MCSAC Task 14-2: Recommendations to the Agency on Financial Responsibility and Security Requirements for Motor Carriers, Brokers, and Freight Forwarders

Discussion Notes
May 19-20, 2014, MCSAC Meeting

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I. General Comments

A. J. Todd Spencer, Owner Operators Independent Drivers Association (OOIDA): Are minimum levels of financial responsibility related to safety? Would increased minimum levels change safety behavior? Because the insurance industry purchases re-insurance and would continue to do so if the minimum levels of financial responsibility for motor carriers were increased, an increase in the minimum levels would likely not change insurance company's behavior towards motor carriers.
   1. Henry Jasny, Advocates for Highway and Auto Safety (Advocates): Insurance does not exist solely to influence safety behavior. Insurance shifts who pays for injuries.

B. Making a determination of a carrier's financial ability to be in business (e.g., whether it has a driver training program, maintenance facilities, increasing the fee for market entry) would be a way to tie financial responsibility to safety, separate from minimum insurance levels.
   1. Is the task focused narrowly on insurance limits or looking more broadly at financial ability to enter the industry?
   2. FMCSA (Larry Minor): The task is intended to focus only on minimum financial responsibility/insurance limits.

C. Possible elimination of self-insurance.
   1. FMCSA concern is that the program costs a lot of money for the Agency to administer, it is not self-sufficient, and it does not seem like a program that FMCSA should administer.
   2. Some MCSAC members expressed concern about the potential elimination of self-insurance because many large companies self-insure.

D. Should insurance minimums be per claim or individual, as opposed to per crash?
   1. Should minimum insurance limits be per claim with a maximum limit per crash?

E. Airline insurance minimum requirements: $300,000 per person minimum, total of $20 million per aircraft, but aircraft with 60 seats or fewer have a lower minimum coverage requirement.

F. Some MCSAC members expressed concern that if the current $750,000 minimum limit for property carriers was not determined in a scientific way, the MCSAC should not use it as a benchmark from which to base an increase. Instead, it would be more appropriate to determine what is appropriate for today.

G. Inflation Method: MCSAC could develop a minimum number for the financial responsibility minimum limits to be increased based on inflation since the last time the limits were established.

H. Damage Costs Method: The Committee may not be able to calculate a precise accurate number for minimum insurance coverage based on average claims as not enough information is available to understand the true cost of claims resulting from catastrophic crashes due to many settlements being sealed records. However, the MCSAC may be able to come up with an appropriate range of minimum insurance amounts while urging the Agency to look to several different variables to get to a precise number.

I. Political Practicality Concerns: There may be a level beyond which it is not politically tenable to be that high.

J. How should successful minimum insurance requirements be defined? That is, what percentage of claims should the minimum limits attempt to cover?

K. Victims Compensation Fund: Pennsylvania had a fee associated with every violation written that went to a fund to compensate victims of catastrophic crashes.

1. If FMCSA created a contingency fund for catastrophic injuries (e.g., each carrier must contribute X percent of revenue to the fund) while keeping minimum financial responsibility requirements on the lower end, the Agency could limit contingency fees and control the payout.
2. Some carriers may have concerns that safer carriers would be paying more for the negligence of lower performing carriers.

L. There are many reasons that a carrier may no longer be able to afford insurance coverage.

M. Rob Abbott, American Trucking Associations (ATA): It might be reasonable to view the range of reasonable minimum limits as being between two endpoints (the appropriate level of minimum coverage is likely somewhere in between, based on complex policy considerations):
1. The minimum limit that would cover X percent of claims (e.g., 90 percent).
2. Feasibility/affordability/reasonableness of the cost of coverage, particularly for small carriers.

N. Gary Catapano, National School Transportation Association (NSTA): This task is not a reasonable request because there is not enough data to make a rational, data-driven recommendation.

II. What information does the MCSAC need to complete this task?

A. What is needed to cover average claims?
1. What are the mean/median cost of claims that are settled without trial?
2. What is the distribution of those costs nationally?
3. Trial outcomes and pre-trial settlements should both be looked at, although settlements may not be accurate regarding actual cost of claims.
    a. Settlements may often be dictated by insurance policy more than cost of injury.
    b. For this reason, it might be helpful to look to settlements paid by larger carriers that have policies for more than $750,000 per vehicle.
4. Do settlements with carriers who self-insure differ from settlements paid by a conventional insurance policy?
5. Perhaps it would be useful to look to settlement information outside of the trucking industry and that relates to the same type of injuries.

