PRUDENT
THE FUTURE OF INSURANCE

LIABILITY CLAIMS *TAKEAWAYS*

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

A Directors and Officers Insurance

WHAT WAS THE CLAIM?

An ex-employee of a consultancy company raised a complaint for wrongful termination and mental harassment against the manager of the company. The ex-employee sent a legal notice to the company and the said manager alleging wrongful termination and mental harassment, with the help of an appointed lawyer. Thereafter the ex-employee started legal proceedings against the said company and the manager and sought damages in the said proceedings. The company notified this claim under its Directors and Officers Policy ("D&O Policy") which did not have the Employment Practices Liability Insurance extension ("EPLI Extension").

KEY ASPECTS TO CONSIDER:

1. **EPLI Extension necessary for company**

   A D&O policy would only respond to the claims made against the directors and officers of the company, save and except in cases the EPLI Extension is availed in which case claims against the *company* for employment practice violations are also covered under the said policy. The Insured in this instance, had not availed an EPLI Extension under the D&O Policy and therefore, the costs incurred by the company stood excluded from coverage under the Policy.

2. **Prior claims and circumstances notification**

   - The legal notice was received by the Company and the manager prior to commencement of the current policy period. However, the said notice was not disclosed in the proposal form at the time of policy renewal. This allowed the Insurer to argue that the Insured had misrepresented in the proposal form resulting in material non-disclosure.
   - Since an insurance policy is a contract of utmost good faith, material non-disclosure and misrepresentation are sufficient reasons which allow an Insurer to avoid the policy ab-initio.
   - Given that the legal notice contained allegations against an officer of the Insured, it fell within the definition of claim under the policy. Since the claim was made against the insured person under the previous policy period, the Insurer refused to register the claim under the renewed policy.
   - During the claim process, it also came to the Insurer's attention that at the time of termination, the ex-employee did express her dissatisfaction of the way her dismissal was conducted. However, the Insured did not inform the Insurer of this as even a circumstance that may reasonably give rise to a claim. This was in complete breach of the policy condition in this regard.
   - Organizations and employees are often unaware that even informal notices, email correspondences or statements that may be made in the normal course of business, can constitute "claim" under an insurance policy. This results in the requirement of intimation to the Insurer. Therefore, it is advisable that such "exchanges" be construed as widely as possible while assessing impact under an insurance policy, to not fall in fault of any policy terms and conditions.

B Professional Indemnity Insurance

WHAT WAS THE CLAIM?

The Insured was acting as the insolvency professional in the corporate insolvency resolution process (CIRP) of a leading company. The Insured was charged with a hefty fine and barred from practicing as an insolvency professional until further orders of the court, on account of gross misconduct under the Insolvency and Bankruptcy Code 2016. The Insured was required to deposit the fine levied within a specific period as per the orders of the disciplinary board. The Insured notified the claim under its Insolvency Professionals Liability Insurance ("PI Policy") and a Surveyor was appointed by the Insurer to examine the loss incurred by the Insured. Additionally, the Insured also filed a writ petition thereby challenging the orders passed against him.

KEY ASPECTS TO CONSIDER:

1. **Claims made BY THE INSURED are not covered under the Policy**

   A PI Policy aims to cover the liability of the Insured during their business or professional services. This necessarily means only claims MADE AGAINST the Insured find coverage under the policy and any claim made BY THE INSURED would not find coverage under the said policy.

2. **Burden of proof to substantiate applicability of exclusion rests with the Insurer**

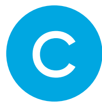
   In this case, the Insurer was trying to rely on an exclusion in the policy to reject the claim. However, the Insurer's argument to substantiate the applicability of the exclusion was based on extremely unclear grounds. The Insurer was unable to pinpoint the exact reason why the exclusion applied and chose to reject the claim by merely relying on an exclusion without offering any further explanation.

   Indian Courts have emphasized gravely on the importance of adhering to the principle of 'utmost good faith' when dealing with insurance contracts. This is coupled with several foreign judgments observing that an exclusion is a deviation from coverage. And since it prejudices the Insured's rights, the Insurer shall be duty bound to prove the applicability of an exclusion to rightfully exclude a claim from the policy and not merely allege its application.

3. **Claim cannot be rejected solely based on surveyor's report**

   The Surveyor appointed to assess the loss, concluded that the Insured deliberately contravened the provisions of law and therefore, the exclusion of fraudulent acts would trigger. The Policy however categorically said that the exclusion of fraud would apply upon fraudulent conduct being proven by the last court. Despite the clear intention of the policy to trigger conduct exclusion only upon fraudulent conduct being proven in a court of law, the Insurer chose to merely rely on Surveyor's report and invoke the said exclusion and reject the claim.

   The Insurer ignored that the role of a Surveyor is limited to being an advisor to the party appointing them and therefore, when the matter was preferred before the competent authority, it was held that the Insurer cannot rely solely on the findings of the Surveyor and the facts must be assessed independently as well to give effect to the intention of the policy.



Commercial General Liability Insurance

WHAT WAS THE CLAIM?

The Insured is engaged in the business of distribution of natural gas. During a repair being conducted at one of their sites, a fire broke out which resulted in one death and few injuries. The deceased person's family and the injured persons raised a claim on the Insured for inter alia medical bills and ex-gratia compensation. The Insured immediately informed their insurance company and intimated the claim under their Commercial General Liability Insurance Policy ("CGL Policy").

KEY ASPECTS TO CONSIDER:

1. **No fault medical payment**

   - A CGL policy usually has a cover for no fault medical bill payment by the Insured. This cover usually reimburses any medical bills paid by the Insured in the aid of persons injured at the business premise of the Insured or due to product of the Insured without the liability of the Insured being established.
   - Such medical payment cover is usually sub-limited to a small value like INR 1 to 2 lakh per person. Therefore, while seeking reimbursement of a claim, the Insured must segregate different person's bills separately and then see what part is reimbursable under the policy.
   - Typically, medical bills of employees and subcontractors is excluded from coverage as those are covered under other forms of health insurance like personal accident or Mediclaim.

2. **Exclusion of employees and subcontractors/WC matters**

   A CGL policy aims to cover all damages that the Insured becomes legally liable to pay on account of bodily injury or property damage caused at the Insured's premise or due to the Insured's product. This cover excludes any payment that may be required to be made by the Insured to its own employees or subcontracted employees. In the above said circumstances a CGL policy would also usually exclude claims of similar nature which may get covered under a workmen compensation policy, irrespective of whether a claim under such policy is being pursued.

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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