

MARSH JLT SPECIALTY

Managing Complex and Disputed Insurance Claims

A Practical Guide



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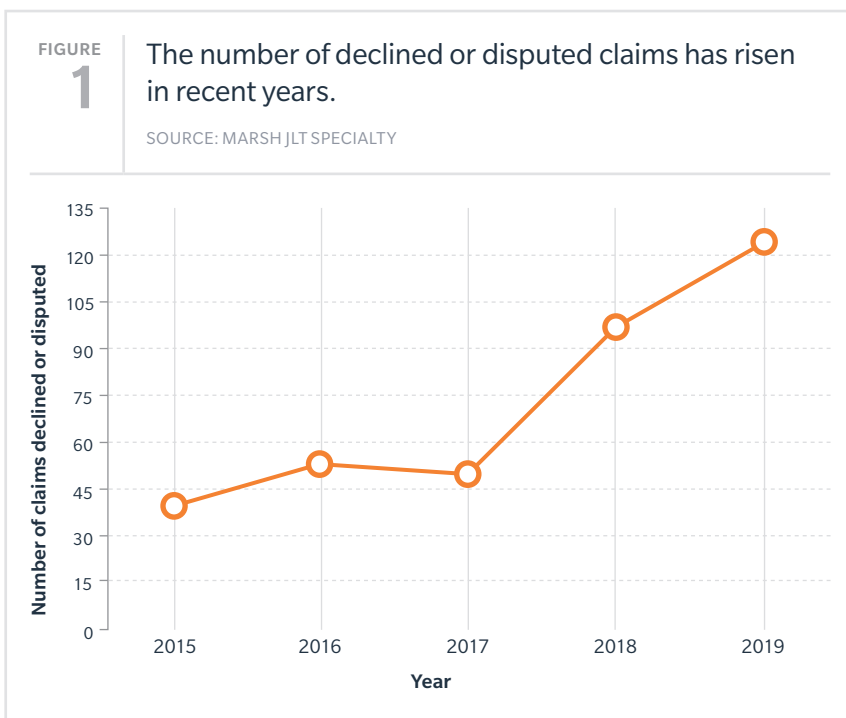
Introduction

When the unexpected occurs, how does your business react? What steps are taken to mitigate further risk or potential losses? And when does somebody consider whether insurance might respond?

Most businesses invest significant time in the insurance buying process to analyse risks and consider risk transfer options. However, during a crisis, a business may find itself overwhelmed, or focused on the immediate response to the claim or loss. Insurance can either be forgotten or put on the shelf to be dealt with later. This is particularly true where the insurance claim is likely to be complex, financially significant, or both. These claims involve an increased burden on the business when managing the recovery, which can be seen as a distraction from the main effort of managing the loss.

As risks evolve, insurance policy response is tested against factual scenarios that are uncharted territory for insurers and policyholders. As society becomes more interconnected, regulated, and litigious, losses have the potential to be more frequent and severe. As such, the likelihood of your business needing to manage a complex insurance recovery is more likely than ever before.

Additionally, the insurance industry continues to scrutinise claims, deploying significant legal resource to assist doing so. The number of declined or disputed claims continues to rise (see Figure 1), a trend we do not expect will change as the insurance market continues to transition.



Although no two claims are the same, certain strategies can help to maximise the outcome of claims in most circumstances.

Set out below are practical tips that can help to resolve complex and disputed recoveries. By collaborating with insurers and internal stakeholders, issues can be avoided or overcome, relationships preserved, and the real value of insurance can be realised.



Step 1: Think Insurance

Insurance may not be a priority in the middle of a crisis. But considering what insurance may be available to support the business should be part of your crisis management, disaster recovery, or business continuity plan. Involving insurers early is vital to protecting your position and avoiding future disputes, even if, ultimately, you do not rely on the policy. In addition, your insurers will have experience in handling crisis events and may be able to provide, either themselves or through their networks, advice and guidance for dealing with the loss.

