The Murky MCS-90 Endorsement Re-Visited

Litigation involving the murky and oft-misunderstood MCS-90 endorsement remains abundant since its inception in response to the requirements of the Federal Motor Carrier Act of 1980 ("MCA"), Pub. L. No. 96-296, 94 Stat. 793 (49 U.S.C. § 10101 et seq.). Specifically, the MCA requires any motor carrier involved in for-hire interstate carriage to establish proof of financial responsibility equal to or greater than minimums of each state. Compliance with this financial responsibility requirement may be achieved through one of three methods (see 49 C.F.R. § 387.7(d)(1)-(3)):

1. “Endorsement(s) 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 by an insurer(s);

2. A “Motor Carrier Surety Bond for Public Liability under Section 30 of the Motor Carrier Act of 1980” (Form MCS-82) issued by a surety; or
The 2017-18 started out with a bang! It began with the 2017 Annual Meeting of the ABA in August 2017. We held a business meeting and a Committee dinner in New York. Fun was had by all. At that meeting, I had the difficult task of assuming the Chair of this great Committee from Sergio Chavez. Enough good things cannot be said about Sergio’s leadership of this Committee. The dedication demonstrated by Sergio, and his predecessor, Eric Probst, make for hard shoes to fill. As a Committee, we all owe a debt of gratitude to these driven professionals. Thank you, Sergio and Eric.

We next met at the Northwest Trucking Conference in Fayetteville, Arkansas. This is always a Committee favorite. We had another dinner at a uniquely Fayetteville restaurant and really enjoyed seeing everyone again. We also had a very healthy turnout at the Business Meeting that we always hold at this conference. We also had some new people attend the meeting. We hope these “newbies” will continue to be interested in the Committee and attend future meetings. We also had a meeting in South Florida. At this meeting, we also had two (2) new members, Jennifer Parrott and Lauren Godfrey, appear for the meeting.

We did not have a business meeting at the mid-year meeting in Vancouver; however, I attended this one as well. Many people spoke to me about the Committee and how it enjoys a good reputation within TIPS. This can only be accomplished through the Committee’s members, which is a testament to you all. Finally, we will hold our next business meeting at the TIPS Section Conference in Los Angeles on May 2, 2018. I believe we will have a great turnout for this, and I look forward to seeing everyone.

We want to encourage all of our members to become active in our Committee as there are great networking and publication opportunities. If you are interested in receiving more information on our Committee, don’t hesitate to simply call Heidi Ruckman (Membership), Lewis Wardlaw (Chair-Elect), me, or any of our other officers as we would welcome the opportunity to discuss our Committee’s activities with you and answer any questions you may have. We have been asked by the incoming Chair of TIPS, Roy Cohen, to conduct a “Vice Chair Drive” within our firms and friends. If any of you have any junior partners or senior associates who would be interested in getting involved, please do not hesitate to contact me or any of our other officers.

Our final meeting for the 2017-18 fiscal year will be held in Chicago at the ABA’s Annual Meeting that will take place from July 27-August 4, 2018. We invite all
interested people to attend. We will all enjoy being together once again. We will host a dinner, and, if the schedules work out and stars align, we will try to catch a Cubs game (Note: They host the Padres August 2-5). At that meeting, I will pass the mantle of leadership to Lew and Heidi. The Committee will be in wonderful hands with these two motivate and dedicated attorneys.

This newsletter has several informative and timely articles which we hope ultimately help you in your practice. We wish everyone a great spring, and look forward to seeing you in L.A. and at many other future meetings!”

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We encourage you to stay up-to-date on important Section news, TIPS meetings and events and important topics in your area of practice by following TIPS on Twitter @ABATIPS, joining our groups on LinkedIn, following us on Instagram, and visiting our YouTube page! In addition, you can easily connect with TIPS substantive committees on these various social media outlets by clicking on any of the links.
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- Enjoy:
  Explore Los Angeles and the sunshine state with colleagues, new and old.

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How the ELD Mandate Will Fuel Reptilian Tactics and Expand Litigation

In December 2017, many motor carriers were required to comply with the Commercial Motor Vehicle Safety Enhancement Act of 2012 (the “ELD Mandate”), which ordered that commercial motor vehicles be equipped with electronic logging devices (“ELDs”) for purposes of improving compliance with hours-of-service regulations. 49 U.S.C. § 31137(a)(1). The ELD Mandate requires that all ELDs automatically connect to an engine’s control module and record certain data, including the date, time, vehicle location and motion status, vehicle mileage, engine hours and power status; however, ELDs are not required to track and document a driver’s speed, hard brakes, or exact location through GPS tracking. (See 49 C.F.R. § 395.26). There is no doubt that ELD service providers will offer comprehensive solutions beyond what is required by the ELD Mandate, including integrating ELDs with other useful fleet management tools such as analytics software designed to identify changes in driving patterns, provide real-time alerts, and recommend ways to address possible safety concerns.

