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IN THE
INDIANA SUPREME COURT

Case No. 20A—CT—OI765

Progressive Southeastern Insurance Company, Appellant,	)	Appeal from the Carroll Circuit Court
v.	)	Trial Court Cause No. 08C01-1811-CT-13
B&T Bulk, LLC, Bruce A. Brown, Robin S. Johnson, as Personal Representative of the Estate of Dona S. Johnson, and Robin S. Johnson, Individually, Appellees.	)	The Honorable Benjamin A. Diener, Judge

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BRIEF OF *AMICUS CURIAE* TRUCKING INDUSTRY DEFENSE ASSOCIATION IN SUPPORT OF APPELLANT'S PETITION TO TRANSFER

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I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Trucking Industry Defense Association ("TIDA") is an international organization comprised of motor carriers, transportation logistics companies, insurers of motor carriers, third party claims administrators, and defense counsel. The motor carrier members of TIDA include common carriers, private carriers, and private fleets. The insurance company members provide transportation liability insurance for the trucking industry. TIDA provides assistance to the trucking industry on various issues regarding risk management, personal injury, property damage, insurance, and workers' compensation claims. http://www.tida.org/. TIDA advocates on behalf of the interests of its members and regularly participates as *amicus curiae* in cases involving issues of concern to its members.

Amicus curiae have an interest in the current appeal because the issue of whether and to what extent state law can expand the scope of the USDOT's MCS-90 endorsement will impact the entire transportation industry. This issue is of utmost importance to *amicus curiae* because if this Honorable Court affirms the Court of Appeals' decision, courts in other states will likely cite to and rely upon this decision as persuasive authority supporting the proposition that courts may unilaterally expand the scope of federal law. Doing so would impose an almost insurmountable burden for insurers to predict whether a given state's courts would expand the scope of federal law as it relates to MCS-90 surety obligations, resulting in higher insurance premiums for motor carriers and, ultimately, higher prices for goods transported by trucks throughout the United

States. Because this Honorable Court's decision could have far-reaching consequences for those in the trucking industry and negatively impact the overall economy, *amicus curiae* request leave to submit the following for consideration.

II. SUMMARY OF ARGUMENT

As an important part of the U.S. economy, the trucking industry is heavily regulated by the federal government. In order to comply with federal regulations, most motor carriers purchase liability insurance coverage and have their insurers file proof of insurance with the USDOT and attach a copy of the MCS-90 to the policy. An insurer's exposure pursuant to MCS-90 endorsement takes the form of a suretyship, separate and distinct from the underlying insurance coverage. Congress properly required that the endorsement be made explicit, and in writing, because it fundamentally changes the typical relationship between insurer and insured. The MCS-90 form explicitly states that its purpose is to assure compliance with federal law.

Separately, Indiana's regulations require state motor carriers to arrange for the filing of a Form E endorsement. However, no such state endorsement apparently was made in this case. Instead, the Court of Appeals' opinion relied on a statute that isn't even directed at insurers or sureties but simply mandates that *motor carriers* comply. As a result, the opinion of the Court of Appeals has the effect of amending the contract of insurance by creating a new suretyship

obligation on the part of insurers without providing insurers, as the MCS-90 does, the specific terms of that new obligation.

If a state court has the power to unilaterally mandate both the presence of a suretyship obligation as well as the scope of that obligation despite a lack of explicit state statutory and/or regulatory authority to do so, then such a surety could be required in every state in the country, the terms of which would be dependent upon the whim of a particular state court, creating uncertainty on the part of insurers. The uncertainty caused by the opinion of the Court of Appeals creates increased risk, which results in higher insurance premiums. Higher insurance premiums inevitably will be passed on to consumers in the form of higher prices on consumer goods in an economy that is already highly stressed because of multiple factors not the least of which is the global pandemic. As a result, the uncertainty wrought by the opinion of the Court of Appeals will adversely affect not only on the transportation industry but the economy as a whole.

