



LIABILITY CLAIMS **TAKEAWAYS**

CONTENT

- Commercial General Liability Insurance
- Commercial Crime Insurance
- Professional Indemnity Insurance

MAY 2021

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

A Commercial General Liability Insurance

WHAT WAS THE CLAIM?

A manufacturing company involved in dealing with hazardous substances received a notice from the State Government informing them about an order passed by the National Green Tribunal regarding effluent discharge by industries across the State and non-adherence of applicable guidelines in this regard. The notice demanded payment of approximately INR 1 crore from the Insured organization. This demand was intimated by the company under their Commercial General Liability Insurance policy ("CGL Policy").

KEY ASPECTS TO CONSIDER:

1. Bodily injury or property damage

A CGL policy typically pays for damages that the Insured is required to pay any third party, due to a legal liability on account of bodily injury or property damage resulting from, inter alia, the business activity of the Insured. In this case, the order passed by the National Green Tribunal did not identify or mention the existence of a bodily injury or property damage which could be at the root of this demand for damages. It was a blanket order to all industries falling within a specific sector operating within the State. Absence of any bodily injury or property damage giving rise to this demand, potentially brought the claim outside the scope of cover under their CGL policy.

2. Occurrence of event giving rise to claim, ought to be within the policy period

The CGL Policy in question was an occurrence form, which required that any claim, for it to be paid under the Policy, ought to arise out of occurrences or accidents that have taken place during the Policy period. In this case, the matter pertained to alleged discharge of effluents by industries since the past 10 years or more. It was not possible to tie the demand to a specific occurrence or timeline. This allowed the Insurer to argue that the coverage clause under the CGL Policy had not triggered since the claim in question did not arise out of an incident that occurred during the Policy period.

3. Pollution exclusion

Typically, CGL policies in India, have an absolute pollution exclusion which aim to exclude any claim that results from handling of pollutants as defined in the Policy. In this case, the matter arose out of alleged discharge of effluents by industries, which fell within the definition of pollutants under the CGL Policy. Accordingly, the claim was excluded by the Insurer and not covered under the CGL Policy. It is, therefore, advised that Insured organizations operating in this sphere of business activity also explore alternate risk transfer mechanism including, but not limited to, the Pollution Legal Liability Policies, which can help them in similar situations.



B Commercial Crime Insurance

WHAT WAS THE CLAIM?

A company engaged in providing human resource-related support to its clients, availed a commercial crime policy. The Insured discovered certain internal frauds committed by their employees. A first information report was lodged with the police and investigations began. In the meantime, the policy was renewed with a different Insurer and a 'no known claims or circumstances declaration' was submitted by the Insured to the Insurer, at the time of renewal. The Insured notified the Claim under their expiring commercial crime insurance policy as well as the renewed policy.

KEY ASPECTS TO CONSIDER:

1. Issues under the expiring policy

- The Policy only covered claims discovered and reported to the Insurer during the Policy Period. Since the notification of claim by Insured took place after the expiry of the policy, this requirement of coverage was not met in this case.
- Even otherwise, given the reporting took place post the expiry of the policy period, while the discovery of fraud was within the policy period and investigations began, the Insured had delayed the intimation by more than 10 months.
- The above could potentially prejudice the claim notified by the Insured.

2. Issues under the renewed policy

- The new Policy was issued by the Insurer based on the 'no known claims or circumstances declaration' submitted by the Insured. Therefore, the Insurer who had issued the new Policy relying on the truth and accuracy of information submitted by the Insured, argued that they were not required to pay the claim as the policy was based on incorrect information provided by the Insured.
- Given the loss was already discovered during the expiring policy period, the 'no known claims or circumstances declaration' was found untrue. An inaccurate and false declaration constitutes misrepresentation and non-disclosure on the part of the Insured, and is contrary to good faith behaviour. This also allows the Insurer to cancel the policy.
- The new policy was a discovery-based policy and only covered claims that arose out of incidents discovered by the Insured during the policy period. In this case, the discovery of the incident took place prior to the new policy incepting.
- On these grounds, the renewed policy Insurer denied the claim.





Professional Indemnity Insurance

WHAT WAS THE CLAIM?

An information technology services company had entered into a master service agreement with their customer. Pursuant to the said agreement, a software was developed and transferred by the Insured to their customer. In the course of the software being put to use, the customer raised a few issues in its functioning, some of which were resolved, and a few remained unresolved. Both parties exchanged correspondences on the subject while working together on the matter. The term of the contract was 5 years. Shortly before the expiry of the contract, the customer filed a Suit against the Insured for damages, due to the shortfall in the services provided by the Insured under their agreement. The Insured notified a claim under their Professional Indemnity Insurance Policy ("PI Policy").

