The Duty to Defend

The MCS-90 Endorsement and the Tripartite Relationship

As if defending a trucking company in a tort case or a wrongful death suit was not challenging enough these days (*see*, *e.g.*, *Understanding the Impact of Nuclear Verdicts on the Trucking Industry*, American Transportation Research Institute, June *Juror Attitudes in Trucking Litigation* (June 2016), http://trialbehavior.com the task of a defense lawyer often develops another layer of complexity when the defense is paid for by the trucker's insurer, particularly when the insurer identifies a coverage issue that could result in a decision to deny coverage down the road. Appointment of defense counsel is not infrequently accompanied by the issuance by the insurer of a reservation of rights letter to its insured. In certain circumstances (and these are not identical in all states), such a reservation might entitle the insured to select its own counsel, which reduces the suspicion that the attorney does not have the insured's best interests at heart. Even when independent counsel is appointed, though, the potential for disagreement between insured and insurer is still present.

The ABA Committee on Ethics and Professional Responsibility issued a formal opinion in 1996 (96-403), identifying some of the tensions that may arise when a defendant's attorney is paid for by the insurer. For instance, some insureds, fearing an injury to the company's reputation, or hoping to avoid paying a large deductible, may wish to try a case the insurer may view as one ripe for settlement. Sometimes, the exact opposite is the case: the insured, possibly fearing an excess judgment or perhaps fearful of offending a customer or other source of revenue, may insist on settling a case (with the insurer's money), which the insurer thinks should be tried. Defense counsel may also find themselves caught between the respective tactical preferences of the insurer, which likely has the contractual right to control the defense, and those of the insured concerned about its ability to conduct its business during the trial or in its wake. The insurer will often reserve its right to deny coverage in the future or will deny coverage in part for elements of

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the complaint that do not fall within the coverage grant or that are excluded (e.g., claims for punitive damages or contractual exposure). That leaves open the possibility that a portion of any judgment will be covered by the insurer, but not all of it. Another recent concern for defense attorneys is whether allowing a bill review company (which many insurers now employ) to review attorney invoices could lead to a breach of confidentiality; even if it does not, concerns that the bill may not be paid in full might consciously or otherwise affect the attorney's approach to the case.

How might the MCS-90 Endorsement affect this somewhat fraught, triangular relationship? As we shall discuss, while the MCS-90 is referred to as an endorsement, it is quite unlike typical insurance policy endorsements that modify the basic coverage provided under a policy. Properly understood, the MCS-90 does no such thing. Rather, it requires the issuing insurer to pay certain judgments, even though there is no coverage under the policy. This distinction may not make much of an impression on a plaintiff or claimant, but it is of great significance for an insured motor carrier.

FMCSA Requirements

For-hire motor carriers operating in interstate commerce are required to register with the Federal Motor Carrier Safety Administration (FMCSA) of the United States Department of Transportation. 49 USC §13902. One of the requirements of the regulations is that the motor carrier show that it is financially responsible, meaning that it is able to pay (or have its insurer pay) judgments up to the required limits. In most cases, this is accomplished by the carrier purchasing liability insurance with limits at least equal to the limits mandated by the FMCSA. Depending on what sort of cargo it hauls, the carrier must show $750,000, $1 million, or $5 million in limits. A surety bond issued by an insurer is also acceptable; also, some truckers (but not many) are able to satisfy FMCSA's criteria to qualify as self-insureds. Most trucking companies use the first method, which will be the focus here.

In order for the motor carrier to satisfy FMCSA requirements for financial security, its insurer must file proof of insurance. An ACORD form (the standard "certificate of insurance" handed out by many insurance brokers), though, is not acceptable tender for this purpose. Instead, the insurer must electronically send a special FMCSA form, the BMC-91 or BMC-91x ("Motor Carrier Automobile Bodily Injury and Property Damage Liability Certificate of Insurance"), to Washington. 49 CFR §387.313T. The BMC-91 certifies not only that a policy has been issued with limits equal to or in excess of the required limits, but also that the policy includes the MCS-90 endorsement.