III. ARGUMENT

A. The Trucking Industry is Important to the U.S. Economy

According to data from the U.S. Bureau of Labor Statistics (BLS) there were approximately 1.75 million heavy and tractor-trailer truck drivers in the United States in 2017, along with 877,670 light truck or delivery services drivers

and 427,000 driver/sales workers.[1] Truck driving is important not only because it is a large occupation, but also because it provides critically important services to the U.S. economy. Trucking is the primary mode of freight transportation within the United States and a crucial component of international trade. In 2016, 65 percent of the value of goods transported between the United States and its neighboring countries (Canada and Mexico) was carried by truck.[2] Trucks were estimated to have hauled 61 percent of the total freight (by value) transported in the United States in 2016, and this activity accounted for an estimated 3.5 percent of U.S. gross domestic product.[3]

The number of trucks on the roadways increased from 8,481,999 in 2005 to 11,203,184 in 2015, a 32% increase over that period.[4] Of the $19.2 Trillion in freight shipments within the U.S. in 2015, $13.1 Trillion (68%) was shipped by truck. By 2045, it is projected that trucks will account for $24.5 Trillion of a total

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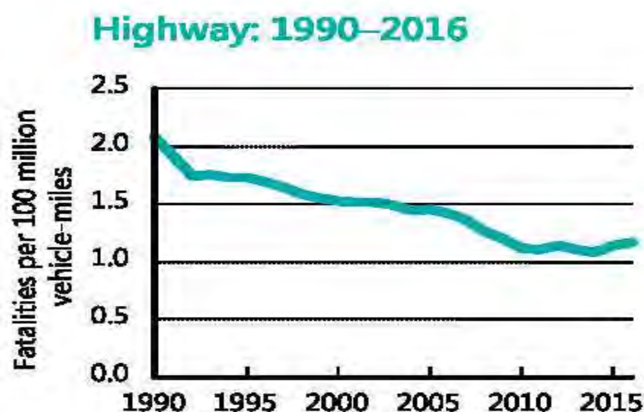
[1] Occupational Employment Statistics (OES) survey, a nationally representative survey of nonfarm business establishments, found in Pocket Guide to Transportation 2018, table 3-3.

[2] *Id.*

[3] Freight Facts and Figures 2017, figure 5-2 (U.S. Department of Transportation, Bureau of Transportation Statistics, 2017), p. 111; and Pocket Guide to Transportation 2018, tables 2-1 and 2-2 (U.S. Department of Transportation, Bureau of Transportation Statistics, 2018), pp. 1–69. https://www.bts.gov/sites/bts.dot.gov/files/docs/browse-statistical-products-and-data/bts-publications/pocket-guide-transportation/215726/pocket-guide-2018complete.pdf. These estimates include both the for-hire trucking industry (firms providing motor freight services to customers who are shippers and receivers) and private carriage (firms hauling their own freight as an internal function within some other primary line of business). Federal statistical agencies assign industry codes according to the primary line of business.

[4] U.S. Department of Transportation, Bureau of Transportation Statistics, National Transportation Statistics, table 1-11, available at www.bts.gov as of October 2017, retrieved from https://www.bts.gov/sites/bts.dot.gov/files/docs/browse-statistical-products-and-data/bts-publications/pocket-guide-transportation/215726/pocket-guide-2018complete.pdf.

$38 Trillion in shipments.[5] Despite these increases in truck traffic and the value of shipments being transported by truck, highway fatality rates have decreased over the past 25 years:



B. Federal Law Requires a Separate, Distinct, and Explicit MCS-90 Endorsement as Part of the Contract of Insurance Between Motor Carriers and Insurers Because it Fundamentally Changes the Relationship Between Insurer and Insured

As an important part of the U.S. economy, the trucking industry is heavily regulated by the federal government. The Motor Carrier Act mandates that commercial motor carriers provide evidence of financial responsibility; as the other amicus briefs in this matter indicate motor carriers have three options by which they can provide such proof. Most though, purchase liability insurance coverage and have their insurers file proof of insurance with the USDOT and attach a copy of the MCS-90 to the policy. 49 C.F.R. § 387 *et seq.* Since insurance policies have pre-requisites to coverage and exclusions, meaning that in some cases the policy at issue will not provide coverage, the MCS-90 provides an extra

[5] U.S. Department of Transportation, Bureau of Transportation Statistics and Federal Highway Administration, Freight Analysis Framework, Version 4.4, available at www.bts.gov as of October 2017.

layer of protection for the public. By issuing the MCS-90, the insurer commits itself to pay certain judgments entered against the motor carrier even if they are not covered under the terms of the basic policy.

