



# LIABILITY CLAIMS *TAKEAWAYS*

## CONTENT

- Directors and Officers Liability Insurance
- Commercial General Liability Insurance
- Professional Indemnity Insurance
- Cyber Liability Insurance

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

# A Directors and Officers Liability Insurance

## WHAT WAS THE CLAIM?

*The directors and key officers of the Insured entity received a notice from one of the regulators regarding alleged no-compliance of disclosure-related regulations. The notice was in the form of a show cause notice which could result in penalty unless settled or disposed of. This was notified as a claim under the Directors and Officers Insurance policy.*

## KEY ASPECTS TO CONSIDER:

### 1. Non-disclosure of known circumstances

The show cause was received within the policy period, however, there were previous correspondences on the same subject with the regulator prior to the policy period. These were not disclosed at the time of renewal of the policy. This could arguably allow the Insurer to raise a concern regarding non-disclosure and prejudice the rights of the Insured under the policy. It is, therefore, recommended to disclose all known circumstances that may result in a claim, at the time of renewal or placement of the policy.

### 2. Insurer's consent for costs

The officers wanted to challenge the show cause notice. Before this challenge was filed, consent was taken from the Insurer about the costs being incurred. The Insurer has the right to give consent or refuse it (if the proposed challenge is unreasonable and the Insurer would rather pay the penalty on behalf of the officer). Given upfront consent was received from the Insurer, the process of reimbursement of cost becomes simpler and efficient.

### 3. Prohibition on claiming penalty from insurance

We have come across regulations specified by certain regulators whereby the concerned company or officers, upon whom an order of penalty, damage is levied, are prohibited from claiming such amount under insurance or any other kind of indemnity. It is, therefore, important to be aware of the regulations governing the Insured entity and officers when dealing with a claim, to ensure there are no last-minute surprises when making a claim of reimbursement on the insurance company.

# B Commercial General Liability Insurance

## WHAT WAS THE CLAIM?

*The Insured, a manufacturing facility was faced with an explosion in their facility, which led to some of their employees as well as employees of sub-contractors facing injuries on their body. While the Insured wanted to, ex-gratia, look after the injuries and pay the medical bills of the injured persons, they intimated a claim with their insurers under the Commercial General Liability Policy.*

## KEY ASPECTS TO CONSIDER:

### 1. Legal liability and not assumed liability is covered

A typical commercial general liability policy covers for inter alia legal liability of Insured due to a bodily injury or property damage arising at the business premises of the Insured. The policy is meant to cover legal liability i.e., liability that is either imposed under law or by a court, tribunal or similar authority or any settlement that is agreed upon pursuant to a claim covered under the policy and consented to by the Insurer. The policy does not aim to cover ex-gratia payment made by the Insured without the Insurer's consent. Therefore typically, to confirm coverage, the Insurer would ask for third party demand, to determine whether the policy has even triggered.

### 2. Medical no fault liability cover has sub-limits

Most commercial general liability policies would also have what is known as no fault medical liability extension which allows for payment by the Insured of medical expenses to the persons injured on their business premises, irrespective of a claim or fault on their part. However, while seeking cover under this extension, the Insured must carefully study the policy to determine (i) limit of liability for the said extension, because in our experience, this extension is mostly sub-limited to only a portion of the overall limit of liability under the commercial general liability insurance and (ii) coverage, as usually, injury to own employees or sub-contracted employees are typically excluded from this cover.





# Professional Indemnity Insurance

## WHAT WAS THE CLAIM?

*The Insured is a global IT Services company, providing services in business intelligence and analytics, application development management, mobility, cloud, social media, testing, enterprise services, and infrastructure management services. As a part of such service, they had entered a contract with their customer, agreeing, inter alia, to use and provide the best-in-industry data security measures. While the contract was ongoing, the Insured's customer faced a data breach. The customer made a claim on the Insured under their contract alleging breach of contract by the Insured and sought damages. This was notified as a claim by the Insured under their Professional Indemnity Insurance.*

## KEY ASPECTS TO CONSIDER:

### 1. **Constant updates to the Insurer including about settlement**

In this case, the Insurer was given frequent and material updates which allowed the Insurer to be updated on the matter on a real-time basis. Owing to this, the discussion with the Insurer about a proposed settlement became easy and the Insurer quickly came on board the idea of settlement. This eased the process for the Insured and avoided unnecessary time lag, which is usually witnessed in matters of settlement, if the Insurer is not kept updated.

### 2. **Insured needs to justify the settlement**

As is the case with any claim, an Insurer would agree to settle a claim if they are satisfied that settlement is the best option, for both Insured and Insurer, and is not merely a commercial solution for the Insured, leaving the Insurer behind to pick up the expenses. This claim arose out of a potential litigation expected in the United States of America. Given the likely costs involved in such litigations coupled with lack of experience in foreign jurisdiction, allowed the Insurer to see that settlement as the best way forward for all parties involved. This could not have been possible without the Insured's cooperation and timely assistance.

### 3. **Protection of Insurer's subrogation rights**

The Insurer has the right to subrogate (step into the shoes of) the Insured once a claim is paid to the Insured. This also means, that if any settlement were being discussed, the right of the Insurer to subrogate would also come into play. In this matter, the rights of both the Insurers, namely the Insurer of the Insured as well as the Insurer of Claimant were under discussions. Accordingly, settlement discussions were navigated in a manner that satisfied all parties and did not leave any doubts in relation to future claims. This helped close the matter in an amicable manner.



# D Cyber Liability Insurance

## WHAT WAS THE CLAIM?

*A multinational company faced a ransomware attack on its servers. The threat actors had shared encrypted messages and data with the Insured to showcase the extent of their control on the Insured's data. The threat actors agreed to return the data of the Insured in return for a ransom payment. This incident, coupled with the demand, was notified as a claim under the Cyber Liability Insurance.*

## KEY ASPECTS TO CONSIDER:

### 1. Whether to pay ransom?

Legality of ransom payment – Organizations have been known to worry about paying ransom and whether it is legal under applicable laws. While some countries have clear laws on the subject, some countries have not clarified this issue.

- Sensitivity of data – another issue faced by entities when deciding about ransom payment is the level of sensitivity of the data which the threat actors possess. The higher the sensitivity quotient, the more eager an organization would be to quickly resolve the issue.
- Potential third-party claims – with stricter laws coming into force on data security and privacy, the risk of third parties getting affected and third-party claims arising from data breach also increases.
- Regulatory issues – we have seen many threat actors demanding payment of ransom in cryptocurrency. However, the regulatory acceptance of using the currency is still in question across many jurisdictions. Similarly, several countries have strict laws and penalty for breach of third-party data security or privacy. These make the decision even more difficult for the Insured organizations.

### 2. Forensic to be strong and minimize business interruption

The phrase 'prevention is better than cure' is equally applicable to a cyber event. When the Insurer reviews the costs being incurred, they are also equally interested in eliminating further spread of the risk and costs. It is, therefore, important to engage with an appropriate forensic organization who can not only help in identifying the threat, but also assist in mitigating the impact. The best form of defense an organization can adopt is to mitigate the loss, rather than wait for the loss to occur and then look at reimbursement.





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 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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