

# TOP TEN INSURANCE ISSUES FOR NON- INSURANCE LAWYERS

June 4, 2015

MILLER | FRIEL  
PLLC

1200 New Hampshire Avenue, NW, Suite 800, Washington, DC 20036  
373 Park Avenue South, 6<sup>th</sup> Floor, New York, New York 10016

# WHO WE ARE



- ❖ Miller Friel, PLLC [www.millerfriel.com](http://www.millerfriel.com) is a specialized insurance coverage law firm whose sole purpose is to help corporate clients better their insurance coverage
- ❖ Our [focus](#) of exclusively representing policyholders, combined with our extensive [experience](#) in insurance law, leads to greater efficiency, lower costs, and better [results](#)

# WHO WE ARE

- ❖ Additional information can be found on our blog ([www.millerfriel.com/blog](http://www.millerfriel.com/blog)), and on our 7 Tips for Maximizing Coverage series (<http://www.millerfriel.com/7-tips.html>)



# BRIAN G. FRIEL

- ❖ Founding Partner at Miller Friel ([frielb@millerfriel.com](mailto:frielb@millerfriel.com) or 202-760-3162)
- ❖ More than 20 years experience litigating and resolving insurance claims on behalf of corporate policyholders
- ❖ Won trials and arbitrations for corporate policyholders, including bad faith award for oil/gas company of nearly three times policy limits
- ❖ Settled insurance coverage disputes for financial institutions, oil and gas companies, electric utilities, and retailers
- ❖ Represented financial institutions, financial service companies, and construction companies in obtaining insurance for government investigations



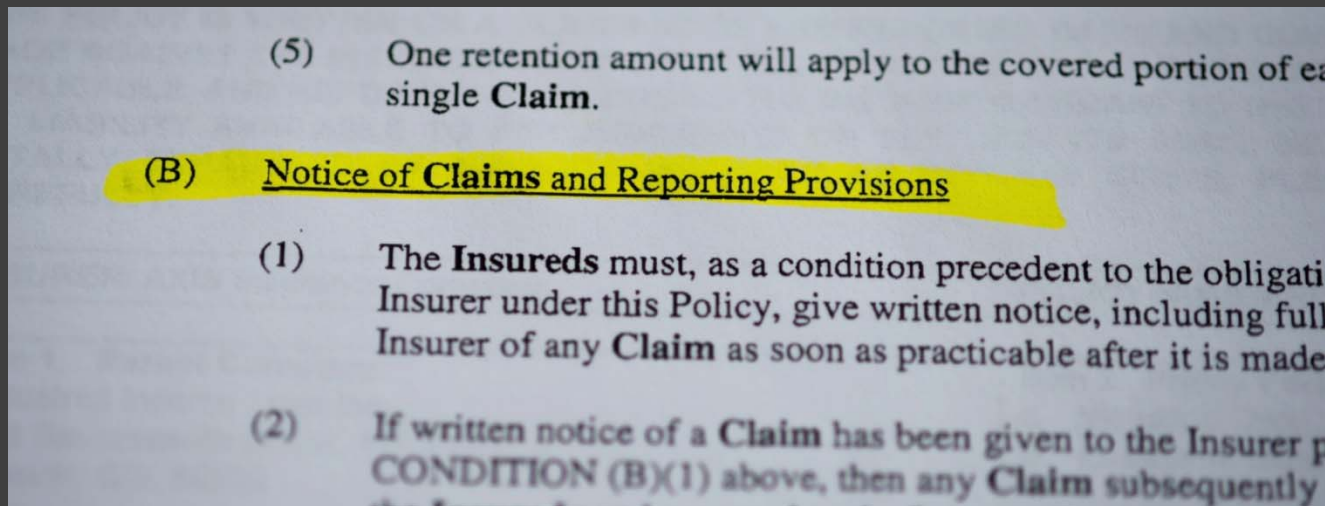
# MARK E. MILLER

- ❖ Founding Partner at Miller Friel ([millerm@millerfriel.com](mailto:millerm@millerfriel.com) or 202-760-3161)
- ❖ More than 20 years experience litigating and resolving insurance claims on behalf of corporate policyholders
- ❖ Recovered in excess of \$1 billion for businesses on D&O, E&O, property, general liability and crime insurance policies
- ❖ His views on insurance have been published in prominent publications, including Forbes, Business Insurance, Legal Times, Treasury and Risk Management, Risk, and The National Law Journal.



