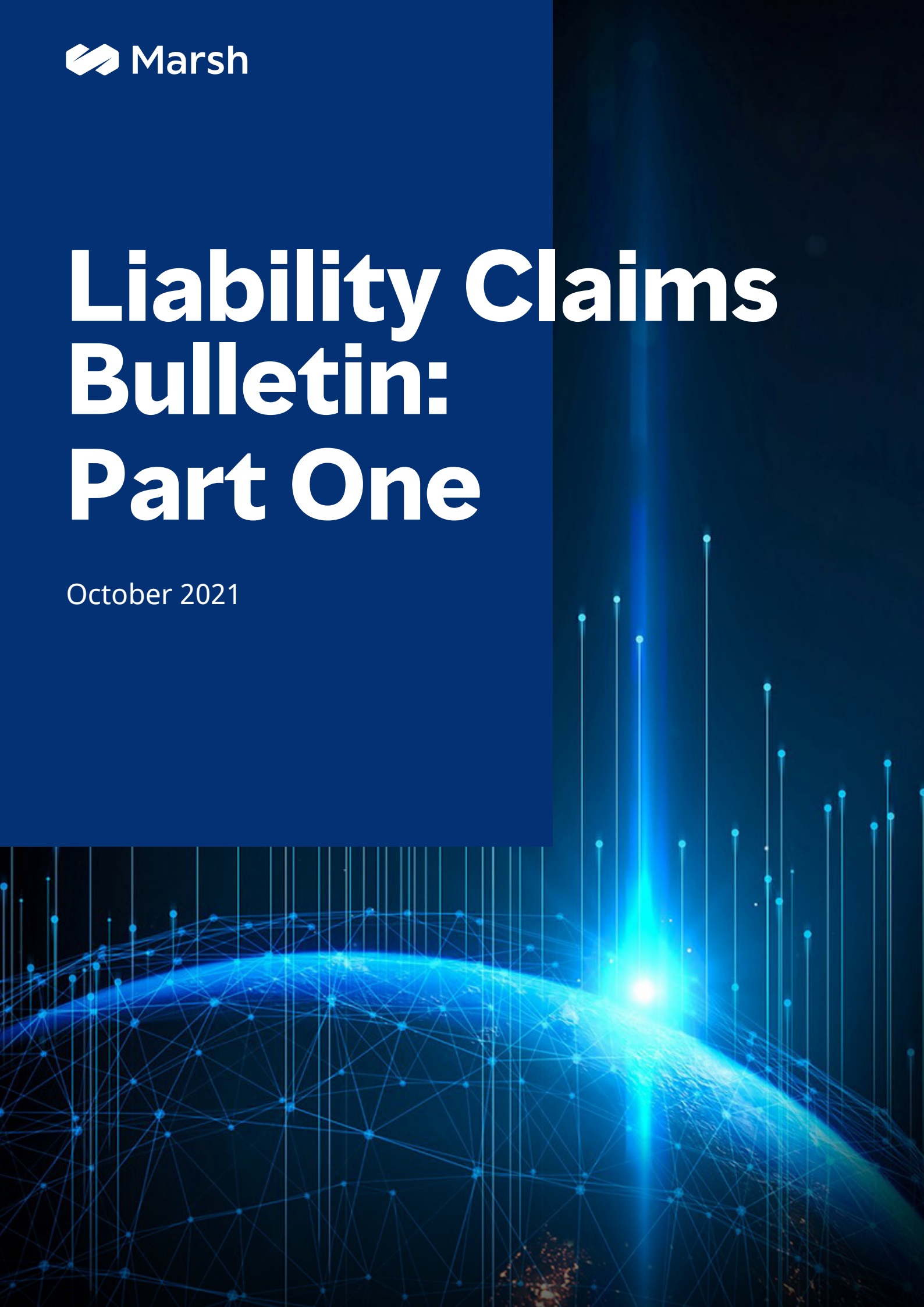
Marsh

Liability Claims Bulletin: Part One

October 2021



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Disclaimer: Claim outcomes are subject to facts and circumstances of each Claim, and subject to Policy terms and conditions, hence should not be used as a precedent.

