

VII. Insurance Coverage

A. Minimum Insurance Requirements

Federal regulations require a motor carrier of non-hazardous property to have an insurance policy or surety bond in place in the amount of \$750,000 to cover liability for injuries to the public.¹ A carrier of certain hazardous materials must have insurance or a bond in the amount of \$5 million dollars in liability coverage.² Whenever an insurance policy and a governing statute requiring minimum insurance are in conflict, the statute controls and the policy is automatically amended by operation of law to conform the statutory minimum.³ The minimum insurance requirements do not apply to reform excess or umbrella insurance policies.⁴

B. The MCS-90 Endorsement

The MCS-90 endorsement is required to be part of any insurance policy issued to a motor carrier in order to comply with federal minimum insurance requirements.⁵ The endorsement states:

“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 the liability described herein, any final judgment recovered against the insured for public liability resulting from the negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. Such insurance as is afforded, for public liability, does not apply to injury to or death of the insured’s employees while engaged in the course of their employment, or property transported by the insured, designated as cargo. It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement... The limits of the company’s liability for the amount prescribed in this endorsement apply separately to each accident and any payment under this 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.”⁶

The MCS-90 endorsement requires the insurer to act as a surety for any injury to the public caused by the carrier during interstate transportation and to be responsible for a judgment against the carrier even though no coverage may exist under the policy issued by the insurer.⁷ The primary purpose

¹ 49 C.F.R. § 387.9.

² 49 C.F.R. § 387.9.

³ Sonoco Products Co., Ins. v. Fire & Casualty Ins. Co. of Connecticut, 767 A.2d 1018 (N.J. 2001).

⁴ Id.

⁵ 49 C.F.R. § 387.15.

⁶ 49 C.F.R. § 387.15.

⁷ Canal Insurance Co. v. Carolina Casualty Insurance Co., 59 F.3d 281 (1st Cir. 1995); T.H.E. Insurance Co. v. Larsen Intermodal Services, Inc., 242 F.3d 667 (5th Cir. 2001).

of the MCS-90 endorsement is to assure that injured members of the public are able to satisfy a judgment from negligent interstate carriers.⁸ The MCS-90 endorsement does not create coverage where it did not formerly exist but only imposes a reimbursable obligation as to final judgments rendered against the named insured.⁹ Pursuant to the terms of the endorsement, an insurer is required to satisfy a judgment against the motor carrier even if the vehicle involved in the accident is not listed as a scheduled auto.¹⁰ The responsibility is on the motor carrier, and not the insurer, to obtain the endorsement, and the insurance contract cannot be reformed to include the MCS-90 if the motor carrier did not request it.¹¹

When the policy is issued to the trucking company operating the vehicle, the MCS-90 endorsement traditionally only applies to judgments against the named insured and not to permissive users¹² or drivers even if the drivers are employees of the carrier.¹³ However, the MCS-90 endorsement has been expanded to collect a judgment against a corporation when the policy is issued to the corporation's sole shareholder and the plaintiff pierces the corporate veil.¹⁴

In 2005, the FMCSA issued an advisory opinion attempting to limit the scope of the MCS-90 endorsement.¹⁵ The advisory opinion states as follows:

Q: Does the term "insured," as used on Form MCS-90, Endorsement for Motor Carrier Policies of Insurance for Public Liability, or "Principal", as used on Form MCS-82, Motor Carrier Liability Surety Bond, mean the motor carrier named in the endorsement or surety bond?

A: Yes. Under 49 C.F.R. 387.5, "insured and principal" is defined 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." Form MCS-90 and Form MCS-82 are not intended, and do 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.

The effect of the advisory opinion has not yet been addressed by any reported appellate decisions.

The MCS-90 endorsement does not apply to shipments in intrastate commerce even if transported by a carrier with interstate authority,¹⁶ but does apply to the transportation of an exempt commodity in interstate commerce.¹⁷ The endorsement does not control disputes among multiple insurers over which insurer should bear the ultimate financial burden for the loss, and the terms of the policies will control the issue of which policy provides primary coverage.¹⁸ An insurer cannot in good

⁸ Adams v. Royal Indemnity Co., 99 F.3d 964 (10th Cir. 1996).

⁹ Harco National Insurance Co. v. Bobac Trucking, Inc., 107 F.3d 733 (9th Cir. 1997).