Insurance policies come with built-in limitations in the form of definitions, exclusions, and conditions. The presence of an MCS-90 in the policy reduces (though it does not completely eliminate) insurance company defenses vis-a-vis a plaintiff who has won a judgment against the motor carrier. A policy, for instance, may only cover scheduled autos; the MCS-90 requires the insurer (all else being equal) to pay judgments entered against the motor carrier, even if the truck involved in the loss is not scheduled or otherwise covered under the policy. A policy may require prompt notice of the loss by the insured or may have a deductible; an insurer may be required to pay under the MCS-90 in spite of the failure to comply with a policy condition or the existence of a deductible. To be sure, the MCS-90 does not require payment for injury to an employee (broadly construed) or a driver (broadly construed) or for loss of or damage to cargo. Policies usually exclude pollution coverage; the MCS-90 requires payment for environmental restoration. In short, the exposure that an insurer has under the MCS-90 is, in several ways, broader than coverage under the policy. This expanded exposure inures to the benefit of the claimant, but ultimately not the insured, because the MCS-90 requires the insured to pay back any amount paid by the insurer to the claimant that was not covered under the basic terms of the policy:

> The insured agrees to reimburse the company (i.e., the insurer) 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.

As is well known, an insurer is not permitted to subrogate against its own insured, which is one of the most basic rules of insurance law. *Phoenix Ins. Co. v. Erie and Western Transportation Co.,*

Couch on Insurance 2d

(1983) ("No right of subrogation can arise in favor of the insurer against its own insured, since by definition subrogation arises only

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with respect to rights of the insured against third persons to whom the insurer owes no duty."). As some commentators have explained, an insurer that indemnifies its insured stands in the shoes of that insured and has no rights beyond what the insured had. Since the insured may not bring an action against itself, neither may the insurer sue the insured. D. Dobbs, *Handbook on the Law of Remedies* §§4.3, 8.10 (1973). Moreover, the whole point of buying insurance would be negated if the insurer were able to recover from the insured after paying the claimant. R. Keeton, *Basic Text on Insurance Law*

Federal Insurance Co. v. Tamiami Trail Tours, 117 F2d 794, 796 (5th Cir. 1941).

MCS-90: A Surety Agreement

How, then, can we explain the permissibility of the insurer collecting back from the insured after paying a judgment under the

MCS-90? Clearly the USDOT, in authorizing the right to reimbursement understood its MCS-90 endorsement, was not coverage but something else. In fact, courts that have interpreted the MCS-90 have usefully compared the MCS-90 to a surety agreement-that is, an agreement whereby one party agrees to be responsible for the debt of another but retains the right to seek full recovery from the principal. *Canal Ins. Co. v. Carolina Ins. Co.,* 59 F.3d 281, 283 (1st Cir. 1995) (the MCS-90 is a "suretyship by the insurance carrier to protect the public—a safety net—but not insurance.... On the contrary it simply covers the public when other insurance is lacking."). Along the same lines are the decisions in *Travelers Indem. Co. v. W. Am. Specialized Transp.*

409 F.3d 256 (5th Cir. 2005); *Kline v. Gulf Ins. Co.* 466 F.3d 450 (6th Cir. 2006) and various others.

Therefore, recharacterizing the relationship between insurer-insured as one of surety-principal when payment is made under the MCS-90 explains why the insurer is permitted to collect back from the motor carrier any amount that it expends under the MCS-90. *Auto-Owners Ins. Co. v. Munroe,* 614 F.3d 322, 327 (7th Cir. 2010); *Bennett v. The Preferred Acc. Ins. Co. of New York,* 192 F.2d 748 (10th Cir. 1951); for a parallel rationale regarding the identical clause in the (state) Form F endorsement *see Rural Mut. Ins. Co. v. Peterson*, 134 Wis. 2d 165 (1986).

For the defense attorney, this may constitute yet another opportunity for discomfort. The insurer's contribution under the MCS-90 might be the key to getting a matter settled and removing the client from the crosshairs of plaintiffs' counsel. Approving the settlement (to the extent the insurer consults with counsel and the insured) will create a new liability for the insured to pay back the insurer. Unlike the policy, the endorsement is in place to guarantee collection to injured members of the public, but not to benefit the insured.

