



Committee News

Spring 2013

Commercial Transportation Litigation Committee



THE MCS-90 ENDORSEMENT— WHAT EVERY TRANSPORTATION LITIGATOR SHOULD KNOW

By: Patrick T. Bergin

Financial responsibility means having insurance policies or surety bonds sufficient to satisfy the minimum public liability requirements. **Public liability** means liability for bodily injury,

property damage, and environmental restoration.

<http://www.fmcsa.dot.gov/forms/print/MCS-90.htm>¹

The MCS-90 endorsement is an increasingly litigated and often misunderstood single-page “form” that acts as a “rider” to commercial motor carriers’ insurance policies to satisfy the financial responsibility 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.). Not surprisingly, the judiciary has been anything but consistent in its application and interpretation of the endorsement in transportation cases. Bewildered transportation litigators will sometimes, understandably, exercise willful avoidance of cases involving murky MCS-90 issues and, instead, pass them off to other unsuspecting attorneys whose knowledge and competence in this area of law may be lacking. But if you consider yourself a transportation attorney or occasionally become entangled in transportation litigation, then the MCS-90 endorsement is a subject-matter with which you should not avoid but should instead become intimately familiar.

To assist in ones understanding of the MCS-90 endorsement and related law, this article provides an in-depth analysis of the endorsement in detail, its history and application, as well as current or developing law on selected issues.

Historical Backdrop

In the past, carriers licensed by the Interstate Commerce Commission (“ICC”), now defunct and replaced by the Surface Transportation Board, were

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Uniting Plaintiff, Defense, Insurance, and Corporate Counsel to Advance the Civil Justice System

Chair

Jeffrey Stupp
Gallagher Sharp
1501 Euclid Ave, Fl 6
Cleveland, OH 44115-2132
(216) 241-5310
jstupp@gallaghersharp.com

Chair-Elect

Jeremy P Taylor
Carr Allison
6251 Monroe St, Ste 200
Daphne, AL 36526-7154
(251) 626-9340
Fax: (251) 626-8928
jptaylor@carrallison.com

Council Representative

Eugene G Beckham
Beckham & Beckham PA
1550 NE Miami Garedens Dr, Ste 504
Miami, FL 33179-4836
(305) 957-3900
Fax: (305) 940-8706
egb@beckhamlaw.com

Last Retiring Chair

Chad Christopher Marchand
Delashmet & Marchand PC
PO Box 2047
Mobile, AL 36652-2047
(251) 433-1577
Fax: (251) 433-1578
ccm@delmar-law.com

Law Student Vice-Chair

Michael Malfettone
Univ of Arizona College of Law
3750 N Country Club Rd
Tucson, AZ 85716-1260
mpmalf@gmail.com

Membership Vice-Chair

Kendall Kelly Hayden
Cozen O'Connor
1717 Main St, Ste 3400
Dallas, TX 75201-7335
(214) 462-3072
Fax: (214) 361-0329
khayden@cozen.com

Scope Liaison

Ronald L Richman
Bullivant Houser Bailey PC
601 California St, Ste 1800
San Francisco, CA 94108-2823
(415) 352-2700
Fax: (415) 352-2701
ron.richman@bullivant.com

Technology Vice-Chairs

Andrew J Fay
LeClairRyan
1 International Pl, Fl 11
Boston, MA 02110-2600
(617) 502-8207
andrew.fay@leclairryan.com

Melissa Marie Sage
Glendening McKenna Prescott
6060 N Central Expy, 5th Fl
Dallas, TX 75206-5209
(214) 237-2917
Fax: (214) 748-4530

Vice-Chairs

Robert J Bassett
Williams Venker & Sanders LLC
100 N Broadway, Ste 2100
Saint Louis, MO 63102-2737
(314) 345-5000
Fax: (314) 345-5055
rbassett@wvslaw.com

David Becker
Freeborn & Peters LLP
311 S Wacker Dr, Ste 3000
Chicago, IL 60606-6679
(312) 360-6391
Fax: (312) 360-6594
dbecker@freebornpeters.com

Brian Beverly
Young Moore and Henderson
3101 Glenwood Ave, Ste 200
Raleigh, NC 27612-5096
(919) 782-6860
Fax: (919) 782-6753

Sean R Burnett
Snyder Law LLP
420 S Fairview Ave, Ste 102
Goleta, CA 93117-3626
(805) 683-7758
Fax: (805) 692-2801
sburnett@snyderlaw.com

Sergio Enrique Chavez
Rincon Law Group
1014 N Mesa St, Ste 200
El Paso, TX 79902-4093
(915) 532-6800

Roy A Cohen
Porzio Bromberg & Newman PC
100 Southgate Pkwy
Morristown, NJ 07960-6465
(973) 889-4235
Fax: (973) 538-5146
racohen@pbnlaw.com

Christy D Comstock
Everett Wales & Comstock
PO Box 8370, 1944 E Joyce Blvd
Fayetteville, AR 72703-0007
(479) 443-0292
Fax: (479) 443-0564
christy@everettfirm.com

Sonia Di Valerio
Rawle & Henderson LLP
1 S Penn Sq, The Widener Building
Philadelphia, PA 19107-3400
(215) 575-4285
Fax: (215) 563-2583
sdivalerio@rawle.com

