IRL

IRL

Did you know?

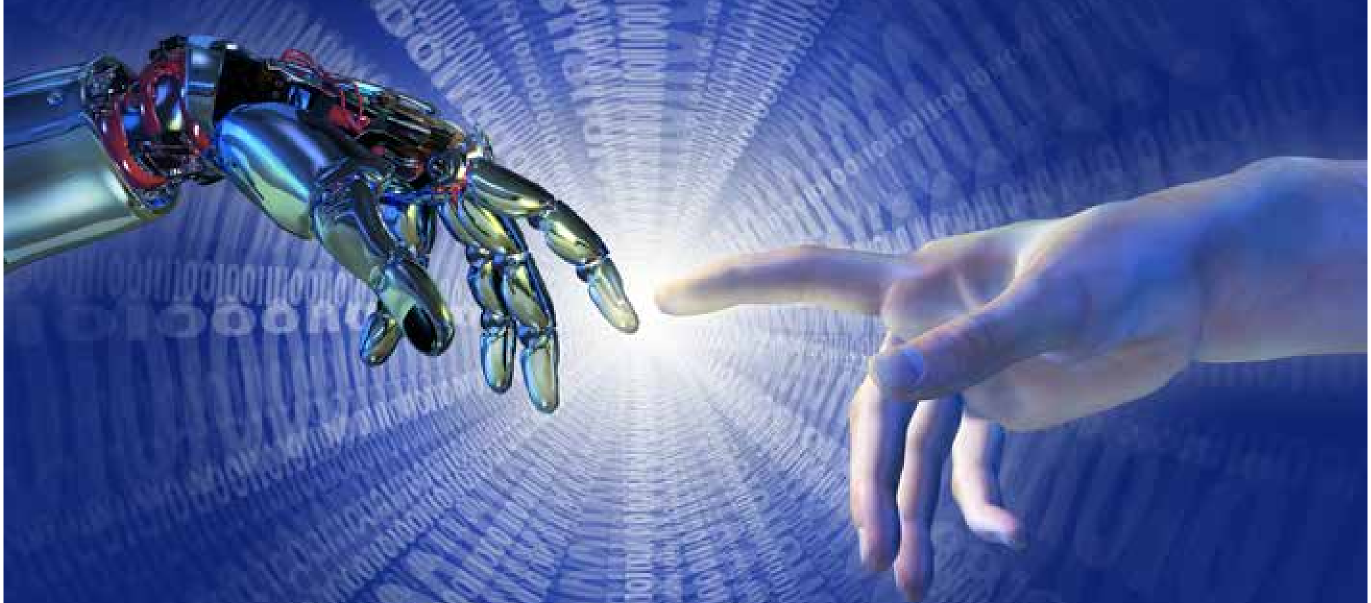
You can add a website shortcut to your mobile homescreen.

DETAILS ON PAGE 30

THE INSURANCE RESEARCH LETTER | May 2016 • ISSN #2165-2740 • Vol. 19 No. 5 • irletter.com

Crisis as a Peril™

ARTICLE BEGINS ON PAGE 19



Technology is changing faster than anyone realizes. The rate of change is one of the biggest exposures the world faces today. Individuals, even those working in the technology field, are no longer able to forecast what the vulnerabilities and threats are of the technologies that are being created. Interestingly, Hollywood does a better job forecasting our exposures than people do.

~ Harry Rhulen, CEO Firestorm

PLUS

Commercial Motor Vehicle Insurers "Beware" MCS-90 Endorsement Implications

By William T. Donnell, Esq. and Jennifer M. Barbour, Esq.

The Federal Motor Carrier Act of 1980 ("MCA") requires trucking companies to provide proof of financial responsibility equal to or greater than statutorily defined minimums in order to receive operating authority. A trucking company can offer the MCS-90, also known as the "Endorsement for Motor Carrier Policies of Insurance for Public Liability under Sections 29 and 30 of the Motor Carrier Act of 1980", as proof of its financial responsibility. The MCS-90 is an endorsement to the insurance contract that amends the contract. Providers of liability insurance to trucking companies should be aware of how the MCS-90 can affect the insurer's rights, obligations and duties under the contract of insurance. This article will address how certain obligations under the insurance contract are modified by the MCS-90.

