Legal departments at companies often unfairly are considered “cost centers.” In truth, the advice and counsel that in-house attorneys provide save their companies substantial sums. With insurance, however, the benefit is measurable. Insurance coverage provides a unique way for legal departments to recover money for their organizations. Most businesses have broad portfolios of insurance policies that may pay for, among other things, costs for investigating a claim or defending a lawsuit, costs for settlements or judgments, loss resulting from property damage, including costs for interruption of a company’s business operations, and loss resulting from a theft or data breach. Whenever assessing a claim or loss, in-house counsel should consider whether there is insurance in play. This chapter will provide the tools to conduct an informed analysis.

I. FUNDAMENTALS OF INSURANCE COVERAGE

A. Different Types of Insurance Policies for Different Risks and Liabilities

Just as individuals purchase different types of insurance to protect against different risks and accidents, companies have many types of insurance policies. Common commercial insurance includes commercial general liability, directors and officers (D&O) liability, employment practice liability, first-party property, and fidelity policies. In addition to
these common policies, there are a number of policies that are becoming more widespread to address emerging risks, including representations and warranties insurance, political risk insurance, and cyber insurance.

Unlike many personal insurance policies, however, there are significant differences among the policy forms available to businesses. There are wide variations from policy form to policy form, and even seemingly minor differences in language can have drastic ramifications on the scope of coverage. As a result, a careful review of language is necessary in assessing whether coverage is available, and it is best never to assume that a claim or loss is not covered. An examination of language should be done after a claim or loss, of course, but prudent in-house counsel should review language before a claim is even made. Corporate policyholders often can request, and insurance companies will accept, revisions to policy language, but companies do not get what they do not ask for.

**B. More Than One Policy May Provide Coverage for the Same Liability**

Not only are there many types of insurance policies, but more than one policy also may respond to the same risk. A common example comes up in the context of personal insurance. If an employee is backing out of his or her home driveway while talking on a work telephone call and has a collision, the employee’s personal automobile insurer, homeowners insurer, or employer’s commercial general liability insurer may respond, depending on the facts and circumstances. Former President Bill Clinton famously found coverage for Paula Jones’s suit alleging sexual harassment under his umbrella homeowner’s policy. More recently, the United States Court of Appeals for the First Circuit found that Bill Cosby had coverage for suits by sexual assault victims alleging defamation under his homeowners and umbrella insurance policy.1

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**Practice Pointer**

Coverage can be found in unexpected places. The first step in maximizing insurance is to understand the organization’s insurance portfolio and know which policies may respond to a loss or claim.

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**C. Insurance Law Is State Law Determinative**

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**Practice Pointer**

One important point to understand in assessing the availability of coverage is that insurance law is state-law specific. Remarkably, this could mean that a court construing the same exact language and the same exact set of facts could reach an

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entirely different outcome depending on which state’s law applies. Given that there may be significant differences in the law from one state to another, this means that it is important to identify which state’s law applies in evaluating whether there may be coverage available for any particular claim or loss.

D. Reading an Insurance Policy Need Not Be Overwhelming

Insurance policies are intimidating. They often are thick documents comprising scores of pages with small, single-spaced font, but once you understand the basic structure, you need not be overwhelmed. Most policies contain five basic sections: (1) a declarations page that sets forth the names of the insured and the insurance company, limits of the insurer’s liability, and policy period; (2) the insuring agreements; (3) the exclusions sections; (4) the policy conditions; and (5) the policy endorsements. With an understanding of these five sections, reading an insurance policy will be much more manageable. Even with this knowledge, however, one should not be surprised to find that the language of an insurance policy is unclear—insurance underwriters can be sloppy if not purposefully confusing.

E. Rules of Construction: Tie Goes to the Policyholder

Practice Pointer

Under the law of most states, there are several common rules regarding the interpretation of insurance policies that favor the policyholder. If the language of the policy is clear on its face and there are no ambiguities (including latent ambiguities), the policy will be construed as written. Depending on the state, the court may look to extrinsic evidence submitted by the policyholder to determine whether the language is ambiguous and whether an ambiguity exists. The language should be interpreted to protect the reasonable expectations of the policyholder. Thus, if the language is ambiguous and subject to two reasonable
interpretations, it will be construed against the insurance company as drafter and in favor of coverage. This is true even if the insurance company's proposed interpretation is a better interpretation, so long as the policyholder's interpretation is a reasonable one. At the same time, whereas coverage grants in insurance policies will be construed broadly, exclusions in insurance policies typically are construed narrowly. The insurance company bears the burden of proving that exclusions and limitations in its policy form bar coverage. To meet this burden, the insurer generally must show that the exclusionary language is unambiguous and clearly bars coverage. Policyholders with a good understanding of these fundamental rules may have an early advantage.