Edgar Elliott
Christian & Small LLP
505 20th St N, Ste 1800
Birmingham, AL 35203-4633
(205) 795-6588
Fax: (205) 328-7234
emelliott@csattorneys.com

David Faulkner
Christian & Small LLP
1800 Financial Ctr
Birmingham, AL 35203-4633
(205) 250-6604
Fax: (205) 328-7234
dlf@csattorneys.com

James A Foster
Cassiday Schade LLP
20 N Wacker Dr, Ste 1000
Chicago, IL 60606-2911
(312) 641-3100
Fax: (312) 444-1669
jfoster@cassiday.com

Robert T Franklin
Franklin & Prokopik PC
2 N Charles St, Ste 600
Baltimore, MD 21201-3723
(410) 230-3623
Fax: (410) 752-6868
rfranklin@fandpnet.com

Nigel A Greene
Rawle & Henderson LLP
1 S Penn Sq, Fl 16
Philadelphia, PA 19107-3400
(215) 575-4200
Fax: (215) 563-2583
ngreene@rawle.com

John Michael Guidos
9409 Loch Glen Ct
Village of Lakewood, IL 60014-3330
(312) 505-5448
john.guidos@gmail.com

Jeremy C Johnson
Jones Skelton & Hochuli PLC
2901 N Central Ave, Ste 800
Phoenix, AZ 85012-2798
(602) 263-4453
Fax: (602) 200-7868
jjohnson@jshfirm.com

Blair Anthony Jones
Germani Martemucci et al
43 Deering St
Portland, ME 04101-2211
(207) 773-7455
Fax: (207) 773-7476
bjones@gmrh-law.com

Kandice Kerwin Hull
McNees Wallace & Nurick LLC
PO Box 1166
Harrisburg, PA 17108-1166
(717) 237-5452
Fax: (717) 237-5300
khull@mwn.com

Paula Christina Kessler
Catri Holton Kessler and Kessler
633 S Andrews Ave, Ste 300
Fort Lauderdale, FL 33301-2849
(954) 463-8593
Fax: (954) 462-1303
paulak@chkklaw.com

Jennifer Shepard Kilpatrick
Degan Blanchard & Nash
400 Poydras St, Ste 2600
New Orleans, LA 70130-3221
(504) 529-3333
Fax: (504) 529-3337
jkilpatrick@degan.com

Christopher James McCabe
*Pion Johnston Nerone Girman Clements
& Smith*
1500 One Gateway Center
Pittsburgh, PA 15222
(412) 281-2288

Hall F McKinley III
Drew Eckl & Farnham LLP
PO Box 7600
Atlanta, GA 30357-0600
(404) 885-6320
Fax: (404) 876-0992
hmckinley@deflaw.com

Michael L Miller
Drew Eckl & Farnham LLP
PO Box 7600
Atlanta, GA 30357-0600
(404) 885-6421
mmiller@deflaw.com

Michael L Miller
Drew Eckl & Farnham LLP
PO Box 7600, 880 W Peachtree St
Atlanta, GA 30357-0600
(404) 885-1400
Fax: (404) 876-0992

Meade W Mitchell
Butler Snow et al
PO Box 22567
Jackson, MS 39225-2567
(601) 985-4560
Fax: (601) 985-4500
meade.mitchell@butlersnow.com

Nelson A F Mixon
The Cavanagh Law Firm PA
1850 N Central Ave, Ste 2400
Phoenix, AZ 85004-4579
(602) 322-4079
Fax: (480) 614-3442
nmixon@cavanaghlaw.com

Harry F Mooney
Hurwitz & Fine PC
424 Main St, Rm 1300
Buffalo, NY 14202-3670
(716) 849-8900
Fax: (716) 855-0874
hfm@hurwitzfine.com

Carrie L Palmer
Resolution Legal Group
100 E California Ave, Ste 200
Oklahoma City, OK 73104-2415
(405) 235-6500
Fax: (866) 257-2880
carrie@palmerwantland.com

Eric L Probst
Porzio Bromberg & Newman PC
100 Southgate Pkwy, Fl 3
Morristown, NJ 07960-6465
(973) 538-4006
elprobst@pbnlaw.com

Kirsten Soto
Gilbert LLP
1100 New York Ave NW, Ste 700
Washington, DC 20005-6133
(202) 772-3989
sotok@gotofirm.com

Andrew Thor Stephenson
Franklin & Prokopik PC
2 N Charles St, Ste 600
Baltimore, MD 21201-3723
(410) 230-3638
Fax: (410) 752-6868
astephenon@fandpnet.com

Edwin Andrew Treese
Drew Eckl & Farnham LLP
PO Box 7600, 880 W Peachtree St
Atlanta, GA 30357-0600
(404) 885-1400
atreese@deflaw.com

Brian P Voke
Campbell Campbell Edwards & Conroy
1 Constitution Ctr, Ste 301
Boston, MA 02129-2031
(617) 241-3000
Fax: (617) 241-5115
bvoke@campbell-trial-lawyers.com

John Lewis Wardlaw
Martin Tate Morrow & Marston PC
6410 Poplar Ave, Ste 1000
Memphis, TN 38119-4839
(901) 522-9000
Fax: (901) 527-3746
lwardlaw@martintate.com