The ELD Mandate has caused a significant amount of controversy and debate throughout the trucking industry; however, implementation of the ELD Mandate will likely have many benefits, including cost savings for motor carriers, increasing motor carrier safety ratings by assisting in the prevention of hours-of-service and other violations of the Federal Motor Carrier Safety Regulations (“FMCSRs”), and potentially saving lives and preventing numerous injuries resulting from accidents involving commercial motor vehicles. (Electronic Logging Devices to be Required Across Commercial Truck and Bus Industries, Dec. 10, 2015, https://www.fmcsa.dot.gov/newsroom/electronic-logging-devices-be-required-across-commercial-truck-and-bus-industries). While electronic data has been utilized by larger motor carriers for years, the fact that motor carriers of all sizes will now be required to maintain voluminous electronic data through use of an ELD service provider will no doubt change the way that trucking cases are litigated. Specifically, the voluminous data that will be maintained by ELD services providers may assist those plaintiff’s lawyers utilizing “reptile” tactics to influence jurors by appealing to their community-conscious minds and may also increase the use of electronically stored information (“ESI”) in discovery, which will raise questions concerning the extent to which such information is discoverable in the context of a trucking claim.

Read more on page 18
Specific Jurisdiction Limited by U.S. Supreme Court in Class Action against Bristol Myers

In 2011 and 2014, the United States Supreme Court limited the scope of general personal jurisdiction over defendant corporations to their state of incorporation and principal place of business unless there existed “exceptional circumstances.” See Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011); see also Daimler AG v. Bauman, 134 S. Ct. 746 (2014). More recently, the United States Supreme Court addressed whether a state court could exercise specific personal jurisdiction over a defendant corporation to entertain nonresidents’ claims. Bristol Myers Squibb v. Superior Court of California, San Francisco County, et al., 2017 U.S. LEXIS 3873 (U.S. 2017), 137 S.Ct. 1773 (2017). The Bristol Myers decision established that states may not expand the scope of specific jurisdiction to simply escape the limits of general jurisdiction as recognized in Daimler.

Facts and Procedural History

In Bristol Myers, a group of plaintiffs, including 86 California residents and 592 residents from 33 other states, filed a civil action in California state court against a pharmaceutical company, Bristol-Myers Squibb Company (“Bristol Myers”), for injuries associated with the drug, Plavix. Each of the plaintiffs asserted 13 claims under California law.

Bristol-Myers asserted lack of personal jurisdiction and moved to quash service of summons on the nonresidents’ claims, arguing that California lacked specific jurisdiction because none of the events which were relevant to the claim occurred in California. Bristol Myers relied on the following facts: (1) Bristol Myers was incorporated in Delaware, headquartered in New York, and maintained substantial operations in New York and New Jersey; (2) over 50 percent of Bristol Myers’ workforce was employed in New York and New Jersey; and (3) Bristol Myers operated only five research and laboratory facilities, with approximately 160 employees, in California. Furthermore, while there are approximately 250 sales representatives and a small state-government advocacy office in California, Bristol Myers argued that they did not develop, create a marketing strategy, manufacture, label, package, or perform any regulatory activities for Plavix in California. In fact, only one percent of the company’s nationwide sales revenue was derived from activities in California.

The California Superior Court denied the motion to quash and held that California courts possessed general jurisdiction over Bristol Myers because it engaged in
extensive activities in the State. The Court of Appeal found that the California lacked general jurisdiction under *Daimler*, but it possessed specific jurisdiction over the nonresidents’ claims. The California Supreme Court affirmed, agreeing with the Court of Appeal on the issue of general jurisdiction, but was divided on the question of specific jurisdiction. The majority adopted a “sliding scale” approach to specific jurisdiction where “the more wide ranging the defendant’s forum contacts,” the more easily a plaintiff may establish personal jurisdiction “based on a less direct connection between [the defendant’s] forum activities and the plaintiffs’ claims.” The court held that the nonresidents’ claims were similar in several ways to the claims of the California residents (where specific jurisdiction was uncontested). Applying this rule, the California courts found specific jurisdiction existed because “[b]oth the resident and nonresident plaintiffs’ claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product.” While acknowledging that there was no claim that Plavix itself was designed and developed in Bristol Myers’ California research facilities, the court thought it was significant for personal jurisdictional purposes that research was conducted in the State.

**Supreme Court Decision**

The Supreme Court granted *certiorari* to decide whether the California courts’ exercise of jurisdiction violated the Due Process Clause of the Fourteenth Amendment. In an 8-1 opinion authored by Justice Alito, the Court ultimately rejected the California Supreme Court’s sliding scale approach and instead, acknowledged the limits imposed by the Fourteenth Amendment’s Due Process Clause on a state court’s ability to decide cases brought by plaintiffs from varying jurisdictions.

The Court first recognized that there must be “an affiliation between the forum and the underlying controversy” for a state court to exercise specific jurisdiction. Such an affiliation is often identified as an activity or an occurrence which takes place in the forum state and subject to the state's regulation. *Goodyear*, 564 U.S., at 919. The Court noted that under California’s sliding scale approach, the strength of the connection between the forum and the specific claim is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. However, a defendant’s general connections with the forum is not enough. The Court held that the mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California and allegedly sustained the same injuries as the nonresidents did not permit the State to assert specific jurisdiction over the nonresidents’ claims. The Court further held that there was no connection between the forum and the specific claims at issue. The mere fact that Bristol Myers contracted with a California distributor was not enough to establish personal jurisdiction in the
The opinion concludes with Justice Alito stating that the "straightforward application in this case of settled principles of personal jurisdiction will not result in the parade of horribles that [plaintiffs] conjure up."

