Liability Claims Takeaways

AUGUST 2023

Welcome to the 32nd edition of 'Liability Claims Takeaways' - our monthly insights from industry stalwarts.

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A

Commercial Crime Insurance

How can you shield your business by ensuring broad coverage for employees?

What was the claim?

The Insured is the owner of a provisional store and had multiple outlets throughout the country. They would procure the various products to be sold in their store from different vendors. However, the Insured started receiving complaints from their vendors for non-payment of the dues. On checking, it was found out that though the Insured made timely payments to the vendors through cheque, the same was not deposited in the vendors' accounts. On further investigation, it was found that one of the employees of the Insured had forged the cheques into their names and deposited them in multiple accounts in collusion with some third parties. The Insured filed a police complaint for their loss and notified the claim under their Commercial Crime Insurance Policy ('Crime Policy').

Key aspects:

1. **Importance of broad coverage for employees**

   A Crime Policy intends to protect the company from losses, both internal and external. While a company may have strong measures to safeguard themselves from external perpetrators or third parties, employees are also a great concern for the companies since they are very well versed with the internal systems and procedures of the company. Therefore, to protect the companies against such losses, it is essential that the scope of coverage of employees under the Crime Policy should be wider.

   During investigations, the accused is generally identified, however, there may be scenarios where the Insured is unable to identify the perpetrator. To cover such cases, it is essential to include provisions in the policy negating the requirement of identifying the perpetrator employee.

   In this particular instance, it was established that the fraud was committed against the Insured, and because the policy covered employees on an unidentifiable basis, the Crime Policy was triggered.

2. **Role of the chargesheet and police investigation in a claim under the Crime Policy**

   As a mandatory requirement under the Crime Policy, the Insured filed a police complaint to begin an investigation in order to determine the perpetrator. Post the completion of the investigation, the police named the Insured's partner and two other employees as accused persons in the chargesheet.

   As soon as the chargesheet was filed, the insurer was of the opinion that because the policy excludes criminal acts of the partner of the Insured, the claim ought to be repudiated. However, it was explained to them that since the chargesheet is not the final order establishing the criminal act committed by some person, and since the chargesheet had the names of two employees as well, the claim ought to be kept open.

   As per the final order of the court, the Insured's partner was acquitted while the other two employees were found to be guilty of committing fraud against the Insured, and thus the claim was paid under the Crime Policy.

B

Cyber and Data Security Insurance

What lessons were learned when a software company was a victim of cyber-attack?

What was the claim?

The Insured was a software designing company and as a part of their business, they would design multiple kinds of software, customised as per the client's requirements. Suddenly, the Insured's software was affected by a malicious code and the Insured was unable to access their computer systems for four days. Due to this, the Insured suffered a loss of profit due to business interruption since they were unable to provide the software to their clients. The Insured immediately notified the claim under their Cyber Policy.

Key aspects:

1. **Network loss coverage under the Cyber Policy**

   The Cyber Policy provides for various key coverages, one of them being cover for loss of net profit due to any unauthorised access/security breach in the Insured's computer system.

   In this case, the Cyber Policy defined network loss as the reduction in net profit earned by the Insured from the expiration of the waiting hours period until the service is restored, which the Insured would have earned after the payment of taxes and operating costs, but for the cyber incident. The Policy specifically defines the waiting hours period as the number of hours that must elapse once an interruption has begun to commence coverage for business interruption loss. The waiting hour period is a kind of retention period, during which the loss has to be borne by the Insured. In this instance, the waiting period was 24 hours and since the interruption in the Insured's computer system was for four days, the claim was triggered under the Cyber Policy.

2. **Net profit versus gross profit:**

   The policy specifically provides coverage for payment of loss in net profit of the Insured due to the cyber incident and does not cover any loss of gross profit suffered by the Insured. For calculating the Network Loss under the policy, the prior experience of the Insured before the beginning of the security failure and the probable business an Insured could have performed had no security failure occurred is reviewed along with projections, past trends, overall profit and loss, and account statements.

3. **Improvement of software under the Cyber Policy**

   In this particular instance, the Insured's software had been attacked due to which it was damaged, and the Insured was unable to carry on its business operations. To mitigate the loss, the Insured started using new software on rent that had enhanced features which allowed them to re-commence operations after four days of the incident.

