Liability Claims Takeaways

NOVEMBER, 2024

Welcome to the 47th edition of 'Liability Claims Takeaways' - our monthly insights from industry stalwarts.

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Content:

1 Public Offering of Securities Insurance (POSI)

Event Chronology

The insured, a newly listed technology company, received a class-action lawsuit against the entity, its directors, and officers, alleging that the prospectus contained misleading statements and omissions which led to the shareholders' financial losses. After the Initial Public Offering (IPO), it was discovered that the financial projections were overly optimistic and based on inaccurate data. Additionally, some key risks were not adequately disclosed in the prospectus. As a result, the company's stock price plummeted shortly after the IPO, causing significant financial losses to the shareholders. The lawsuit claimed that the company and its executives failed to provide accurate and complete information, violating securities laws and, inter alia, causing losses to the shareholders. The insured notified the loss under their POSI policy.

Key Intent of the Claims Case Study

A POSI policy is a comprehensive insurance policy designed to provide coverage for claims arising from risks related to public offerings. These public offerings can involve debt or equity, fresh issues or OFS, IPOs, or FPOs. The POSI policy covers declarations provided in the DRHP (Draft Red Herring Prospectus), roadshows, investor presentations, etc, as they fall within the ambit of the 'offer document' defined in the Policy.

The insured obtained a POSI policy well in time for their IPO, ensuring coverage during a claim and protecting the company and executives from potential liabilities.

Areas of Concern

How a POSI complements a D&O insurance

Traditionally companies used to believe that any claim against a director, whether arising from an IPO or otherwise, would find cover in a D&O policy. However, it is critical to note that most D&O policies exclude claims arising from public offer of securities. Therefore, a POSI Policy is structured as a multi-year policy, with durations typically ranging from 3 to 6 years after an IPO since a claim from an IPO could very well arise during subsequent years.

Furthermore, a POSI policy provides more extensive coverage for insured persons by including protection for selling shareholders, controlling shareholders, and issuing underwriters, which is not typically available under a standard D&O insurance policy.

Prudent: The Part Well Played

By understanding the nature of the insured's business and with timely advice to secure a POSI policy before listing, the insured was covered under their POSI policy within the necessary timeline when the claim was made against them.

A company's exposure to liabilities often commences with the IPO roadshow or even earlier, as it engages in legal, tax, and operational decision-making in preparation for the event. Investors place considerable trust in the statements delivered during these roadshow presentations and in the information contained in the company's prospectus. Any misleading statements made during this period can lead to IPO-related claims. The transition to becoming a publicly traded entity carries substantial risks for the directors, officers, and the company itself. It is essential to examine the primary risks associated with the IPO process. Our team of experts identified the insured's requirement for such coverage, safeguarding them against exactly these types of risks and ensuring significant protection for the insured persons and the entity.

2 Professional Indemnity Insurance

Event Chronology

The policyholder, a manufacturer of engines that also provides post-sale services such as repairs and annual maintenance, received a claim from one of its customers for damage to their engine. During routine maintenance, the personnel confirmed that the engine was in order. However, immediately after, the engine came to a complete stop. The customer filed a claim for repair and reinstatement, alleging that the servicing was faulty and caused damage to the engine.

Key Intent of the Claims Case Study

Professional Indemnity Insurance Policy covers the cost of compensating clients for losses or damages resulting from negligent services or advice provided by a business or an individual. The coverage provided by the insurance companies focuses on the alleged failure of the services delivered by the company, leading to financial losses to third parties due to errors and omissions in the acts or services provided by the insured. Therefore, any claim made against the insured alleging deficiencies in their services, consultations, or professional capacity should be notified under a PI Policy.

Effective claim management ensured alignment with the insurer, preventing deductions and facilitating a seamless settlement by clarifying 'warranty' and endorsing off-role employees.

Areas of Concern

Exclusion for warranty-related claims:

Unfortunately, the way the claimant worded the written demand against the insured referred to repairs being covered under a 'warranty' provided by the insured during the supply of the engine. This led the surveyor and insurer to attach the policy exclusion regarding 'contractual liability claims'.

The contractual liability exclusion in a PI policy means that the policy does not cover claims arising from the insured's assumption of liability under a contract or agreement. This is because the insurer only covers liabilities that would exist in the absence of such a contract. This includes situations where the insured has guaranteed specific outcomes or performance standards that are not met.

However, the insured confirmed that there was no such contractually agreed warranty, and the language was loosely used by the claimant when making the claim.