Which Policies to Notify?

The first issue to grapple with is identifying the relevant policy or policies. Sometimes this will be straightforward, but it is possible that multiple policies could respond to the loss. Some factors to consider in identifying responsive policies are as follows:

- If an event has resulted in damage to both your own property and that belonging to others, you may need to consider both your property damage policy and your public liability cover.
- Whether all relevant insureds are covered under the same policy; is there infill cover available for relevant subsidiaries as well as a master programme?
- Which policy year(s) to notify:
 - For occurrence-based wordings, this will require careful consideration of the timing of the relevant event.
 - For claims-made wordings, consider whether any notifications have been made previously to which the current event might relate, or whether this is something new.
- If there is any cover available that was not placed by you, for example:
 - A programme set up in accordance with the requirements of a construction contract.
 - Where the loss is in respect of items that you have loaned to or borrowed from a third party.
 - Possible run-off cover or other surviving cover in relation to a new acquisition.
- A loss could potentially be considered for cover across multiple policies; for example, a complaint against a director where the detail is unclear could result in claims that would trigger a company's professional indemnity policy, as well as directors and officers liability policy.



Case Study

Marsh assisted a construction client following the collapse of a structure for which it was the design and build contractor. The collapse caused damage to the neighbouring property and the works and surrounding area, which the contractor was liable to reinstate (and, where necessary, redesign). The client identified and made notifications to its professional indemnity insurers, its construction all-risks insurers, and its public liability insurers. The client had not taken out project specific insurance on this occasion and so looked to its annual programmes. Allocation between the policies was not straightforward and various insurers argued that alternative policies should respond. The client ultimately recovered a proportion of its loss from each of the insurance programmes notified.

Which Policy Responds?

If multiple insurance policies respond to different aspects of a single loss, be prepared to deal with different insurers who may have differing interests and views on how the matter should be managed. This may extend the recovery time, so update your board and finance team accordingly.

However, multiple policies may be responsive to the same aspect of the loss. This situation results in what is called “double insurance” for those aspects of the loss where the cover overlaps. Where this arises, there will be a potentially difficult question to address as to how the policies interact.

Technically Speaking

Where more than one policy responds to a particular loss, you are generally free to pursue recovery from whichever insurer you choose (subject to the limitation that you cannot be indemnified for more than your loss). It will then be a matter for the paying insurer to seek contribution from other responsive policies, as appropriate. This approach is subject to policy terms, however, and most policies will include “other insurance” clauses that seek to address how that particular policy will respond in a double-insurance situation. Such clauses generally come in three different guises:

1. Exclusion clauses – where another policy is responsive to the loss, the loss is excluded from the policy in question.
2. Excess clauses – where another policy is responsive to the loss, the policy in question will apply in excess of that other policy.
3. Rateable proportion clauses – where another policy is responsive to the loss, the policy in question will only bear a proportion of the loss.

These clauses are relatively straightforward to apply where they only appear in one of the responsive policies. However, where all responsive insurance policies contain either the same or different forms of “other insurance” clause, the rules of construction become complex and reconciling the clauses can be difficult.

These clauses should be identified early on and addressed with all interested insurers, so that the issue of responsive insurance can either be resolved or an interim solution can be achieved that allows the claim to be managed effectively. Avoid a situation where an ongoing debate with insurers delays your indemnification or ability to deal with the loss. Insurers may be willing to share the indemnity until such time as their actual proportion of liability is established.



Takeaway Tips

1. Consider insurance early.
2. Consider your insurance programme as a whole and identify all policies that could be responsive, not just the most obvious.
3. If multiple policies are likely to respond, try to put in place a protocol to manage the competing interests of different insurers.
4. If a double insurance issue arises, seek to resolve it early; if this is not feasible, seek an interim solution that allows smooth management of the loss or claim.
5. Ensure your board, and anyone dealing with the loss itself, is aware of the insurance implications.

