

The MCS-90 Endorsement

By Ashley Veitenheimer

I. Introduction

The MCS-90 endorsement is one means by which an interstate motor carrier can demonstrate compliance with minimum financial requirements established by federal statute and regulations. The application of this endorsement by the courts, however, has caused a great deal of confusion and debate. This paper will address the MCS-90 endorsement; when and how it applies; and other specific issues arising thereunder.

II. The Motor Carrier Act of 1980

Congress passed the Motor Carrier Act of 1980 (the "MCA") which, in addition to deregulating the trucking industry and reducing barriers to entry, addressed safety issues and financial responsibility for trucking accidents.¹ In particular, there was concern regarding the growing use of leased or borrowed vehicles by motor carriers to avoid financial responsibility for accidents occurring during transport in interstate commerce.² Accordingly, in order for a "motor carrier" to operate as such, the MCA requires proof of financial responsibility demonstrating the motor carrier is "adequately insured in order to protect the public from risks created by the carrier['s] operations."³ The minimum level of financial responsibility requirements only apply to "for-hire carriers operating motor vehicles transporting property in interstate or foreign commerce" and motor carriers transporting hazardous materials.⁴

The MCA mandates that a commercial motor carrier may operate only if registered to do so, and registration is contingent, in part, upon the carrier's compliance with minimum financial responsibility requirements. Federal regulations require interstate carriers to maintain insurance or another 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."⁵

The federal regulations set forth the minimum amount of financial responsibility coverage an interstate motor carrier must maintain: (1) at least \$750,000 for vehicles transporting non-hazardous cargo; (2) \$1 million for those transporting oil and certain hazardous substances; and (3) \$5 million for other hazardous substances and radioactive materials.⁶

¹ See *Nat'l Specialty Ins. Co. v. Martin-Vegue*, 644 Fed.App. 900, 906 (11th Cir. 2016), citing *Carolina Cas. Ins. Co. v. Yeates*, 584 F.3d 868, 873 (10th Cir. 2009).

² See *Canal Ins. Co. v. Distribution Servs.*, 320 F.3d 488, 489 (4th Cir. 2003).

³ *Yeates*, 584 F.3d at 875; see also 49 U.S.C. § 31139(b), (f); 49 C.F.R. § 387.7(a).

⁴ 49 C.F.R. § 387.3.

⁵ 49 C.F.R. §§ 387.301(a), 387.7.

⁶ *Id.* at § 387.9.

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An interstate motor carrier can establish proof of financial responsibility in one of three ways: (1) an MCS-90 endorsement; (2) a surety bond; or (3) self-insurance.⁷ Most interstate trucking companies obtain the MCS-90 endorsement, which was designed to eliminate the possibility of a coverage denial based on limiting provisions in the policy. The endorsement is only required when an insurance policy is used to satisfy the MCA.⁸

III. The MCS-90 Endorsement as a Surety Obligation

An insurer's obligation under the MCS-90 endorsement is "one of a surety rather than a modification of the underlying policy."⁹ This is key to understanding application of the MCS-90, which is "a safety net in the event other insurance is lacking."¹⁰ The Tenth Circuit has explained that "an MCS-90 insurer's duty to pay a judgment arises not from any insurance obligation, but from the endorsement's language *guaranteeing* a source of recovery in the event the motor carrier negligently injures a member of the public on the highways."¹¹

The MCS-90 endorsement provides as follows:

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 [MCA] and the rules and regulations of the Federal Motor Carrier Safety Administration.

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

⁷ *Yeates*, 584 F.3d at 875, citing *Canal Ins. Co. v. Distrib. Servs., Inc.*, 320 F.3d 488, 489 (4th Cir. 2003).

⁸ *See Wells v. Gulf Ins. Co.*, 484 F.3d 313, 315 (5th Cir. 2007).

⁹ *Yeates*, 584 F.3d at 878.

¹⁰ *Id.*, citing *Canal Ins. Co. v. Carolina Cas. Ins. Co.*, 59 F.3d 281, 283 (1st Cir. 1995) (holding the endorsement to be a "suretyship by the insurance carrier to protect the public – a safety net – but not insurance relieving... [another] insurer. On the contrary, it simply covers the public when other coverage is lacking."); *see also Kline v. Gulf Ins. Co.*, 466 F.3d 450, 455-56 (6th Cir. 2006) (same); *Canal Ins. Co. v. Underwriters at Lloyd's London*, 435 F.3d 431, 442 n.4 (3rd Cir. 2006) (same); *Harco Nat'l Ins. Co. v. Bobac Trucking Inc.*, 107 F.3d 733, 736 (9th Cir. 1997); *Occidental Fire & Cas. Co. of N.C. v. Int'l Ins. Co.*, 804 F.2d 983, 986 (7th Cir. 1986).

¹¹ *Yeates*, 584 F.3d at 878 (emphasis in original).

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and 30 of the [MCA] 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.

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 payment of final judgments resulting from any other accident.

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Accordingly, the surety obligation of the MCS-90 endorsement is "one that is triggered only when (1) the underlying insurance policy to which the endorsement is attached does not otherwise provide coverage, *and* (2) either no other insurer is available to satisfy the judgment against the motor carrier, or the motor carrier's insurance coverage is *insufficient* to satisfy the federally-prescribed minimum levels of financial responsibility."¹² So, for example, if a motor carrier's insurance policy did not cover an accident involving a leased vehicle, then the endorsement would be triggered such that the insurer would be required to pay a final judgment awarded against the insured. Once the federally-mandated minimum has been satisfied as against a particular motor carrier, however, that motor carrier's endorsement does not apply.¹³ In addition, as discussed in more depth below, the insurer may be entitled to reimbursement from its insured for any payment made under the endorsement.

IV. No Duty to Defend Under the MCS-90

The MCS-90 does not address disputes between the insured and the insurer and, as such, "does not impose a duty to defend on the insurer where such a duty would not have otherwise existed."¹⁴ The Fifth Circuit has explained:

[T]he MCS-90 leaves unaffected any provisions of the Policy that do not impact the insurer's duty to compensate injured members of the public...[A]lthough the MCS-90 itself does not impose a duty to defend upon the insurer, neither does it negate such a duty that might fall upon the insurer under the Policy as interpreted according to state law.¹⁵

Despite there being no duty to defend under the MCS-90 endorsement, it is wise for the insurer to nonetheless offer a courtesy defense in situations where the MCS-90 might be potentially implicated. That is because if the insured is not afforded a defense, the insurer loses control of its own pocketbook. A shoddy defense may result in liability when no liability would otherwise exist. A default judgment could be entered. The insured could agree to a judgment without the insurer's knowledge. Lots of things can happen. If there is potential liability under the MCS-90, it is better

¹² *Id.* (emphasis added), citing *e.g.*, *Kline*, 466 F.3d at 455-56; *Underwriters at Lloyd's London*, 435 F.3d at 442 n.4; *Minter v. Great Am. Ins. Co. of N.Y.*, 423 F.3d 460, 470 (5th Cir. 2005).

