

Liability Claims Bulletin:

Fourth Edition

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Contents

Introduction.....	2
Employment Practices Liability Insurance (EPLI) Claims	3
1. Employment Class Action: Discrimination.....	3
2. Employment Class Action: Wrongful Termination.....	4
3. Employee Action: Harassment and Retaliation	5
Commercial General Liability (CGL) Claims.....	6
4. Civil Action arising out of Bodily Injury	6
5. Product Recall	7
Summary of Key Learnings	8
Know Your Team	9

Introduction

The risk landscape continues to broaden across geographies, industries and sectors. Multinationals are witnessing event-driven and standalone losses that are giving rise to complex and contentious liability claims. Corporate performance and functionality is eventually growing to be synonymous with big-ticket and sophisticated liability disputes.

As a testament to the diverse nature of claims, the **Fourth Edition** of our **Liability Claims Bulletin** provides an overview of five insightful claims scenarios ranging from Employee Class Action Suits to Commercial General Liability claims involving civil action and product recall situations.

This bulletin includes our comments on the expertise involved in the handling of said claims, the final outcome, and key learnings, which will provide our readers with significant insights into enhanced claims management.

As a leading global broker, Marsh continues its commitment to achieve the best claims outcomes for its clients, advocating their interests and securing optimal settlements in all the claims managed by us.











Employment Practices Liability Insurance (EPLI) Claims

1. Employment Class Action: Discrimination

 Insured	An Indian global information technology company
 Background	<ul style="list-style-type: none"> This claim relates to a class action suit filed in the USA by various ex-employees (claimants) against the insured entity alleging discriminatory employment practices against them. The claimants first filed notice of complaint before the Equal Employment Opportunity and Commission (EEOC) alleging discrimination based on national origin and age, and on account of being non-Indians, wrongful replacement from an ongoing project, and wrongful termination from employment. The Claimants subsequently filed a class action complaint before a district court, and alleged violations of the Civil Rights Act. The Parties settled before the class was certified.
 Claim Amount	Prior to the certification of the class, the claim was settled at an excess of \$4M; Defence costs incurred: \$6 million (approx.)
 Policy Type	EPLI
 Challenges Raised by Insurers	<ul style="list-style-type: none"> Considering the value of the settlement, and the defence costs being in excess of the primary layer, we had to engage with the 1st excess insurer as well. The excess insurer had claims control for their concerned layer. Therefore, along with the primary insurer, 1st excess insurer's consent was required before settling the matter. The 1st excess insurer updated after the notification as the claim was not expected to breach the primary layer. As the legal fees of the defence lawyers were high, insurer discounted and applied rates which they considered were reasonable.
 Marsh's Contribution	<ul style="list-style-type: none"> Marsh being the broker on the 1st excess layer coordinated with the insured for provision of all documents to the 1st excess insurer. The legal rates approved by the primary insurer were also agreed by the excess insurer. Marsh coordinated with the insured to understand the primary insurer's position and accordingly communicated with the excess insurer.
 Claim Outcome	Insurers paid the full amount (after applying reasonable legal rates)
 Key Learnings	<ul style="list-style-type: none"> Engage defence counsels who are on the insurer's panel to avoid challenges pertaining to reasonability of rates. Keep excess insurers simultaneously apprised of all developments, especially if they have claims control for their layer. They should be actively involved as soon as there is any indication or possibility of the primary policy limit exhausting.

2. Employment Class Action: Wrongful Termination





 Insured	An Indian global information technology company
 Background	<ul style="list-style-type: none"> • In December 2017, a nationwide class action lawsuit was filed in the USA by a number of ex-employees (claimants) of the insured for wrongful termination and other related grounds. • Claimants filed a motion for Class Certification. Certification of a termination class implied an approximate \$200 million in exposure. The court denied the motion. • Parties settled the dispute.
 Claim Amount	Settlement: \$4 million; Defence Costs: \$6 million (approx.)
 Policy Type	EPLI
 Challenges Raised by Insurers	Application of the specific Class Action Retention on this claim due to the initial nature of the complaint, despite the class ultimately not being certified by the concerned Court.
 Marsh's Contribution	Marsh engaged with multiple parties on this multi-year claim, including the insurer, reinsurer, insured's legal teams and counsels engaged from both sides.
 Claim Outcome	Insurers paid the full amount (after applying reasonable legal rates)
 Key Learnings	<ul style="list-style-type: none"> • Necessity of apprising and guiding the insured and their representatives to mitigate costs. • The nature of the initial complaint determines the application of the type of retention. • Keep both the insurer and reinsurer updated on a timely basis to avoid any delays in decision-making and pay-outs made under the policy.

