

# Boundaries of General Liability and Marine, P.I. and EPLI

# A Marine risk?



# Maintenance of the buoy





# What if it fails?



# Product Recall and Professional Indemnity

- **Public, Product and Professional Liability Policy (Broker's wording)**

- Product Liability Section: Products Withdrawal Extension (sublimit):

Operative Clause: *The Company will indemnify the Insured...in respect of its legal liability for any claim for product withdrawal expenses that the Insured shall become liable to pay in respect of recall, removal, repair, replacement or reinstatement of products.*

Definition of Product Withdrawal Expenses: *The costs incurred in connection with the recalling, removing, repairing, replacing, reinstating or the cost of a reduction in value of any products, arising as a result of any defect therein or the unsuitability thereof for its intended purpose.*

Definition of Product: *any tangible property or software after it has left the custody or control of the Assured which has been designed, specified, formulated, manufactured, constructed, installed, sold, supplied, distributed, treated, serviced, altered or repaired by or in any other way dealt with or recommended by or on behalf of the Assured and shall include any technical advice, engineering data, instructions, drawings and such like related to the aforementioned tangible property or software. "Product" shall also include any labelling, container or specification of any goods.*

Product Withdrawal Extension exclusion: *any liability arising from advice, design ...given for a fee*

# Product Recall and Professional Indemnity

- PI Section Operative Clause:

*The Company will indemnify the Insured against all sums which the Insured shall become legally liable to pay arising from any claim first made against the Insured during the Period of Insurance as a result of any negligent act, error or omission in the conduct of the Insured's professional activities.*

- PI Section Product Liability exclusions: *This Section does not cover liability for and/or arising out of:*

~~*Any product or the recall of any product*~~ (defined term? The product of the Insured or any product?) ~~*or part thereof*~~: deleted and replaced by:  
*arising out of or resulting from the manufacture of any goods or products for multiple sales or mass distribution which are sold or supplied by the Insured or by others under license from the Insured.*

*Costs incurred by the Insured for the recall of any such products or part thereof.*

# Product Recall and Professional Indemnity

## UK Market Insurer's PI wording

- Operative Clause: We agree to indemnify the *insured* against *loss* incurred as a result of any *civil liability claim* first made against the *insured* and notified to us during the *period of insurance*, based solely on the *insured's* provision of the *professional services*.
- Exclusion: We will not pay anything in respect of any cost of or expense incurred in withdrawing a product or good from sale or recalling any product or good;
- No definition of product

# Product Recall and Professional Indemnity

## UK Market Insurer's PI wordings

This **insured section** excludes and does not cover:

- **Product recall**

any **claim**, loss, liability, expenses, costs or **defence costs** arising directly or indirectly out of, or in any way involving the withdrawal, inspection, repair, modification or replacement of any **technology** or of any property of which such **technology** form a part, if such **technology** or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein.

### **Technology definition:**

Technology shall mean:

any software, hardware, firmware, cabling or electronic equipment; and / or any service, advice or work provided by the insured in the conduct of the profession in relation to or in connection with any of the matters referred to in clause xyz and including without limitation, data processing, data warehousing, facilities management and outsourcing, telecommunication and data communication, website design and webhosting services provided by the insured.



# Product Recall and Professional Indemnity

## UK Market PI Insurer's wordings

We will not:

- make any payment on your behalf a) for any claim; or
- b) incur any **costs and expenses**; or
- c) reimburse **you** for any **loss, damage**, legal expenses, fees or costs sustained by **you**:
- **Product recall**: arising directly or indirectly from the recall of any **product** or part thereof except for **claims** made under Section A where **you** are legally liable for these costs to a **third party** as the direct result of a **wrongful act** committed or alleged to have been committed by **you**.
- SECTION A: PROFESSIONAL LIABILITY
- **We** agree to pay on **your** behalf all sums which **you** become legally obliged to pay (including liability for claimants' costs and expenses) as a result of any **claim** first made against **you** (regardless of who caused the **claim**) and notified to **us** during the **period of the policy** for any:
  - a) negligent act, error, omission, advice, misstatement or misrepresentation; or
  - b) breach of any contractual term implied by law concerning necessary quality, safety or fitness, or **your** duty to use reasonable care and skill; or
  - c) dishonesty of **your senior executive officers** or **employees** provided that **we** maintain all rights of subrogation against the **senior executive officer** or **employee** if they are found guilty of such a dishonest act; or
  - d) other act, error or omission giving rise to civil liability;
- arising out of **your business activities** performed for a **client**.
- "Product" means any tangible property (including containers, packaging, labelling or instructions, but explicitly excluding any software, data, or source code) after it has left your custody or control which has been designed, specified, formulated, manufactured, constructed, installed, sold, supplied, distributed, treated, serviced, altered, processed, cleaned, renovated or repaired by you or on your behalf in the course of your business activities.

# Product Recall and Professional Indemnity

**Professional Indemnity Insurance for providing advice for a fee in relation to a Product Recall campaign? Which exclusion to apply?**

# EL, EPL, Data Protection...

## **EPLI: Cover for liability**

Any actual or alleged act, error or omission committed or attempted by you or an insured person or by any third-party where you are held vicariously liable relating to any actual or alleged wrongful, unfair or constructive dismissal, discharge or termination of employment, breach of written or implied contract, employment related misrepresentation, wrongful deprivation of a career opportunity, failure to grant tenure, negligent employee evaluation, harassment, unlawful discrimination, failure to provide adequate employee procedures and policies, retaliation, defamation, invasion of privacy arising solely as a result of the employment or non-employment by you of any current, former or prospective employee

## **Exclusions**

- for the death or any bodily or mental injury or emotional distress suffered by anyone, or the loss, damage or destruction of any tangible property, other than emotional distress directly arising from any **employment practice wrongful act**.
- based upon, attributable to or arising out of the use of any mechanically propelled vehicle for which compulsory insurance is required under any legislation.

# EL, EPL, Data Protection...

## **EPLI: Covers liability for**

(i) wrongful or unfair termination, whether actual or constructive, of the employment of, or demotion of, or failure or refusal to hire or promote, any natural person in violation of the law, whether common or statutory, or in breach of any agreement to commence or continue employment; or (ii) employment discrimination, including any failure or refusal to hire any natural person, or discharge of, or other discrimination against, any natural person with respect to his remuneration or any of the terms, conditions or privileges of his employment, or any limitation, segregation or classification of any Employee or of applicants for employment in any way which would deprive or tend to deprive any natural person of employment opportunities or otherwise adversely affect his status as an Employee, because of such natural person's race, colour, religion or belief, age, gender or sexual orientation, national origin, disability, pregnancy, part time or fixed term status or other protected status; or (iii) harassment of an Employee on any protected grounds, including unwelcome sexual advances, requests for sexual favour or other verbal or physical conduct of a sexual nature; or (iv) failure to allow an Employee to exercise any rights under law; or (v) victimisation or retaliatory treatment against an Employee on account of such Employee exercising or attempting to exercise his rights under law; or (vi) breach of the express or implied terms of any contract of employment; or (vii) libel, slander or defamation of any Employee or negligent misrepresentation in any reference in respect of any Employee or any breach of the Data Protection Act 1998 in respect of the personal data of any Employee committed or allegedly committed by the Insured.

# EL, EPL, Data Protection...

## Exclusion: BODILY INJURY OR PROPERTY DAMAGE

arising out of any actual or alleged bodily injury, mental illness, sickness, disease or death of any person, including any criminal prosecution for manslaughter or under the Health and Safety at Work Act 1974 (or any equivalent foreign legislation), or arising out of any actual or alleged damage to or destruction of any tangible property, including loss of use thereof, provided that this exclusion shall not apply to a **Claim** alleging injury to feelings caused by a **Wrongful Employment Act**.

