

IN-HOUSE PRIMER: Exploring Key Topics Central to the Role of the General Counsel

Key Risk Management and Insurance Issues for In-House Counsel

Presented by:
Carnot Evans, Marriott International, Inc.
Julie Ortmeier, CARFAX, Inc.
John Gibbons, Blank Rome LLP

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"Where there's smoke, there's money."

Risks Facing Your Businesses

2017 TRAVELERS RISK INDEX | THE BUSINESS VIEW

THE MOST WORRISOME RISKS REMAIN THE SAME AS IN EARLIER YEARS: MEDICAL COSTS, CYBER RISKS AND EMPLOYEE BENEFITS

- Worry a great deal about this affecting my business
- Worry some about this

	2017	2016	2015	2014
Medical cost inflation	61%	59%	60%	67%
Cyber, computer, technology, and data breaches and risks	56%	54%	58%	53%
Risk of increasing employee benefits costs	55%	56%	56%	62%
Legal liability (including the risk of your business being sued)	51%	51%	56%	58%
Ability to attract and retain talent/appropriately skilled staff/labor	51%	50%	53%	50%
Understanding and complying with U.S. government laws and regulations	47%	45%	51%	52%
Broad economic uncertainty	46%	48%	51%	57%
Financial issues, including access to capital and cash flow risks	44%	43%	49%	47%
Employee safety, including workplace violence	37%	36%	43%	39%

THE MOST IMPORTANT BUSINESS RISKS IN 2019

Ranking changes are determined by positions year-on-year, ahead of percentages

Rank	Percent	2018 rank	Trend
1 Business interruption (incl. supply chain disruption)	37%	1 (42%)	↔
2 Cyber incidents (e.g. cyber crime, IT failure/outage, data breaches, fines and penalties) ¹	37%	2 (40%)	↔
3 Natural catastrophes (e.g. storm, flood, earthquake)	28%	3 (30%)	↔
4 Changes in legislation and regulation (e.g. trade wars and tariffs, economic sanctions, protectionism, Brexit, Euro-zone disintegration)	27%	5 (21%)	↗
5 Market developments (e.g. volatility, intensified competition/new entrants, M&A, market stagnation, market fluctuations)	23%	4 (22%)	↗
6 Fire, explosion	19%	6 (20%)	↔
7 New technologies (e.g. impact of increasing interconnectivity, nanotechnology, artificial intelligence, 3D printing, autonomous vehicles, blockchain) ²	19%	7 (15%)	↔
8 Climate change/increasing volatility of weather	13%	10 (10%)	↗
9 Loss of reputation or brand value ³	13%	8 (13%)	↗
10 Shortage of skilled workforce ⁴	9%	15 (6%)	↗
11 Political risks and violence (e.g. war, terrorism, civil commotion) ⁵	9%	9 (11%)	↗
12 Product recall, quality management, serial defects ⁶	9%	13 (8%)	↗
13 Macroeconomic developments (e.g. austerity programs, commodity price increase, deflation, inflation)	8%	11 (9%)	↗
14 Environmental risks (e.g. pollution)	7%	14 (6%)	↔
15 Theft, fraud and corruption ⁷	7%	12 (9%)	↗
16 Health issues (e.g. pandemic outbreak)	3%	17 (2%)	↗
17 Power blackouts	2%	16 (3%)	↗
Other	3%	-	-



- 1 Business interruption and cyber incidents are tied at the top of the ranking at 37%. However, business interruption received more responses by number.
- 2 Fire, explosion ranks higher than new technologies by number of responses.
- 3 Climate change/increasing volatility of weather ranks higher than loss of reputation or brand value by number of responses.
- 4 Shortage of skilled workforce, political risks and violence and product recall, quality management and serial defects are ranked by number of responses.
- 5 Environmental risks ranks higher than theft, fraud and corruption by number of responses.

Allianz Risk Barometer 2019 Appendix,

Travelers Business Risk Index 2017.