Step 2: Front-Load

Once you have identified the relevant policies, the appropriate notifications need to be made. In particular, consider the requirements of the policy wording in terms of notification, as these can vary between insurer and policy. Failure to comply with notification requirements is one of the most common grounds for disputed claims.

Take the time to review the specific policy wording, and take steps necessary to ensure that the notification is compliant before making it. Points to look out for in the policy wording include:

1. Timing requirements.
2. Content requirements.
3. The appropriate recipient of the notification.
4. The appropriate method of communication.

If notifying a liability policy, consider whether you are notifying a claim or a circumstance and what each requires. If notifying a circumstance, you will need to consider: (i) whether the event in question satisfies the policy requirements of a “circumstance” in order to be notifiable; and (ii) if so, the level of detail that should be included in that notification.

If the notification of a circumstance is too broad it risks being ineffective. If the notification is too specific it will limit the future claims that can “attach back” to it, and potentially result in a gap in cover.



Technically Speaking

As a matter of English law, the possibility of making a “can of worms” or “blanket” notification has existed for some time. However, the recent decision of the Court of Appeal in *Euro Pools Plc v. Royal and Sun Alliance Plc* [2019] EWCA Civ 808 has brought some further clarity to the potential scope and impact of such a notification.

Euro Pools was a manufacturer and installer of swimming pools. It discovered and notified (to its professional indemnity policy), an issue with the movement of rising and falling vertical booms used to divide its pools into different swimming zones. The original notification was made in the first policy period and included reference to an intended solution to resolve the issue. However, the actual issue causing the failure of the booms was not correctly identified and resolved until the second policy period. The Court of Appeal decided that on the facts of the case, the mitigation costs incurred in connection with both remediation approaches should attach back to the first policy period, as all remediation approaches were causally related to the failure of the booms.

It is likely to be helpful to policyholders to have confirmation that “hornet’s nest” notifications remain valid and, indeed, can have broad application to subsequent developments that were perhaps not envisaged at the time of the notification. However, which matters are capable of attaching back to an original notification will be very fact-specific.

As such, continue to bear in mind the ongoing need to review existing notifications and consider whether developments should be advised as updates or new notifications. Spending some time considering how a matter could develop, and the potential outcomes or impacts, will help to draft a notification that maximises the protection available at that time.

If notifying a first-party loss, consider what information is required initially and any time limits specified for submission of a full proof of loss. Also consider whether to notify excess layer insurers at the same time as primary insurers. This will be subject to the terms of excess layer policies but, if in doubt, it is good practice to notify all insurers simultaneously.

Also consider whether there are any additional requirements or obligations linked to notifying a circumstance or claim, such as contacting a crisis hotline (which is common in product recall or cyber policies), obtaining insurers' consent prior to incurring costs in mitigating the potential loss, or using specific third-party services from the outset.

In Practice

Pay particular attention to notification provisions that are conditions precedent to a recovery under the policy.

Where this is the case, a breach of the notification provision is serious as it will allow insurers to decline the claim in its entirety, regardless of the extent of the breach or the prejudice caused to the insurer by virtue of the breach. A condition can be drafted in a number of ways so that it will operate as a condition precedent to cover.

For example:

- It may be expressly stated to be a condition precedent to cover.
- It may state that "insurers will have no liability unless ...".
- There may be a general condition in the policy that purports to require that compliance with all terms and conditions is a condition precedent to cover attaching.

Policyholders should also be alert to notification requirements being "built into" the insuring clause of the policy, resulting in a failure to trigger the policy absent compliance with notification requirements.

Failure to comply with strict conditions of this nature is a common reason for insurers declining claims. Marsh is often asked to support policyholders in seeking to challenge insurers following a declination on this basis, in particular where no prejudice has been suffered by the insurer as a result of a breach.

