

Hidden Risks and Opportunities in Your Insurance Program

A Practical Guide for In-House Counsel Navigating Insurance Issues

Introduction

Insurance is often treated as a background risk-management function, separate from the legal work of drafting contracts or defending litigation. In practice, however, insurance is frequently the determinative factor in whether contractual risk allocation succeeds or fails.

For in-house counsel, the challenge is not simply understanding insurance in the abstract, but recognizing how insurance operates at each stage of the risk lifecycle—from contract negotiation, to policy placement, to claims handling, and ultimately to coverage disputes. This paper examines those stages and highlights common assumptions that can quietly undermine corporate risk transfer strategies.

I. The Contract Stage: Risk Transfer on Paper

A. Why Contracts Alone Do Not Transfer Risk

Contracts are the first mechanism by which companies attempt to shift risk. Indemnity provisions, additional insured requirements, and insurance clauses are often drafted with the expectation that liability will ultimately be borne by another party and its insurer.

A recurring mistake is assuming that a contractual obligation automatically equates to insurance coverage. In reality, a contract can require a counterparty to indemnify the company for a loss that the counterparty's insurance does not cover at all.

The practical consequence is that risk transfer fails at the moment it is needed most—after a loss has occurred.

B. Upstream and Downstream Risk Transfer

Corporate risk transfer typically flows either “downstream” (to contractors, vendors, and suppliers) or “upstream” (to customers, owners, or project sponsors).

Downstream risk transfer is common in vendor agreements, construction contracts, and supply-chain arrangements, where the company seeks indemnity and insurance protection from parties performing work or supplying products. Upstream risk transfer arises when the company itself is required to indemnify others and provide additional insured status.

In both directions, the same question must be asked: **does the insurance program backing the contract align with the risk being shifted?**

C. Indemnity Versus Insurance

Indemnity provisions are contractual promises; insurance policies are separate contracts governed by their own terms, exclusions, and conditions.

Corporate counsel frequently assume that contractual indemnity obligations will be insured through “contractual liability” coverage under a Commercial General Liability policy. That assumption is often incomplete. Contractual liability coverage is limited to specific categories of “insured contracts” and typically applies only to bodily injury or property damage caused by the indemnitor’s operations.

Broad indemnity language that extends to economic loss, penalties, or liability unrelated to physical injury may be entirely uninsured.

D. Additional Insured Structures and Limitations

Requiring additional insured status is a common way to reinforce contractual indemnity. While valuable, additional insured coverage is not uniform and is frequently misunderstood.

Additional insured endorsements vary widely. Some provide coverage only for vicarious liability. Others apply only to ongoing operations, exclude completed operations, or operate on an excess basis despite contractual language requiring primary coverage.

Additional insureds also may share policy limits with the named insured and often lose control over defense and settlement decisions.

The key takeaway is that additional insured status should be treated as a negotiated coverage grant, not a checkbox.

E. Common Contract-Stage Assumptions

At the contract stage, in-house counsel should be alert to these recurring assumptions:

- That indemnity automatically equals insurance coverage
- That certificates of insurance reflect actual policy terms
- That additional insured endorsements are standardized
- That completed operations coverage is implicit

Each assumption should be tested against actual policy language.

II. The Policy Stage: What the Insurance Actually Covers

A. Coverage Blind Spots Corporate Counsel Often Miss

Once a contract is signed, attention often shifts away from insurance until a claim arises. At that point, companies may discover that coverage is narrower than expected.

The most common blind spots involve misunderstandings about what CGL policies cover, how exclusions operate, and how manuscript endorsements quietly narrow coverage.

B. What CGL Policies Are—and Are Not—Designed to Do

CGL policies are designed to insure third-party liability for bodily injury and property damage caused by accidents. They are not warranties for defective work or products.

Understanding this distinction is essential when evaluating whether insurance supports contractual risk transfer.

C. The “Insured Contract” Misconception

While CGL policies can cover certain indemnity obligations, that coverage is limited. Not all indemnity agreements qualify as insured contracts, and even qualifying agreements are typically limited to liability for bodily injury or property damage.

Indemnity provisions that extend beyond those categories may leave the company exposed despite the presence of insurance.

D. Manuscript Endorsements and Quiet Coverage Narrowing

Many corporate insurance programs include manuscript endorsements that modify standard coverage forms. These endorsements can significantly narrow coverage without drawing attention at renewal.

