

## Errors and Omissions, Media and Privacy (EMP)

### Claims Examples



#### Errors and Omissions

A management consulting firm specializing in efficiency consulting was hired to reduce the cost of distribution for a large chain of retail bakeries. They advised the company to concentrate on baking and packaging and to contract out delivery to a trucking company. The consulting firm worked closely with the bakery to complete the changes by the end of their fiscal year. Delays in contract negotiation with the trucking company caused distribution setbacks for the company's flagship product, Independence Day-themed cupcakes. The cupcakes did not arrive in time for the holiday, causing the bakery a significant loss in revenue. The management consultant was sued for negligence and defense costs exceeded \$200,000.

#### Technology Errors and Omissions

A software company was hired by a transportation company to design a software program that would route freight more efficiently. After six months, the developer failed to deliver the program as promised in their contract, and the company was forced to hire a replacement firm to complete the project. The transportation company sued for damages of \$3,000,000, which included the additional cost to complete the program and recover lost profits. The software company argued damages sustained by the plaintiff were limited to \$650,000 in fees paid for the software program. However, due to the negligence of the software design firm, the jury rendered a verdict of over \$1,000,000 in favor of the plaintiff.

#### Intellectual Property

During a televised sporting event, a car company aired a commercial that showed a ball with a trademark symbol bearing a striking resemblance to a logo of a luxury fashion designer. The fashion designer filed suit against the car company alleging trademark violations. It turned out that neither the car company nor their ad agency had permission to use the trademark. The fashion designer won summary judgment in the case and was ultimately awarded damages of \$3,200,000.

#### Personal Injury

A manager of a well-known hotel heard a rumor that a competing hotel had bedbugs and published a tweet based on that rumor. The competing hotel became aware of the tweet and sued for libel. During discovery, it became apparent that the allegations in the tweet were not factual, and the tweet was timed to inflict maximum harm to the competing hotel. The jury ruled in favor of the competing hotel for a total of \$1.25 million in damages.

#### Network Security and Privacy Liability

An employee of a manufacturing company inadvertently downloaded a destructive virus that quickly spread throughout their network. As a result, approximately 25 percent of the company's customers were infected with the same virus. Consequently, their customers suffered a widespread loss of data and a complete shutdown of their networks. The customers filed a class action suit against the company, claiming they should have prevented the transmission of the virus. The customers sought damages for the cost to restore lost data and their economic loss. Total damages awarded were over \$3,000,000.

## Regulatory Defense

A national network support company has field employees who frequently used company-issued laptops at customer locations. The laptops contained sensitive data from their customers' networks, including social security numbers and medical records. One day, an employee of the support company had his laptop stolen from his car. Although the data on his laptop was encrypted, the employee had his password taped to the laptop. Due to embarrassment, the employee did not notify the employer until two months later. Although the network support company immediately set about notifying affected parties of the breach, they were ultimately fined by the Attorney General for not notifying their customers in the time frame allotted by the state. The total amount of loss and claim expense was over \$700,000.

## Payment Card Industry (PCI) Fines and Penalties

A multi-location retailer was notified by its payment card-processing bank of a possible data breach to their point-of-sale (POS) system. A forensic investigation found that the retailer unknowingly transmitted unencrypted credit card numbers. The payment card processor demanded indemnification for fines assessed by the credit card companies who alleged a data breach. The payment card processor withdrew \$100,000 from the retailer's bank account and sued them for the balance of \$500,000.

## Privacy Breach Expense

A restaurant with 15 locations was hit with a data breach that exposed the credit and debit card numbers and expiration dates of approximately 480,000 customers. The company spent over \$890,000 to hire a firm to conduct forensics to determine all those affected, re-secure its network and send out notification letters across multiple states. They also set up credit monitoring for its customers and spent an additional \$90,000 on hiring a public relations firm to manage the publicity surrounding the event. The costs associated with the breach were over \$1,000,000.

## Cyber Extortion Threat Expense

The owner of a marketing agency arrived at the office to discover he and his employees were locked out of their computer system. A hacker notified him that the agency had 48 hours to pay \$50,000 or all files on their server would be deleted. As the deadline approached, the owner realized that he couldn't thwart the attack and was forced to pay the amount demanded.



Email submissions to [proof@oralcarepartnership.com](mailto:proof@oralcarepartnership.com)

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## Errors and Omissions, Media and Privacy (EMP)

Our product provides broad coverage for evolving exposures faced by all businesses. The policy can be purchased with one or more coverage parts for companies with revenues between \$15 million and \$150 million.