F. Avoid Land Mines in Completing the Application

Even where a claim is clearly covered, insurance companies may seek to avoid their coverage obligation by claiming that there was a misrepresentation in the application for the policy. Policyholders, of course, are well served to be truthful in their applications, but there is language that businesses can include in their insurance policies to reduce the likelihood of an insurer denying coverage based on a misrepresentation. First, the definition of “application” in the policy may include not only the formal application that the business is required to fill out to obtain the policy, but also other materials such as filings with the SEC or other regulators; the narrower this definition, the better for the policyholder. Second, policyholders can request nonimputation or severability clauses.

to, or (3) eliminates the dominant purpose of the transaction”); Hallowell v. State Farm Mut. Auto. Ins. Co., 443 A.2d 925, 927 (Del. 1982) (“the Court will look to the reasonable expectations of the insured at the time when he entered into the contract if the terms thereof are ambiguous or conflicting, or if the policy contains a hidden trap or pitfall, or if the fine print takes away that which has been given by the large print”); Jordan v. Allstate Ins. Co., 116 Cal. App. 4th 1206, 1214 (2004) (ambiguous policy terms should be construed to protect the objectively reasonable expectations of the insured).

5. Hercules, Inc. v. AIU Ins. Co., 784 A.2d 481, 492 (Del. 2001) (Delaware courts apply the doctrine of contra proferentem and resolve ambiguities against insurers and in favor of coverage).


7. Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1032 (9th Cir. 2008) (insurance coverage is interpreted broadly and policy exclusions are construed narrowly); MacKinnon v. Truck Ins. Exchange, 31 Cal. 4th 635, 648 (2003) (insurance policies are interpreted broadly “to afford the greatest possible protection,” whereas exclusions and other coverage-limiting provisions are “interpreted narrowly against the insurer”); Bituminous Cas. Corp. v. Sand Livestock Sys., Inc., 728 N.W.2d 216, 220 (Iowa 2007) (insurance policies are interpreted broadly “to afford the greatest possible protection,” but exclusions and other coverage-limiting provisions are “construed strictly against the insurer”).


These provisions limit the impact of any misrepresentation to the person with knowledge and preserve coverage for those that did not know of the misrepresentation. In addition, keep in mind that even where there is a misrepresentation, the insurer usually has the obligation to prove that the misrepresentation was material and that the insurer relied on the misrepresentation in selling the policy.10

G. Importance of Notice

Too often corporate policyholders forfeit their right to coverage simply because they fail to take one simple step: provide notice to their insurance company of the claim or loss. It is imperative for legal departments to understand what they are required to do in the event of a claim, accident, or loss. Some policies require notice within a certain number of days, some “as soon as practicable,” and some within a reasonable time period. Policies also commonly provide specific information on how notice must be provided, including in some instances in a specified form and to a specific location.

Practice Pointer

Even before a claim comes in, companies should have a thorough understanding of what notice is required and a plan in place to meet those requirements. Providing notice is not difficult, and no one wants to be responsible for costing their company millions of dollars simply by failing to check the proverbial box. Importantly, although strict compliance with notice provisions is the best practice, the failure to do so does not always result in forfeiture of coverage. In some states, the insurer has the burden to prove that it was prejudiced by late notice before its obligation will be excused.11

H. Settling Lawsuits with Insurance in Mind

Often in high-stakes, complex litigation there are opportunities to enter into an early settlement to resolve a complex claim and avoid the associated expenses and publicity. In the context of liability insurance, before entering into a settlement, businesses must consider carefully the implications on insurance. For example, most policies require the policyholder to obtain the insurer’s consent prior to settlement. Although some states will not enforce this requirement where an insurer has denied coverage or unreasonably refuses consent,12 companies should review the applicable law on the “consent to settle”

11. Nationwide Mut. Ins. Co. v. Starr, 575 A.2d 1083 (Del. 1990) (under Delaware law, even if notice is untimely, late notice will not result in a forfeiture of coverage unless the insurer establishes that it was materially prejudiced by the late notice).
12. Rhodes v. Chicago Ins. Co., a Div. of Interstate Nat. Corp., 719 F.2d 116, 120 (5th Cir. 1983) (“[a] consequence of a breach of the duty to defend is the inability to enforce against the insured any conditions
provision before settling. Additionally, the underlying lawsuit may allege both covered and uncovered claims. In those instances, the policy and the applicable law should be evaluated as to whether the settlement will be allocated between the insurer and the policyholder.

I. Protection in Commercial Agreements: Additional Insured Coverage and Indemnification

In addition to the company’s own insurance policies, in-house counsel should not lose sight of protection established by commercial agreements. In a company’s business agreements, the other contracting party often agrees to indemnify the company and/or name the company an additional insured under its insurance policies. This is another source of protection that is often forgotten until it is too late.

