

Damage to Infrastructure:

What is the most effective means of cost recovery?

Payment & Performance Bond vs Auto Liability Insurance Policy



Introduction

Herein, we will explain why the payment and performance (P&P) bond is **NOT** the appropriate risk transfer instrument and why the interests of the respective state entities, regulating motor carriers, are better served and protected by the auto liability policy.

In many states, motor carriers hauling over-size, over-weight or over-dimensional freight are required to post a payment and performance bond in order to secure a permit. Typically, the payment and performance (P&P) bond has language similar to the following:

“The purpose of this Bond is to guarantee that the Principal will be held accountable for any damage done to the roadway, or structures, within right-of-way along the permitted route.

“If the Principal does any damage to the highway right-of-way as a result of movement on the road or deviates from the stipulated routes and does damage to the highway right-of-way, this bond is hereby extended to cover any removal or corrective action determined necessary by the owner.”

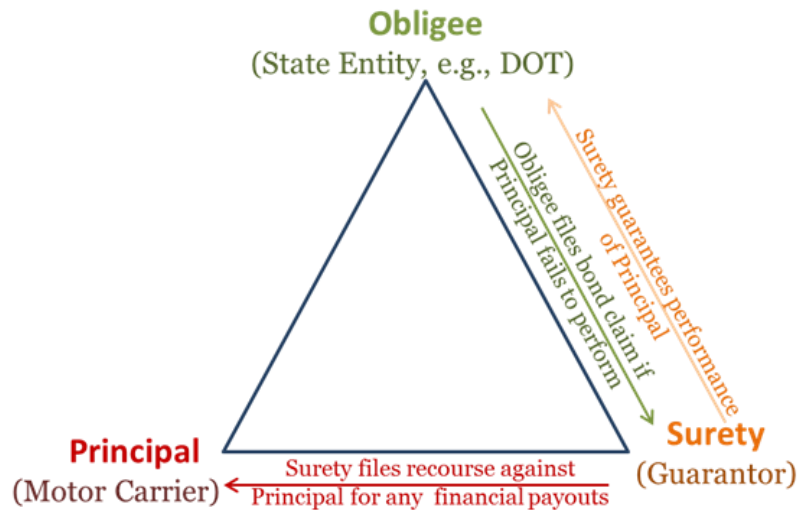
Next, we will examine **WHY** the protection, which states are attempting to address with the P&P bond language, is **ALREADY** specifically addressed within the motor carrier’s auto liability policy.

P&P Bond vs. the Auto Liability Policy

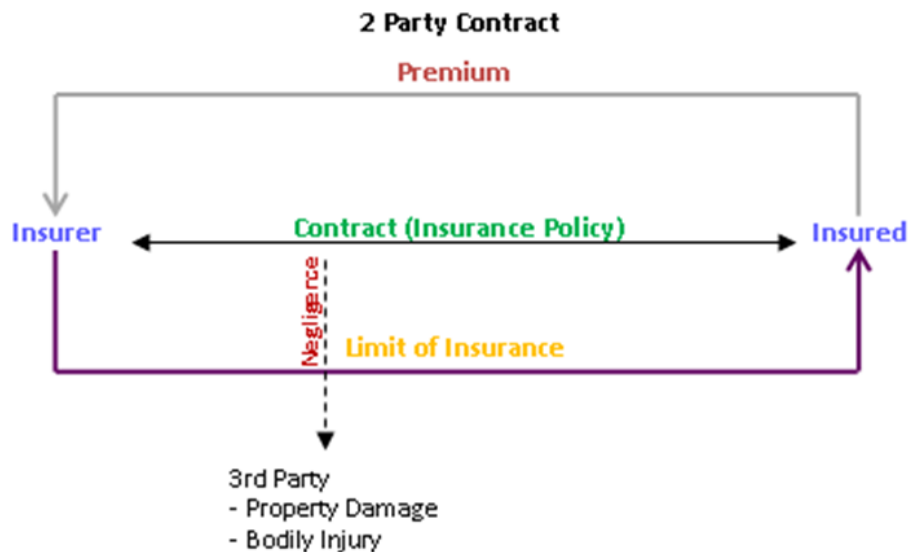
There are 3 parties to a P&P bond: the principal (e.g., motor carrier), the surety (guarantor) and the obligee (e.g., a state entity or bond beneficiary). A P&P bond guarantees the motor carrier’s performance based on an underlying contract. In this instance, the permit’s terms and conditions are the underlying contract. Therefore, the P&P bond is a 3rd party guarantee that the motor carrier will perform according to the permit’s terms and conditions.

