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The MCS-90 Endorsement – Interstate Insurance Assurance

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What is the MCS-90?

- Attached to auto liability policy
- Does not provide insurance
- Insurers obligated to pay for any public liability

United States Department of Transportation
Federal Motor Carrier Safety Administration

Endorsement for Motor Carrier Policies of Insurance for Public Liability
under Sections 29 and 30 of the Motor Carrier Act of 1980

FORM MCS-90

Issued to _____ of _____
(Motor Carrier name) (Motor Carrier state or province)

Dated at _____ on this _____ day of _____, _____

Amending Policy Number: _____ Effective Date: _____

Name of Insurance Company: _____

Countersigned by: _____
(authorized company representative)

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.

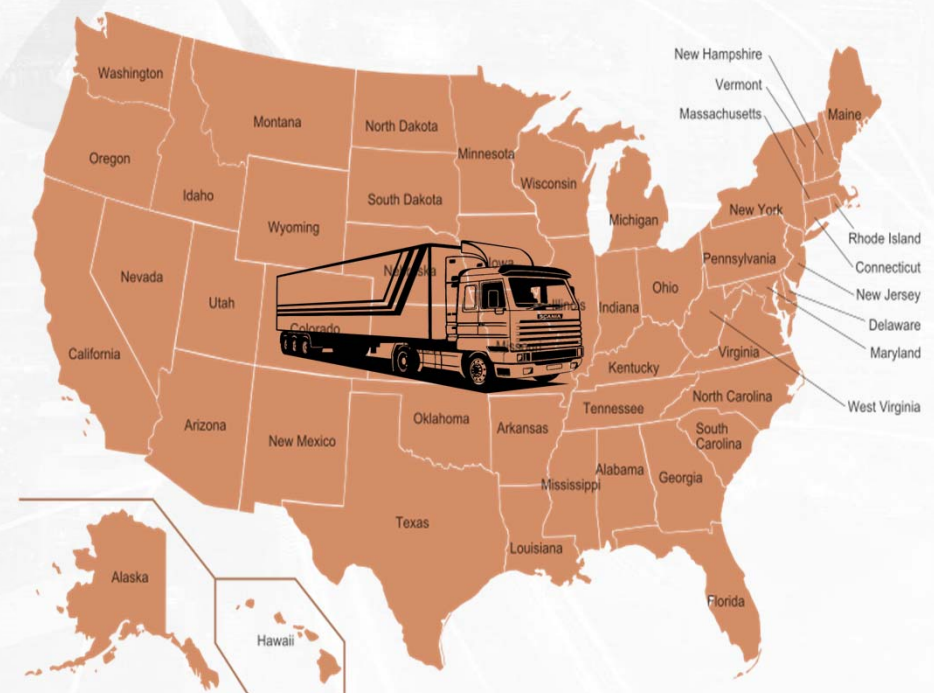
This insurance is excess and the company shall not be liable for amounts in excess of \$ _____ for each accident in excess of the underlying limit of \$ _____ for each accident.

Whenever required by the Federal Motor Carrier Safety Administration (FMCSA), the company agrees to furnish the FMCSA a duplicate of said policy and all its endorsements. The company also agrees, upon telephone request by an authorized representative of the FMCSA, to verify that the policy is in force as of a particular date. The telephone number to call is: _____

Cancellation of this endorsement may be effected by the company or 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).

When is the MCS-90 Endorsement required?

- For-hire motor carrier
- Operating in interstate commerce
- Policy limits vary depending on type of haul



Form Endorsement

- Not a typical endorsement
- Issuing insurer to pay final judgment against insured, even if not covered under basic policy



Background on MCS-90 Endorsement

- Motor Carriers Act of 1980
- FMCSA enforcement
- Components of the MCA of 1980
 - Deregulation
 - Reducing barrier to entry
 - Safety issues
 - Financial responsibility for trucking accidents



F M C S A
Federal Motor Carrier Safety Administration

Financial Responsibility for Trucking Accidents

- Reinforced financial responsibility by motor carriers
- MCA requires proof of financial responsibility to protect the public from risks by the carrier



MCA Sections 29 and 30

- Focus on insurance and scope of liability
 - Insurer agrees to pay a final judgment entered against insured for “public liability” resulting in the operation, maintenance, or use of motor vehicles
 - Public Liability inclusions
 - Bodily injury
 - Property damage
 - Environmental restoration
 - Demonstrates of financial responsibility to FMSCA

What are the policy limits for the MCS-90?

Category of Cargo	Minimum Coverage Required
Non-Hazardous Cargo	\$750,000
Oil and Some Hazardous Substances	\$1 million
Other Hazardous Substances/Radioactive Substances	\$5 million

Does the MCS-90 permit reaching minimum coverage by aggregation?

- Aggregation is permissible
 - Using two or more insurers to meet mandated limits
 - Excess carrier



Ways to Show Financial Responsibility

- Surety Bond
- Self-Insurance
 - Need significant liquidity, only bigger companies can consider
- MCS-90 Endorsement
 - By far the most common way of showing responsibility

What is filed with the FMCSA?