In her dissenting opinion, Justice Sotomayor, claimed that the decision will make it nearly impossible to bring a nationwide mass action in state court against defendants who are at home in different states and will result in piecemeal litigation and the bifurcation of claims. Justice Sotomayor stated that there is nothing unfair about subjecting a massive corporation to suit in a state for a nationwide course of conduct that injures both forum residents and nonresidents alike, and that the effect of the opinion will curtail and possibly eliminate plaintiffs' ability to hold corporations fully accountable for their nationwide conduct.

**Impact**

The majority in *Bristol Myers* reiterated well-settled precedent—that specific jurisdiction is deficient when there is no connection between the forum state and the underlying controversy. In this case, the decision to contract with a California company and distribute a product nationally was not sufficient to satisfy specific jurisdiction. The ruling makes it clear that lower courts may not loosen the rules governing specific jurisdiction in the wake of the Court's decision in *Daimler*, which emphasized the limitations on general jurisdiction.

The holding in *Bristol Myers* is not simply limited to pharmaceutical and product liability suits. It impacts any jurisdiction subject to high-stakes litigation, including commercial transportation, which limits the forums where class actions in state court can proceed. See i.e., *BNSF Railway Co. v. Tyrrell*, 2017 WL 2322834 (2017) (reaffirming the decision in *Bristol Myers*).

The *Bristol Myers* decision will be particularly useful to trucking defense attorneys who respond to numerous lawsuits filed in plaintiff-friendly jurisdictions, including jurisdictions where the accident did not occur, where the plaintiff does not reside, and where the trucking company is not incorporated and/or have its principal place of business. Going forward, it is anticipated that plaintiffs' attorneys will continue to rely on the contention that a corporation doing business in a state or designating an agent to accept service in that state constitute consent to the jurisdiction, in addition to any other creative strategies or arguments developed in response to the ruling. However, the *Bristol Myers* decision provides further certainty regarding specific jurisdiction and will reduce the ability of plaintiff's lawyers to engage in forum shopping.
(3) A written decision, order, or authorization of the Federal Motor Carrier Safety Administration authorizing a motor carrier to self-insure under § 387.309, provided the motor carrier maintains a satisfactory safety rating as determined by the Federal Motor Carrier Safety Administration....


The MCS-90 endorsement (model form is reproduced at 49 C.F.R. § 387.15) is actually nothing more than a single-page “form” typically appended as a “rider” to insurance policies creating a guarantee, or surety, “which obligates an insurer to pay certain judgments against the insured arising from interstate commerce activities, even though the insurance contract would have otherwise excluded coverage” (including liability having nothing to do with the issue of negligence). In other words, the MCS-90 endorsement ensures, consistent with public policy, that there will be no financial consequences in the event that a motor carrier doesn’t have the minimums required. The MCS-90 states that it “covers all vehicles owned, operated, or maintained by the insured regardless of whether or not each motor vehicle is specifically described in the policy.” However, if a claim is paid out under the MCS-90, the insurance company may recoup its losses by subrogating the claims paid against the motor carrier.

Not surprisingly, judicial intervention is often needed to interpret and apply federal law in cases involving the MCS-90 endorsement. Unfortunately, judicial interpretation and application of related law has been anything but consistent. This article provides an update on selected areas of this murky law in an effort provide transportation litigators with a better understanding of it. A brief recap of what led to the background history of this endorsement, followed by a discussion on current or developing law on specific issues.

**Historical Backdrop**

Safety and financial responsibility regulations were enacted in response to the exercise of allegedly abusive practices of interstate motor carriers. See Motor Carrier Act of 1935, 49 Stat. 543, ch. 498, approved 1935-08-09 (revised and re-enacted in 1978 through 49 U.S.C. § 11107); see also 49 U.S.C. § 10927. Carriers purportedly employed leased, borrowed, or interchanged vehicles such as tractor-trailers in order to avoid safety regulations governing equipment and drivers. *American Trucking Ass'n v. United States*, 344 U.S. 298, 300 (1953). In some cases, employment of non-owned trucks resulted in confusion as to who was financially responsible for
accidents caused by those vehicles. See generally Mellon Nat’l Bank & Trust Co. v. Sophie Lines, Inc., 289 F.2d 473 (3d Cir. 1961). This avoidance and resultant confusion were deemed a threat to the safety and other interests of the public and economic stability of the trucking industry. Congress expressed a “fear that increased safety problems [would] result from the expanded entry provided in [the MCA]” and that “increased entry [would] open the highways to truckers who might have little concern for the safe operation and maintenance of their vehicles, thereby posing a threat to those who share the highways with them.” H.R.Rep. No. 96-1069, at 6, as reprinted in 1980 U.S.C.C.A.N. at 2284; see also 49 U.S.C. § 304(e) (1956). This all led to incorporation of provisions that addressed these safety and financial responsibility concerns into the MCA. Canal Ins. Co. v. Distrib. Servs. Inc., 320 F.3d 488, 489 (4th Cir. 2003).

