



RISK MANAGEMENT 201

BEST PRACTICES IN FINANCIAL AND PROFESSIONAL
LIABILITY CLAIMS MANAGEMENT

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RISK
MANAGEMENT
series

BEST PRACTICES IN FINANCIAL AND PROFESSIONAL LIABILITY CLAIMS MANAGEMENT

INTRODUCTIONS



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BEST PRACTICES IN FINANCIAL AND PROFESSIONAL LIABILITY CLAIMS MANAGEMENT

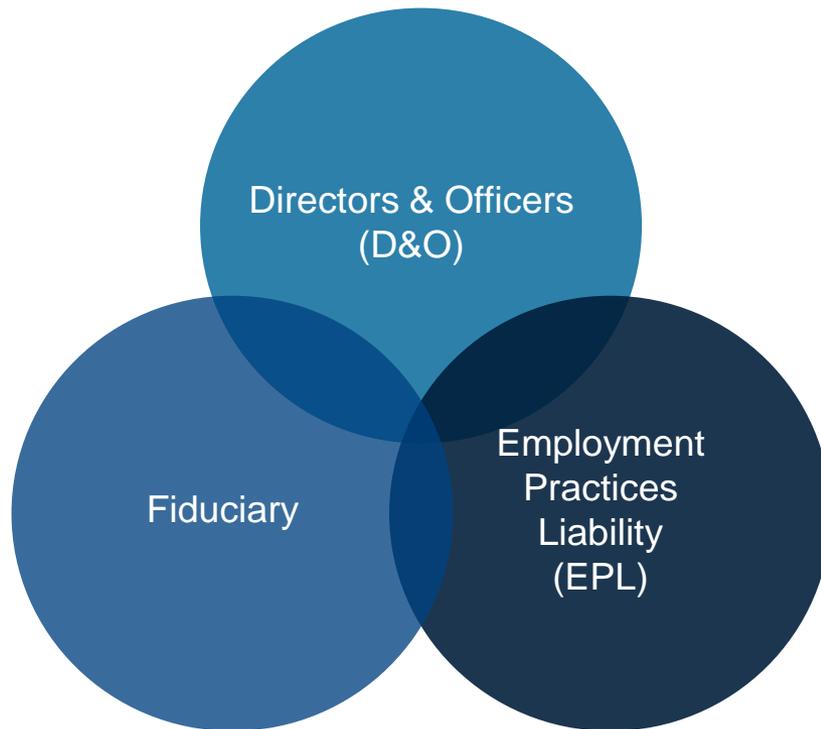
AGENDA

- Coverages overview – D&O, Fiduciary, and EPL.
- Coverage triggers.
- What is a claim?
- Overview of claims process.

COVERAGES OVERVIEW



COVERAGES OVERVIEW



COVERAGES OVERVIEW

DIRECTORS & OFFICERS (D&O)



- What is D&O Insurance?
 - Directors and officers (D&O) liability insurance provides financial protection for corporate officers and directors for loss (including defense expenses, costs of settlements, judgments, or awards) sustained as a result of claims made against them by shareholders, employees, creditors or others. Corporate officers and directors have a number of duties they must meet, and they can be held personally liable if they fail to do so.

COVERAGES OVERVIEW

EMPLOYMENT PRACTICES LIABILITY (EPL)



- What is Employment Practices Liability Insurance?
 - Employment Practices Liability (EPL) Insurance provides coverage for defense costs, settlements and judgments incurred by both the corporation and its directors, officers and employees relating to employment practices including (but not limited to) discrimination, wrongful termination, sexual harassment, and retaliation.



COVERAGES OVERVIEW

FIDUCIARY



- What is Fiduciary Liability Insurance?
 - Fiduciary Liability insurance provides coverage for the fiduciaries of corporate pension plans, profit sharing plans, thrift plans or other employee benefit plans against liability arising out of claims for violations of ERISA, breach of fiduciary duty, or errors in plan administration.