- BMC-91 or BMC-91X and MCS-90
 - Provides proof of insurance
 - BMC-91: single insurer
 - BMC-91X: multiple insurers sharing exposure





What doesn't the MCS-90 do?

- Insurers cannot rework language
- Does not modify coverage
- Does not necessarily terminate/cancel with underlying policy
- Does not absorb responsibility unless final judgment

Factors that trigger the MCS-90 into action

- Final judgment against insured motor carrier
- Judgment is for “public liability”
- Absence of coverage
- Judgment resulted from negligence in the operation of vehicles subject to financial responsibility requirements

Second Factor – Absence of Coverage within Base Policy

- Insurer's obligation under MCS-90 Endorsement is not triggered unless underlying policy does not provide coverage and other coverage is insufficient
 - *Carolina Casualty Insurance v. Yeates*, 584 F.3d 868 (10th Cir. 2009)

What are some things that don't trigger MCS-90?

- Claims by employees of the insured
- Cargo loss



Why would an insurer agree to this?

- Insured pays for the endorsement
- Gives insurer a claim for reimbursement



What is reimbursement under the MCS-90 Endorsement?

- If coverage is only because of MCS-90, insured is obligated to pay insurer back in full
- Violates tenent of insurance law

Commonly Litigated Issues with the MCS-90 Endorsement

- Amount of Endorsement exceeds the minimum financial requirements under the MCA?
- Private motor carriers filing MCS-90?
- Duty to defend insured by insurer?
- Ambiguities with MCS-90?
- No MCS-90 filed?
- Is MCS-90 coverage per-accident/per-person/per-year?

Amount of Endorsement Exceeds Minimum Financial Requirements

- Different kinds of cargo require different levels of coverage
- Insured and Insurer elect to increase coverage
 - Federal minimum requirement is \$750,000 for nonhazardous materials; company raises coverage to \$1 million

Private Motor Carriers and the MCS-90 Endorsement

- Private motor carriers are exempt
 - EXCEPTION: hazardous substances



Duty to Defend

- If insurer's only liability is under MCS-90, there is no duty to defend
- However, there is incentive to defend as insurer may ultimately have to pay for judgment against the insured
 - *Harco Nat'l Insurance v. Bobac*, 107 F.3d 733 (9th Cir. 1997)

Ambiguities in the MCS-90

- Ambiguities not construed against insurer
 - MCS-90 is promulgated by USDOT and cannot be modified
 - *Williams v. Universal Insurance Company*, 2014 WL 12621154, No 4:13-cv-3518-PMD (D.S.C. Oct. 9, 2014)

No MCS-90 Attached

- No basis to reform or modify filing to include MCS-90 if not attached
 - *Illinois Central Railroad v. Dupont*, 326 F.3d 665 (5th Cir. 2003).
 - Motor carriers are responsible for correct filings, not insurer
 - Other courts followed this logic, including:
 - The Northern District of Georgia in *Progressive N. Ins. Co. v. TAK Transp., LLC*, No. 1:13-CV-03662-LMM, 2015 U.S. Dist. LEXIS 180771 (N.D. Ga. Feb. 10, 2015);
 - The Southern District of New York in *General Star Nat'l Ins. Co. v. Ginnetti Trucking, LLC*, 2010 U.S. Dist. LEXIS 147890 (S.D.N.Y. Feb. 15, 2010);
 - The Northern District of Indiana in *Carolina Cas. Ins. Co. v. Estate of Zinmaster*, No. 1:06-CV-33-TS, 2007 U.S. Dist. LEXIS 14579 (N.D. Ind. Feb. 27, 2007).

Is the MCS-90 Per-Accident, Per-Person, or Per-Year?

- MCS-90 applies to each accident, not to each injured individual or each year
 - *Carolina Casualty Insurance Company v. Karpov*, 559 F.3d 621 (7th Cir. 2009)
- Limits are not a yearly aggregate

Scenarios in Interstate Commerce in which MCS-90 is NOT Triggered

- For-hire carrier traveling interstate will have final judgment against them, but MCS-90 not triggered:
 - Goods not moving under named insured's motor carrier's authority
 - Loss occurred outside of United States
 - *Lincoln General Ins.Co. v. De La Luz Garcia*, 501 F.3d 436 (5th Cir. 2007).
 - Intrastate only in scope
 - Injury is to insured's truck driver
 - Injury or damage to property was cargo



QUESTIONS?



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Upcoming Themis Webinars *Mark Your Calendars*

- **Transportation: The MCS-90 Endorsement - Interstate Insurance Assurance Webinar**
Thursday, November 5, 2pm ET
- **Biomechanics: Using all the Evidence with SEA LTD Webinar**
Thursday, November 12, 2pm ET
- **Product Liability: Basics and Claims Handling Pointers Webinar**
Thursday, December 3, 2pm ET
- **Women of Themis: Candid Conversations with a Decision Maker - Comcast NBCUniversal's Senior Director, Claims Management Global Risk Management's Deborah Saunders Webinar**
Wednesday, December 16, 4pm ET