¹³ *Id.* at 879; see also *Herrod v. Wilshire Ins. Co.*, 499 Fed. Appx. 753, 758 (10th Cir. 2012).

¹⁴ *T.H.E. Ins. Co. v. Larsen Intermodal Servs., Inc.*, 242 F.3d 667, 677 (5th Cir. 2001).

¹⁵ *Id.*; see also *OOIDA Risk Retention Group, Inc. v. Williams*, 579 F.3d 469, 478 n. 6 (5th Cir. 2009) (MCS-90 relates solely to duty to indemnify, not duty to defend).

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to provide a defense and file a declaratory judgment action to determine the application of the MCS-90.

V. "Up to" Federally-Mandated Limits

i) MCS-90 as to Primary Policy Limits

One issue that often arises in relation to the MCS-90 is what happens when the amount of the endorsement exceeds the minimum financial requirements. In that case, the insurer must pay the face amount of the policy. This is based on the language in the endorsement stating that "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." Because the language of the endorsement does not alter the limits of the underlying contract, the insurer must pay up to the policy limits and then seek reimbursement for that amount from its insured.

Assume a motor carrier is required to be insured up to \$750,000 but increases its limits to \$1 million. If the MCS-90 endorsement is triggered as to that motor carrier, the insurer would have to pay the policy limits of \$1 million, even though the amount is greater than the federal requirements. The insurer, however, can then seek to recover the amount paid from its insured-motor carrier. But what if two motor carriers insured by the same insurer are involved in the same collision? Does the endorsement apply to each injured person, thereby increasing the policy limits depending on the number of injured people? No, the MCS-90 applies on a per-accident basis.

This was the situation in *Carolina Cas. Ins. Co. v. Estate of Karpov*. There, the motor carrier and its driver set off a chain-reaction collision that led to the deaths of four individuals and injured numerous others.¹⁶ Carolina Casualty insured both the carrier and the driver with policy limits of \$1 million for any one accident. Attached to the policy was an MCS-90 endorsement that likewise provided that Carolina Casualty's maximum liability per accident was \$1 million.¹⁷

The injured parties argued that the limits applied on a per-person basis because of the following language in the federal regulations: "The security must be sufficient to pay not more than the amount of the security, *for each final judgment* against the registrant for bodily injury to, or death of, *an individual* resulting from the negligent operation, maintenance, or use of motor

¹⁶ 559 F.3d 621, 622 (7th Cir. 2009).

¹⁷ *Id.*

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vehicles..."¹⁸ Essentially, the injured parties sought \$1 million each from the motor carrier based on this language.

The court, however, ruled differently, adopting the reasoning of a case affirmed by the Fourth Circuit on appeal:

With respect to the statute, it provides that "the security must be sufficient to pay, *not more than the amount of the security.*" The clear meaning of this statement is that whatever amount is to be paid will not exceed the amount of the security which has been established by the statute or the policy itself. This would mean that if the actual amount of the security is the minimum required by the statute, then the limit of potential liability for an insurer would be \$750,000. However, *if as in this case, the insured voluntarily elects to obtain a security in a larger amount, such as \$1 million, then that amount becomes the limits of potential liability for the insurer for claims resulting from a single accident.*¹⁹

The same outcome was reached in another case involving an MCS-90 endorsement that included a limit of \$5 million when the requisite minimum limits were only \$1.5 million.²⁰ Relying on *Karpov*, the court held that "the face of the endorsement specifically provides that Plaintiff shall not be liable for amounts in excess of \$5,000,000 per accident" regardless of whether the van at issue was specifically described in the policy.²¹ As such, to the extent the endorsement governed the accident, the \$5 million limit applied.²²

Importantly, both of these cases involved MCS-90 forms that specifically included the above written-in amounts in the first box below:

The policy to which this endorsement is attached provides primary or excess insurance, as indicated for the limits shown (*check only one*):

- This insurance is primary and the company shall not be liable for amounts in excess of \$ _____ for each accident.
- This insurance is excess and the company shall not be liable for amounts in excess of \$ _____ for each accident in excess of the underlying limit of \$ _____ for each accident.

¹⁸ *Id.* (emphasis in original).

¹⁹ *Id.* at 624 (emphasis added), citing *Hamm v. Canal Ins. Co.*, 10 F.Supp.2d 539, 544 (M.D.N.C. 1998), *aff'd*, 178 F.3d 1283 (4th Cir. 1999).

²⁰ See *Lincoln Gen. Ins. Co. v. Pacheco*, 2012 WL 12539325 (W.D. Tex. March 2, 2012).

²¹ *Id.* at *4.

²² *Id.*

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Only one case could be found referencing an MCS-90 endorsement that was left blank, but the court's language is only dicta. There, the court looked to the Schedule of Limits contained in the endorsement itself to determine the minimum requirements applicable to the motor carrier.²³ However, another court may simply fill in the amount of the policy limits, which could be above the minimum requirements, thereby increasing the exposure to the insurer.

ii) MCS-90 on Excess Policies

What happens when an MCS-90 endorsement is mistakenly attached to an excess policy? If the motor carrier is financially solvent, must the excess carrier step into its shoes and pay based upon the endorsement? Not according to the Sixth Circuit.

In *Kline v. Gulf Ins. Co.*, the motor carrier self-insured for \$1 million, which was the minimum amount for the type of cargo it transported.²⁴ The carrier also had an excess policy for \$1 million and an umbrella for any claims above \$3 million from two insurers. The umbrella policy included an MCS-90 endorsement, which Gulf (the excess insurer) admitted was a mistake because the motor carrier self-insured up to the minimum requirements.

Kline obtained a \$3.2 million judgment but could not collect from the self-insured motor carrier because it declared bankruptcy.²⁵ She did, however, collect \$1 million from the excess insurer and \$200,000 from the umbrella insurer.²⁶ She then sought to collect the \$2 million that remained unsatisfied from Gulf, arguing that the MCS-90 operated to satisfy that portion of the unpaid judgment.²⁷ Essentially, Kline argued that the endorsement increased Gulf's liability by amending its insurance policy.²⁸

The Court, however, concluded that the MCS-90 endorsement was inapplicable, in part because "the purpose of the [MCS-90] endorsement is to give full security for protection of the public up to the limits prescribed by [federal regulation]."²⁹ Because the carrier self-insured to the minimum regulatory amount, the endorsement's "public policy purpose was not implicated." As Kline had already collected \$1.2 million of the judgment, the recovery exceeded the minimum

²³ *Auto-Owners Ins. Co. v. Munroe*, 614 F.3d 322, 327 (7th Cir. 2010); *but see Canal Ins. Co. v. Shelter Ins. Co.*, 2010 WL 4447566, at * 4 (D. Idaho Oct. 28, 2010) (questioning whether a blank MCS-90 endorsement attached to a policy failing to provide the federally-required minimum coverage is valid or can be triggered).

