



LIABILITY CLAIMS *TAKEAWAYS*

CONTENT

- Directors' and Officers' Liability Insurance
- Cyber Insurance
- Commercial Crime Insurance

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

A Directors' and Officers' Liability Insurance

WHAT WAS THE CLAIM?

The Insured, a logistics service provider, and its directors, received a notice from the income tax authority regarding non-payment of TDS for the financial years 2017-2018 and 2018-2019. The Insured, after verifying the same internally, observed that there was indeed an oversight at their end and relevant declarations and deposits were not made before the authority, resulting in breach of applicable law. The matter was investigated by the authority and the Insured's officers-in-charge as well as the company were asked to pay a fine of INR 4,00,000. The Insured lodged the claim under its Directors' and Officers' Liability Insurance Policy (D&O Policy).

KEY ASPECTS TO CONSIDER:

1. Wrongful acts established after final adjudication, not covered

Insurance is based on the Latin maxim *ex turpi causa non oritur actio*, which translates to "from a dishonorable cause an action does not arise". A Policyholder can only seek cover under its liability insurance as long as any willful violation of law or breach of duty is not proved against the directors and officers of the policyholder through final adjudication. If it is established that the directors and officers of the policyholder were, in fact, engaged in willful breach of law or breach of duty, then pursuant to the conduct exclusion in the D&O policy, the Insurer has a right to repudiate the claim and seek reimbursement of any defense costs already advanced to the Insured. In the instant claim, since upon adjudication of the proceedings before the relevant authority resulted in establishing the liability of the Insured D&O, the claim was excluded from coverage under the D&O Policy.

2. Voluntary admission of wrongful act without prior consent of Insurer

In the instant matter, in order to protect the Insured entity's reputation and limit the Insured's balance sheet risk, while the investigation was ongoing, the Insured admitted to their statutory non-compliance and requested for the offence to be compounded by the Income Tax Authority. The Insured filed the application eight months prior to notification of the claim and did not seek prior consent of the Insurer.

Pursuant to the terms of the D&O policy, the Insurer has a right to be informed about any admission of liability that the Insured intends to make, and the Insured is required to take Insurer's prior written consent before making any such admission. Given that the Insured breached two fundamental policy conditions, a resultant material breach of the Policy occurred, and the Insurer was entitled to not pay under the Policy.

3. Wrongful acts committed prior to retro-active date

The Insured's policy was a claim made policy for the policy period: May 2020 to May 2021, with a retroactive date of May 2019. Given that the wrongful act in question (i.e., the violation of law) occurred in 2018, which was prior to the retroactive date, the Policy did not respond to the same.

Retroactive date can have a large impact on coverage under the policy. Therefore, it is important to ensure that:

- Each policy is read independently to ascertain the implication of the retroactive date
- Matters arising out of wrongful act that take place prior to retroactive date are not covered and, therefore, the Insured needs to ascertain any alternative risk transfer mechanism or take the risk into their balance sheet



B Cyber Insurance

WHAT WAS THE CLAIM?

The consulting arm of an audit firm suffered from an unauthorised access into their computer systems and network, resulting in (i) data being stolen (ii) a ransom demand being made in exchange for stolen data being returned. The matter was notified under their cyber security insurance policy (Cyber Policy).

KEY ASPECTS TO CONSIDER:

1. Timely notification is key

In matters of data security and breach of privacy, time is of extreme essence. Given the sensitivity of the issue and impact that may be caused, it is expected that the Insured informs their Insurer of such an incident immediately, allowing the Insurer to take appropriate measures on behalf of the Insured to mitigate the loss and control the impact of the incident.

2. Understanding of coverages

It is extremely important to review and understand the coverage available in the respective insurance policy since one cyber policy may be different from the other. For example, some insurers do not pay for increased cost of working resulting from the cyber-attack. There are other policies which do not specifically include coverage for appointment of counsel generally in connection with a cyber event. Some policies restrict their proportionate share of payment for losses arising out of a ransomware event.

It is, therefore, imperative to review the policy availed to understand the coverage available in case of a cyber event, and also the process to be followed thereafter, as per the respective policy terms and conditions.



Commercial Crime Insurance

WHAT WAS THE CLAIM?

The insured is an e-commerce market player, specialising in the delivery of groceries and farm produce. The Insured's business largely operates on the model of deputing its personnel to deliver goods and collect monies from the end customer. After around nine months of completing operations, during an audit, the Insured discovered that the cash register and the accounts did not tally and were able to trace the same to three of its employees. The Insured filed a claim under its crime policy.

KEY ASPECTS TO CONSIDER:

1. Negligent control

The Insured's Crime Policy required the Insured to design and implement sufficient security protocols to minimise the risk of loss, one of which involved conducting a quarterly audit of the Insured's books of accounts and reviewing the effectiveness of the organisational standard operating procedure. The Insured had failed to implement the necessary checks and balances and had also failed to audit their books for over six months. This was viewed as gross negligence on the part of Insured, by the Insurer as well as a breach of policy conditions. This heavily prejudiced the ability of the Insured to make a successful claim under the policy.

We always recommend that the terms of policy be studied in detail by the Insured with a fine-tooth comb to ensure that the Insured can optimise coverage at the time of a claim. It is therefore advisable to seek guidance from experienced insurance consultants.

We at Prudent, provide our clients with a hands-on review of the Policy terms and conditions at the time of placement and claim intimation to ensure that the Insured's obligations mentioned in fine print are not disregarded and their rights under the policy remain protected.

2. Exclusion of discovering loss during profit/loss or inventory records

Typically, most commercial crime policies would exclude losses, which are solely proved by means of:

- A profit and loss computation or comparison; or
- A comparison of inventory records with an actual physical count

The intent of adding such clauses to an insurance policy is to ensure that the Insured implements sufficient standardisation to monitor its employees/third party activity to the best of its ability such that any deviation from the regular process is flagged off at the earliest. If the Insured sleeps on its obligations under the policy, the Insurer has a right to withhold coverage to that extent.

In this instance, the Insured only became aware of the said loss at the time of tallying the branch accounts and after a significant amount of time had passed. This was clearly in violation of their policy obligations and also triggered an exclusion, resulting in the claim not being paid.



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.





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