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# THE MCS-90 ENDORSEMENT THE BASICS

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## **THE MCS-90 ENDORSEMENT: THE BASICS**

### **I. WHAT IS MCS-90?**

#### **A. Brief Description**

1. Federal Motor Carrier Safety Administration regulations require interstate, foreign and some intrastate for-hire motor carriers to maintain specific levels of financial security for the protection of the public.<sup>1</sup>
2. the principal means by which motor carriers meet the specific financial responsibility requirements is through the purchase of insurance and by filing proof of insurance with the applicable government agencies.<sup>2</sup>
3. In the case of interstate motor carriers, these endorsements are certifications by the motor carriers' insurers that the policies meet the requirements imposed by federal law. In some cases, these mandatory endorsements dramatically expand the scope of coverage in order to protect the public.<sup>3</sup>

#### ***In other words:***

4. MCS-90 is proof of financial responsibility ò it indemnifies for loss, it is not insurance.<sup>4</sup>
5. MCS-90 is a contract between the insurer and the insured. The insurer must indemnify the insured for its payments to the public, regardless of coverage in the main policy. MCS-90 protects the public without delay. If a payment for final judgment is made outside the main insurance policy's coverage (meaning the loss is covered solely by MCS-90), then the insurer may seek reimbursement of the uninsured payment from the insured.<sup>5</sup>

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## **B. Brief Description of Purpose of MCS-90**

1. The purpose according to the statute: "to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways."<sup>6</sup>

### ***In other words:***

2. MCS 90 is the intent of Congress to protect the public.<sup>7</sup>
3. MCS-90 defines "public liability" as : "bodily injury, property damage and environmental restoration."<sup>8</sup>
4. The purpose of MCS-90 is to assure federal authorities that the insurer is available to meet the motor carrier's duty to indemnify for final judgments due to an injured member of the public.<sup>9</sup>
5. MCS-90 ensures the motor carrier is financially responsible by covering all vehicles.<sup>10</sup>
6. The insurer agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured motor carrier for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to financial responsibility requirements . . . 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.<sup>11</sup>

## **C. To Whom Does MCS-90 Apply?**

1. Minimum insurance requirements for *private* and *for hire motor carriers* are set out in the Code of Federal Regulations 49 C.F.R. § 387.7.<sup>12</sup>

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So, what is a *motor carrier*?

2. "Motor carrier means a for-hire motor carrier or a private motor carrier. The term includes, but is not limited to, a motor carrier's agent, officer, or representative; an employee responsible for hiring, supervising, training, assigning, or dispatching a driver; or an employee concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories."<sup>13</sup>
3. "A motor carrier is a person or organization providing transportation in the furtherance of a commercial enterprise."<sup>14</sup>
4. Subject to certain exceptions, these regulations stipulate that no motor carrier shall operate a commercial motor vehicle in interstate commerce until the motor carrier has first obtained and has in effect the minimum levels of financial responsibility established by the Federal Motor Carrier Safety Administration ("FMCSA").<sup>15</sup>
5. In order to obtain Department of Transportation operating authority, the motor carrier must establish financial responsibility through insurance, a bond, or self-insurance, with limits that depend on the carriage and type of commodity being transported.<sup>16</sup>
6. A short list of vehicles that must obtain Department of Transportation operating authority:
  - i. For hire motor carriers operating a vehicle with a gross vehicle weight rating exceeding 10,000 lbs. and which transport nonhazardous property must establish financial responsibility coverage of at least \$750,000.<sup>17</sup>
  - ii. For hire and private motor carriers operating in interstate or foreign commerce that operate vehicles with gross weight ratings exceeding 10,000 lbs. and that haul material as defined in 49 C.F.R. §§ 172.101, 172.8 (such as oil, hazardous waste, or hazardous materials or

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substances) must establish financial responsibility coverage of not less than \$1,000,000.<sup>18</sup>

- iii. Both for hire and private carriers operating portable tanks, cargo, or hopper-type vehicles with capacities in excess of 3,500 water gallons and hazardous materials as defined in 49 C.F.R. §173.403 must obtain financial responsibility limits of at least \$5,000,000.<sup>19</sup>