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Top 2019 Risks by Industry

TOP 5 RISKS IN AGRICULTURE

Rank		Percent	2018 rank	Trend
1	Climate change/increasing volatility of weather	46%	1 (60%)	↔
2	Natural catastrophes (e.g. storm, flood, earthquake)	44%	2 (46%)	↔
3	Business interruption (incl. supply chain disruption)	36%	3 (29%)	↔
4	Changes in legislation and regulation (e.g. trade wars and tariffs, economic sanctions, protectionism, Brexit, Euro-zone disintegration)	28%	5 (21%)	↗
5	Fire, explosion	21%	4 (27%)	↕

TOP 5 RISKS IN CONSUMER GOODS

Rank		Percent	2018 rank	Trend
1	Business interruption (incl. supply chain disruption)	48%	1 (41%)	↔
2	Product recall, quality management, serial defects	35%	4 (23%)	↗
3	Changes in legislation and regulation (e.g. trade wars and tariffs, economic sanctions, protectionism, Brexit, Euro-zone disintegration) NEW	28%	-	↗
4	Fire, explosion NEW	24%	-	↗
5	Market developments (e.g. volatility, intensified competition/new entrants, M&A, market stagnation, market fluctuation)	22%	3 (28%)	↕

TOP 5 RISKS IN AVIATION, AEROSPACE, DEFENSE

Rank		Percent	2018 rank	Trend
1	Cyber incidents (e.g. cyber crime, IT failure/outage, data breaches, fines and penalties)	43%	2 (44%)	↗
2	Business interruption (incl. supply chain disruption)	37%	1 (45%)	↕
3	Changes in legislation and regulation (e.g. trade wars and tariffs, economic sanctions, protectionism, Brexit, Euro-zone disintegration)	36%	4 (26%)	↗
4	Market developments (e.g. volatility, intensified competition/new entrants, M&A, market stagnation, market fluctuation)	33%	3 (33%)	↕
5	Natural catastrophes (e.g. storm, flood, earthquake) NEW	19%	-	↗

TOP 5 RISKS IN ENGINEERING, CONSTRUCTION, REAL ESTATE

Rank		Percent	2018 rank	Trend
1	Natural catastrophes (e.g. storm, flood, earthquake)	40%	1 (45%)	↔
2	Business interruption (incl. supply chain disruption)	33%	2 (40%)	↔
3	Changes in legislation and regulation (e.g. trade wars and tariffs, economic sanctions, protectionism, Brexit, Euro-zone disintegration) NEW	26%	-	↗
4	Market developments (e.g. volatility, intensified competition/new entrants, M&A, market stagnation, market fluctuation)	26%	5 (21%)	↗
5	Fire, explosion	23%	3 (29%)	↕

TOP 5 RISKS IN CHEMICALS, PHARMACEUTICALS, BIOPHARMA

Rank		Percent	2018 rank	Trend
1	Business interruption (incl. supply chain disruption)	59%	1 (64%)	↔
2	Cyber incidents (e.g. cyber crime, IT failure/outage, data breaches, fines and penalties)	37%	2 (40%)	↔
3	Changes in legislation and regulation (e.g. trade wars and tariffs, economic sanctions, protectionism, Brexit, Euro-zone disintegration) NEW	27%	-	↗
4	Market developments (e.g. volatility, intensified competition/new entrants, M&A, market stagnation, market fluctuation)	24%	4 (24%)	↔
5	Product recall, quality management, serial defects NEW	21%	-	↗

TOP 5 RISKS IN ENTERTAINMENT & MEDIA

Rank		Percent	2018 rank	Trend
1	Cyber incidents (e.g. cyber crime, IT failure/outage, data breaches, fines and penalties)	40%	1 (33%)	↔
2	Business interruption (incl. supply chain disruption)	31%	4 (28%)	↗
3	Market developments (e.g. volatility, intensified competition/new entrants, M&A, market stagnation, market fluctuation) NEW	26%	-	↗
4	Loss of reputation or brand value NEW	22%	-	↗
5	Changes in legislation and regulation (e.g. trade wars and tariffs, economic sanctions, protectionism, Brexit, Euro-zone disintegration) NEW	18%	-	↗

