

ACC NCR FALL CONFERENCE

In-House Primer

Key Risk Management and Insurance Issues for In-House Counsel

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ACC NCR IN-HOUSE PRIMER: KEY RISK MANAGEMENT AND INSURANCE ISSUES FOR IN-HOUSE COUNSEL

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Contractual Methods of Mitigating Business Risk

- Insurance
- Contractual Risk Transfer

- A contractual means of transferring risk from one party (the policyholder) to another party (the insurer) in exchange for payment of an insurance premium.
- The insurer agrees to take responsibility for the risks of the responsible party in the event of a covered loss.

- A contractual means of transferring risk to the party in a contract that may be in the best position to control the risks related to the goods or services to be provided.
- One party agrees to take responsibility for costs and liabilities related to the service to be provided.

The 10 Biggest Risks And Threats For Businesses In 2022

According to Forbes informal survey of business executives

- | | |
|-----------------------|--------------------------|
| (1) Data Breaches | (6) Lack of Inventory |
| (2) Climate Change | (7) Burnout |
| (3) Great Resignation | (8) Inflation |
| (4) Obtaining Talent | (9) Financial Crises |
| (5) Pandemic | (10) Failure to Innovate |

The Top Risks for 2022: A Global Perspective

1. Government public health policies and protocols may impact the business
2. Succession challenges and inability to attract and retain top talent may limit operations
3. Pandemic-influenced market conditions may affect customer demand and relationships
4. Digital technologies may require significant, frequent efforts to upskill or reskill employees
5. Economic conditions may significantly restrict the organization's growth opportunities
6. Anticipated increases in labor costs may affect ability to meet profitability targets
7. Resistance to change may restrict ability to pivot and adapt
8. Inability to utilize sufficiently advanced data analytics to achieve market intelligence
9. Inability to manage cyber threats that can significantly disrupt operations
10. Shifts in perspectives and expectations about diversity, equity, and inclusion (DE&I)

Business Risks Translated Into The Language of Insurance



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ALLIANZ RISK BAROMETER 2022 APPENDIX

The most important business risks in 2022: global

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

| Rank | | Percent | 2021 rank | Trend |
|------|---|---------|-----------|-------|
| 1 | Cyber incidents (e.g. cyber crime, IT failure/outage, data breaches, fines and penalties) | 44% | 3 (40%) | ↑ |
| 2 | Business interruption (incl. supply chain disruption) | 42% | 1 (41%) | ↓ |
| 3 | Natural catastrophes (e.g. storm, flood, earthquake, wildfire, weather events) | 25% | 6 (17%) | ↑ |
| 4 | Pandemic outbreak (e.g. health and workforce issues, restrictions on movement) | 22% | 2 (40%) | ↓ |
| 5 | Changes in legislation and regulation (e.g. trade wars and tariffs, economic sanctions, protectionism, Brexit, Euro-zone disintegration) | 19% | 5 (19%) | → |
| 6 | Climate change (e.g. physical, operational, financial and reputational risks as a result of global warming) ¹ | 17% | 9 (13%) | ↑ |
| 7 | Fire, explosion | 17% | 7 (16%) | → |
| 8 | Market developments (e.g. volatility, intensified competition/new entrants, M&A, market stagnation, market fluctuation) | 15% | 4 (19%) | ↓ |
| 9 | Shortage of skilled workforce | 13% | 13 (8%) | ↑ |
| 10 | Macroeconomic developments (e.g. monetary policies, austerity programs, commodity price increase, deflation, inflation) | 11% | 8 (13%) | ↓ |
| 11 | Loss of reputation or brand value (e.g. public criticism) | 10% | 12 (9%) | ↑ |
| 12 | New technologies (e.g. impact of artificial intelligence, connected/autonomous vehicles, electric/fuel cell vehicles, 3D printing, Internet of Things, nanotechnology, blockchain, 5G) ² | 9% | 11 (9%) | ↓ |
| 13 | Political risks and violence (e.g. political instability, war, terrorism, civil commotion, riots and looting) ³ | 9% | 10 (11%) | ↓ |
| 14 | Critical infrastructure blackouts (e.g. power disruption) or failures (e.g. aging dams, bridges, rail tracks) | 9% | 15 (5%) | ↑ |
| 15 | Product recall, quality management, serial defects | 6% | 16 (5%) | ↑ |
| 16 | Theft, fraud, corruption | 5% | 14 (7%) | ↓ |
| 17 | Environmental risks (e.g. pollution) | 4% | 17 (5%) | → |
| | Other | 3% | | |

Source: Allianz Global Corporate & Specialty

Allianz Risk Barometer 2019 Appendix.

Planning for Business Risk

INSURANCE

Lost Business Income
Cyber Attacks
Class Action & Derivative Suits
Employment Practices
Products Liability
Media/ Advertising Liability

CONTRACT

Indemnification Provisions
Insurance Procurement Clauses
Waiver of Subrogation
Anti-Compete Clauses
Representations and Warranties

First Party Risks
Third Party Risks

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Business Risk – 4 quadrants

Hazard Risk

Arises from property, liability, or personnel loss exposures

Property Risk
Legal Risk
Personnel Risk
Consequential Loss

Operational Risk

Arises from people, processes, systems or controls

People Risk
IT Risk
Management Oversight
Business Processes

↑ Pure Risk
↓ Speculative Risk

Financial Risk

Arises from the effect of market forces on financial assets or liabilities

Market Risk
Credit Risk
Price Risk
Liquidity Risk

Economic environment
Political environment
Demographics
Competition

Strategic Risk

Arises from trends in the economy or society

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Insurance Is An Asset

- Think of insurance as an asset.
- The four main times when a business thinks of insurance:
 - When it buys a property or business
 - When its insurance is up for renewal
 - When an event occurs that leads to or threatens a loss
 - When it sells a property or business
- Businesses with multiple tiers and properties consider insurance more frequently than simple single-tiered businesses

Align Your Insurance Assets with Your Risks: the Big Four

- Third-Party 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

Align Specialized 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

- Insurance Requirements for Others
 - 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.