The now-defunct Interstate Commerce Commission (“ICC”) was the agency that initially implemented and administered safety and financial responsibility regulations by requiring financial responsibility as a condition precedent to issuance of interstate operating permits. After the U.S. Department of Transportation (“DOT”) replaced the ICC in 1995, the Federal Motor Carrier Safety Administration (“FMCSA”) took over oversight and administration of these regulations. Today, these regulations require: (1) that every lease entered into by a licensed commercial carrier contain a provision declaring it will maintain “exclusive possession, control, and use of the equipment for the duration of the lease”; (2) that the carrier “assume complete responsibility for the operation of the equipment for the duration of the lease” (49 C.F.R. § 1057.12(c)); and (3) that had the carrier maintain insurance or other 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” under the carrier’s permit. 49 C.F.R. § 1043.1(a). Specifically, the MCA provides that a commercial motor carrier3 may operate only if registered to do so and must be “willing and able to comply with ... [certain] minimum financial responsibility requirements.” 49 U.S.C. §§ 13901 & 13902(a)(1).

MCS-90 Endorsement and Liability Insurance

The financial responsibility provisions of an MCS-90 endorsement are rather ambiguous regarding how they interact with underlying insurance coverage. “Courts across the country have taken vastly different approaches to the issue.” Spirit Commercial Auto Risk Retention Group, Inc. v. Kailey, 2017 WL 2935726, at *5 (E.D. Mo. July 10, 2017). This is the consequence of the language of the MCS-90 endorsement itself which declares that “no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement
thereon, or violation thereof, shall relieve the [insurance company] from liability or from the payment of any final judgment, within the limits of liability herein described.” This language arguably suggests that the endorsement modifies an underlying policy to the extent the policy is inconsistent with the purpose of an MCS-90 endorsement. However, the endorsement also provides 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.”

Ambiguities aside, the majority of circuit courts have concluded that the MCS-90 endorsement is a surety rather than a modification of the policy because it acts as safety net in the event other insurance is lacking. Canal Ins. Co. v. Carolina Cas. Ins. Co., 59 F.3d 281, 283 (1st Cir.1995) (protects the public “when other coverage is lacking”). Under this reasoning, 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. The surety obligation to pay a judgment (e.g., in a negligence action, for example) against a motor carrier under the MCS-90 endorsement is triggered 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. Kline v. Gulf Ins. Co., 466 F.3d 450, 451 (6th Cir. 2006).

Selected Issues And Case Law

**Federal Question and Jurisdiction**


**Minimum Coverage Under MCS-90’s Financial Responsibility Scheme**

 The minimum amount of coverage required to meet financial responsibilities under MCS-90 regulations depend upon the type of cargo involved in interstate transportation. Carolina Cas. Ins. Co. v. Yeates, 584 F.3d 868, 885 (10th Cir. 2009).
Motor carriers must maintain at least $750,000 in financial responsibility coverage for vehicles transporting non-hazardous cargo, $1 million for vehicles transporting oil and certain hazardous substances, and $5 million for other hazardous substances and radioactive materials. See 49 C.F.R. § 387.9.

**Vehicles Not Listed On Policy**
The MCA and subsequent regulations promulgated by the FMCSA require interstate motor carriers to obtain “a special endorsement ... providing that the insurer will pay within policy limits any judgment recovered against the insured motor carrier for liability resulting from the carrier’s negligence, whether or not the vehicle involved in the accident is specifically described in the policy.” *Environmental Cleanup, Inc. v. Ruiz Transport, LLC*, 2017 WL 2080270, at *1 (W.D. Okla. May 12, 2017) (citations omitted). So even if the MCS-90 endorsement is attached to a policy that covers only listed vehicles, the endorsement applies to all vehicles that have statutory insurance requirements under the MCA. *Canal Ins. Co. v. First Gen’l Ins. Co.*, 889 F.2d 604, 608 (5th Cir. 1989), modified by *Canal Ins. Co. v. First Gen’l Ins. Co.*, 901 F.2d 45 (5th Cir.1990).