COVERAGE TRIGGERS



COVERAGES OVERVIEW

WHAT IS A TRIGGER AND WHY IS IT IMPORTANT?

- Policy/Coverage Trigger:
 - Claim against an insured.
 - Claim alleges a wrongful act(s).
 - Alleged wrongful act(s) results in loss.
 - Wrongful act(s) occurred after retroactive date.
 - Claim was first **made** and **reported** to the carrier(s) during the policy period.
 - Claim is at least partially covered.
 - Duty to defend/defense costs reimbursement obligations kick in.
 - Excess Policy Trigger
 - Exhaustion of primary policy limits.
- Once the policy is “triggered,” the insurer and insured have obligations to each other.

WHAT IS A CLAIM?



WHAT IS A CLAIM?

D&O



- **D&O claim**
 - A written demand for monetary or non-monetary relief.
 - A civil proceeding commenced by the service of a complaint or similar pleading.
 - A criminal complaint commenced by a return of an indictment.
 - A formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigation order, or similar document.
- Against an insured person for a wrongful act resulting in loss.
- **Securities claim**
 - Main purpose is to provide entity coverage under clause c.
 - Typically includes claims:
 - For violations of the federal, state, and/or local securities laws (or those in foreign jurisdictions).
 - Brought by shareholders in their capacity as such.
 - Arising from the purchase or sale of securities, or offer to do same.

WHAT IS A CLAIM?

D&O (CONT.)



- Insured person
 - Any past, present or future director or officer of the insured organization and its subsidiaries.
 - And any “foreign equivalent” positions.
 - Private company forms may include employees and the entity.
- Wrongful act
 - Any actual or alleged act, omission, error, misstatement, misleading statement, neglect, or breach of duty by any insured persons in their capacity with the company or arising from their status as such persons.

WHAT IS A CLAIM?

D&O CLAIM?



- **Certain D&O claim triggers**
 - Subpoena, Wells Notice or target letter.
 - A lawsuit or legal complaint.
 - Shareholder derivative demand.
 - Extradition.
 - Tolling agreement.
 - Pre-claim inquiries against individuals.
- **D&O optional notice provisions short of claims**
 - Notice of circumstances that may give rise to a claim.



WHAT IS A CLAIM?

EPL



- Employment Practices Liability (EPL) claim
 - A written demand for monetary or non-monetary relief
 - A civil, criminal, administrative, or arbitration proceeding for monetary or non-monetary relief commenced by (1) service of a complaint or similar proceeding; (2) return of an indictment; or (3) receipt or filing of a notice of charges **(including EEOC or similar state agency charges)**.
 - Brought and maintained by past, present or prospective employees, volunteers, or independent contractors.
 - Third-party coverage expands coverage to discrimination and harassment claims brought by outside vendors, customers, clients.
 - Claims brought “on behalf of” employees — EEOC.

WHAT IS A CLAIM?

EPL (CONT.)



- Insured
 - Entity (and subsidiaries), directors, officers, and employees.
 - Broad forms include part-time, temporary, leased, and seasonal employees.
- Wrongful employment act
 - Typically includes discrimination, wrongful termination, sexual harassment, and retaliation.
 - May be broadened to include other employment-related claims.



