

Liability Claims Takeaways

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Welcome to the 40th edition of 'Liability Claims Takeaways' - our monthly insights from industry stalwarts.

CONTENT:

Comprehensive
General Liability

Liability in the course
of a transaction

Employment Practices
Liability Insurance



Comprehensive General Liability Policy (CGL Policy)



What was the claim?

Insured is a leading manufacturer of packaging material primarily used for food packaging. These packaging rolls are exported to multiple geographies, including Europe and the USA. The insured received a complaint from one of their buyers in the food packaging business in the USA regarding contamination in the supplied packaging material. As a result, the buyer was compelled to recall the packaged product from their clients due to suspected contamination of the packaging material. The buyer also allegedly suffered a significant loss of their own product and thus raised a demand of approximately USD 5 million against the insured. Upon receiving the information, the insured promptly informed the broker, who, in turn, notified the insurer under their Comprehensive General Liability Policy (CGL Policy).

Key aspects to consider:

1. Prior consent for costs:

Upon receiving the demand notice from the buyer, the insured immediately involved us, and we advised them not to incur any costs, including those related to the repair or replacement of the allegedly defective products. Guided by this, the insured sought prior consent from the appointed surveyor and the insurer before initiating the recall of their product. The insurer gave approval for the recall without prejudice to their rights under the policy and advised the insured to ensure that all the costs incurred during the recall process are supported by documentation.

Additionally, we assisted the insured in justifying to the insurer that the recall undertaken was the most economically viable option, as reprocessing and salvaging the defective product in India were most likely to minimise losses.

Thus, it is crucial to keep the broker and insurer involved in case of any claim from the inception. This helps navigate the claim in a manner consistent with policy terms and conditions. Further, with timely intervention, the business interests of the insured and the insurance policy terms and conditions can be aligned to the benefit of all the stakeholders.





2. Coverage for defence costs:

The CGL Policy inter alia covers defence costs incurred by the insured in defending any claim, subject to the terms and conditions of the policy.

In the present matter, the insured wanted to engage a legal counsel in the respective jurisdiction to assist them. As their broker, we also assisted them in identifying lawyers in the relevant jurisdiction who could represent the interests of the insured. Additionally, prior consent from the insurer was also obtained timely, resulting in a smooth engagement.

It is imperative to undertake the appointment of defence counsel with the prior consent of the insurer for coverage of defence costs under the policy.

3. Preservation of evidence:

Since the matter arose in the USA, the claimant's lawyers had asked for the preservation of all evidence related to the matter. Keeping this in mind, suitable legal advice was sought at all times before handling any returned materials. As insurance brokers operating in the liability insurance space, it is also critical to understand the broad potential nuances of litigation in different countries to be able to provide timely advice to the client at the time of a claim.

Liability in the course of a transaction



What was the claim?

The insured recently acquired another business via an asset purchase, coupled with a subsequent merger of the two organisations. Post the closing, a claim was made against the director of the insured, who was appointed as a director pursuant to the transaction. The claimant was a former employee of the entity whose assets were acquired. The matter was primarily notified under the Employment Practices Liability Insurance policy (EPLI policy).

Key aspects to consider:

1. Scope of policy vis-à-vis acquired entities:

A liability policy typically provides coverage for any claim made against the insured during the policy period and notifies the insurer within the agreed notification period. Another aspect of coverage is the action/wrongful act that gives rise to the claim. Generally, coverage applies only to claims arising from wrongful acts occurring after the policy's inception. Therefore, in a case where a company is acquired by another company, the transferor company will be covered under the transferee company's policy only from the date of acquisition being complete. Coverage applies solely to actions taken/wrongful acts committed on or after the date of acquisition.

2. Need for a run-off:

More often than not, we have witnessed situations where a claim arises against a transferor company for actions taken by them prior to the date of acquisition. Since these claims are not typically covered by the transferee company's insurance policy, it is expected that the transferor company will take a run-off of their respective insurances that were valid and subsisting as of the acquisition date. This ensures that new claims arising from prior actions can still be covered.

3. Need for warranty and indemnity insurance:

Additionally, in the case of such acquisitions, we recommend that the transferee explore the need for warranties and indemnity insurance.

This is critical if the intent is for the transaction to be closed without tail liabilities and other methods like escrow and claw-back are not intended to be pursued. Such insurance will cover the transferee for any losses that they suffer due to a breach of covered representation and warranty of the transferor in the transaction documents.



Employment Practices Liability Insurance (EPLI)



What was the claim?

A case was filed by one of the erstwhile directors of a leading IT company in India, alleging wrongful dismissal and non-payment of agreed remuneration and additional compensation. The matter was notified under the Employment Practices Liability Insurance (EPLI) section of their Directors and Officers (D&O) insurance.

Key aspects to consider:

1. Coverage for remuneration:

EPLI policy provides cover for legal liability via damage or compensation of the insured entity or insured persons against the claimant arising from covered employment practice violations. In this case, the claim included back wages, front wages, salary, and other contractually agreed remuneration, which were categorically excluded from the policy. Therefore, when allocating defence costs, the insurer, broker, and insured agreed to an allocation that reflected the division between covered and uncovered aspects of the claim. .

2. Insurer's consent – one shot or stage-wise?

In such cases, multiple stages may occur, interim applications may be filed, and different proceedings may be required to counter a specific aspect of the matter. Therefore, if the initial consent received from the insurer did not include a fee estimate for any stage arising later, then consent needs to be obtained again for the new stage that has arisen for the first time. This ensures that all costs are incurred with the insurer's prior consent and policy terms are adhered to, resulting in a smooth claim process.

3. Reasonableness of defence cost:

One of the most commonly discussed aspects of defence costs is reasonability. We have seen at times that the insured's legal advisors propose a fee structure that may seem disproportionate to the work or similar work done before. In such cases, the insurer may question the reasonability of cost as is their right under the policy, and a discussion ensues on what part of the cost is, in fact, reasonable

and, therefore, covered in the policy. Generally, three alternatives arise:

- The insurer proposes a lawyer of their choice, including reasonability of cost, and the insured engages such a lawyer
- The insurer proposes a reasonable fee slab, and the insured is able to convince their lawyer to agree to the said slab
- The insured's lawyer did not change their proposed fee, and the insured wishes to continue with the lawyer and agreed to subsume the delta between the reasonable fee and the actual fee

As the insurance broker, the role of the intermediary is critical in keeping the conversation aligned with the thought that while the reasonability of costs is a positive aspect, it must not result in the insured's right being prejudiced, and their defence remains sufficiently strong.



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 one of the largest claims teams 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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