LIABILITY CLAIMS *TAKEAWAYS*

APRIL 2022

CONTENT

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

A Cyber Security Insurance

WHAT WAS THE CLAIM?

The Insured was in the business of providing manufacturing services to its clients globally. The Insured suffered a malware attack that was identified due to multiple log-in failures across their organisation at the same time. The Insured suffered network traffic from over four countries and immediately isolated the impacted servers from its network. The Insured notified its Cyber Insurers of the attack immediately.

KEY ASPECTS TO CONSIDER:

1. **Maintaining the notification window:**

   The Insured intimated its Cyber Insurer of the malware attack after four days of their systems getting affected and the Insured gaining knowledge of the attack. The Insured's cyber policy provided cover for 'Emergency Costs' which the cyber policy mandates the Insurer to reimburse to the Insured, costs incurred without The Insured's cyber policy provided cover for 'Emergency Costs', as per which, the Insurer has to reimburse the Insured the costs incurred without the prior consent of the Insurer, during the first 48 hours of a security breach, if the security breach is deemed an emergency by the Insured.

   The emergency cost can only apply up to a specific limit as capped under the policy. Since the Insured made the instant notification after four days (i.e. 96 hours), the Insurer was liable to only reimburse the Insured for the costs incurred without Insurer's consent during the first 48 hours from the breach.

   While a cyber security breach is a critical situation and requires the Insured to implement significant loss minimisation processes it is to be borne in mind that the process of tracing the breach, root cause analysis, and analysis, and forensics forensics investigation is time-consuming as well as expensive, which can have a significant impact on the Insured's balance sheet. It is, therefore, pertinent that the Insured has a designated team that is trained in cyber-attack preparedness and can ensure timely intimations to all relevant stakeholders, to ensure that the Insured does not lose out on their ability to effectively utilise their cyber policy.

2. **Calculation of Business Interruption costs:**
   Due to the malware attack, the Insured's main servers were impacted resulting in a delay in the execution of projects. On account of the attack, the software could not be operated and the Insured could not access the data on the server, which led to a delay in the deliverables. The Insured suffered a loss of approximately INR 10 crore, which it intends to claim under the Business Interruption cover of its cyber policy.

   Given that the Insured was consumed in remedying its losses and setting up parallel servers to continue its business activities, there was a delay of over four months in giving the Insurer the mandatory information required to assess the nature and quantum of business interruption loss suffered.

Like every other liability policy, under the cyber policy as well, the Insured is required to keep the Insurer informed of all developments in a prompt manner, provide an accurate assessment of loss and take appropriate and timely loss mitigation measures. In this instance, the Insured was found to be in breach of this policy condition.

Additionally, the delayed intimation to the Insurer also prevented them from exercising their right to appoint a forensic team and mitigate further loss suffered by the Insured, and timely engage with an accounting consultant to assess the business interruption loss..

All the above impacted the Insured's right and had the potential to reduce their entitlement of claim settlement under the policy.

3. **Maintaining the notification window:**

As soon as any organisation suffers a cyber breach, the first step is to isolate the attacked system and prevent further loss. This process happens in phases and forensic experts are required to act swiftly.
According to the terms and conditions of the cyber insurance policy, the Insured is not only required to keep the Insurer in the loop on all developments but is also required to take the Insurer's prior consent before incurring any costs. Therefore, the appointment of the forensic team, as critical as it may be, and except for the costs which fall under emergency forensics requires the Insurer's prior consent. While usually, insurance companies may have a set of forensic experts on their panel, the Insured might have their preferences/forensic partners. In such cases, it is recommended that at the time of policy placement, a consolidated list of forensic experts is agreed upon between the Insurer and Insured. This will help in taking immediate action in an unforeseen event of a cyber-attack.

