

ACC NCR INSURANCE YEAR IN REVIEW

Risk Management and Insurance Issues for In-House Counsel

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General Observations of the Year

Challenges with Negotiating Risk Transfer

Significant Court Rulings In the First Party Property and Liability Settings and Changes in Legislation (See Appendix)

Case Filings –upward trends from recent years – high value case filings continue at a significant rate

Trials – Are back

Market Forces

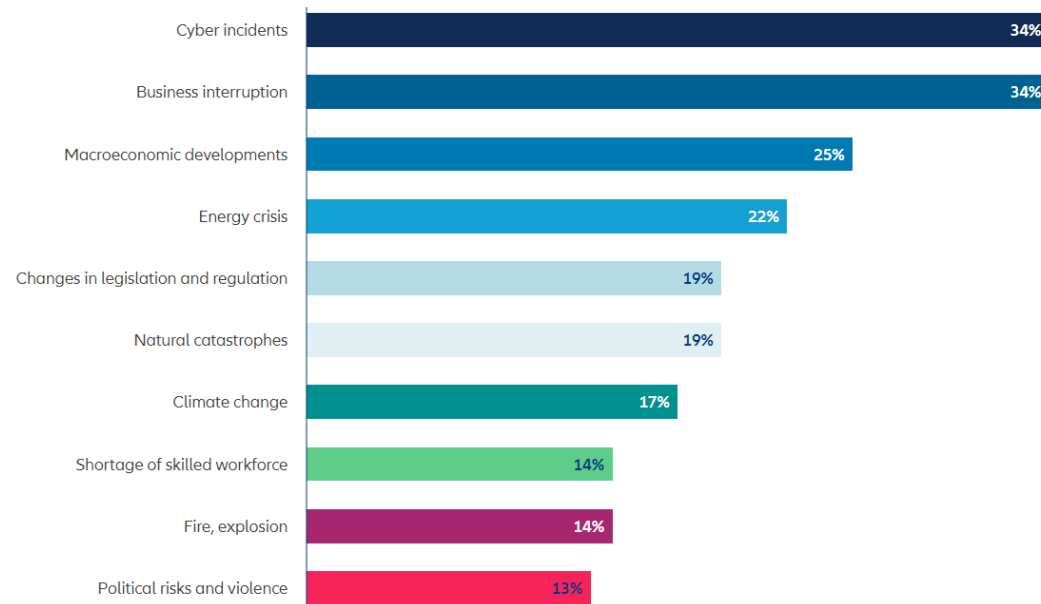
Specialized Products

Tight market for Certain Lines

Increased Premiums

The most important global business risks for 2023

For more details click on the bars in the diagram



Source: Allianz Risk Barometer 2023

Numbers represent the percentage of all participants who responded (2,712). The numbers do not add up to 100% because more than one risk could be selected.

The top 10 global business risks for 2024

Rank		Percent	2023 rank	Trend
1	Cyber incidents (e.g., cyber crime, IT network and service disruptions, malware / ransomware, data breaches, fines, and penalties)	36%	1 (34%)	→
2	Business interruption (incl. supply chain disruption)	31%	2 (34%)	→
3	Natural catastrophes (e.g., storm, flood, earthquake, wildfire, extreme weather events)	26%	6 (19%)	↑
4	Changes in legislation and regulation (e.g., tariffs, economic sanctions, protectionism, Euro-zone disintegration) ¹	19%	5 (19%)	↑
5	Macroeconomic developments (e.g., inflation, deflation, monetary policies, austerity programs) ²	19%	3 (25%)	↓
6	Fire, explosion	19%	9 (14%)	↑
7	Climate change (e.g., physical, operational, and financial risks as a result of global warming)	18%	7 (17%)	→
8	Political risks and violence (e.g., political instability, war, terrorism, coup d'état, civil commotion, strikes, riots, looting)	14%	10 (13%)	↑
9	Market developments (e.g., intensified competition / new entrants, M&A, market stagnation, market fluctuation)	13%	11 (11%)	↑
10	Shortage of skilled workforce ³	12%	8 (14%)	↓