II. MAJOR COMMERCIAL INSURANCE POLICIES

A. Commercial General Liability (CGL) Insurance

CGL insurance policies are an important protection for corporate policyholders against third-party liability claims, broadly providing defense and indemnity coverage against claims for bodily injury, property damage, personal injury (e.g., false arrest, libel and slander, invasion of privacy), and advertising injury. CGL policies typically are written on standard policy forms developed by nationwide insurance-industry organizations.

1. Explanation of Coverage

Although there may be some variance in language, standard primary CGL policies typically provide the following promises:

The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies caused by an occurrence and the Company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage . . . .

As the language suggests, the coverage is triggered when bodily injury or property damage takes place during the policy period. By contrast, “claims made” policies generally are
triggered by a claim asserted against the policyholder during the policy period. When a policy is triggered, an insurer owes its policyholder two principal obligations: a duty to defend and a duty to indemnify.

**The duty to defend.** The insuring agreement gives the insurer the right and imposes upon the insurer the duty to defend any suit seeking covered damages from the policyholder. The obligation to defend is determined by comparing the allegations of the underlying complaint with the language of the policy.\(^{13}\) If even a single claim potentially falls within coverage, under the law of many states, the insurer must defend the entire action.\(^{14}\) The insurer’s duty arises even when the underlying lawsuit or claim is groundless, false, or fraudulent.\(^{15}\) Notably, if an insurance company reserves its rights to disclaim an indemnity obligation, a conflict of interest is created, which courts in most jurisdictions resolve by permitting a policyholder to retain independent defense counsel at the insurer’s expense.\(^{16}\)

Unsurprisingly, the insurer’s defense obligation generally is extremely valuable to the policyholder. As a practical matter, a policyholder may incur tens of millions of dollars in legal fees for large-scale environmental or product liability claims, even where the policyholder faces a frivolous claim or ultimately avoids liability. Depending on the language of the policy, defense costs may or may not erode the limits of CGL coverage.

**The duty to indemnify.** In contrast to the duty to defend, the insurer’s duty to indemnify more narrowly turns on the actual facts of the third-party claim as developed in the underlying case. The duty to indemnify arises upon the policyholder’s legal obligation to pay a judgment or settlement.\(^{17}\)

### 2. Key Exclusions

CGL policies have a number of significant exclusions based on insurance-industry claims experience. The following exclusions are some of the most important to consider:

**Pollution exclusions.** Beginning in the 1960s and 1970s, the insurance industry began to recognize the potential for exposure for significant environmental liability

\(^{13}\) Brohawn v. Transamerica Ins. Co., 276 Md. 396, 408, 347 A.2d 842, 850 (1975) (under Maryland law, the obligation of an insurer to defend is broad and is judged by whether there is a potential that the allegations of the claim fall within coverage); Aetna Cas. & Sur. Co. v. Cochran, 337 Md. 98, 102, 651 A.2d 859, 861 (1995) ("[A]n insurance company has a duty to defend its insured for all claims which are potentially covered under an insurance policy").

\(^{14}\) United Servs. Auto. Ass’n v. Morris, 154 Ariz. 113, 117, 741 P.2d 246, 250 (1987) ("the insurer must defend claims potentially not covered and those that are groundless, false, or fraudulent").

\(^{15}\) Aetna Ins. Co. v. Aaron, 112 Md. App. 472, 481–82, 685 A.2d 858, 862–63 (Ct. Spec. App. 1996) ("[T]he duty to defend arises as long as the complaint against the insured alleges ‘action that is potentially covered by the policy, no matter how attenuated, frivolous, or illogical that allegation may be’").

\(^{16}\) Rhodes v. Chicago Ins. Co., 719 F.2d 116, 120–121 (5th Cir. 1983) ("When a reservation of rights is made, however, the insured may properly refuse the tender of defense and pursue his own defense. The insurer remains liable for attorneys’ fees incurred by the insured and may not insist on conducting the defense."); Moeller v. Am. Guarantee & Liab. Ins. Co., 707 So. 2d 1062, 1071 (Miss. 1996) (insurer that provided a defense under a reservation of rights to disclaim coverage was obligated to let its policyholder select its own defense counsel at the expense of the insurer).

\(^{17}\) Perdue Farms, Inc. v. Travelers Cas., 448 F. 3d 252 (4th Cir. 2006).
claims. The insurance industry responded by adding an exclusion that barred coverage for environmental contamination unless the discharge of pollutants was “sudden and accidental.” The language of this exclusion resulted in many lawsuits regarding whether this form of the pollution exclusion barred coverage for gradual, unexpected contamination, with many cases finding in favor of policyholders. Subsequently, the insurance industry modified the exclusion in the 1980s and introduced what is known as the “absolute pollution exclusion.” As the name suggests, the exclusion is broad but not without limits. Litigation continues today as to whether this exclusion bars coverage for only traditional pollution or whether it should have broader application. Many courts have reached policyholder-friendly results based on the scope of the exclusion.

