



# LIABILITY CLAIMS *TAKEAWAYS*

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Welcome to the November edition of 'Liability Claims Takeaways' – our monthly insights from industry stalwarts.



# A Professional Indemnity Insurance

## WHAT WAS THE CLAIM?

*The Insured is a super specialty maternity clinic. A patient admitted at the Insured's clinic for a caesarean procedure alleged medical deficiency by the doctors, consultants, and medical staff of the Insured. The Claimant alleged that the Insured's negligence resulted her newborn child being born with severe mental and physical disorders. The claimant filed a suit for compensation against the Insured. The Insured notified the claim under their medical PI Policy.*

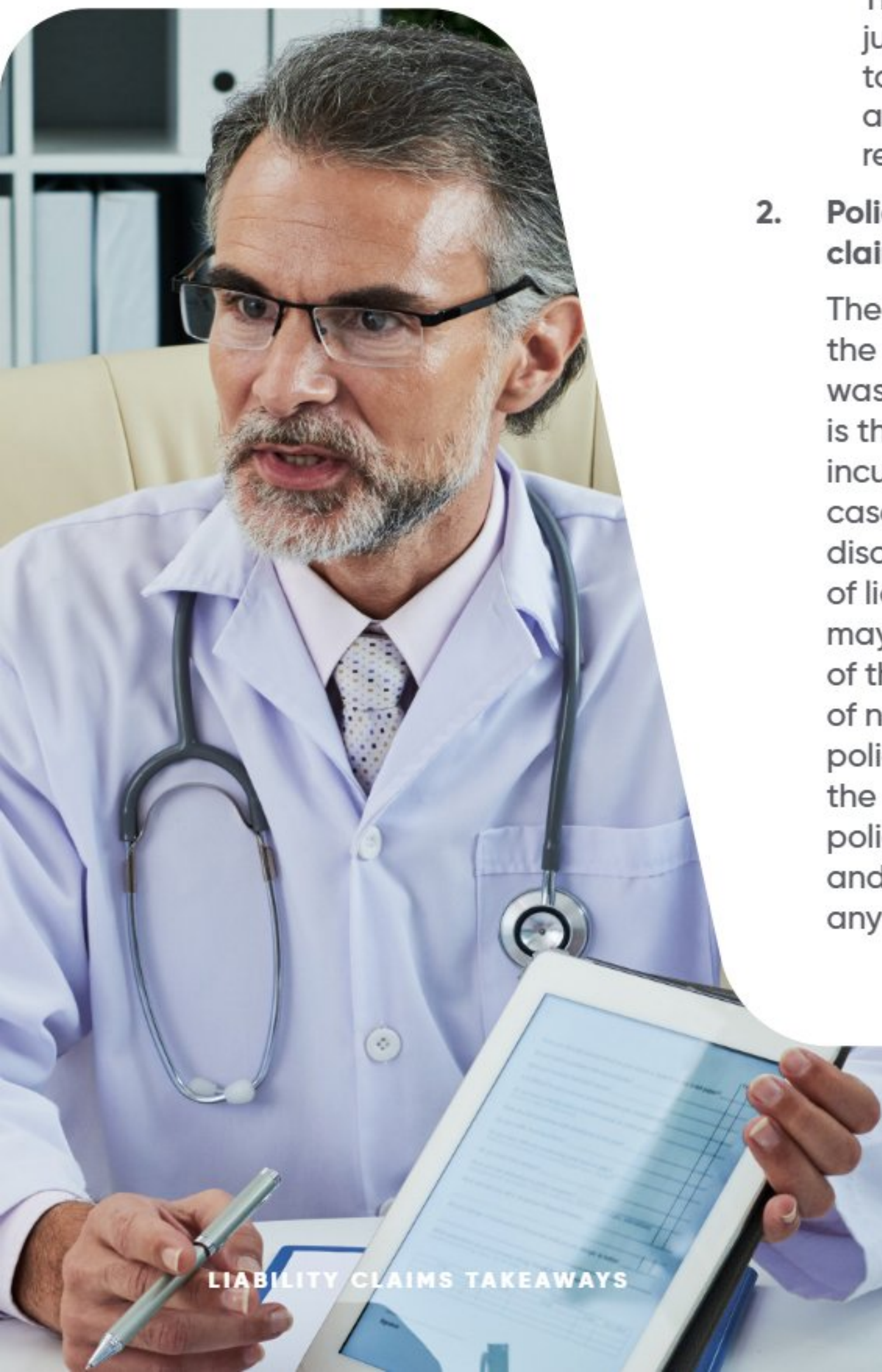
## KEY ASPECTS TO CONSIDER:

### 1. Reasonability of defence costs

- Given the nature and quantum of the claim, in order to protect the Insured's reputation and defend themselves adequately, the Insured engaged the services of a legal counsel with an extensive medico-legal background. In view of the legal counsel's experience and qualifications, his fee estimate was relatively higher, compared to most tier one law firms in the country. As a part of adhering to the policy conditions, the Insurer's prior consent for appointment of the defence counsel was sought, at which time, the Insurer raised an issue regarding the reasonability of the quoted fee.
- As the Insured's representatives, we were able to make a case before the Insurer and explain the importance of engaging a reputed and experienced legal counsel who is equipped to represent the Insured in such a sensitive case. Therefore, the argument of reasonability was justified basis the value the lawyers were bringing to the table in the given scenario and the Insurer agreed to the fee quoted by the legal counsel, for reimbursement under the policy.

### 2. Policy limits should be adequate in view of average claim value and frequency

The Insured had a policy limit of INR 10 crore and the claim made by the claimant in this instance was of approximately INR 9 crore. Adding to that is the defense cost that the Insured is required to incur to defend themselves before the court. In such cases, it is important as the Insured's advisors to discuss with the Insured the adequacy of the limit of liability, where the frequency of high value claims may rise in the immediate future. Upon adjudication of the matter, if the courts find the Insured guilty of negligence and the total claim value under the policy exceeds INR 10,00,00,000 (compensation to the claimant + defence costs) the payout under the policy will not be sufficient to reimburse the Insured, and the Insured will need to pay out of pocket for any amount that exceeds the limit of liability.





# B Commercial General Liability Insurance

## WHAT WAS THE CLAIM?

*The Insured is a manufacturing unit for pesticides and insecticides. The boiler on the Insured's business premises experienced an explosion and destroyed a part of the Insured's plant, premises, and also caused damage to third party property. Unfortunately, a few of the Insured's workmen were grievously injured while a few succumbed to their injuries. The Insured notified the claim under its commercial general liability insurance policy (CGL Policy).*

## KEY ASPECTS TO CONSIDER:

### 1. CGL Policy will only respond to legal liability of the Insured

- As a result of the fire, four third-party vehicles were damaged. Before the official investigation into the same could commence, the Insured paid a sum of INR 1,50,000 to each vehicle owner as ex-gratia payments and claimed the same under the CGL Policy. This payment was made by the Insured without consulting the Insurer/broker, nor was prior consent of the Insurer obtained for the said payment.
- CGL Policy only covers those damages that the Insured is legally liable to pay to a claimant, and any costs, settlements, promise to pay or obligation assumed by the Insured without prior consent of the Insurer, is not usually paid under the CGL Policy. This ex-gratia payment of the Insured resulted in a breach of both policy conditions i.e., was incurred without Insurer's consent and was not in the form of Insured's legal liability. Accordingly, the said sum was not reimbursed by the Insurer under the CGL Policy.

### 2. Costs incurred on account of Insured's employees excluded under CGL Policy

The Insured incurred significant medical expenses towards the treatment of its employees who were injured in the explosion. Additionally, the Insured paid an ex-gratia full and final settlement amount of INR 10,00,000 to the family of each of the deceased and INR 20,000 as compensation for injuries to the employees who suffered bodily injuries. The Insured's CGL policy provided for medical expenses up to INR 2,00,000 to be paid, per person and therefore, the Insured wished to claim the compensation for the medical expenses incurred under this cover. However, this amount was not payable by the Insurer under the CGL Policy since a CGL Policy excludes claims for bodily injury caused to the Insured's employees and the employer's liability of the same.

### 3. Contractual employees are deemed as employees of the Insured under workman compensation laws

Of the total number of employees who suffered bodily injuries, a few were contractual employees who were employed by a contractor and worked for the Insured for a specific tenure. In this regard, it is pertinent to note that with respect to the employee compensation laws in India, once a principal (in this case the Insured) contracts out, and hires employees from a contractor,





the principal steps into the shoes of the employer and is liable to the employee for any compensation that an employer would be liable to pay. The Insurer's views were no different and, on this basis, since a contractual employee is deemed to be an employee of the Insured, the costs incurred on their behalf also fell within the policy exclusion.

