PRUDENT
THE FUTURE OF INSURANCE

LIABILITY CLAIMS *TAKEAWAYS*

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CONTENT

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

A Liability Policies – Impact of Acquisition

WHAT WAS THE CLAIM?

The Insured is a leading IT company based in India, with subsidiaries across the globe. They frequently engage in inorganic expansion by acquiring local IT companies in different jurisdictions. The Insured's Directors and Officer's Liability Insurance Policy with Employment Practices Liability Extension (EPLI Policy) is a master policy taken in India and covers all subsidiaries across the world. One of the Insured entities acquired a 100% stake in another company (New Co.). Post the acquisition, an ex-employee made a claim on the New Co. in their erstwhile name for an alleged wrongful act committed before the acquisition. The Insured along with the New Co. notified the claim under their current EPLI policy. The New Co. also notified the matter under their erstwhile EPLI policy.

KEY ASPECTS TO CONSIDER:

1. When a company is acquired as a subsidiary, typically the liability policies of the Acquirer company grant cover to a new subsidiary only for a limited period (usually between 30 to 90 days). Post expiry of the automatic cover period, the newly acquired subsidiary is required to be added into the policy as an Insured by paying an additional premium.

2. If the newly acquired subsidiary is expected to be covered in the ongoing liability policy of the Acquirer company and carries the process as above, even then, cover extended to it is only for wrongful acts committed on or after the date of such entity becoming the subsidiary of the Acquirer entity. For actions or omissions committed by the subsidiary before the acquisition, there would not be any cover in the liability policies of the Acquirer entity. Therefore, the retroactive date for the New Co. in these policies would be the date of acquisition.

3. In case of acquisition as above, typically the liability policy of the New Co. usually terminates on account of a change in control, unless extended by the Insurer by way of an endorsement, which is usually subject to payment of an additional premium.

4. The Acquirer's policy grants cover to the New Co. only for prospective actions or omissions, and the latter's erstwhile cover for actions taken before the acquisition terminates unless extended. This results in a gap in the cover for the New Co. in respect of claims that arise out of actions or omissions committed by the New Co. before the acquisition. For this purpose, it is recommended that, when a company is being acquired by another third party entity as a subsidiary, a run-off endorsement be purchased for the New Co.'s liability policies to cover any claims that may arise post-acquisition out of actions or omissions of the New Co., committed before the acquisition.

B Fidelity Guarantee Insurance

WHAT WAS THE CLAIM?

The Insured was in a man-power heavy business. In addition to the permanent employees on their payroll, they engaged with a man-power contractor for additional manpower from time to time as per the business needs. The employees on the payroll of the Insured, along with some of the contracted employees, colluded and misappropriated the Insured's accounts using multiple employee IDs and credited their respective accounts with money fraudulently taken from the bank account of the Insured entity. The Insured notified the claim under their Fidelity Guarantee Insurance (FG Policy).

KEY ASPECTS TO CONSIDER:

1. **The Insurer's right to employee's full & final settlement**

   - In any FG Policy, all employment dues of the accused employees are required to be withheld by the Insured entity as the Insurer is entitled to the same. The amount of full and final sum payable to the accused employee by the Insured under their employment contract (minus any statutory liability) is required to be deducted from the final assessment of loss.
   - In this case, the Insured had failed to withhold the said full and final amounts for the accused employees and had credited their bank accounts with the said sum. Accordingly, the Insurer deducted the said sum from the final loss and the Insured had to bear it on their books.

2. **Forfeiture of Gratuity by the Employer**

   - A Surveyor was appointed by the Insurer to assess the way forward and ascertain the loss payable. The Surveyor, in providing his comments, deducted the gratuity payable to the defrauding employee from the total loss value.
   - The Insured needed a statutory basis for the said deduction. Our team of lawyers were able to take the Insured through the provisions of the relevant statute which allows for '*forfeiture of gratuity by an employer if the services of an employee have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, to the extent of the damage or loss so caused*'.
   - This resulted in a seamless assessment and the Insured also received a justification for all deductions made in the assessed loss.

3. **Bail Deposit Considered as Recovery**

   - In the criminal proceedings initiated by the Insured, one of the accused deposited a sum of INR 26 Lac before the concerned court and obtained bail. The Surveyor insisted that the sum deposited by the accused before the court must be treated as recovery and be deducted from the total loss.

- We made representations on behalf of the Insured to demonstrate that recovery would only include such items which the Insured was entitled to receive in connection with the money lost. Bail deposit is made with the court and is in their custody. The entitlement of the Insured towards the said deposit is not certain.
- If and when the court were to decide the criminal matter conclusively, and if the Insured were to receive a favourable order coupled with an order directing that the bail deposit be paid to the Insured, it shall be treated as recovery only at such a stage.

C Professional Indemnity Insurance

WHAT WAS THE CLAIM?

The Insured was in the business of providing supervisory services in connection with the installation of pipes manufactured by other entities. In one of the projects, when the pipes were installed, there was an error in the process, resulting in back to back pipes being damaged. The customer made a claim on the Insured to compensate them for losses suffered by them and the Insured entered into discussions with the customer. These discussions continued for over 18 months and since the customer did not reduce their claim, the Insured decided to notify the matter under their Professional Indemnity Insurance (PI Policy).

KEY ASPECTS TO CONSIDER:

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

   - A PI policy aims to cover any claim arising against an Insured, during the policy period, alleging an error or omission in the professional services being provided by the Insured. A claim usually would include a written demand for compensation or any other monetary or non-monetary relief. Therefore, as soon as the Insured becomes aware of a claim or a potential claim, the Insured must immediately inform its brokers and the insurers to ensure policy conditions are complied with.

2. **Importance of an Identified Control Group Clause in the Policy**

   - 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.
   - The first instance, where the Insured was informed *that the error had occurred by its employees and the loss was payable by the Insured,* is to be calculated as the start date of the Insured's knowledge.
   - However, the Insured reported this claim after a significant lapse of time - approximately 18 months after they first became aware of a claim from the customer.
   - Our placement team, being aware of the involvement of multiple teams in the overall business, ensured that the Policy had a defined control group clause, under which the Insured's knowledge of any claim would only commence once the Insured's CFO, Senior Manager or legal counsel, or a person of equivalent designation, was made aware of the claim. While the Insured's ground team was dealing with the client-facing team, the relevant members of the Insured's control group were only involved in the claim, one month before the intimation of the matter to the Insurer. Therefore, the Insured did not lose coverage under the PI policy on account of this alleged delay in intimating the claim to the Insurer.
   - It is instances like these that further bolster the fact that appropriate and timely advice from experts and experienced insurance brokers can go a long way in helping companies gain complete advantage of the policies they are buying.

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 organisation. 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.

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