²⁴ 466 F.3d 450, 451 (6th Cir. 2006).

²⁵ *Id.* at 452.

²⁶ *Id.*

²⁷ *Id.* at 453.

²⁸ *Id.* at 452.

²⁹ *Id.* at 455 (emphasis added).

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level of financial responsibility. Accordingly, the purposes underlying the MCA and the regulatory regime had been served, and the MCS-90 did not operate to make Gulf liable on any amount its policy did not otherwise mandate.³⁰

iii) When Underlying Limits are Inadequate

Remember that the entire purpose of the MCS-90 is to protect injured members of the public from negligent motor carriers. The endorsement specifically covers motor carriers for "public liability," which is defined to include "environmental restoration." But what happens if the limits of insurance a motor carrier has are inadequate to cover an injured party's damages? Typically, the MCS-90 is only implicated when coverage is *not* provided by the underlying policy. At least one court has held that public policy outweighs this general rule.

When a single-vehicle accident occurred, spilling hundreds of gallons of transformer oil and diesel fuel on the highway, Environmental Cleanup, Inc. ("ECI") was hired by Global Hawk's insured, Ruiz, to perform remediation services.³¹ When Ruiz refused to pay for the services rendered, ECI obtained a default judgment against Ruiz and commenced a garnishment proceeding against Global Hawk, which policy carried the MCS-90, alleging it was entitled to reimbursement under the endorsement.³²

On cross-motions for summary judgment, Global Hawk argued that the policy provided up to \$10,000 for "pollution liability," and, therefore, the endorsement was not triggered because coverage was provided by the underlying policy.³³ ECI, however, argued that this situation was precisely the kind to which the endorsement applies because it was not adequately protected by the underlying policy.

The court began its analysis by noting that excusing Global Hawk's surety obligation would go against the very purpose of the endorsement. Global Hawk conceded its policy provided coverage, "but only to a limit that leaves the public liability judgment largely unsatisfied."³⁴ The court rejected this contention, recognizing that "[i]f the MCA's concern is unsatisfied judgments and injured plaintiffs, it is difficult to see how excusing Global Hawk from its surety obligation does not frustrate that very purpose."³⁵ The court did note, however, that Global Hawk could seek

³⁰ *Id.* at 456.

³¹ *Env'tl. Cleanup Inc. v. Ruiz Transport, LLC*, 2017 WL 2080270, at *2 (W.D. Okla. May 12, 2017).

³² *Id.*

³³ *Id.* at * 3.

³⁴ *Id.* at *4.

³⁵ *Id.* at * 4.

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reimbursement from its insured if it did not believe its policy would have otherwise obligated it to pay ECI for its services.³⁶ No further action appears to have been taken in this case, so it is unclear whether Global Hawk pursued its right to reimbursement or whether it was successful in that pursuit.

VI. Application of the MCS-90 When the Vehicle is Leased to Another Motor Carrier

One issue that frequently arises is when the named insured leases a tractor to a motor carrier for operation under that motor carrier's permit and an accident occurs while a load is being hauled under that permit. If there is no coverage for the vehicle under the lessor's insurance policy, and there is a verdict or settlement in excess of the motor carrier's insurance limits, does the MCS-90 of the named insured/lessor have to respond to the claim?

This was the issue in *Herrod v. Wilshire Ins. Co.*³⁷ There, the district court held that there was no reason under the MCA that just because the motor carrier's insurance had satisfied the minimum limits required on behalf of the *motor carrier*, that should eliminate the lessor's MCS-90 liability.³⁸ In other words, simply because the motor carrier had satisfied the underlying limits did not mean that the MCS-90 obligations of a *different insurer*, on behalf of a *different tortfeasor*, were eliminated.

On appeal, the Tenth Circuit affirmed in part and reversed in part the district court's judgment. The court held that Wilshire, the insurance carrier for the lessor, was not relieved of liability on the MCS-90 simply because the federally-mandated limits had been satisfied by the motor carrier's insurance. In doing so, the Court distinguished *Carolina Casualty Co. v. Yeates*, which held that "once the federally mandated minimum limits have been satisfied,... the endorsement does not apply."³⁹ The Court elaborated on that statement and held that the true rule is that "once the federally mandated minimum has been satisfied *as against a particular motor carrier*, either by virtue of that motor carrier's liability coverage or payment out-of-pocket, that particular motor carrier's MCS-90 endorsement does not apply."⁴⁰

³⁶ *Id.* at * 5.

³⁷ 499 Fed. Appx. 753 (10th Cir. 2010).

³⁸ *Id.*

³⁹ 584 F.3d 868 (10th Cir. 2009).

⁴⁰ *Id.* at 758 (emphasis in original).

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HOWEVER, the *Herrod* Court also held that there was an issue as to whether Wilshire's insured, the lessor, qualified as a motor carrier. The court recognized that a "motor carrier" is a "person providing motor vehicle transportation *for compensation*."⁴¹ Wilshire argued in the trial court that its MCS-90 endorsement was not triggered because the lessor was not a motor carrier for purposes of this accident as it was "not transporting property for hire when the accident occurred."⁴² The district court held that the MCS-90 was triggered simply because Wilshire's insured was registered as a motor carrier. The Tenth Circuit disagreed and held that the true issue was whether Wilshire's insured was acting as a motor carrier for hire at the time of the accident. Because that issue had not been decided in the district court, the court remanded the case for that determination.⁴³

The upshot of the *Herrod* case is twofold. Where the insured is the lessor of a vehicle and that vehicle is operating under another motor carrier's certificate hauling a load at the time of the accident, the fact that the motor carrier's insurance meets statutory limits does not relieve the lessor's insurance carrier from liability on the MCS-90 if there is insufficient coverage for its insured, such as when the vehicle is not a scheduled vehicle. However, for that scenario to take place, the lessor would have to be deemed a "motor carrier" at the time of the accident. In the situation where the load is being hauled under the lessee's motor carrier certificate, the lessor should not be deemed a motor carrier, and its MCS-90 should not be applicable.