Allianz Risk Barometer 2019 Appendix

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Top 2019 Risks by Industry

TOP 5 RISKS IN FINANCIAL SERVICES

Rank		Percent	2018 rank	Trend
1	Cyber incidents (e.g. cyber crime, IT failure/outage, data breaches, fines and penalties)	46%	1 (51%)	↔
2	Changes in legislation and regulation (e.g. trade wars and tariffs, economic sanctions, protectionism, Brexit, Euro-zone disintegration)	31%	2 (28%)	↔
3	Market developments (e.g. volatility, intensified competition/new entrants, M&A, market stagnation, market fluctuation)	28%	2 (28%)	↕
4	Natural catastrophes (e.g. storm, flood, earthquake) NEW	26%	-	↗
5	Business interruption (incl. supply chain disruption)	24%	4 (27%)	↕

TOP 5 RISKS IN HOSPITALITY, LEISURE, TOURISM

Rank		Percent	2018 rank	Trend
1	Business interruption (incl. supply chain disruption)	47%	2 (31%)	↗
2	Cyber incidents (e.g. cyber crime, IT failure/outage, data breaches, fines and penalties)	40%	4 (28%)	↗
3	Fire, explosion	38%	3 (20%)	↔
4	Natural catastrophes (e.g. storm, flood, earthquake)	31%	1 (37%)	↕
5	Political risks and violence (e.g. war, terrorism, civil commotion)	24%	5 (24%)	↔

TOP 5 RISKS IN FOOD & BEVERAGES (MANUFACTURING & SUPPLY)

Rank		Percent	2018 rank	Trend
1	Business interruption (incl. supply chain disruption)	49%	1 (53%)	↔
2	Product recall, quality management, serial defects	42%	4 (24%)	↗
3	Natural catastrophes (e.g. storm, flood, earthquake)	25%	3 (27%)	↔
4	Cyber incidents (e.g. cyber crime, IT failure/outage, data breaches, fines and penalties) NEW	22%	-	↗
5	Loss of reputation or brand value	22%	2 (31%)	↕

TOP 5 RISKS IN POWER & UTILITIES

Rank		Percent	2018 rank	Trend
1	Business interruption (incl. supply chain disruption)	52%	1 (58%)	↔
2	Fire, explosion	34%	4 (20%)	↗
3	Cyber incidents (e.g. cyber crime, IT failure/outage, data breaches, fines and penalties)	33%	2 (47%)	↕
4	Natural catastrophes (e.g. storm, flood, earthquake)	27%	3 (46%)	↕
5	Climate change/increasing volatility of weather NEW	25%	-	↗

TOP 5 RISKS IN GOVERNMENT, PUBLIC SERVICES (INCL. HEALTHCARE)

Rank		Percent	2018 rank	Trend
1	Changes in legislation and regulation (e.g. trade wars and tariffs, economic sanctions, protectionism, Brexit, Euro-zone disintegration)	41%	4 (20%)	↗
2	Cyber incidents (e.g. cyber crime, IT failure/outage, data breaches, fines and penalties) NEW	41%	-	↗
3	Market developments (e.g. volatility, intensified competition/new entrants, M&A, market stagnation, market fluctuation) NEW	27%	-	↗
4	Business interruption (incl. supply chain disruption) NEW	25%	-	↗
5	Natural catastrophes (e.g. storm, flood, earthquake) NEW	18%	-	↗

TOP 5 RISKS IN TECHNOLOGY

Rank		Percent	2018 rank	Trend
1	Cyber incidents (e.g. cyber crime, IT failure/outage, data breaches, fines and penalties)	53%	1 (50%)	↔
2	New technologies (e.g. impact of increasing interconnectivity, nanotechnology, artificial intelligence, 3D printing, autonomous vehicles, blockchain)	42%	3 (35%)	↗
3	Business interruption (incl. supply chain disruption)	40%	2 (42%)	↕
4	Market developments (e.g. volatility, intensified competition/new entrants, M&A, market stagnation, market fluctuation)	24%	5 (10%)	↗
5	Changes in legislation and regulation (e.g. trade wars and tariffs, economic sanctions, protectionism, Brexit, Euro-zone disintegration)	18%	4 (25%)	↕

Allianz Risk Barometer 2019 Appendix.

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Most Common Insurance Claims

The Most Common Types of Claims

The Hartford's analysis provides some insight as to the types of claims that small businesses can expect to make. The insurer cited the 10 most common types of claims incurred by small businesses and the percentage of such claims made.