Introduction

The rapid pace of change across industries has led to an increase in the frequency and size of disputes. Liability insurance has seen new and evolving trends, which raises various important questions regarding the admissibility of claims.

The management of insurance claims is becoming more complex, supplemented by the ever-hardening insurance market, where insurers try to limit their liability by restricting coverage, with an increasing number of exclusions.

The current year continues to see a large number of Employment Practice Liability Insurance (EPLI) claims, followed by Professional Indemnity Insurance (PI). In addition to this, there has been a substantial jump in cyber claims, as the incidence of cyber-attacks including those involving ransomware has risen sharply since the inception of COVID-19.

Some of the primary reasons for claims have been data breaches, delays, wrongful terminations, discrimination, frauds, regulatory inquiries and/or investigations, or negligence.

While the challenges in the settlement of such claims have been diverse, some of the common concerns across are -

1) Delayed notification
2) Non-disclosure
3) Non-submission or delayed submission of essential documents
4) No trigger of insuring clause
5) Prior claims exclusion
6) Settlement without consent
7) Breach of conditions/condition precedents

The Marsh Claims Group's philosophy is to provide holistic support for a client's claims, identify trends and think strategically to achieve optimal claims outcomes today, tomorrow and in the long term.

We are pleased to present Part One of the Claims Bulletin which provides an overview on the types of liability claims seen by Marsh India in recent times across PI Policies, Directors and Officers Policies (D&O), Commercial General Liability (CGL) and EPLI Policies, as well as the various challenges highlighted by insurers in settling these claims. We also look at the challenges highlighted by insurers in settling these claims, the solutions offered by Marsh in this regard and what have been the learnings from these claims. Our bulletin focuses on how things can be done differently to avoid some of these challenges in the future. "*Learnings for the Insureds*" section will let readers know what to do, and what not to do when a claim is seen by them.

PI Insurance Claim Scenarios

1. Termination of Contract due to Delay and Negligence

Insured	An Indian global information technology company
Background	• The insured's customer had terminated their ongoing contract citing reasons of delay, sub-standard quality of outcome and inability to meet the project deliverables. • The parties decided to avoid costs associated with long drawn litigation and to settle the matter. Insured agreed to pay damages and restitution/ return of fees.
Claim amount	USD 1.2 Million approx. including defence costs.
Policy type	Tech PI
Challenges raised by insurers	• The settlement amount comprising of refund of fees is excluded from the policy coverage. • Delay in sharing information. • Carve back to delay exclusion was inapplicable in the present scenario. • Legal counsel Liability–Quantum Assessment not available.
Marsh's contribution	• We represented the insured everywhere in negotiations proved that the settlement amount was majorly attributable to damages and only part of it was restitution/return of fees. • We reinforced that the damages were due to the professional services provided by the insured, which were covered under the policy.
Claim outcome	Considering the above challenges on the claim insurer agreed to pay USD 350,000 approx. (net of deductible).
Key learnings	• Insureds should take note of the elements that are not covered under the policy. • The policy does not cover restitution/return of fees, as these are not damages. • Avoid any delay in sharing relevant information with insurers. • Keep your Marsh advisor and insurer involved at every stage. • A liability–quantum assessment of the legal counsel engaged should be taken in writing and shared with the insurer.

2. Misuse of Confidential Data

Insured	An Indian global information technology company
Background	• The insured's customer informed them that some of their employees were misusing customer's confidential data without their authorisation. • The customer engaged external investigators and the insured was asked to pay the costs. • The insured's customer raised confidentiality breach issues and claimed for damages.
Claim amount	Settlement amount upwards of USD 15 Million approx.
Policy type	Tech PI
Challenges raised by insurers	• IP exclusion applies. • Termination without cause. • Delay in notification– prior knowledge exclusion applies. • Costs incurred without consent and before the notification. • Settlement without consent.
Marsh's contribution	We along with the insured were able to convince the insurer to pay costs that were incurred before notification as these could not have been avoided and were reasonable costs.
Claim outcome	The insurer agreed to pay upwards of USD 10 Million approx. (net of deductible) with certain deductions related to breach of policy conditions.
Key learnings	• The insured should notify the claim as soon as they are aware of the claim/circumstance. • All costs should be incurred with the prior written consent of the insurer. • Breach of conditions can lead to deductions being made by the insurer, whereas breach of condition precedents can lead to claim being declined.

