

# Liability Claims Bulletin: Third Edition

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# Introduction

Businesses have become vulnerable worldwide and are exposed to multiple risks. Economic pressure, technology changes, legal and regulatory developments and the way it influences businesses worldwide has made liability insurance a need now more than ever.

Our previous editions of Liability Claims Bulletin focused on some of the most stimulating claims Marsh India has seen and managed. This included a wide array of claims ranging from professional indemnity (PI) claims arising from misuse of confidential data to directors and officers (D&O) claims arising out of criminal complaints lodged against the directors. We had dedicated an entire edition of the bulletin to justify the divergent cyber claims we have managed.

**We are pleased to now present the Third Edition** of the Liability Claims Bulletin which expands over multiple Employment Practices Liability Insurance (EPLI) claims arising out of wrongful dismissal of the directors and officers, more data breach incidents, a parlance between PI claims and intellectual property infringement, and commercial general liability (CGL) claims arising out of defective product scenarios.

We have also listed some of the key observations from these claims, including what should be done and what should be avoided in settling claims.

# Professional Indemnity Insurance Claims

## 1) Breach of contract and intellectual property infringement

<b>Insured</b>	An Indian Global Information Technology Company
<b>Background</b>	<ul style="list-style-type: none"><li>• The insured's services were engaged by an international bank for developing and maintaining a new banking system and associated services.</li><li>• A dispute arose between the insured and the bank and the engagement was subsequently terminated on account of:<ul style="list-style-type: none"><li>▪ Breaches of contract and failure to comply to obligations during the design and delivery phase, and</li><li>▪ Breaches of copyright pertaining to the source code and design of the system when providing services to one of the bank's competitors;</li></ul></li><li>• Multiple settlement offers were tabled and rejected during mediation, and the bank eventually commenced proceedings.</li></ul>
<b>Claim Amount</b>	Upwards of \$6 million.
<b>Policy Type</b>	Tech PI
<b>Challenges Raised by Insurers</b>	<ul style="list-style-type: none"><li>• Adjustments towards restitution and wasted costs (claims for consequential damage, economic loss in tort or damages relating to loss of profit, loss of revenue).</li><li>• Adjustments on account of extraneous considerations such as reputational and commercial motives to settle.</li><li>• Deductions of defence costs incurred without the insurer's consent.</li><li>• Cause of action - IPR infringement versus violation of trade secrets.</li></ul>
<b>Marsh's Contribution</b>	<ul style="list-style-type: none"><li>• Marsh successfully represented the claim to be a copyright infringement instead of trade secrets infringement, thereby averting non-admissibility of the claim.</li><li>• We convinced insurer to circumvent the requirement of the original forensic analysis report and provide their offer with the existing information and documents as made available by the insured.</li><li>• We negotiated with the insurer to reduce proposed haircuts and increase the admissible figures of the costs deemed unreasonable.</li></ul>
<b>Claim Outcome</b>	The insurer applied further deductions and ultimately agreed to settle upwards of \$3 million net of deductible.
<b>Key Learnings</b>	<ul style="list-style-type: none"><li>• It is important for the insured to take appropriate efforts to quantify and classify the admissible aspects of the claim.</li><li>• A conditional approval from the insurer should not be construed as a blanket settlement authorisation and must be clearly communicated to an insured with explicit caveats.</li></ul>

## 2) Erroneous data entry

<b>Insured</b>	An Indian Registrar & Transfer Agent Company
<b>Background</b>	<ul style="list-style-type: none"><li>• The insured performed backend services for a loan services company in the United States.</li><li>• A customer of this loan services company had paid their outstanding loan in full and applied for an update of their credit score.</li><li>• Said request for updating was received by the insured on multiple occasions, but was incorrectly or semi-correctly updated every time and reported to the concerned credit rating agencies.</li><li>• Due to these repeated operational errors while updating said credit score, the customers could not avail a loan on account of not having a qualifiable credit score; resultantly, the customers filed a lawsuit against the loan services company.</li><li>• The initial damages claimed were around \$2 million, which was negotiated and settled with the customers at \$600,000 approx.; this was thereupon demanded from the insured in line with the indemnity provisions of the effective Master Services Agreement with an adjustment for legal fees.</li></ul>
<b>Claim Amount</b>	\$500,000 approx.
<b>Policy Type</b>	Tech PI
<b>Challenges Raised by Insurers</b>	<ul style="list-style-type: none"><li>• Multiple errors - the requests for the credit score updates were repetitive due to the platform not having a system to flag multiple tickets arising from the same request/instruction.</li><li>• Delayed notification - the insured had notified the claim months after the reporting of the lawsuit by their client.</li><li>• Lack of documentation and quantum assessment - the insured was not in a position to obtain settlement details and supporting documents from their client due to the confidentiality clauses governing the settlement agreement in the United States.</li></ul>
<b>Marsh's Contribution</b>	<ul style="list-style-type: none"><li>• Marsh successfully averted the application of multiple deductibles on account of the multiplicity of errors by evincing the errors as a system issue instead of gross negligence by the employees of the insured.</li><li>• We provided legal opinion from insured's legal team to showcase the range of court-awarded damages typical to such disputes, establishment of legal liability and the liability quantum assessment.</li></ul>
<b>Claim Outcome</b>	The insurer agreed to pay the full value claimed, net of deductible.
<b>Key Learnings</b>	<ul style="list-style-type: none"><li>• Understanding the nuances of an independent settlement outside the purview of the insured's control.</li><li>• In lieu of a verifiable quantum assessment, being made available, case laws and legal precedents may be used to establish an approximation of claim amounts.</li></ul>