7. Subject to certain exceptions, the limits for buses are:

- i. Any vehicle with a seating capacity of 16 passengers or more must obtain financial responsibility limits of \$5,000,000.<sup>20</sup>
- ii. Any vehicle with a seating capacity of 15 passengers or less must obtain financial responsibility limits of at least \$1,500,000.<sup>21</sup>
- iii. Exceptions to the requirements for buses include:
  - a. transporting only school children and teachers to or from school;
  - b. taxicabs providing taxicab service with a seating capacity of less than seven passengers;
  - c. a motor vehicle carrying less than 16 individuals in a single daily round trip to commute to and from work; and
  - d. vehicles operated by a motor carrier under contract providing transportation of primary and secondary students for extracurricular trips.<sup>22</sup>

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Type of Vehicle	Minimum Insurance Level
Fleet, including only vehicles under 10,000 GVWR (small freight vehicles) <sup>23</sup>	\$300,000
Vehicles with a seating capacity of 16 passengers or more. <sup>24</sup>	\$5,000,000
Vehicles with a seating capacity of 15 passengers or less. <sup>25</sup>	\$1,500,000
Freight Vehicles of 10,001 pounds or more GVWR carrying hazardous substances, as defined in §171.8, transported in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3,500 water gallons, or in bulk Class A or B explosives, poison gas, liquefied compressed gas or compressed gas, or highway route controlled quantity radioactive materials as defined in §173.455. <sup>26</sup>	\$5,000,000
Freight vehicles of 10,001 pounds or more GVWR carrying non-hazardous property. <sup>27</sup>	\$750,000
Freight vehicles of 10,001 pounds or more GVWR carrying oil listed in 49 C.F.R. §172.101; hazardous waste, hazardous materials and hazardous substances defined in 49 C.F.R. §171.8 and listed in 49 C.F.R. §172.101. <sup>28</sup>	\$1,000,000
Freight vehicles under 10,000 pounds GVWR carrying any quantity of Class A or B explosives; any quantity of poison gas; or highway route controlled quantity radioactive materials as defined in §173.455. <sup>29</sup>	\$5,000,000

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8. What about Named Insureds?
  - i. MCS-90 covers the named insured in the operation, maintenance or use of motor vehicles subject to federal financial responsibility (except in the minority view of the U.S. Court of Appeals in the Ninth and Tenth Circuits).<sup>30</sup>
  - ii. The U.S. Court of Appeals in the 9<sup>th</sup> and 10<sup>th</sup> Circuits include permissive users.<sup>31</sup>
9. Which Vehicles Are Covered Under MCS-90?
  - i. An MCS-90 endorsement applies to all motor vehicles used by a motor carrier, whether named or not.<sup>32</sup>

**D. Why Should We Care About MCS-90?**

1. The duty to indemnify under MCS-90 is broad, broader than coverage granted in most commercial auto policies.<sup>33</sup>
2. Under ideal circumstances, the owner and operator of the tractor, the owner of the trailer, and the lessee of the vehicles would have sufficient coverage to cover most damages incurred by the public involved in motor vehicle accidents with a negligent operator, owner, or permit hauler of an interstate tractor trailer. However, when a negligent operator, owner, or permit hauler appears to lack coverage, an understanding of state and federal financial responsibility requirements is important because these requirements may create coverage for the accident where it would not otherwise exist.<sup>34</sup>
3. If a payment is made under MCS-90 by the insurer for a loss outside the main insurance policy, the insurer may seek reimbursement of the uninsured payment from the insured. In other words, the insurer agrees to accept financial responsibility temporarily until the motor carrier reimburses the insurer.<sup>35</sup>

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*Ultimately, we care about MCS-90 because:*

4. MCS-90 requires a different underwriting approach than standard insurance policies. An underwriter may consider offering an MCS-90 endorsement by relying on a motor carrier's financial strength.
5. Another underwriting option is to select motor carriers whose operations are acceptable aside from financial strength. Without careful analysis, insurers may incur unforeseeable loss well beyond a policy's coverage.

## **II. MCS-90 APPLIES TO INTERSTATE TRAVEL.**

### **A. What Is "Interstate" Travel?**

1. The difference between "interstate" and "intrastate" travel "hinges upon an assessment of the essential character of the commerce, manifested by the shipper's fixed and persisting intent at the time of the shipment, and ascertained from all of the circumstances attending the transportation." <sup>36</sup>
2. Relevant circumstances include:
  - a. the presence (or absence) of certain indicia of "through carriage" such as through billing; storage-in-transit tariff provisions; un-interrupted movement;
  - b. continuous possession by the carrier; unbroken bulk; and
  - c. the absence of processing or substantial product modification.<sup>37</sup>
3. "Courts frequently caution, however, that no particular factor is, in and of itself, determinative. The determination is, instead, to be based upon the practical realities of the transportation at issue."<sup>38</sup>

### **B. An Example of The Importance of "Interstate" versus "Intrastate".**

1. In Progressive Casualty Insurance v. Hoover, et al., 570 Pa. 423, 436, 809 A.2d 353, 360 (Pa. 2002), the Pennsylvania Supreme Court found that where an accident occurred between a car and a trucked leased by a Pennsylvania shipper carrying grain ordered from Illinois, there was not sufficient evidence to determine whether the commerce involving the grain

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was intra-state or interstate at the time of the accident to grant a motion for summary judgment.