Federal law applies to the operation and effect of insurance policy endorsements mandated by regulations promulgated pursuant to Motor Carrier Act. *Carolina Cas. Ins. Co. v. E.C. Trucking,* 396 F.3d 837, 841 (7th Cir. 2005). The growing consensus of the case law is that the MCS-90 does not apply if the underlying transportation was intrastate. *See, e.g., Lyons v. Lancer Ins. Co.,* 681 F.3d 50, 60 (2d Cir. 2012); *Canal Ins. Co. v. Coleman,* 625 F.3d 244, 249 (5th Cir. 2010).

An insurer's exposure pursuant to MCS-90 endorsement takes the form of a suretyship, rather than providing insurance coverage *per se.* 49 U.S.C.A. § 31139(e); 49 C.F.R. § 387.7. *Travelers Indem. Co. of Ill. v. Western American Specialized Transp. Co., Inc.,* 317 F.Supp.2d 693, 699 (W.D.La. 2004), affirmed 409 F.3d 256. As a result, the suretyship is a requirement that is separate and distinct from the underlying insurance coverage. Congress properly required that the endorsement be made explicit, and in writing, because it fundamentally changes the typical relationship between insurer and insured.

The MCS-90 form mandates that it be signed by an authorized insurance company representative to the effect that the policy of insurance is amended to

comply with *federal* law.[6] In fact, the form explicitly states that its purpose is to "assure compliance" with *federal* law:

> 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** (FMCSA).[7]

The form explicitly states that, in return for the premium paid by the motor carrier, the insurer agrees to pay under those conditions described by *federal* law:

> 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** . . . .[8]

The form explicitly states that the schedule of limits apply under conditions required by *federal* law:

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[6] https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2021-06/FMCSA%20Form%20MCS-90%2006032021_508.pdf

[7] *Id.* (Emphasis added.)

[8] *Id.* (Emphasis added.)

FORM MCS-90 **OMB No.: 2126-0008 Expiration: 05/31/2024**

SCHEDULE OF LIMITS — PUBLIC LIABILITY

Type of carriage	Commodity transported	January 1, 1985
(1) For-hire (in interstate or foreign commerce, with a gross vehicle weight rating of 10,001 or more pounds).	Property (nonhazardous)	$750,000
(2) For-hire and Private (in interstate, foreign, or intrastate commerce, with a gross vehicle weight rating of 10,001 or more pounds).	Hazardous substances, as defined in 49 CFR 171.8, transported in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3,500 water gallons; or in bulk Division 1.1, 1.2, and 1.3 materials, Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A material; in bulk Division 2.1 or 2.2; or highway route controlled quantities of a Class 7 material, as defined in 49 CFR 173.403.	$5,000,000
(3) For-hire and Private (in interstate or foreign commerce, in any quantity; or in intrastate commerce, in bulk only; with a gross vehicle weight rating of 10,001 or more pounds).	Oil listed in 49 CFR 172.101; hazardous waste, hazardous materials, and hazardous substances defined in 49 CFR 171.8 and listed in 49 CFR 172.101, but not mentioned in (2) above or (4) below.	$1,000,000
(4) For-hire and Private (In interstate or foreign commerce, with a gross vehicle weight rating of less than 10,001 pounds).	Any quantity of Division 1.1, 1.2, or 1.3 material; any quantity of a Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A material; or highway route controlled quantities of a Class 7 material as defined in 49 CFR 173.403.	$5,000,000

*The schedule of limits shown does not provide coverage. The limits shown in the schedule are for information purposes only.

Under the schedule of limits, the form mandates insurance for *inter*state commerce only, unless the commodity transported is specifically listed in the schedule of limits (*i.e.,* hazardous substance, oil, hazardous waste, etc.) as defined by *federal* law.[9]

As noted in the amicus brief of Sandberg and Scapellato, Indiana's regulations require state motor carriers to arrange for the filing of a Form E endorsement. We are unsure why no mention was made of the Form E in the opinion of the Court of Appeals but we gather that no such state endorsement was made in this case. That failure was B&K's (and perhaps also the Indiana Department of Revenue's). We observe that the Indiana statute on which the Court of Appeals' opinion is based isn't even directed at insurers or sureties but

[9] *Id.*

simply mandates that *motor carriers* comply. Ind. Code § 8-2.1-24-18. As a result, the opinion of the Court of Appeals has the effect of amending the contract of insurance by creating a new suretyship obligation on the part of insurers without providing insurers, as the MCS-90 does, the specific terms of that new obligation.