# Cyber Claims

## 3) Data breach

<b>Insured</b>	A Global Business Process Outsourcing Company
<b>Background</b>	The insured became aware of certain activity of an unauthorized third party exporting a copy of their Active Directory database.
<b>Claim Amount</b>	Upwards of \$150,000 towards first party costs.
<b>Policy Type</b>	Cyber Liability Insurance
<b>Challenges Raised by Insurers</b>	<ul style="list-style-type: none"><li>• The insurer initially denied cover stating that in the absence of a 'Security Breach' as defined under policy, the insuring clause does not respond.</li><li>• Deduction towards duplication of work carried out by two vendors for incident response and analysis.</li><li>• Only third party data restoration cost are covered under the scope of the policy.</li></ul>
<b>Marsh's Contribution</b>	<ul style="list-style-type: none"><li>• Marsh strongly contended that intent of the 'First Party Costs' extension is to afford coverage towards any costs incurred by the insured to determine the existence and cause of the security breach or privacy breach.</li><li>• We emphasised on the necessity of engaging two vendors drawing a clear distinction between their roles, and asserted that any concerns regarding overlap of work should have been raised at the time of engagement of such vendors itself.</li><li>• We also highlighted that since the insured is a BPO, any compromise of the insured's login credentials has a direct bearing on their client's system security.</li></ul>
<b>Claim Outcome</b>	Upwards of \$60,000 net of deductible
<b>Key Learnings</b>	<ul style="list-style-type: none"><li>• Secure detailed work narratives in support of the invoices raised by the vendors engaged by the insured. Avoid engaging multiple vendors.</li><li>• Seek clarity from the cyber insurance underwriters on the policy triggers and corresponding coverage under the insurance policy.</li><li>• Subject to the policy terms and conditions, cyber insurance policy extends cover towards first party costs irrespective of any harm caused by an unauthorised access.</li></ul>

# Employment Practices Liability Insurance Claims

## 4) Director's dismissal due to internal reorganization

<b>Insured</b>	Indian Multinational Technology Company
<b>Background</b>	<ul style="list-style-type: none"><li>• The claimant, an ex-director, was hired by the insured under a permanent employment contract.</li><li>• After 4 years, the insured decided to reorganize its managerial structure, due to which, the claimant's role was abolished and the function was centralized, so they faced dismissal.</li><li>• In order to avoid the dismissal, two reclassification offers, i.e. offers to move to alternate roles were made to the claimant, both of which were denied. No other position corresponding to the claimant's profile could be identified.</li><li>• Subsequently, the claimant contested the dismissal by initiating legal proceedings against the insured.</li><li>• In order to avoid litigation, both parties agreed to out of court settlement.</li></ul>
<b>Claim Amount</b>	Settlement cost plus legal fees paid by the Insured amounting to \$115,000 approx.
<b>Policy Type</b>	D&O Policy (EPLI)
<b>Challenges Raised by Insurers</b>	<ul style="list-style-type: none"><li>• Lack of documentation, translations as the pleadings were not in English.</li><li>• Settlement achieved without insurer's consent.</li></ul>
<b>Marsh's Contribution</b>	Marsh extensively negotiated with the insurer for the claim settlement to overcome insurer's concerns of lack of documentary evidence and breach of policy conditions. The claim was subsequently settled, however, the insurer made adjustments owing to various breaches.
<b>Claim Outcome</b>	The claim was settled at \$30,000 approx. net of deductible.
<b>Key Learnings</b>	<ul style="list-style-type: none"><li>• It is necessary for the insured to maintain documentary evidence to substantiate their claim.</li><li>• Provide English translations of all documents, if paper work is in any other language.</li><li>• Seek prior written consent of the insurer before settling claims.</li></ul>