The following “bond triangle” illustrates the relationship of the parties.

Payment & Performance Bond Triangle



The auto liability policy is a contract between the insurer and the insured; it is a 2 party contract. For an exchange of premium, the insurer agrees to pay 3rd party claims for bodily injury and property damage due to the insured’s **negligence** up to the limit of liability. The following diagram illustrates this relationship.



Scenario

STRESS FRACTURE TO A BRIDGE:

\$350,000 TO REPAIR! WHO PAYS?

In late 2014, a motor carrier moved a 350-ton generator over a permitted route including several interstate roadways and 2 older bridges (1200 miles). Following the move, state engineers re-tested the bridges and identified several stress fractures as a result of the move. The motor carrier had posted a payment and performance (P&P) bond in the amount of \$500,000; additionally, the motor carrier had an auto liability policy with both a \$1MM limit and the required MCS-90.

The state DOT filed a claim with the surety providing a copy of the P&P bond. The surety denied the claim stating, in part, *"...The Motor Carrier Policy of Insurance for Public Liability Under Sections 29 & 30 of the Motor Carrier Act of 1980 (a/k/a MCS-90) endorsement to the motor carrier's auto liability policy requires the auto liability insurer 'to pay, within the limits of liability, any final judgment recovered against the insured from negligence.' This surety's investigation has determined the claim for damage to the bridge is the result of the motor carrier's negligence and therefore falls under the scope of the motor carrier's auto liability policy and the MCS-90. Said motor carriers' negligence does not fall within the scope of this surety instrument."*

The auto liability insurance policy is the first policy to respond to infrastructure damage. Even if a P&P bond is in effect, the auto liability policy is the first source of funds to restore/repair the bridge, roadway, right-of-way, side-street, etc.

Attached to the motor carrier's auto liability insurance policy is the MCS-90 endorsement. This endorsement requires the insurer to pay a 3rd party property damage claim (e.g., infrastructure damage) due to the motor carrier's negligence. The MCS-90 endorsement reads:

- *"The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended to assure compliance by the insured..."*
- *"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."*

Summary

Regardless of the language in the P&P bond form, the motor carrier's auto liability policy is the first means of financial recovery as required by the FMCSA mandated MCS-90 endorsement. The P&P bond form does not have the MCS-90 and therefore, does not have the same legal requirement, due to negligence (direct and/or vicarious), as the motor carrier's auto liability policy.

Many P&P bond forms include a 1-year provision for reporting a claim. Conversely, the auto liability insurance policy does not have a defined reporting time frame. For example, a section of state highway was severely damaged in 2010 by an over-size move. The claim was not reported until 2014. The auto liability insurance policy in place at the time of the occurrence responded to the claim.

Payment and performance bonds are beneficial to ensure payment of fuel taxes and permit fees. However, for a state to require an additional P&P bond for movement on a right of way or highway does **NOT** reduce risk or protect the state entity because the MCS-90 is not included on the bond form nor is it required to be included.

As part of the permit application process, every state permitting office should simply require that a copy of the motor carrier's MCS-90 be filed with the permit application. Every motor carrier has a copy of it's MCS-90 and the MCS-90 shows the limit of liability and the auto liability insurer for the motor carrier. The MCS-90 should include the name of the motor carrier and it's US DOT #.

Determine that the limit of auto liability, noted on the motor carrier's certificate of insurance, is adequate for any potential infrastructure damage on the permitted route. A \$1,000,000 limit is typically adequate for any one permitted move.

An ACORD form (e.g., certificate of insurance) and the MCS-90 do not carry the same weight. A certificate of insurance is information only and is NOT part of the insurance policy contract. The MCS-90 is an endorsement to the auto liability insurance policy and therefore has direct impact on coverage and claims.

Review additional insured endorsements carefully to make certain that the rights of the additional insured are adequately protected and addressed. Special attention should be given to severability of insureds language and how limits apply to both the named insured and any additional insured. Additional insured endorsements are not uniform and will likely vary by insurer.

Conclusion

A motor carrier's auto liability insurance policy is the proper financial instrument to protect state entities from damages to infrastructure during the movement of loads be they over-sized or of legal dimension. Requiring an additional P&P bond should never be needed if the state validates the motor carrier's MCS-90, insurance certificate (including limits) and other required auto liability insurance policy endorsements.

About the Author

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