Although your broker can support you in pursuing a recovery in these circumstances, the potential for this outcome can be mitigated before a claim ever arises. Ask your broker to review the policy before renewal and argue for the removal of any conditions precedent. Push insurers to accept that their remedy for breach of notification provisions will be damages if insurers can demonstrate prejudice. Their willingness to do so may be influenced by your track record on notification and litigation/claim management.



Takeaway Tips

1. Be familiar with policy wordings, in particular any notification requirements (ideally before the loss occurs), and comply strictly with those requirements.
2. In large (particularly global operations), ensure you have an effective system for directing news about losses into a central system so that insurers can be advised early on.
3. Where policies require notification of circumstances, not just claims, ensure that you have guidelines in place to identify, assess, and notify circumstances.
4. Consider what exactly you are notifying to each policy, and tailor your notification to ensure that it is fit for purpose.

Step 3: Collaborate

Insurers hate surprises. An insurance claim proceeds far more smoothly if you engage with insurers early on and continue to inform them of significant developments. Be open and share information with insurers regarding the reasons for any proposed decisions on strategy, and keep all lines of communication open (whether via brokers, lawyers, adjusters, or direct to the insurer), so that you can address any concerns quickly and effectively.

If you are uncomfortable with any requests made by insurers (for example, if confidentiality or privilege concerns arise, or you feel that insurers are asking questions that are irrelevant to the claim), then speak to your broker who can help to manage these requests.

The advantages to operating in this way include:

- When the time comes to make a significant decision regarding the loss – for example, regarding settlement of a third-party liability – insurers are more likely to be meaningfully involved in the decision and agree the proposed course of action, which reduces the likelihood of a challenge later on.
- You are less likely to inadvertently breach policy terms and conditions requiring collaboration and/or consent.
- Insurers are more likely to be in a position to make decisions on coverage in a timely fashion.

Try to understand insurers' position and how that affects the dynamics of the relationship. What is driving them? If it's not clear, ask.

Ask for the justification behind information requests. Ask what underpins their concerns about a given course of action in respect of the loss. By understanding their position, you can save time by focusing your responses accordingly. Your broker may have seen similar claims before, or worked with a particular insurer in the past, and this insight could speed things up.



Case Study

A financial institution company faced a regulatory investigation where investigation costs were likely to be significant, and decisions on large items of expenditure needed to be made quickly. Marsh assisted the client in setting up a claims protocol to manage insurers' involvement in the investigation, which included:

1. Defining in advance the steps that would specifically require insurer signoff.
2. Regular meetings with insurer representatives to provide an update on developments.
3. Insurers setting up a steering group of those who could make certain decisions without reference to the remainder of the market.
4. Agreeing confidentiality agreements to address confidentiality concerns arising from the investigation.



Technically Speaking

Insurers rely on the information you provide them in order to understand their potential liability – whether that means interpreting coverage, analysing the quantum or likelihood of the loss, or both.

An area of tension commonly arises in US liability claims. US lawyers will often be extremely concerned about losing legal privilege in information, as sharing such information makes the privilege that would otherwise attach more vulnerable than in some other jurisdictions. As such, policyholders often find themselves in a position where insurers are not able to confirm the coverage position or consent to settlements without further documentation, including liability analysis and defence strategies, but their lawyers recommend that those documents are not shared.

The coverage impasse is unlikely to be overcome without providing the information to enable insurers to be comfortable. Think about creative ways around this problem, such as:

- Where coverage has been confirmed, consider a common interest privilege agreement (although bear in mind that the effect of these differs between US states, and you should always consult local lawyers).
- Where an agreement is not possible, can the relevant documents be redacted or summarised into a less harmful document (while maintaining accuracy)?
- If not, how else can the information be shared? Over the telephone? In a meeting? It might be an opportune moment to come together with insurers and their advisers and discuss coverage and the claim in more detail.



