor Carrier Act of 1980. Any motor carrier that receives payment for transporting someone else's property across state lines must have an MCS-90 attached to any liability policy in

effect. *Am. Inter-Fidelity Ex. v. Am. Re-Ins. Co.*, 17 F.3d 1018, 1021 (7th Cir. 1994). If the motor carrier is not transporting property at the time of the accident (i.e. there is no trailer or an empty trailer) the MSC-90 does not apply. *Canal Ins. Co. v. Coleman*, 625 F.3d 244,247 (5th Cir. 2010). The form also does not apply to motor carriers that engage wholly in intrastate hauling. *General Sec. Ins. Co. v. Barrentine*, 829 So.2d 980, 983 (Fla. Dist. Ct. App. 2002). The sole purpose of the MCS-90 is to make certain that the general public is adequately compensated for any bodily injury, property damage, or damage to the environment caused by the negligent carrier without consideration of whether or not insurance coverage exists to satisfy a judgment. *John Deere Ins. Co. v.*

Nueva, 229 F.3d 855 (9th Cir. 2000). The endorsement only applies when the insurance policy does not provide coverage to the insured. *Nat'l Indep. Truckers Ins. Co. v. Gadow*, 860 F.Supp. 2d 946,954 (D.Neb. 2012). It is very important to understand, though, that the MCS-90 is not insurance. It does not expand insurance coverage, alter the terms of the insurance policy, alter the premium payment, and it does not increase the insurance limits under the policy. See *Carolina Cas. Ins. Co. v. Yeates*, 584 F.3d 868, 878 (10th Cir. 2009).

Instead, the MCS-90 has been likened to a surety bond that guarantees that the insured has the proper coverage afforded under the law and is able to adequately satisfy any judgment in favor of the public due to the insured's negligence. *T.H.E. Ins. Co. v. Larsen Intermodal Servs., Inc.*, 242 F.3d 667, 672 (5th Cir. 2001); *Canal Ins. Co. v. Carolina Cas. Ins. Co.*, 59 F.3d 281, 283 (1st Cir. 1995). The insurer which issued the policy associated with the MCS-90 acts as the surety and the insured is the principal. If there is a judgment against the insured that is not covered under the insurance policy, the insurer must step in and satisfy that judgment regardless of the coverage issues. Specifically, the endorsement provides that the insurance carrier "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 said motor vehicles. . . 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." 49 C.F.R. § 387.15. No conditions exist to relieve the insurer from its obligation to satisfy a judgment, and the MCS-90 trumps all provisions in the

insurance policy that may conflict with it. *Campbell v. Bartlett*, 975 F.2d 1569, 1580-81 (10th Cir. 1992). The endorsement further excludes the insured's employees that are injured or killed in the course of employment and excludes property designated as cargo transported by the insured. The schedule of limits attached to the MCS-90 requires that "for-hire" motor carriers transporting nonhazardous materials maintain coverage of up to \$750,000, and those transporting hazardous materials maintain coverage of \$1 million or \$5 million, depending on the materials transported. In the event that the insurer fails to pay any final judgment against the insured, the party that obtained the judgment has the right to bring a direct action against the insurer to collect payment. 49 C.F.R. § 387.15.

Once the judgment is satisfied by the insurer, the insurer is entitled to reimbursement from the insured for any payments made as a direct consequence of the MSC-90. 49 C.F.R. § 387.15; *Canal Ins. Co. v. Distribution Servs., Inc.*, 176 F.Supp.2d 559, 565 (E.D. Va. 2001). The form states that the "insured agrees to reimburse the [insurance] company for any payment made by the [insurance] company on account of any accident, claim or suit involving a breach of the terms of the policy, and for any payment that the [insurance] company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement." 49 C.F.R. § 387.15.

The MCS-90 may be cancelled by either the insured or insurer. To do so, the entity seeking cancellation must give the other party thirty-five days notice in writing. If the insured falls under the FMCSA's requirements for registration, the cancelling party must also give thirty days notice (it does not specify that this notice be in writing) to

the FMCSA at its office in Washington D.C. The time begins on the day the FMCSA receives notice. 49 C.F.R. § 387.15.

The insurer of an entity which requires an MCS-90 be attached to its policy must understand that there is no way to avoid the endorsement. To mitigate its potential effects, insurers must use care in the underwriting process and must understand the nature of the insured's business and any potential liability that may not be covered under the insurance policy. Although the insurer has the clear right to reimbursement from the insured for any judgment paid when coverage does not exist, the attempt to recoup the expenses may prove time consuming, costly and may be complicated if the insured is not on strong financial footing.

A motor carrier must understand that the financial burdens of a judgment ultimately fall on it in the event there is no insurance coverage for its negligence. It must make

certain to obtain insurance with the proper amount of coverage for the materials it hauls across state lines and to obtain as much coverage as possible to avoid direct liability for a potentially costly judgment. Furthermore, the burdens placed on the motor carrier by the MCS-90 should serve to further compel its efforts to ensure safe driving and safe transport of the materials hauled.

