

# Liability Claims Bulletin

Sixth Edition

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# Introduction

As organisations expand their capabilities, and continue to grow across geographies, they are confronted with newer challenges and risks such as enhanced scrutiny from regulators, increased litigations from customers and stakeholders, and various uncertainties arising from economic uncertainties in the world. These challenges translate into complex claims, involving substantial financial losses to organisations.

For the fourth quarter of 2023, Marsh clients saw a variety of claims under their Directors & Officers Liability, Employment Practices Liability, and their Commercial General Liability insurance policies. These clients, multinationals operating across the spectrum of territories and businesses, experienced unique and large losses with various challenges under the insurance policies where insurers raised concerns such as delayed notifications, lack of insurer’s consent towards settlement and myriad other concerns.

We attempt to provide you brief summaries of some of our contentious liability claims through the Sixth Edition of our flagship Liability Claims Bulletin.

In this bulletin, we focus on seven insightful scenarios, including challenges, solutions, and our learnings on the way.

As a leading global broker, Marsh continues its commitment to achieving the best outcomes for its clients, advocating clients’ interests, and securing maximum claim settlements.

# Employment Practices Liability Insurance (EPLI) Claims

## 1. Workplace discrimination and retaliation



**INSURED** - An Indian Global Information Technology Company

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**BACKGROUND** - An ex employee (claimant) filed a complaint before the Equal Employment Opportunity Commission (EEOC) against the insured on grounds of discrimination owing to their sex, pregnancy, and subsequent retaliation at work place. The employee alleged that they were subjected to hostile work environment, and filed a complaint before the US District Court of Texas.

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**CLAIM AMOUNT** - Settlement of USD 45,000 approx. / INR 37 lakhs approx. + Defence costs of USD 54,000 approx. / INR 45 lakhs approximately.

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**POLICY TYPE** - EPLI

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### CHALLENGES RAISED BY INSURER -

- **Delay in intimation:** The case was initially closed by EEOC. When a complaint was filed before the District Court, the insurer was notified, almost one year after the matter was made known to the insured.
  - **Non-disclosure in proposal form:** This incident was not disclosed in the proposal form at the time of renewal, despite being in the insured's knowledge.
  - **No consent of insurer:** 50% of the defence costs were incurred without consent of the insurer.
  - **Policy exclusion:** Insurer denied to extend cover towards 'lost wages' forming part of the settlement agreement between the parties.
- 



### MARSH'S CONTRIBUTION -

- Since there were multiple policy breaches, insurer agreed to apply an allocation of 25% towards the total claim amount.
  - Marsh successfully represented to the insurer that the component of 'lost wages' must in fact be treated as damages since it formed a part of the overall damages.
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**CLAIM OUTCOME** - USD 6,700 approx. / INR 6 lakhs approx.(net of deductible).

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### KEY LEARNINGS -

- **Accurate disclosures:** Clients must respond to the information requested in the proposal form with utmost caution. Any incorrect disclosures or non-disclosures of known matters altogether can lead to denial of a claim.
- **Notification of circumstances:** All matters which may potentially give rise to a claim should be notified to the insurer as caution, to avoid any breach of policy terms and conditions.

## 2. Wrongful dismissal of employees



**INSURED** - An Indian Global Information Technology Company

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### BACKGROUND -

- Disciplinary actions taken against certain ex-employees (claimants) of the insured eventually led to their dismissal.
  - These claimants filed various litigations alleging illegal dismissal against the insured.
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**CLAIM AMOUNT** - USD 700, 000 approx. / INR 6 cr. approx. (Damages & defence costs)

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**POLICY TYPE** - EPLI

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### CHALLENGES RAISED BY INSURER -

- Delay in intimation, due to which insurer/ reinsurer was not given appropriate opportunity to associate in the defence of the claim.
  - Separate deductibles for each of the notified claims, instead of considering the claims as related.
  - The policy does not extend cover towards separation pay. For the matters where breakups of these damages were not available, insurer applied a 30% allocation towards uncovered components.
- 



### MARSH'S CONTRIBUTION -

- Marsh successfully argued that the litigations were initially stagnant, and hence no substantial information was available to notify the claim. Besides, the insured had acted in a prudent manner, and no prejudice was caused to the insurers.
  - **Application of deductible:** Since all the claims arose from the same wrongful act, one policy deductible shall apply. Insurer agreed to this approach.
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**CLAIM OUTCOME** - USD 660, 000 approx. / INR 5.5 cr. approx. (net of policy deductible)

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### KEY LEARNINGS -

- Insurer's right to associate in defence should not be denied.
- EPLI Policy does not cover severance pay/separation pay. Thorough understanding of the policy inclusions and exclusions is advisable.

### 3. Wrongful termination



**INSURED** - Indian Multinational IT Services & Consulting

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**BACKGROUND -**

An ex-employee (claimant) in the insured's UK office filed a claim before the Watford Employment Tribunal, UK against the insured and their Group Chief Human Resources Officer alleging unfair dismissal, discrimination and harassment because of their sex and/or race.