**Insurers Not Responsible for Attaching MCS-90 Endorsement**
Motor carriers are required to have the MCS–90 endorsement as a part of its vehicle insurance policy. A carrier’s failure to obtain such an endorsement does not make an insurer liable for damages incurred by a third party. This conclusion is the result of at least one court’s rejection of an argument that, since carriers are required to have the endorsement, the insurance policy should be read as automatically including the endorsement. *Illinois Cent. RR Co. v. Dupont*, 326 F.3d 665, 668 (5th Cir. 2003).
The reasoning underlying this is that regulations requiring an endorsement in lieu of other financial responsibility options are directed at the motor carrier, not its insurer. Failure to comply with these financial responsibility regulations carries a fine against the “person ... who knowingly violates” the financial responsibility rules. 49 C.F.R. § 387.17 (2002); see also 49 U.S.C. § 31139(f). Because regulations requiring the MCS–90 endorsement are directed at the motor carrier, courts have held that they “impos[e] a duty on the insurer to make sure that non-exempt motor carriers secure the required insurance.” *Illinois Cent. RR Co.*, 326 F.3d at 669. “To hold that that the MCS–90 endorsement is automatically a part of the policy whether or not a motor carrier requested or paid for such an endorsement would create a perverse incentive. Motor carriers then would have an incentive not to comply with the regulations and obtain the endorsement and pay the additional premium associated with it, knowing that the courts would deem the endorsement part of the policy whether or not it was requested by the carrier.” *Id.* The remedy, therefore, is through a claim against the carrier and not the insurer in the event the endorsement was not requested and made a part of the insurance policy.
“Transportation” Which Triggers MCS-90 Coverage
A plain-English interpretation of the text of the MCS-90 endorsement and § 30 of the MCA has led to the universal conclusion that only vehicles engaged in the transportation of property in interstate commerce are covered. See, e.g., Canal Ins. Co. v. Coleman, 625 F.3d 244, 251 (5th Cir. 2010). This “trip-specific” approach asks the question of whether the accident occurred while the insured vehicle was transporting property in interstate commerce. Pace v. Travelers Indem. Co. of America, 2010 WL 5141252, at *2 (E.D. La. Dec. 9, 2010) (citing cases). Thus, the MCS-90 endorsement does not cover other kinds of liabilities--i.e., liabilities incurred outside of the transportation of property.

The MCS-90 Endorsement and the Meaning of “Insured”
There is no consensus on whether the MCS-90 endorsement applies to permissive users of an insured vehicle or other parties who are excluded under the insurance policy at issue. See, e.g., John Deere Ins. Co. v. Nueva, 229 F.3d 853, 858 (9th Cir. 2000) (“MCS-90 endorsement requires an insurer to indemnify a permissive user of a non-covered auto”). In response to John Deere and other cases with similar holdings, insurance companies and the American Insurance Association petitioned the FMCSA to issue a ruling on whether the MCS–90 endorsement applies where a party is excluded or disqualified under a policy of insurance. The FMCSA responded by issuing “regulatory guidelines” that suggest the term, “insured” should be construed to mean the motor carrier identified in the policy and not another party excluded under a policy.

The problem with these guidelines is that this seems to amount to a modification of the terms of policies that do provide coverage to permissive users. As discussed in a preceding section herein, a majority of circuit courts have concluded that the endorsement acts as a surety and not a modification of policy language. In the end, many courts have followed the FMCSA’s guideline and rejected the holding of John Deere and its progeny. Armstrong v. U.S. Fire Ins. Co, 606 F.Supp.2d 794 (E.D. Tenn. 12009) (providing an in-depth analysis of this issue).

Insolvency and MCS-90 Obligations
The MCS-90 endorsement imposes an obligation on the insurer to provide coverage for “any final judgment ... irrespective of the financial condition, insolvency or bankruptcy of the insured.” 49 C.F.R. § 387.15. In this event, “the motor carrier becomes a judgment-debtor to the injured party, the judgment-creditor. The endorsement would then operate to read out any exclusions or limitations and thereby require the MCS–90 insurer, as a surety, to pay the injured party.” Carolina Cas. Ins. Co., 584 F.3d at 885.
However, the “endorsement does not extinguish the debt of the insured; it transfers the right to receive the insured's debt obligation from the judgment creditor to the insurer.” *Travelers Indemn. Co. v. Western America Specialized Transp. Servs., Inc.*, 409 F.3d 256, 260. (5th Cir. 2005). It merely shifts the risk of non-payment from the injured party to the MCS–90 insurer. See *49 C.F.R. § 387.15* (insurer has right to reimbursement from motor carrier for payment of judgment).

**Exempt Commodities**

Courts have been inconsistent in their application of the MCS-90 endorsement in cases involving exempt commodities. A majority of courts has held that the MCS-90 endorsement does not apply to transportation of exempt commodities such as agricultural products. *49 USC § 13506(a)(6)(B)*. Other courts have held that, despite the fact that a carrier is engaged in transportation of exempt commodities, the MCS-90 endorsement may nonetheless apply to the carrier if it is also engaged in the transportation of non-exempt commodities on other separate occasions. See, e.g., *Century Indem. Co v. Carlson*, 133 F.3d 591, 599-600 (8th Cir. 1998) (“MCS-90 endorsement applies notwithstanding that an interstate motor carrier transported an agricultural commodity” because an agricultural commodity exemption constitutes a limitation on the jurisdiction of the Interstate Commerce Commission, while the MCS-90 regulation was promulgated under the broader jurisdiction of DOT to impose financial responsibility standards).

**Interstate vs. Intrastate and State Endorsements**

As noted, the MCS-90 applies only to interstate transportation—not to intrastate transportation. In such cases, minimum levels of financial responsibility under federal law are not required (although some states do dictate their own levels of financial responsibility in the absence of federally mandated levels as discussed below). See, e.g., *Thompson v. Harco Nat’l Ins. Co.*, 120 S.W.3d 511 (Tex. App. 2003).


