

Liability Claims Takeaways

October 2023

Welcome to the 34th edition of 'Liability Claims Takeaways' - our monthly insights from industry stalwarts.

C O N T E N T :

Employment Practices Liability
Insurance Policy

Commercial Crime
Insurance Policy

Contaminated Products
Insurance Policy



EPLI Policy

How a relevant endorsement can make or break a claim?

What was the claim?

The insured are Asset Management Consultants who offer a wide range of services to help their clients in selecting the vendors, analysing their scope of work, and their onboarding. During an ongoing project for their client, two of the client's employees raised an allegation against the insured's employee for sexually harassing them in his office. They filed a complaint with their organisation which terminated the project and filed a police complaint against the insured's employee. The employee defended himself claiming that he was being framed by the client's employees. As a result, the insured filed a claim under their Employment Practices Liability Insurance (EPLI) policy.

Key aspects to remember:

1. Importance of the endorsement covering EPLI claims by a third-party

An EPLI policy aims at covering alleged or actual wrongful acts brought by or on behalf of any past, present, or prospective employee(s) of the insured organisation.

In the present matter, the allegation of sexual harassment has been made by the client's employee against the employee of the insured i.e., a claim made by a third-party against the insured person.

The base wordings of the EPLI policy do not usually provide coverage for such claims, however, due to the expertise of our team and previous experiences in handling EPLI matters, we ensured that an endorsement covering claims by any customer(s), client(s), supplier(s), distributor(s), non-employee or third-party against any insured person for wrongful acts or alleged sexual harassment in connection with employment is covered under the policy.

While the definition of a wrongful act is very extensive under the EPLI policy, the endorsement for third-party claims is restricted only to a few wrongful acts. This means that if a claim were to be brought for any other allegation not included in the endorsement, then such a claim, even if related to EPLI matters, would not find coverage under the policy.

2. Concept of interrelated wrongful acts

In an EPLI policy, typically each wrongful act is a separate incident and thus a separate deductible is applicable to each claim.

However, the EPLI policy provides a concept of Interrelated Wrongful Acts i.e., all losses arising out of single wrongful act or interrelated wrongful acts shall be considered as one claim under the policy regardless of the number of claims, claimants, or insureds against whom such claims are made.

In such cases, the date of receipt of the first claim pursuant to a wrongful act would be taken as the date of the claim first made against the insured for all interrelated wrongful acts and, the policy in existence during such first date would trigger.

Since the insured's EPLI policy provided for interrelated wrongful acts, and the complaint was filed by two of the client's employees, against the same insured person, owing to the policy terms, we were able to convince the insurer to treat these as a single claim and a single deductible was applied accordingly.



Commercial Crime Insurance Policy (Crime Policy)

What are the fine differences between the Criminal Act and IT Criminal Act?

What was the claim?

To manage their finances appropriately, the insured appointed a third-party vendor who would take care of their investments and financial transactions. However, one of the insured's employees in collusion with an employee of this third-party vendor maliciously prepared a false program which resulted in the insured losing their money. Consequently, the insured filed a police complaint against the employee of the third-party vendor and made a claim under their Crime policy for the amount lost.

Key aspects to remember:

1. Concept of IT criminal fraud under the Crime policy

The insured's Crime policy provides coverage for losses sustained by the insured as a direct result of any criminal act or any legal liability that covers only theft, fraud, and robbery.

However, there was an extension taken under the Crime policy for IT Criminal Act which provides coverage for any willful, unlawful, and targeted intrusion into the insured's data or computer system, which is fraudulently, dishonestly, or maliciously prepared, created, input, modified, damaged, or deleted.

Since the insured suffered losses on account of the action taken by the employee of the insured who relied upon the malicious code prepared by the third-party employee, the claim was paid under the IT Criminal Act extension.

2. Difference between Criminal Act and IT Criminal Act

Typically, in Crime policies, the Criminal Act is restricted to the physical act of the crime that covers theft, fraud, and robbery, whereas any intrusion in the insured's computer system or data is covered by the IT Criminal Act.

Further, for a claim to trigger under the Criminal Act cover, there should be a financial or property loss suffered by the insured or a

legal liability imposed on the insured by their client due to the criminal act. However, in an IT Criminal Act, it must be established that any data or computer programme which the insured has relied on in the course of the insured's business has fraudulently or maliciously been modified/damaged as a result of wilful, unlawful and targeted intrusions into the insured's computer system committed with the intent to cause a loss specifically and directly to the insured.