In light of the opinion of the Court of Appeals that Indiana's legislature intended to expand the federal MCS-90 obligation and the scope of an insurer's federally defined contractual obligations to now include unladen, intra-Indiana trips, insurers will have questions, answers to which the Court of Appeals provides absolutely no guidance whatsoever. For instance, because the MCS-90 explicitly states that it is limited to compliance with *federal* law (*i.e.,* interstate commerce), what are the explicit terms of the new suretyship created by the opinion of the Court of Appeals? At this point, insurers don't know.

In addition, insurance companies justifiably will be concerned that courts in other states will utilize the opinion of the Court of Appeals as a basis of support for their own versions of "MCS-90-like" obligations, whether or not they track the obligations as envisioned by the opinion of the Court of Appeals, again without a "MCS-90-like" form explicitly stating the terms of those new obligations and signed by a representative of an insurance company. If a state court has the power to unilaterally mandate both the presence of a suretyship obligation as well as the scope of that obligation despite a lack of explicit state statutory and/or regulatory authority to do so, then such a surety could be required in

every state in the country, the terms of which would be dependent upon the whim of a particular state court.

C. Confusion and Uncertainty With Respect to State Law on the Obligations of Insurers Undoubtedly Will Result in Higher Premiums to All Motor Carriers that Will Be Passed on to Consumers in the Form of Higher Prices on Consumer Goods

Apart from the issue of whether Indiana statutory law merely adopts or incorporates federal law as opposed to expanding it, and apart from the issue of whether the Court of Appeals and/or the Indiana legislature even has the power to expand the scope of the federal MCS-90 obligation to include intrastate commerce (issues analyzed in depth by Progressive in its petition to transfer), concerns like the ones posed above, left unaddressed by the Court of Appeals, create uncertainty on the part of insurers.

And this uncertainty is tied to a significant portion of the transportation of goods. As of 2010, six of the top ten most valuable national trade corridors were solely intrastate.[10] These six trade corridors alone represented $221.6 Billion in trade.[11] Because intrastate transportation comprises a significant portion of all freight transfers, insurers may be forced to provide a surety where none existed before on significant portion of all motor carriers.

The uncertainty caused by the opinion of the Court of Appeals creates increased risk, which results in higher insurance premiums. Higher insurance

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[10] Adie Tomer and Joseph Kane, Mapping Freight: The Highly Concentrated Nature of Goods Trade in the United States (Brookings Institution, 2014), table 3 items 2-7.

[11] *Id. See also* Interstate and Intrastate Flows as Share of Outbound Shipment Values by State: 2002, Bureau of Transportation Statistics, U.S. Department of Transportation, figure 15 https://www.bts.gov/archive/publications/freight_in_america/figure_15

premiums inevitably will be passed on to consumers in the form of higher prices on consumer goods in an economy that is already highly stressed because of multiple factors not the least of which is the global pandemic. There can be little doubt that the opinion of the Court of Appeals will contribute to higher prices generally for goods transported by trucks.

By expanding the federal requirement of a suretyship obligation on the part of insurers to include intrastate transportation despite the absence of explicit statutory language requiring as much or an MCS-90-like form that explicitly details the scope of the obligation, the opinion of the Court of Appeals removes from the insurer the ability to calculate the risk of issuing such a surety to a particular motor carrier and, accordingly, adjust its premium to that carrier. In short, the opinion of the Court of Appeals will create confusion and uncertainty among insurers.