Examples include endorsements restricting additional insured coverage, limiting completed operations, or modifying key definitions such as “occurrence.”

Periodic legal review of policy endorsements is an essential risk-management function.

E. Key Exclusions Frequently Used to Deny Claims

1. Damage to Your Product

This exclusion eliminates coverage for damage to the insured’s own product arising out of the product itself. Coverage may exist for resulting damage to other property, but not for repairing or replacing the product.

2. Damage to Your Work

This exclusion removes coverage for damage to the insured's completed work. While many policies include a subcontractor exception, that exception can be removed by endorsement.

3. Impaired Property

The impaired property exclusion bars coverage for loss of use of property that has not been physically damaged, when the loss results from defective work or products that can be repaired or replaced.

This exclusion frequently surprises companies facing claims for downtime, delay, or lost production.

F. Practical Implications

Policy-stage analysis should focus on identifying where contractual expectations exceed policy reality. Discovering those gaps before a loss occurs allows companies to renegotiate contracts, adjust insurance programs, or consciously retain certain risks.

III. The Claim Stage: The First 72 Hours

A. Why the First 72 Hours Matter

The initial response to a claim often determines whether coverage is preserved or forfeited. Notice failures, tender mistakes, and early missteps can permanently impair recovery.

B. Notice Obligations and Internal Reporting Failures

Timely notice is critical, particularly under claims-made policies such as D&O, E&O, and cyber insurance where late notice can bar coverage regardless of prejudice. By contrast, under CGL policies, many states require a showing of prejudice, and in corporate settings, the duty to report is often tied to knowledge at a specified management level—not merely awareness by any employee. That makes it important to negotiate notice provisions to clearly define whose knowledge triggers the reporting obligation.

In-house counsel should ensure internal protocols require immediate escalation of incidents, demands, and lawsuits.

C. Tender Strategy

Effective tender strategy involves identifying all potentially responsive policies and carriers, including:

- Primary and excess policies
- Prior policy years
- Additional insured opportunities
- Counterparty insurance programs

Tendering early and broadly preserves options and prevents later disputes.

D. Additional Insured and Multi-Carrier Tenders

When additional insured coverage may apply, tenders should be made promptly and independently of the named insured's actions.

Where multiple carriers are involved, in-house counsel should insist that defense obligations are honored while allocation disputes are resolved separately.

E. Coordinating Defense Counsel and Coverage Counsel

Defense counsel appointed by insurers focus on the underlying liability. Coverage counsel focuses on preserving and maximizing insurance recovery.

When reservations of rights are issued, conflicts may arise that justify independent counsel. Early coordination avoids coverage-damaging defense strategies.

F. Privilege Considerations

Communications involving insurers and brokers can jeopardize privilege. Legal analysis of coverage issues should be carefully segregated and routed through counsel where appropriate.

IV. The Litigation Stage: Challenging Coverage Positions

A. Coverage Letters Are Not Final Decisions

Many companies accept insurer coverage positions without challenge. This is a strategic mistake.

Coverage letters are advocacy documents, not adjudications. They are often negotiable and certainly open to challenge.

B. Reservation of Rights Letters

Reservation of rights letters should be analyzed closely. Vague or overbroad reservations can be challenged, clarified, and narrowed through engagement.

C. Denials and Partial Coverage Positions

When coverage is denied or limited, in-house counsel should consider:

- Informal negotiation and broker advocacy
- Formal written responses to coverage positions
- Mediation or structured settlement discussions
- Declaratory judgment actions where necessary

Challenging coverage can materially expand settlement and defense funding.

D. Additional Insured Denials

Additional insured denials frequently rest on narrow interpretations of endorsement language. These denials should be scrutinized, particularly where the underlying facts implicate the named insured's operations.

E. Multi-Carrier and Excess Carrier Disputes

Disputes between carriers should not leave the insured unprotected. Excess carriers, exhaustion requirements, and allocation fights require careful strategic management.

F. Why Challenging Coverage Matters

Coverage disputes are not merely about insurance—they directly affect litigation leverage, settlement capacity, and balance-sheet exposure.

Final Takeaway: Three Questions Corporate Counsel Should Always Ask

- 1. Does the contract actually transfer the risk we think it does?**
- 2. Does the insurance policy respond the way we assume it will?**
- 3. Have we considered all policies that may afford coverage?**
- 4. When coverage is challenged, are we treating it as a legal issue or simply accepting the carrier's position?**