VII. The MCS-90 Does not Apply to Disputes Between Insurers

Oftentimes, insurers attempt to utilize the MCS-90 endorsement to "pass the buck" to other primary or excess insurers for coverage purposes. Take, for example, a situation in which a motor carrier is insured by two different insurers – one policy includes the endorsement and the other does not. Does attachment of the endorsement automatically render the policy bearing the endorsement primary for coverage purposes? No.

⁴¹ *Id.* at 759 (emphasis added).

⁴² *Id.*

⁴³ On remand, the district court concluded that Wilshire's insured was not in the business of transporting goods of another for compensation because it had ceased transportation services and operated only as a lessor. Because it did not qualify as a motor carrier, the MCS-90 endorsement was not triggered. 2014 WL 6871259, at *1 (D. Utah Dec. 5, 2014).

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The majority of circuits hold that the MCS-90 endorsement does not affect the obligations between joint insurers.⁴⁴ "The rationale behind the majority view is that the purpose of the MCS-90 endorsement, like the [MCA], is to protect the public, and therefore, the MCS-90 endorsement does not control the allocation of loss among insurers."⁴⁵

As the Fifth Circuit explained:

[The MCS-90] endorsement accomplishes its purpose by reading out only those clauses in the policy that would limit the ability of a third party victim to recover for his loss. But there is no need for or purpose to be served by this supposed automatic extinguishment of [a] clause insofar as it affects the insured or other insurers who clamor for part or all of the coverage. Instead, the MCS-90 states that "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." Therefore,...if an insurer's policy contained the [MCS-90] endorsement, it would not render the insurer primary as a matter of law. [T]he [MCS-90] endorsement is not implicated for the purpose of resolving disputes among multiple insurers over which insurer should bear the ultimate financial burden of the loss.⁴⁶

Because the primary purpose of the endorsement is to protect the public, there is no need for its application as between joint insurers. Rather, pursuant to its very terms, the endorsement only reads out policy clauses that would limit the recovery of injured members of the public; it has no bearing on priority of coverage.

⁴⁴ See *Canal Ins. Co. v. Distribution Servs., Inc.*, 320 F.3d 488, 492 (4th Cir. 2003) ("The federal courts of appeals which have considered the issue now before us are split, with the majority holding that the MCS-90 endorsement does not control the allocation of loss among insurers."); *Carolina Cas. Ins. Co. v. Underwriters Ins. Co.*, 569 F.2d 303, 313 (5th Cir. 1978) ("ICC policy factors are frequently determinative where protection of a member of the public or a shipper is at stake, but those factors cannot be invoked by another insurance company which contracted to insure a specific risk and which needs no equivalent protection."); see also *T.H.E. Ins. Co. v. Larsen Intermodal Servs., Inc.*, 242 F.3d 667, 672 (5th Cir. 2001); *Carolina Cas. Ins. Co. v. Transport Indem. Co.*, 533 F.Supp. 22, 25 (D.S.C. 1981), *aff'd*, 676 F.2d 690 (4th Cir. 1982); *Travelers Ins. Co. v. Transport Ins. Co.*, 787 F.2d 1133, 1140 (7th Cir. 1986).

⁴⁵ *Canal Ins. Co. v. Distrib. Servs., Inc.*, 320 F.3d 488, 492 (4th Cir. 2003).

⁴⁶ *T.H.E. Ins. Co. v. Larsen Intermodal Servs., Inc.*, 242 F.3d 667, 673 (5th Cir. 2001) (internal quotation marks and citations omitted) (second alteration in original).

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VIII. Reimbursement Under the Endorsement

Say you're an insurer who has just paid out your policy limits to satisfy a judgment awarded against your insured-motor carrier. Remember, the endorsement typically only applies when underlying coverage is lacking or excluded. As the insurer, you are required to cover the otherwise non-covered claims, such as those arising from the use of a vehicle that is not scheduled on the policy. But are you, as the insurer, then left without recourse because your insured failed to identify the vehicle on its policy? No, you can seek reimbursement from your insured for the amount paid.

The general rule is that the MCS-90 endorsement gives the insurer the right to seek reimbursement from the insured for "any payment" the insurer is required to pay only by reason of the endorsement, which the insurer would not otherwise have to pay under the policy. This would arise if a vehicle is not scheduled on the policy, like in our example above. Some exceptions to this rule allowing reimbursement exist, however, and should be carefully considered in any coverage matter.

A. Injured Party's Insurance is not "Other Available Insurance"

For instance, in *Global Hawk Ins. Co. v. Century-National Ins. Co.*, the court held that a trucking company's liability insurer was required to reimburse the injured party's insurer for payment of uninsured motorist benefits.⁴⁷ The Global Hawk insured carrier injured an individual, who was covered with uninsured/underinsured ("UM") motorist benefits through Century-National. Global Hawk denied the injury claim because the truck was not listed on Global Hawk's policy, but the policy carried an MCS-90 endorsement.

Century-National paid the claim up to its limits of \$100,000 for UM benefits and then sought reimbursement from Global Hawk, which argued that the endorsement was not triggered because the issue was between two insurance companies.⁴⁸ Global Hawk further asserted that the endorsement did not apply because the second requirement to trigger it – no other insurer is available to satisfy the judgment – was not met. In essence, because the injured party had been made whole by the payment of the underlying UM limits, Global Hawk's endorsement was never triggered and, therefore, no reimbursement right existed.

⁴⁷ 203 Cal.App.4th 1458, 138 Cal.Rptr.3d 363 (Cal.Ct.App. [1st Dist.] 2012, rev. denied).

⁴⁸ *Id.* at 1464.

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The court disagreed, concluding that "'other insurer' within the meaning of the FMCSA and MCS-90 endorsement means any other insurer of the tortfeasor *motor carrier*, not the insurer of the person injured by the motor carrier."⁴⁹ The court determined that "[a]ny other interpretation – for instance, one which places the onus of insuring against accidents caused by interstate truckers on the accident victims – would defeat the purpose of the regulations adopted to implement the FMCSA...."⁵⁰

Global Hawk's erroneous denial coverage, which caused Century-National to compensate its insured under the UM provision, did not relieve Global Hawk of its responsibility to cover the loss under the MCS-90 endorsement. Succinctly put, "[t]he first party coverage provided to the injured...by Century-National is not 'other insurance' available to satisfy the judgment against" Global Hawk's insured.⁵¹

The Eighth Circuit reached the same conclusion in an issue of first impression.⁵² There, an employee of Yelder-N-Son Trucking, Inc. collided with a Tri-National, Inc. truck.⁵³ Tri-National filed a claim with its insurer, Harco Insurance Company ("Harco"), which paid Tri-National \$91,100 and retained a subrogation interest in the claim. The Yelder defendants were insured by Canal Insurance Company, which policy included an MCS-90 endorsement.