Three incidents from my own practice come to mind in this context. In one case, at a mediation, my client (the insurance company) agreed to settle the plaintiff's claim because of an MCS-90 exposure. The insured, with its own counsel, was also present at the mediation. Alongside the settlement of the plaintiff's claim, the insurer and the insured agreed upon a partial reimbursement to be made in yearly installments over ten years. This is a useful reminder that most trucking companies are simply not in a position to pay back large amounts of money to their insurers, whatever the MCS-90 provides. Insurers dealing with particularly large and well-financed truckers may be able to protect themselves with a letter of credit, but those are simply too expensive for most trucking companies to arrange. A second scenario involved an insured that, without the services of counsel, negotiated a settlement with a claimant and paid the loss. (He actually did a pretty good job of negotiating.) Only after paying did he report the claim to his insurer, which hired us to look over the coverage implications. Quite apart from notice issues, we concluded the policy itself provided no coverage for the loss. The only possible exposure would have been under the filing-but since the insured had already paid, there was no point in having the insurer reimburse the insured under the filing, since the insured would then have to reimburse the insurer.

Finally, with respect to the broad point that the MCS-90 is in place to protect the public not the insured, many years ago, we represented an insurer seeking to recover its payment under an MCS-90 and defend against the insured's claim that the MCS-90 required the insurer to defend the insured. (There is no such duty-see below.) After the oral argument was over, I was chatting with the insured's attorney, who said he disagreed with my comment that only the public was meant to benefit from the MCS-90. After all, his client had essentially received an interest-free loan from the insurer! I suppose he had a point.

MCS-90 Differs from Policy Terms

Let us return to differences between the MCS-90 and the policy terms. There are underwriters who will fill in the limits for the MCS-90 equal to whatever limits of liability coverage the insured wishes to purchase. That accounts for some of the large limits that one occasionally sees on the USDOT's licensing and insurance database. Most insurers, though, properly in my view, will issue the MCS-90 only in the amount needed by the motor carrier to satisfy the FMCSA. Haulers of general commodities, for instance, require only $750,000 of financial security. If the insured purchases $1 million or $2 million of liability coverage, the insurer will still issue the MCS-90 with limits of $750,000. There are often complaints by motor carriers or their insurance agents who point out that some shippers or other customers are insisting on higher limits; of course, the insured may purchase higher liability limits and show the policy declarations pages to its customer, but if the customer or a freight broker insists on seeing a $1 million filing so that the licensing and insurance database (accessible by the public) shows $1 million of financial security, then the parties may have a real problem that is not easily resolved. A well-managed insurer will have procedures in place to make sure that filings are issued only in the amount required. On rare occasions an insurer in error might make a !ling of $750,000 for a trucker that needs $1 million of !nancial security—that could lead to a temporary suspension of the trucker's authority and generate bad blood and even a claim for damages. But the bot-tom line here is clear: there is no legal requirement for the !ling/MCS-90 to be issued with the same limits as the policy.

Additionally, the MCS-90 states: "The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended to assure compliance by the insured within the limits stated herein, as a motor carrier of property with Sections 29 and 30 of the Motor Carrier Act of 1980...." The phrase "within the limits stated herein" is arguably understood to refer to the amount set out on the MCS-90 form itself. *See Carolina Cas. Ins. Co. v. Estate of Karpov,* 559 F.3d 621, 625 (7th Cir. 2008). Accordingly, if the insurer is paying solely under the endorsement because the policy itself does not apply, then it is the MCS-90 limit that is owed. The insured motor carrier may or may not agree with this conclusion, but it is well-grounded and does offer at least one advantage to the insured: the amount that it is required to pay the insurer back will be capped by the lower MCS-90 limit.

Another truly significant difference between a standard policy and an insured's MCS-90 exposure relates to the