B Commercial Crime Insurance

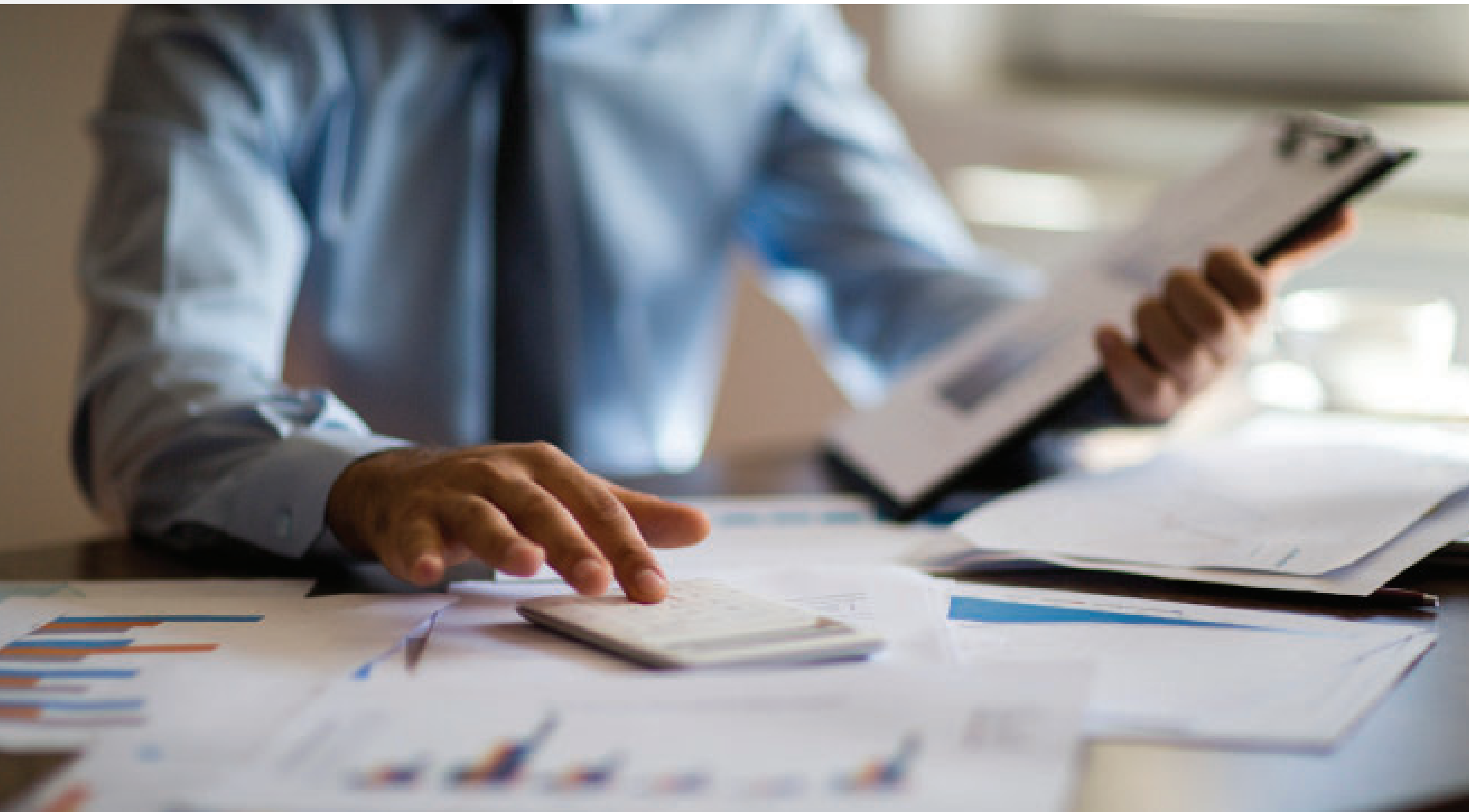
WHAT WAS THE CLAIM?