Absence of an MCS-90’s application notwithstanding, some states such as California and Pennsylvania have imposed on commercial motor carriers financial requirements (comparable to its federal counterpart) when intrastate transportation
is involved. But see Connecticut Indem. Co. v. QBC Trucking, Inc., 2005 WL 1038878, at *6 (S.D.N.Y. May 5, 2005) (“Any transportation occurring within the commercial zone of New York City is beyond the DOT’s jurisdiction and therefore exempt from DOT regulations”) (citations omitted).

**Triggering of Payment and Subrogation Rights**

A payment by the insurer under the MCS-90 endorsement should only occur if and when a final judgment is rendered against the insured. See 49 C.F.R. § 387.15. Upon receipt of a final judgment, a claimant can invoke the MCS-90 endorsement and request payment from the insurer. After paying the judgment, the MCS-90 endorsement grants the payor of the judgment the right to demand payment or reimbursement from the insured. Canal Ins. Co. v. Underwriters at Lloyd’s London, 435 F.3d 431, 442 n.4 (3d Cir. 2006). In other words, the motor carrier may be required to reimburse the MCS-90 insurer for any payout the insurer would not otherwise have been obligated to make under the policy of insurance (because, for example, the tractor-trailer was not listed a scheduled vehicle). Stated succinctly, the endorsement is not meant to be a “windfall” for the motor carrier. Harco Nat’l Ins. Co. v. Bobac Trucking Inc., 107 F.3d 733, 736 (9th Cir. 1997).

**MCS-90 Endorsement and the Duty to Defend**

Bottomline—the MCS-90 endorsement does not create a duty to defend. An MCS-90 endorsement only creates a duty to indemnify in the event of liability. Accord OOIDA Risk Retention Group, Inc. v. Williams, 579 F.3d 469, 478 n.6 (5th Cir.2009) (MCS-90 endorsement relates solely to duty to indemnify, not duty to defend).

**Nullification of Exclusions**

Courts have sometimes held that MCS-90 endorsements trump policy exclusions when such exclusions would defeat financial protection for the public. For example, the Tenth Circuit held that the endorsement trumps non-cooperation and notice clauses. Campbell v. Bartlett, 975 F.2d 1569, 1580-81 (10th Cir. 1992).

**Conclusion**

Although interpretation and application of MCS-90 law is not entirely uniform, the judiciary does consistently recognize the public’s interest in ensuring that authorized interstate carriers will satisfy a judgment in the event of injuries sustained due to negligent acts. See, e.g., John Deere Ins. Co., 229 F.3d at 857; Harco Nat’l Ins. Co. v. Bobac Trucking Inc., 107 F.3d 733, 736 (9th Cir.1997) (referencing Canal Ins. Co. v. First Gen’l Ins. Co., 889 F.2d 604, 611 (5th Cir.1989)) (“The purpose of the MCS-90 is to protect the public, not create a windfall for the insured.”); accord Kline
endnotes

1. "Financial responsibility" means "the financial reserves (e.g., insurance policies or surety bonds) sufficient to satisfy liability amounts set forth ... covering public liability." 49 C.F.R. § 387.5.

2. The MCS-90 form with definitions and "schedule of limits" along with other forms may be downloaded from the Federal Motor Carrier Safety Administration website: http://www.fmcsa.dot.gov/forms/print/MCS-90.htm.

3. The MCA defines "motor carrier" as "a person providing motor vehicle transportation for compensation." 49 U.S.C. § 13102(14). Federal regulations promulgated pursuant to the MCA and accompanying the MCS-90 endorsement define "motor carrier" as a "for-hire motor carrier or a private motor carrier." 49 C.F.R. § 387.5.
A. ELDs and “Reptile” Tactics: Changing the Focus of Trucking Claims

By now, most civil defense litigators have either heard of or experienced a plaintiff’s attorney who uses “reptile” tactics in an effort to inflate the value of their case and influence jury decision-making. Generally, the “reptile” strategy triggers jurors’ survival instincts, or their “reptilian brain”, by emphasizing that the defendant’s actions present an immediate danger to their community and that the actions of the defendant must be punished as a means of deterrence. (What is Reptile Theory?, Excelas, http://www.excelas1.com/perspectives/blog/post/2016/07/29/What-is-Reptile-Theory.aspx [Sept. 5, 2017]). Use of reptilian tactics is common in civil cases involving tractor trailer collisions, with plaintiff’s lawyers framing pleadings, discovery, depositions, and trial around the action or inaction of the motor carrier and/or the driver rather than focusing on the actual accident or the plaintiff’s injury. In trucking cases, plaintiff’s lawyers use “reptile” tactics to focus on (1) establishing the existence of a general or specific danger or safety rule, (2) luring a defense witness into agreeing that such a danger/rule exists, (3) demonstrating how the motor carrier or driver violated the rule or caused the danger, and (4) emphasizing that the motor carrier’s and/or the driver’s action or inaction “needlessly endangers the community.” In theory, the emphasis on a motor carrier’s or a driver’s violation of a safety rule appeals to the jury’s “reptile” brain by encouraging jurors to take action, usually by way of awarding large damages, to protect their community, which can result in a large damages award even when the plaintiff’s injuries are minimal.