¹⁰ John Deere Insurance Co. v. Nueva, 229 F.3d 853 (9th Cir. 2000); Adams v. Royal Indemnity Co., 99 F.3d 964 (10th Cir. 1996).

¹¹ Illinois Central Railroad Co. v. DuPont, 326 F.3d 665 (5th Cir. 2003).

¹² Del Real v. U.S. Fire Insurance Crum & Forster, 64 F.Supp.2d 958 (E.D. Cal. 1998).

¹³ Perry v. Harco National Insurance Co., 129 F.3d 1072 (9th Cir. 1997).

¹⁴ Miller v. Harco Insurance Co., 522 S.E.2d 848 (Ga. 2001).

¹⁵ 70 FR 58065-01.

¹⁶ Progressive Casualty Insurance Co. v. Hoover, 768 A.2d 1157 (Penn. 2001); QBE Insurance Co. v. P & F Container Services, Inc., 828 A.2d 935 (N.J. 2003).

¹⁷ Royal Indemnity Co. v. Jacobsen, 863 F.Supp. 1537 (D.Utah 1994); Century Indemnity Co. v. Carlson, 133 F.3d 591 (8th Cir. 1998).

¹⁸ Canal Insurance Co. v. First General Insurance Co., 889 F.2d 604 (5th Cir. 1989); Occidental Fire & Casualty Co. of N.C. v. International Insurance Co., 804 F.2d 983 (7th Cir. 1986); John Deere Insurance Co. v. Truckin' USA, 122 F.3d 270 (5th

faith refuse to pay a judgment against a trucking company when the MCS-90 endorsement is part of the policy.¹⁹

A State Public Service Commission may adopt regulations requiring an endorsement similar to the MCS-90 for insurance policies for intrastate carriers, and this endorsement will require an insurer to be responsible for a judgment against a carrier regardless of whether the vehicle involved in the accident is a scheduled auto.²⁰ State regulations also make an insurer liable for a loss to the extent of the minimum limits of required insurance coverage regardless of the actual policy limit.²¹

****Practice Pointer:** If there are any coverage defenses, try to utilize the MCS-90 endorsement to pursue a recovery.

C. Cancellation of a Policy

The MCS-90 endorsement must specify that: “Cancellation of this endorsement may be effected by the company or the insured by giving (1) 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 jurisdiction by providing 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, D.C.).”²² A failure to follow this procedure will result in the policy remaining in effect despite the insurer’s intent to cancel the policy.²³

Federal regulations require that certificates of insurance cannot be canceled or withdrawn until 30 days after written notice has been given to the Board by the insurance company, surety or sureties, motor carrier, broker or other party which period of 30 days shall commence to run from the date such notice on the prescribed form is actually received by the Board.²⁴ Certificates of insurance or surety bonds may be replaced by other certificates of insurance, surety bonds or other security and the liability of the retiring insurer or surety under such certificates of insurance or surety bonds is terminated as of the effective date of the replacement certificate of insurance provided the policy is acceptable to the Commission under the rules and regulations of this part.²⁵

An insurer must also comply with state law regarding notice provisions before canceling a policy on file with a State Public Service Commission and a failure to give the notice required by State law can create continuous coverage despite the intent of the insurer to cancel the policy and the availability of other coverage.²⁶ If the insured is engaged solely in intrastate commerce or the insured tells the insurer that it is not engaged in interstate commerce after such information is requested by the insurer, the insurer does not have to comply with federal regulations and only needs to meet the state law requirements.²⁷ However, a failure to cancel a policy in accordance with federal or state law provisions does not necessarily mean that the predecessor insurer’s policy provides primary coverage

Cir. 1997).

19 Canal Insurance Co. v. Distribution Services, Inc., 176 F.Supp.2d 559 (E.D. Va. 2001).

20 Ross v. Stephens, 496 S.E.2d 705 (Ga. 1998).

21 Id.

22 49 C.F.R. § 387.15.

23 Luizzi v. Pro Transport, Inc., 548 F.Supp.2d 1 (E.D.N.Y. 2008).

24 49 C.F.R. § 387.313(d).

25 49 C.F.R. § 387.313(e).

26 DeHart v. Liberty Mutual Insurance Co., 169 F.3d 727 (11th Cir. 1999).

27 Howard v. Quality Xpress, Inc., 989 P.2d 896 (N.M. 1999).

in a dispute between insurers.²⁸

****Practice Pointer:** If the amount of coverage is an issue, review filings with state agencies to make sure all predecessor policies were properly cancelled. If a former insurer failed to properly notify the state agency of the cancellation, the policy may still be in effect.