Source: Allianz 2024 Barometer

2023 Heading to 2024

Top 10 Current Risks

- 01** Cyber Attack or Data Breach
- 02** Failure to Attract or Retain Top Talent
- 03** Weather and Natural Disasters
- 04** Regulatory or Legislative Changes
- 05** Economic Slowdown or Slow Recovery
- 06** Damage to Brand or Reputation
- 07** Tech or System Failure
- 08** Increasing Competition
- 09** Climate Change
- 10** Failure to Innovate or Meet Customer Needs

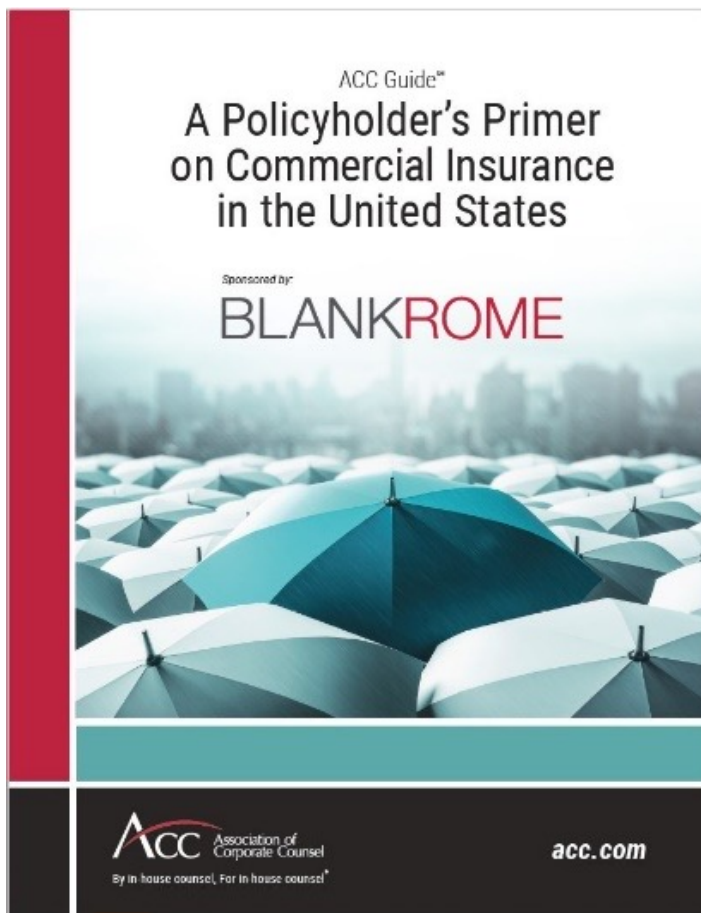
Top 10 Future Risks

- 01** Cyber Attack or Data Breach
- 02** Climate Change
- 03** Weather and Natural Disasters
- 04** Failure to Attract or Retain Top Talent
- 05** Economic Slowdown or Slow Recovery
- 06** Failure to Innovate or Meet Customer Needs
- 07** Artificial Intelligence (AI)
- 08** Regulatory or Legislative Changes
- 09** Geopolitical Volatility
- 10** Disruptive Technologies

Source: AON Global Risk
Management Survey

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ACC Guide 2023



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RISK IS SPECIFIC TO YOU

TOP 5 RISKS IN
AGRICULTURE

TOP 5 RISKS IN
FINANCIAL SERVICES

TOP 5 RISKS IN
HOSPITALITY, LEISURE,
TOURISM

TOP 5 RISKS IN
CONSUMER GOODS

TOP 5 RISKS IN AVIATION,
AEROSPACE, DEFENSE

TOP 5 RISKS IN
POWER & UTILITIES

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

TOP 5 RISKS IN
ENGINEERING,
CONSTRUCTION,
REAL ESTATE

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

TOP 5 RISKS IN
TECHNOLOGY

TOP 5 RISKS
IN CHEMICALS,
PHARMACEUTICALS,
BIOPHARMA

TOP 5 RISKS IN
ENTERTAINMENT &
MEDIA

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Layers of Protection

- Waivers
- Limitations
- Indemnity
- Insurance
 - Tie indemnity with GL extension of protection to “Insured Contract”