3. Failure to Perform

Insured	An Indian global information technology company
Background	• The insured's customer based in the United States held them responsible for their failure to perform services, leading to project inadequacy. • The contractual breaches and other misconduct caused the customer to go live with a defective system and sustain millions of dollars in business disruption, remediation and other damages.
Claim amount	As there were various challenges on the claim, the insured agreed to limit its claim to only defence costs of USD 20 Million approx.
Policy type	Tech PI
Challenges raised by insurers	• Prior knowledge/non-disclosure • Prior claims/circumstance exclusion • Settlement without consent
Marsh's contribution	• The insured had a reasonable basis to settle the matter out of arbitration, as defence costs otherwise would have been huge. • We sought a second opinion from external counsel, on behalf of the insured, which reinforced Insured's position under the policy.
Claim outcome	The insurer agreed to pay upwards of USD 10 Million approx. (net of deductible) for the insured from the insurer.
Key learnings	• Since it is a "Claims Made and Reported Policy" - therefore claim/ circumstance should be reported under the same policy period under which the Claim is made against Insurer. • The insured should provide full disclosures during the renewal of policies to avoid any issues of prior knowledge and subsequent allegations of non-disclosure of claims.

D & O Insurance Claim Scenarios

4. A criminal complaint against Director

Insured	Infrastructure company's directors and officers
Background	• FIR filed against the directors and officers alleging criminal conspiracy, cheating, criminal breach of trust, dishonest delivery of property, criminal intimidation, fraud and extortion. • Directors filed petitions independently and some as a group, to quash the FIR.
Claim amount	USD 200,000 approx. towards defence costs.
Policy type	D & O
Challenges raised by insurers	• Defence costs incurred in the name of the entity are not covered. • GST and TDS Tax are not covered.
Marsh's contribution	• We helped the insured, communicate to the insurers that the affected company/entity was not named in the FIR. Therefore, costs incurred were on behalf of the directors and officers. • We helped the insured in successfully maintaining that it was the insured's legal strategy to file petitions on behalf of the insureds. • While the insurer agreed to pick up the TDS portion of the claim, GST was excluded as the policy excluded taxes.
Claim outcome	The insurer agreed to pay USD 190,000 approx. towards defence costs (net of deductible).
Key learnings	• External counsel's advice is important. • The insured should avoid engaging multiple lawyers, and if the same is required, it should be backed with reasonable grounds. • Defence costs incurred should be reasonable and always incurred with the insurer's prior written consent.

EPLI Claim Scenarios

5. Gender and Employee Discrimination

Insured	An Indian global information technology company
Background	The insured had received a legal notice from an ex-employee of one of its non-covered subsidiaries alleging gender discrimination, retaliation, and wrongful termination and breach of the employment contract. It is named the insured company.
Claim amount	Settlement amount - USD 350,000 approx. (insured's share of the settlement amount) and defence costs - USD 300,000 approx. (insured's share of defence costs).
Policy type	EPLI
Challenges raised by insurers	• Delayed notification. • Insurers were not sufficiently involved in the dispute resolution process. • Defence costs were incurred without the prior written consent of the insurers. • The complainant was an ex-employee of the subsidiary (not covered).
Marsh's contribution	• We were able to convince the insurers that, since the initial notice was received by the insured's non covered subsidiary, the defence counsel was appointed by them. Insured continued with the same counsel when they were impleaded. • We got the claim covered under the Third Party Wrongful Act, as the wording of this insuring clause was wider than the usual wordings. However, this cover was narrower than the Employment Practices Wrongful Act cover. • We also ensured that moving ahead, all the communication reached the insurers, and that their consent/opinion was sought wherever needed.
Claim outcome	The insurer agreed to pay full defence costs and almost 60% of the settlement as the allegations made by the claimant also included some non-covered items. A payout of USD 250,000 approx. (net of deductible) with allocation towards the subsidiary was achieved.
Key learnings	• Insured should be able to provide evidence of payment made by them to settle the amount. Proof of payments should be in the insured's name. • Insured should also be aware of any exclusions and extensions regarding acts of any additional insured/subsidiaries (including their employees).