# TOP TEN INSURANCE ISSUES

- 1) Notice - Defense Counsel may have the obligation to advise clients on the need to provide notice



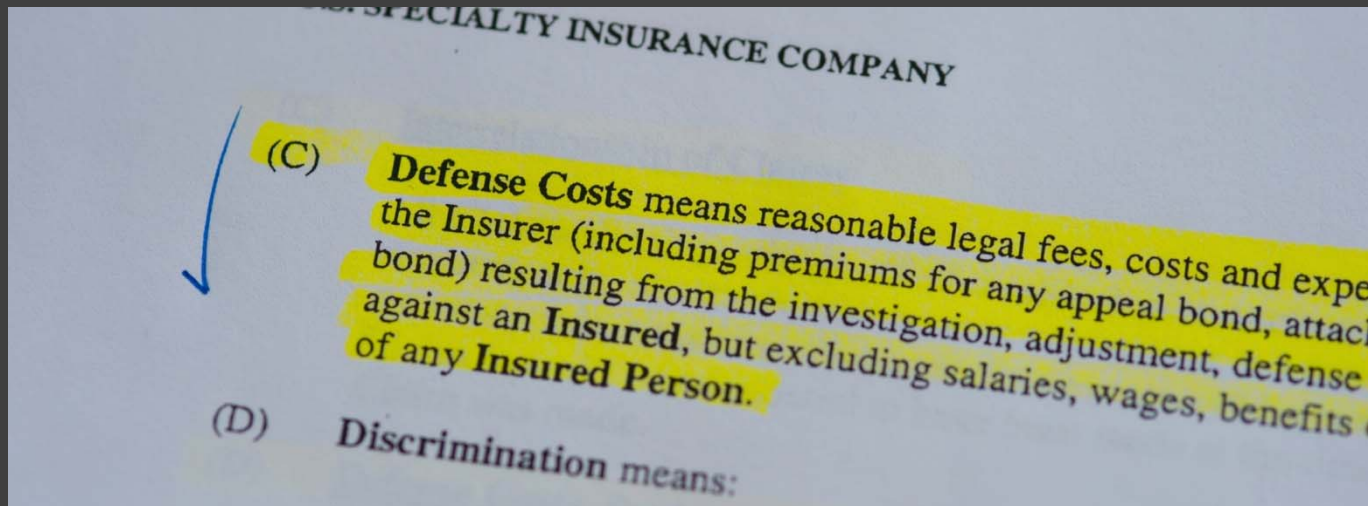
- ❖ Correctly providing notice is not an easy task
- ❖ Notice provisions in policies must be strictly followed

# TOP TEN INSURANCE ISSUES

- 1) **Notice** – Defense Counsel may have the obligation to advise clients on the need to provide notice
  - ❖ **Claims Made coverage (D&O, E&O, etc.) may have absolute timing triggers for notice:**
    - Within policy period
    - Within certain time (30 days) after expiration of policy
    - Notice of facts or circumstances that may give rise to a claim may be optional or mandatory
  - ❖ **Occurrence based policies (CGL) may require notice on multiple policy years**
  - ❖ **Brokers often get it wrong**

# TOP TEN INSURANCE ISSUES

- 2) Defense Costs – getting paid by insurers can present difficult issues for defense counsel
- ❖ Carriers often put defense counsel in a difficult position





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  - ❖ Defense counsel cannot advocate for full payment



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- 2) Defense Costs – getting paid by insurers can present difficult issues for defense counsel
- ❖ Clients may get stuck paying more than they should; defense counsel may suffer unwarranted write-offs
  - ❖ Typical Situations Causing Issues:
    - Covered claims vs. uncovered counterclaims
    - Overreaching billing guidelines
    - Untimely payments
    - Covered vs. uncovered claims

# TOP TEN INSURANCE ISSUES

3) Government Investigations – investigations are generally covered

❖ SEC, DOJ, CFPB, FinCEN, etc.