The truck was not listed under the shipper's insurance policy, so the injured plaintiffs sought to recover under the MCS-90 endorsement. The insurer then commenced its own declaratory judgment action to determine whether it was liable under the endorsement.

The court recognized that a route of shipment may be entirely within one state, but could still be part of "interstate" travel, if the shipment is part of a larger, continuing movement in interstate commerce. In Progressive, the shipment originated from out of state and stored in a Pennsylvania warehouse. After the grain was shipped from Illinois the Pennsylvania warehouse, the customer could have the product shipped to it (as occurred in the Progressive case), or pick it up directly.

The lower courts had determined the shipment was part of "interstate" travel, and the endorsement applied because the fixed and persisting intent of both shippers was to move the grain by virtually continuous movement from Illinois to Pennsylvania. Due to gaps in the evidence, the Pennsylvania Supreme Court found there was not sufficient evidence to find the initial shipper's awareness and intent at the outset of the transportation of the grain was for the grain to embark on interstate travel to and through Pennsylvania.

### III. INTRA-STATE TRAVEL.

#### A. Does MCS-90 Apply To Intra-State Travel?

1. Although interstate motor carriers must provide proof of financial responsibility in accordance with the regulations of the Federal Motor Carrier Safety Administration, the Department of Transportation's jurisdiction does not extend to *intrastate* trucking operations.<sup>39</sup>
2. However, intrastate carriers of hazardous materials, substances and wastes must meet financial responsibility requirements of \$1,000,000 or \$5,000,000,000 depending on the material being transported.<sup>40</sup>

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#### **IV. ADMINISTRATIVE REQUIREMENTS OF THE MCS-90 ENDORSEMENT.**

##### **A. Where Should I Keep The MCS-90 Endorsement?**

A motor carrier operating with a United States Department of Transportation permit must keep a copy of the endorsements, insurance filings, and accompanying forms on file at their principal place of business." These documents are public information and as such, the documents must be produced to the public for inspection upon a reasonable request by a member of the public.<sup>42</sup>

##### **B. How Do I Cancel The MCS-90 Endorsement?**

###### ***1. The Motor-Carrier Receives 35 Days Written Notice.***

The MCS-90 financial responsibility endorsement may only be canceled by giving, in writing, thirty-five (35) days notice to the motor carrier of the cancellation. The thirty-five days commences from the date the notice is mailed.<sup>43</sup>

###### ***2. The Federal Motor Carrier Safety Administration Receives 30 Days Written Notice.***

In addition to the motor carrier, the insurer must also notify the Federal Motor Carrier Safety Administration thirty (30) days prior to cancellation. The thirty (30) days commences the day the notice is received by the Federal Motor Carrier Safety Administration at its offices in Washington, D.C.<sup>44</sup>

The Federal Motor Carrier Safety Administration's address in Washington, D.C. is:

*Federal Motor Carrier Safety Administration  
400 7<sup>th</sup> Street SW  
Washington, DC 20590*

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## V. NEW DEVELOPMENTS.

A significant development in the application and interpretation of MCS-90 is the determination of who is covered by an MCS-90 endorsement. The majority of jurisdictions have interpreted the endorsement to apply to the named insured, however, the Ninth and Tenth Circuits have interpreted the MCS-90 endorsement to include persons other than the named insured:

- A. John Deere Ins. Co. v. Nueva, et al. 229 F.3d 853 (9<sup>th</sup> Cir. 2000), cert. Denied, 534 U.S. 1127, 122 S. Ct. 1063 (2002).

The U.S. Court of Appeals in the 9<sup>th</sup> Circuit issued an opinion that reminds us that "the purpose of MCS-90 is to protect the public . . ."

Deere involved an rear-end accident between "Garcha" (not John Deere's named insured) who was driving a tractor/semi-trailer unit and a city bus operated by "Nueva" of the Los Angeles County Metropolitan Authority ("LACMTA"). Nueva and LACMTA claimed damages.