**Assault and battery exclusions.** A typical assault and battery exclusion provides that coverage does not apply to injury directly or indirectly arising from any actual or alleged assault and/or battery. A common dispute relates to whether an underlying suit alleges negligence claims that fall outside the scope of the exclusion, and whether the claims fall within any exception to the exclusion.

**Expected or intended limitations.** Nearly all CGL policies limit coverage for injury expected or intended from the standpoint of the insured.

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**Practice Pointer**

Insurance companies commonly try to extend the reach of this language so that it applies to all intentional acts, but most courts hold that the language bars coverage only when the damage itself was expected or intended.

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**Contractual liability exclusions.** Many CGL policies contain an exclusion barring coverage for damages that the policyholder is obligated to pay by reason of assumption of liability in a contract. However, there typically are two significant exceptions. First, the exclusion often excepts liability that “the insured would have in the absence of the contract or agreement.” Second, to preserve coverage in instances where the policyholder is required to indemnify another business, the exclusion often excepts liability “[a]ssumed in a contract or agreement that is an ‘insured contract.’”

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Cyber and data exclusions. After courts found coverage under CGL policies for liability resulting from several data breaches, the insurance industry in 2014 introduced a broad exclusion “for injury or damage arising out of any access to or disclosure of any person’s or organization’s confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit-card information, health information, or any other type of nonpublic information.” Policyholders that have policies with this exclusion may have an uphill battle seeking coverage for liability from a data breach, but in-house counsel should not assume that this exclusion necessarily is part of the policy, and several courts have found coverage for cyber liability where policies omit this language.

3. Other Important Conditions and Considerations

Other policy terms may impact the coverage initially promised in the insuring agreement. CGL policies impose various duties and conditions on policyholders, including requirements concerning when and how policyholders must give notice to their insurers of occurrences or claims.

Trigger of coverage. One issue that comes up frequently in disputes regarding CGL policies is determining when the event that gives rise to coverage takes place. In contrast to a “claims made” policy, which is triggered by claims made during the policy, CGL policies typically are “occurrence” policies, which require the injury to occur during the policy period. Where injury is latent and occurs over the course of many policy periods, the “trigger” issue is identifying which policy or policies will respond to a claim. It is important to assess carefully which state or states’ law applies in conducting this analysis. Where the date of the injury is uncertain or ongoing, coverage may be available under multiple policy years.

Number of occurrences. Determining the number of occurrences can be a key consideration in assessing coverage under CGL policies. This issue has broad ramifications, including how many deductibles the policyholder must pay and whether a claim is subject to a single limit or multiple limits. Interestingly, sometimes insurance companies will favor a finding of multiple occurrences (so that the policyholder must separately pay many deductibles), whereas other times insurance companies will favor a finding of a single occurrence (so that the insurer’s liability is limited to a single limit). As a result, helpful admissions often can be found in past court filings by the insurance industry.

Allocation. Where multiple policies respond to the same claim, questions often arise regarding how liability should be allocated among insurers. Courts have reached varying conclusions regarding this issue. Some have determined that the policyholder can select any triggered policy, and the insurer is required to pay “all sums” for which the policyholder is legally obligated to pay. Other courts, to the detriment of policyholders,

have found that a “pro rata” allocation applies meaning that the loss is allocated among all applicable policy periods, with each insurer paying a pro rata share of the policyholder’s total liability.23

B. D&O Liability Insurance

One of the important protections available to directors and officers and companies is D&O insurance. The extent of insurance coverage provided varies considerably among D&O policies. However, these policies often provide valuable protection for cases ranging from mismanagement claims to antitrust cases.

1. Explanation of Coverage

Whereas many CGL policies are written on a form used throughout the insurance industry, D&O insurance is not sold on any one standard form. Rather, each insurance company uses different language for its D&O policy forms. As circumstances have evolved in recent years, each insurance company has continued to modify its policy language. However, there are typically some commonalities among D&O insurance policies.

Practice Pointer

There generally are three main coverage grants: Side A coverage, Side B coverage, and Side C coverage.

Side A coverage provides insurance to protect directors and officers from claims made against them. It does not provide insurance for claims against the entity itself. Under a typical D&O insurance policy, the insurance company agrees to indemnify, or to pay on the behalf of, the individual directors or officers for all “loss” that those individuals become legally obligated to pay arising from a “wrongful act” committed in their capacity as a director or officer. One typical provision provides:

This policy shall pay the Loss of any Insured Person arising from a Claim made against such Insured Person for any Wrongful Act of such Insured Person, except when and to the extent that an Organization has indemnified such Insured Person.

The individuals covered under a D&O policy often include past, present, and future directors and officers, but the individuals are covered only for claims that allege wrongdoing performed by the director or officer while acting in his or her capacity as a director or officer. This coverage also generally insures individuals who serve as outside

directors of other corporations at the request of their corporate employer. Coverage also may extend to the spouses of current or former directors and officers.