Canal sought a declaratory judgment against the Yelder defendants and Harco that the endorsement did not require Canal to satisfy Harco's subrogation claim. Harco filed a motion to dismiss for failure to join Tri-National, which the court granted. Tri-National then sued the Yelder defendants and obtained a \$91,100 default judgment. Thereafter, it filed a petition for equitable garnishment against Canal in an effort to collect on that judgment.

The court first noted that MCS-90 endorsements "are not treated as coverage where *other insurance policies are available* to provide full coverage for the victim's injuries."⁵⁴ Canal argued that coverage should be denied under the endorsement because Tri-National's insurance policy, through Harco, provided full compensation for the injuries and, therefore, Tri-National had already been made whole. The court, however, rejected this argument, stating: "Canal would have us remove the MCA's protection against negligent tortfeasors for members of the public who

⁴⁹ *Id.* at 1466-67, citing *Carolina Cas. Ins. Co. v. Yeates*, 584 F.3d 868 (10th Cir. 2009).

⁵⁰ *Id.* at 1466.

⁵¹ *Id.*

⁵² See *Tri-National, Inc. v. Yelder*, 781 F.3d 408 (8th Cir. 2015).

⁵³ *Id.* at 410-11.

⁵⁴ *Id.* at 415 (emphasis in original), citing *Nat'l Indem. Co. v. Ozark Mountain Sightseeing, Inc.*, 46 Fed.App. 864, 865 (8th Cir. 2002) (unpublished per curiam) (emphasis added); see also *Yeates*, 584 F.3d at 871.

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prudently carry their own insurance, shifting the burden of protection and the financial burden from the tortfeasor's insurer to the injured party's insurer."⁵⁵ The court held that Harco's satisfaction of Tri-National's claim did not prevent Tri-National from asserting its rights as a member of the general public under the MCS-90 endorsement.

These cases illustrate exceptions to the general requirement that no other insurer be available to satisfy a judgment to trigger the endorsement's obligation. If the injured party is made whole by her own insurance, her insurer has a right of reimbursement against the MCS-90 insurer. If the policy to which the endorsement is attached would not otherwise cover the claim, the MCS-90 insurer may have an additional right to reimbursement against its insured-motor carrier.

B. Effect of Settlement on Indemnity and Reimbursement Rights

The MCS-90 language is fairly clear that reimbursement is allowed when an insurer pays a final judgment against its insured that the policy would not have required in the absence of the endorsement. What happens if the insurer opts to settle the case and pays the settlement amount on behalf of its insured? There is no final judgment and never can be. Is the insurer still entitled to reimbursement? The answer is unclear.

For instance, the Fifth Circuit rejected a motor carrier's argument that the endorsement's language limits the availability of reimbursement only to final judgments, noting: "If the insurer must pay a final judgment under the MCS-90, there is no reason why it could not seek a favorable settlement rather than risk litigating to a final judgment that could be more onerous."⁵⁶ The court also pointed to additional language in the endorsement permitting the insurer to recover "*any* payment" in support of its holding.⁵⁷ So, at least in the Fifth Circuit, settlement funds are subject to reimbursement under the endorsement.

The opposite conclusion was reached, however, by the Seventh Circuit.⁵⁸ There, the plaintiffs were involved in a collision with three trucks that were all owned and operated by the same motor carrier.⁵⁹ Consequently, they argued that the endorsement, which was attached to the policy issued by Auto-Owners, provided \$750,000 in coverage for *each* carrier.⁶⁰ The plaintiffs entered a partial settlement agreement in which they agreed to release the motor carrier and the

⁵⁵ *Id.*

⁵⁶ *T.H.E. Ins. Co. v. Larsen Intermodal Servs., Inc.*, 242 F.3d 667, 676 (5th Cir. 2001) citing *Canal Ins. Co. v. First Gen. Ins. Co.*, 889 F.2d 604, 612, (5th Cir. 1989), modified on other grounds, 901 F.2d 45 (5th Cir. 1990).

⁵⁷ *Id.* (emphasis added); see also *Harco Nat. Ins. Co. v. Bobac Trucking Inc.*, 107 F.3d 733 (9th Cir. 1997).

⁵⁸ *Auto-Owners Ins. Co. v. Munroe*, 614 F.3d 322, 327 (7th Cir. 2010).

⁵⁹ *Id.* at 323.

⁶⁰ *Id.* at 324.

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drivers from individual liability above their liability insurance coverage in exchange for the remainder of the \$1 million coverage limit after property damage was paid.⁶¹ The agreement further provided that Auto-Owners would seek a declaratory judgment that the policy limits were \$1 million, and the plaintiffs reserved their right to proceed with their case if the court determined additional coverage was available.

The court first noted that no other court had addressed application of the endorsement when more than one insured vehicle is involved in the same accident.⁶² It punted on deciding that issue, however, concluding that "the MCS-90 is inapplicable for a more fundamental reason: there is no final judgment in this case, so Auto-Owner's payment obligation under the MCS-90 has not been triggered."⁶³ Moreover, because the plaintiffs agreed to release the motor carrier, "there will never be an unpaid final judgment..."⁶⁴

Attempting to avoid this conclusion, the plaintiffs argued the endorsement set minimum insurance amounts and amended the policy to provide that amount.⁶⁵ The court, however, disagreed because the endorsement did not modify the terms of the policy but rather required the insurer to pay up to minimum limits of a final judgment "regardless of the terms of the policy."⁶⁶ Under the terms of the endorsement, the court held, the insurer is only obligated to pay "what the insured actually owes, and then only if that debt arises from a final judgment."⁶⁷ Therefore, the court concluded:

[W]hen an injured claimant releases a motor carrier from liability beyond the coverage limits of its insurance policy, there can be no liability that the insurer is responsible for under the MCS-90. This is true regardless of whether the settlement amount is greater or less than the liability limits mandated by the MCS-90. ***The MCS-90 guarantees payment of a final judgment up to a certain amount; it does not guarantee a minimum settlement amount.***⁶⁸

⁶¹ *Id.*

⁶² *Id.* at 326.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* (emphasis added).

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Consequently, the court held that the MCS-90 endorsement did not affect Auto-Owners' liability because it applied only if triggered by an unpaid final judgment against the carrier.⁶⁹ Since there was no final judgment, the endorsement did not apply.⁷⁰

IX. To Whom does the Endorsement Extend?

One of the biggest questions facing an insurer in light of the MCS-90 obligations is to whom those obligations apply. For instance, suppose a motor carrier and its driver are sued for negligence arising out of a collision. The truck involved is not scheduled on the policy and, therefore, no coverage exists for either the motor carrier or the driver. If a final judgment is reached against them, does the endorsement provide coverage for them both? No, the endorsement only applies to the named insured on the policy.