The tractor was owned by Blue Star Trucking and operated by its employee, Garcha. The trailer was owned by Sahota. John Deere insured Sahota the owner of the trailer. LACMTA filed a motion seeking indemnification from John Deere to LACMTA and Nueva on behalf of Sahota, Garcha and Blue Star Trucking. Importantly, the motion asked to court to declare Garcha and Blue Star Trucking as insureds pursuant to the MCS-90 endorsement attached to Sahota's policy. The District Court ruled in favor of John Deere; the Ninth Circuit Court of Appeals reversed and found that Sahota's MCS-90 endorsement also covered Garcha and Blue Star.

The Court focused on the definition of an "insured" and found the definition was broad enough to include permissive users of ay owned vehicle. The majority of courts have not followed this interpretation and continue to find that the insurance of the trailer in tow follows the tractor the trailer's liability is inseparable from the tractor. Garcha or Blue Star Trucking's insurance (had there been any) would have covered the trailer. Instead, the company who insured the trailer also insured the owner and operator of the tractor.

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- B. Pierre v. Providence Washington Insurance Co., 99 N.Y. 2d 222, 78 N.E.2d 52 (2002).

The New York Court of Appeals held that the insurer was obligated by the MCS-90 endorsement to pay a default judgment entered against the owner and driver of a tractor leased to a registered motor carrier. The tractor was garaged and licensed in Pennsylvania, but was being used in the motor carrier's business in New York, where the collision occurred. Plaintiff sued the owner and driver of the vehicle and obtained a default judgment of \$250,000 against them. Plaintiff then brought an action against the motor carrier's insurance company demanding payment under the policy. The original defendants (owner and driver of the tractor) had not notified the insurance company of the loss, as required by the policy, and the insurance company argued that Plaintiff could not recover from it under the policy. Plaintiff countered that MCS-90 required payment of the judgment since the owner and driver of the vehicle under the definition "insured" under the insurance policy.

Thus, even though the driver and operator had waived their rights under the policy by not reporting the loss, the insurance carrier was still obligated to pay the default judgment amount under the MCS-90 endorsement.

- C. Lynch v. Yob., 95 Ohio St. 3d 441, 768 N.E.2d 1158, cert denied sub nom. National Union Fire Ins. Co. of Pittsburgh v. Lynch, 123 S.Ct. 695 (2002).

In this case, the Ohio Supreme Court took a very expansive view of the MCS-90. Yob was a truck driver employed by Bath Transport, a registered motor carrier whose authority was being used when he was involved in a two vehicle collision. Bath maintained a policy of insurance for liability by AIG. The controversy arose over a policy AIG had issued to Central Cartage Company, the owner of the trailer attached to the Bath tractor at the time of the accident. The sole issue was whether the MCS-90 endorsement that covered the trailer also covered the owner and operator of the Tractor.

The Ohio Supreme Court found that the MCS-90 mandates coverage for permissive users of non-covered vehicles; it is irrelevant whether or not the

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driver qualifies as an insured under the basic policy and held that the endorsement followed the trailer and covered the tractor and its driver.

- D. Courts have found the MCS-90 to apply to someone other than the named insured where:
- i. There was a judgment against the employee truck driver and recovery from the employer's policy;<sup>45</sup>
  - ii. There was a judgment against the tractor-trailer driver and recovery from the trailer lessee's policy;<sup>46</sup>
  - iii. There was a judgment against the uninsured tractor owner and the uninsured truck driver and recovery from the trailer owner's policy;<sup>47</sup>
  - iv. There as a judgment against the tractor driver and recovery from the trailer owner's policy;<sup>48</sup>
  - v. There was a judgment against the driver of the tractor-trailer and the owner of the tractor and recovery from the trailer owner's policy;<sup>49</sup>

## V. MISCELLANEOUS ISSUES.

### A. MCS-90 Does Not Cover The Insured's Employees Killed or Injured in the Course of Employment.

1. The body of the MCS-90 endorsement expressly states "Such insurance as is afforded, for public liability, does not apply to injury or death of the insured's employees while engaged in the course of their employment, . . ."<sup>50</sup>

### B. MCS-90 Applies to Negligence, Not to Intentional Torts.

In Swartz v. McNabb, 830 So.2d 1093 (La.App.), the Louisiana court found that the MCS-90 endorsement applies only to negligent acts, not intentional torts.