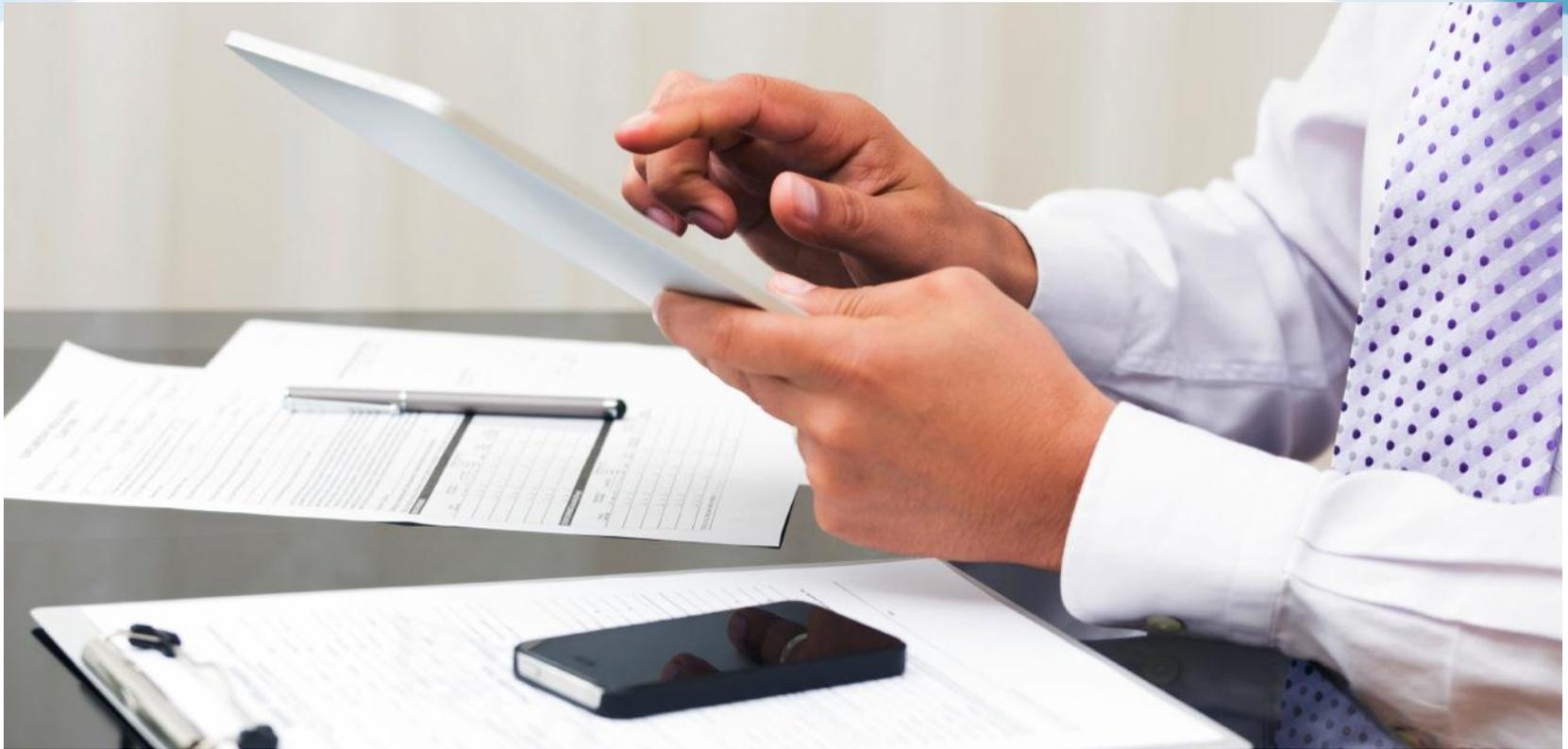
WHAT IS A CLAIM?