The MCS-90 does not define the term "insured." Prior to clarification by the FMCSA, some courts interpreted the definition to include the definition of "insured" contained in the underlying policy. Consequently, anyone qualifying as an omnibus insured under the policy also qualified as such under the endorsement.⁷¹

The term "insured" is defined, however, in Part 387 of the 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."⁷² Based on this language, and in response to these cases, the FMCSA issued regulatory guidance in 2005 indicating that the term "insured" is the motor carrier identified in the policy: "Form MCS-90...[is] not intended, and do[es] not purport, to require a 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."⁷³ Courts interpreting the endorsement in light of this guidance have consequently held that the endorsement only applies to the named insured.⁷⁴

⁶⁹ *Id.* at 328.

⁷⁰ *Id.*

⁷¹ See, e.g., *John Deere Ins. Co. v. Nueva*, 229 F.3d 855 (9th Cir. 2000) (applying endorsement to permissive user of non-scheduled auto who would not otherwise qualify as insured); *Lynch v. Yob*, 768 N.E.2d 1158 (Ohio 2002) (allowing recovery in excess of federally mandated limits from insurer even though driver was not covered under the policy).

⁷² 49 C.F.R. § 387.5.

⁷³ See FMCSA Regulatory Guidance, 70 Fed. Reg. 58065-01 (Oct. 5, 2005).

⁷⁴ See *Ooida Risk Retention Grp., Inc. v. Williams*, 579 F.3d 469, 477 (5th Cir. 2009); *Sentry Select Ins. Co. v. Thompson*, 665 F.Supp.2d 561, 565-69 (E.D. Va. 2009); *Armstrong v. U.S. Fire Ins. Co.*, 606 F.Supp.2d 794, 825-26 (E.D. Tenn. 2009); see also *Illinois Nat'l Ins. Co. v. Temian*, 779 F.Supp.2d 921, 927 (N.D. Ind. 2011) ("Courts addressing the meaning of 'insured' in the MCS-90 endorsement since the FMCSA guidance have consistently held that the endorsement's coverage does not extend beyond the named insured.").

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X. Employee versus Independent Contractor

The status of the injured party in relation to the motor carrier is an important consideration when determining whether the endorsement applies. This is because neither an employee nor an independent contractor who qualify as a statutory employee is entitled to benefits under the endorsement, even if the individual was a driver or passenger at the time of the collision.⁷⁵ So, if a driver for a motor carrier is involved in a collision, the MCS-90 will *not* apply if he qualifies as a statutory employee of the motor carrier. Assume the driver sues the motor carrier – typically, the endorsement operates to read out language in the underlying policy that would bar coverage. Because of the specific language in the endorsement, however, this does not happen when a statutory employee of the motor carrier is the one seeking coverage under the carrier's policy.

The endorsement itself does not define "employee" or "independent contractor." Section 390.5 of the FMCSA regulations, however, defines "employee" as follows:

Any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such terms includes a driver of a commercial motor vehicle (*including an independent contractor while in the course of operating a commercial motor vehicle*), a mechanic, and a freight handler.⁷⁶

Courts have uniformly held that this definition "eliminates the traditional common law distinction between employees and independent contractors."⁷⁷

The Fifth Circuit addressed the interplay between this definition and the standard fellow-employee exclusion found in most commercial motor carrier policies in *Ooida Risk Retention Group, Inc. v. Williams*.⁷⁸ There, Moses was the sole proprietor of Slim Shady Express, a commercial motor carrier insured by Ooida for the rigs owned and operated by Moses.⁷⁹ Moses' tractor-trailer was being driven by Williams at the time of the collision, and Moses was occupying the sleeper berth.⁸⁰ Williams lost control of the rig, causing it to overturn and kill Moses.⁸¹ When

⁷⁵ The endorsement specifically provides: "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..."

⁷⁶ 49 C.F.R. § 390.5 (emphasis added).

⁷⁷ *Consumers Cnty. Mut. Ins. Co. v. P.W. & Sons Trucking, Inc.*, 307 F.3d 362, 365 (5th Cir. 2002).

⁷⁸ 579 F.3d 469 (5th Cir. 2009).

⁷⁹ *Id.* at 471.

⁸⁰ *Id.*

⁸¹ *Id.*

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Moses' family filed suit, Ooida provided a defense to Williams under a reservation of rights and then filed a declaratory judgment action seeking a declaration that it owed no duty under the policy to defend or indemnify Williams.⁸²

The court began its analysis by reviewing the policy provisions to determine who constituted the "insured" for coverage purposes. The "Who is an Insured" portion of the policy identified "[y]ou for any covered 'auto'" and "[a]nyone else while using with your permission a covered 'auto' you own, hire or borrow..."⁸³ The policy's definition also contained a "severability of interests" clause, which, under Texas Supreme Court precedent, results in the term "the insured" referring to the individual seeking coverage, not all insureds collectively.⁸⁴ Accordingly, Williams, as the permissive driver of the truck, was deemed the "insured."⁸⁵

The court then turned to the application of the policy exclusions. In determining whether the fellow-employee exclusion applied, the court addressed whether Williams and Moses qualified as statutory "employees." The complaint set out facts establishing that Williams was driving the truck while Moses was asleep in the cab. He was, at a minimum, an independent contractor and, therefore, a statutory "employee" under § 390.5.⁸⁶

Because Moses was the one to whom "bodily injury" occurred, in order for the fellow-employee exclusion to apply, the court was required to find that they were both statutory "employees." The question of Moses' status as an "employee," however, was more difficult. Moses' family argued that the phrase "other than an employer" in § 390.5 meant the definition could not apply to Moses as a sole proprietor, but the court disagreed. It pointed to the statutory definition of "employee" and concluded that it "is broad enough to include owner-operators such as Moses, while in the course of driving a commercial motor vehicle."⁸⁷

Having held that a sole proprietor operating a motor vehicle can be an "employee" under federal regulations, the court then turned to whether Moses was driving in tandem with Williams and, therefore, also "operating" the motor vehicle. In doing so, the court looked outside the pleadings to conclude that Moses was tandem driving with Williams the night the accident

⁸² *Id.*

⁸³ *Id.* at 472.

⁸⁴ *Id.* at 472-73, citing *Commercial Standard Ins. Co. v. Am. Gen. Ins. Co.*, 455 S.W.2d 714 (Tex. 1970).

⁸⁵ *Id.* at 473.

⁸⁶ *Id.*

⁸⁷ *Id.* at 474.