Cover for off-role employees:

The personnel who erroneously caused the issue with the engine was not employed directly on the insured's payroll. This question arose during the assessment of coverage under the policy. The policy definition does not include contractors, sub-contractors, temporary employees, and off-role employees unless specifically endorsed. The insured's business operations require the deployment of specific engineers across various parts of the country. Keeping this in mind, the definition of employee was revised to include off-role temporary employees, which ultimately came to hand at the time of claim.

Prudent: The Part Well Played

Managing the narrative of the entire claim helped the surveyor and insurer align with the facts of the claim and ensured that no non-standard deductions were made during the assessment of the loss. We supported the insured by addressing the issue of separating the usage of the term 'warranty' from the demand letter. Additionally, it is evident that the role of experts extends beyond managing claims; a robust insurance program is critical to ensure that the insured is not susceptible to balance sheet losses due to insufficient cover. Endorsing off-role employees addressed this aspect as well, thereby ensuring the claim was settled seamlessly.

3 Cyber Insurance

Event Chronology

The insured is a chemical manufacturer with a significant portion of their business dedicated to exporting raw material overseas. On three separate occasions, the insured received fabricated emails wherein threat actors gained access to existing email trails between the insured and their customers and vendors. Due to this improper access, the threat actors shared false bank account details with the insured's customers. However, noticing the difference in the bank account details, each of the insured's customers wrote back to confirm whether the revised bank account details were shared by the relevant authority. The insured was able to alert their customers to the improper interception by the threat actors and successfully prevented significant monetary losses.

Key Intent of the Claims Case Study

Cybersecurity insurance, or cyber insurance, helps businesses manage risks associated with cybercrime.
A cyber policy is designed to provide financial protection for any first-party losses suffered by the insured or third-party financial losses arising out of unauthorised access, hacking, phishing, and other computer-related losses, as mentioned in the policy.

Timely notification to the insurer/insurance broker and engagement of forensic experts enabled the insured to proactively address threats and prevent future vulnerabilities.

Areas of Concern

No actual claim/loss to insured:

Since the insured did not suffer a monetary loss due to the potential attack being exposed in time, the policy was not technically triggered. However, the insured had coverage for 'proactive forensic costs,' which made them eligible to engage with forensic experts to run a scan to prevent a cyber attack from occurring/escalating further.

Broadly, proactive forensic cover refers to insurance and risk management strategies that involve the proactive collection, preservation, and analysis of data to detect and address potential security incidents before they escalate. Most policies typically cover forensic costs to analyse the nature and extent of a cyber attack, while proactive costs cover helps the insured identify gaps in their systems and remedy them.

Keeping the insurer apprised of all developments:

The insured successfully made a case to the insurer by strictly adhering to all policy conditions and keeping the insurer informed throughout the incident. These steps are often overlooked by insureds who primarily focus on mitigating their losses. While insurers are generally reasonable and understand the situation's severity, breaching policy conditions can be counterproductive and may result in the denial of a legitimate claim.

Empanelment of forensic experts:

At the time of binding the policy, a list of surveyors and forensic and other legal experts were impanelled in the insured's program. This enabled us to engage them swiftly without awaiting the insurer's consent or go to-and-fro on the rates, etc. Time is of critical importance in such claims, and therefore, having a pre-agreed list of consultants/experts helps expedite proactive measures.

Prudent: The Part Well Played

Even though the insured did not suffer a cyber attack, we immediately notified the insurer to ensure no undetected losses went unreported. This also enabled us to secure the insurer's timely alignment to engage a forensic expert for proactive forensic screening.

Acting swiftly to prevent any further damage, the forensic experts initiated corrective measures without delay. The insured's proactive engagement with the insurer ensured swift authorisation of expenses, consultant hiring, and the commencement of a forensic investigation. This proactive approach significantly eased the situation for the insured. Timely engagement with the incident response team also helped identify the root cause, enabling the insured to implement corrective actions and prevent future vulnerabilities.

We recommend appointing a designated individual in the insured entity to ensure efficient and timely communication with us as the brokers and the insurer during any incident that may lead to an insurance claim. This will help ensure that no critical information is overlooked during the claims process.

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

Stay tuned for the next edition!

About Prudent Insurance Brokers

We, at Prudent Insurance Brokers, provide industry-leading expertise in designing and managing insurance programs to address unique requirements of your organisation. We have a client-centric service infrastructure that delivers proactively & passionately in a highly systematic manner. Our Liability Team consists of members with underwriting experience and the largest number of lawyers who can assist 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 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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Certificate of Registration IRDAI No. 291 & IFSCA No. 017 (Validity: 18th February 2023 to 17th February 2026)

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