FIDUCIARY



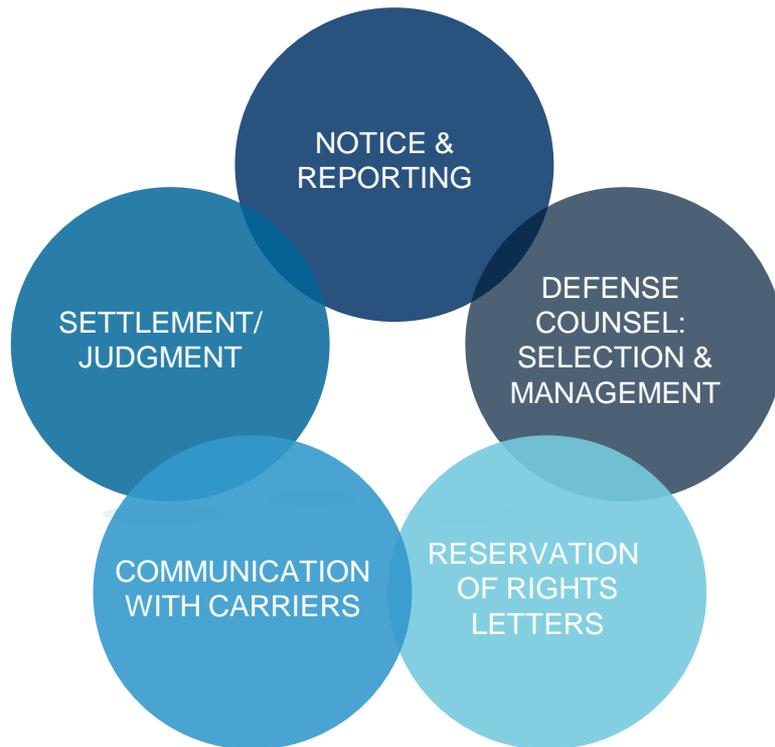
- A written demand against the insured for monetary damages or non-monetary or injunctive relief.
- A civil, criminal, or arbitration proceeding against the insured commenced by the service of a complaint or similar pleading; a return of an indictment, information, or similar document; or a demand for arbitration.
- A civil, administrative or regulatory proceeding against the insured commenced by the filing of a notice of charges, investigative order, or similar document.
- A fact-finding investigation by the US Department of Labor, the US Pension Benefit Guaranty Corporation, or any similar governmental authority anywhere in the world, including without limitation the Pensions Ombudsman appointed by the United Kingdom Secretary of State for Social Services or the United Kingdom Occupational Pensions.

OVERVIEW OF CLAIMS PROCESS



OVERVIEW OF CLAIMS PROCESS

LIFECYCLE OF A CLAIM



OVERVIEW OF CLAIMS PROCESS

NOTICE AND REPORTING ISSUES



- Claims-made coverage.
- Claims v. circumstances / potential claims.
- Claim reporting requirements.
 - As soon as practicable.
 - Knowledge of certain individuals.
 - Definite time period following policy expiration.
- Reporting circumstances.
- EEOC charges.
- Bordereau reporting.
- Multiple layers.
- Other insurance.



OVERVIEW OF CLAIMS PROCESS

NOTICE AND REPORTING ISSUES (CONT.)



COMMON QUESTIONS

- How do I determine if a potential claim should be reported?
- Do I need to report verbal complaints or letters from claimants or their attorneys?
- Does a subpoena or informal investigation constitute a claim?

OVERVIEW OF CLAIMS PROCESS

NOTICE AND REPORTING ISSUES



- **Best practices:**
 - Confirm claim definition, insureds, and reporting requirements and disseminate to the appropriate departments including legal, human resources, etc.
 - Confirm reporting procedure, whether direct or via broker, with all layers and ensure correct contacts and addresses (most carriers now accept notice via email).
 - Survey and review existing claims/potential claims 30 days prior to policy expiration to confirm all necessary matters reported.
 - Within definite time period following policy expiration, survey and review for any additional claims made prior to policy expiration that can still be reported.
 - Provide carriers with all relevant documents such as copies of demand letters, charges, and complaints.
 - Provide direct contact for questions and inquiries and highlight any deadlines for responses.
 - Confirm receipt if acknowledgment not received from carriers.
 - Evaluate potential applicability of and notice to other lines of coverage such as general liability, professional liability, etc.