Side B coverage, sometimes referred to as “reimbursement” coverage, obligates the insurance company to reimburse the corporate entity for all “loss” for which the company is required to indemnify, or has legally indemnified, the directors or officers for a claim alleging a wrongful act. A common Side B insuring agreement provides:

[T]he Insurer shall pay on behalf of the Company or any Subsidiary, Loss for which the Company or any Subsidiary is required, or has determined as permitted by law, to indemnify the Insured Persons and which results from any Claim first reported by the Company to the Insurer during the Policy Period or Extended Reporting Period, if applicable, and made against the Insured Persons for a Wrongful Act.

Again, Coverage B does not provide insurance for the corporate entity’s own liability for claims. Rather, it requires the insurer to reimburse the corporate entity for amounts it has spent to protect individual insureds.

Finally, Side C coverage requires the insurer to pay the corporate entity for the entity’s own liability in defending or resolving claims against it alleging wrongful acts. For example, one typical provision provides:

The Insurer will pay on behalf of the Company, Loss resulting from Claims first made during the Policy Period or the Discovery Period against the Company for which the Company is legally obligated to pay for Wrongful Acts.

The term “Wrongful Acts” often is broadly defined to include “any act, error, misstatement or omissions, neglect, or breach of duty.” However, the manner in which terms are defined in D&O policies can be important and warrant special attention.

2. Key Exclusions

Unsurprisingly, D&O insurance policies, like all policies, contain a section that sets forth exclusions that limit coverage for certain types of claims or losses. However, not all policies are the same, and some policies are far less restrictive. Depending on market conditions, insurers often agree to changes requested by their policyholders to eliminate, or narrow the scope of, certain exclusions.

Practice Pointer

Consider working with your broker or experienced coverage counsel to obtain the most favorable language. Some of the most significant exclusions typically found in D&O policies include the following:

Conduct exclusions. These include exclusions that restrict coverage due to a policyholder’s misconduct, such as exclusions for illegal personal gain, dishonest acts, or fraudulent or illegal conduct. For more favorable language, policyholders
should request that any conduct-based exclusion be removed or, at a minimum, limited to instances in which intentional misconduct is established by final adjudication in the underlying case. Assuming that change is made, the conduct-based exclusions generally will not relieve the insurer from providing defense coverage, regardless of how egregious the allegations of misconduct, nor will they preclude coverage in the case of settlements. Policyholders also should closely examine the allegations of any underlying complaints. If any of the claims in the underlying case are based on nonintentional conduct, a conduct-based exclusion likely will not absolve an insurer of its duty to defend.

“Prior acts” or “prior litigation” exclusions. These include exclusions for claims relating to wrongful acts that occurred prior to a specific date set forth in the policy, or for claims relating to a specified claim or circumstance. Policyholders should be cognizant of any prior acts exclusions and their impact on any existing but unknown claim, and attempt to limit the application of such exclusions.

Insured versus insured exclusions. The “insured vs. insured” exclusion typically bars coverage for claims “by, on behalf of, or at the behest of” the insured company or any insured person against another insured. This exclusion was designed by insurance companies in response to collusive “disputes” between or among companies and directors and officers. However, some insurers have relied on this exclusion beyond its intended purpose to bar coverage for claims by bankruptcy trustees and others following a corporate insolvency. Many courts have rejected this position, but during the underwriting and purchase of D&O insurance, corporate policyholders should consider seeking endorsements from the insurer clarifying that the insurer will not invoke the insured vs. insured exclusion for claims by trustees or receivers in the event of bankruptcy or insolvency.

Hidden limitations on coverage. Intuitively, policyholders may assume that the major limitations on coverage are spelled out in the exclusions section, but with increasing frequency, insurance companies are hiding limitations on coverage in definitions and elsewhere in the policy. For example, the definition of “loss” generally includes settlements, verdicts, and judgments. However, the definition of “loss” may “carve out” not only punitive damages, but also disgorgement and the depreciation of investments. In most states, exclusions must be clear and unambiguous; therefore, these limitations may not pass the test. To avoid these issues, policyholders should carefully review the definitions section to assure that there are no hidden limitations on coverage.


3. Other Important Conditions and Considerations

“Claims-made” coverage. D&O coverage is written on a claims-made basis, which requires that a claim be made against the policyholders during the policy period. Some policies also may require that the claim be reported to the insurer during the policy period. One question that often arises regarding the trigger of the claims-made policy is what constitutes a claim. The definition of “claim” varies from policy form to policy form. The definition will undoubtedly include civil lawsuits; however, it also may include civil investigation demands and subpoenas.