Among the important points to remember, the MCS-90 exists to protect the public from the negligence of an insured motor carrier. It contains strict requirements for both the insurer and the insured beyond the obligations set forth in the insurance policy in effect that can result in additional liability. Although the MCS-90 attaches to the liability policy, it is not insurance. Understanding the purpose of the MCS-90 and how it impacts insurers and motor carriers is essential to assisting clients in assessing risk and protecting their business from potentially damaging exposure in the event of an accident.

Keep on Trucking- Deceit, Speculation and Discovery Abuse Result in Exclusion, Sanctions and Dismissal

ABOUT THE AUTHORS



Mike Gladstone counsels clients on matters related to civil litigation in injury and property damages cases, commercial disputes, immigration consequences of criminal actions, and employment issues raised by immigration law. He has experience in many aspects of litigation, including insurance and coverage, commercial matters, trucking, professional liability, fire cases, product liability, immigration/removal, and worksite enforcement. He obtained the first post-Kumho Tire exclusion of an Accident Reconstruction Expert in a trucking matter. He practices in the state and federal courts in Virginia and the District of Columbia. He can be reached at mgladstone@lawmh.com.



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On February 16, 2010, the defendant, an employee of a North Carolina interstate carrier, was driving a tractor-trailer on Route 7 in Winchester, Virginia. While accelerating from an intersection, a portion of the tractor's driveshaft suddenly and unexpectedly separated and fell to the road, causing the truck to lose power. It was later determined that a failed u-joint caused the driveshaft to separate.

The driver immediately activated his hazard lights and safely pulled off of the highway to the side of the road. Within seven minutes of stopping, the truck driver set up warning triangles, called for help, inspected the truck and determined that the driveshaft was

missing. Meanwhile, five vehicles, including a vehicle operated by the 48-year-old plaintiff, ran over the driveshaft as it lay in the road. None of the drivers or passengers of the vehicles that ran over the driveshaft reported injuries at the scene.

Two days later, however, the plaintiff treated with his primary care provider complaining of neck and shoulder pain. Diagnostic tests revealed a cervical laminar fracture of unknown origin and degenerative disc disease. Plaintiff claimed a C-5 laminar fracture with cervical spondylosis/radiculopathy requiring a C4-5/C5-6 vertebral fusion, shoulder impingement syndrome requiring arthroscopic repair, and

permanently restricted neck range of motion with cervical dystonia. The plaintiff underwent two years of medical treatments, neck and shoulder surgery, and racked up over \$225,000 in special damages.

The plaintiff filed suit in the United States District Court for the Western District of Virginia, Harrisonburg Division, on January 23, 2012 seeking \$1.5 million. The plaintiff alleged that the trucking company failed to properly inspect and maintain its vehicles in compliance with Virginia law and the Federal Motor Carrier Safety Act causing the u-joint to fail and the driveshaft to separate, and that the defendant driver failed to warn others of a road hazard once the driveshaft separated.

In support of the negligent maintenance claim, plaintiff's commercial trucking expert, Robert Reed, testified that the defendant trucking company failed to properly document its fleet-wide truck maintenance as required under the FMCSRs. Reed declared that the absence of required maintenance documentation proved that actual maintenance did not occur. He further opined that u-joints do not ordinarily fail in-service unless they are poorly maintained. Although he admitted several non-maintenance related reasons that a u-joint could fail, he summarily 'ruled out' the alternative reasons as causes. According to Reed, this allowed him to opine, without ever inspecting the driveshaft or failed u-joint, that negligent maintenance by the carrier caused the u-joint to fail and the driveshaft to separate, causing the incident.

The defendants' commercial trucking experts, Roland Brown and Joe Atherton, testified that the absence of FMCSR required maintenance documentation did not mean that the required maintenance did not actually occur and, further, that no methodology exists within the commercial

trucking industry or accident reconstruction community to reliably determine how and why a truck part failed without physically inspecting the failed part. The carrier's maintenance supervisor testified that proper driveshaft and u-joint maintenance was performed on the truck despite the documentation lapses.

In support of the failure to warn claim, plaintiff alleged that the driver had obstructed the highway and then negligently failed to warn plaintiff of the danger, or remove the driveshaft from the roadway before he arrived at the scene.

Two weeks before the discovery deadline, defense counsel learned the plaintiff had failed to disclose significant, relevant, pre-existing conditions and failed to produce corresponding pre-accident medical records in response to written discovery. Detailed follow up occurred. Later received medical records confirmed that the plaintiff had blatantly misrepresented his medical and employment history during his deposition and in written discovery in order to hide prior pertinent medical problems. Over ten medical care providers and years of relevant pre-accident treatment were eventually identified which ought to have been disclosed in written discovery and at deposition.