### Highlights Applicable to All Coverage Parts

- Limits available up to \$5,000,000
- Worldwide coverage territory
- Vicarious liability included
- Full severability for innocent parties
- Softened hammer clause of 75/25 in favor of insured
- Three year extended reporting period
- Single deductible applies to interrelated acts
- Duty to defend policy with 100 percent allocation

### Highlights Applicable to Cyber Coverages (Parts C and D)

- Full prior acts coverage available for first-time buyers
- Full limits available for all coverages (no sublimits)

### Professional and Technology Errors and Omissions (Coverage Part A)

Covers claims arising from the insured's professional services for a broad range of companies including miscellaneous professionals and technology firms. This includes coverage for:

- Unintentional breach of contract
- Independent contractors coverage
- Broad coverage for use of the Internet and technology in delivery of professional services, for most miscellaneous professionals and technology firms
- Technology products coverage available for qualifying accounts

### Media Liability (Coverage Part B)

Covers claims alleging personal and intellectual property injury including libel, slander, copyright and trademark infringement. This includes coverage for:

- Negligence in content
- Content displayed on products (logos, images, etc.)
- Broadly-defined "covered content" or option to customize schedule of "covered media activity"
- Full limits of intellectual property
- Media liabilities assumed under contract

### Network Security and Privacy (Coverage Part C)

Covers claims against insureds arising from a failure of network security, breach of private data, violation of a privacy law or disclosure of third party corporate information. This includes coverage for:

- Regulatory actions arising from violation of HIPAA or any other privacy law, including claims expense, fines, penalties and consumer redress funds
- Payment Card Industry (PCI) fines and penalties
- Payment Card Industry (PCI) assessments which include reimbursement for fraudulent bank charges and costs to reissue debit and credit cards
- Full limits available for regulatory actions, PCI assessments, fines and penalties

### Privacy Breach and Extortion Threat Expense (Coverage Part D)

Covers expenses arising from a privacy breach, including forensics, notification (including call center services), credit monitoring, public relations and computer system restoration, as well as expenses arising from a cyber extortion threat. This includes coverage for:

- Breach of Personally Identifiable Information (PII) in any form (including both digital and paper files)
- PII stored by the insured's third party vendors
- Privacy breach caused by a rogue employee
- Breach of employees' private data
- Voluntary notifications
- No "failure to maintain safeguards" clause
- Business interruption arising from a privacy breach available for qualifying accounts
- Privacy breach expense in addition to limits of liability available
- Full limits available for data restoration, cyber extortion threat expense and business interruption

### Additional Advantages:

- Unsurpassed service with a sense of urgency and care
- Same day or next business morning claims acknowledgement

- Policyholders have access to many free and discounted services through our Business Resource Center that will assist in growing and protecting their business
- Carriers are members of the Berkshire Hathaway Company

### **What Is the Benefit of the EMP Policy?**

Businesses face increasingly complex legal exposures in their day-to-day operations. Litigation can arise from the professional services they provide, their marketing and advertising efforts and data they collect or store.

Our EMP product provides a solution for these various exposures all in one policy form. We provide the flexibility to purchase one or more coverage parts, enabling our policy to be tailored to the policyholder's needs. When an incident occurs, our world-class experts will respond by providing guidance, helping to reduce expenses and protect the policyholder's reputation.

### **What Is the Benefit of Privacy Coverage?**

Most businesses store and transmit many types of sensitive data, including customer data, credit card numbers and employee information. Addressing a breach involving this data is complex and expensive. State and federal laws require businesses to go through an expensive process of notifying customers and employees that their sensitive data is missing (known as a "data breach"). No evidence of malicious use of missing data is needed to constitute a breach; simply misplacing data in paper or digital format qualifies the incident as a breach. In addition to being an extensive and expensive process, a data breach also damages the reputation of a business, leading to loss in revenue.



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## Executive ViewPoint (EVP)

### A Management Liability Product *Claims Examples*



#### **Directors and Officers**

##### *Supplier Error Causes Breach of Contract Claim from Customer*

ABC Company is a privately held wholesaler that sells to contracted retail businesses. ABC depends on its supplier to provide material necessary to create its product. In preparation to fulfill ABC's customers' contract orders for the upcoming season, ABC places its supply order. Unfortunately, days before the delivery date, a processing error occurs in the supplier's facility, which renders the material unusable. As a result, ABC is unable to fulfill customer orders. ABC and its directors are sued for breach of contract by customers. The individual directors are provided a defense. Defense costs total \$74,858.

