

October 30, 2008

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CAROLINA CASUALTY INSURANCE
COMPANY,

Plaintiff-Appellant,

v.

TYMER YEATES; SHARI YEATES,

Defendants-Appellees.

No. 07-4019
(D.Ct. No. 1:05-CV-124-PGC)

TRUCKING INDUSTRY DEFENSE
ASSOCIATION,

Amicus Curiae.

ORDER

Before **HENRY**, Chief Judge, **TACHA**, **KELLY**, **BRISCOE**, **LUCERO**, **MURPHY**,
HARTZ, **O'BRIEN**, **McCONNELL**, **TYMKOVICH**, **GORSUCH** and **HOLMES**,
Circuit Judges.

This matter is before the Court on appellant's petition for rehearing en banc. Upon consideration, the petition is granted. On or before Friday December 12, 2008, Appellant Carolina Casualty shall file a supplemental brief addressing:

Whether this Court's holding in *Empire Fire & Marine Ins. Co. v. Guaranty National Ins. Co.*, 868 F.2d 357 (10th Cir. 1989), that an MCS-90 endorsement only negates limiting provisions in the policy to which it is attached, to render the policy a primary source of insurance coverage, should be reaffirmed, overruled, or modified.

In addressing this general issue, the parties should specifically discuss the merits of the position adopted by most other circuit courts, *i.e.*, that an MCS90 endorsement simply creates a surety obligation and does not otherwise alter the terms of an insurance policy to create or expand coverage.

The supplemental brief shall comply generally with Federal Rules of Appellate Procedure 28 and 32 and the relevant local rules of this Court associated with those rules. The brief must not, however, exceed 30 pages in length in a 13 point font.

Within 30 days of service of appellant's brief, Appellees Tymer and Shari Yeates may file a response. The same general requirements for briefing shall apply to the appellees' submission. Appellant Carolina Casualty may submit an optional reply within 14 days of service of the appellees' brief, not to exceed 10 pages in length.

In addition, due to the governmental interests involved, we direct the clerk of court to forward a copy of this order to the Secretary of Transportation, through counsel for the Federal Motor Carrier Safety Administration, so that the agency can assess whether to submit a brief *amicus curiae* per Federal Rule of Appellate Procedure 29.

This matter will be set for oral argument during the court's March 2009 term. That

session is currently set for the week of March 9-13. The parties will be advised of the exact date and time for argument at a later date.

Entered for the Court,

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", with a long horizontal flourish extending to the right.

ELISABETH A. SHUMAKER
Clerk of the Court