#### **4. Insured cannot profit from a beneficiary legislation**

Typically, a claim of this nature could be covered under an employee compensation policy, however, the Insured had already made a claim under the ESIC scheme (employees' state insurance corporation). The ESIC scheme is based on the Employees' State Insurance Act, 1948 wherein, when a person is entitled to any of the benefits provided therein, he shall not be entitled to receive any similar benefit admissible under the provisions of any other enactment. Provisions like these are incorporated to ensure legislations, that have been laid out to protect a specific section of society, are not abused for monetary gain. For this reason, the same claim would not be reimbursed under the workman compensation insurance policy when a claim under ESIC is pending.







# Directors and Officers Liability Insurance

## WHAT WAS THE CLAIM?

*The Insured is a leading company in the oil and gas sector. The Securities and Exchange Board of India (SEBI) imposed a multi-crore penalty on the Insured for making a misleading announcement regarding the buyback of shares. Further, the regulator imposed a fine on each of the directors of the company at the time of violation. According to the SEBI order, the buyback announcement made by the appellants was misleading without any intent to fulfill it and that it was designed to influence the decision of the investors and induce them to trade in the shares of the company. The Insured notified the claim under their Directors and Officers Liability Insurance Policy (D&O Policy).*

## KEY ASPECTS TO CONSIDER:

### 1. Coverage under the holding company's insurance policy

- The Insured entity was in the process of an organisational restructuring wherein it would be restructured as a subsidiary of an existing parent company. At the time of claim notification, the Insured's merger with the parent company was already approved by the relevant authority and was being implemented. This resulted in the Insured already becoming a subsidiary of the parent company. The instant claim was notified under the Insured's own D&O policy and the Insurer was of the view that the 'other insurance' clause would trigger, and the claim ought to be considered under the parent entity's D&O policy covering all its subsidiaries.
- Our team of lawyers was able to demonstrate to the Insurer that while the Insured stood covered under the parent company's insurance program, the retroactive date for the Insured's cover was with effect from the date of merger. Since the cause of the present claim was of a time prior to the merger, it is the Insured entity's local policy which will cover the current claim, and not the parent company's insurance policy. Upon our representation, the Insurer lodged the claim under the Insured's independent insurance policy and proceeded to assess the claim thereunder.

### 2. Importance of reading a policy with a fine-tooth comb

- The base wordings of the Insured's policy provided cover for a securities claim arising out of any written demand or civil, criminal, administrative, regulatory or arbitration proceedings alleging a violation of any laws (statutory or common), rules or regulations regulating securities, the purchase or sale or offer or solicitation of an offer to purchase or sell securities, or any registration relating to such securities. However, the covering clause excluded administrative or regulatory proceedings against the Company from its purview.
- SEBI is a securities regulator in India and therefore, any action by them would fall under the phrase - regulatory proceedings. Therefore, on the face of it, the Insured's claim would stand excluded under the policy, given the carve back of the insuring clause mentioned above. Our team was able to identify this anomaly and have the same rectified with the Insurer ahead of placement, keeping in view the industry the Insured operated in, and nature of claims they are likely to face. This ensured the Insured's claim would





not fall through on account of restrictive policy terms which renders the insuring clause inapplicable.

- Experienced advisors with complete understanding of Insured's business are an important part of a comprehensive risk management program.

### 3. Reasonability of defence costs

- This matter was under appeal before the Securities Appellate Tribunal in Mumbai. The Insured had engaged a legal counsel based out of Delhi who had charged the Insured for outstation fees for appearing before the tribunal. The Insurer raised the contention of reasonability of defence costs on the grounds that, while the Insured has engaged the legal counsel based out of Delhi, their counterparts in Mumbai, ought to be sufficiently equipped to represent the Insured and therefore, the higher rates of outstation appearance need not be incurred by the Insured.
- We have discussed above, how reasonability of defence costs go beyond an 'appropriate fee quote' and extends to the sensitivity of the matter and experience required to handle the same. Inversely, the Insurer cannot be expected to ignore such incremental costs when other practicable solutions are available to the Insured. The Insured in this case, requested their lawyers to brief their counterparts in Mumbai and the defence costs significantly reduced without any impact to the Insured's defence strategy.





We are sure you found the anecdotes interesting and got some key points to take away.

Stay tuned for the next edition!

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- Identifying and addressing gaps in your current insurance programs
- Arranging the most cost-effective cover from Indian and international markets
- Ensuring contract compliance for your insurable indemnities
- Offering 360° claims management by the largest claims team across any broker in India
- Providing global solutions through the strongest international alliances

## Our Claim-Handling Expertise

Our team members come from varied areas of expertise, thereby enabling us to ensure that our clients are assisted thoroughly, through every step of the claims-handling process. We take pride in our professional competency and diligence, and our team is always willing to walk the extra mile in client service.





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