3. Employee Action: Harassment and Retaliation









 Insured	An Indian global information technology company
 Background	<ul style="list-style-type: none"> An ex- employee (claimant) filed an administrative EEOC proceeding in the USA and alleged harassment, discrimination, and retaliation against the insured entity. The EEOC's decision was pending and once the stipulated 180 days had elapsed, they had issued a Notice of Right to Sue letter. Thereafter, the claimant filed an action in the state court and the matter was moved to the concerned district court having the relevant jurisdiction. The matter subsequently was settled in a mediation.
 Claim Amount	Settlement quantum: \$100,000 (approx.); Defence Costs: Excess of \$30,000
 Policy Type	EPLI
 Challenges Raised by Insurers	<ul style="list-style-type: none"> The insurer raised concerns regarding delayed notification and non-disclosure in the proposal form. The EEOC notice dated back to 2019, and the insurer was notified in 2020. Moreover, the manner in which the notification was made, and information provided was considered inadequate by the insurer. Documents/information on the matter were shared inconsistently, which disabled the insurer from reviewing the matter holistically. The insurer flagged not receiving the liability and quantum assessment, the employee-related documents, etc. in a timely manner. Appropriate payment proofs for the defence costs incurred, in the manner expected by the insurer were not available with the insured.
 Marsh's Contribution	<ul style="list-style-type: none"> Marsh represented the case appropriately and obtained the insurer's consent on the mediation settlement on a non-prejudice basis. Appropriate reasons for delay in notification were provided.
 Claim Outcome	<ul style="list-style-type: none"> The insurer settled after applying certain allocations on account of breach of policy terms and conditions. The claim was settled in excess of \$50,000.
 Key Learnings	<ul style="list-style-type: none"> Submission of all documents/information pertaining to the claim should ideally be done periodically without any delays - to enable the insurer to associate with the defence of the matter. Insurers require appropriate payment proofs to be submitted, which include bank statements which reflect the details of the payee, payer, the amount paid, and the transaction number.

Commercial General Liability (CGL) Claims

4. Civil action arising out of bodily injury

 Insured	A Multinational textile company
 Background	<ul style="list-style-type: none"> Insured supplied rugs to an American chain of retail stores. The claimant slipped and fell while using the said bath rug and sustained bodily injuries. The claimant filed a suit against the retail store, and subsequently, a third party complaint was filed against the insured before the District Court in USA. The claimant alleged that the rug manufactured by the insured was defective, not reasonably safe in design, and was not accompanied by adequate warning and instructions.
 Claim Amount	Settlement amount of upwards of \$100,000 and defence costs incurred
 Policy Type	CGL
 Challenges Raised by Insurers	<ul style="list-style-type: none"> The policy was a '<i>right and duty to defend</i>' policy and the insurer took over the defence on behalf of the insured entity. The insurer engaged a counsel in the USA to defend and the insurer's counsel negotiated with the claimant's counsel to reach a settlement in light of the injuries sustained by the claimant, and to prevent a trial before the court.
 Marsh's Contribution	<ul style="list-style-type: none"> We liaised with the insurer from the point of institution of legal proceedings against the insured. We guided the insured in assisting the insurer's counsel to devise a suitable defence strategy on the matter.
 Claim Outcome	<p>Considering the defence was taken up by the insurer, and costs borne by them - there was no payout to the insured.</p> <p>Settlement of \$150,000 + Defence costs borne by the insurer</p>
 Key Learnings	<ul style="list-style-type: none"> Timely notification of the claim must be made to enable the insurer to exercise their right and duty to defend the insured. Extending full cooperation towards the insurer's coverage counsel and their opinion on the defence strategy to be adopted, so as to achieve the best possible outcome for the insured. In a <i>Duty to Defend</i> policy, the insurer is obligated to defend the insured against any suit that seeks damages. Hence, the insurer must take a lead in arranging the defence and assigning the matter to a law firm of their choosing. Whereas in a non-duty to Defend/Right to Defend policy, the insured is obligated to manage their defence, i.e., the insured engages a legal counsel with the prior consent of the insurer, and subsequently the insurer reimburses the costs which are covered under the policy.