Contaminated Products Insurance Policy

To what extent does your product insurance cover government recalls?

What was the claim?

The insured was in the business of manufacturing pharmaceutical products and exported the same to customers in the USA. The FDA (Food and Drug Administration) banned the manufacturing of one of the insured's products upon finding the carcinogenic limits beyond the prescribed limit by the FDA. In addition, the FDA informed the insured that the amount of the carcinogenic element increased over time and appeared to be dependent on the formulation and how close the batch was to expiry. Therefore, the FDA issued a notice to the insured to voluntarily withdraw the product. Accordingly, the insured notified the claim under their Contaminated Products Insurance Policy (CPI Policy).

Key aspects to remember:

1. Trigger under the CPI Policy

While insurance policies such as product recall insurance are available in the market and come to the aid of policyholders to recover financial losses, CPI policies have a specific role. CPI addresses accidental or malicious tampering of products that could result in bodily injury or property damage.

CPI provides cover to policyholders for recall costs, loss of gross profits, and rehabilitation costs following either accidental or malicious contamination (whether actual or threatened).

2. Coverage for government recall

Given the nature and cover of CPI policies, one of the most critical coverages for the insured is that of recall, which includes government recall and associated costs.

In this situation, the policy extends cover to any accidental or unintentional contamination, impairment, or mislabeling of an insured product(s). This occurs during or as a result of its production, preparation, manufacture, packaging, or distribution and when it has been deemed by a competent authority to be unfit for human consumption and has resulted in an authority-mandated recall in compliance with regulations on food safety.

The requirement of being declared unfit by a competent authority keeps a check on the cover from being misused for voluntary recalls.

The coverage was extremely critical to ensure the insured was covered by the FDA recall notice. The exercise carried out by our liability experts in understanding the insured's business, the laws of the jurisdiction in which the insured operates, and the risk of recall/incurring costs of this nature came to be extremely crucial.

3. Concept of unintentional impairment leading to accidental contamination resulting in coverage under the policy

The insurer repudiated the claim and did not request any further information after the forensic reports established the presence of carcinogenic substances in the product, given that the policy excluded claims arising out of, based upon, or attributable to carcinogens.



However, while the levels of carcinogen in the product crossed the acceptable limit and threshold, the insured was eligible for coverage under the policy since the very trigger for a recall (government) that the insured was facing was to establish accidental or unintentional contamination, impairment, or mislabeling of the product which:

- i. Occurs during or as a result of its production, preparation, and/or manufacturing.
- ii. Has been deemed by a competent authority to be unfit for human consumption by reason of being injurious to health.
- iii. Has resulted in a recall by such authority in compliance with regulations on food safety.

In the instant matter, we were able to make a case before the insurance company highlighting how each and every one of these ingredients for a covered incident were met under this matter:

- a. While the insured was aware of the presence of the carcinogen in the formulation of the product, the increased level of the carcinogen beyond the acceptable level was not known or intended.
- b. Further the increased carcinogenic levels made the product unfit for use resulting in an unintentional impairment in the product.
- c. This unintentional impairment ***occurred as a result of the insured's manufacturing process. This rendered the product unfit for human consumption by a competent authority and lastly resulted in a recall of the product by such authority in compliance with the FDA regulations.***

Therefore, the policy condition which excluded claims arising out of accidental contamination arising out of carcinogens, did not apply to the insured's claim since the necessary ingredients to establish an accident as against an 'unintentional impairment' were not met. Further, we were able to establish that the rise in the existing level of carcinogen cannot be deemed as accidental if it was within the knowledge of parties including the insured and insurer.



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.



www.prudentbrokers.com

FOR MORE QUERIES, PLEASE REACH OUT TO:

Tanuj Gulani
tanuj.gulani@prudentbrokers.com

Richa Dhasmana
richa.dhasmana@prudentbrokers.com

Nishant Kashyap
nishant.kashyap@prudentbrokers.com

Arun Prasadh
arun.prasadh@prudentbrokers.com

Shreya Dave
shreya.dave@prudentbrokers.com

Neha Anand
neha.anand@prudentbrokers.com

Jyoti Krishnan
jyoti.krishnan@prudentbrokers.com

Mayank Sharma
mayank.sharma@prudentbrokers.com

Hemangi Jhaveri
hemangi.jhaveri@prudentbrokers.com

PRUDENT INSURANCE BROKERS PVT. LTD.

Mumbai | Bengaluru | Gurugram | Pune | Chennai | Hyderabad | Ludhiana | Ahmedabad | GIFT City - Gujarat | Kolkata

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