The Insured was in the business of providing warehousing services to its clients. The Insured had stored at its warehouse grains worth more than INR 5 crore. A few of the Insured's employees colluded and over a period of two weeks committed theft of the grains, resulting in a loss of approximately INR 5 crore to the Insured. The Insured discovered the loss and notified a claim under their commercial crime insurance policy.

KEY ASPECTS TO CONSIDER:

1. **Intimation at the time of policy renewal:**
   TheThe exact timing of the incident/theft was not clear and discovery of loss happened immediately upon renewal of the Insured's policy. This resulted in several queries being raised regarding prior knowledge, non-disclosure, and misrepresentation. With the help of our claims team, we were able to create a clear chronology of events for the Insurer, exhibiting that there was no failure to disclose on the part of the *Insured.*

2. **Delay in filing police complaint will severely impact claim assessment process:** To record the theft committed and commence relevant investigations, a police complaint ought to be filed by the Insured and request that an FIR is registered. This process is pertinent from a recovery and insurance standpoint. The Insured, in this instance, did not file a police complaint immediately, which delayed the registration of the FIR, and further delayed the investigation, which ended many months after the incident. As the police investigation was pending, the claim remained open without the Insurer being able to provide their comments on coverage/admissibility of the claim. claim.



C Employment Practices Liability Insurance

WHAT WAS THE CLAIM?

The Insured was a multi-national company conducting business in the Information Technology sector. One of its ex-employees filed a complaint before the labour courts challenging his termination and claimed compensation on account of alleged mental agony and harassment suffered by him. The Insured notified the claim under their Directors' and Officers' insurance policy with an Employment Practices Liability (EPLI) extension ('EPLI Cover').

KEY ASPECTS TO CONSIDER:

1. **Impact of retroactive date:**

   A retroactive date in a policy is typically the date since when the Insured has had an uninterrupted insurance coverage, therefore, providing coverage for claims that are filed against the Insured during the policy period but arising from acts or omissions of the Insured committed prior to the policy's inception date (albeit on or afterthe retroactive date.

   The termination of the insured's employee took place in the year 2017, the Insured received the summons for appearance from the labour court in the year 2020 and the retroactive date of the Policy was January 1, 2019

   Therefore, while the claim was lodged against the insured during the policy period, the wrongful act which resulted in the claim was committed prior to the retroactive date. As a result, the claim did not find cover under the policy.

2. **Declaration of past claims and litigations:**

   Since the termination took place in 2017, the Insured had received a series of legal notices from the claimant's lawyers. These were duly responded to by the Insured as well.

   When the policy was renewed, the Insured was required to disclose in the proposal form, all circumstances that may result in a claim. Given the exchange of legal notices with the lawyer of the ex-employee, this matter was also required to be disclosed in the proposal form. Unfortunately, the Insured failed to declare this incident in the proposal form which resulted in the Insurer's right to assess the risk being prejudiced and also was viewed as a non-disclosure by the Insured, This also resulted in the prior claim and circumstances exclusion being triggered under the policy.

3. **Run Off cover to be on expiring policy terms:**

Usually, when an organisation undergoes corporate restructuring resulting in being merged into or acquired by another unrelated company, their erstwhile policy terminates. This results in the company not having an insurance policy for past actions.

To ensure cover for claims that may arise in the future but relates to past actions, a run off cover is purchased. A 'Run off' cover typically provides covers for the claims that may be made against an Insured on or after the date of the transaction resulting in their merger or acquisition, however, the claim results from wrongful acts or omissions committed prior to such date.

In this case, the new claim, although related to a previous wrongful act, was notified under the run off policy as well. Unfortunately, the erstwhile consultant who advised the Insured, failed to mention that the run off policy did not include an EPLI cover. This resulted in the current claim not finding cover under the run off policy either.

We, therefore, advise all Insured to engage with experienced insurance brokers and consultants and seek advice on coverage at the time of placement of policy, to avoid any unpleasant surprises at the time of a claim.

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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