"FRINGE" INSURANCE ISSUES: OTHER INSURANCE CONSIDERATIONS FOR INTERSTATE MOTOR CARRIERS IN TEXAS

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2009 Transportation Seminar
Cityplace Conference Center – Dallas, TX
June 12, 2009

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I. INTRODUCTION

When one thinks about the type of insurance that an interstate motor carrier requires to meet the U.S. Department of Transportations minimum standards along with the various state law regarding the minimum amount of insurance to meet financial responsibility requirements. Typically, the most common type of insurance would a standard general liability policy with appropriate endorsements for motor carriers. In addition, many carriers rely upon "owner-operators" and also are familiar with both non-trucking use insurance policy issued to the lessee/owner operator and a trucking use policy, which may include coverage for "trailer interchange" agreements.

However, while liability coverage itself is of utmost importance to a motor carrier, the question of insurance certainly does not stop there, nor do federal and state regulations that guarantee the general public a minimum level of financial responsibility.

The paper talks about two very different arenas in managing risk in the transportation industry. First, there is a discussion of the federally mandated MCS-90 endorsement. The unusual nature of the endorsement has left many an insurance professional scratching their head at its application. We will discuss what the endorsement is, how it transfers risk, an insurance carrier's rights, and the technical requirements of the endorsement.

In addition, we will turn one-hundred and eighty degrees and discuss the Texas scheme of "non-subscriber" coverage for on the job injuries. Unlike other states, Texas allows for an employer to "opt out" of the mandatory workers compensation insurance requirements for on the job injuries. In recent years, many motor carriers, both small and large, have opted out of the workers compensation system in Texas and become "non-subscribers". These employers self-insure their employees and typically take out policies of "excess" coverage – commonly known as non-subscriber insurance. This paper will discuss the law regarding non-subscribers, along with the potential risks and benefits from opting out of workers compensation.

II. UNDERSTANDING THE MCS-90 ENDORSEMENT:

A. What is the MCS-90?

One of the least understood "insurance" provisions in the trucking context is the MCS-90 endorsement. The MCS-90 endorsement arose from the passage of the Motor Carrier Act of 1980. The purpose of the endorsement was to ensure compliance with the Act's mandated levels of financial responsibility. The MCS-90 endorsement is essentially a suretyship that inures to the benefit of the public and rests on top of the motor carrier's liability policy. See *Minter v. Great American Ins. Co. of N.Y.,* 423 F.3d 460 (5th Cir. 2005); see also *Canal Ins. Co. v. Carolina Cas.Ins. Co.*, 59 F.3d 281, 283 (1st Cir. 1995); *John Deere Ins. Co. v. Truckin' U.S.A*. 122 F.3d 270 274–75 (5th Cir.1997).

The Act requires the MCS-90 endorsement be attached to any liability policy issued to motor carriers operating commercial motor vehicles that are transporting property in interstate or foreign commerce. See 49 C.F.R. §§ 387.3, 387.7. When not physically attached to the policy, the terms of the endorsement may be imputed by law. *Hagans v. Glens Falls Ins. Co*., 465 F.2d 1249 (10th Cir. 1972); *Travelers Ins. Co. v. Transport Ins. Co*., 787 F.2d 1133, 1139 (7th Cir. 1986).

B. "Coverage" Under the Endorsement:

The MCS-90 endorsement language states:

"[T]he 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 regardless of 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. It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other 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. Public liability is defined as "liability for bodily injury, property damage and environmental restoration."

Pretty broad, eh? While this sounds like insurance, the endorsement is not consideration insurance coverage or a policy of insurance. No statutory or common law duty to defend an insured arises from the execution of an MCS-90 endorsement. Rather, the endorsement is a suretyship that obligates the insurer to pay any judgment awarded against the insured subject to reimbursement from the motor carrier. The endorsement runs directly to the public, to pay judgments resulting from negligence in the operations, maintenance, or use of motor vehicles, even if the vehicle is not identified or covered under the policy. *Industrial Indem. Co. v. Truax Trucklines, Inc*., 45 F.3d 986, 991 (5th Cir. 1995). *See also Canal Ins. Co. v. First Gen. Ins. Co*., 889 F.2d 604, 614 (5th Cir. 1989); *National Am. Ins. Co. v. Century State Carriers, Inc.,* 785 F.Supp. 793, 795 (N.D. Ind. 1992).