Pauline C Will
Watson Bennett Colligan & Schechter LLP
12 Fountain Plz, Ste 600
Buffalo, NY 14202-2222
(716) 852-3540
pwill@watsonbennett.com

Scott T Winstead
Sutterfield & Webb LLC
650 Poydras St, Ste 2715
New Orleans, LA 70130-6111
(504) 347-8425
Fax: (504) 529-7197
swinstead@swslaw.com

Vice-Chair (Newsletter)

James R Jebo
Harman Claytor Corrigan & Wellman PC
PO Box 70280
Richmond, VA 23255-0280
(804) 762-8032
Fax: (804) 747-6085
jjebo@hccw.com

Letter From The Chair



Dear CTLC Members:

I hope this letter finds you well. If you have not yet had the opportunity, please take a couple of moments to visit the Committee's revamped website at <http://apps.americanbar.org/dch/committee.cfm?com=IL205400>, as well as our LinkedIn page at <http://www.linkedin.com/groups?gid=4564311>. Both initiatives were completed in an effort to provide better communication with and additional resources for our members. Your feedback is appreciated.

Speaking of additional resources, we hope that those of you who attended the webinar entitled "Successfully Litigating Your Case Against An Experience Trucking Attorney," put on by committee members Meade Mitchell and Art Spratlin, found it to be an informative topic and discussion. We were pleased with the exceptional attendance for the program, and I strongly encourage everyone to attend the next committee webinar, which should take place in the Fall. More details will follow in the next newsletter.

Finally, I would like to encourage all of our members to join us in San Francisco for the ABA's annual conference, which will commence on August 7th and conclude on August 12th. Our committee will have a business meeting on Saturday, August 10th, where we will be discussing ideas for future programs, publications, and innovative ways to deliver value to our committee members. That evening, we will hold a cocktail hour and dinner for the committee members in an on-going effort to support networking and collegiality among our members. Additional details will follow shortly, and we hope to see you in San Francisco! ☺☺

Warmest Regards,
[Jeffrey D. Stupp](#)

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THE CARMACK AMENDMENT: PREEMPTS SHIPPER CLAIMS AGAINST CARRIER BUT SHOULD NOT PREEMPT CARRIER CLAIMS AGAINST SHIPPER FOR TORTIOUS ACTS OR BREACH OF CONTRACT

By: [Brian P. Voke](#)

A carrier accepts a load of toxic waste material which is mislabeled by the shipper and negligently packaged and loaded by the shipper. In route for disposal, the toxic waste explodes causing property damage and a major environmental mess, as well as state and federal investigations and fines. The Carmack Amendment should not preempt the carrier's tort and breach of contract claims against the shipper for damage to recover the costs of the carrier's property damage or its expenses incurred in cleaning up the toxic waste material, and its incidental and consequential damages resulting from the state and federal investigations.

The Carmack Amendment, [49 U.S.C.A. § 14706](#), governs interstate cargo claims by shippers against carriers. It occupies the field and preempts shippers' state law claims resulting from the loss or damage to property in interstate transport. See, [Charleston & W.C. Ry. Co. v. Varnville Furniture Co.](#), [237 U.S. 597, 601 \(1915\)](#). The Carmack Amendment is titled, "[l]iability of carriers under receipts and bills of lading." [49 U.S.C.A. § 14706](#). Furthermore, the text of the act only provides for liability of carriers and freight forwarders. [49 U.S.C.A. §14706\(a\)](#). Additionally, the only civil actions defined under the act are against carriers and freight forwarders. [49 U.S.C.A. § 14706\(d\)](#).

Despite the Carmack Amendment's silence on carrier-claims against shippers, shippers have occasionally argued that such claims are within the preemptive scope of the act. This very issue was discussed in depth in [Southern Pac. Transp. Co. v. U.S.](#), [456 F.Supp. 931 \(1978\)](#). There has been little subsequent case law.

The [Southern Pacific](#) case dealt with damage to a carrier's property as a result of the explosion of bombs being transported for the Department of the Navy. [Id.](#) Southern Pacific brought suit against the United States under the Federal Tort Claims Act for the damage. The government claimed that Southern Pacific's claims were governed by the Carmack Amendment. After a lengthy discussion, the court found that:

...the rationale behind passage of the Carmack Amendment provides

no indication whatsoever that the Amendment was intended to apply to carrier-claims. Rather the clear intent of the Amendment, as shown by its terms, was to facilitate shippers' recoveries against carriers for damage to transported cargo.

[Id. at 937.](#)

The [Southern Pacific](#) court likewise dismissed the government's argument that the Carmack Amendment's imposition of carrier liability for a shipper's full actual loss could be stretched to cover a carrier's claims against a shipper for its own damages. [Id.](#) The court's final position on the issue was summarized as follows:

To adopt the United States' position, that the Carmack Amendment applies to a carrier's claim for its own damages, would be to ignore and misconstrue many provisions of the Amendment. For example, whenever the Amendment refers to the carrier being "liable" for damages, it is stated with reference to liability to the lawful holder of the bill of lading. It does not make sense that Southern Pacific would be liable to the United States for damages suffered by Southern Pacific. Yet this is the necessary result of the United States' interpretation of the Amendment.