B. What do varying levels of insurance coverage cost for different sized carriers? What can the industry afford?
1. From insurance industry: What might the typical policy that they would write look like based on carrier size?
2. Increases in costs for additional $1 million of coverage – is that per truck? Does the cost for such coverage increases vary with carrier size?

C. What are the values of lost life and of losses from catastrophic injuries (brain and spinal injuries)?
1. DOT uses value of statistical life of $9.1 million ($5.2-12.9 million for purposes of sensitivity).
2. Average life care plan for brain/spinal injuries?

D. Ask safety technology providers which carriers are investing in safety technologies (collision avoidance technologies).
1. What size are these carriers?
2. If they are informed investments, the additional cost must be worth the crash risk reduction and something can be learned from that decision. Knowing the profile of such carriers might be informative.
3. J. Todd Spencer, OOIDA: For-hire companies that invest in advanced safety technologies do not have fewer crashes than those that do not.

E. Confirm original baseline date for purposes of inflation and health care costs inflation (i.e., 1980 or 1985?).

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F. Costs and benefits of increased financial responsibility requirements on various segments of the motor carrier industry
G. More information regarding insurance coverage per vehicle for passenger carriers and motorcoaches specifically.
H. How have other industries determined increases in minimum insurance levels?
I. How many crashes include what could be considered catastrophic injuries (if such data exists)?
J. Gary Catapano, NSTA; Rob Abbott, ATA: There should be some standard of reasonableness applied and some consideration of parity regarding passenger vehicle responsibility; often passenger vehicle insurance policies are not sufficient to cover resulting damage.

III. Inflationary Adjustment Approach

A. An increase of minimum financial responsibility requirements could be determined by increases in the previous minimum insurance limits that are tied to inflation.
B. Core vs. Medical Inflation
    a. Generally, tying the increase in minimum limits to inflation of health care costs over time would be more appropriate for purposes of the coverage, i.e., compensation for injuries and death.
    b. Tying an increase to core Consumer Price Index (CPI) (1985 base year) would result in minimum requirements of $1.6 million for property carriers (~ $10 million for passenger carriers).
    c. Tying an increase to health care costs inflation (1985 base year) would result in minimum requirements of $3.2 million for property carriers (~ $21 million for passenger carriers).
    d. Another option would be to tie the increases in minimum financial responsibility requirements to a hybrid of core CPI and medical CPI? For example, 75 percent medical CPI, 25 percent core CPI might be reasonable because not all compensatory costs are medical costs.
C. Base Year (1980 vs. 1985)
    1. 1985 was the year in which the previous minimum limits were published, but it was based on 1980 dollars.
    2. Using 1980 base year and medical CPI would raise property carrier minimums to $4.3 million (~ $28.4 million for passenger carriers).
    3. One option would be to compromise by using the 1980 base year, but a hybrid inflation factor that combined medical CPI and core CPI.
    4. Rob Abbott, ATA: The Volpe report indicates that no analysis has been developed that shows the basis for the previous established financial responsibility requirements/limits.
D. Ongoing Adjustment Factor based on Medical Costs Inflation.
    1. The time period for review and adjustment of minimum financial responsibility requirements should be every 3-5 years.
    2. Option A: FMCSA should implement an automatic adjustment in minimum insurance limits based on medical CPI every 4 years.
        a. Additionally, FMCSA should review the minimum insurance limits every 4 years to examine any new data and the state of the industry to potentially revise the minimum limits by some rate other than medical CPI at that time.
        b. If review is not complete or is inconclusive at the 4-year deadline, the minimum limits would be automatically increased by medical CPI.
        c. The Agency would likely use projected medical CPI in a rulemaking implementing this recommendation.
    3. Option B: FMCSA should regularly review the minimum insurance limits based on the data and state of the industry every 4 years.
        a. This would require FMCSA to promulgate a notice and comment rule.

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  b. ATA believes that increases in the limits should only be made if data can show that that the current minimum limits are not covering a sufficient amount of claims and that the resultant premium increases could be borne by carriers at a reasonable cost.