The endorsement applies only when no other policy provides coverage. *John Deere Ins.,* 122 F.3d at 275.

Under the MCS-90, the following provisions apply before the right to indemnification arises:

- First, for the MCS-90 to apply, the underlying policy CANNOT not provide coverage.
- The MCS-90 only applies to a JUDGMENT. Costs of defense and indemnifying for compromise settlements are NOT covered.
- The insurer only pays the portion of a judgment, resulting from negligence in the operation, maintenance or use of motor vehicle.
- The suretyship established by the MCS-90 only requires the carrier to pay up to the required statutory limits of insurance.
- Last, but most important, the insurer may seek reimbursement through indemnification from the motor carrier.

C. The MCS-90 Reimbursement Clause:

As mentioned above, the MCS-90 endorsement contains a reimbursement clause that states:

> "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 said 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 the endorsement." See 49 C.F.R. §387.15

On its face, this provision allows for an insurance carrier to essentially subrogate against its own insured for amounts paid in satisfaction of the judgment. This would facially appear to provide a liability carrier with some assurance of recovery. However, the insurer cannot attempt reimbursement efforts against its insured until after they satisfy the judgment, which is often years after the loss occurs. Over this time frame, its insured can file bankruptcy or transfer its assets to avoid paying any judgment the insurer receives. Ultimately, exercising subrogation rights under the MCS-90 endorsement becomes an expensive exercise in futility for the insurer and may not be worth pursuing.

D. Technical Requirements for the MCS-90:

To be effective, the endorsement must be issued in the exact name of the motor carrier and must be maintained at the motor carrier's principal place of business. The MCS-90 endorsement is subject to special cancellation requirements that operate independently of the policy's cancellation provisions. The endorsement must remain in effect continuously until canceled or replaced. Cancellation may be effected by either the insured or the insurer with 35 days' notice, in writing, to the other party. If the insured carrier is subject to FMCSA jurisdiction, 30 days' notice must also be given to the FMCSA; beginning on the date notice is received by the FMCSA. 49 C.F.R. §387.15. All endorsements and filings are deemed public information. Registered DOT carriers must keep a copy on file at their principal place of business and produce such information to the public for inspection. 49 C.F.R. §387.7.

For the MCS-90 to apply, the accident must have occurred when the truck was engaged in interstate commerce. *Thompson v. Harco Nat'l Ins. Co*., 120 S.W.3d 511 (Tex. App. – Dallas 2003), cert. denied, 543 U.S. 876, 125 S.Ct. 100, 160 L.Ed.2d 127 (2004)

E. Intrastate Endorsements Forms E and F by Texas Department of Transportation:

The terms and conditions of the MCS-90 only apply to interstate motor carriers. In Texas, motor carriers and private carriers otherwise exempt from the federal DOT jurisdiction, financial responsibility lies with the Texas Department of Transportation. See Tex. Transp. Code §642.002 et seq.

Texas has a suretyship similar to the MCS-90 named "Forms E and F." Much like the MCS-90 endorsement, these forms provide the insured with "coverage" in the event no other insurance applies. *Nat'l Cas. Co. v. Lane Exp., Inc.*, 998 S.W.2d 256, 263 (Tex. App. 1999).

Although similar in effect to the MCS-90, Forms "E" and "F" are potentially broader obligations because these forms more directly incorporate financial responsibility laws into the insurance contract. R. Mosher, STATUTORY INSURANCE REQUIREMENTS, MCS-90 ENDORSEMENT AND OTHER MINIMUM COVERAGE REQUIREMENTS, Texas State Bar Prosecuting and Defending a Trucking Accident (2002).

Unlike the MCS-90, Form "F" does not specifically express the limits of public liability within the endorsement itself. Not surprisingly, it has been widely argued that Form "F", therefore, increases the limits in the body of the policy to the extent that the policy is greater than what the law would require. See *Id.* Citing *Tri State Pipe and Equipment,Inc. v. Southern County Mutual Ins. Co.*, 8 S.W.3d 394, 398 (Tex. App. – Texarkana 1999, no writ).

III. UNDERSTANDING THE TEXAS SYSTEM OF NON-SUBSCRIBER INSURANCE FOR INJURED EMPLOYEES

A. What is a Non-Subscriber?

Like most states in the Union, the Texas Labor Code provides an employee an exclusive remedy through a claim for workers' compensation insurance for any work related injury or death suffered while in the course and scope of employment. Under a traditional policy of workers compensation insurance, the employee has no right to ever bring a civil action directly against an employer for their at work injury (save for the gross negligence of the employer).