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occurred. Consequently, Moses qualified as a statutory "employee" such that the fellow-employee exclusion applied to negate Ooida's duty to defend in the underlying suit.⁸⁸

The last issue the court tackled was whether Ooida owed a duty to indemnify Williams pursuant to the MCS-90 endorsement. The specific issue the court addressed was "whether the 'separation of insureds' clause, which made Williams the 'insured' for purposes of the policy exclusions, similarly operates to make Williams the 'insured' in the context of the MCS-90 Endorsement."⁸⁹ Answering the question in the negative, the court relied upon the federal regulation requiring the endorsement and defining the "insured" as "the motor carrier *named* in the policy of insurance...[or] endorsement..."⁹⁰ The FMCSA's guidance emphasized that the MCS-90 was not intended to require a motor carrier's insurer to satisfy a judgment against any party other than the named carrier. Therefore, Moses, as the named insured, was the "insured" for purposes of applying the MCS-90 endorsement.⁹¹

The court, recognizing that the endorsement does not indemnify "employees" of the named insured acting in the course of their employment, concluded that Williams, as a statutory "employee" of Moses, did not fall within the ambit of the endorsement. Accordingly, Ooida had no duty to indemnify Williams.⁹²

Several other courts have reached similar conclusions regarding when a motor carrier driver qualifies as a statutory "employee" for purposes of applying policy exclusions.⁹³

⁸⁸ *Id.* at 476.

⁸⁹ *Id.* at 477.

⁹⁰ *Id.*, citing 49 C.F.R. 387.5 (emphasis added).

⁹¹ *Id.* at 477-78.

⁹² *Id.*

⁹³ See, e.g., *Canal Ins. Co. v. Moore Freight Servs., Inc.*, 2015 WL 3756840 (E.D. Tenn. June 16, 2015) (driver who pulled over to check on smoking brakes and died of heart attack was employee; "Even though he was outside of the vehicle, the Court finds he did not cease operating the vehicle. Undisputedly, he got out of the vehicle so that he could ensure the vehicle's operability."); *Lancer Ins. Co. v. Newman Specialized Carriers, Inc.*, 903 F.Supp.2d 1272 (N.D. Ala. 2012) (unloading boat docks from flatbed tractor trailer constituted "operating"; use of "operating" indicates Congress' intent to include "more than solely the act of driving"); *Progressive Mountain Ins. Co. v. Madd Transp., LLC*, No. CV413-254, 2015 WL 1419486 (S.D. Ga. Mar. 27, 2015) (driver moving between loading platform and trailer flatbed to secure load was employee); *Miller v. Northland Ins. Co.*, No. M2013-00572-COA-R3-CV, 2014 WL 1715076 (Tenn. App. Apr. 29, 2014) (passenger injured while other was driving constituted employee); *Luizzi v. Pro Transport, Inc.*, No. 02 CV 5388(CLP), 2013 WL 3968736 (E.D.N.Y. July 31, 2013) (self-employed independent owner-operator who hired out services and vehicle was employee); *Carolina Cas. Ins. Co. v. Ark. Transit Homes, Inc.*, No. 7:10-cv-01614-JEO, 2011 WL 7719671 (N.D. Ala. Dec. 22, 2011) (owner and lessor who escorted truck qualified as employer); *Barnett v. Bullock*, No. 12-CV-326-JWD-SCR, 2015 WL 58869 (M.D. La. Jan. 5, 2015) (tandem driver injured while in sleeper berth an employee in course of employment); *Great West Cas. Co. v. Nat'l Cas. Co.*, 53 F.Supp.3d 1154 (D.N.D. 2014) (independent-contractor lessor-operator was employer, not employee); *United Fin.*

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XI. Does the Endorsement Apply Outside the US?

Assume a motor carrier subject to the federal regulations is hauling a load that originates in Texas when a collision occurs just across the border in Mexico. The endorsement states that the insurer agrees to pay any final judgment resulting from negligence "whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere..." Based on this language, it seems the hypothetical collision in Mexico would be covered, but that is not the case.

In *Canal Indemnity Company v. Galindo*, the parties disputed the meaning of the endorsement's language referenced above.⁹⁴ Canal conceded that coverage under the MCS-90 was not limited to the policy territory defined in the main body of the policy but argued that coverage under the endorsement was limited to transportation occurring within the U.S.⁹⁵ The family of the decedent, however, argued that no such limitation existed within the endorsement and, even if it did, coverage still existed because the acts of negligent entrustment, hiring, retention, and supervision allegedly occurred in the U.S.⁹⁶

The court first examined the federal regulations, explaining that motor vehicles subject to the financial responsibility requirements are those providing transportation subject to the Secretary of Transportation's jurisdiction, which is limited to transportation by motor carrier in interstate and foreign commerce "to the extent the transportation is in the United States."⁹⁷ Accordingly the court held that the MCS-90 did not apply to damages resulting from negligence while providing transportation that occurs outside the U.S.⁹⁸ Because the underlying negligence occurred in Mexico and was not covered, no coverage existed for the negligence claims against the motor carrier, either.⁹⁹

Cas. Co. v. Hershberger & Sons Trucking Ltd., No. 11AP-629, 2012 WL 457715 (Oh. App. Feb. 14, 2012) ("Nothing in section 390.5 limits an independent contractor's status as a statutory employee to time when the individual is actually operating a commercial motor vehicle.")

⁹⁴ 2009 WL 10669138, at *3 (W.D. Tex. Feb. 2, 2009).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at *4-6, citing 49 U.S.C. § 13501(c)-(e).

⁹⁸ *Id.* at *6.

⁹⁹ *Id.* at *10.

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XII. Duties of Excess Carrier

One question that often arises in MCS-90 cases is what duty, if any, an excess carrier owes when it is the first solvent insurer. This was addressed in *Wells v. Gulf Ins. Co.*, in which the Fifth Circuit held that the MCS-90 endorsement does not require an excess insurer to drop below its liability floor and pay a judgment when it is the first solvent insurer.¹⁰⁰

Builder's Transport, Inc. ("BTI") was self-insured up to \$1 million and had excess insurance with four other companies, including Gulf Insurance Company ("Gulf").¹⁰¹ Wells was injured in an accident involving a truck operated by BTI and obtained a judgment against it.¹⁰² BTI's bankruptcy, however, prevented execution, and the insurance company providing coverage under the Gulf layer was declared insolvent.¹⁰³ Wells then sued Gulf, which policy contained the MCS-90 endorsement but was unnecessary because BTI satisfied the financial requirements with self-insurance.¹⁰⁴

The district court relied primarily on federal public policy considerations in determining that the endorsement's language "renders an excess insurer's policy primary as a matter of law when it is the first solvent insurer."¹⁰⁵ The Fifth Circuit disagreed, however, noting that the MCA allows for self-insurance and does not require the MCS-90 endorsement in such a contract. "Federal public policy appears unconcerned with the possibility of an insolvent but self-insured carrier, for the only assurance the regulations require is the [FMCSA]'s satisfaction that the carrier is qualified."¹⁰⁶

The Fifth Circuit concluded that "where an excess insurer's coverage is not required to satisfy a carrier's minimum level of financial responsibility under the [MCA], the form MCS-90 endorsement does not require the excess carrier to satisfy a judgment below its liability floor simply because it is the first solvent insurer."¹⁰⁷

¹⁰⁰ 484 F.3d 313 (5th Cir. 2007).