[Id. at 938.](#)

In the more than thirty years since the [Southern Pacific](#) decision, it appears that only one other District Court has accepted this principle and applied it to a similar attempt by a shipper to bring a carrier-claim within the purview of the Carmack Amendment. See, [InTransit, Inc. v. Excel N. Am. Rd. Transp., Inc.](#), [426 F. Supp. 2d 1136, 1140 \(D. Or. 2006\)](#) (holding that the Carmack Amendment did not apply to a carrier's claim against a shipper for wrongful rejection of a shipment).

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THE MISUNDERSTOOD WITNESS - EVENT DATA RECORDERS FOR HEAVY VEHICLES

By: William T.C. Neale and William M. Bortles

Introduction

The emergency crews investigating a triple fatality bus rollover accident outside Cañon City, Colorado on the evening of December 21, 1999, were not aware they were to be involved in one of the most impactful investigations regarding commercial vehicle accidents in recent history. The bus had 60 people on board – a driver and 59 passengers, who were returning to Texas from a ski trip in Crested Butte, Colorado.

According to the Highway Accident Brief, the incident occurred on eastbound Colorado State Highway 50, near milepost 273. This stretch of eastbound Highway 50 is a winding seven-mile downgrade, with a posted speed limit of 65 mph, and 55 mph advisory speeds around curves. The road surface was icy in areas; however, roadway salting and

sanding operations had occurred throughout the day. Witnesses report that as the vehicle was traveling along the descending roadway, the vehicle ‘fishtailed,’ but the driver was able to recover. A short time later, as the bus continued to gain speed, the driver lost control of the bus on a curve. The vehicle initially departed the right-hand side of the roadway, striking a delineator and a milepost marker. The vehicle returned to the roadway, crossed the centerline and departed the left-hand side of the road prior to rolling down an embankment.

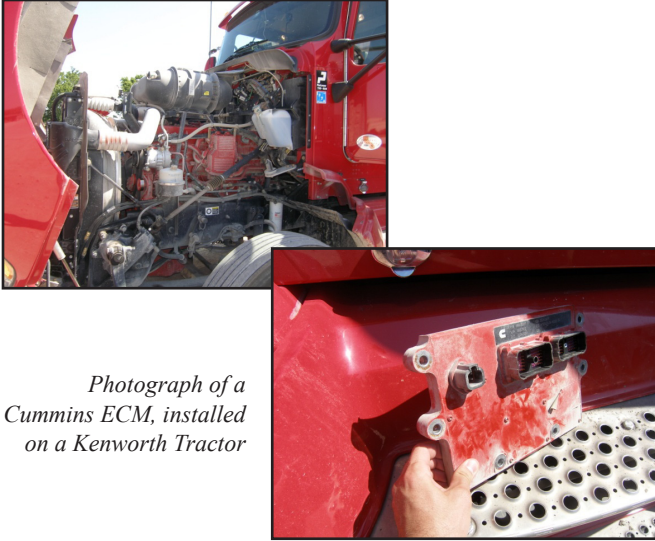
The National Transportation Safety Board investigated this incident for nearly three years before issuing recommendations that set precedence for how modern commercial vehicle accidents are reconstructed using the event data recorders already installed on the vehicle. However, more than ten years later, the use of Heavy Vehicle Event Data Recorders (HVEDRs) to reconstruct accidents is still largely underutilized and misunderstood.

The Background of the Heavy Vehicle Event Data Recorder

Electronic Control Modules (ECMs) were created, in part, to maximize fuel efficiency and meet increasingly stringent federally mandated emissions requirements. ECMs have since been installed in commercial trucks for nearly three decades. Detroit Diesel was the first heavy duty engine manufacturer to introduce the industry’s first fully integrated control system, the Detroit Diesel Electronic Control (DDEC) in 1985. Cummins and Caterpillar soon followed the trend². Nowadays, heavy vehicles contain sophisticated multi-module control systems that control engine and transmission functions, emission aftertreatment systems, anti-lock braking and stability control systems and, in the case of Volvo, airbag systems.



*Photograph Courtesy of National Transportation Safety Board –
Highway Accident Brief*



Photograph of a Cummins ECM, installed on a Kenworth Tractor

Roughly the size of a textbook, ECMs are usually mounted on the driver’s side of a truck engine. In the 1990s and early 2000s, ECMs were being manufactured not only to maximize fuel efficiency, but to record data that is useful during the investigation and reconstruction of an accident. By incorporating recoverable memory to these ECMs, the Heavy Vehicle Event Data Recorder was created.

There are several types of data that are helpful in reconstructing an accident³:

1. Acceleration Triggered Records

These events are triggered by a collision or braking event that causes a change in vehicle speed above some predefined threshold, usually 7 - 10 mph/sec (~0.3 to 0.45 g). These records may contain more than a minute of data prior to the trigger and several seconds of data subsequent to the triggering event. This data includes parameters such as vehicle speed, engine speed, brake, clutch, throttle and cruise control usage. These events are also known as **‘Quick Stop’** for a Caterpillar engine, **‘Hard Brake’** for a Detroit Diesel and Mercedes Benz engine, and **‘Sudden Deceleration’** for a Cummins engine.