CGL Claim Scenarios

6. Defective goods

Insured	Multinational manufacturing company
Background	• The insured's US-based subsidiary had sold a batch of silicone liners to its client in the US. • Upon usage and subsequent testing, the goods turned out to be defective, which caused the client to incur losses in terms of a product recall, testing and destruction of damaged goods. • The subsidiary (based in the US) claimed against the insured. • The client's policy in the US did not cover the cost of goods.
Claim amount	Replacement costs upwards of USD 100,000 approx.
Policy type	CGL
Challenges raised by insurers	• The settlement was entered with the client's US-based subsidiary, which was not covered. • Insurers asked for the demand letter received by the insured, which is a requirement to satisfy the insuring clause.
Marsh's contribution	• We were able to understand the insured's internal mechanism of reimbursing the subsidiary and prepare appropriate responses for the insurers. • To satisfy the insurer's requirement, the insured provided a demand letter from its subsidiary.
Claim outcome	The insurers agreed to consider the claim under policy. The quantum is still in discussion.
Key learnings	Insured may have multiple policies covering different coverages, and therefore, should seek the broker's help to understand under which policies notification should be made.

Commercial Crime Claim Scenarios

7. Fraudulent transactions by Employee

Insured	An Indian global information technology company
Background	One of the insured's employees had made several fraudulent expense claims on his corporate credit card for non-business expenses.
Claim amount	Upwards of USD 80,000 approx.
Policy type	Crime
Challenges raised by insurers	Classifying the employee's acts as fraud since the employee's superior approval mails and forms only stated, "Approved", and did not mention the amounts.
Marsh's contribution	• We helped the insurer understand that by seeking blanket approvals without stating the amounts the employee had perpetrated the fraud. • Similarly, in a subsequent enquiry, the employee had admitted his guilt, which proved the matter beyond a reasonable doubt.
Claim outcome	The claim was settled for an amount upwards of USD 30,000 approx. (net of deductible)

Key learnings	• The insureds must keep the insurers and their brokers informed about:
	  • Complete background/description of the claim,
	  • A summary of events to date, including details such as the admission of guilt by the perpetrator, at the earliest.
	• The investigation report is an important document to establish the fraud.
	• In case the insured is unsure of what details to share, their broker's advice.

Summary of Key Learnings

1. Have a thorough understanding of coverages, conditions and exclusions within your policy. Engage with your broker for a better understanding.
2. If it is a “Claims Made and Reported” policy, the claim/circumstance should be reported under the same policy period under which the claim is made against the insured.
3. Do not engage counsel/forensic experts or incur any costs without the prior written approval of the insurer.
4. Do not engage multiple counsel/experts on a single claim. If it is unavoidable, the same should be done with the insurer’s prior written consent. Try to engage experts who are on the insurer’s panel.
5. Keep insurers updated on all developments about the claim on a real-time basis.
6. In a D&O claim, do not wait for the show cause notice or for the penalty order to notify the incident of the insurer. Notify the insurer on first knowledge of the incident.
7. Provide evidence of payment made to settle the amount with the payment proofs in your organization’s (insured’s) name.
8. Prioritise obtaining First Information Report (FIR) and investigation reports for crime claims.
9. Seek help from your broker in deciding the policy to notify under multiple policies are covering the same subject matter.

General Dos and Don’ts:

1. Inform the insurers as soon as the claim/circumstance comes to the company’s notice. DO NOT delay reporting the claim.
2. Co-operate with the insurer. Provide regular updates on claims and prompt responses to insurer’s queries.
3. To take all steps to minimize the loss and act as if you are uninsured.
4. To take appropriate action to preserve the insurer’s right of recovery.
5. DO NOT admit liability for any accident or loss or enter into any settlement with a third party without the consent of the insurer.
6. DO NOT appoint a law firm without the prior consent of the insurer.
7. DO NOT incur legal expenses which you expect to recover from insurers without first seeking their written consent.
8. DO NOT tell claimants that you are notifying insurers – “deep pocket” syndrome.

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About Marsh

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