E. Caveats
1. Victims Compensation Fund:
   a. FMCSA should seek authorization from Congress to implement a Victims Compensation Fund to pay motor carrier crash victims when their established claims exceed a carrier's insurance policies.
   b. Funding could be attained in several different ways:
      i. Via a surcharge paid when registering a vehicle in a State.
      ii. Based on risk – charge a fee that would go towards the fund for each citation.
         (A) Concerns about charging via citations: States may implement this charge differently. For this reason, some members expressed that the surcharge for the fund should be implemented the same way nationally.
   c. Several members suggested that both intrastate and interstate carriers should have to pay into any Victims Compensation Fund.
      i. FMCSA (Larry Minor): 49 CFR part 387 (Minimum Levels of Financial Responsibility for Motor Carriers) does not cover intrastate carriers, except certain hazardous materials bulk intrastate carriers.
   d. Compensation via a Victims Compensation Fund should not go to persons other than victims.
   e. A Victims Compensation Fund with payout controlled by FMCSA would address concerns about too much insurance payout going towards attorneys' fees as well as crashes with multiple victims with catastrophic injuries that require long-term care.
   f. Concern: Victims Compensation Fund may result in large carriers rationalizing that they can carry less insurance than they ordinarily would because the fund would be viewed as a fall back/back stop.
2. Passenger Carrier Mitigation/Relief
   a. FMCSA should consider the need for some mitigation/relief for passenger carriers if the Agency ties the increase of current limits to medical CPI (i.e., ~ $28.4 million for passenger carriers based on 1980 base year).
   b. Passenger carriers <u>might</u> be able to accept an increase in minimum coverage from $5 million to $10 million with a 5-year phase-in period.
      i. Gary Catapano, NSTA: The only way this will work is if the limit is reduced from $28.4 million with a 5-year phase-in period.
         (A) The rationale for a reduction could be that the Victims Compensation Fund would cover claims in excess of insurance levels.
         (B) Many passenger carriers are small businesses and would be driven out of the market by a larger or quicker increase.
         (C) Many passenger carrier school bus charter contracts with customers are for 3-5 years.
3. Political Practicality
   a. $4.2 million may be too high in terms of premium costs for small carriers. FMCSA should potentially consider a subjective downgrade to make the minimum financial responsibility requirement amount viable.
   b. Based on the economic impact analysis, FMCSA could determine whether a downward adjustment or a phase-in period would be appropriate to prevent significant job losses or elimination of small carriers in the industry.
4. Phase-in Period
   a. A phase-in of increased minimum limits would allow carriers time to adjust their businesses to afford increased coverage.

    b. For both property and passenger carriers, FMCSA should allow a phase-in period that is calculated based on the Agency's estimate of costs, i.e., premium increases.
        i. For example, FMCSA could make the phase-in proportionate to the percentage of the average premium increase for a safe carrier.
    c. Time periods that members expressed that were reasonable: 3-5 years.
    d. Phase-ins were tied to capped minimum limits, i.e., not $30 million.

F. Dissenting Views:
1. Danny Schnautz, Clark Freight Lines: In light of the overwhelming absence of information and without an informed discussion on the impact of increased financial responsibility requirements on the industry or society, a recommendation that involves a specific number would be inappropriate.
2. J. Todd Spencer, OOIDA: Regarding the topic of financial responsibility requirements, there is a lack of information, a lack of discussion regarding cost effectiveness, and lack of consideration of from where any numbers quoted came. Minimum financial responsibility requirements do not correlate to safety.
3. Rob Abbott, ATA: FMCSA should acknowledge and consider the following statements from the Volpe analysis:
    a. If the limits are set to high, the costs will exceed the benefits.
    b. Contingency fees create strong incentives to maximize claims and direct a significant amount of insurance compensation away from victims.
    c. FMCSA should look at alternative means to reduce the number and severity of crashes.
4. Gary Catapano, NSTA:
    a. The MCSAC seemed to rush into this task.
    b. The presentations given did not take into account all the dimensions of the issue, which made the process of considering this task flawed. The Committee did not have enough data/information.
    c. If the proposed cap on passenger carrier minimum insurance levels and the phase-in period are not well defined in a proposed recommendation, NSTA reluctantly would not support it.
5. Peter Pantuso, American Bus Association (ABA):
    a. The Committee did not have enough reliable information to evaluate the task; much more detail was needed.
    b. Information presented from plaintiffs' attorneys is biased.
    c. More information was needed from the insurance industry. It would have been better to hear from someone on the inside of underwriting in the insurance industry, as opposed to someone on the sales side.

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