2. Last Stop Record

These records contain data pertaining to the last time the vehicle had been driven. This record may contain up to two minutes of data as the vehicle stopped, including vehicle speed, engine speed and brake, clutch, throttle and cruise control usage.

3. Fault Codes or Diagnostic Trouble Codes

Faults occur when an input sensor receives a signal outside of its range of normal operating conditions. When a problem is detected, a ‘snapshot’ may record data pertaining to the conditions surrounding the time of the fault.

4. Configuration Settings

Useful parameter programming configurations include road and engine speed limiters, which govern the engine to a defined maximum road speed or RPM.

Different modules have different capabilities and available data. Since the data from the electronic control module is associated with the engine manufacturer, not the vehicle maker, it is important to know not only the make and model of the vehicle but also which engine is in the vehicle. Below is a matrix of heavy vehicle engines capable of recording event data:

<u>Caterpillar</u> 1995 & newer	<u>Detroit Diesel</u> 1998 & newer	<u>Mack</u> 1998 & newer	<u>Mercedes Benz</u> 2000 & newer
<u>Cummins</u> 2002 & newer	<u>Volvo</u> 2002 & newer	<u>International</u> 2010 & newer	<u>PACCAR + MX Engine</u> 2010 & newer

Case Study: National Transportation Safety Board (NTSB), Accident No. HWY-00-FWY011

In the case of the Cañon City bus crash, the HVEDR provided key insight into how the accident occurred. The bus was equipped with a Detroit Diesel engine, featuring the DDEC IV engine control module. Using data from the DDEC IV, data from the transmission control module, along with the documented physical evidence and traditional reconstruction methods, investigators were able to determine the following regarding this accident:

- The vehicle speed sensor in the ECM recorded that the vehicle was traveling at 63 mph prior to the initial ‘fishtail.’
- The ECM data allowed investigators to determine that a transmission retarder had activated during the initial loss of control. This loss of control was caused by the driver’s use of the retarder, despite the adverse weather conditions. The manufacturer of the transmission warns: “Using the retarder on wet or slippery roads can be like jamming on the brakes – your vehicle may slide out of control. To help avoid injury or property

damage, turn the retarder enable to OFF when driving on wet or slippery roads.”

- The ECM recorded that the driver then shifted the vehicle into neutral and briefly regained control of the vehicle. Shifting into neutral disengaged the transmission retarder; however, it also prevented any retarding torque from the powertrain. As a result, the vehicle continued to gain speed as it traversed the descending roadway.
- ECM data also showed the bus driver pumped the brakes six times in the 36 seconds between the initial loss of control and the rollover. Unfortunately, none of these brake applications resulted in significant reduction in speed. Ultimately, the vehicle was traveling approximately 70 mph when the accident occurred.

Almost three years later, on December 17, 2002, the NTSB adopted recommendations to increase awareness regarding the use of transmission retarders during inclement conditions, as well as recommendations regarding the development of more comprehensive data collection for HVEDRs installed in commercial vehicles. This accident set a precedent. It demonstrated how HVEDRs allowed investigators to learn, with great precision, the details leading up to the accident that

could not have been known using only physical evidence and traditional accident reconstruction methods. The HVEDR data was invaluable to the investigation of this accident and to the recommendations that improved motor vehicle safety.

The value of the data collected from the ECM is matched by its vulnerability, since it can be overwritten or lost under certain circumstances. Given the increase in the number of vehicles on the road capable of recording valuable data, prompt collection and preservation of the data is therefore critical. ⚖️

William T. C. Neale, M. Arch., is the Director of Visualization at Kineticorp LLC, a Forensic Engineering and Visualization company in Denver. He is the chairman of the Animation Committee for the Society of Automotive Engineers (SAE) Accident Reconstruction Session and has authored numerous papers in the area of computer animation, photogrammetry and nighttime visibility. Since 2000, Mr. Neale has created hundreds of scientific visualizations for Federal and State Courts as well as received national awards for his research in these topics and his work has been featured on ABC's 20/20, Denver's News Channels, and The Discovery Channel.

William M. Bortles is a Senior Engineer and ACTAR accredited Accident Reconstructionist at Kineticorp, LLC in Denver. He has training and experience using Event Data to reconstruct heavy vehicle crashes. His training includes Heavy Vehicle Crash Reconstruction from Northwestern University Center for Public Safety, How to Interpret Commercial Vehicle Event Data Recorders from the University of Tulsa and Accessing and Interpreting Heavy Vehicle Event Data Recorders from the Society of Automotive Engineers.

1 National Transportation Safety Board, Highway Accident Brief, Accident No. HWY-00-FH011, <http://www.nts.gov/doclib/reports/2002/HAB0219.pdf>
2 Goebelbecker, John M., Ferrone, Christopher, *Utilizing Electronic Control Module Data in Accident Reconstruction*, SAE Technical Paper 2000-01-0466. Warrendale, PA: Society of Automotive Engineers, 2000.
3 Cheek, Timothy, Steiner, John “Accessing and Interpreting Heavy Vehicle Event Data Recorders,” Seminar materials, Society of Automotive Engineers Course C1022, 2012.