##### *Shareholders Sue Board for Breach of Duty After Investment Loss*

After a successful season, Company A accumulates a large surplus of capital. The board recommends that Roger, a director, lead a committee to generate investment income with the goal to eventually use the funds to build a new facility. The committee meets with several investment consultants before finally deciding to purchase shares of Company B. Four months into the purchase, Company B's shares plummet due to an unsuccessful product launch. As a result, the value of Company A's investment is significantly reduced. Shareholders sue Roger and the committee for breach of duty, mismanagement of funds and negligence. Defense costs exceed \$490,000.

##### *Business Expansion Leads to Competitor Lawsuit*

ABC Company is a privately held distributor that is looking to expand its retail customer base in a nearby city. A direct competitor of ABC has already contracted with major retail stores within that city. In an effort to win business, ABC launches an exclusive incentive allowing customers to waive delivery fees for a full year. As a result and unknown to ABC, the customers of the competitor terminate their agreements with the competitor. The competitor sued ABC for tortious interference (wrongful interference with contractual or business relationships). ABC was provided a defense and ultimately won at trial after the judge agreed that ABC's actions did not constitute tortious interference. Defense costs were over \$300,000.

#### **Employment Practices Liability**

##### *Employee Fired After Positive Review and Sues for Wrongful Termination*

Company A hires Joan. Despite a rigorous hiring process, it soon becomes clear that Joan is not meeting expectations; she is repeatedly late, is rude to her co-workers and managers, and often misses deadlines. In an attempt to avoid dealing with Joan, her manager decides to give Joan a positive review and promote her to another position where she reports to another manager. In her new position, Joan continues to exhibit her poor work ethic. The new manager is unsatisfied with her performance and fires Joan. A few weeks later, the company receives a suit from Joan alleging wrongful termination, as her records show her positive performance review. Joan sues for back pay and front pay and emotional distress. Defense and settlement exceed \$85,000.

## Employment Practices Liability (Cont.)

### *Employee Sues for Workplace Bullying Despite Accommodations*

Chrissie works for Company A. She claims to be harassed and bullied by her co-workers. Chrissie goes to her manager and complains. Her manager explains that this is the culture of the department; they like to joke around and enjoy a lively, fun pace. After complaining one more time, the manager decides it would be best to move Chrissie to another department without change in pay. Chrissie is again unhappy and resigns despite accommodations. A few weeks later, Chrissie sues, alleging workplace bullying, sexual harassment and hostile work environment. She claims the new department was a demotion; it limited her opportunity for growth and caused a loss in seniority status. Settlement and defense costs total \$318,750.

### *Termination of Under-Performing Employee Leads to Age Discrimination Allegation*

Company A has employed Ted, age 59, for the last fifteen years. The company invests in new project management software. They offer extensive training sessions to allow all employees to feel comfortable with the software, but Ted does not attend any of them. Ted's productivity is consistently below standard, and the company receives several customer complaints. Ted's supervisor reviews Ted's performance and encourages him to attend the trainings, saying he will be more efficient when he learns to correctly utilize the new software. When Ted's performance does not improve, Ted is fired. Ted files a lawsuit against the company alleging age discrimination, seeking two years' worth of front pay and a large sum for emotional distress. Defense costs and settlement exceed \$120,000.

## Fiduciary

### *Administrative Error Results in Lost Investment Income for Plan Participants*

An administrative error causes a stock investment change to not be implemented in Company A's 401k Plan. A group of plan participants realizes this request was never put into effect, and, as a result, they collectively lost \$86,971 in investment income they would have gained. Defense costs and settlements are greater than \$90,000.

### *Plan Participants Sue Fiduciaries for Failing to Review Work of Third Party Plan Administrator*

To ensure the best employee benefit plan investment management, Company AB decides to utilize an outside service provider, XY Benefits, to administer their employee benefit plan. XY Benefits fails to properly diversify plan participants' assets, causing a significant loss in value. Company AB is sued for breach of duty for failing to review the work of XY Benefits. Defense and settlement exceed \$150,000.



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## Executive ViewPoint (EVP)

### Lifetime Occurrence Reporting Provision



#### Directors and Officers

Directors and officers of an organization may still be at risk of being named in a lawsuit even years after leaving their positions. Under Devon Park's Executive ViewPoint ("EVP") policy, former directors and officers automatically receive an unlimited extension of protection from claims if the new board elects to cancel or non-renew their coverage with us. The LORP gives former directors and officers peace of mind by combining the advantages of occurrence coverage on a claims made policy.

