Marsh

Liability Claims Bulletin

Seventh Edition

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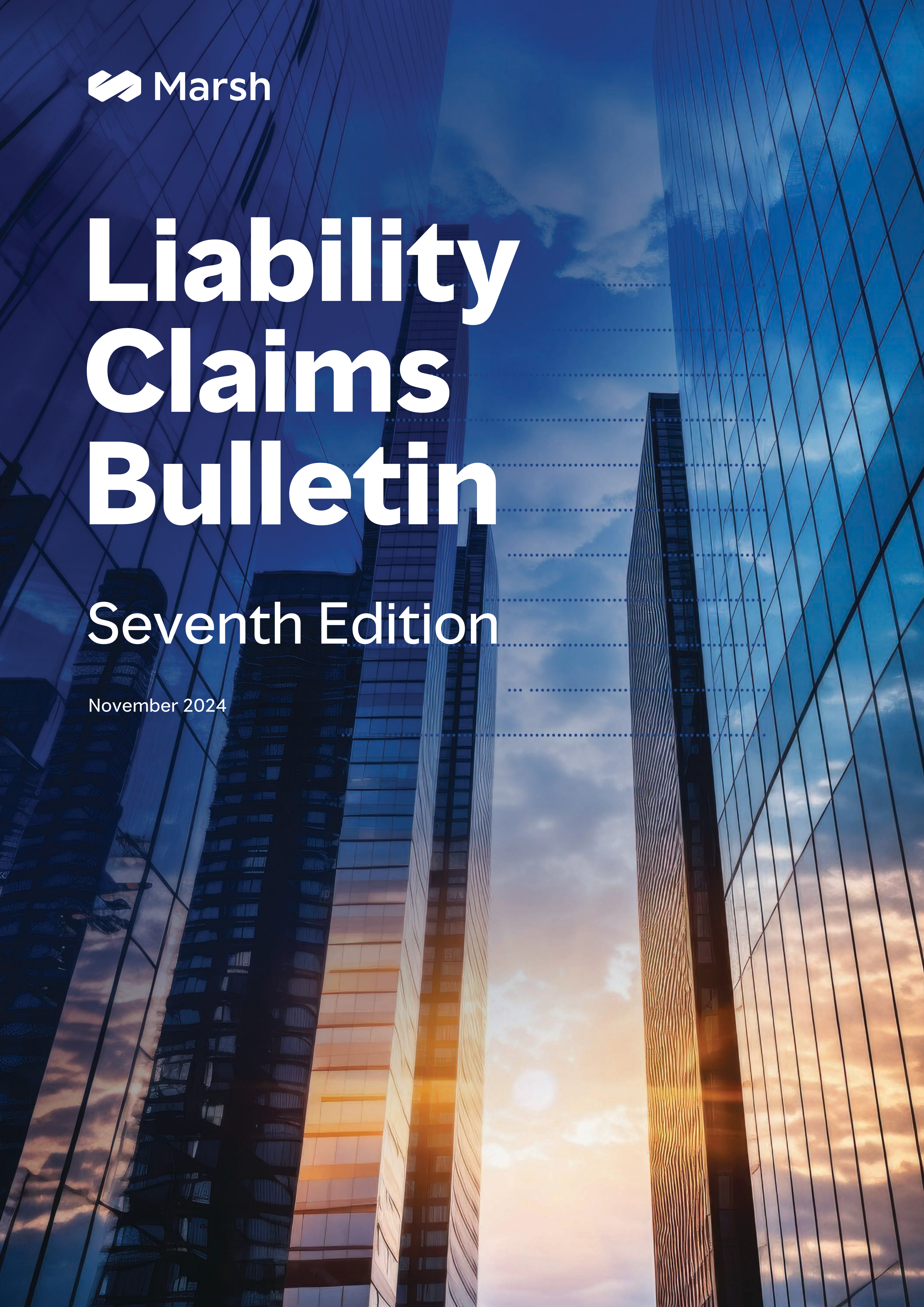

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Disclaimer: The final outcome of a claim notified under an insurance policy is subject to the facts and circumstances of the claim and the policy terms and conditions. The case studies in this bulletin are illustrative only and are not intended to be used as precedents.