Indiana law recognizes the fact that uncertainty is tied to an insurer's decision whether to insure a particular risk and, if so, the premiums that must be charged to insure that risk. *See, e.g., Watson v. Golden Rule Ins. Co.,* 564 N.E.2d 302, 304 (Ind. Ct. App. 1990); *Holtzclaw v. Bankers Mut. Ins. Co.,* 448 N.E.2d 55, 58 (Ind. Ct. App. 1983); *American Family Mut. Ins. Co. v. Kivela,* 408 N.E.2d 805, 810 (Ind. Ct. App. 1980). Without a statutory basis or explicit terms of a surety for intrastate transportation and resulting lack of means by which an insurer can calculate risk to a particular motor carrier (*i.e.,* carriers that engage in intrastate transportation in Indiana), the insurer will have no choice but to raise the premiums of *all* carriers:

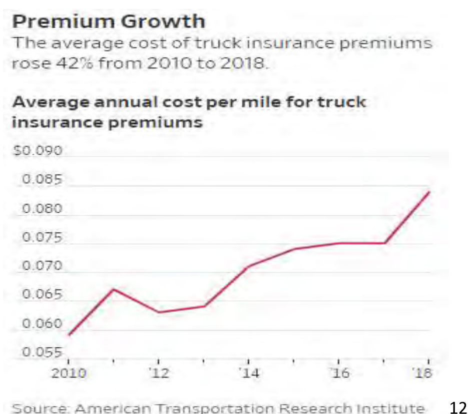
> The uncertainty occasioned by the inability of an insurer to rely on reasonable limits to its liability would most likely be passed along to the insured in the form of higher premiums to cover the unknown risk or the constriction of insurance coverage in general.

Founders Ins. Co. v. May, 44 N.E.3d 56, 63–64 (Ind. Ct. App. 2015). In fact:

> The business of insurance is covering losses. The more policies written, the better from the insurance company's standpoint—but this is provided the company can estimate within a reasonable range the size of the losses that it is likely to be required to reimburse the policyholders for. Otherwise it can't set premiums that will be high enough to compensate it for the risk of having to reimburse the losses it's insuring, without being so high that no one will buy its polices.

Scottsdale Indem. Co. v. Vill. of Crestwood, 673 F.3d 715, 717 (7th Cir. 2012) (cited in *State Auto. Mut. Ins. Co. v. Flexdar, Inc.,* 964 N.E.2d 845, 853–54 (Ind. 2012) (J. Sullivan, dissenting)).

The uncertainty occasioned by the opinion of the Court of Appeals comes at a time of enormous pressure on the trucking industry and the economy as a whole. Before the pandemic, the average cost of truck insurance premiums had risen 42% between 2010 and 2018:



[12]

[12] Jennifer Smith, Surging Truck Insurance Rates Hit Freight Operators, WALL STREET JOURNAL, January 13, 2020. https://www.wsj.com/articles/surging-truck-insurance-rates-hit-freight-operators-11578934834 (accessed July 16, 2021).

The pandemic exacerbated worker shortages, and along with increased demand for home delivery of packages, costs have continued to increase, resulting in higher prices on most consumer goods.[13] Along with the current economic climate, the increased premiums to all carriers created by the uncertainty in the wake of the opinion of the Court of Appeals undoubtedly will result in higher transportation costs and higher prices on consumer goods generally. As a result, *amicus curiae* respectfully requests that this Honorable Court consider the adverse effect of the uncertainty wrought by the opinion of the Court of Appeals not only on the transportation industry but on the economy as a whole.

IV. CONCLUSION

For these reasons, *amicus curiae* Trucking Industry Defense Association respectfully requests this Court grant transfer, reverse the trial court's summary judgment order, and direct that court to enter judgment in Progressive's favor.

Respectfully submitted,

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[13] On April 14, 2021, 117 organizations representing the U.S. supply chain sent a letter to Congress detailing the challenges wrought by the pandemic that have resulted in higher transportation costs and increased prices for consumers on everything from electronics to food. The letter can be found at: https://www.trucking.org/sites/default/files/2021-04/DRIVE%20Safe%20Act%20Coalition%20Support%20Letter%2C%20FINAL%204.14.21.pdf

WORD COUNT CERTIFICATE

I verify that this Brief of *Amicus Curiae* does not exceed 4,200 words. The Brief of *Amicus Curiae* contains 3,855 words (including those used in footnotes) based upon the count of the word processing system employed to prepare the brief, Microsoft Word.

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CERTIFICATE OF SERVICE

On August 2, 2021, I filed this Brief of *Amicus Curiae* with the clerk via the IEFS. On the same date, I served this Brief of *Amicus Curiae* on the following counsel via the IEFS:

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