#### Directors and Officers Liability

- Lifetime Occurrence Reporting Provision (LORP) for former directors and officers
- Additional Side A Limit of \$1,000,000 automatically included
- \$100,000 sublimit for:
  - ◆ HIPAA fines and penalties
  - ◆ Foreign Corrupt Practices Act (FCPA) fines and penalties
- Carveback in the definition of "loss" for taxes imposed in bankruptcy on directors and officers for Side A Loss
- Broad definition of "claim," including extradition costs
- \$250,000 sublimit for "shareholder derivative demand investigation costs"
- Broad definition of "insured," including:
  - ◆ Advisory board
  - ◆ In-house general counsel
  - ◆ Independent contractors
- Conduct exclusion includes final non-appealable adjudication in the underlying action language
- Severability of the application and conduct exclusions for "insured persons"

#### Claims Examples

Christina served as president of a trade association. During her tenure, she diligently maintained a Devon Park Specialty EVP Directors and Officers Liability policy. After her term expired, and she was no longer an officer or director of the association, the new president and the board failed to renew the D&O policy. Two years later, Christina was included as a defendant in a lawsuit filed against the new president for mismanagement of funds, which allegedly occurred while the EVP D&O policy was in effect. Without insurance, the new president was forced to pay a substantial amount out of pocket for his own defense. Because Christina was not an officer or director of the association when the decision was made to non-renew the EVP policy, she had coverage for her defense costs under the LORP.

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## Executive ViewPoint (EVP)

### A Management Liability Product

Executive ViewPoint (EVP) is a Management Liability policy designed to cover private companies with 201 up to 1,500 employees. We offer the following coverage parts and policy features:

#### Key Policy Features

- Non-rescindable policy
- Duty to defend policy with 100 percent allocation
- No hammer clause
- 12-month application look-back
- Limits of up to \$5,000,000 available for each coverage part
- Timely Notice and Resolution Incentive

#### Directors and Officers Liability

- Lifetime Occurrence Reporting Provision (LORP) for former directors and officers
- Additional Side A Limit of \$1,000,000 automatically included
- \$100,000 sublimit for:
  - ♦ HIPAA fines and penalties
  - ♦ Foreign Corrupt Practices Act (FCPA) fines and penalties
- Carveback in the definition of "loss" for taxes imposed in bankruptcy on directors and officers for Side A Loss
- Broad definition of "claim," including extradition costs
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#### Coverage available via endorsement:

- ♦ Privacy Breach Expense
- ♦ Workplace Violence Expense
- ♦ Kidnap and Ransom Expense
- ♦ Identity Theft Expense
- ♦ Defense outside limits up to \$1,000,000

#### Employment Practices Liability

- "Loss" includes:
  - ♦ Claimant's attorney fees, as awarded by the court
  - ♦ Front and back pay
- Broad definition of "employee," including:
  - ♦ Interns
  - ♦ Volunteers
  - ♦ Independent contractors
- Broad definition of "wrongful employment act," including:
  - ♦ Gender identity discrimination
  - ♦ Invasion of privacy (includes unauthorized use or disclosure of "confidential employee information")
  - ♦ Acts committed via Internet, email or social media
  - ♦ Harassment including workplace bullying
- Sublimit for \$100,000 (defense and indemnity) for Wage and Hour claims, available by endorsement
- Third-party coverage included for most classes

#### Fiduciary Liability

- \$150,000 sublimit for "voluntary settlement program costs"
- \$25,000 sublimit for 502c fines and penalties
- \$25,000 sublimit for fines and penalties under the Pension Protection Act of 2006
- \$150,000 sublimit for HIPAA fines and penalties
- Investment loss carveback to the Benefits Due exclusion



## Why Purchase an EVP Policy?

- Directors' and officers' personal assets are at risk; they may be personally liable for their business decisions and may be sued as individuals
- A private company is more likely to have an employment practices claim than a general liability or property claim
- By law, fiduciaries of pension and benefit plans are personally liable for their decisions even if they outsource their employee benefit plan to third parties
- Private companies face claims from their employees, customers, suppliers, competitors, creditors and shareholders

## Additional Advantages

- Unsurpassed service with a sense of urgency and care
- Same day or next business morning claims acknowledgement
- Policyholders have access to many free and discounted services through our Business Resource Center that will assist in growing and protecting their business
- Carriers are members of the Berkshire Hathaway Company



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