One way that an MCS-90 endorsement modifies insurance coverage is in the context of limitations and defenses of the insurance policy. For instance, with a policy of insurance covering Specifically Described Autos, the insurer would typically only be obligated to perform its contractual duties if a claim arose from the negligent operation, maintenance or use of a vehicle or trailer listed on the schedule of covered autos. However, insurers should be aware that the coverage afforded under a liability policy may be modified by virtue of the MCS-90. Within the MCS-90 is the following language:

> 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 **regardless of whether or not each motor vehicle is specifically described in the policy**...(emphasis added).

As a result of this language, Specifically Described Autos Coverage can be expanded by virtue of the MCS-90 endorsement to require the insurer to pay a judgment on behalf of its insured even if the tractor trailer involved in an accident is not specifically listed in the schedule of covered autos. (*Integral Ins. Co. v. Lawrence Fulbright Trucking, Inc.*, federal appeals court, Second Circuit). Courts have held that this plain-reading of the MCS-90 is in line with the purpose of the form – to wit, "to assure to members of the public and shippers that a certified carrier has independent financial responsibility, within the dollar limits prescribed, to pay for losses created by its carrier operations." (*Canal Ins. Co. v. First Gen. Ins. Co.*, federal appeals court, Fifth Circuit). Although the insurer can seek reimbursement from the insured to enforce the terms of its policy, the insured may be insolvent or not capable of reimbursing the insurer for the full amount. Thus, the result is that the insurer has indemnified an insured for a loss not covered by the policy.

It should be noted that the obligation to pay by virtue of the MCS-90 is contingent upon there being no other insurance available to cover the vehicle. If there is another policy of insurance applicable to the vehicle, the policy containing the MCS-90 will only be triggered if the other applicable insurance coverage does not satisfy the federally-mandated minimum coverage. (*Carolina Cas. Ins. Co. v. Yeates*, federal appeals court, Tenth Circuit).

The next obligation under a contract of insurance that courts have considered with regard to MCS-90 implications is the insurer's duty to defend. In the instance of a Specifically Described Auto policy, the insurer's duty to defend is not expanded by the MCS-90 endorsement. Federal courts considering this issue have consistently held "the MCS-90 endorsement does not create a duty to defend claims which are not covered by the policy but only by the endorsement." (*Harco Nat'l Ins. Co. v. Bobac Trucking*, federal appeals court, Ninth Circuit.) However, even this well-settled area carries with it pitfalls if the insurer elects not to defend. For instance, if the motor carrier does not appear before the court and a default judgment is entered against the motor carrier, the insurer could be obligated to pay a more significant judgment had it defended the suit for the insured. This is because the MCS-90 obligation is to pay a final judgment, not a judgment rendered after trial on the merits.

The MCS-90 can also modify the insurer's rights under the contract, and thereby also affect the defenses available to an insurer. The MCS-90 states in pertinent part:

> It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereof, 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.

Based on this language, insurers have been obligated to pay a judgment to a third party even when the insurance contract contained a valid defense. For instance, when an insured failed to cooperate with the defense and failed to appear at trial, an insurer was still obligated to pay a judgment despite a clear cooperation clause within the insurance policy contact due to the MCS-90 endorsement. (*Campbell v. Bartlett*, federal appeals court, Tenth Circuit).