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**CLAIM AMOUNT** - USD 1.5 million approx. / INR 13 cr. approx.

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**POLICY TYPE** - D&O (EPLI)

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**CHALLENGES RAISED BY INSURER -**

- Prior and pending claim: The action before the Employment Tribunal was following an internal grievance and appeal raised by the claimant and these events preceded inception of the policy.
  - Non-disclosure in proposal form: Insured did not disclose the matter in the proposal form while the internal investigation in relation to the said grievance remained ongoing.
  - No consent: Engagement of multiple counsels, and initiation of settlement negotiations without the insurer's prior consent.
- 



**MARSH'S CONTRIBUTION -**

- We successfully contended that a claim for the purposes of the policy arose only when the claimant approached the Employment Tribunal; and that the insured did not foresee a routine internal grievance evolving into a claim before the Tribunal.
  - We were able to convince the insurer that neither the engagement of a counsel nor the settlement reached between the parties caused any prejudice to the insurer.
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**CLAIM OUTCOME** - Full settlement of USD 800,000 approx. / INR 7 cr. approx. (net deductible)

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**KEY LEARNINGS -**

- **Notification:** Notify claims and any claim like situations to the insurer prudently. Any known matters which may lead to a claim should be promptly notified as a circumstance and also disclosed in the proposal form.
- **Insurers to associate in defence:** Ensure that the insurer is informed and aligned with the defence strategy and settlement discussions.

# Directors and Officers (D&O) Liability Insurance Claims:

## 4. CBI inquiry initiated against D&O



**INSURED** - Indian Pharmaceutical Company

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### BACKGROUND -

A CBI inquiry was initiated against directors and officers of the insured alleging that the said individuals offered bribes to seek certain procedural waivers in relation to an ongoing clinical trial of the insured company. The authorities levelled charges under the Indian Penal Code and Prevention of Corruption Act.

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**CLAIM AMOUNT** - USD 250,000 approx. / INR 2 cr. approx. towards defence costs.

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**POLICY TYPE** - D&O

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### CHALLENGES RAISED BY INSURER -

- **No consent:** Lawyers were engaged and costs were incurred without insurer's prior written consent.
  - **Reasonability of costs:** As per the insurer, the rates quoted by the lawyers were high and unreasonable. The insurer also questioned the rationale behind engaging multiple senior counsels. Since the briefing lawyer was a retainer, costs are not covered.
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### MARSH'S CONTRIBUTION -

- **Necessity to engage senior counsels:** Marsh convinced the insurer of the urgency and sensitivity associated with the matter which led to the said engagements without consent.
  - **Retainership:** Insured could provide separate invoices for the matter which were accepted by insurer.
  - **On account payments:** Considering the matter is still ongoing, insurer agreed to pay on account payment of the reasonable costs.
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**CLAIM OUTCOME** - USD 180,000 approx. / INR 1.5 cr. approx. (net of deductible)

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### KEY LEARNINGS -

- **Consent:** Insurer's written consent prior to incurring any costs or admitting any liability is a condition precedent under the policy, which must be complied.
- **Retainer agreements:** In case of retainer agreements with lawyers, in the event of an insurance claim, clear bifurcation and documentation should be made available to the insurer to ease reimbursement of such costs under the policy.

## 5. Criminal complaint filed against D&O



**INSURED** - Indian e-Commerce Company

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### BACKGROUND -

A complaint was filed by a buyer registered on the insured's website in the police station against 2 directors of the insured in connection with abduction and theft by seller registered on the insured's website. The insured received two notices under the Criminal Procedures Code requiring both the directors of the insured to be present and provide certain information in the police station. Subsequently the insured found out that FIR had been filed against one of the directors.

Defence costs were incurred when petitions for quashing of FIR were filed in court in director's name.

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**CLAIM AMOUNT** - USD 28,000 approx. / INR 23 lakhs approx. towards defence costs.

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**POLICY TYPE** - D&O

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### CHALLENGES RAISED BY INSURER -

**Allocation of costs:** The insured proposed an allocation of 33% towards the defence costs incurred owing to the fact that the individuals were named in the matter merely as representatives of the company.

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### MARSH'S CONTRIBUTION -

Marsh was able to contend that since the allegations levelled were against the individuals, and litigation was instituted against them and not the company, allocation was baseless.

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**CLAIM OUTCOME** - USD 26,000 approx. / INR 22 Lakhs approx. as full and final settlement (net of deductible)

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### KEY LEARNINGS -

**Coverage:** The D&O policy extends coverage towards any claims arising out of a 'wrongful act' of the directors/officers. The policy does not respond to any liability of the insured entity.