The operator of a truck punched the manager of a convenience store who had asked him to move his truck. Plaintiff argued that the MCS-90 should apply (the tort was excluded from coverage under the basic policy). The court found that the MCS-90 applies only from injury resulting "from negligence in the operation,

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maintenance or use of motor vehicles." and that the injury be neither expected nor intended. The driver acted intentionally and the MCS-90 was inapplicable.

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1. 49 C.F.R. §387.
2. Westlake Transportation, Inc., et al. v. Michigan Public Service Commission, et al., 255 Mich. App. 589, 662 N.W.2d 784 (Mich. Ct. App. 2003).
3. The Law of Commercial Trucking: Damages to Person and Property, Matthew Bender & Co., Inc., 2004.
4. National American Ins. Co. v. Central States Carriers, Inc. et al., 785 F. Supp. 793; 1992 U.S. Dist. LEXIS 2727 (N.D. IN 1992).
5. The Law of Commercial Trucking: Damages to Person and Property, Matthew Bender & Co., Inc., 2004; Kaplan v. Harco Nat'l Ins. Co., 716 So.2d 673, 674-75 (Miss. App. 1998).
6. 49 C.F.R. §387.1.
7. Millers National Insurance Company v. Axel's Express, Inc., et al., 851 F.2d 267; 1988 U.S. App. LEXIS 8953 (9<sup>th</sup> Cir. Ct. App. 1988).
8. 49 C.F.R. §387.5.
9. Millers National Insurance Company v. Axel's Express, Inc., et al., 851 F.2d 267; 1988 U.S. App. LEXIS 8953 (9<sup>th</sup> Cir. Ct. App. 1988); Harco National Insurance Company v. Bobac Trucking, Inc., et al., 1995 U.S. Dist. LEXIS 21722 (N.D. Ca. 1995).
10. 49 C.F.R. §387.15.
11. 49 C.F.R. §387.15.
12. 49 C.F.R. § 387.7. Committee on Insurance Coverage Litigation, Coverage, Mosher, Vol. 13, No. 1, 2003
13. 49 C.F.R. §387.5
14. 49 U.S.C.A. §13102(12).
15. 49 C.F.R. §387.7. Committee on Insurance Coverage Litigation, Coverage, Mosher, Vol. 13, No. 1, 2003

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16. 49 C.F.R. §§387.7, 387.9, 387.31, 387.33. Committee on Insurance Coverage Litigation, Coverage, Mosher, Vol. 13, No. 1, 2003.
17. 49 C.F.R. §387.9
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20. 49 C.F.R. §387.33.
21. 49 C.F.R. §387.33.
22. 49 C.F.R. §387.27(b).
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30. 49 C.F.R. §387.15.
31. John Deere Insurance Company v. Nueva, et al. 229 F.3d 853, 2000 U.S. App. LEXIS 23490 (9<sup>th</sup> Cir. Ct. App. 2000); Adams v. Royal Indemnity Company, 99 F.3d 964; 1996 U.S. App. LEXIS 27836 (10<sup>th</sup> Cir. Ct. App. 1996).
32. 49 C.F.R. §387.15.
33. 49 C.F.R. §387. *et seq.*

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34. The Law of Commercial Trucking: Damages to Person and Property, Matthew Bender & Co., Inc., 2004; Committee on Insurance Coverage Litigation, Coverage, Mosher, Vol. 13, No. 1, 2003.
35. 49 C.F.R. §387.15.
36. Progressive Casualty Insurance v. Hoover, et al., 570 Pa. 423, 436, 809 A.2d 353, 360 (Pa. 2002), citing, United States v. Erie R.R. Co.š 280 U.S. 98, 102, 50 S.Ct. 51, 53, 74 L.Ed. 187 (1929).
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39. 49 U.S.C.A. §13501(a).
40. 49 C.F.R. §387.9.
41. 49 C.F.R. §387.7(d).
42. 49 C.F.R. §387.7(e).
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44. 49 C.F.R. §387.15.
45. Campbell v. Bartlett, 975 F.2d 1569 (10<sup>th</sup> Cir. 1992); See also, The Law of Commercial Trucking: Damages to Person and Property, Matthew Bender & Co., Inc., 2004.
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48. Lynch v. Yob, 95 Ohio St.3d 441 (2002); See also, The Law of Commercial Trucking: Damages to Person and Property, Matthew Bender & Co., Inc., 2004.
49. Pierre v. Providence Wash. Ins. Co., 99 N.Y. 2d 222, 78 N.E. 2d. 52 (2002); See also, The Law of Commercial Trucking: Damages to Person and Property, Matthew Bender & Co., Inc., 2004.
50. 49 C.F.R. 387.15.

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