### 'Insured' shall mean:

- (i) the Company;
- (ii) any Director or any Officer of the Company;
- (iii) any Employee of the Company;
- (iv) the lawful spouse of any person as described in (ii) or (iii) above, but only in respect of a claim against such a spouse to enforce a judgment against such person for a Wrongful Employment Act by that person in his capacity as Director, Officer or Employee of the Company; and
- (v) in the event of the death or incompetency or bankruptcy of any person as described in (ii), (iii) or (iv) above, their estate, heirs, legal representatives or assigns, for legal liabilities incurred due to any Wrongful Employment Act of any Director, Officer or Employee in his capacity as a Director, Officer or Employee of the Company.

# Cyber Liability

War Games film, released 1983



# Stuxnet

The first example of cyber warfare?

# Prudential Regulation Authority

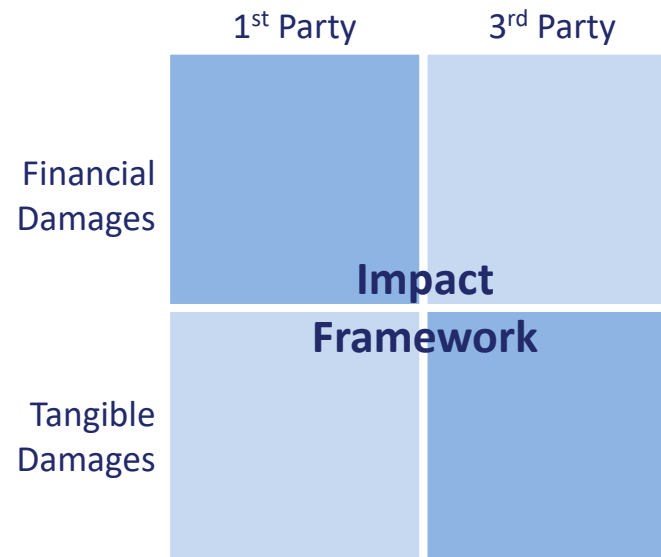
Dear CEO letter 14 November 2016  
Cyber Insurance Underwriting Risk 2017  
(SS4/17)

Dear CEO letter 30 January 2019

# How to define Cyber?

IUA Cyber Exclusion Clauses issued  
17 May 2019

# Cyber Quadrant



# German Steel 2014

Unable to shut down blast furnace  
leading to massive damage to the  
system

# Maroochy Shire 2001

1 million litres of sewage released.



# Ashley Maddison 2015

Hack leading to leaking of 33m users  
data

Taken from <https://>

# Internet of Things

The beginning of another industrial revolution  
Estimated 50 billion items connect to the internet by  
2020

Every object, even the human can become part of the  
IOT

Taken from The Internet of Things:  
Evolution or Revolution by AIG

# Conclusion

The law of unintended consequences:  
warning that an intervention in a complex  
system tends to create unanticipated and often  
undesirable outcomes

# Environmental Insurance

## Coverage

A GL Policy typically excludes Pollution **unless** due to a “sudden, identifiable, unintended and unexpected incident” – ABI Pollution form

It typically indemnifies for liability for “damages” or “compensation”, but is often extended to include some **third party** clean up costs ordered by a Regulator in the EU (the “Bartoline” Extension)

An EIL Policy indemnifies for:

- Own site clean up costs (as required by law or regulation)
- Off site clean up costs (as required by law or regulation)
- Third party claims for injury and damage
- Etc

Resulting from the discharge, release, escape etc of pollutants or actual changes in the environment for which action is prescribed by Environmental law

# Environmental Insurance

## Scenario

An explosion and fire at the Insured's premises results in:

1. Contamination of the site
2. Damage to third party property
3. Contamination of a watercourse

Both GL and EIL are in place

## Which Policy responds????

1. Above would only be indemnified by EIL, 2. by both , and 3. potentially by both

**Other Insurance Conditions come into play!**

# Directors and Officers

## Background

If a matter that gives rise, or could give rise, to a loss under a GL Policy is sufficiently large to impact the Insured as a whole and its value to investors, it could also give rise to an action against Directors and the Company that is indemnified under their D&O coverage

A current example is Opioids – claims are being brought for bodily injury and healthcare costs, and also as shareholder actions

## Overlap

These actions are based on different legal liabilities and are therefore separate valid claims!



# Professional Indemnity

## Coverage

A GL policy indemnifies against liability in respect of accidental Injury and Property Damage

A PI Policy indemnifies against liability for a breach of professional duty by reason of a wrongful act – a neglect error or omission in the performance of the business

## Exclusions

GL – excludes liability for “advice design or specification provided for a fee”

PI – may exclude liability for Injury or Property Damage

# Professional Indemnity

## Overlap

Both Policies may respond, if a “breach of professional duty” causes injury and damage and exclusions are not triggered, or neither, if exclusions on both are triggered

It all depends on the Wordings!

# Professional Indemnity

## Scenario:

A contractor is engaged to design and construct a shopping centre  
Part of the Centre collapses, damaging other parts of the structure  
The Centre is shut down for 6 months for repairs – tenants incur business interruption

## Policy response

Policies in place:

- Project Liability Policy
- Contractor's Annual GL
- Designer's PI Policy

**Which responds – possibly all of them!** It gets very complicated based on the exact circumstances!

# “Other Insurance” Clauses

Where more than 1 Policy covers the same loss, which Policy pays first depends on the terms of each Policy

The “Other Insurance” Condition attempts to set a priority – noting whether a Policy is “Primary” or “Excess”

If the relevant Policy conditions do not set a clear order of priority, the ultimate decision rests with a Court! The basic principle is that liability will be shared if the terms are unclear

Sample Clauses attached – UK, US (ISO) and Bermuda

# “Other Insurance” Clauses

UK Format - GL

## Other Insurances

The Company will not indemnify the Insured in respect of liability which is insured by or would but for the existence of this Policy be insured by any other policy except in respect of any excess beyond the amount payable under such other policy or which would have been payable under such other policy had this insurance not been effected.

# “Other Insurance” Clauses 2

## US Format (ISO)

### Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:

- a. **Primary Insurance**

This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.** below.
- b. **Excess Insurance**
  - (1) This insurance is excess over:
    - (a) Any of the other insurance, whether primary, excess, contingent or on any other basis:
      - (i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
      - (ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
      - (iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or
      - (iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion **g.** of Section **I** – Coverage **A** – Bodily Injury And Property Damage Liability.
    - (b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured.
  - (2) When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.
  - (3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:
    - (a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
    - (b) The total of all deductible and self-insured amounts under all that other insurance.
  - (4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

# “Other Insurance” Clauses 2

Bermuda Format (“004”)

## **OTHER INSURANCE**

If other valid and collectible insurance with any other insurer, whether issued prior hereto, simultaneously herewith or subsequent hereto, is available to the **Insured** for **Ultimate Net Loss** covered by this Policy, other than insurance which is expressly and specifically excess of the limits of, or quota share on the same layer as, this Policy, the insurance afforded by this Policy shall be in excess of and shall not contribute with such other insurance. Nothing herein shall be construed to make this Policy subject to the terms, conditions or limitations of other insurance.

If this Policy shall be deemed or required to contribute to **Ultimate Net Loss** with other insurance and such contribution arises in whole or in part from the failure of the **Named Insured** to list such other insurance on Schedule B hereto in accordance with the instructions for such Schedule B, then the **Named Insured** shall indemnify the **Company** for the amount of any such contribution, and this Policy shall apply as if such other insurance had been so listed.