**Practice Pointer**

The expanded definition of “claim” can be beneficial to policyholders, but in-house counsel should recognize that with an expanded definition of “claim,” there correspondingly is an expanded obligation to provide notice to the insurer(s). Note that even if a claim is not made during the policy period, there may be coverage under some D&O policies so long as notice of potential circumstances that could give rise to a claim is provided to the insurer during the policy period.

**Be careful during renewal and in replacing insurers.** One of the times policyholders must be most careful is when they renew their policies or decide to replace their insurance company. The issue is that existing policies may not cover claims reported after the policy period, and the replacement policies may contain prior acts or prior litigation exclusions. Additionally, some replacement policies may contain a retroactive date limitation barring coverage for claims arising from acts taking place after a specified date. Companies must be aware of the implications of these provisions in view of existing claims and potential claims.

C. First-Party Property Insurance

1. Explanation of Coverage

First-party property policies typically provide two types of coverage: coverage for property damage and coverage for business interruption. The first protects against the risk of physical damage to a company’s property. The second is designed to compensate for the financial loss stemming from the disruption of an entity’s business and can be either direct (i.e., damage sustained by the policyholder itself) or contingent (i.e., damage sustained by the policyholder’s integral third parties, such as suppliers, customers, etc.).

Some property policies cover “all risks” except those that are expressly excluded. Other policies are written on a “covered peril” basis, which means they respond only to losses caused by specifically enumerated events. A typical all-risk policy will provide coverage for loss mitigation, business income losses (including losses caused by damage to any suppliers), extra expenses, debris removal, and blocked access to company
facilities. For coverage to be triggered, physical damage is an essential prerequisite in most first-party property policies.

2. Key Exclusions

Corporate policyholders must be acutely aware of potentially applicable exclusions in their property insurance policies. The most significant exclusions include:

**Intentional act exclusions.** These exclusions bar coverage for loss intentionally caused by the policyholder. This obviously bars coverage when the policyholder intentionally damages property, but depending on the scope of the exclusion it also could extend to damage that was expected based on the insured’s conduct.

**Water and flood exclusions.** At a high level, water and flood exclusions bar coverage for loss caused by flooding, but there are a number of potential exceptions and issues regarding its application. For example, depending on which law applies and the language of the policy, the exclusion may or may not apply to man-made flooding. Given the increasing severity of damaging weather events, corporate policyholders should consider seeking coverage for flood losses.

**Enforcement of ordinances exclusions.** These exclusions bar coverage for losses resulting from compliance with government-issued ordinances; however, if the ordinance results from an otherwise covered loss, the exclusion may not apply.

**Wear-and-tear exclusions.** These exclusions bar coverage for loss caused by ordinary wear and tear expected from the use of the property.

3. Important Conditions and Other Considerations

There are a number of important steps that prudent in-house counsel should take in securing coverage for a property loss:

**Protect property if possible.** Protect material assets by boarding up windows and doors, moving raw materials and finished products to higher ground, and relocating portable property. These steps are not only necessary to minimize a loss, they may be important for maximizing coverage. There are two basic reasons for this. First, loss mitigation may be a prerequisite to coverage. Second, many policies will actually reimburse storm preparation costs.

**Promptly notify your carrier.** All policies require notice to the insurer following a loss and most provide specific details regarding the timing and manner of that notice. Although policyholders should follow the mandate of each particular policy, it is imperative to provide the required notice as promptly as possible. Depending on the language of the policy and which state’s law applies, failing to do so may result in forfeiture of coverage.

**Document your losses.** It is essential to carefully document all property damaged as well as any resulting expenses. In addition, in the event of an interruption to the operations of a business, organizations should have a protocol in place, such as a daily diary, for recording all actions taken from the time of the loss, including mitigation efforts and extra expenses. Such protocols will ensure accurate and concise records to present to the insurer.
Rely upon insurance professionals. Understanding the applicable policy provisions, comprehensively documenting losses, tendering a formal proof of loss, and interacting with the carrier’s representatives can be a complicated and confusing process. Mistakes in the early stages can have a drastic effect on the ultimate recovery.

Practice Pointer

Given the potential complexity of tendering a loss, coverage counsel, insurance brokers, and forensic accountants should be consulted from the outset. For example, in measuring a business interruption loss, there may be several complex ways in which the loss can be calculated. It behooves policyholders to retain an expert who can articulate defensible calculations for measuring the loss to the business.

D. Cyber Insurance

1. Explanation of Coverage

The cyber-insurance market has been described as the “wild west.” As one of the fastest growing forms of coverage, there are more than 60 insurers selling dozens of different insurance policy forms with no standardization. Cyber-insurance policy forms are complex legal instruments with extremely technical language.

Given the various policies on the market, policyholders should look for a product that is tailored to their risk, beginning with an understanding of the organization’s exposures. Each company will have a different risk profile, depending on several factors such as industry, type of records maintained, and payment collection methods.