Takeaway Tips

1. Get to know your insurance claims handler and claims broker, ideally before a claim ever arises. This will help to build trust and make for a smoother discussion when broaching the steps you want to take to deal with a loss.
2. Understand policy requirements in terms of consent, collaboration, and cooperation.
3. Involve insurers as much as possible in developments and decisions in dealing with the claim or loss. If you find this practically difficult, or have concerns regarding insurers' questions, then seek advice from your broker.
4. Comply with reasonable requests for information. If you don't understand why certain information is requested, ask the insurer to explain the rationale.
5. Consider putting in place a protocol for managing the claim so that everyone is clear the extent to which you are entitled to take steps without specific reference to the insurer.
6. Remember, the more complex the loss, the more questions and investigation there will be. This will take time and stakeholders' expectations should be managed early on. It is good to impress upon your colleagues the importance of involving insurers, as a failure to do so could jeopardise your recovery.

Step 4: Pick Your Best Team

Where a loss is large or complex, consider the people engaged to support you in managing the insurance claim and ultimately finalising a recovery. Which people are relevant will be determined by the nature and complexity of the loss, any issues in dispute, any commercial relationships that can be leveraged and, to an extent, the team assembled by insurers.

Relevant individuals might include:

- Brokers (you will likely want support from claims specialists as well as your usual broker contact).
- Defence lawyers.
- Coverage lawyers.
- Public relations consultants.
- Loss assessors.
- Experts.
- Forensic accountants.

Also consider what team you need within your business. Nominate one person to handle the claim and manage the process. If further people are required internally, ensure that you have clearly defined reporting lines and procedures in place.

Technically Speaking

Insurance policies may provide cover for the costs of some of these individuals; this should be checked and insurers should be apprised of their instruction as early as possible.

For example:

1. Most liability insurance policies will provide cover for reasonable costs incurred in defending claims made against the insured to which the policy is responsive. This will include the costs of lawyers and experts, and may extend to costs incurred in bringing actions in contribution against third parties in connection with the loss.
2. Some policies (particularly policies covering first-party loss – for example, property damage and business interruption, construction all-risks, cyber, and crime) will provide cover for claims preparation. As such, the costs (for example, forensic accountants and loss assessors) of preparing, presenting, and substantiating the claim could be covered.

3. A major concern for many businesses is the reputational impact of a loss. Some policies will provide cover for the costs of a specialist PR adviser to help handle any fallout. These costs could be specifically provided for, or may fall under more general “costs and expenses” or “mitigation costs” cover if the PR’s positive effect can be demonstrated.

Your best team might include a variety of experts. Where possible, they should be joined up and aware of the implications of their actions on your insurance recovery.

Understand the drivers for different people in your business. Do you need your finance team to help quantify the claim or has a separate project team already been established? Will the in-house legal team manage any external lawyers within policy parameters? Have you identified the internal or external specialists to help insurers and their advisers to understand the loss?



Takeaway Tips

1. Identify the relevant expertise early – think beyond your organisation, and if you haven’t dealt with a complex loss before, ask someone who has for the benefit of their experience.
2. Choose an insurance project manager – your broker, lawyer, or risk manager – and ensure that they keep insurance considerations at the heart of their role.
3. Check your cover – what costs might be covered, and do you need consent before incurring them?



Step 5: Be Creative

An insurance claim can be complex for several reasons: the nature of the underlying loss (for example, loss of life, reputational impact, business interruption, or complex allegations of liability); coverage issues (for example, causation, policy trigger, aggregation, or exclusions); or simply the scale of the loss and number of stakeholders involved in making decisions.

In these situations, there are generally extra hurdles to overcome before coverage is confirmed and insurance proceeds are made available. There are also more challenges in managing the claim in a way that works for everyone. There are rarely right or wrong answers as to how large claims of this nature should be managed, and you may need to seek solutions outside of the policy wording or the usual claims process.

You have an insurance contract that sets out both parties' legal obligations and protections. However, provided you keep insurers in the loop as regards the status and progress of the loss, and seek their input, they are likely to be supportive of proposed steps for managing the claim more effectively.

