



# LIABILITY CLAIMS *TAKEAWAYS*

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



# A Cyber and Data Security Insurance

## WHAT WAS THE CLAIM?

*The Insured, an importer of automotive components was due to make payments to its vendor in China. The Insured and its vendor were in constant communication via email to finalise the details thereof. During such period, the foreign vendor's computer systems got hacked, resulting in an imposter communicating with the Insured and eventually the payment of USD 20,000 being made by the Insured to the imposter. The Insured notified the claim under its cyber and data security policy ('Cyber Policy').*

## KEY ASPECTS TO CONSIDER:

### 1. Incident not covered within the ambit of the Cyber Policy:

The IT Theft cover under a typical Cyber Policy covers direct fund transfer resulting from an IT Theft within the Insured's own computer systems or wherein data has been tampered within the Insured's systems. The instant claim resulted due to an impersonation of the Insured's foreign vendor, due to interception of the vendor's email, without any intrusion to the Insured's computer systems/data.

The claim was not paid by the Insurer under the Cyber Policy and the only remedy available with the Insured was for the vendor to file a claim under their Cyber Policy and then carry on the transaction with the Insured.

### 2. Necessity of an appropriate insurance policy:

As mentioned above, the incident of this nature was not covered in the Insured's Cyber Policy. Usually, we have seen such incidents being covered under a commercial crime policy. The crime insurance policy is peculiar to claims of this nature wherein fraud on account of employees, third party impersonators, social engineering frauds, and the likes are covered thereunder.

However, in this case, the Insured had not purchased a commercial crime insurance. The Insured had been in discussions to avail a crime policy, but the decision was being deferred as they did not see potential losses being incurred by the company.

This resulted in the Insured incurring a loss which had to be taken into their balance sheet due to a misjudgment with respect to insurance purchase.

### 3. Higher policy deductible for cyber insurance:

We have observed several Insured entities confusing the need for a Cyber Policy with the need for a crime policy. This results in them either buying only one of these policies or not buying either. The coverages under both policies are fairly distinct. Despite that, if there were an overlap, it ought to be borne in mind that a Cyber Policy usually has a higher deductible which can result in all similar claims not being paid. That is yet another reason to buy a crime policy with appropriate coverage in order to protect the company from such losses.





# B Directors and Officers Insurance

## WHAT WAS THE CLAIM?

*The Insured entity had been buying a Directors and Officers insurance (D&O) policy since 2016. In December 2019, an order was passed against the entity under the Insolvency and Bankruptcy Code, 2016 and the company was undergoing corporate insolvency resolution process. The company did not renew its D&O policy which expired in March 2020. In January 2021, certain customers of the company sent legal notices to the company, marking directors of the entity, claiming non-performance of service by the company and claiming damages. A police complaint was also registered against some of the directors of the Insured entity. The company notified a claim under their existing D&O policy which had expired in March 2020.*

## KEY ASPECTS TO CONSIDER:

### 1. D&O policy is a claims-made policy:

A directors and officers insurance policy is usually a claims-made policy i.e., it will cover losses and defence costs incurred by the Insured Persons for claims first made against them during the policy period and notified to the Insurer within the policy prescribed timeline.

In this case, since the policy had expired in March 2020, a claim that was made in January 2021, did not find cover under the said policy. Accordingly, the Insurer refused to admit the claim.

### 2. D&O policy covers directors and officers, not the entity:

A D&O policy provides coverage to the Insured Persons who are directors or officers in the policyholder entity. The policy does not offer cover to the claims made against the entity itself (except in case of employment violation or securities claim). While some of the notices were addressed directly to the directors and officers of the Insured entity, there were no specific allegations against them, and the claim was directly made against the entity. Therefore, such claims were not covered under the policy.

Similarly, no part of the costs incurred for the defence of the entity would find coverage under the said D&O policy.

### 3. Professional service exclusion:

In this case, the notices as well as the criminal complaint were a result of alleged non-performance of professional service by the Insured. The D&O policy in question had a professional service exclusion which sought to exclude claims arising out of, or relating to alleged or actual performance or non-performance of professional services by the Insured entity. Given the said exclusion and subject matter of the notices, the Insurer triggered the said exclusion and rejected the said claims.

Unfortunately, in this case, the Insured entity did not have a professional indemnity insurance which could have potentially come to their rescue.





#### 4. Claim series clause:

In this case, police complaints were registered against some of the directors in connection with certain actions taken by the directors, unconnected to the services provided by the Insured but in reference to the same claimants. While the D&O policy had a per claim deductible of INR 1,50,000, since all claims arose out of the same cause of action, and since the policy had a claims series clause, the Insurer agreed to view the multiple complaints as a single claim and apply a single deductible, while paying the defence costs incurred by the directors (or on their behalf). This helped the Insured entity in minimising their out-of-pocket payouts.

It is therefore extremely important to engage with experienced and knowledgeable insurance brokers and consultants, who can help enhance the quality of coverage and terms and conditions in the insurance policy being availed by an Insured.





# Commercial Crime Insurance

## WHAT WAS THE CLAIM?

*The Insured was in the warehousing business. They stored goods that were in transit on behalf of its customers for further despatch. A certain new batch of goods were deposited into the Insured's warehouse in April 2021. An internal audit was conducted, and the audit report was submitted towards the end of April 2021 confirming the goods and their value. The Insured's employee, who was also the warehouse supervisor, stole goods worth INR 5 crores and absconded. The Insured only discovered the loss after a period of one month while inspecting the stock for their monthly audit. Accordingly, the Insured filed a police complaint against the absconding employee and a first information report was also registered. The Insured notified a claim under its commercial crime policy.*

## KEY ASPECTS TO CONSIDER:

### 1. Incident too close to policy renewal:

In the month of May 2021, the policy was to be renewed and due to certain issues with risk acceptance by existing Insurer, the policy had to be placed with a new Insurer.

Since the incident was discovered post renewal of policy, the Insured notified it under the renewed policy with the new Insurer. However, the new Insurer, without any material to substantiate, alleged that the loss should have taken place prior to renewal and ought to be notified under the old policy.

For sake of comprehensiveness, the loss was notified under the old policy too because the old policy had a discovery period of 90 days after policy expiry and absence of renewal. However, the old Insurer refused to entertain the claim on the ground that the policy was already renewed and therefore the discovery period provision is not applicable and since the crime policy is discovery based, the incident ought to be covered by the new insurance policy during whose policy period the loss has been discovered.

This resulted in a prolonged discussion amongst the parties. Ultimately, the Insured was able to recover the loss from the perpetrator and both claims were withdrawn.

### 2. Repeat offense is a red flag. Insured's obligation to disclose in proposal form:

In the instant case, one of the employees was caught trying to manipulate the Insured's books of accounts in connection with the above incident. Given that he was one of the older employees of the organisation, he was reprimanded, and no serious action was taken as the fraudulent act did not result in any actual loss to the Insured. The Insured did not disclose this information in the proposal form at the time of policy renewal and therefore, the insurer raised an issue of non-disclosure and misrepresentation. The Insured ought to have informed the insurer of the attempted fraud by the employee as per the requirement of the proposal form as well as the policy conditions.

The proposal form is an integral part of policy placement and risk underwriting. The insurer's risk exposure under a policy directly depends on the valuation of the risk and the Insured's loss history. Concealing this information most often results in the repudiation of a claim and in some cases, even avoidance of the insurance policy.





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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- Arranging the most cost-effective cover from Indian and international markets
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- Offering 360° claims management by the largest claims team across any broker in India
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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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