Although the specifics of coverage will change, cyber-insurance policies generally provide two forms of protection: (1) third-party liability coverage, i.e., amounts paid in defending or resolving claims by third parties; and (2) first-party coverage, i.e., the business’s own losses. Legal departments should assess the risk of third-party claims broadly and look for cyber policies to provide coverage for: (1) lawsuits and written demands from customers or suppliers resulting from a cyber breach; (2) liability for regulatory claims—an increasing risk with the European Union’s implementation of the General Data Protection Regulation and the SEC instituting investigations and seeking fines from companies for failing to disclose cyber events; and (3) online media liability for claims alleging that the organization’s website contains defamatory or infringing statements. For first-party coverage, policyholders will want to focus on breach response costs, business interruption costs, and costs for data loss and restoration. In addition, businesses that collect payment cards should ensure that coverage extends to payment-card industry fines or fees imposed by bank or credit-card companies for failing to comply with security requirements. Given that cyber risks evolve rapidly, coverage provided by these policies necessitate regular updating. For example, in 2017 and 2018, ransomware attacks and social engineering attacks were the most common cyber attacks,
but other risks are anticipated in the years ahead. Companies must remain vigilant for what comes next.

2. Key Exclusions

Just as the scope of coverage varies from cyber policy to cyber policy, exclusions likewise vary by policy form. Although the language of exclusions in different policy forms is not identical, the following are common exclusions included in cyber-insurance policies.

**Intentional, dishonest, or fraudulent acts exclusions.** Cyber policies frequently include exclusions for intentional, dishonest, or fraudulent acts.

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**Practice Pointer**

To ensure that this exclusion is narrowly tailored, policyholders should seek an exclusion that is applicable only upon a final, nonappealable determination of a court.

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**Civil fines and penalties limitations.** If these losses are excluded, it may be done as a stand-alone exclusion or a carve-out from the “loss” definition. Policyholders should avoid these limitations if possible because these are one of the costs that a policyholder is most susceptible to incur following a data breach.

**Acts of war or terrorism exclusions.** Some cyber-insurance policies bar coverage for loss resulting from acts of war or terrorism. Given that state actors often have been the culprits behind cyber attacks and data breaches, policyholders should seek policies that do not have such an exclusion or limit the exclusion to narrow factual scenarios.

**Laptop exclusions.** Cyber policies frequently limit coverage for portable devices. Policyholders can often negotiate to have this coverage added back into the policy by agreeing to provide satisfactory encryption for data on portable devices.

**Prior knowledge and/or retroactive coverage limitations.** Most cyber policies exclude loss arising from events occurring before a specified “retroactive date,” regardless of when a claim is made or a loss is discovered. Policyholders should negotiate the earliest retroactive date possible. The problem is that events thought to be blips often turn into catastrophic events. Sometimes hackers may be inside a company’s system for months before the company becomes aware of it. Other times, companies will learn about a cyber event but not appreciate the ramifications. Legal departments should protect their organizations from these contingencies.

3. Important Conditions and Other Considerations

**Understand the Underwriting Process.** The underwriting process for cyber liability insurance is detailed and comprehensive. Cyber-policy applications typically require the applicants to, among other things, attach their most recent financial statements; answer questions about their practices in connection with vendor contracts; provide information
about whether they are compliant with payment-card industry data-security standards; and provide information about the type of data they collect. Cyber-policy applications also seek information about any prior data breach the company has experienced.

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**Practice Pointer**

It is important that policyholders provide thoughtful and accurate information during this process because some cyber insurance companies have focused on policy applications to dispute coverage following a data breach. Additionally, prudent policyholders will take steps at the front end of the underwriting process that can reduce premiums, such as providing additional information where application questions are vague, working with brokers and consultants who understand cyber coverage and technology-related issues, and involving individuals from the information-security department to ensure responses about security practices are accurate.

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**Beware of sublimits.** In some instances, sublimits in endorsements may add coverage that does not exist, but in many instances insurers add sublimits that actually reduce coverage already provided. In-house counsel should carefully review sublimited coverage to ensure that: (1) it is not reducing coverage that the policy otherwise would have provided, and (2) it is sufficient to address the organization’s risk and potential exposure.

**Understand what to do in the event of a loss or breach.** Focused legal departments will have a plan before a loss occurs. Many companies retain a SWAT team—consisting of a cyber coach, attorneys, forensic accountants, and engineers—to take action in the event of a breach. During underwriting, policyholders should ensure that this preferred SWAT team is approved for use by the insurer. Insurance must be part of the plan. In the aftermath of a breach or a loss, policyholders also should have coverage counsel in place that will assess which insurance policies may respond, provide notice to applicable insurers as required under the policies, and document corporate losses in a manner that is likely to be paid. The worst-case scenario is both to have a cyber loss and fail to properly access and maximize insurance.

