What's Coverage Have To Do With It?

Litigation Management and The MCS-90 Endorsement

By Maggie Tucker and Lewis Harper

"It's a Long Way to Tipperary" was a tune popular in British music halls at the turn of the 19th Century — its popularity was not derived from marching, but through the theater. While this is interesting, you may ask what this has to do with insurance coverage. In a word, nothing. To some unfamiliar with coverage issues in the transportation industry, the question could be asked, what does the MCS-90 have to do with coverage under a trucking insurance policy? The answer depends on a particular jurisdiction's interpretation of the MCS-90 endorsement and interpretations vary depending on the facts and circumstances of a given claim.

With the passage of the Motor Carrier Act of 1980 (MCA), some believed the added number of motor carriers on the highways could potentially increase the number of catastrophic accidents. This belief was the catalyst for the Federal Motor Carrier Safety Administration (FMCSA) and its predecessor, the now defunct Interstate Commerce Commission (ICC). The MCA requires insurers who cover interstate motor carriers to provide a "surety" to protect and reimburse the public when exclusions under an insurance policy would otherwise allow the insurer to deny coverage. Interstate motor carriers and their insurers comply with these regulations through an MCS-90 endorsement.

The MCS-90 endorsement contains two very important provisions. The first provides that the insurer must pay a final judgment against its insured motor carrier regardless of whether the motor vehicle is specifically described in the policy or some other coverage defense exists. The second provision allows the insurer to recover payments made on behalf of the insured that the insurer would not have been obligated to pay absent the MSC-90 endorsement. However, the economic reality of collecting these payments from the insured is the insurer's dilemma.

MCS-90 has led to litigation requiring courts to determine under what circumstances the endorsement applies. This litigation has resulted in discord among the various courts concerning the nature of the MCS-90 (coverage or surety, begging the question: what does the MCS-90 have to do with coverage?) Under the rule followed in the majority of courts, an insurer has no obligation to make payment under the MCS-90 endorsement unless 1) the underlying insurance policy does not provide coverage for the accident, and 2) the motor carrier's other coverage, if any, is insufficient to meet the mandated minimum coverage.

The Tenth Circuit recently adopted the majority rule in the case of *Carolina Casualty Insurance Company v. Yeates*, 584 F.3d 868 (10th Cir. 2009). In the *Carolina Casualty* case, a truck owned by Bingham Livestock was involved in an accident. Bingham Livestock had one insurance policy issued by State Farm that insured the truck involved in the accident and one issued by Carolina Casualty that had an MCS-90 endorsement but did not insure the truck. State Farm paid its policy limit of $750,000, and the injured party then pursued Carolina Casualty's policy. In examining the applicability of Carolina Casualty's MCS-90 endorsement, the Tenth Circuit held the MCS-90 endorsement was not triggered because the plaintiffs had already received payment from State Farm in the amount of the minimum mandated coverage. In essence, Carolina asserted and the Tenth Circuit ultimately agreed the MSC-90 was a surety designed to protect the public only if the minimum coverage was insufficient or nonexistent. As coverage was available, the Court ruled the surety did not apply.

What does the MCS-90 endorsement have to do with coverage? It depends on whether the court examining the issue follows the majority rule. The jurisdiction can have a huge impact on an insurer's obligations and the amount it may be required to pay on a given loss. When a suit is filed involving coverage and the potential application of an MCS-90 endorsement, the first step is to determine the position the jurisdiction follows. If the case is filed in a jurisdiction that follows the majority rule, the road is much easier, but it may not be less costly in terms of litigation expense. If the case is filed in a jurisdiction that does not follow the majority rule, an insurer may be forced to consider a different business model in managing litigation. If the case is filed in an unfavorable jurisdiction, the insurer should follow the example of Carolina Casualty and forcefully assert the position and rationale for following the majority rule. In those cases, the road is harder but victory is clearly possible. Regardless, if there is any question as to the coverage available, the goal should be to file a declaratory judgment at the earliest opportunity to determine appropriate coverage(s) under all available policies so the matter can be resolved quickly to avoid added litigation expenses. LM

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