



# LIABILITY CLAIMS *TAKEAWAYS*

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



# A Employment Practices Liability Insurance (EPLI Policy)

## WHAT WAS THE CLAIM?

*The Insured is a multinational corporation in the business of providing information technology services. The management of the Insured decided to effect internal restructuring. Pursuant whereof, the Insured had to lay off a few employees. One such employee challenged their termination and filed a civil suit against the Insured and demanded reinstatement along with compensation for wrongful termination. The Insured filed a claim under its EPLI Policy.*

## KEY ASPECTS TO CONSIDER:

### 1. **Deliberate/dishonest conduct not covered under the Policy**

It is pertinent to note that a typical EPLI Policy will not cover deliberately dishonest conduct or willful breach of law, as that would fall against public policy. Further, while defence costs would be advanced if a claim is covered, the policy also demands that such costs be refunded by Insured to the Insurer, should it be ultimately determined through a final adjudication that the claim is a result of a deliberately dishonest conduct or willful breach of law. In this case, when the matter was ultimately adjudicated, some of the directors were found to be in gross violation of labour laws and therefore, the defence costs incurred on account of the said directors was excluded under the policy.

### 2. **Policy excludes the amount payable to a reinstated employee**

The labour court pronounced the order in favour of the employee and directed the Insured to reinstate the employee to the original post with continuity of service, front wages, arrears of pay and such other dues, benefits, etc. from the date of termination till the date of reinstatement. The EPLI Policy has an exclusion wherein the amount payable to a reinstated employee as front wages pursuant to a judicial/administrative order is excluded under the policy. Similarly, any benefit that the employee is entitled to pursuant to their contract or law is also not covered in the policy. This is critical information that the Insured must be provided before the policy is placed in order for the Insured to appropriately plan for such eventualities.

### 3. **Split the invoices between the entity and named directors and officers**

Like is the case with any liability claim involving multiple parties, allocation between covered and not covered claimants is the reality of an insurance claim. Generally, an allocation is a percentage applied by Insurers towards covered and non-covered matters. In order to protect the Insured's interest and support the Insurer, it is recommended that the invoices raised in defending the claim are clearly demarcated across persons and matters such that the cost incurred for defending the Insured





entity and for defending the directors and officers of the Insured, and any covered and uncovered matters becomes clear. This will ensure that the Insured has sufficient proof of the cost incurred for covered matters and covered Insured persons and the Insured is able to recover all sums due and claimable under the policy.

#### **4. Policy structuring – EPLI versus D&O**

Typically, we have seen that the deductible in an EPLI policy is higher than a D&O policy. Therefore, while structuring the program, as the Insured's advisors, the insurance brokers must explore the possibility of covering directors and officers of the Insured for EPLI matters under the D&O cover, while entity is covered under the EPLI policy. This will allow the directors and officers to take advantage of a lower deductible that may be available under the D&O section.





# B Cyber Security Insurance

## WHAT WAS THE CLAIM?

*The Insured was in the business of providing consultancy services to its clients globally. The Insured developed its own software and worked on the clients' data based on their requirements. The Insured suffered a ransomware attack, and the threat actor was able to encrypt most of the Insured's servers and data. The Insured notified the Insurer immediately of the incident and engaged with the pre-agreed consultants who were on the Insurer's panel.*

## KEY ASPECTS TO CONSIDER:

### 1. Measures taken to minimise business interruption losses

- The threat actor (TA) did not release the Insured's data for over a period of 7 days and thereafter, given the risk of malware, the process of decrypting the data was rather time consuming, resultantly, the Insured was losing a lot of business. In order to prevent further business interruption losses, the Insured set up a parallel server by renting hardware equipment. This entire process was done by keeping the Insurer duly informed. The cyber response manager engaged by the Insured was authorised by the Insurer to monitor the entire process and provide necessary consent to the Insured, as it deemed fit and keep the Insurer updated of the same. The Insured adhered to these conditions and timely updates were provided to the cyber response manager as well as the Insurer.
- The above came to the Insured's rescue at the time of reimbursement. The Insured was able to make a case before the Insurer with supporting emails to establish that the cost incurred were in accordance with the policy terms and conditions and with Insurer's prior consent. Further, the costs were incurred with a view to minimise the business interruption losses, as at the time of the incident, that appeared to be the best solution for loss mitigation.
- The Insurer was eventually satisfied with the rationale provided and agreed to the costs since it was a sound financial decision taken by the Insured, with the Insurer's prior consent, which ought not to be revoked retrospectively.

### 2. Duty to keep the Insurer apprised

- The Insured was successful in making a case for itself before the Insurer only because the Insured adhered to all the policy conditions and ensured that the Insurer was kept in the loop through the course of the incident. Right from the discovery of the incident, to seeking approval for appointment of the various consultants to discussing recovery models and plans of renting equipment, the Insurer's rights were respected.
- These aspects are often overlooked by Insureds since they focus on mitigating their losses. While the Insurer is reasonable and understands the severity of the situation, there are policy conditions which if breached, will prove counterproductive to the Insured's cause and deprive them of a genuine claim.





We urge that upon the occurrence of an incident which results in an insurance claim and through the pendency of the same, a designated person be identified who will ensure efficient and quick sharing of all material events with the broker/the Insurer to ensure no critical information is missed.





# Fidelity Guarantee Insurance

## WHAT WAS THE CLAIM?

*The Insured was in a business which required them to have a set of employees on its payroll and also to hire persons from a manpower contractor. The employees on the payroll of the Insured along with some of the contracted employees colluded and misappropriated the Insured's accounts using multiple employee IDs and credited their respective accounts with the illicit gains. The Insured notified the claim under its Fidelity Guarantee Insurance.*

## KEY ASPECTS TO CONSIDER:

1. **Coverage under the Policy is extended only to fraud committed by the 'employees' of the Insured**
  - A fidelity guarantee policy typically aims to indemnify the Insured for their losses arising from the dishonest or fraudulent acts of their employees. At the time of assessing coverage under the policy, the Insurer raised a contention regarding the loss suffered by the Insured due to the employees outsourced from the manpower contractor. It was being suggested that only that part of the loss, which resulted on account of the Insured's 'payroll employees' will be considered under the claim. The Insurer's rationale being the outsourced employees did not fall within the ambit of 'employee'.
  - With sufficient judicial precedence, our team of lawyers were able to establish that the work of the outsourced employees, the salaries, gratuities, and other employee benefits, including the bonuses in this case, was controlled by the Insured. The requisites to prove the employer- employee test was met by the Insured. The Insurer, upon being satisfied of the same, considered the total loss value for payment.
  - Another key aspect that assisted in the above was inclusion of 'contractual employees' in the policy at the time of placement. This was possible due to the experience and knowledge of our placement team. This further emphasises the importance of experienced advisors while placing liability insurance policies and handling claims.





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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We, at Prudent Insurance Brokers, provide industry-leading expertise in designing and managing insurance programs to address unique requirements of your organization. We have a client-centric service infrastructure that delivers proactively & passionately in a highly systematic manner. Our Liability Team comprises of ex-underwriters and the largest number of qualified lawyers and legal professionals who can help you across different areas:

- 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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