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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Planning for and Addressing Risk

Are you working from a clean slate or are there pre-existing operations, contracts, insurance, and liabilities?



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

Mitigating Risks to Your Business

- Force Majeure
- Cancellation Provisions
- Delay Provisions
- Limitations on Contract Damages
- Limited Agency Agreements
- Indirect Contracting
- Priority Protection for AR and Extensions of Financing

A Corporate Insurance Portfolio

Third-Party Liability



First-Party Loss



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Coverages Frequently In Corporate Portfolios – Tailored to You

- General Liability (ACC Primer 34-79)
 - Bodily Injury and Property Damage
 - Advertising Injury
- First-Party Property (ACC Primer 108-131)
 - Business Interruption
 - Contingent Business Interruption
- Directors & Officers (“D&O”) (ACC Primer 79-96)
- Errors & Omissions (“E&O”) / Professional Liability (ACC Primer 96-98)
- Employment Practices (98-101)

- Representation & Warranty (128-31)
- Cyber & Privacy (101-08)
- Credit Insurance / Lienholder Interest
- Patent (76-79)
- Product Recall (75-76)
- Environmental (62-71)
- Crime / Fidelity (126-28)
- Fiduciary
- Event Cancellation
- Title Insurance
- Cargo / Storage
- Wrap Up / OCIP / CCIP
- Political Risk (120-26)

TIMES WHEN RISK IS ANALYZED

- 1) Starting/Initiating Business
- 2) Adding/Acquiring New Business Venture
- 3) Selling a Business
- 4) During an Annual Insurance Renewal or Risk Management Review
- 5) New Partnerships, Financial Relationships
- 6) A Loss Event Happens (To You or Someone Else)

Takeaway: risk is present during all business operations

Risk Management Fundamentals For a Business Transaction

- What risks are presented by the deal
- What opportunities for using insurance to help close the deal
- Historic insurance can play an important role before, during, and after a transaction
- Structure the deal to work with indemnities and according to the waterfall of assets you intend

Takeaway: Understanding and planning for all implications of the business transaction is critical

- Insurance Requirements for Others
 - Specify the types of policies required.
 - Specify the minimum levels 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.

Fundamentals When Renewing or Purchasing New Insurance

- What are the biggest risks to your business and personnel?
- Who is an insured?
- How do you intend for the waterfall of assets to work?
- How does the insurance work within the overall portfolio of insurance? (Is it a stand-alone coverage portfolio?)
- How are you aligning insurance to the risks that you perceive?

Consider the due diligence that went into the transactions

Are there lingering liability concerns?

Consider structuring transactions to provide that insurance assets (historic, current, and future) exist for the benefit of the purchaser and seller, setting up a waterfall that leaves your assets last

Consider the necessity of specialty insurance products to address outstanding liability issues

A Loss and A Claim

Analyze all potentially applicable insurance assets and indemnifications.

Begin with the presumption that there is insurance coverage for your loss unless it can be unequivocally shown that coverage is excluded.

Provide notice to your insurers on this basis. Provide notice and demand indemnification. Ask for the insurance policies from those who owe you indemnities.

Ask questions about your rights to others' insurance.

Your Insurance Claim

Focus on the written Policy terms not what the conventional wisdom says about what is or is not covered or what is or is not “intended” to be covered. You bought insurance to protect your business that is what your business intended when it paid for the insurance.

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)

Document Your Claim

Require the insurer to investigate and to explain its analysis to you.