¹⁰¹ *Id.* at 314.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 315.

¹⁰⁶ *Id.*, citing 49 C.F.R. § 387.309.

¹⁰⁷ *Id.* at 318, citing *Kline v. Gulf Ins. Co.*, 466 F.3d 450 (6th Cir. 2006).

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XIII. Application to Punitive Damages

While the MCS-90 endorsement operates to ensure coverage for a third-party injured by a motor carrier's negligence, it is unclear whether the endorsement would also cover an award of punitive damages. Viewing the endorsement's language itself, however, indicates that it may not cover such damages. That is because the endorsement provides that it covers final judgments resulting from "*negligence* in the operation, maintenance or use of motor vehicles...whether or not such *negligence* occurs on any route or in any territory..." There is a complete absence in the case law of any discussion regarding the application of the MCS-90 endorsement to punitive damages, however, so this remains an open question.

XIV. How to Effectively Cancel an MCS-90 Endorsement

Suppose, as a motor carrier, one of your drivers is involved in a collision that results in multiple fatalities. The risk is huge that an adverse judgment will be entered against you and your driver. Your policy includes an MCS-90, but the endorsement was cancelled the week before the fatal collision. Was the cancellation effective?

The MCS-90 provides the following with regard to cancellation:

Cancellation of this endorsement may be effected by the company of the insured by giving (1) thirty-five (35) days notice in writing to the other party (said 35 days notice to commence from the date the notice is mailed, proof of mailing shall be sufficient proof of notice), and (2) if the insured is subject to the FMCSA's registration requirements under 49 U.S.C. 13901, by providing thirty (30) days notice to the FMCSA (said 30 days notice to commence from the date the notice is received by the FMCSA at its office in Washington, DC).

As one Texas case has held, "[w]hen an insurance policy is amended by an MCS-90 endorsement, coverage under the endorsement remains in effect unless and until it is canceled in a manner described by federal law."¹⁰⁸

¹⁰⁸ *Republic Western Ins. Co. v. Rockmore*, 2005 WL 57284, at *9 (N.D. Tex. Jan. 10, 2005) (internal citations omitted).

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Thus, in order to cancel the MCS-90 endorsement, at least 30-days' notice must be provided to the FMCSA. The only exception to this is when the endorsement is cancelled by replacement, at which point the "liability of the retiring insurer or surety...shall be considered as having terminated as of the effective date of the replacement certificate of insurance, surety bond or other security, provided the said replacement certificate, bond or other security is acceptable to the FMCSA under the rules and regulations in this part."

XV. Can the MCS-90 be Read into the Policy as a Matter of Law?

The MCS-90 endorsement applies when the underlying policy *to which the endorsement is attached* does not provide coverage, and there is no other insurer available to satisfy the judgment or the motor carrier's insurance is insufficient to satisfy the minimum federal requirements. But what if there is no endorsement attached to the subject policy? Can the court read the terms into the policy as a matter of law?

Not in the the Fifth Circuit. The Court has held that an MCS-90 endorsement should not be read into a policy because it "question[ed] the fairness" of placing a duty on the insurance company to determine whether the endorsement is necessary.¹⁰⁹ Other courts have read the endorsement's language into the policy as a matter of law, however, when there is evidence showing the insured informed the insurer of its need for interstate coverage and when an insurer affirmatively represents to the federal government that the policy issued to its insured complies with federal law.¹¹⁰

¹⁰⁹ *Ill. Cent. R.R. Co. v. Dupont*, 326 F.3d 665 (5th Cir. 2003).

¹¹⁰ *See, e.g., Hagens v. Glens Falls Ins. Co.*, 465 F.2d 1249, 1250 (10th Cir. 1972); *Pierre v. Providence Washington Ins. Co.*, 784 N.E.2d 52 (N.Y. 2002); *Prestige Cas. Co. v. Michigan Mut. Ins. Co.*, 99 F.3d 1340, 1348 n. 6 (6th Cir. 1996); *Travelers Ins. Co. v. Transport Ins. Co.*, 787 F.2d 1133, 1140 n. 5 (7th Cir. 1986). Note, however, that in some of these cases, the parties either agreed that the endorsement was incorporated or admitted it should have been attached. Each of these cases was distinguished for these reasons by courts around the country.

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ABOUT THE AUTHOR

[Ashley Veitenheimer](#) is a senior attorney at Kane Russell Coleman Logan. She relies on her attention to detail and unparalleled research skills to achieve results for her clients in the insurance industry. Her focus is both on insurance coverage and insurance defense. In the coverage arena, Ashley has created a reputation as a thorough, detail-oriented, and responsive attorney. She guides her clients both by the letter of the law and by thinking outside of the box. Her insurance defense practice focuses on commercial transportation, construction, and business litigation. She has extensive experience representing interstate and intrastate trucking companies, manufacturers, employers, and construction entities from the lowest-tier subcontractor to the general contractor and owner of the premises. In all areas, she strives to respond immediately to her clients' needs and to present them with a detailed plan of attack early in the case.

Ashley is dedicated to providing excellent service and creative approaches to her clients' legal issues. She is a resourceful attorney, who takes a proactive approach to defending her clients in ways so as to reach the best outcome for the client, whether that be by motion practice, settlement negotiations, or trial. Her impressive writing capabilities are pivotal in large, complex cases where dispositive motions are critical to narrowing down the relevant issues at play. She prides herself on being able to find a "needle in a haystack" on any legal question or issue that may arise through diligent research, investigation, and analysis of the facts presented.

Prior to joining Kane Russell Coleman Logan, Ashley honed her litigation skills at a nationally-recognized plaintiffs' firm where she represented clients in personal injury cases. She also has extensive experience representing defendants in products liability, premises liability, personal injury, and appellate matters. Ashley spent seven years in the defense industry serving clients such as hospitals, nursing homes, manufacturers, employers, premises owners, and more before moving to the plaintiff's side.

Ashley is a member of the Dallas Trial Lawyers Association and the Dallas Bar Association. She is admitted to practice in all state courts in Texas, the Northern District Court, and the Tenth Circuit Court of Appeals. Ashley is an alumnus of Baylor University, where she earned both a Bachelor of Arts degree and Juris Doctor.