LIABILITY CLAIMS *TAKEAWAYS*

CONTENT

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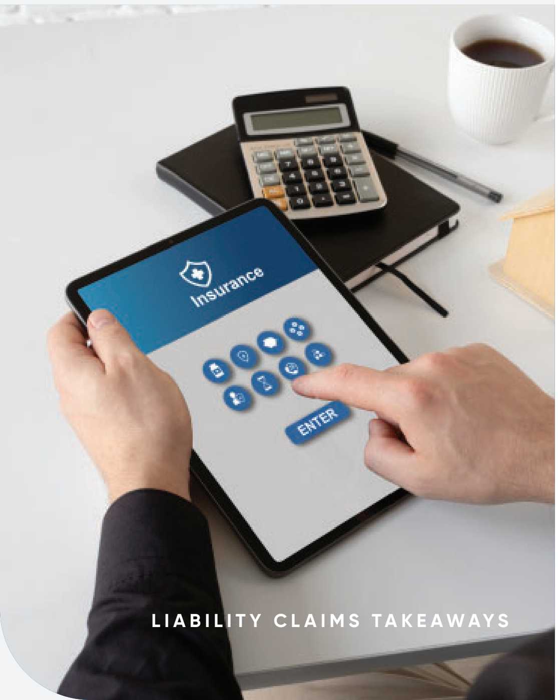
Welcome to the September edition of 'Liability Claims Takeaways' - our monthly insights from industry stalwarts.

A Professional Indemnity Insurance

WHAT WAS THE CLAIM?

The Insured was in the business of providing engineering services to its clients. The customers had shared structural designs with the Insured, basis which the Insured designed the fabrication specifications.
While creating one such design, the Insured's employees erroneously misread the measurements and calculated the designs in the incorrect units, resulting in the development of an incorrect design. While the customer rectified the design at their own cost, they deducted this cost from the Insured's invoice value payable. Hence, the Insured suffered a loss and claimed the same under its professional indemnity insurance.



KEY ASPECTS TO CONSIDER:

1. **Can the withheld sum be claimed under the Professional Indemnity Insurance Policy?**

   As the Insured's loss was a result of a back-charge and not a demand made against it, the Insurer was of the view that the policy was not triggered. However, our team of lawyers made submissions on the Insured's behalf, which was primarily two-fold:

   a) The policy intends to cover the loss suffered by the Insured on account of an act/error/omission committed by them.

   b) The fact that no demand for payment had been made against the Insured does not mean that they had not been held liable for the loss. The deduction from the invoice value payable by the customer is sufficient proof that the Insured has been held liable and has suffered a loss due to an alleged error or omission.

2. **Disputed Fee Endorsement:**

   Our placement had advised the client to obtain a disputed fee endorsement in their policy providing cover for any fee that is not received by the Insured from their customer due to an alleged error or omission in their professional services, meaning that the payment of this fee by the Insurer would avoid a dispute from the Insured against their customer along with a larger claim being made by the customer against the Insured. The dispute in the professional service should have been first raised during the policy period.

3. **Importance of sharing documents and information with the Insurer promptly:**

   Every liability policy comes with a standard set of conditions, which primarily ensures that the Insurer's rights to participate in the claim are not prejudiced. One of these conditions is that the Insurer must be kept informed of all material developments of the claim and all information or documentation required to assess the claim must be shared promptly. In this instance, while the Insurer was informed as soon as a claim had arisen, they did not share further updates. After multiple discussions, when the parties reached a settlement, the Insurer was informed. This led to a major delay in the claim assessment as the Insurer had a right to participate in these discussions and justify the lack of information being shared.

B Commercial General Liability Insurance

WHAT WAS THE CLAIM?

The Insured is a leading pharmaceutical company with a presence across India. One of the chemical by-products generated at the plant was entrusted by the Insured to its partner for processing and onward sale to the customers who find it useful. While one such consignment of the by-product was being transported, it met with an accident resulting in the death of residents and severe injury to many others. The Insured intimated this incident under its Commercial General Liability Policy (CGL Policy).

KEY ASPECTS TO CONSIDER:

1. **What does a CGL Policy cover?**

   The Commercial General Liability Policy (CGL Policy) aims to cover/pay damages that the Insured becomes legally liable to pay on account of bodily injury or property damage that may arise out of the Insured's business operations or business premises or products. This Policy also reimburses the Insured for any medical expenses incurred due to a bodily injury caused to a third party, arising out of the Insured's business operations or business premises or products.

2. **What is a pollution exclusion?**

   Most CGL Policies have a pollution exclusion for claims arising out of "bodily injury" or "property damage" at any premises, site, or location arising out of the actual, alleged, or threatened discharge, dispersal, release, or escape of pollutants. This said "bodily injury" or "property damage" may be due to any of the Insured's operations including those which produce a "products-completed operations hazard". Pollutants mean any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapour, soot, fumes, acids, alkalis, chemicals, and waste. Waste includes materials to be recycled, reconditioned, or reclaimed.