OVERVIEW OF CLAIMS PROCESS

DEFENSE COUNSEL ISSUES



- Duty to defend v. duty to indemnify.
- Panel counsel requirements.
 - Marsh's D&O Panel Counsel has four insurers participating; more are expected.
- Consent to counsel
 - Expertise and rates.
 - Multiple firms.
 - Litigation management guidelines.
- Advancement / allocation of defense costs.
- Legal fees review/audit.



OVERVIEW OF CLAIMS PROCESS

DEFENSE COUNSEL ISSUES



COMMON QUESTIONS

- Can I choose my own counsel even though I have a duty to defend policy or my indemnification policy has a panel counsel requirement?
- I submitted a claim to the carrier after I already engaged a law firm to handle the claim. Will I have to switch law firms now?
- How can I get my preferred law firm added to the panel counsel list or to my policy by endorsement?

OVERVIEW OF CLAIMS PROCESS

DEFENSE COUNSEL ISSUES



- Best practices:
 - Prior to policy purchase, determine the level of control desired over defense (duty to defend v. duty to indemnify).
 - If there is a panel counsel requirement, review carrier counsel list to determine if the options are acceptable to legal.
 - Evaluate adding pre-approved counsel to policy.
 - If defense counsel has been retained, include request for consent to counsel in notice letter.
 - Ensure counsel is familiar with carrier litigation management guidelines.
 - Confirm that bills are provided to carriers on a regular basis and well before retention is exhausted.

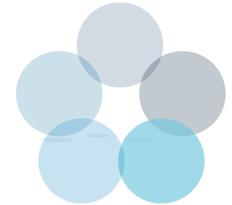
OVERVIEW OF CLAIMS PROCESS

RESERVATION OF RIGHTS

- Reasons for issuance of reservation of rights.
- Typical coverage defenses
 - Late notice.
 - Exposures better insured elsewhere (ERISA, bodily injury, pending or prior litigation, prior wrongful acts).
 - Exposures/activities uninsurable by law (personal conduct, disgorgement or restitutionary damages, taxes, fines, and penalties).
 - Exposures outside the intent of the D&O / EPL policy (insured v. insured, pollution, insured capacity, OSHA, FLSA, WARN, workers' compensation).
- Additional requests for information.
- Issues particular to duty to defend policies.

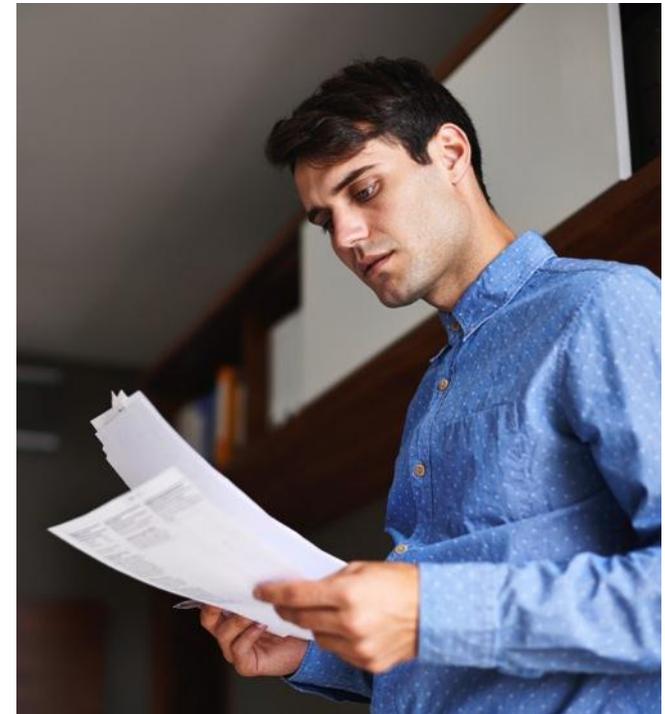
OVERVIEW OF CLAIMS PROCESS

RESERVATION OF RIGHTS (CONT.)