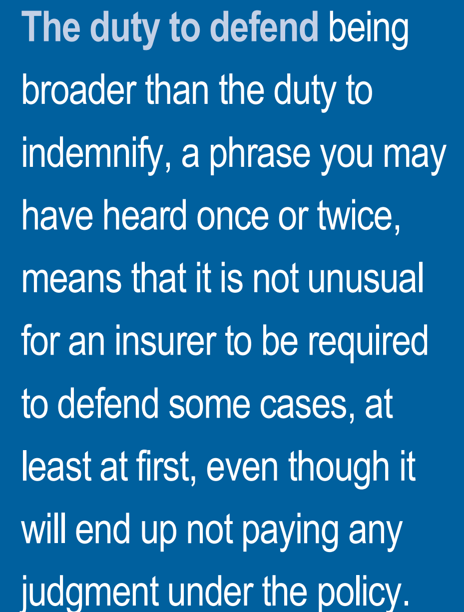
duty to defend. Standard policies contain a defense obligation, which is a major boon for insureds; that is particularly true of defense obligations such as those found in standard commercial auto policies that do not erode limits. Where the insurer's sole potential exposure is under the filing, though, no duty to defend exists. That is the unanimous view of the courts that have reviewed the issue. For instance, in *Harco National Insurance Co. v. Bobac Trucking,* 107 F3d 733 (9th Cir. 1997), our firm represented the insurer that sued to recover a payment it had made under the MCS-90. The insured countered-claimed, asserting that it should be excused from reimbursing the insurer because the insurer had not paid for its defense in the tort case. The court found in favor of the insurer; there is no defense obligation under the MCS-90. Subsequent caselaw is in accord.

In spite of that, many insurers will defend anyway for purely selfish reasons, even if only the MCS-90 is in play, as long as the case is defensible or there is a fear that a default judgment would result in massive inflation of the judgment. Since most insureds are not in a position to reimburse the insurer, even though they are obligated to, most insurers feel that it is better to try to limit the damage. The defense attorney who will be litigating the tort case or negotiating with claimant's lawyer may try to convince the insurer to waive its right to recover. Absent such a waiver, there is going to be some level of tension between the insurer and the insured. The risk of guessing wrong-litigating when you should have settled, or the opposite-technically falls on the insured; the larger and more established the insured is and the more concerned the insured is with its good name, the more palpable the risk. For some insureds, though, the risk may be more theoretical than real, and the pressure is actually on the insurer. The defense counsel may be sitting uncomfortably in the crossfire.

Be warned, however, the insurer will have no duty to defend if it is immediately obvious from the language of the complaint that there cannot possibly be coverage under the policy. For instance, there is no duty to defend if the loss occurs after the policy has been terminated or has expired and the lack of a current policy is immediately clear to all. If the insurer, though, has failed to cancel its filing and no replacement filing has been made, the MCS-90 may still be applicable. In that case, there clearly is no obligation to defend. The same would be true if an exclusion clearly applies.

However, there may be circumstances where, at the end of the day, it is true that the insurer will not have coverage requiring it to indemnify the insured, but where the insurer could still have a duty to defend because the allegations of the complaint set out a potentially covered loss. That was, broadly speaking, the holding in *T.H.E. Ins. Co. v. Larsen Intermodal Services,* 242 F.3d 2001 (5th Cir. 2001). The facts of the *Larsen* case were analyzed by the court in great detail, and the holding is more nuanced than this article can describe. In fact, the decision can be criticized, and the court may not have reached the correct conclusion. The larger point though, is correct: where coverage is theoretically possible, however unlikely, a duty to defend may exist-even if, at the end of the day, the court holds that the policy did not cover the loss. It is not always possible to make a policy coverage determination when the facts are sketchy. The duty to defend being broader than the duty to indemnify, a phrase you may have heard once or twice, means that it is not unusual for an insurer to be required to defend some cases, at least at first, even though it will end up not paying any judgment under the policy. Any such defense is likely to be provided under reservation.

A related question, though not one that courts have weighed in on, is whether an insurer that has no duty to defend still has some obligation to negotiate with the claimant's lawyer. Recall that the MCS-90 requires by its terms only that the issuing insurer pay certain judgments. Insurers may certainly opt to defend or take other steps they deem prudent to protect the interests of the insured or their own interests. That is not the same, though, as saying that the insurer has a duty to negotiate (and in good faith) before a judgment is entered. As a coverage attorney, this is a big deal. I don't need to tell readers of this publication how often and with what meager facts some counsel allege insurer bad faith. It is all too common, even when the insurer's only exposure is under the MCS-90. It also likely affects "*Stowers*" demands (or the equivalent outside of Texas), in which failure to settle within a certain (small) time frame triggers the risk of an excess judgment against the insurer. Since the insurer is not obligated to do anything under the filing except pay judgments against the named insured (and not all judgments),



there is no duty to settle or respond to a *Stowers* demand or negotiate in good faith. Obviously, the defense attorney will want to work with the insurer (and coverage counsel if applicable) to defend the interests of the defendant motor carrier; the absence of a threat of an excess judgment may, though, make defense counsel's job harder, not easier in some cases, while easing the concerns of the insurer's policy.