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- 3) Government Investigations – investigations are generally covered
- ❖ SEC, DOJ, CFPB, FinCEN, etc.
  - ❖ Typically covered under D&O policy
  - ❖ Timely notice can be an issue as determining when notice must be provided may not be easy
  - ❖ Subpoenas and voluntary document requests may trigger claims
  - ❖ Best to address insurance issues when an investigation commences, even if investigation is informal
  - ❖ Sensitivities of disclosure vs. waiver of insurance should be understood and addressed

# TOP TEN INSURANCE ISSUES

- 4) Independent Investigations – always expensive, often covered
- ❖ Independent investigations are common for certain kinds of claims: FCA, FCPA
  - ❖ Policies often provide coverage for defense of claims
  - ❖ Some policies provide coverage for “investigation of claims” as well
  - ❖ Timing of when a claim arises is often an issue
  - ❖ Post-claim investigation costs are often covered

# TOP TEN INSURANCE ISSUES

## 5) Cyber / Intellectual Property Claims

- ❖ Advertising injury coverage under GL policies may provide coverage for both cyber attack lawsuits, and intellectual property claims



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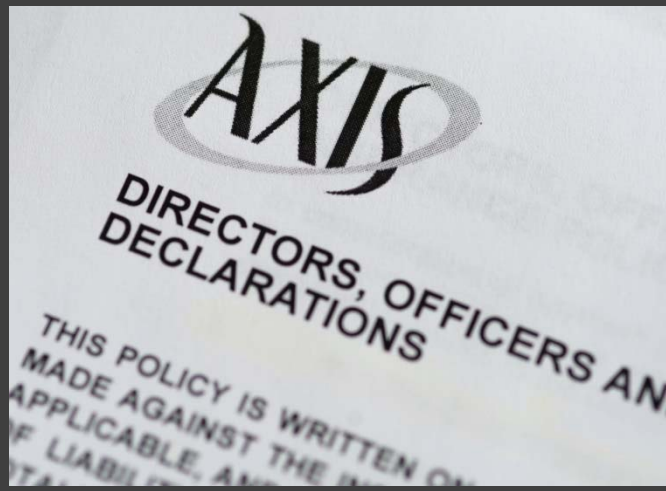
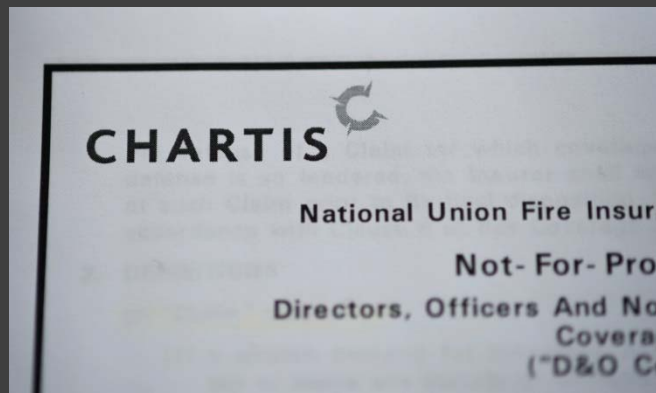
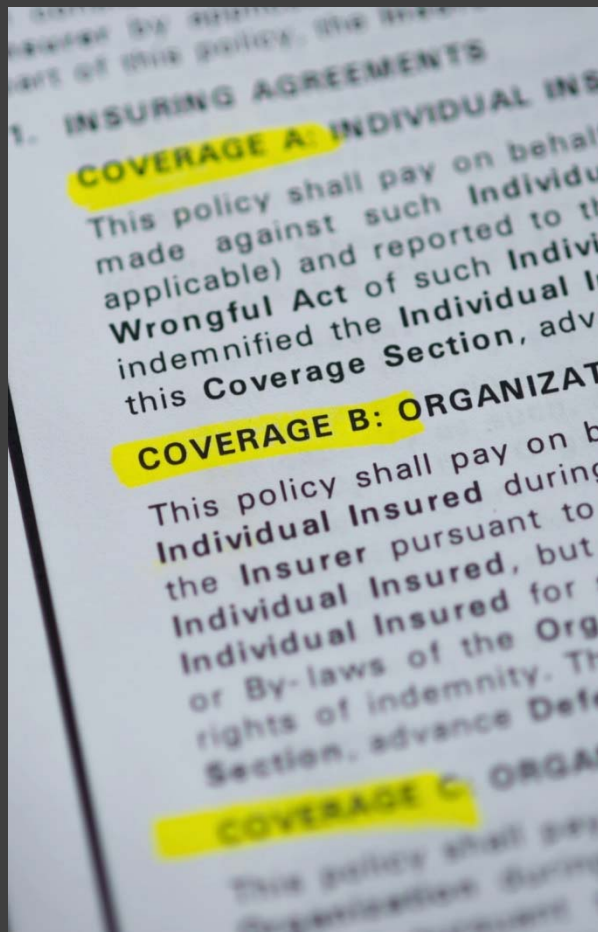
## 5) Cyber / Intellectual Property Claims