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THE MCS-90 ENDORSEMENT...

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accused of employing leased, borrowed, or interchanged vehicles such as tractor-trailers to avoid safety regulations governing equipment and drivers. *See, e.g., American Trucking Ass'ns v. United States*, 344 U.S. 298, 304-05 (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, e.g., Mellon Nat'l Bank & Trust Co. v. Sophie Lines, Inc.*, 289 F.2d 473, 477 (3d Cir. 1961). This avoidance and resultant confusion was viewed as “abuses” that purportedly threatened the safety and other interests of the public and economic stability of the trucking industry. *Id.*

These perceived abuses motivated Congress to amend the Interstate Commerce Act—authorizing the ICC to develop regulatory laws holding commercial motor carriers responsible for the operation of vehicles certified to them. [49 U.S.C. § 304\(e\) \(1956\)](#). In response to this Congressional mandate, the ICC developed and promulgated regulations requiring: (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, regulations provide that a commercial motor carrier² may operate only if registered to do so and must be “willing and able to comply with ... [certain] minimum financial responsibility requirements,” *T.H.E. Ins. Co. v. Larsen Intermodal Servs., Inc.*, 242 F.3d 667, 670 (5th Cir. 2001).³ Financial responsibility requirements of the MCA may be met through one of three methods:

- (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

- (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....

[49 C.F.R. § 387.7\(d\)\(1\)-\(3\)](#). The first of these three is the preferred method of “the vast majority of motor carriers.” C. Anto & M. Halverson, *The MCS-90 Endorsement (The Ultimate Monkey Wrench)*, In Transit (Dec. 16, 2011) (hereinafter “Anton & Halverson”).

MCS-90 Endorsement

The express language of the MCS-90 ([49 C.F.R. § 387.15](#)) endorsement provides that:

The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended to assure compliance by the insured, within the limits stated herein, as a motor carrier of property, with sections 29 and 30 of the Motor Carrier Act of 1980 and the rules and regulations of the Federal Motor Carrier Safety Administration.

In consideration of the premiums 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 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 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.

It is further understood and agreed that, upon failure of the company to pay any final judgment recovered against the insured as provided herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the company to compel such payment.

The limits of the company's liability for the amounts prescribed in this endorsement apply separately to each accident and any payment under the policy because of any one accident shall not operate to reduce the liability of the company for the payment of final judgments resulting from any other accident.

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. For example, an MCS-90 endorsement 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." *Id.* Thus, this provision suggests that the endorsement modifies an underlying policy to the extent the policy is inconsistent. 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." *Id.* This ambiguity has led to confusion regarding an MCS-90 endorsement's effect on an injured party's right to recover a judgment against a motor carrier.

The majority view of the MCS-90 endorsement and its coverage of a "final judgment" in an appropriate action characterizes the insurer's obligation under the endorsement as one of a surety⁴ rather than a modification of the underlying policy. The endorsement is a safety net in the event other insurance is lacking. See [Canal Ins. Co. v. Carolina Cas. Ins. Co.](#), 59 F.3d 281, 283 (1st Cir.1995). 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 majority describes the surety obligation – to pay a judgment (in a negligence action, for example) against a motor carrier under the MCS-90 endorsement – as one that is triggered only 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. See, e.g., [Kline v. Gulf Ins. Co.](#), 466 F.3d 450, 455-56 (6th Cir.2006).

The MCS-90 endorsement, its terms, and its operating provisions are only implicated as between an injured member of the public and the MCS-90 insurer. See, e.g., [Canal Ins. Co. v. Distrib. Servs., Inc.](#), 320 F.3d 488, 493. The endorsement operates only to protect the public and "does not alter the relationship between the insured and the insurer as otherwise provided in the policy." [49 C.F.R. § 387.15](#)

The MCS-90 Endorsement and Related Issues in Brief ***Vehicles Not Listed On Policy***

The MCS-90 endorsement provides "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.*" *Ill. Cent. R.R. Co. v. Dupont*, 326 F.3d 665, 666 (5th Cir. 2003). This is the case 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. Ins. Co.*, 889 F.2d 604, 608 (5th Cir.1989), modified by 901 F.2d 45 (5th Cir.1990).

Vehicles Not Engaged in Transportation of Property

A plain-English interpretation of the text of the MCS-90 endorsement and § 30 of the MCA leads to the conclusion that only vehicles presently engaged in the *transportation* of property in interstate commerce are covered. *Canal Ins. Co. v. Coleman*, 625 F.3d 244, 249 (5th Cir. 2010) (emphasis added). The MCS-90 endorsement does not cover *other* kinds of liabilities--*i.e.*, "liabilities incurred outside of the transportation of property." *Id.* (5th Circuit rejected argument that MCS-90's coverage extended to accident involving trucker who, while heading home, backed his truck into another vehicle being driven by plaintiffs who were consequently injured).