However, unlike those other states, Texas allows for employers to choose not to carry workers' compensation. Employers that "opt out" of the workers compensation system are generally called "non-subscribers" – as they do not subscribe to a policy of workers compensation coverage. Typically, the type of company that becomes a non-subscriber tends to be fairly large or fairly small. Larger companies tend to have the resources to staff in-house risk management departments who quite literally handle claims brought by injured employees. Several major interstate motor carriers maintain such staffing options. In such cases, the motor carrier itself maintains an "employee injury welfare plan" and adjusts the claims, processes payments, pays indemnity and injury benefits – much as a workers' compensation insurer would normally do. This gives the employer a great measure of control over the handling of the claim.

Likewise, a small company with few employees can frequently non-subscribe because so few claims will ever be processed that usually the employee who handles the human resources issues can likely handle the employee claim. Not to mention, third party administrators can assist in the processing and handling of the claims.

Many employers have found that the Texas non-subscriber system is an attractive option to the high premiums and complete loss of control over the claim that being a subscriber to workers compensation can bring. However, the Texas legislature has attempted to dissuade employers from making that choice a desirable option by imposing some severe restriction on defenses that are typically available to defendants under Texas law.

B. No "Exclusive Remedy" Provision:

The biggest distinction between having a policy of workers compensation and non-subscribing is the fact that the employee can actually sue their employer for the cause of the injury itself. As mentioned above, if the employer is a subscriber the workers compensation benefits themselves account for the workers' "exclusive remedy" and a civil suit is barred, but for the employers' gross negligence. See Tex. Lab. Code § 408.001, et seq. Thus, a subscribing employer simply pays their premiums for workers compensation coverage and really has no more worry about the situation from a liability perspective. If the employee has a dispute over the benefits received, then the employee must take that before the Texas Department of Insurance, Division of Workers Compensation. Moreover, that dispute is between the employee and the insurance carrier, not the employer.

In a non-subscriber context, the exclusive remedy provisions of the Labor Code do not apply. Thus, the employee can bring a suit against an employer for damages beyond what the employee injury plan contemplates. This suit can seek the standard personal injury damages, including past and future medical expenses, economic damages such as lost income and loss of earning capacity, along with non-economic damages such as pain and suffering, disfigurement, etc.

C. Texas Law Regarding Non-Subscriber Litigation:

Under Texas law, where an employer is not a subscriber to worker's compensation, an employee injured on the job must still prove that the employer was negligent in order to recover from the employer for his injuries. *Werner v. Colwell*, 909 S.W.2d 866, 868 (Tex. 1995). In order to establish negligence, evidence must be produced to establish a duty, a breach of that duty, and damages proximately caused by the breach. *Id.*

Proximate cause comprises two elements: cause in fact and foreseeability. *Excel Corporation v. Apodaca,* 81 S.W.3d 817, 820 (Tex. 2002). The test for cause in fact, or but for cause, is whether the act or omission was a substantial factor in causing the injury, without which the harm would not have occurred. *Id.* In a non-subscriber case, evidence that the injury occurred on the job is not sufficient. Rather, the claimant must show that but for the alleged negligence of the employer, he would not have sustained the on-the-job injury. *Id.* at 822; *Patino v. Complete Tire, Inc*., 158 S.W.3d 655, 661 (Tex. App.-- Dallas 2005, pet. denied)(Holding that evidence of work-place injury is not evidence that if [employer] had done something different, [plaintiff] would not have been injured or would not have received the specific injuries he claimed.). In such a case, this causal link must be proven though expert testimony. *Leitch v. Hornsby,* 935 S.W.2d 114, 119 (Tex. 1996). (Holding that where there is no medical testimony linking the alleged negligence to the injury, a claimant must provide probative evidence, through expert testimony, connecting the injury to the alleged negligence.).

Consequently, a non-subscriber case is not as simple as demonstrating that the employee sustained an at work injury, which is a common misconception. An employee still must prove that the negligence of the employer caused the injury. However, as we will see next, the law gives them a real advantage to do just that.

D. Abrogation of Common Law Defenses and Proportionate Responsibility:

As mentioned above, an injured employee will have to establish that the employer's actions proximately caused his or her injuries. However, in the event that the employee can establish causation, to any degree, a non-subscribing employer, has waived most common-law defenses, including the defense of contributory negligence.