KEY ASPECTS TO CONSIDER:

1. What is a Claim, and when to report?

- The Parties had exchanged several emails and letters in this matter whereby the customer had raised several allegations against the Insured and the Insured had responded to the same while raising counter-allegations against the customer.
- A PI Policy aims to cover any claim arising out of professional services, during the policy period. A claim usually would include a written demand for compensation or any other monetary or non-monetary relief.
- The Insurer rejected the claim and presented the following arguments in favour of their action:
 - Since the customer had already alleged wrongful act on the part of the Insured and demanded recovery of damages from the Insured in their previous letters, the Insurer argued that the claim had arisen prior to the inception of the PI Policy and, therefore, should have been notified as a claim under the previous policy.
 - The Insurer further argued that because of the above, a claim was already existing when the policy was incepted. Therefore, the prior and pending claims exclusion under the policy would trigger and the claim will not be covered under the current policy.
 - The Insurer also argued that non-disclosure of the above allowed them to cancel the policy altogether.
 - Since the PI Policy is a claims-made policy, the claim having arisen prior to the inception of the Policy, was not covered within the ambit of the PI Policy.

2. Refund of fee - Ensure coverage in the policy wording

- The customer's demand from the Insured also included forfeiture of balance payment to the Insured in lieu of part of the alleged loss suffered by the customer owing to breach of contract on the part of the Insured.



- This part of the claim was questioned by the Insurer on the ground that a PI Policy aims to cover any order or award of damage that the Insured is liable to pay to a third party arising out of their professional services. However, if a customer fails to pay the Insured their fee, such non-payment is not a damage that Insured pays to third party and, therefore, such unpaid fee cannot be claimed and paid under the PI Policy.
- The Insurer and Insured along with the insurance broker, worked together in this case and it was explained to the Insurer how the sum in question constituted a loss to the Insured and was being “not paid” in lieu of a part of the compensation that the customer has claimed from the Insured pursuant to their provision of professional services. Therefore, the nature of loss is the same as is covered in the PI Policy.
- However, to avoid similar issues, we do recommend that organizations review their PI Policy and seek advice from experts and insurance brokers on how best this potential gap could be covered in their policies. There are several solutions available in the Indian market that could be explored and implemented.



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.



www.prudentbrokers.com

FOR MORE QUERIES, PLEASE REACH OUT TO:

Tanuj Gulani
tanuj.gulani@prudentbrokers.com

Neha Anand
neha.anand@prudentbrokers.com

Richa Dhasmana
richa.dhasmana@prudentbrokers.com

Jyoti Krishnan
jyoti.krishnan@prudentbrokers.com

Nishant Kashyap
nishant.kashyap@prudentbrokers.com

Mayank Sharma
mayank.sharma@prudentbrokers.com

Arun Prasadh
arun.prasadh@prudentbrokers.com

PRUDENT INSURANCE BROKERS PVT. LTD.
Mumbai | Bengaluru | Chennai | Gurugram | Hyderabad | Ludhiana | Pune

CIN No.: U70100MH1982PTC027681 | License No. 291 (Validity: 18th February 2020 to 17th February 2023)

Insurance is a subject matter of solicitation

This report and any recommendations, analysis or advice provided herein, are based on our experience as insurance and reinsurance brokers or as consultants, as applicable, are not intended to be taken as advice or recommendations regarding any individual situation. The opinions expressed herein are valid only for the purpose stated herein and as of the date hereof. We are not responsible for the consequences of any unauthorized use of this report. We have used what we believe are reliable, up-to-date and comprehensive information and analysis, but all information is provided without warranty of any kind, express or implied, and we disclaim any responsibility for such information or analysis or to update the information or analysis in this report. We accept no liability for any loss arising from any action taken or refrained from, or any decision made, as a result of or reliance upon anything contained in this report or any reports or sources of information referred to herein, or for actual results or future events or any damages of any kind, including without limitation direct, indirect, consequential, exemplary, special, or other damages, even if advised of the possibility of such damages. Please know the associated risks and the applicable charges, from your policy document issued by the insurance company. For more details on benefits, exclusions, limitations, terms and conditions, please read sales brochure/policy wording carefully before concluding a sale. Commencement of risk cover under the Policy is subject to receipt of payable premium to desired Insurance Company only. Prudent Insurance Brokers Pvt. Ltd. is the registered Broker with IRDAI and does not underwrite the risk or act as an Insurer.