- ❖ Coverage for publication of material that violates a persons right of privacy
- ❖ Coverage for infringing on another's copyright, trade dress or slogan in your advertisement
- ❖ Multiple policies may be triggered, depending on allegations.



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- 6) D&O Insurance – obtaining the best possible policy terms often requires legal input



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- 6) D&O Insurance – obtaining the best possible policy terms often requires legal input
- ❖ Brokers know the market, but do not know how courts address relevant policy language
  - ❖ Considerable variability on terms, including:
    - Exclusions
      - ❖ Conduct (fraud/personal profit); insured vs. insured; professional services
    - Scope of covered “Claims”
      - ❖ Entity coverage; investigations
    - Definition of “Loss”
      - ❖ Carve-outs (fines, punitive damages, uninsurable loss)
    - Allocation
      - ❖ Defense costs; indemnity
    - Notice
      - ❖ Timing, prejudice for late notice
    - Warranty/Rescission

# TOP TEN INSURANCE ISSUES

- 7) Post Merger/Acquisition Claims – proper treatment requires input at the time of the transaction and when a claim is made
- ❖ Properly negotiated tail coverage is often critical for both the acquiring entity & officers and directors of the acquired company
    - Must provide the ability for the acquiring organization to bring and maintain claims
    - Must be written on favorable paper
  - ❖ Acquiring company's coverage may exclude claims relating in any way to pre-transaction conduct
  - ❖ Tail coverage can provide coverage

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- 8) Rescission – The insurance industry’s go-to tool for denying coverage
- ❖ Increasing trend over the last few years
  - ❖ Treat the policy as if it never existed – worst case for insurer is that they must refund premiums
  - ❖ Disaster for policyholders
  - ❖ Very specific rules; vary by state; vary by policy line

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- 9) Criminal Activities – coverage for criminal activities should not summarily be dismissed
- ❖ Common perception is that there is no coverage for criminal activities
  - ❖ Perception is often incorrect
  - ❖ Two issues are often presented:
    - Conduct Exclusions – may not apply to defense costs
    - Public policy – may be against public policy to insure against criminal conduct, but there are numerous exceptions

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10) Privilege – communications must remain privileged



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- 10) Privilege – communications must remain privileged
- ❖ Brokers often involve themselves with claims
  - ❖ Communications with brokers are often discoverable
  - ❖ Discovery of those communications can be disastrous

# TOP TEN INSURANCE ISSUES

Conflicts – with insurance, conflicts are everywhere

- ❖ All large law firms have insurance conflicts





# TOP TEN INSURANCE ISSUES

## Conflicts – with insurance, conflicts are everywhere

- ❖ Insurance companies often treat conflicts differently than lawyers do
- ❖ Many large law firms take matters adverse to insurance companies with conditional waivers
- ❖ Clients may be upset when advised that a law firm that provided advice on insurance cannot follow through with a lawsuit
- ❖ It is not proper for lawyers to litigate against insurers if their hands are tied by conflict-waiver agreements prohibiting certain kinds of litigation strategy (bad faith)

# CONTACT INFORMATION

**Mark E. Miller**

**Direct: (202) 760-3161**

**millerm@millerfriel.com**

**Brian G. Friel**

**Direct: (202) 760-3162**

**frielb@millerfriel.com**