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**E. Other Significant Commercial Insurance Policies**

Although the foregoing sections discussed four types of insurance policies at length, in-house counsel should not lose sight of other common insurance policies that their organizations may have. To name a few, these include employment practices liability insurance (covering claims by employees alleging wrongful termination, harassment, discrimination, and similar conduct); fidelity insurance (covering loss resulting from dishonest or fraudulent acts by employees or others); pollution liability insurance (covering liability resulting from pollution); fiduciary liability insurance (covering claims alleging mismanagement of an organization’s benefit plans); representations...
and warranty insurance (covering loss resulting from a breach of a representation or warranty in a purchase and sale agreement); and inland marine insurance (covering loss to property in transit). Again, depending on the facts of the specific loss or claim, coverage may be found in more than one policy and sometimes in unexpected places.

III. SEEKING COVERAGE FOR A CLAIM OR LOSS

A. Dealing with a Claim

There are a number of steps that all in-house counsel should ensure are taken in the event the company plans to seek coverage for a claim:

1. **Review notice provisions to ensure notice is provided in a timely manner and any specific requirements are met.** Notice should be provided not just to primary insurers, but also to excess insurers whose policies potentially will be implicated by the loss. Unless called for by the policy, policyholders generally should avoid summarizing or characterizing the claim made against them.

2. **Be careful in communications with the insurance company regarding the claim.** Keep detailed notes of any oral communications and maintain copies of communications with the insurer. Note that depending on the coverage position taken by the insurer and the applicable law, the underlying claimants may be able to discover information shared with the insurance company.

3. **Promptly communicate any offers to settle, especially any offer to settle within limits.** As noted above, many policies contain consent-to-settle provisions requiring an insurer’s consent before the policyholder enters into a settlement. The failure to comply with such provisions may result in the forfeiture of coverage. At the same time, a settlement offer within limits may put pressure on an insurer to agree to coverage to avoid exposure for bad faith claims and consequent damages in excess of policy limits.

B. Dealing with a Denial

It will come as no surprise that in some instances, insurance companies might deny coverage for a claim or loss. There are a number of steps that legal departments should consider, short of litigation, to persuade an insurer to revisit its denial:

1. **Build the case for coverage.** In doing so, consider all facts showing that the claim or loss was intended to be covered and is not barred by any exclusion asserted by the insurer. Policyholders should review other language available in the marketplace that insurance companies could have used, but did not use, to clearly bar coverage. In addition, marketing materials and underwriting information should be revisited. Unsurprisingly, the insurer’s representations when marketing and selling a policy are frequently inconsistent with positions taken following a claim or loss. Once this information has been collected,
policyholders should educate the claims handler about the case for coverage and speak to a supervisor if necessary.

2. **Bring business relationships to the table.** The insurance industry is a business built on relationships. Policyholders seeking coverage should lean on business relationships with brokers, insurance companies, and coverage counsel to try to reach a positive result.

3. **Demand to settle within limits.** In the context of a third-party liability claim, if the insurer receives a demand to settle within limits and refuses, and a verdict later comes back in excess of the limits, the insurer may be liable to pay the full amount of the judgment, including the amount in excess of the insurer’s policy limits.

4. **Submit an insurance department inquiry.** Many states have a process whereby complaints can be filed against insurers based on improper claims handling. Although the approach of regulators varies by state, the inquiry alone may put pressure on the insurance company and force it to focus on the claim.

5. **Request mediation.** Many policies now have provisions requiring mediation before a lawsuit can be filed. Even where such language is not included, there may be a benefit to requesting an early mediation. Although the mediator’s views are not binding on either side, mediation often forces parties to focus on the strengths and weaknesses of their cases. There are a few important points to consider in moving forward with mediation. First, the selection of the mediator can be crucial. Given that the insurance industry has hundreds of mediators on its roster, it is important to find someone who does not treat the insurance industry as a client. Second, the identity of the insurer’s representatives at the mediation can be important. Those attending for the insurer should have authority to settle at the full amount of the demand. Finally, corporate policyholders should articulate the amount of their full claim without leaving anything on the table, including attorney’s fees, prejudgment interest, and any bad-faith damages.

6. **Litigating insurance disputes.** In some instances, litigation will be necessary to obtain coverage. Before proceeding with litigation, in-house counsel should evaluate and understand whether litigation is likely to move the case toward resolution or lead to years of disputes. As a plaintiff seeking coverage, corporate policyholders should seek an early trial date and attempt to keep the schedule. However, businesses should not lose sight of the potential benefit of discovery from insurance companies. Sources of discovery from an insurer’s files, such as drafting history, claims documents, reinsurance communications, and loss reserve information, often contain a treasure trove of helpful admissions.

When an organization experiences a significant claim or loss, in-house counsel undoubtedly has multiple priorities. The organization’s insurance coverage should not get lost in the flurry. Corporate counsel’s focus on available insurance may provide the best opportunity to recoup losses and to minimize the organization’s exposures.