Introduction

In today's dynamic environment, organisations are reimagining and reinventing every aspect of their business. While the world continued to grapple with volatile factors in the first quarter of 2024 - including heightened political tensions, increased cyberattacks, global organizational level restructuring, and inflation - some Marsh clients experienced unique losses. These included computer frauds, employment disputes, and the onset of professional indemnity claims against insolvency resolution professionals.

This seventh edition of the Liability claims bulletin continues our commitment to keeping clients abreast of developments in liability insurance. The Bulletin presents the lifecycle of five claims, focusing on challenges, outcomes, and key lessons learned.

Employment Practice Liability Insurance (EPL) Claim:

1. Allegation of workplace discrimination on basis of age and gender

Insured: Indian Multinational Conglomerate

Background: Due to internal restructuring of the organisation, the claimant was terminated due to their role becoming redundant. After termination, the claimant sent a demand notice to the insured, alleging discrimination on the basis of age and gender.

Claim Amount: USD 240,000/INR 2 Cr. + defence costs

Policy Type: Management Liability Insurance policy – EPL

Challenges raised by the Insurers:

- The insurer questioned the insured's choice of defence counsel and enquired regarding the reasonability of their rates.
- The insurer sought a detailed liability and quantum assessment to accord consent on the settlement between the insured and claimant.

Marsh's Contribution:

- We explained that the insured routinely consulted with the said legal counsel on all employment matters.
- We referenced hourly rates of the counsel on a past matter of the insured, with the same insurer, to justify reasonability of counsel rates.
- We provided the insured with comprehensive guidance on what needs to be incorporated and included in the liability and quantum assessment. The insured's counsel shared a liability assessment and justification of the proposed settlement amount to enable the insurer to form a decision.

Claim Outcome: Full settlement amount of USD 240,000/INR 2 Cr.+ defence costs of USD 86,000/INR 72 lakhs (deductible to apply).

Key Learnings:

- EPL claims require alignment of the insurer with the insured's defence strategy.
- Insureds should seek insurer's prior written consent before engaging counsel, initiating settlement negotiations, and executing settlement agreements.

Commercial General Liability (CGL) Insurance Claim:

2. Product rejections due to faulty product supply

Insured: A Global Chemical Manufacturing Company

Background: Insured's client raised quality concerns with certain batches of the insured's products. These products were already used by the client in the end-product, resulting in a product liability and a product recall claim. The insured's client raised three claims towards products supplied through three separate batches.

Claim Amount:

- Product liability and product recall costs claimed to the tune of USD 250,000/INR 2 Cr.
- Product liability related to the costs of client's end product, segregation costs, overhead costs, costs of certain mitigation measures to reduce the loss impact, and costs of extra product.
- Product recall in the nature of product disposal costs.

Policy Type: Commercial General Liability Policy

Challenges raised by the Insurers:

- Insured was unable to substantiate the claimed amount as their client did not cooperate with document/information sharing.
- Without the supporting documents, the surveyor/insurer was unable to understand the rationale of claiming certain costs.
- Surveyor/insurer was not willing to consider subsequent claims from the insured since the insurer believed that these could have been averted after the insured became aware of the first claim.

Marsh's Contribution:

- We convinced the surveyor/insurer that they should consider reasonably claimed costs based on the information available on record.
- We explained categorically to the surveyor/insurer the reasoning for incurring these costs.
- We convinced the insurer that the subsequent claims were genuine, and that the insured could not have averted the same.

Claim Outcome:

- Product liability costs paid to the tune of USD 150,000/INR 1 Cr. (net of deductible).
- Product recall costs did not breach the policy deductible.

Key Learnings:

- It is important to substantiate a claim with necessary documentation. Where these documents are with the insured's client, efforts should be made to obtain them before settling the claim.
- Continuous dialogue with the insurers/surveyors can ensure a smooth flow of information and speedy claim resolution.

Cyber Claim:

3. Potential data breach from a compromised server

Insured: Indian Cloud Lending Platform

Background: The insured was made aware of a data breach through press reports, which said that the insured's customer's data was leaked on the dark web from the insured's data centre. The insured engaged cybersecurity firms to investigate the breach.

Claim Amount: First party costs of USD 100,000/INR 1 Cr.