In a non-subscriber case, it is not a defense (1) that the employee was guilty of contributory negligence; (2) that the employee assumed the risk of injury or death; or (3) that the injury or death was caused by the negligence of a fellow employee. *Brookshire Bros., Inc. v. Wagnon,* 979 S.W.2d 343, 347 (Tex. App.-- Tyler 1998, pet. denied). In other words, the employer's only defense may be that it was not negligent in causing the injury or that its employee was the sole proximate cause of the injury. *Id.*

Moreover, since the defense of contributory negligence is not available to the defendant

employer, the proportionate responsibility provisions of Chapter 33 of the Texas Civil Practice and Remedies Code are not available either. *Moore v. Phi Delta Theta Co.,* 976 S.W.2d 738,741 (Tex. App.-Houston [1 Dist.] 1998, pet. denied)(Under the Texas proportionate responsibility statute, a jury would typically be asked to determine the percentage of responsibility of the Plaintiff and any Defendants. Tex. Civ. Prac. & Rem. Code § 33.004. Under Chapter 33, a plaintiff cannot recover any damages if his/her percentage of responsibility is determined to be greater than 50 percent. Tex. Civ. Prac. & Rem. Code § 33.001. In addition, Chapter 33 also provides that a defendant is liable to a claimant only for the percentage of the damages found by the trier of fact equal to that defendant's percentage of responsibility, and a defendant is not jointly and severally liable with other defendants if the defendant's percentage of responsibility is less than 50%. Tex. Civ. Prac. & Rem. Code § 33.013.

Thus, since the non-subscribing employer is not entitled to the benefit of Chapter 33, the employer will be liable for the plaintiff's injuries, even if the employer would have normally only been held at fault for a small percentage of the liability. This is sometimes referred to as the "1%" rule.

E. No Pre-Injury Waiver Available:

One of the questions that non-subscribing employers frequently ask of their attorneys is whether or not they can get the employee sign a pre-injury waiver that will effectively impose an exclusive remedy like provision on the non-subscriber injury plan. In other words, not subscriber to workers compensation and yet still be immune from litigation. There was a brief period of time where the Texas Supreme Court specifically approved the use of pre-injury employee elections to participate in a non-subscribing benefit plan in lieu of exercising their common law remedies. See *Lawrence v. CDB Services, Inc. and Lambert v. Affiliated Foods, Inc*., 44 S.W. 3d 544 (Tex. 2001).

However, the statute itself was amended to prevent the application of pre-injury waivers and legislatively overruled Lawrence. Section 406.033(e) states definitely that:

A cause of action described in Subsection (a) may not be waived by an employee before the employee's injury or death. Any agreement by an employee to waive a cause of action or any right described in Subsection (a) before the employee's injury or death is void and unenforceable. Tex. Lab. Code §406.033(e).

F. Benefits of the Non-Subscriber System:

On its face, the Texas non-subscriber system seems like a bad deal for employers. However, the ranks of the non-subscribing employers grow every year. While there are considerable hazards associated with non-subscribing, including the loss of common law defenses and the exclusive remedy provision, there are numerous benefits to not subscribing as well.

The most common benefit that I hear from non-subscribing clients is cost. Workers compensation coverage can be prohibitively expensive. Non-subscribing can reduce costs. The risk involved with not subscribing is frequently allocating through the purchase of an Employers Excess Indemnity policy (EEI), commonly known as a non-subscriber policy. While the employer may be technically self-insured, a policy of insurance protects them from catastrophic or significant claims beyond a self-insured retention. These policies are substantially less expensive than traditional workers compensation policies because carriers do not bear 100% of the risk.

Another common benefit that is mentioned is control over the setup of the plan and claims management. In a traditional workers compensation situation, the Labor Code essentially governs how the claims will be conducted and a network of approved physicians is established to provide care. Texas nonsubscribers can establish their own arrangement with healthcare professionals to develop programs to provide quality care at a reasonable cost. Texas nonsubscribers can customize their occupational injury benefit plan to improve the injury costs. Moreover, advocacy groups such as the Texas Association of Responsible Nonsubscribers also believe that non-subscribers improve the standard of employee injury care as the cost savings allow them to expend additional resources to prevent

injuries and offer quality post-injury benefits and care. See http://www.txans.org/questions.htm.

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