After implementation of the ELD Mandate, plaintiff’s lawyers will have easy access to voluminous amounts of data that was not likely available in cases involving smaller motor carriers. While this increase in information will undoubtedly assist defense attorneys by making it easier to spot potential hours-of-service and other violations by their clients, the ease of access to such voluminous information will also assist plaintiff’s lawyers in pinpointing the very same thing – violations of the FMCSRs. Additionally, a motor carrier utilizing an ELD provider that offers more than the ELD Mandate requires will essentially be agreeing to hand over such additional information to a plaintiff’s attorney in discovery. For example, while the ELD Mandate does not require a motor carrier to maintain information concerning a driver’s speed or hard brakes, it is possible that courts may require motor carriers to produce such information in discovery if it is recorded and maintained by the ELD provider and is easily accessible by the motor carrier. (See analysis of this issue in Section B supra). The voluminous amount of data that will become easily accessible to plaintiff’s lawyers after December 2017 could make it easier for a
plaintiff to inflate the value of the case, which in turn may result in higher settlements by motor carriers that are worried that the information captured by the ELD provider will ignite the “reptilian” minds the jury.

Information recorded and maintained by ELDs will be especially helpful to a plaintiff’s lawyer during the deposition of a motor carrier’s safety director. Imagine a case where a driver was in violation of an hours-of-service regulation at the time of the collision, the ELDs produced by the motor carrier identified other prior hours-of-service violations by the same driver, and the ELDs clearly document each and every notice sent to and received by the driver and motor carrier prior to and after each hours-of-service violation. Now imagine that, after pointing out each and every violation of the FMCSRs by the driver along with the pre-and-post notice of violation received by the motor carrier, the safety director of the motor carrier admits that no warnings or reprimands were given to the driver and no additional training was provided to the driver. Not only would these facts support a claim for negligent training, negligent supervision, and/or negligent entrustment, but they could support a claim for punitive damages depending upon the nature of the prior violations and whether such violations were similar to the violation at issue in the litigation. It is also easy to imagine how this narrative would play out at trial and how having this data from the motor carrier’s own ELD provider will allow a plaintiff’s lawyer to persuasively argue that the motor carrier is clearly indifferent to violations of the FMCSRs by its drivers and is not concerned with the safety of other drivers operating in the community.

Plaintiff’s lawyers will likely be able to request and obtain from the motor carrier’s ELD provider information regarding other drivers not involved in the collision at issue and, in turn, discover prior violations of the FMCSRs by such other drivers. Imagine how angry a juror may become after discovering that, not only did the motor carrier fail to reprimand or provide additional training to the driver at issue after each and every violation the FMCSRs, the motor carrier was indifferent to violations by all of its drivers despite the motor carrier’s easy access to analytical and other data clearly documenting such violations. There is no doubt that this compilation of data provided by ELDs will greatly benefit plaintiff’s attorneys in appealing to the jury’s interest in protecting their community from unnecessary danger and that the use of “reptile” tactics in trucking cases will increase after implementation of the ELD Mandate.

B. The ELD Mandate and the Increase of ESI in Trucking Litigation

While the average trucking case may not involve discovery of ESI, that will likely change. As discussed above, ELD providers will offer widely differing functionality and options beyond those required by the ELD Mandate, which will result in voluminous
amounts of documentation and data being maintained by motor carriers that was not previously maintained. ELD devices that offer additional features beyond what is required under the ELD Mandate raise interesting ESI implications. For example, the fact that a motor carrier does not subscribe to certain features does not necessarily mean that the ELD provider is not collecting or documenting such data. As we all know, if data exists, shrewd attorneys will seek to get their hands on it. This begs the question, whether and to what extent a motor carrier will be required to preserve, track down, obtain, and produce information that its ELD provider collects but that the motor carrier does not subscribe to and/or pay for in discovery.

For example, in Smith, et al v. Burch Corporation, (Civil Action File No. 14EV000522C, Order March 5, 2015 [St. Ct. Ga. 2014]), the court compelled a non-party providing GPS tracking and similar services to produce data and generate reports that the defendant company did not subscribe to prior to the litigation. Specifically, in Smith, the defendant's vans were equipped with third-party subscription-based GPS systems which could provide information beyond GPS tracking; however, the defendant did not subscribe to or utilize those options of the GPS system. Despite the fact that the defendant did not receive the other services offered by the provider prior to the litigation, it was possible for the provider to generate reports with additional information than the report received by the defendant. While the Georgia Civil Practice Act does not require parties to generate documents that did not previously exist, the court in Smith compelled the non-party provider to produce the reports that the defendant did not subscribe to, presumably because the provider had the data and could easily create the requested reports with the push of a button. Although Smith is non-binding precedent in Georgia, the holding is an example of the information that motor carriers may be required to produce in discovery following implementation of the ELD Mandate, especially since such information will be easily accessible by the motor carrier’s ELD provider.