Insurers may also have some suggestions of their own as to what has worked for them in the past.

For example:

- Are there any easy wins on coverage? For example, could you seek confirmation for cover in relation to certain heads of loss now, with the more contentious issues to be determined at a later date?
- If cashflow is an issue, could you seek an interim payment?
- If insurers are not in a position to provide consent to a certain course of action, could they provide a waiver of that consent requirement to allow you to proceed as a prudent uninsured?
- Can you split out the claim into different issues with different advisers responsible for different areas, for example, quantum and liability?
- If confidentiality and/or privilege are a concern in terms of information sharing, can you put in place NDAs or agreements relating to the protection of privilege?
- If you disagree on the law firm to act in the defence of a third-party claim against you, consider a contribution to legal costs based on capped hourly rates.
- If it is better for all concerned to settle/mitigate a loss early on, can you put a clear case to insurers on anticipated liability/loss (substantiated by legal advice/independent expert opinion, where possible), and explain/quantify the savings to be made?
- Where a detailed and time-consuming adjustment is likely, consider accepting a discount factoring in the time-value of receiving the indemnity sooner.
- Are there any issues that lend themselves to a quick and discrete dispute resolution mechanism, and would unlock further discussions?





Case Study

A company was the subject of a regulatory investigation and consequent redress programme. The total loss to the insured was anticipated to be over double the limit of the insurance programme available. However, there were numerous questions as to which aspects of costs and redress payments would fall for cover.

It was important to the company to ensure that insurers would confirm coverage in time for a financial reporting deadline, and to avoid having every pound adjusted. A detailed review of all amounts paid out would have been time-consuming and expensive.

Working with the policyholder's risk management and finance team, Marsh formulated a plan to give insurers and their advisers sufficient comfort that the insurance programme would be eroded in full, while factoring in certain mechanisms in the settlement agreement to allow for revisiting the adjustment in specific circumstances, in exchange for a small discount. The full tower of insurance could then be recognised as an asset for accounting purposes, and needless coverage arguments were avoided.

Technically Speaking

On 4 May 2017, the Enterprise Act 2016 came into force. This act introduced a new Section 13A into the Insurance Act 2015, which implies into every insurance contract that the insurer must pay any sums due in respect of a valid claim within a reasonable time. Breach of that implied term could result in a claim for damages against the insurer, in addition to the insured's claim for recoveries under the policy. Among other advantages to policyholders, this development in the law is likely to give the policyholder greater leverage to secure interim payments of amounts that are not in dispute.



Takeaway Tips

1. Put emotions to one side. Complex insurance claims are rarely solved overnight. Insurers need to quantify accurately their contractual liabilities just as you need to quantify your own loss.
2. Identify any quick wins. If you are likely to be negotiating for a considerable time, or if the precise facts of the loss are unclear and likely to delay a full coverage determination, work to identify aspects that can be agreed and narrow the issues.
3. Seek interim payments/partial confirmation of coverage.
4. Consider your wider commercial relationship with the insurer and other factors that might move the insurer to a quicker resolution.

Step 6: Time to Move on?

Insurance disputes can be time-consuming and costly to resolve, particularly in circumstances where insurers have not been kept informed of the matter as it developed or where one party has been poorly advised on the merits of their position. Of course, there are some recoveries where the amounts in dispute are significant and the issues sufficiently contentious that an extended (and often formal) dispute resolution process is warranted. But these cases are in the minority.

Weigh up whether the loss justifies the management time taken up by a dispute, or the fees spent on coverage lawyers. Most insurance claims are capable of early resolution. It is therefore worth considering the following:

- Have you received complete advice on your prospects of recovery, including the amount of any recovery? Depending on the nature of the loss, this may involve advice from your broker, a loss assessor and/or an insurance lawyer (not necessarily your usual commercial litigation adviser).
- Have you considered the time and cost involved to take the dispute through a formal dispute resolution process?