<https://www.thebalancesmb.com/common-insurance-claims-462673>

1. **Burglary and theft—20 percent:** The perpetrators of these crimes may be [dishonest employees](#) or outsiders.
2. **Water and freezing damage—15 percent:** These include claims involving roof damage from snow or ice and [damage caused by frozen pipes](#)
3. **Wind and hail damage—15 percent:** These can affect automobiles, outdoor equipment, and buildings and structures.
4. **Fire—10 percent:** Fire is one of the most common causes of property damage, but many policyholders underestimate its destructive power.
5. **Customer [slips and falls](#)—10 percent:** Almost any type of business can incur a slip-and-fall claim, but your company might be more vulnerable if customers or members of the public regularly visit your premises or work site.
6. **Customer injury and damage—Less than 5 percent:** Customers can sustain [bodily injury](#) or [property damage](#) in accidents that don't involve slips and falls. A customer might be injured in your office when something heavy falls off a shelf and hits him in the head.
7. **[Product liability](#)—Less than 5 percent:** Your vulnerability to a product liability claim depends on a variety of factors, including the nature of your product and any warranties you make when you sell it.
8. **Struck by an object—Less than 5 percent:** A wide variety of moving objects can cause injuries. Examples are cars and trucks, [mobile equipment](#), and falling construction tools.
9. **Reputational harm—Less than 5 percent:** These are third-party claims against small businesses for acts such as [libel and slander](#). Plaintiffs can allege that their reputation was damaged by such acts.
10. **Vehicular accident—Less than 5 percent:** A vehicle safety program can help prevent auto accident claims.

Third-Party Liability



First-Party Loss



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Align Insurance Assets with the Risks Facing Your Business



- General Liability
 - Bodily Injury and Property Damage
 - Advertising Injury
- First-Party Property
 - Business Interruption
 - Contingent Business Interruption
 - Employment Practices
- Directors & Officers (“D&O”)
- Errors & Omissions (“E&O”) / Professional Liability

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Types of Insurance

General Liability Insurance

- Protects a policyholder against “suits” seeking damages for bodily injury or property damage.
- Typically provides defense coverage for policyholders facing a lawsuit or equivalent proceeding.
- May also provide:
 - Advertising Injury
 - Products / Completed Operations Coverage
 - Business Auto-Liability

Types of Insurance

First-Party Insurance

- Insures against:
 - Loss or damage to the policyholder's property
 - Lost business income
 - Other specialized coverages
- Examples:
 - Business Property
 - Business Interruption
 - Contingent Business Interruption
(Addressing losses caused by interruptions in the supply/distribution chain)

Types of Insurance

Employment Practices Liability

- Protects a business against employment-related claims brought by current and former employees.
- The types of claims include wrongful termination, discrimination, failure to promote, constructive discharge, harassment, breach of an employment contract, among others.
- Typically provides defense coverage.

Types of Insurance

Directors & Officers (“D&O”)

- Three main aspects (Not simply for directors and officers!)
 - Side A responds when a company is unable to indemnify its directors and officers (Directors and Officers Liability).
 - Side B reimburses a corporation when the corporation indemnifies its directors and officers for claims against them (Indemnification).
 - Side C ensures there is corporate coverage whenever the corporation is sued along with the directors and officers (Corporate Liability).

Types of Insurance

Directors & Officers (“D&O”)

- Claims by shareholders
- Generally stem from stock devaluations and often include claims of inadequate or inaccurate disclosure, dishonesty or fraud, and breach of fiduciary duty.
- Claims by governmental agencies
- Investigations by the SEC, DOJ, or EPA and can have criminal implications
- Claims by competitors
- Antitrust and unfair competition claims

Types of Insurance

Errors & Omissions Coverage (“E&O”)

- Professional Liability
- Insures against claims arising out of an act, error, or omission of the named insured in rendering or failing to render services.
- Typically provides defense coverage for insured entities and individuals facing a claim.
- Protects individuals who possess specialized knowledge and skills in a particular field (doctors, lawyers, etc.) from liabilities and litigation costs arising from their professional activities.