Utilize Additional Contract Provisions To Mitigate Risks and Expand Assets

- Limitations of Liability
- Indemnities and Hold Harmless Clauses
- Waivers of Liability
- Limitations on Damages
- Forum and Choice of Law Selection

Contractual Provisions that Mitigate Risks to Your Business

- Force Majeure
- Termination Provisions
- Delay Provisions
- Key Personnel Clauses
- Priority Protection for AR and Extensions of Financing

Maximize Your Insurance and Indemnity Assets When You Have Claims

1. When analyzing an insurance issue, regardless of type:

- Work from the proposition that there should be coverage unless it can be unequivocally shown that there is no basis for coverage.
- Follow claim submission requirements in the policy to avoid the insurer arguing forfeiture of the insurance.
- Present the claim to the Insurer in a way that will maximize coverage.
- Analysis will be driven by state law.

2. Start your coverage analysis with the basic rules of construction:

- Words in a policy are construed by their “ordinary and popular,” or “plain meaning,” not some technical meaning known only to insurance specialists.
 - See, e.g., *Buckeye State Mut. Ins. Co. v. Carfield*, 914 N.E.2d 315, 318 (Ind. Ct. App. 2009); *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1264 (Cal. 1990)
- **If the words are reasonably susceptible of more than one meaning, they are ambiguous and must be construed in favor of coverage.**
 - See, e.g., *Mega Life & Health Ins. Co. v. Pieniozek*, 585 F.3d 1399, 1406 (11th Cir. 2009); “); *Int’l Bus. Machs. Corp. v. Liberty Mut. Fire Ins. Co.*, 303 F.3d 419, 424 (2d Cir. 2002)
- **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.**
 - See, e.g., *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 153 (Minn. Ct. App. 2001)
- **The insurance should be interpreted to give the policy and risk transfer real meaning.**
 - See, e.g., *USAA Cas. Ins. Co. v. Carr*, 225 A.3d 357 (Del. 2020)

3. Don't blindly accept conventional wisdom about what is and is not covered, and reject assertions that insurance is just “not intended” to pay your type of claim.

- E.g., assuming intentional acts aren't covered when some things expressly covered under advertising injury and personal injury are, by definition, intentional.

4. Explore your specific policy language, how it relates to other language in the insurance market, and how it was developed advertised to consumers and regulators.

- When procuring or renewing insurance, identify the type of liabilities for which the policyholder needs coverage, and for reviewing the policy language offered by competing insurance companies.
- Assess how various policies within a program fit together.

Trends In Insurance and Risk Transfer

- Business Interruption Claims
- Pandemics
- Civil and Political Unrest
- Cyber & Crime Loss
- Supply Chain Disruptions

Hypothetical #1: Large Wire Transfer Fraud

- A financial institution experiences a significant monetary loss from a fraudulent transfer induced by a cyber attack. Criminals steal funds with the help of an insider who facilitates placing malware within the environment. They conduct successful internal-social engineering to orchestrate large transfers from the institution to accounts controlled by the criminals. Later, it is determined that a foreign government is behind the cyber attack.

Hypothetical #2: Data Breach & Targeted Information Leak

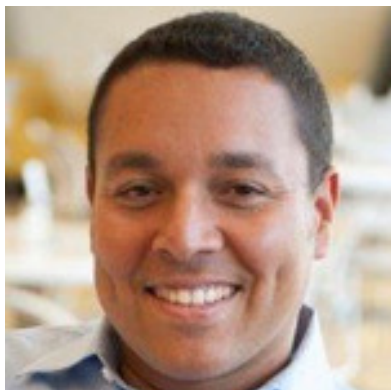
- A ratings agency is compromised, and the attackers publicly release incriminating emails, documents, and select company information after a failed extortion attempt. The incriminating emails call into question the authenticity of the agency's ratings with accusations of quid pro quo deals for good ratings by rated organizations. A group of shareholders bring a derivative suit against the board at ratings agency, alleging that wrongful acts by the board in accepting the quid pro quo deals.

QUESTIONS?

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PANELISTS

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Carnot is Marriott's global technology counsel and handles 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.



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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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Scott is the Director, Insurance Services on Marriott's Global Insurance team that provides overall strategic leadership, direction, and oversight of Marriott's global insurance programs. He is responsible for providing direction and consult with internal corporate stakeholders on the organization's insurance programs, including coverage, premium/deductible allocations, and contractual risk transfer review for arrangements that may impact Marriott's global insurance programs. Scott also has oversight of Marriott's high-risk activities review process for participating domestic properties.

Scott has worked for Marriott for over 20 years in various positions including Marriott's accounting, liquor license administration and legal departments.

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Dominique Meyer is an associate in Blank Rome's policyholder-only insurance recovery practice. She focuses her practice on insurance recovery matters and complex commercial litigation, with experience in federal and state court insurance coverage disputes, contract actions, and business tort matters.

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