D. Trailer Policies

The owner of a trailer may have a policy of liability insurance providing coverage to a driver as a permissive user.²⁹ Even if the tractor and trailer are insured under the same policy, there may be separate limits of coverage for both the tractor and trailer (i.e. \$1 million of coverage on each for a total of \$2 million).³⁰ When the trailer owner is different than the tractor owner, the MCS-90 endorsement on a liability policy covering the trailer may be used to create an additional recovery up to the federal statutory minimum including an expansion of the definition of a permissive user found in the policy to include both the driver and the owner of the tractor.³¹

****Practice Pointer:** If there is an issue about the amount of coverage, review the trailer policy to determine if it provides extra coverage.

E. Lessor's Insurance

The lessor/owner of a tractor-trailer may purchase liability insurance to cover its vehicles even though the vehicles are leased to and operated by another company. The policy issued to the lessor/owner may provide coverage to a permissive driver as an additional insured under the policy even though the lessor/owner has no role in the transportation process and is not vicariously liable for the driver's conduct.³² Depending on the situation, the lease agreement may limit the amount of coverage provided to the driver.³³

F. Non-Trucking/Bobtail Policies

An owner of a tractor may purchase non-trucking/bobtail coverage. This coverage is intended to provide insurance when the tractor is not being operated in the business of or under dispatch from a trucking company, and the policy usually contains an exclusion to this effect. Most courts have upheld this exclusion as valid.³⁴ The reason that the exclusion does not violate public policy is because the federal scheme does not allow the driver to drive in an out of coverage. The trucking liability policy covers the driver when he is driving on the business of a trucking company and the non-trucking/bobtail coverage provides coverage in all other circumstances. There is no gap in coverage. At least one jurisdiction has found that the exclusion violates public policy but limits the amount of

²⁸ Canal Insurance Co. v. Insurance Co. of North America, 424 So.2d 749 (Fla. 1982).

²⁹ Wilshire Insurance Co. v. Sentry Select Insurance Co., 124 Cal.App.4th (2004); LaFleur v. AFTCO Enterprises, Inc., 927 So.2d 1200 (La. 2006).

³⁰ Auto-Owners Insurance Co. v. Anderson, 756 So.2d 29 (Fla. 2000). But See Canal Insurance Co. v. Blankenship, 129 F.Supp.2d 950 (S.D.W.Va. 2001).

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³³ Cotton v. Commodore Express, Inc., 459 F.3d 862 (8th Cir. 2006).

³⁴ Integral Insurance Co. v. Maersk Container Service Co., 520 N.W.2d 656 (Mich. 1994); Connecticut Indemnity Co. v. Podeszwa, 921 A.2d 458 (N.J. 2007).

coverage to the state statutory minimum.³⁵ Most courts take a very expansive view of the phrase “in the business of” and hold that a truck is in the business of the trucking company until (1) returns to the place where the haul originated; (2) returns to the terminal from which the haul was dispatched, or (3) returns to the terminal from which the driver customarily is assigned hauls.³⁶ As such, non-trucking/bobtail policies rarely provide coverage for a loss.

G. Commercial General Liability Policies

Commercial General Liability (“CGL”) policies are generally obtained by businesses to insure against injuries occurring on a business premises. The CGL policy typically has an exclusion for any injuries related to automobiles, including the unloading and loading of vehicles. Because of the auto exclusion, CGL policies usually do not provide coverage for a tractor-trailer accident even if it occurs on a business premises.³⁷ Even if negligent hiring or retention is alleged, the auto exclusion will exclude coverage for the loss.³⁸

H. Passenger Exclusions

An exclusion of coverage for passengers in a commercial vehicle is valid and enforceable, but a policy with such an exclusion will still be conformed to provide the minimum amounts of coverage for commercial vehicles required by federal and state law when a passenger is injured in an accident.³⁹

I. Direct Action against Insurer

Some jurisdictions allow a cause of action to be maintained against the insurer of a trucking company as a named party defendant VII. Insurance Coverage

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Federal regulations require a motor carrier of non-hazardous property to have an insurance policy or surety bond in place in the amount of \$750,000 to cover liability for injuries to the public.⁴⁰ A carrier of certain hazardous materials must have insurance or a bond in the amount of \$5 million dollars in liability coverage.⁴¹ Whenever an insurance policy and a governing statute requiring minimum insurance are in conflict, the statute controls and the policy is automatically amended by operation of law to conform the statutory minimum.⁴² The minimum insurance requirements do not apply to reform excess or umbrella insurance policies.⁴³

B. The MCS-90 Endorsement

The MCS-90 endorsement is required to be part of any insurance policy issued to a motor

³⁵ Connecticut Indemnity Co. v. Hines, 40 A.D.3d 903 (N.Y. 2007).