   Accordingly, we advise clients, who are engaged in a business activity that is likely to face a pollution-related event, to:

   a) ensure their CGL policy has a 72-hour sudden and accidental pollution extension

   b) avail a pollution legal liability policy to cover pollution-related legal liabilities

3. **The 72-hour sudden and accidental pollution cover:**

   While most liability policies exclude cover for claims arising out of 'pollution,' the Insured can bridge the gap and avail of an extension, at an additional premium, for '72 hours sudden and accidental pollution cover.' As per this extension, the policy responds to the Insured's legal liability arising out of an occurrence that causes bodily injury or property damage due to pollution; and such pollution is caused by ***a sudden, unintended, and unexpected happening, which takes place in its entirety at a specific time and place during the policy period.***

The Insured must identify and notify the Insurer of a potential pollution event/release in the set time. The pollution event/release, itself, must begin and end in a designated period; the time allowed for identifying and reporting the release/event begins at the start of the actual event/release. The coverage provided is limited, but still serves the purpose of providing coverage for pollution events that are immediately discovered and reported by the Insured. However, to avail of benefits under this cover, the Insured must ascertain when a pollution event/release began. Typically, this cover has a 72-hour identification period and a 7-day reporting period, but the Insured is required to identify the spill within the first 72 hours of the start of the occurrence and notify the carrier within 7 days of the commencement of the incident.

Given that the present incident qualifies to be a 'sudden' and 'identifiable' occurrence, the Insured made a timely intimation to us, the Insured's insurance brokers. Responding proactively, we informed the Insurer of the event within the stipulated time frame resulting in the Insured being able to benefit from the cover and make a claim under its CGL policy.

C Employee Dishonesty Insurance

WHAT WAS THE CLAIM?

The Insured was engaged in the business of providing manpower facilities to its client. One of the clients is a nationalised bank to whom the Insured supplied manpower to work in their credit card department. One of the employees of the Insured deputed with the bank was working as a Branch Relationship Executive. The Insured's employee, using his official position, committed fraud with the customers of the bank using their credit cards which resulted in losses to the customers. The frauds were detected by the bank's team who then informed the Insured about the same. Upon investigation, it was noticed that all the frauds were committed by one employee. The bank filed a claim on the Insured to recover its losses i.e., the amount payable to the customers who became victims of the fraud. The Insured had taken an Employee Dishonesty Insurance Policy and intimated the matter to their Insurer.

KEY ASPECTS TO CONSIDER:

1. **Client Loss Endorsement under the Policy:**

   The Employee Dishonesty Policy availed by the Insured covered the internal crime which is defined as any fraudulent or dishonest single, continuous, or repeated act(s) committed by an employee - either acting alone or in collusion with others to cause loss to the Insured or to obtain an improper financial gain i.e., the amount the individual was not entitled to gain.

   However, the policy also provided a specific endorsement to cover claims made by the client who suffers a direct loss due to these fraudulent acts of the employee.

   The 'Client Loss Endorsement' states that the Insurer shall indemnify the client of the policyholder for the loss of money or securities suffered by the client for which the Insured is legally liable to pay the client. Here, the Insurer would directly pay the client the amount of loss suffered. This endorsement can be understood as an exception to the traditional way of paying third-party losses, where the Insured compensated the third party for their loss and was then reimbursed for the same by the Insurer.

2. **Financial Loss suffered is to be established beyond doubt:**

   It is imperative to prove that the client has suffered financial loss due to the acts of the Insured's dishonest employee. It is to be established beyond doubt to the Insurers that the client has reimbursed the amount of fraud to each of the customers before being indemnified by the Insurer. One of the most effective ways of establishing this is to use bank statements of the client, demonstrating that the amount debited from the Insured's account is the sum credited to the customers' bank account. Here, the client has to establish the direct financial loss caused before the claim is made payable under this policy. If the client is unable to show that they have suffered some direct financial loss due to the fraudulent acts of the Insured's employee, then they are not entitled to the benefit of this provision.

3. **Insurer's right to recover:**

   A liability insurance policy would provide the Insurer with a right to bring a subrogated claim against any other party legally responsible for the event due to which the loss occurred. The existence of an insurance policy does not relieve the person legally responsible from their liability. In case of a dishonest employee, the Insurer is entitled to recover the loss amount from the culprit. In all such cases, the Insurer asks the Insured to immediately stop any payment to the employee such as his/her salary, gratuity, or any kind of remuneration. In cases, where the employee has been terminated or has resigned, the Insured is required to stop the full & final settlement. The Insurer has a right to recover from the Insured, all the costs payable to the fraudulent employee or have been paid post discovery of the fraud. In case the Insured can recover certain costs from the fraudulent employee, they are required to deposit such costs recovered to the Insurer.

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 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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