The extent of expansion of coverage is less clear when allocating risk between insurers. The attempts to allocate risk have largely developed when an insurer, after being obligated to pay under an MCS-90 endorsement, is unable to seek reimbursement of the payment from the insured due to the financial condition of the insured. As a result, insurance companies have frequently attempted to seek reimbursement from or allocate the risk to other insurance companies. The Federal Circuit Courts of Appeal are split regarding the effect of MCS-90 endorsements on allocation of risk between insurers, but a majority rule has emerged. The majority rule is that the MCS-90 endorsement "applies only to situations in which a claim is being asserted by a shipper or member of the public, and has no application as among insurers." (*Prestige Casualty Co. v. Michigan Mutual Insurance Co.*, federal appeals court, Sixth Circuit, discussing split in circuits). Stated another way, the presence of an MCS-90 endorsement obligates the insurer to pay the injured third party, but not to reimburse another insurance company that may be liable for the judgment. The minority rule is that the MCS-90 endorsement "only negates limiting provisions in the policy to which it is attached, but does not establish primary liability over other policies that are also primary by their own terms." (*Prestige*, discussing split in circuits). In this instance where two policies are considered primary, liability is apportioned between the policies on a pro rata basis.

As a result, an insurer signing an MCS-90 endorsement should beware. The MCS-90 can amend the terms of the insurance policy in important ways that can materially affect the coverage provided and the limitations and exclusions of the policy. Before issuing an insurance policy with an MCS-90 endorsement, make sure you know how it affects your policy.

New Expert Commentary Available on IRMI.com

By Jack Gibson, CPCU, CRIS, ARM, President, International Risk Management Institute, Inc.

International Risk Management Institute has added the following new articles to its website, IRMI.com, which you can access at no cost:

The Role of Beliefs in Safety – Peter Furst discusses how subjective judgment is a major component in any risk assessment, particularly in construction.

Driver Training and Education -- Worth It? – Looking at traffic violator and other programs, Paul Farrell wonders if they provide measurable results.

The Corner of "Agriculture" and "Pollution" – Farm/ag insureds often don't recognize the danger of pollutants. Casey Roberts explains.

Looking for Better Answers? Ask Better Questions! – Great questions are deliberately created. Dr. Patrick McGuigan looks at how to do it.

Federal Maritime Jurisprudence Presents Ambiguity – Michael Orlando relates a case on attachable interest under Rule B.

Agent's Lie to Insurer Voids Policy – Lies about material facts cancels coverage. Barry Zalma relates the case.

- IRMI Online
- ReferenceConnect

For summaries of other new and updated information in your IRMI library, go to What's New on IRMI Online or What's New in Vertafore ReferenceConnect.

Mergers & Acquisitions Integration

By Erik Davison

Many of our insurance clients have struggled with effectively and efficiently integrating new merger partners. Insurance brokers are under tremendous cost-pressures, and acquisitions are one way to secure double-digit growth. The due-diligence has been completed and the merger closed; now the hard part starts with integrating systems, tools, processes and organizations in the acquiring organization's operation.

Is there a "cookie-cutter" approach to ease the pain of integration? The short answer is no, since much of it depends on the complexity of the acquiring entity's operational and technology blueprint. While we have devised a successful, comprehensive methodology to integrate all aspects, one must still perform a thorough analysis of all operational components prior to any integration activities. Furthermore, in most cases the acquired agency is smaller and has connected all their systems, tools and processes, and the larger acquiring entity has a more complex structure, which provides significant challenges during the integration.

In our overall methodology we allocate sufficient time on the front end, post the due-diligence efforts, to strategically and tactically plan for all implementation facets. We are of the opinion that you have to plan for all that could go wrong ahead of time, and set forth plans and processes in advance to avoid costly disruptions. Many mergers fail to deliver the intended results due to unforeseen issues that are not correctable in time, but could have been avoided or mitigated with proper preparation.

The biggest challenges surface during the migration from a legacy agency management system (AMS) to the acquiring entity's AMS. Data does not convert properly, certain data does not convert at all and requires manual data entry and financial transactions are not accounted for accurately. Setting up a comprehensive plan that includes multiple trial data conversions will ease the pain and burden of these issues. We have been able to leverage our alliance partner in India to complete a significant amount of the manual clean-up, thus reducing the burden on our clients, and keeping them focused on servicing their clients without interruption.

Adjusting to a new organization can be a challenge, especially for the merger partner. The employees have to learn the new systems, processes and tools, and still work their day jobs! Working through these challenges many brokers find it helpful to bring on board temporary staff to complete some day-to-day activities. Again, proper planning a few months before the go-live date will alleviate last minute fire