³⁶ St. Paul Fire & Marine Ins. v. Frankhart, 370 N.E.2d 1058 (Ill. 1977); Auto-Owners Insurance Co. v. Redland Insurance Co., 522 F.Supp.2d 891 (W.D.Mich. 2007).

³⁷ Strickland v. Auto-Owners Insurance Co., 615 S.E.2d 808 (Ga. 2005); Federal Insurance Co. v. New Coal Co., Inc., 415 F.Supp.2d 647 (W.D.Va. 2006).

³⁸ Howell v. Ferry Transportation, Inc., 929 So.2d 226 (La. 2006).

³⁹ Guinn Transport, Inc. v. Canal Insurance Co., 507 S.E.2d 144 (Ga. 1998).

⁴⁰ 49 C.F.R. § 387.9.

⁴¹ 49 C.F.R. § 387.9.

⁴² Sonoco Products Co., Ins. v. Fire & Casualty Ins. Co. of Connecticut, 767 A.2d 1018 (N.J. 2001).

⁴³ Id.

carrier in order to comply with federal minimum insurance requirements.⁴⁴ The endorsement states:

“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 the liability described herein, any final judgment recovered against the insured for public liability resulting from the negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. Such insurance as is afforded, for public liability, does not apply to injury to or death of the insured’s employees while engaged in the course of their employment, or property transported by the insured, designated as cargo. It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement... The limits of the company’s liability for the amount prescribed in this endorsement apply separately to each accident and any payment under this 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.”⁴⁵

The MCS-90 endorsement requires the insurer to act as a surety for any injury to the public caused by the carrier during interstate transportation and to be responsible for a judgment against the carrier even though no coverage may exist under the policy issued by the insurer.⁴⁶ The primary purpose of the MCS-90 endorsement is to assure that injured members of the public are able to satisfy a judgment from negligent interstate carriers.⁴⁷ The MCS-90 endorsement does not create coverage where it did not formerly exist but only imposes a reimbursable obligation as to final judgments rendered against the named insured.⁴⁸ Pursuant to the terms of the endorsement, an insurer is required to satisfy a judgment against the motor carrier even if the vehicle involved in the accident is not listed as a scheduled auto.⁴⁹ The responsibility is on the motor carrier, and not the insurer, to obtain the endorsement, and the insurance contract cannot be reformed to include the MCS-90 if the motor carrier did not request it.⁵⁰

When the policy is issued to the trucking company operating the vehicle, the MCS-90 endorsement traditionally only applies to judgments against the named insured and not to permissive users⁵¹ or drivers even if the drivers are employees of the carrier.⁵² However, the MCS-90 endorsement

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has been expanded to collect a judgment against a corporation when the policy is issued to the corporation's sole shareholder and the plaintiff pierces the corporate veil.⁵³

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Q: Does the term “insured,” as used on Form MCS-90, Endorsement for Motor Carrier Policies of Insurance for Public Liability, or “Principal”, as used on Form MCS-82, Motor Carrier Liability Surety Bond, mean the motor carrier named in the endorsement or surety bond?

A: Yes. Under 49 C.F.R. 387.5, “insured and principal” is defined 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.” Form MCS-90 and Form MCS-82 are not intended, and do 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.

The effect of the advisory opinion has not yet been addressed by any reported appellate decisions.