Push back on delays, denials, and on incomplete or incorrect analysis by the insurer.

Document your claim in formal written correspondence with the insurers.

Obtain the Full Value of Your Assets



Use an understanding of the insurance and reinsurance industries to anticipate how the insurer's motivations will drive its response to your claim.

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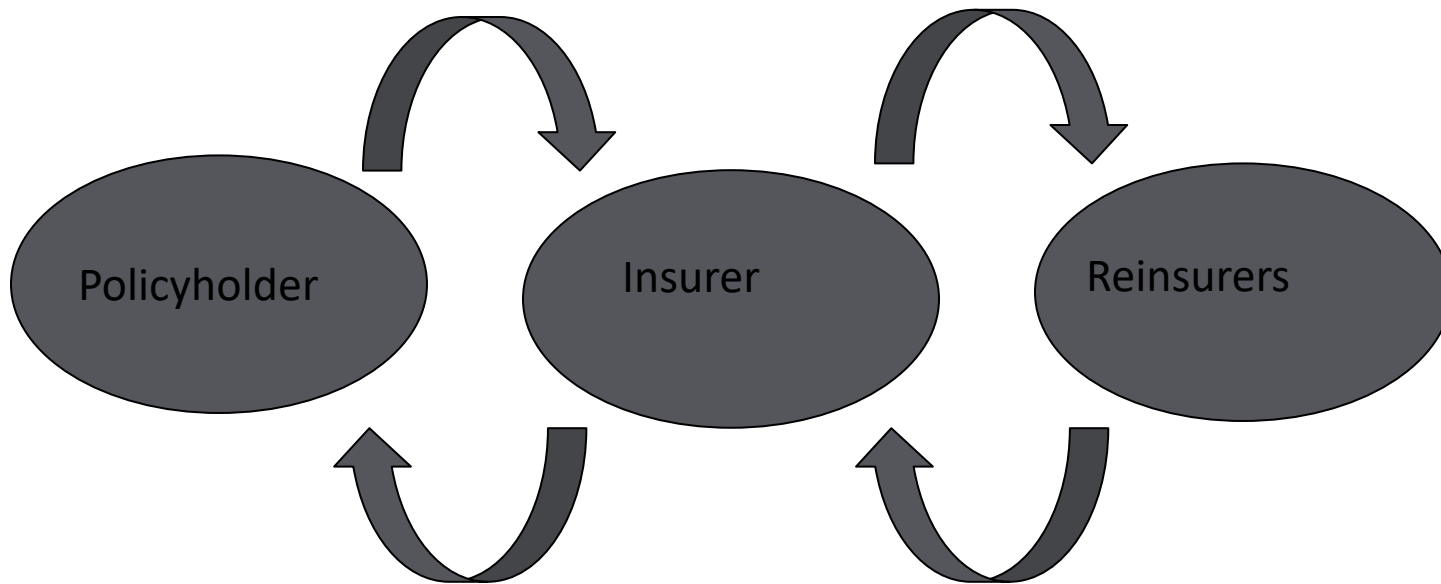
Know Your Counterparty

“Float”

One reason we were attracted to the property-casualty business was its financial characteristics: P/C insurers receive premiums upfront and pay claims later. In extreme cases, such as those arising from certain workers’ compensation accidents, payments can stretch over many decades. This collect-now, pay-later model leaves P/C companies holding large sums – money we call “float” – that will eventually go to others. Meanwhile, insurers get to invest this float for their benefit. Though individual policies and claims come and go, the amount of float an insurer holds usually remains fairly stable in relation to premium volume. Consequently, as our business grows, so does our float. And *how* we have grown, as the following table shows:

<u>Year</u>	<u>Float (in \$ millions)</u>
1970	\$ 39
1980	237
1990	1,632
2000	27,871
2010	65,832
2014	83,921

Traditional Reinsurance



Your Indemnitor



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Recurring Themes With Insurers

Asserting the insurer's intent/purpose in selling a policy

Arguing about the “gist” of a claim rather than the specifics

Insurer assertions without evidence.