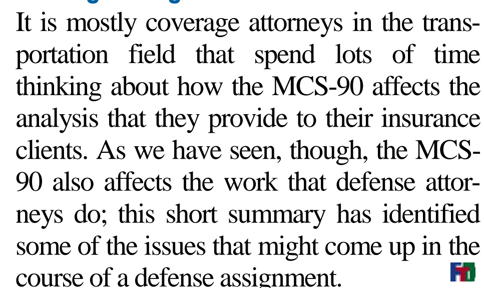
There are other ways in which the MCS-90 exposure is *narrower* than the coverage provided by the policy. The MCS-90 applies only to losses that occur in the United States; the policy likely extends into Canada and could theoretically be endorsed to pick up Mexico locations or border areas. If a loss that falls outside the policy coverage (perhaps involving a non-covered auto) occurs in Mexico, even if the loss began in the United States, the MCS-90 will not apply. *Canal Indem. Co. v. Galindo,* 2009 WL 10669138 (W.D. Tex)

(affirmed in an unreported decision by the Fifth Circuit).

Perhaps the most confusing, practical difference between the endorsement and actual policy coverage is that the MCS-90 only requires the insurer to respond to a judgment against the named insured motor carrier. The confusion was caused in large part by a series of unfortunate decisions by courts during the late 90s and early 2000s, which improperly thought that the MCS-90 removed all exclusions or limitations from the policy but kept all existing coverage from the policy in place. Thus, for instance, under this view, use of a non-covered auto was transformed by the MCS-90 into use of a covered auto, and all of the policy provisions, including omnibus insured provisions, remained in effect. See *Pierre v. Providence Washington Ins. Co.*, 99 N.Y.2d 222, 754 N.Y.S. 2d 179 (2002) and *Adams v. Royal Indem. Co.,* 99 F.3d 964 (10th Cir. 1996), for some examples of this now-discredited view. (The 10th Circuit has still not disavowed *Adams*, though it really should!) This interpretation is wrong: the MCS-90 requires payment in certain cases, even though there is *no* policy coverage; that is the whole point and explains why collecting back from the insured is permitted. The error was fixed by a clarification issued by USDOT in 2005. *Regulatory Guidance for Forms Used to Establish Minimum Levels of Financial Responsibility of Motor Carriers,* 70 FR 58065-01 (Oct. 5, 2005).

Since the clarification, courts have unanimously concluded that the MCS-90 applies only to judgments entered against the named insured motor carrier. *See, e.g., Ooida Risk Retention Group, Inc. v. Williams, 579 F.3d 469* (5th Cir. 2009). A judgment against the driver will not trigger the MCS-90. An insurer confident that it is exposed solely on the basis of the MCS-90 may be disinclined to offer a defense to a driver, though if it is already providing a courtesy defense to the named insured motor carrier, it might be willing to have defense counsel represent the driver as well-as long as counsel advises that there is no conflict between the clients. Here again, though, defense counsel might find themselves in an uncomfortable position of needing to explain to the driver that if judgment is entered against him or her, the insurer will not be paying.

One other major difference in the scope of the MCS-90, as opposed to that of the policy, is that the policy draws no distinction between interstate and intrastate use. As long as the loss takes place in the policy territory (usually the U.S. and Canada), it will qualify for coverage, all else being equal. The MCS-90, though, under the current view of the courts, is triggered only if the rig was engaged in interstate commerce at the time of the loss. *Canal Ins. Co. v. Coleman,* 625 F.3d 244 (5th Cir. 2010). The MCS-90 also applies only to commercial rigs; the policy can apply to any vehicle that the insured arranges to list or qualify as a covered auto. There may or may not be a parallel state filing and endorsement (such as the Form E / Form F tag team) that protects the public for intrastate operations as the MCS-90 does for interstate commerce.



Parting Thoughts

It is mostly coverage attorneys in the transportation field that spend lots of time thinking about how the MCS-90 affects the analysis that they provide to their insurance clients. As we have seen, though, the MCS-90 also affects the work that defense attorneys do; this short summary has identified some of the issues that might come up in the course of a defense assignment.