## 5) Wrongful termination and retaliation

<b>Insured</b>	An Indian Multinational Technology Company
<b>Background</b>	An ex-employee of the insured filed a claim under the Civil Rights Act 1964, Human Rights Law, etc. on grounds of gender discrimination and retaliation. She claimed upwards of \$1 million. Parties settled at \$400,000 approx.
<b>Claim Amount</b>	Settlement amount plus defence costs paid by the insured amounting to \$500,000 approx.
<b>Policy Type</b>	EPLI
<b>Challenges Raised by Insurers</b>	<ul style="list-style-type: none"><li>• No cover for unpaid commissions.</li><li>• Detailed liability quantum assessment not available.</li><li>• Non availability of documents such as communications with the claimant prior to filing of the formal complaint, etc.</li><li>• Defence costs incurred higher than the estimates shared initially.</li></ul>
<b>Marsh's Contribution</b>	<ul style="list-style-type: none"><li>• We along with the defence counsel explained that the insured may not be successful at the jury trial due to lack of evidence/witness, with substantially higher damages being imposed on the insured.</li><li>• Substantial reasons for increased defence costs were given including early settlement of claim which required extra hours/work.</li><li>• Detailed liability quantum assessment was arranged.</li></ul>
<b>Claim Outcome</b>	Insurer paid full defence costs and the settlement amount excluding unpaid commissions - \$350,000 net of deductible.
<b>Key Learnings</b>	<ul style="list-style-type: none"><li>• A detailed liability and quantum assessment is essential for the insurer to conclude their assessment.</li><li>• In case of a substantial increase from the cost estimates, keep your broker and insurer duly informed.</li></ul>



## 6) Wrongful termination

<b>Insured</b>	A Multinational Conglomerate
<b>Background</b>	<ul style="list-style-type: none"><li>• Insured received an email alleging discriminatory behaviour from one of their senior employees in the United States.</li><li>• Insured terminated the employment of the claimant on grounds of deficiency in performance at work.</li><li>• The claimant sent a legal notice to the insured charging them with employment related discrimination and retaliation under United States Federal Law, New York State Law and the New York City Human Rights laws.</li><li>• The claimant also filed a complaint with the Equal Employment Opportunity Commission (EEOC) against the insured alleging retaliation for opposing discriminatory practices and for requesting disability-related time off.</li></ul>
<b>Claim Amount</b>	\$600,000 approx. in settlement, and defence cost incurred by the parties.
<b>Policy Type</b>	D&O Policy (EPLI)
<b>Challenges Raised by Insurers</b>	<ul style="list-style-type: none"><li>• The insurer initially disallowed the severance pay/wages component of the settlement executed between the parties from the loss amount stating that the same is an exclusion under the policy.</li><li>• Back wages are not covered.</li></ul>
<b>Marsh's Contribution</b>	<ul style="list-style-type: none"><li>• We strongly contended that the claimant was not entitled to any severance pay as per the employment contract with the insured.</li><li>• We harped on the fact that the question of excluding the same does not arise since the said component was in lieu of damages alone.</li><li>• We established that the back and front wages claimed were damages, and not wages, which are excluded.</li></ul>
<b>Claim Outcome</b>	Full settlement amount including defence costs incurred net of deductible.
<b>Key Learnings</b>	<ul style="list-style-type: none"><li>• Keep the insurer informed in a timely manner of the settlement negotiations to avert any challenges with regards to the prior consent of the insurer.</li><li>• Involve the insured's external counsel in discussions with the insurer to explain the various nuances of the matter.</li><li>• Any settlement arising out of contractual obligations is excluded.</li></ul>