About a week before the discovery deadline, plaintiff's expert Reed was deposed. At his deposition, Reed produced numerous items which he relied upon for his reported opinions which were neither referenced nor listed in his Rule 26 report. Further, Reed twice refused to answer relevant factual questions about his driveshaft separation and u-joint failure theories due to his expectation that if he answered the questions, defense counsel would instruct defendant's yet-to-be-deposed employees how to falsely testify based on

Reed's answers, and that the employees would then later falsely testify.

On November 30, 2012, the Court issued a memorandum opinion dismissing the case with prejudice. The Court's opinion reiterated its prior evidentiary rulings. The Court granted the defendants' Motion *in limine* to exclude Robert Reed's expert testimony as a sanction for obstructing discovery during the deposition and for his failure to comply with FRCP 702, holding Reed's opinions were insufficiently grounded in fact, speculative and thus, inadmissible. This disposed of plaintiff's negligent maintenance claim.

The Court granted the defendants' Motion for Summary Judgment on the failure to warn claim, holding that no reasonable jury could find the defendant driver negligent for failing to warn drivers of the driveshaft in the road within seven minutes of stopping and securing his vehicle. The Court also granted the defendants' Motion to Dismiss and Motion for Sanctions, finding dismissal was the only appropriate remedy for the plaintiff's willful and deceptive failure to disclose the nature and extent of his relevant prior medical history.

Counsel believe that there are several lessons to be learned from this matter.

- a) Do not concede liability or overvalue a case just because FMCSR violations are identified. If the alleged violations are not causative, then address the lack of causation in *Daubert* and Rule 702 reliability terms. The defendants elicited expert testimony which established the lack of any reliable methodology connecting a paucity of maintenance documentation with the actual fact of

poor general or specific truck maintenance. The plaintiff's expert's bald assertion that 'no records constitute no maintenance' was found baseless, speculative and thus, inadmissible.

- b) Rule 26 requirements related to expert filings and depositions are significant and where abused by an expert are sanctionable. Implicit in the obligation of experts to provide reports and give depositions is that they be complete and meaningful. Here, plaintiff's expert 'ambushed' defense counsel by appearing at the deposition with extensive, substantive materials not referenced or listed in his Rule 26 report. This tactic necessitated a lengthy inventory process to identify what was previously disclosed and what was not, in addition to requiring a qualified adjournment of the deposition for later follow up as to the initially omitted items. As for the refusals to answer, the duty to answer questions trumps an expert's effort to advance his party's case by selectively refusing to answer questions. There simply is no 'privilege' or 'protection' which authorizes this tactic. This behavior, alone, justified the expert's exclusion.
- c) *Daubert* and Rule 702 requirements for adequate reliable underlying data and methodology are alive and well and their absence warrants expert exclusion. The failed u-joint was never inspected by plaintiff's expert. The expert failed even to inspect the driveshaft, which was retrieved at the scene. The Court refused to countenance plaintiff's effort to

substitute a theoretical failure theory for a reliable part failure analysis, which plaintiff admittedly did not conduct, and which necessarily requires examination of the failed parts.

- d) Deliberate deception in discovery responses by a party can compel dismissal as a sanction because it threatens the discovery process. Dismissal with prejudice is a rare discovery sanction and an understanding of the special behavior which justifies it is essential. The behavior must exhibit an intent to wrongfully manipulate the judicial system. Thorough, tenacious development of the plaintiff's deceptive behavior and a careful marshalling of the facts resulted in an irrefutable pattern of willful deception for monetary gain. The court declared that plaintiff's behavior was so deceptive and disruptive that it compelled the court to dismiss the case.
- e) The factual standard for summary judgment – where reasonable minds cannot differ – is alive and well and supports summary judgment. The plaintiff's last resort was an assertion

that the driver negligently failed to warn him of the driveshaft on the road in time for him to avoid running over it. Although an issue of fact was argued by plaintiff on this point, the overarching facts and common sense buttressed the assertion that reasonable minds could not differ that there was no negligence by the driver in failing to warn plaintiff of the driveshaft in the road. This was so because of the uncontested short period of time that elapsed after the driveshaft separation during which the plaintiff drove over the driveshaft while the truck driver was occupied with complying with Va. State and FMCSR duties concerning the securing of a vehicle with a mechanical failure. The defendant's bold no-negligence assertion concerning the driver's reaction to the emergency was affirmed by the court's ruling that no issue of fact justified a jury hearing the case.

For those who wish to see the opinion, the case style is *Timothy Call v. Nathan Harrison Jr., and Williamson Distributors, Inc.*, in the U.S.D.C. for the Western District of Virginia at Harrisonburg, Case No: 5:12-cv-00008. The Court's memorandum opinion is filed as docket item 97.



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Richard M. Dunn and MaryTeresa Soltis