5. Product Recall

 Insured	An Indian multinational consumer goods manufacturer
 Background	<ul style="list-style-type: none"> The insured's European unit manufactured a product that are components for agricultural machinery. In early 2022, their customer notified them about product failure. The analysis of the failed product and those from the production line revealed lack of <i>weld penetration</i> as the root cause. Owing to the potential risk of fatal accidents, 4000+ products were recalled and replaced with new ones which corrected the welding parameters.
 Claim Amount	\$800,000 (Approx.)
 Policy Type	CGL
 Challenges Raised by Insurers	<ul style="list-style-type: none"> The insurer was initially of the opinion that the faulty welding parameters were made by a third party contractor. However, it was clarified that the issue had arisen due to parameters set by the insured's technical design team, which was later rectified by the third party contractor during the replacement exercise.
 Marsh's Contribution	<ul style="list-style-type: none"> Marsh assisted the insured to present the facts and circumstances of the claim in an unambiguous manner. Marsh guided the insured on the relevant documentation, collation of data, and submission of numbers.
 Claim Outcome	<ul style="list-style-type: none"> Full settlement was achieved up to the policy sub-limit under the Product Guarantee cover, net of deductible. Final pay out was approximately \$600,000.
 Key Learnings	<ul style="list-style-type: none"> Timely notification, action and collaboration is necessary on both the insured's part to reduce any delays and the overall life cycle of the claim. The insured must be made aware of the exact nature of information and financial data/documentation to be submitted so as not to prejudice their position. A detailed Root Cause Analysis Report which highlights the nature of defect in the manufactured/supplied product is extremely important for Product Liability claims.

Summary of Key Learnings:

- Have a comprehensive understanding of the coverages, conditions and exclusions within your policy. Engage with your broker for details of the workings and intent of the policy contract, and your rights, duties and obligations as the policyholder.
- Keep your Broker informed about all issues and developments so they can aptly assist and guide you through the entire claim assessment, and advocate your interests to the insurer/surveyor.
- Be cognizant of timelines pertaining to a claim or circumstance coming to the notice of your Organisation. Immediately inform your broker and insurer – as well as excess layer insurer(s)/reinsurer(s) – in order to avoid any delays in notification.
- Do not disclose the existence of an insurance policy and any notification thereunder to any claimants; this encourages “deep pocket” syndrome.
- Maintain records, proofs and supporting documents for everything related to the claim. Provide evidence of payment made to settle the amount with the payment proofs being in the policy holding insured entity’s name.
- Co-operate with the insurer and/or surveyor during the claim assessment process. Provide regular and timely updates on the developments in the claim, comprehensive responses to the insurer’s queries and seek your broker’s advice on appropriate submission and representation of the information, data and supporting documents pertaining to the claim.
- Take appropriate measures to preserve the insurer’s right of recovery, and not prejudice your position under the policy.
- Take necessary steps to minimize and mitigate the loss, and act as a prudent uninsured party. Do not admit liability for any accident or loss, or enter into any settlement with a third party without the explicit written consent of the insurer.
- Avoid engaging legal counsels, forensic experts or consultants, or incur any costs without prior written consent of the insurer. It is advisable to engage experts empaneled with the insurer.
- Avoid engaging multiple counsels and/or service providers on a single claim unless required, and necessarily with the insurer’s consent.

Know Your Team:

LEADERSHIP	CLAIMS
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