# CGL Claims

## 7) Product replacement

<b>Insured</b>	Large Manufacturing Company
<b>Background</b>	<ul style="list-style-type: none"><li>• Insured received complaint from their customer via customer's end user that the product supplied, being silicon-coated film, by the insured could not be used without being torn. After conducting meetings with the insured's management, defect in insured's products was confirmed.</li><li>• The complaint was lodged on insured's subsidiary, which was not a named/additional insured within the Policy.</li></ul>
<b>Claim Amount</b>	Initial demand from insured's customer was for \$500,000 approx, (including a claim for product liability and product guarantee) which was brought down through negotiations to \$100,000 approx.
<b>Policy Type</b>	CGL Policy
<b>Challenges Raised by Insurers</b>	Complete set of documents/information as required by the insurer not provided in one go. As the claim was made on the uncovered subsidiary, the subsidiary had to in turn file a formal claim against the insured, as it was the insured which had supplied the goods to the subsidiary.
<b>Marsh's Contribution</b>	<ul style="list-style-type: none"><li>• Marsh played an influential role in assimilating the list of requirements raised by the insurers.</li><li>• We acted as the central point of contact between the insured-surveyor-insurer, making sure of the best available outcome for the insured.</li></ul>
<b>Claim Outcome</b>	\$90,000 approx. net of deductible. On suggestions from the surveyor, certain adjustments were made to the product liability claim. Product recall aspect of the claim was found to be within the deductible.
<b>Key Learnings</b>	<ul style="list-style-type: none"><li>• All the information/documentation required by the insurer/surveyor should be shared in one go, as far as possible to avoid delayed coverage confirmation from the insurer.</li><li>• Read the policy document thoroughly, as there may be separate deductibles for separate covers under the policy.</li></ul>

# Stock Brokers Policy Claims

## 8) Wrongful execution of trade order

<b>Insured</b>	A Global Financial Securities (Stock Broking) Service Provider
<b>Background</b>	<ul style="list-style-type: none"><li>• Insured's trader erroneously executed a client's/claimant's trade order.</li><li>• The order was to be executed in the future's window- where two simultaneous order executions would have generated profits for the client, due to arbitrage opportunity created by price differentials of buy/sell future prices.</li><li>• However, the order was erroneously executed in the normal trading window (spot market), and to honour the trade, the client had to suffer losses.</li><li>• The claimant subsequently claimed the losses from the insured, since the executed order was not as per their instructions and was a mistake/error on the insured's part. The insured subsequently paid for the losses to the client.</li></ul>
<b>Claim Amount</b>	\$66,000 approx.
<b>Policy Type</b>	Stock Brokers Policy
<b>Challenges Raised by Insurers</b>	<ul style="list-style-type: none"><li>• Insurer/surveyor raised the question on the nature of the error, if it was a deliberate intentional act.</li><li>• Insured had verbally argued their position; however there was a lack of email trail proving the reasoning, arguments posed, and for the client's request to be made good on their losses.</li><li>• The insurer also had a detailed list of requirements, which expanded as the claim progressed.</li></ul>
<b>Marsh's Contribution</b>	<ul style="list-style-type: none"><li>• Marsh guided and helped the insured to put together the documents required by insurer and representing the insured's position to the insurer.</li><li>• We were able to keep track of and help the insured address all the queries raised by the surveyor. Us acting as a liaison between the insurer/surveyor and the insured - helped translate and address all the challenges for a speedy claim settlement.</li></ul>
<b>Claim Outcome</b>	Claim was settled at full amount net of deductible.
<b>Key Learnings</b>	<ul style="list-style-type: none"><li>• Keep your broker informed about the claim, its details and inner workings, since they would be best able to translate/guide on addressing the same to the insurer.</li><li>• Keep a written record of the communication with the claimant; this would be required to prove the reasoning and the claim amount paid/payable.</li></ul>

# Summary of Key Learnings:

- Have a thorough understanding of coverages, conditions and exclusions within your policy. Engage with your broker for a better understanding.
- Inform the insurers as soon as the claim/circumstance comes to the company's notice. DO NOT delay claims reporting.
- DO NOT tell claimants that you are notifying insurers – “deep pocket” syndrome.
- Keep a written record and proof for everything related to the claim. Provide evidence of payment made to settle the amount by sharing the payment proofs in your organization's (insured's) name.
- Co-operate with the insurer: provide regular updates on claims and prompt responses to insurer's queries. Take appropriate action to preserve insurer's right of recovery.
- Take all steps to minimize the loss and act as if you are uninsured. DO NOT admit liability for any accident or loss or enter into any settlement with a third party without the consent of the insurer.
- Do not engage counsel/forensic experts or incur any costs without the prior written consent of the insurer. Try to engage experts who are on the insurer's panel of experts.
- Do not engage multiple counsel/experts on a single claim. If it is still required, the same should be with insurer's consent.
- Progress on the advice of your defence counsel.
- Ensure timely review of your policies. Make sure the policy covers essential risks, consult your broker.

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