

KEEP TRUCKIN! COVERAGE AND THE MCS-90



April 2023

Robert J. Witmeyer
Summer L. Frederick

What is a motor carrier?

A company that provides truck transportation.

- Federal Motor Carrier Safety Administration Act
("FMCSA")

Private Motor
Carrier

For-Hire Motor
Carrier

FMCSA

Administration within the United States Department of Transportation responsible for monitoring and developing safety standards for commercial vehicles operating in interstate commerce



Private Motor Carrier

Transports its own cargo, usually as part of a business that produces, uses, sells, and/or buys the cargo being transported

For-Hire Motor Carrier

Commercial motor carrier whose primary business activity is the transportation of property or passengers by motor vehicle for compensation

US DOT NUMBERS - WHO NEEDS THEM?

- Carriers hauling passengers or transporting property in interstate commerce
- Carriers transporting hazardous cargo intrastate that requires a safety permit

US DOT numbers allow the FMCSA to track compliance, safety/crash records, and inspections. Some states, including Texas, require *intrastate* motor carriers to have US DOT numbers.

MC NUMBERS - WHO NEEDS THEM?

- Vehicles that transport passengers in interstate commerce for a fee
- Vehicles that transport federally-regulated commodities owned by others (or arranging for their transport), for a fee, in interstate commerce

For these carriers, MC number is required in addition to US DOT number. This is called “operating authority” and is issued based upon particular operations and cargo.

INSURANCE FOR INTERSTATE MOTOR CARRIERS

Governed by Code of Federal Regulations; 49 CFR 387.9

- \$750,000 – for-hire carriers transporting non-hazardous property interstate or foreign
- \$5,000,000 – private and for-hire interstate, foreign, or intrastate carriers transporting hazardous substances interstate, foreign, or intrastate
- \$1,000,000 – for-hire and private oil, hazardous waste, or hazardous substances. Interstate commerce = any quantity. Intrastate commerce = bulk.
- \$5,000,000 – private and for-hire interstate and foreign bulk

A motor carrier can establish proof of financial responsibility in one of 3 ways:

1. MCS-90 endorsement
2. Surety bond
3. Self-insurance

- 49 C.F.R. 387.7(d)

First Step When Claim Comes In: Check for Coverage

- Look at policy's insuring agreement to see what it covers
- If the policy provides liability for Specifically Described Autos only and the auto involved in the accident is not on the policy:
 - Is it hired or borrowed?
 - Is it a temporary substitute?
 - Is the auto newly purchased? If it is newly purchased, does the policy provide automatic coverage for a period of time that may attach?
- Who Is An Insured?

BUT ...
WHAT IF THERE IS NO COVERAGE?



INSURED

YES

NO

WHAT IS THE MSC-90?

(And what is it not?)

Form MCS-90 is an endorsement for motor carrier policies of insurance for public liability under sections 29 and 30 of the Motor Carrier Act of 1980.

- FMCSA

The MCS-90 is not insurance.

It is a suretyship which obligates an insurer to pay judgments against the named insured to members of the injured public, arising out of interstate commerce activities *in the event there is no coverage.*

“[A]n 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.” *Carolina Cas. Co. v. Yeates*, 584 F.3d 868, 878 (10th Cir. 2009).



In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured.

However, 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. The insured agrees to reimburse the company 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.

[Excerpt from MCS-90]



The goal:
protect the
public.

When is the MCS-90 triggered?

4 REQUIREMENTS TO TRIGGER MSC-90

1. Final judgment entered against the named insured
2. Named insured must have been a for-hire motor carrier engaged in the transportation of property in interstate commerce at the time of the accident
3. The underlying insurance policy must exclude coverage/not apply
4. Either no other insurer provides coverage or the motor carrier's coverage, in the aggregate, is insufficient to satisfy the minimum statutory requirements

What does “final judgment” mean?

Majority of jurisdictions broaden the term to include permissive settlements in the interest of efficient settlement and resolution of cases.

For-Hire Motor Carrier Engaged In The Transportation of Property In Interstate Commerce

Trip-Specific Approach

Majority approach.

What was the motor carrier doing at the time of the loss in question?

Public Policy Approach

Minority approach.

What was the general nature of the motor carrier?

4 MAIN REASONS FOR NO COVERAGE (MCS-90 TRIGGER)

- Coverage has expired or cancelled. Carrier must give 30 days of written notice to FMCSA or endorsement is still in effect.
- Coverage is excluded
- Vehicle not on the policy
- Permissive driver

No Other Insurance Available

Other insurance means any other insurance available to the negligent motor carrier, not the injured party.

- *Yeates*, 584 F.3d 868 (10th Cir. 2009)

Insufficient Coverage

Where coverage is not available up to the FMCSA proscribed minimum to satisfy a judgment in favor of an injured party, the MCS-90 is implicated up to the amount of public liability.

MCS-90 APPLIES TO LEASED VEHICLES

Entities tried to use leased or borrowed vehicles to avoid safety regulations.

This led to abuses that threatened public interest and economic stability of the trucking industry.