Align Insurance Assets with the Risks Facing Your Business



- Representation & Warranty
- Cyber & Privacy
- Credit Insurance / Lienholder Interest
- Patent
- Product Recall
- Environmental
- Crime / Fidelity
- Fiduciary
- Event Cancellation
- Title Insurance
- Cargo / Storage
- Wrap Up / OCIP / CCIP
- Political Risk

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Cyberinsurance Grabbing Headlines...

	Property	General Liability	Crime	K&R	E&O	Cyber Risk
1st Party Privacy/Network Risks						
Physical damage to data only		X			X	✓
Virus/Hacker damage to data only		X	X	X	X	✓
DOS (Denial of Service) Attack		X	X	X	X	✓
BI Loss from security event		X	X	X	X	✓
Extortion or Threat	X	X	X	✓	X	✓
Employee Sabotage of data only	X	X		X		✓
3rd Party Privacy/Network Risks						
Theft/Disclosure of private information	X		X	X		✓
Confidential Corporate information breach	X		X	X		✓
Technology E&O	X	X	X	X	✓	Combinable
Media Liability (electronic content)	X		X	X		✓
Privacy Breach expense/notification	X	X	X	X	X	✓
Damage to 3 rd Party's data only	X			X		✓
Regulatory Privacy Defense/Fines	X	X	X	X	X	✓
Virus/Malicious code transmission	X		X	X		✓



Coverage Not
Likely



Possible Coverage



Coverage
Available

Hub International, <http://www.hubinternational.com/crisis-management/cyber-risk/>

Use Insurance to Further Your Business Goals



- Remember that insurance is an asset.
- The value will depend on proper selection and usage.
- Evaluating this asset will be important for a business at various decision points, including:
 - When you are engaged in a significant transaction.
 - During your annual insurance renewal, which is a good time for an annual risk analysis.
 - When your company faces potential loss or liability arising from an event.
 - During the expansion or contraction of your business.

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Insurance Fundamentals When Renewing or Purchasing New Insurance



- Who is an insured?
- What are the biggest risks to your business and personnel?
- How do you intend for the waterfall of assets to work?
- How does the insurance work within the overall portfolio?
 - Do you have sufficient excess capacity?
 - Are your excess layers compatible or are there gaps created by inconsistencies?
- Does your insurance align with the risks that you perceive?

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Insurance and Vendors

1. Fully assess the distribution of risks between you and your vendors.
2. Implement insurance requirements to avoid taking on unwanted exposures:
 - Specify the types of policies required.
 - Specify the minimum level of insurance necessary.
 - Request “additional insured” status and waiver of subrogation.
 - Request separate notice of cancellation and the option to continue the policy in the event the vendor fails to pay the necessary premiums.

Insurance and Vendors

3. Make the procurement of adequate insurance a material term in the vendor service agreement.
4. Insist on reviewing the insurance policies to ensure compliance before the vendor begins work:
 - “Certificates of Insurance” are not insurance.
 - Policies are not created equal and the titles can be deceiving. The conditions, limitations, and exclusions are where the rubber meets the road.
 - Determine whether specialized endorsements should be added for your project. Vendors can often obtain such endorsements for little cost given the discrete nature of the risk.

Navigating a Claim

1. Understand which insurance policies might apply.
 - Words in the policy are to be construed in their ordinary, plain meaning.
 - If policy is ambiguous, must be construed in favor of coverage.
 - Communications with your broker are not covered by the attorney-client privilege.
2. Provide notice to your insurers.
 - Application of deductible or retention.
 - Control of defense and selection of counsel.
3. Be cooperative, but cautious.
 - Be careful in responding to questions or risk compromising your claim.
 - Insurers defend against claims and litigate coverage all of the time.
4. Be persistent—don't take no for an answer.
 - Insist on explanations.

Trending Disputed Issues

- Control of defense and selection of counsel
- Application of deductibles and retentions
- Claims of recoupment
- Rescission
- Notice
- Occurrence v. claims-made
- Sophisticated insured
- Underinsurance
- Coinsurance
- Business interruption
- Dispute resolution
- Valuation methods
- Forum and governing law
- Privilege
- Cooperation

QUESTIONS?