- What are the business' needs in terms of cashflow?
- Are you driven by emotional ties to the claim? Individuals can spend years arguing technical points of principle with insurers. Sometimes a fresh, objective view of the situation – be it a different person within your organisation (for example, finance/board level), or someone external – can put the issues in perspective and create new ideas for resolution.

With a realistic approach, proper advice, and a willingness to negotiate, most insurance claims can be resolved – allowing you to move on with your business.

Technically Speaking

Several formal and informal mechanisms can assist in the resolution of disputed claims. Typically a policy will provide for litigation, arbitration, or a tiered process that may require mediation first.

Litigation is public and insurers often prefer to keep their disputes private, and avoid setting precedents with court decisions.

Arbitration is private and therefore avoids precedents being set. However, arbitration is no longer the faster and cheaper alternative to litigation that it is often perceived to be. Consider whether all or certain aspects of coverage can be dealt with by a paper arbitration, whereby arguments are submitted to an arbitrator in writing and the parties are bound by their findings.

In mediation, the policyholder and insurer set out their positions and negotiate with the help of an independent mediator. This is only binding if both parties come to an agreed resolution.

Early neutral evaluation may be useful where a single disputed issue is holding up resolution of the claim. Consider asking a mutually appointed expert – for example, an insurance barrister – to give an opinion on the disputed issue. The parties can agree beforehand whether to be bound by the opinion or not, but it can be useful in unlocking the dispute and enabling the parties to re-evaluate their position, which in turn will influence their approach to negotiation.





Case Study

A policyholder was sued by one of its customers for damages. The customer had been fined by a regulator due to failings by the policyholder, as an outsourced service provider. The policyholder paid its customer and sought recovery from its civil liability insurers. Insurers argued that the claim was caught by a term excluding “loss arising directly or indirectly from fines or penalties”.

Although the policyholder did not agree that the loss experienced was intended to be excluded (it was caused by a breach of their services to the customer, and they themselves were not fined), they accepted that the exclusion was broadly drafted.

With the policyholder’s agreement, Marsh wrote an open letter explaining why the policy afforded cover notwithstanding the broad drafting of the exclusion, while separately writing a “without prejudice” letter offering to accept 50% of the loss if it could be agreed immediately. The insurer accepted this claim fell into “a grey area” and agreed the 50% figure.

A realistic view of the challenges faced meant the policyholder secured a quick recovery – no delay, no lawyers’ fees, no management time – and could go back to their day job.



Takeaway Tips

1. What is the priority in terms of outcome for your business? Consult with your board, finance team, and other stakeholders – what does a good outcome look like? Is it maximising recovery or is a swift resolution more important? How important is maintaining commercial relationships with the insurer(s)?
2. Before initiating legal action, have you considered all options? Lawyers are very valuable in helping you interpret the policy and advising you on your rights. However, when they become visible to insurers, insurers will appoint their own lawyers and the parties’ positions can become entrenched. Consider how your broker might fulfil a mediating or facilitating role before launching into costly and uncertain proceedings.
3. Remember – if the dispute goes to court or arbitration, the judge/panel will look at the facts and the law objectively. To understand your position and inform your strategy, you must do the same.



Conclusion

Insurers want to pay valid claims. However, they have their own pressures that might be invisible to you, including management, reinsurance, regulatory, internal guidelines, and shareholders. Ultimately the policy dictates what is covered and protects those interests.

The closer you work with insurers (by complying with policy terms and the spirit of the claims process), the more likely it is that your loss will be recovered. Equally, this does not mean you should not be alive to unreasonable requests or positions adopted, and you will need to balance the interests of both parties.

When the unexpected happens, it is critical that your business takes a proactive approach to navigate the insurance claim that may follow.

For further information, please contact your local Marsh office or visit our website at [marsh.com](https://www.marsh.com)

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