Fifth Circuit recognizes that the MCS-90 originated in the desire to protect the public when a licensed carrier uses a leased vehicle to transport goods.



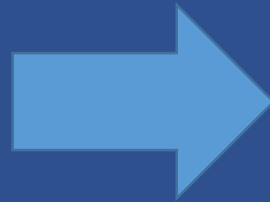
Look Both Ways When Evaluating Coverage Before MCS-90



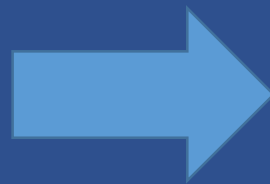
- “Public liability” encompassed by the MCS-90 applies to third-party claims against the named insured
- The MCS-90 does not require an insurer to act as a surety to the insured’s injured employees
- Insurers can seek recoupment of amounts paid from its insured (the motor carrier)
- MCS-90 applies on a “per accident” basis, not per injured party

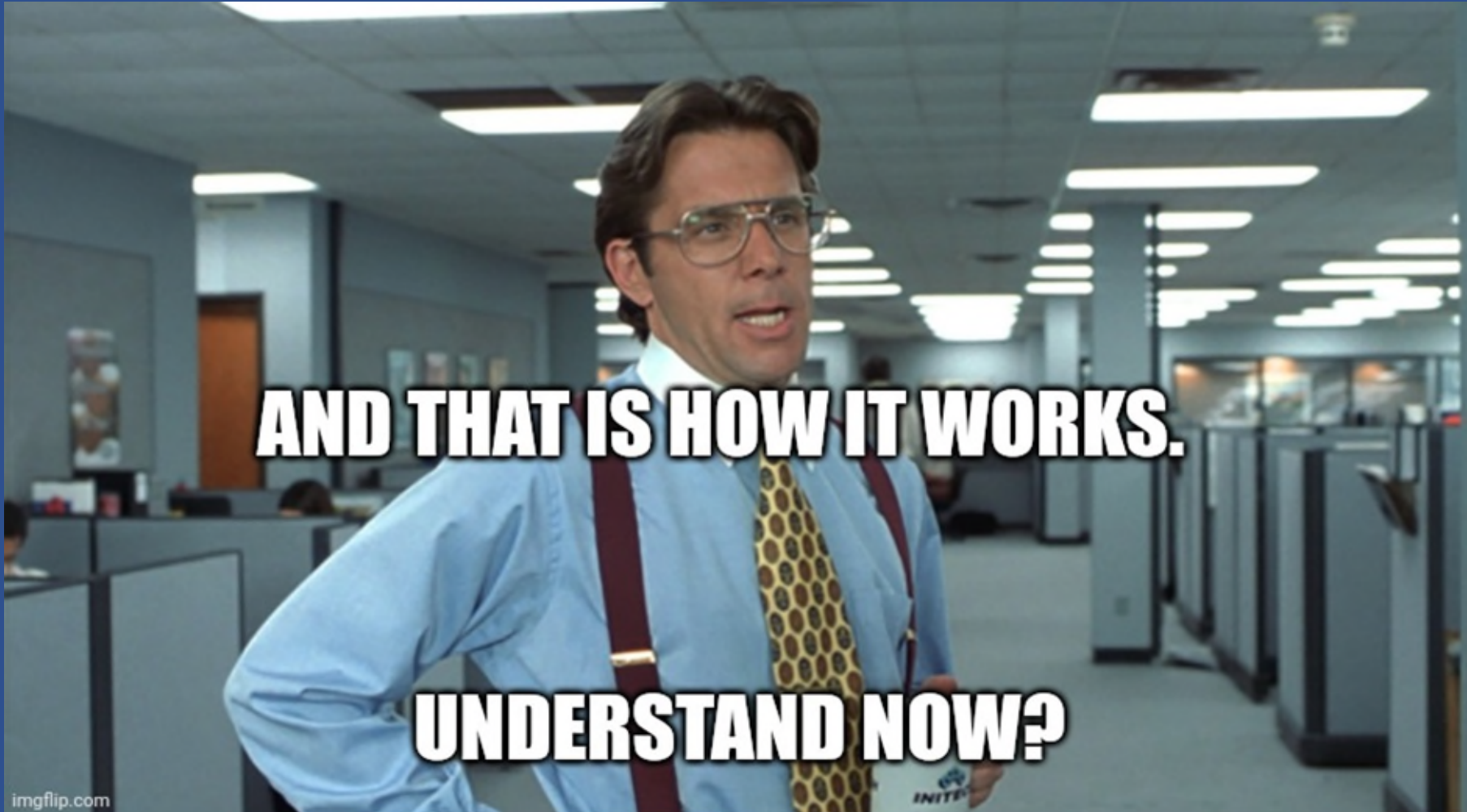
So How Does This Work?

If there
is
coverage



If there
is no
coverage





AND THAT IS HOW IT WORKS.

UNDERSTAND NOW?

Robert Witmeyer

214-712-9554

rob.witmeyer@cooperscully.com

Summer Frederick

214-712-9528

summer.frederick@cooperscully.com