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APPENDIX

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Tips: Utilize the Full Value of Your Assets When an Event Has Occurred



1. Analyze all potentially-applicable insurance assets.
2. Begin with the presumption that there is coverage for your loss unless it can be unequivocally shown that coverage is excluded.
3. Provide notice to your insurers on this basis.
4. Focus on the *written* Policy terms—not what the conventional wisdom says about what is or is not covered or “intended” to be covered. You bought insurance to protect your business and that is what your business intended when it paid for the insurance.

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Tips: Utilize the Full Value of Your Assets When an Event Has Occurred

5. Analyze your loss/liability in accordance with the pillars of insurance policy construction:
 - Words in a policy are construed by their “ordinary and popular,” or “plain,” meaning, not some technical meaning known only to insurance specialists.
 - If the words are reasonably susceptible of more than one meaning, they are ambiguous and must be construed in favor of coverage.
 - A policyholder does not have to show that its construction is the only permissible one, or the best one, only that it’s a reasonable one.

Tips: Utilize the Full Value of Your Assets When an Event Has Occurred

5. Analyze your loss/liability in accordance with the pillars of insurance policy construction (cont.):
 - Words in a policy must be given meaning and cannot be rendered superfluous.
 - An insurer cannot rewrite the terms of a policy that it has sold to you.
6. Demand that the insurer investigate and explain its analysis to you. Push back on delays, denials, and on incomplete or incorrect analysis by the insurer.

Tips: Utilize the Full Value of Your Assets When an Event Has Occurred

7. Understand the financial drivers for insurers.

- An understanding of the insurance and reinsurance industries can help you anticipate how the insurer's motivations may impact its response to your claim.

8. Be cooperative, but cautious.

- Insurers defend against claims and litigate coverage disputes in the ordinary course.
- All questions and communications have a definite purpose. Ensure that you understand that purpose before responding ... or risk compromising your claim.

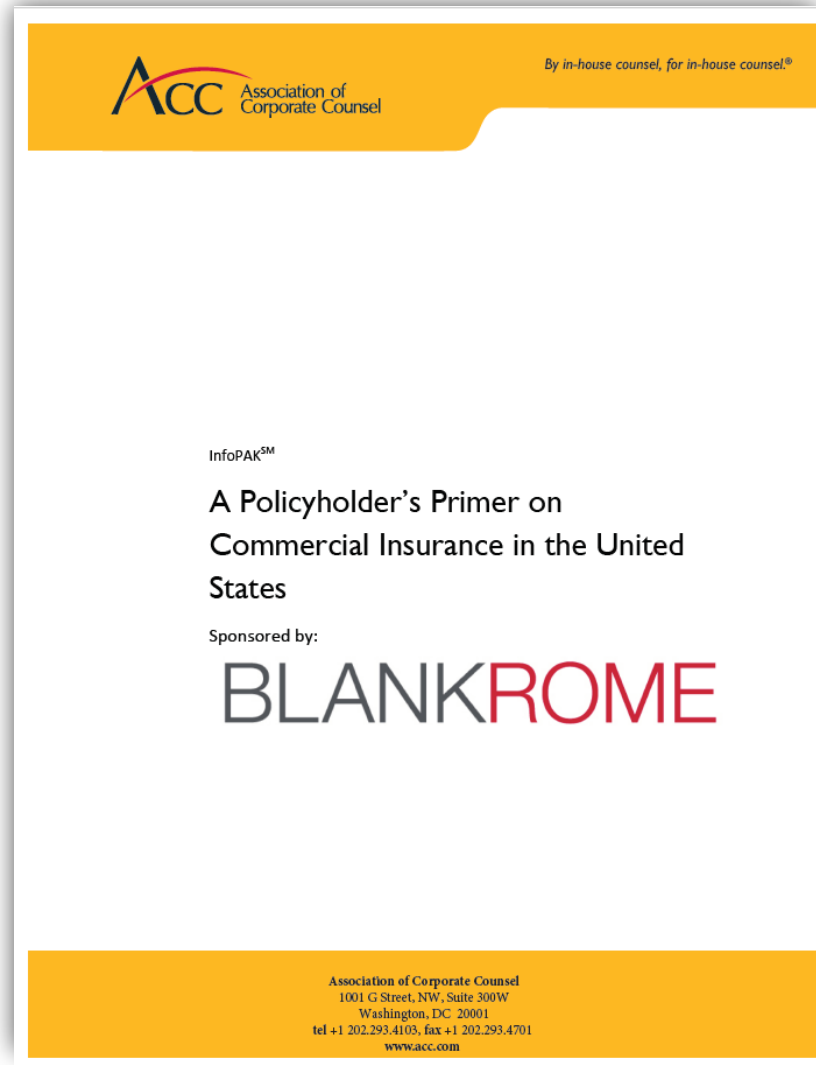
Business Growth, Contraction, Transition

