



LIABILITY CLAIMS *TAKEAWAYS*

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

A Commercial Crime Insurance

WHAT WAS THE CLAIM?

A private company had forged and fabricated Bank Guarantee in favor of the Insured, based on which the Insured sold their products worth approximately INR 3.4 crores. As the outstanding dues were not paid despite follow-ups, the Insured decided to encash the Bank Guarantee. When an attempt was made to encash the Bank Guarantee, the Bank informed the Insured that they had not issued any Bank Guarantee. Once the forgery came to light, the Insured filed an FIR and notified a claim under their commercial crime insurance policy.

KEY ASPECTS TO CONSIDER:

1. Subrogation right of Insurer to be protected

In this case, once the forgery was discovered, the Insured filed an FIR against the company. The private company subsequently underwent the corporate insolvency resolution process. At that stage, the Insured also filed a claim with the resolution professional. This ensured that the subrogation rights of the Insurer were intact and, if needed, the Insurer could claim from the perpetrator once the Policy had paid the Insured.

2. Substantiation of value and quantum through supporting documents - invoices, payment proof, bank statements, etc.

In this instance, the value of goods supplied had to be substantiated, followed by confirmation on an unrecovered amount. Initially, the Insured was only able to produce internal excel sheets in that regard. However, after constant engagement between the broker and Insured, it was explained to the Insured that as this was a reimbursement policy, proof of the above facts were a pre-condition to receiving reimbursement from the Insurer. Thereafter, all supporting documents were provided.



B Directors and Officers Liability Insurance

WHAT WAS THE CLAIM?

A notice was received by several officers of the Indian subsidiary of a foreign company from the GST authorities seeking certain documents and information about the company's revenue and GST payments. A lawyer was appointed to represent the officers before the concerned authorities, and a claim was notified under the Directors and Officers (D&O) Insurance Policy.

KEY ASPECTS TO CONSIDER:

1. Insurer's consent before incurring costs

It is a condition of the Policy that, no cost is to be incurred by an Insured with respect to a claim, without prior consent of the Insurer. If such a cost is incurred, the Insurer has the right to not pay that part of the cost, which was incurred without their consent. In this case, lawyers were engaged without the Insurer's consent. After detailed discussions on the claim, including admissibility and urgency of a GST investigation and possibility of arrest, the Insurer agreed to accept the cost incurred, post facto, only as an exception. It is, therefore, highly recommended that no costs be incurred on the defense of a claim or any other form, without the Insurer's prior consent.

2. Costs ought to be reasonable

While Defense Costs are included and paid by an Insurer under a D&O Policy, such defense costs incurred should be reasonable. The Policy does not define what reasonable means, however, parameters like sensitivity, subject matter expertise, level of experience required, surrounding circumstances, and risk of arrest are a few broad aspects that are taken into consideration usually by the Insurer when granting consent to the lawyer proposed by the Insured.

3. Allocation between entity and officers in a D&O policy

A D&O Policy covers the cost incurred in the defense of directors and officers of the company. The defense of the company itself is not covered in the Policy (assuming the subject of claim is not an employment claim or securities claim). Therefore, if a legal proceeding or investigation is commenced against both the company and its directors and officers, then the D&O Policy will only cover and pay that part of the cost which is incurred in connection with the defense of the directors and officers, and not pay the cost incurred in the defense of the entity.



C Professional Indemnity Insurance

WHAT WAS THE CLAIM?

A suit was filed against a leading business outsourcing company in India, by one of their customers in the United States of America, for alleged breach of contract. This alleged breach included failure to perform, threatened termination of contract, and breach of confidentiality. The Indian Company, being the Insured, filed a claim under their Professional Indemnity Insurance Policy.

KEY ASPECTS TO CONSIDER:

1. Insurer's consent for incurring cost versus mitigation costs

Since the case was in the United States, and the lawyers' fee was incurred in US dollars, the Insured appointed an Indian lawyer to do the bulk of the backend work to limit the cost incurred. While the intent of this action was to save costs for the Insured as well as the Insurer, it was also necessary to take the Insurer's consent before a new lawyer was engaged. While in this situation, it is arguable that the new lawyers' appointment was a mitigation measure, we do recommend taking all steps in relation to a claim in complete adherence to the policy terms and conditions.

2. Law of Policy Interpretation

Even if the claim is outside India, the Insurance policy is governed by the Indian law and will be interpreted in accordance with the Indian law. Therefore, policy terms and conditions ought to be adhered to completely. While reviewing policy terms, caution must be taken so that if a dispute arises in relation to the Policy terms, the governing law of the policy comes to rescue, irrespective of the law under which the original claim arose (in this case, laws of the United States of America).

D Cyber Insurance

WHAT WAS THE CLAIM?

A manufacturing company was faced with a ransomware attack that led to a brief business disruption. A claim was filed under their cyber insurance policy.

KEY ASPECTS TO CONSIDER:

1. Regular and frequent update to the Insurer

In this case, when the claim arose, immediate notification was made to the Insurer. However, after that, no updates were shared with the Insurer. Ultimately, after almost 6 months, a cost sheet was shared setting out costs incurred in relation to the cyber incident. As a policy condition, the Insurer must always be kept informed of all developments in the claim. Breach of this condition can result in the Insurer not paying/reimbursing the claim amount.

2. Incurred cost without consent of Insurer

The costs incurred by Insured were not approved by the Insurer in advance. No consent was, in fact, sought from the Insurer before the said costs were incurred. This led to the Insurer questioning the costs, as it is their right under the Policy. We strongly urge the Insured entities to seek Insurer's prior consent before incurring costs to ensure a smooth claim processing experience.



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 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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