# Commercial General Liability (CGL) Insurance Claims

## 6. Product defect



**INSURED** - Indian Multinational Plastic Manufacturer

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### BACKGROUND -

The insured was engaged by their customer for the supply of plastic films. The customer complained that the material supplied to them led to breakage and line stoppage. Resultantly, the insured incurred losses on account of their own faulty material and the customer's loss on account of using the faulty material.

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**CLAIM AMOUNT** - USD 2 million approx. / INR 17 cr. approx.

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**POLICY TYPE** - CGL

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### CHALLENGES RAISED BY INSURER -

- The surveyor questioned why the defect in the material provided was not noticed during the quality checks of the insured.
  - The surveyor sought details of the salvage arising out of the damaged material provided to the customer.
- 



### MARSH'S CONTRIBUTION -

- We reasoned with the surveyor that the quality checks were performed by the insured on a sample basis of the initial layers of the product and no defect was noted.
  - The insured also explained that the salvage quote was not available since the insured's customer sold to local scrap buyers.
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**CLAIM OUTCOME** - Full policy limit of USD 200,000 approx. / INR 2 cr. approx. (net of deductible)

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### KEY LEARNINGS -

The insured was in a position to substantiate their claim with prompt responses, and sufficient corroboration through submitting adequate documentation which led to speedy resolution of the claim.



## 7. Product defect



**INSURED** - Indian Manufacturer of Auto Ancillaries

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### **BACKGROUND -**

The insured supplied pistons to their customer. The customer reported engine seizures due to piston scuffing. The insured's customer had to then carry out inspection of all the engines fitted with the pistons supplied by the insured, and rework upon certain engines which had seized.

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**CLAIM AMOUNT** - USD 900,000 approx. / INR 7 cr. approx.

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**POLICY TYPE** - CGL

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### **CHALLENGES RAISED BY INSURER -**

- In order to carry out the engine investigation and inspection, the insured had to procure various instruments and testing kits, and the surveyor sought investigation/inspection reports in relation to each of these tests.
  - The surveyor also sought the insured's clarification towards documentation in relation to this incident, specifically in relation to demand letter from the customer, proofs of delivery of the said pistons, transportation chain, statement of account of the customer etc.
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### **MARSH'S CONTRIBUTION -**

We assisted the client with the exhaustive submission to the various requisites sought by the surveyor. We also assisted the surveyor with identifying the relevant coverages under the policy.

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**CLAIM OUTCOME** - Full policy limit of USD 600,000 approx. / INR 5 cr. approx. (net of policy deductible)

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### **KEY LEARNINGS -**

Product Guarantee and Recall claims demand a meticulous documentation process with surveyors/loss adjusters. We recommend that clients maintain appropriate records not only of the product delivered, but also of all the measures taken and costs incurred subsequent to receiving any demand from a customer.

# Know your team:

## Leadership

ANUP DHINGRA  
Managing Director, FINPRO India,  
Middle East & Africa (IMEA)  
[anup.dhingra@marsh.com](mailto:anup.dhingra@marsh.com)

BHISHMA MAHESHWARI  
Senior Vice President, Communications,  
Media and Technology Leader, FINPRO,  
Marsh India  
[bhishma.maheshwari@marsh.com](mailto:bhishma.maheshwari@marsh.com)

JAY SHAH  
Senior Vice President, Financial Institution  
Leader, FINPRO, Marsh India  
[jay.shah@marsh.com](mailto:jay.shah@marsh.com)

NACHIKET SHAH  
Senior Vice President, Management Liability  
Leader, FINPRO, Marsh India  
[nachiket.shah@marsh.com](mailto:nachiket.shah@marsh.com)

ANSHU MAHESHWARI  
Senior Vice President, FINPRO, Marsh India  
[anshu.maheshwari@marsh.com](mailto:anshu.maheshwari@marsh.com)

INDRANIL ROY  
Senior Vice President, Corporate Segment  
Liability Leader, Marsh India  
[indranil.roy@marsh.com](mailto:indranil.roy@marsh.com)

## Claims

SIDHARTHA PATTNAIK  
Senior Vice President, Head of Claims,  
Marsh India  
[sidhartha.pattnaik@marsh.com](mailto:sidhartha.pattnaik@marsh.com)

AKSHARA SHARMA  
Vice President, FINPRO, Marsh India  
[akshara.sharma@marsh.com](mailto:akshara.sharma@marsh.com)

ARPITA CUDDAPAH  
Senior Manager, FINPRO, Marsh India  
[arpita.cuddapah@marsh.com](mailto:arpita.cuddapah@marsh.com)

RADHIKA NIPHADKAR  
Assistant Manager, FINPRO, Marsh India  
[radhika.niphadkar@marsh.com](mailto:radhika.niphadkar@marsh.com)

AISHWARYA SHETTY  
Assistant Manager, FINPRO, Marsh India  
[aishwarya.shetty@marsh.com](mailto:aishwarya.shetty@marsh.com)

URJA DOSHI  
Management Trainee, FINPRO, Marsh India  
[urja.doshi@marsh.com](mailto:urja.doshi@marsh.com)

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