Insurers bear the burden of proof for Exclusions

Drafting history, regulatory history, and course of conduct evidence

Recurring Arguments From Insurers

Concerns— explicit or implicit—that a ruling in favor of coverage would wreak financial havoc on the insurance industry

Assertion that harm from intentional conduct cannot be insured – (Wrong)

Paint the policyholder in a bad light for the alleged conduct

Argue Misrepresentation and/or Recission

Argue that other types of coverage (not purchased) better fit the loss

Cont'd



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Significant Trends Seen in 2023 and Early 2024



Insurers forcing insureds to litigate for their coverage

Raising old issues asserting new evidence

Recoupment

Losing coverage by winning the underlying case

Rescission

Underwriting at the point of claim

Mandatory Arbitration

Mandator Mediation

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QUESTIONS?

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PANELISTS

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John is a partner and Co-Chair of Blank Rome's national policyholder-only Insurance Recovery practice. His practice focuses on advising corporate policyholders about their insurance policy rights and recovery insurance assets, either through negotiation or trial. With 25 years of experience, he maintains an active national trial practice, and in the past decade has, through negotiations, litigation, and trial verdicts, enforced clients' rights to more than \$3 billion worth of insurance. John is the principal author and editor of the Association of Corporate Counsel's *A Policyholder's Primer on Commercial Insurance in the United States*.



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2023 Exemplar Developments

National Union v. Cargill, No. 21-3141 (8th Cir. 2023)

Held: Insured suffered a covered loss resulting directly from employee's theft when an employee embezzled money by misrepresenting the price at which grain was sold, including by diverting the funds to her own account and paying for freight costs that would not have been incurred absent the scheme.

Discover Property & Casualty Ins. Co. v. Blue Bell Creameries USA, No. 22-50842 (5th Cir. July 11, 2023)

Held: allegations that directors and officers knowingly disregarded a contamination risk and safety compliance and willfully failed to exercise their authority are not covered under CGL policy as they were not caused by an "accident."

Consolidated Restaurant Operations, Inc. v. Westport Ins. Corp., 2024 N.Y. Slip Op. 00795 (N.Y. Ct. App. Feb 15, 2024).

Held: Allegations that COVID-19 was present in insured's restaurants were insufficient to state a claim for "direct physical loss or damage," as that phrase "requires a material alteration or complete and persistent dispossession of insured property."

Team 44 Restaurants, LLC v. American Ins. Co., No. 2:21-cv-00404-DJH (9th Cir. Jun 26, 2023)

Temporary loss of use as a result of COVID-19 closures is not covered by a “direct physical loss of or damage to property” provision.

Rockefeller University v. Aetna Casualty & Surety Co., Index No. 654425/2019 (N.Y. Sup. Ct. N.Y. Cnty. Dec. 8, 2023)

Denying insurers’ motion to dismiss claims for bad faith and deceptive business practices alleging that insurers adopted a “wait and see” approach that protected their own interests to the detriment of the plaintiff in connection the underlying sexual abuse claims against the insured institution.

Florida Bill SB 2A

- ☐ Reforms to how policyholders in Florida are able to obtain property insurance coverage.
 - ☐ Reduces deadline for policyholders to report a claim from 2 years to 1 year.
 - ☐ Alters attorney’s fees in a coverage action arising under a residential or property insurance policy.
 - ☐ Addresses additional issues with bad faith litigation
- ☐ Does Not Apply Retroactively

Harrington v. Purdue Pharma L.P., No. 23-124 (Sup. Ct. Dec. 4, 2023)

Supreme Court currently considering whether the Bankruptcy Code authorizes a court to approve releases, as part of a plan of reorganization under Chapter 11, that extinguish claims held against nondebtor third parties without the claimants’ consent.