Policy Type: Cyber Security Insurance

Challenges raised by the Insurers:

- The surveyor questioned if forensic costs will be covered in the policy in the event of no insuring clause triggering, since, in the case at hand, the insured engaged these firms only due to speculation of a breach.
- The insured engaged two firms to assess the potential breach. The surveyor questioned the rationale behind the engagements, differences in the scope of their services, and duplication of work.

Marsh's Contribution:

- We made a representation to the insurer highlighting that the policy covers forensic costs incurred by an insured to ascertain whether their systems have been compromised or not.
- We scrutinized the statements of work of both the forensic consultants to demonstrate the differences in their roles and the necessity for said engagements.

Claim Outcome: Insurer paid full costs of USD 90,000/INR 80 Lakhs (net of deductible).

Key Learnings:

- For cyber claims, we recommend that the insured engage vendors empanelled by insurers in order to circumvent any concerns of consent of insurer and reasonability of rates.
- In the event of an insured engaging more than one vendor for similar work, the insured should be clear as to whether there is any duplication of the work conducted by the vendors.
- It is important to remember that the insurance policy affords coverage only towards reasonable costs incurred by an insured.

Crime Claim:

4. Brute forcing of customer accounts leading to fraudulent transactions

Insured: Indian e-Commerce Company

Background: Fraudsters brute forced into customer accounts, took them over, and raised fraudulent return and refund requests, redirecting the refund amount to their UPI IDs.

Claim Amount: USD 600,000/INR 5 Cr.

Policy Type: Commercial Crime

Challenges raised by the Insurers:

- The insurer questioned how the 'computer fraud' coverage was relevant for the present loss.
- The surveyor highlighted certain transactions wherein key data points were missing, questioned the insured's refund process, and applied certain deductions.
- The insurer made multiple rounds of enquiries on the insured's business model, internal return and refund processes, and corrective actions implemented.

Marsh's Contribution:

- We shared detailed coverage comments with the insurer to enable them to confirm cover under the policy.
- We facilitated a walkthrough of the insured's systems for the surveyor to help them understand the lifecycle of each transaction.
- We demonstrated how the insured's process was in line with their business model and ensured minimal deductions.

Claim Outcome: USD 400,000/INR 3 Cr.

Key Learnings:

- For losses under a crime policy, it is essential to understand the loss in light of the business of the insured.
- As businesses evolve, insureds and insurers will need to be prepared to address unique losses arising out of sophisticated MOs.

Insolvency Resolution Professional, Professional Indemnity (PI) Insurance Claim:

5. Allegations of non-payment of pre-corporate insolvency proceeding dues against insolvency professional

Insured: Multinational Professional Services Firm

Background: A show cause notice was issued to the insured in connection with their insolvency resolution services for non-payment of certain statutory dues owed to some vendors of a corporate debtor, in violation of the Insolvency and Bankruptcy Code 2016 by the Insolvency and Bankruptcy Board of India (IBBI).

Claim Amount: USD 70,000/INR 60 Lakhs (defence costs + IBBI imposed penalty of USD 6,000/ INR 5 Lakhs).

Policy Type: Professional Indemnity Policy for Insolvency Resolution Professionals

Challenges raised by the Insurers:

- Prior knowledge: The insurer contended that the insured should have intimated the incident when they received initial queries from the IBBI on the assignment.
- Applicability of the extended reporting period: The insurer opined that since the claim was notified in the extended reporting period, the same was in violation of the policy terms as the extended reporting period would not be applicable due to the policy renewal.
- Fines and penalties: The insurer required Marsh/insured to prove coverage for the penalty imposed by IBBI.

Marsh's Contribution:

- We successfully argued that the insured receives queries from IBBI routinely, and therefore it is difficult to ascertain if such queries would evolve into a show cause notice. In this case, the insured had intimated the claim as soon as they received a show cause notice.
- We convinced the insurer that the said policy was an assignment-specific policy and was a yearly contract. The policy afforded an extended reporting period for 7 years, and cover for the specific assignment was not renewed, hence the extended reporting period was applicable.
- We argued that since there was no statute/court order prohibiting insurability of the said penalty, same shall find coverage.

Claim Outcome: USD 60,000/INR 50 Lakhs (net of deductible and subject to some allocations).

Key Learnings:

- Policies require the insured to notify circumstances. It is important for insureds to notify any claim-like situations immediately, without delays.
- Insurers should be kept aware of the developments from inception of the matter by an insured.

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