The data and documentation that will be maintained by ELD providers and the ability to generate data and analytics not required by the ELD mandate will unquestionably lead to voluminous amounts of ESI being produced in discovery. There is no doubt that courts across the United States will soon consider the scope of the ESI that must be produced by a motor carrier in the context of motions to compel discovery. For example, does the fact that an ELD provider maintains endless amounts of data concerning the motor carrier and its drivers mean that the motor carrier must produce all of that data to a plaintiff in discovery even though the FMCSRs do not require the motor carrier to maintain data or documentation beyond a certain, specified period of time? And at what point will a plaintiff be considered to be on a fishing expedition or requesting irrelevant information before a court will limit a request for information concerning all of a motor carrier’s violations of the FMCSRs from years before the collision?
Although the ELD Mandate requires motor carriers to maintain various documents supporting the information maintained by its ELD provider, the question of what specific steps a motor carrier must take to ensure that such supporting documentation is maintained is also an issue that will likely be addressed by courts following implementation of the ELD Mandate. While this issues remains to be determined, motor carrier will likely be required to do more than merely print the supporting documentation and place it in a file folder. In O’Berry v. Turner, (7:15-CV-00064, 2016 WL 1700403 [M.D. Ga. 2016]), plaintiff filed a motion for sanctions due the motor carrier’s failure to produce relevant ESI. (Id. at *1). The facts showed that the motor carrier printed off one copy of the ESI at issue, placed it in a manila folder, and subsequently lost the manila folder in a move. (Id. at *2-3). After receiving an evidence preservation letter, the motor carrier took no additional steps to ensure that the relevant ESI maintained by the third-party was preserved. (Id. at *3). Because there was only one hard copy of the relevant ESI and such copy was placed in the hands of various people and subsequently lost, the court concluded that the motor carrier failed to take reasonable steps to preserve the ESI. (Id.) In applying amended Federal Rule 37(e), the court held that an adverse inference instruction, in which it would instruct the jury that it must presume that the lost evidence was harmful to the defendant, was the appropriate remedy because the motor carrier had and lost the relevant ESI. (Id.)

While O’Berry v. Turner involved a complete spoliation of evidence in the pre-ELD Mandate era, the Court’s discussion and analysis concerning the motor carrier’s obligation to take steps to preserve ESI in addition to maintaining a hard copy is instructive. Defense attorneys will likely see this become an issue in discovery and should be prepared to instruct their clients to maintain all relevant ESI in the event of a future litigation.

C. Conclusion

While the ELD Mandate will benefit the trucking industry and make the defense of trucking cases easier in a number of respects, the vast amount of information that will be available to a plaintiff’s lawyer in discovery will make it much easier for those lawyers utilizing “reptile” tactics to pinpoint a specific danger and/or safety issues caused by the motor carrier and/or driver and use such danger or safety issues to appeal to the community-conscious minds of the jury. Additionally, the ELD Mandate will certainly lead to an increase in ESI in trucking litigation and will likely raise concerns as to the discoverability of the extensive data maintained by a motor carrier’s ELD provider. How plaintiff’s lawyers will utilize ELD data in discovery and at trial, and the extent to which such data will be discoverable in litigation, will likely be a topic of concern among defense attorneys in the near future.
## Calendar

| Date             | Event Name                                      | Contact Information                                                                 | Location  
|------------------|-------------------------------------------------|-------------------------------------------------------------------------------------|-----------
| April 14-18, 2018 | **TIPS National Trial Academy**                 | Donald Quarles – 312/988-5708                                                      | Peppermill Resort & Spa Casino Reno, NV |
| May 2-5, 2018    | **TIPS Section Conference**                     | Felisha A. Stewart – 312/988-5672 Donald Quarles – 312/988-5708                  | Loews Hotel Hollywood Los Angeles, CA |
| May 9-11, 2018   | **Fidelity & Surety Law Spring Conference**     | Donald Quarles – 312/988-5708                                                      | La Fonda on the Plaza Santa Fe, NM  |
| June 11, 2018    | **TIPS Free Member Monday CLE**                 | Ninah Moore – 312/988-5498                                                         | Free Teleconference             |
| August 2-5, 2018 | **ABA Annual Meeting**                          | Felisha A. Stewart – 312/988-5672 Donald Quarles – 312/988-5708                  | Swissotel Chicago Chicago, IL   |
| October 10-14, 2018 | **TIPS Fall Leadership Meeting**            | Felisha A. Stewart – 312/988-5672                                                  | Ritz Carlton Amelia Island Amelia Island, FL |
| October 18-19, 2018 | **Aviation Litigation Conference**         | Donald Quarles – 312/988-5708                                                      | Ritz Carlton Washington DC Washington, DC |
| November 7-9, 2018 | **Fidelity & Surety Law Fall Conference**       | Donald Quarles – 312/988-5708                                                      | Ritz Carlton Philadelphia Philadelphia, PA |
| January 16-18, 2019 | **Fidelity & Surety Law Midwinter Conference** | Felisha A. Stewart – 312/988-5672 Donald Quarles – 312/988-5708                  | Hilton San Diego Bayfront San Diego, CA |
| January 23-27, 2019 | **ABA Midyear Meeting**                      | Felisha A. Stewart – 312/988-5672                                                  | Las Vegas, NV                   |
| March 20-22, 2019 | **Transportation MegaConference XIV**         | Donald Quarles – 312/988-5708                                                      | Sheraton New Orleans New Orleans, LA |

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