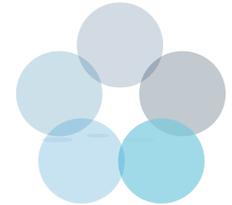
COMMON QUESTIONS

- How long does a carrier have to issue a coverage position?
- How does a reservation letter differ from a denial of coverage?
- Do I need to respond to the reservation of rights letter?



OVERVIEW OF CLAIMS PROCESS

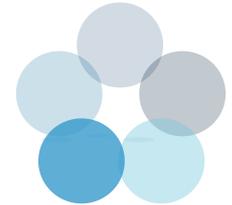
RESERVATION OF RIGHTS (CONT.)



- **Best practices:**
 - Review the reservation letter to determine if there are any inaccuracies in the description of claim or policy provisions cited.
 - Confer with the broker to determine validity of coverage defenses raised and whether a response is warranted.
 - Respond to specific requests for additional information, billing rates, other insurance, etc.
 - If there is a duty to defend policy, determine if reservation creates a conflict such that independent counsel may be required.

OVERVIEW OF CLAIMS PROCESS

COMMUNICATION WITH CARRIERS



- Duty to cooperate.
- Coordination and distribution.
- Duties to primary v. excess carriers.
- Privilege issues.



OVERVIEW OF CLAIMS PROCESS

COMMUNICATION WITH CARRIERS (CONT.)



COMMON QUESTIONS

- Do I need to keep all layers apprised of developments if I don't expect the excess to be implicated?
- Carriers are requesting written reports regarding defense strategy and damage calculations. Am I jeopardizing any privilege protections if I disclose this information?
- Do I need to send defense counsel invoices prior to exhaustion of the retention? Do I need to send copies of bills to all layers or just the primary?

OVERVIEW OF CLAIMS PROCESS

SETTLEMENT ISSUES



- Consent
- Allocation
- Exhaustion of underlying limits
- Demand within policy limits



OVERVIEW OF CLAIMS PROCESS

SETTLEMENT ISSUES (CONT.)



COMMON QUESTIONS

- Do I need consent from all carriers to settle a claim or just from those who are impacted by the settlement?
- What if I have a settlement opportunity and the carriers won't provide consent?
- What if the insurer recommends settlement of a case, but we don't believe a settlement is appropriate?

OVERVIEW OF CLAIMS PROCESS

SETTLEMENT ISSUES (CONT.)



- Best practices:
 - Advise all carriers of any potential settlement opportunities as quickly as possible so they have an opportunity to evaluate.
 - If carriers are unable to provide consent, request agreement that they will not raise failure to seek consent as a coverage defense.
 - Evaluate any proposed allocation of settlement amounts by the carrier and consider if a counter-proposal is warranted.
 - Review any release required by the carrier; distinguish a claim release from a full policy release.

OVERVIEW OF CLAIMS PROCESS

MOST COMMON D&O CLAIMS DISPUTES

- Timely notice / claim first made.
- Defined claim.
- Defense counsel identity and rates.
- Allocation of covered/uncovered claims.
- Disgorgement.
- Bump up claims.
- Plaintiffs' fees.



MARSH CLAIMS ADVOCACY

DATA ANALYTICS – OVERVIEW

As part of Marsh's continuing efforts to provide clients with best-in-class D&O claims information, colleagues from the Claims Advocacy Practice and the FINPRO Global Advisory Board have collaborated to create an entirely new set of data analytics – a deep dive into actual securities-related claims that are all managed and resolved by Marsh claims advocates over the past 4 years at a minimum. All data is sourced from Marsh's proprietary FINPRO claims database. All data included in this set is updated quarterly.

CLAIMS ADVOCACY – VALUE ADDED

In the last seven years, Marsh's FINPRO claims advocates negotiated in excess of \$3.13 billion in insurance settlements.

BEST PRACTICES IN FINANCIAL AND PROFESSIONAL LIABILITY CLAIMS MANAGEMENT

QUESTIONS AND ANSWERS

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