The MCS-90 endorsement does not apply to shipments in intrastate commerce even if transported by a carrier with interstate authority,⁵⁵ but does apply to the transportation of an exempt commodity in interstate commerce.⁵⁶ The endorsement does not control disputes among multiple insurers over which insurer should bear the ultimate financial burden for the loss, and the terms of the policies will control the issue of which policy provides primary coverage.⁵⁷ An insurer cannot in good faith refuse to pay a judgment against a trucking company when the MCS-90 endorsement is part of the policy.⁵⁸

A State Public Service Commission may adopt regulations requiring an endorsement similar to the MCS-90 for insurance policies for intrastate carriers, and this endorsement will require an insurer to be responsible for a judgment against a carrier regardless of whether the vehicle involved in the accident is a scheduled auto.⁵⁹ State regulations also make an insurer liable for a loss to the extent of the minimum limits of required insurance coverage regardless of the actual policy limit.⁶⁰

****Practice Pointer:** If there are any coverage defenses, try to utilize the MCS-90 endorsement to pursue a recovery.

C. Cancellation of a Policy

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D. Trailer Policies

The owner of a trailer may have a policy of liability insurance providing coverage to a driver as a permissive user.⁶⁸ Even if the tractor and trailer are insured under the same policy, there may be separate limits of coverage for both the tractor and trailer (i.e. \$1 million of coverage on each for a total of \$2 million).⁶⁹ When the trailer owner is different than the tractor owner, the MCS-90 endorsement on a liability policy covering the trailer may be used to create an additional recovery up to the federal statutory minimum including an expansion of the definition of a permissive user found in the policy to

61 49 C.F.R. § 387.15.

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69 Auto-Owners Insurance Co. v. Anderson, 756 So.2d 29 (Fla. 2000). But See Canal Insurance Co. v. Blankenship, 129 F.Supp.2d 950 (S.D.W.Va. 2001).

include both the driver and the owner of the tractor.⁷⁰

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F. Non-Trucking/Bobtail Policies

An owner of a tractor may purchase non-trucking/bobtail coverage. This coverage is intended to provide insurance when the tractor is not being operated in the business of or under dispatch from a trucking company, and the policy usually contains an exclusion to this effect. Most courts have upheld this exclusion as valid.⁷³ The reason that the exclusion does not violate public policy is because the federal scheme does not allow the driver to drive in an out of coverage. The trucking liability policy covers the driver when he is driving on the business of a trucking company and the non-trucking/bobtail coverage provides coverage in all other circumstances. There is no gap in coverage. At least one jurisdiction has found that the exclusion violates public policy but limits the amount of coverage to the state statutory minimum.⁷⁴ Most courts take a very expansive view of the phrase "in the business of" and hold that a truck is in the business of the trucking company until (1) returns to the place where the haul originated; (2) returns to the terminal from which the haul was dispatched, or (3) returns to the terminal from which the driver customarily is assigned hauls.⁷⁵ As such, non-trucking/bobtail policies rarely provide coverage for a loss.

G. Commercial General Liability Policies

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H. Passenger Exclusions

An exclusion of coverage for passengers in a commercial vehicle is valid and enforceable, but a policy with such an exclusion will still be conformed to provide the minimum amounts of coverage for commercial vehicles required by federal and state law when a passenger is injured in an accident.⁷⁸

I. Direct Action against Insurer

Some jurisdictions allow a cause of action to be maintained against the insurer of a trucking company as a named party defendant whenever an accident occurs.⁷⁹ The rationale for allowing a direct action against the insurer is that the insurer acts as the surety of the trucking company for the benefit of the public since the trucking company could not obtain authority to operate in interstate commerce without filing its proof of insurance.⁸⁰

Certificate of Insurance

INSERT PICTURE PROOF OF INSURANCE

This form is filed with the federal or state government as proof of financial responsibility.

****Practice Pointer:** If your jurisdiction has a direct action statute, always name the insurer as a party defendant whenever an accident occurs.⁸¹ The rationale for allowing a direct action against the insurer is that the insurer acts as the surety of the trucking company for the benefit of the public since the trucking company could not obtain authority to operate in interstate commerce without filing its proof of insurance.⁸²

Certificate of Insurance

INSERT PICTURE PROOF OF INSURANCE

This form is filed with the federal or state government as proof of financial responsibility.

****Practice Pointer:** If your jurisdiction has a direct action statute, always name the insurer as a party defendant.

⁷⁸ Guinn Transport, Inc. v. Canal Insurance Co., 507 S.E.2d 144 (Ga. 1998).

⁷⁹ See O.C.G.A. § 46-7-12.1.

⁸⁰ Jackson v. Sluder, 569 S.E.2d 893 (Ga. 2002).

⁸¹ See O.C.G.A. § 46-7-12.1.

⁸² Jackson v. Sluder, 569 S.E.2d 893 (Ga. 2002).