Permissive Users and Other "Unqualified" Insureds

A majority of courts has concluded that the MCS-90 endorsement also applies to permissive users of the vehicle at issue even though they would not otherwise qualify as an insured under the insurance policy at issue. *See, e.g.*, *John Deere Ins. Co. v. Guillermo Nueva*, 229 F.3d 853, 858 (9th Cir. 2000). In response to *John Deere* and other cases with similar holdings, the FMSCA issued "regulatory guidelines" which at least suggests that the term, "insured," as used in the MCS-90 endorsement should be construed to mean the motor carrier identified in the policy. *See* Anto & Halverson (Some courts have followed this "guideline." The 9th Circuit has "alluded to the fact" that *John Deere* may still be valid law).

Exempt Commodities

Courts have held that the MCS-90 endorsement does not apply in cases involving transportation of exempt commodities such as agricultural products. *See, e.g.*, 49 USC § 13506(a)(6)(B).

But other courts have held that, even if a carrier is engaged in transportation of exempt commodities, an

MCS-90 endorsement may nonetheless apply under exceptional circumstances. *See, e.g.*, *Century Indem. Co. v. Carlson*, 133 F.3d 591, 599-600 (8th Cir. 1998) (MCS-90 applies because agricultural commodity exemption constitutes limitation on jurisdiction of ICC); *Canal Ins. Co. v. Owens Trucking*, 2011 WL 4833045 (S.D. Miss. Oct. 11, 2011) ("Section 13506 does not imply a hole in the MCS-90 Endorsement's coverage when the offending motor vehicle contains livestock").

Interstate vs. Intrastate and State Endorsements

The MCS-90 applies only to interstate transportation—not to intrastate transportation. In cases of intrastate transportation, 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). In analyzing whether a truck is engaged in interstate commerce several jurisdictions consider the essential character of the truck company's business. *See, e.g.*, *Branson v. MGA Ins. Co.*, 673 So. 2d 89 (Fl. Dist. Ct. App. 1996) (declining to apply the MCS-90 to purely intrastate transportation); *General Sec. Ins. Co. v. Barrentine*, 829 So. 2d 980, 984 (Fla. Dist. Ct. App. 1st Dist. 2002) ("The issue is not whether a truck might be used for an interstate shipment in the future. That much could be said of nearly any tractor-trailer rig. Rather, *the issue is whether the injury in question occurred while the truck was operating in interstate commerce.*")

Triggering of Payment and Subrogation Rights

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 as 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). Again, under the MCS-90 framework, an MCS-90 insurer acts as a surety for the motor carrier.

Duty to Defend

If a vehicle is not listed in the policy’s schedule of vehicles and no coverage is therefore afforded under that policy to which a MCS-90 endorsement is attached, a duty to defend under the policy does not arise because an MCS-90 endorsement only creates a duty to indemnify in the event of a final judgment. It does not create a duty to defend. See, e.g., [OOIDA Risk Retention Group, Inc. v. Williams](#), 579 F.3d 469, 478 n.6 (5th Cir.2009).

CONCLUSION

Federal regulatory laws pertaining to the MCS-90 endorsement and its coverage of a “final judgment” were enacted to address widespread concerns over financial responsibility for injuries sustained in accidents involving motor carriers which operate vehicles transporting property in interstate commerce. Despite the absence of uniform interpretation and application of MCS-90 law, 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. This is the crux of MCS-90 law. Recognition of this simple principle will provide the foundation upon which the transportation litigator may acquire an understanding of the law and competently apply it in the appropriate cases. ⚖️

Patrick Bergin is a partner with the firm of Butler, Snow, O’Mara, Stevens & Cannada, P.L.L.C., where he focuses his practice on transportation litigation, property-damage and personal-injury defense as well as toxic tort and environmental law. He earned an English degree from the University of South Carolina, followed by a J.D. degree, cum laude, from the Florida State University College of Law in 1988 where served as an editor on the law review. He thereafter clerked for the Mississippi Supreme Court and the United States District Court for the Southern District of Mississippi and is currently a member of the Trucking Industry Defense Association, Defense Research Institute, Claims and Litigation Management Alliance, Mississippi Bar Character and Fitness Committee and Mississippi Defense Lawyers Association Board of Directors—to name a few.

1 From website of the FMCSA where MCS-90 and other forms may be found.
 2 The MCA defines “motor carrier” as “a person providing motor vehicle transportation for compensation” and “includes, but is not limited to, a motor carrier’s agent, officer, or representative; an employer responsible for hiring, supervising, training, assigning, or dispatching a driver; or an employee concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories.” [49 C.F.R. §§ 387.5](#) & 13102(14).
 3 The implementing regulations “prescribe[] the minimum levels of financial responsibility required [of] motor carriers of property operating motor vehicles in interstate, foreign, or intrastate commerce,” [49 C.F.R. § 387.1](#), and “appl[y] to for-hire motor carriers operating motor vehicles transporting property in interstate or foreign commerce,” *id.* [§ 387.3](#). Specific minimum levels are defined by the cargo being transported. *Id.* [§ 387.9](#).
 4 A surety in this instance has been characterized as “a contractual relation resulting from an agreement whereby one person, the surety, engages to be answerable for the debt, default or miscarriage of another, the principal.” [74 Am.Jur.2d Suretyship § 1](#) (1974); see [Carolina Cas.](#), 533 F.3d at 1208.

THE CARMACK AMENDMENT:...