- Consider the risks that your business has historically encountered and how those risks, as well as emerging risks, may change.
- Are there lingering liability concerns?
- Structuring insurance assets (historic, current, and future) for the benefit of the future business while maintaining protection for the past.
- Consider the necessity of specialty insurance products to address outstanding liability issues.

2019 ACC InfoPak: A Policyholder's Primer on Commercial Insurance



<https://www.acc.com/resource-library/policyholders-primer-commercial-insurance-united-states>

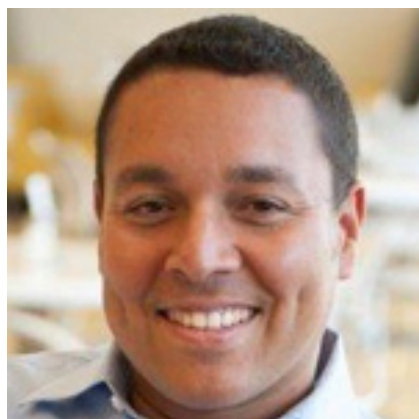


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PANELISTS

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Carnot Evans



**Vice President &
Senior Counsel**
Marriott
International, Inc.

Carnot supports Marriott's Global Information Technology team on a wide variety of issues and transactions, including procurement of various technology products and services, advising on new technology initiatives, managing vendor disputes and audits, and providing counsel on regulatory and legal compliance issues. Prior to joining Marriott, Carnot served as in-house counsel to Software AG, Inc., the North American division of one of Europe's largest software companies. Carnot also worked in private practice handling complex mergers, acquisitions and securities matters, as well as working for the U.S. Securities & Exchange Commission.

Julie Ortmeier



**Vice President,
General Counsel
& Secretary**
CARFAX, Inc.

Julie is responsible for the strategic direction and operation of Carfax's legal matters in the United States, Canada and Europe. She leads a team that provides support in the areas of commercial transactions, litigation, intellectual property, insurance, regulatory compliance, employment, privacy and security. Prior to joining Carfax, Julie was with the American Red Cross from 2001 to 2008 as Senior Counsel, also serving as Corporate Secretary for the Board of Governors Finance Committee and managing counsel to Pathogen Removal and Diagnostic Technologies Inc., a for-profit biotechnology joint venture undertaken by the American Red Cross in partnership with a Montreal-based company. From 2000 to 2001, Julie was Associate General Counsel at Enermetrix.com, Inc., a company based in Boston, Massachusetts and one of the earliest entrants to the e commerce marketplace for the energy space. Julie began her legal career at McGuireWoods.

John Gibbons



Partner & Vice Chair Insurance Recovery Practice

Blank Rome LLP

202.420.3644

jgibbons@blankrome.com

1825 Eye St, NW
Washington, DC 20006

John's national practice focuses on advising corporate policyholders about their insurance policy rights and recovery insurance assets, either through negotiation or trial. He maintains a particularly active trial practice that includes serving as trial counsel for a *Fortune* 100 pharmaceutical company in a four-month trial, a *Fortune* 500 regulated utility in two separate multiweek jury trials, and a large multinational engineering services corporation in a three-judge panel arbitration. John is ranked in *Chambers USA* and *Legal 500* recommended John for his "subject-matter expertise and business-focused approach." *Benchmark Litigation* also recognized John as a local (Washington, DC) "Plaintiff Litigation Star" and ranked him in the National Tier 1 level (one of only 11 for insurance nationally). He is also recognized in *Best Lawyers in America*.

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