Continued from page 5

On the other hand, there appears to be no case where the Carmack Amendment was held to preempt a carrier-claim. Still, it can be disquieting when one is left relying on a thirty year-old District Court decision outside of one’s jurisdiction as the only support for the propriety of a carrier-claim sounding in state tort or contract law. The issue became murkier based on dicta in the Seventh Circuit’s decision in [REI Transport, Inc. v. C.H. Robinson Worldwide, Inc.](#), 519 F.3d 693 (7th Cir. 2008).

REI Transport dealt with a carrier’s conversion, unjust enrichment, and breach of contract claims against a freight broker. *Id.* at 694-95. C.H. Robinson moved for summary judgment on the basis that REI Transport’s breach of contract claim was preempted by the Carmack Amendment. *Id.* at 697. The court defined the issue

as “whether breach-of-contract claims by a carrier against a ‘person entitled to recover’ under the Carmack Amendment fall within [that Act’s] preemptive sweep.” *Id.* While holding that the claim was not preempted by the Carmack Amendment, the court stated as follows: “We hold that the Carmack Amendment does not preempt *all* claims by a carrier against a shipper or other ‘person entitled to recover’ for non-payment.” *Id.* (emphasis added). The court explained that the Carmack Amendment only preempted state and common law claims that were inconsistent with the federal Act. *Id.* at 698. The Seventh Circuit elaborated as follows: “...claims that do not affect a carrier’s liability for lost or damaged goods - such as a suit by a carrier against a ‘person entitled to recover’ for non-payment - do not upend the uniformity effected by the Carmack Amendment and are therefore not preempted.” *Id.*

Federal preemption of state law, when not accomplished through specific statutory language,

operates under the Supremacy Clause of the Constitution and can be effected through two modes. “First, ‘state law is naturally preempted to the extent of any conflict with a federal statute.’ Second, [the Supreme Court has] deemed state law pre-empted ‘when the scope of a [federal] statute indicates that Congress intended federal law to occupy a field exclusively.’” *Kurns v. R.R. Friction Products Corp.*, 132 S. Ct. 1261, 1266 (2012) (internal citations omitted).

The first type of preemption occurs in, “cases where ‘compliance with both federal and state regulations is a physical impossibility,’ and those instances where the challenged state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’ (‘What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects’).” *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012).

In the second instance, “[t]he intent to displace state law altogether can be inferred from a framework of regulation ‘so pervasive ... that Congress left no room for the States to supplement it’ or where there is a ‘federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’” *Id.*

The Supreme Court originally articulated the preemptive nature of the Carmack Amendment with the following reasoning:

That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession

of the subject, and supersede all state regulation with reference to it.

Adams Express Co. v. Croninger, 226 U.S. 491, 505-06 (1913).

The Supreme Court makes clear in *Croninger* that the Carmack Amendment preempts claims involving “liability of carriers.”

The statutory language of the Carmack Amendment along with the case law interpreting it all define the intended focus of the Act as “carrier liability” for the loss of or damage to goods in interstate transport. The *Southern Pacific* court correctly limited the preemptive scope of the Act to claims *against* carriers. Furthermore, the reasoning of the Seventh Circuit in *REI Transport* supports such a limit on preemptive scope. Unfortunately, the remainder of the *REI Transport* opinion failed to take this reasoning to its logical conclusion and appears to have opened the door for preemption of some, unknown, carrier claims under the Carmack Amendment.

Carriers who suffer damages as a result of tortious conduct or breach of contract by a shipper who negligently loads or improperly identifies hazardous materials should aggressively pursue claims against a shipper to recover damages. While shippers may try to defend such claims arguing that the Carmack Amendment occupies the field and thus preempts such claims, neither the Carmack Amendment nor the case law interpreting this statute limit the liability of a shipper for damages caused to a carrier by a shipper’s negligence or its breach of contract. Only when a carrier’s claims against a shipper seeks to limit the carrier’s liability to the shipper for lost or damaged goods should a court find that the Carmack Amendment preempts such claims. ⚖️

Brian Voke is a Shareholder at Campbell Campbell Edwards & Conroy PC in Boston, MA. He acts as lead trial counsel in the defense and trial of transportation, complex products liability, toxic tort, negligence, professional liability, employment and insurance coverage matters. As one of the firm’s principal trial attorneys, Brian has tried catastrophic injury and death cases in Maine, Massachusetts, New Hampshire, Rhode Island, Connecticut, and Georgia.

2013-2014 TIPS CALENDAR

August 2013

8-11 ABA Annual Meeting Westin St. Francis
San Francisco, CA
Contact: Felisha A. Stewart – 312/988-5672
Speaker Contact: Donald Quarles – 312/988-5708

October 2013

8-13 TIPS Fall Leadership Meeting Minneapolis Marriott Hotel
Minneapolis, MN
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Speaker Contact: Donald Quarles – 312/988-5708

17-18 Aviation Litigation Fall Meeting Ritz-Carlton, Washington, DC
Washington, DC
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November 2013

6-8 Fidelity & Surety Committee The Fairmont Copley Plaza
Fall Meeting Boston, MA
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January 2014

21-25 Fidelity & Surety Committee Waldorf~Astoria Hotel
Mid-Winter Meeting New York, NY
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February 2014

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Chicago, IL
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April 2014

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Phoenix, AZ
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