   Once the malicious code was out of the Insured's system, the Insured continued using the new software to meet the client's requirements.

   While the Cyber Policy does provide for the loss suffered by the Insured it is an indemnity policy, the aim of which is to put the Insured in the same position as they were prior to the loss. In this case, the policy paid the cost of renting the new software until the malicious code was removed from the Insured's computer system. However, the cost incurred on the rentals after the Insured's systems were back was not covered in the policy. This was a business decision taken by the Insured and not a loss suffered by them.

C

Commercial General Liability Insurance ('CGL Policy'):

How did our experts help in resolving an impasse in the CGL Policy claim?

What was the claim?

The Insured was in the business of manufacturing components and parts that can be used in medical and defence equipment. The Unique Selling Proposition of the Insured's products is its sleek design and the practicality of the product's functioning. These products typically range between 2 mm-5 mm in size; therefore, it is critical for all of the parts manufactured by the Insured to conform to the design specifications. In one of the lots manufactured by the Insured, the specification was off by 0.5 mm, resulting in the entire batch being redundant to the customer. The customer rejected the goods and raised a claim against the Insured for the same. The Insured notified the matter under its CGL Policy.

Key aspects:

1. **Costs covered under product recall cover:**

   The recall cover under the CGL Policy typically covers the following costs incurred by the Insured, with the prior written consent of the insurer, with respect to a covered incident:

   - The cost of returning the Insured's product(s) from any purchaser, distributor, or user except for its affiliated, subsidiary, and associated manufacturing companies
   - The actual cost of disposal of the products is less than any salvage or scrap value recovery
   - Extra expense to rent additional warehouse or storage space
   - The cost to redistribute the product that is recalled and restored or the cost of the distribution of a replacement product
   - Expenses to make any repair, recondition, decontaminate, or otherwise treat the recalled products to render them marketable

   A covered incident typically means an event relating to the product due to which either the products results in or causes an imminent threat to result in bodily injury or property damage.

2. **Value of goods arrived post-destruction:**

   In the instant matter, the Insured's customer rejected - the goods, the cost of freight to bring the goods back, and the cost of reworking the goods that were higher than the cost of manufacturing the goods. Therefore, it was decided to destroy the goods at the place of delivery, which in the instant matter was Ireland. While these discussions were ongoing, the insurer was not kept informed. The Insured was focused on the continuity of its business and therefore, negotiated the matter with its customer.

   Upon informing the insurance company of this, they raised a contention of breach of policy conditions for the following reasons:

   - Their consent before destroying the goods and incurring costs for destruction was not obtained
   - The insurer was not provided with an opportunity to inspect the goods, verify the issue, and assess whether the matter falls for coverage
   - The insurer was not given the opportunity to ascertain whether the price/cost for destruction was as per the standard costs/the best available in the market

This resulted in the claim reaching an impasse since the insurer was not in a position to comment on the matter without having sufficient information.

In order to support the Insured in recovering their losses and also provide the insurance company with adequate information to carry out their own coverage assessment, our team of experts arrived at the following solution: we requested the Insured to arrange three quotes from local salvage buyers and prepare an extremely detailed comparative analysis on the actual design vs the faulty product supplied to the customer. The salvage quotes helped the insurer realise the value of the faulty product and the report clarified all ambiguities on the claim. This resulted in the insurance company being able to release their coverage assessment without any non-standard deductions to the loss value.

3. **Admission of liability without the insurer's consent:**

We have in a significant number of our past publications highlighted the importance of adhering to the general policy conditions since a policy is nothing but a contract between the Insurer and the Insured and breach of any conditions can have a severe and direct impact on the claim. While the insurer's consent is evidently critical before incurring any costs, the same applies to the admission of liability as well. In the instant matter, the Insured was not required to make any active payout, but the customer forced the Insured to release a credit note basis which the customer deducted a portion from all subsequent invoices to recover the losses. We had to yet again substantiate how this was not a choice offered to the Insured but any refusal to align with the customer would result in severe business impact. By way of evidence of this position with email trails and minutes of meetings between the parties, the insurer was able to verify the Insured's position. This resulted in a complex matter being resolved by a way of keeping crisp and neat documentation records to allow the relevant stakeholders a fair opportunity to present their submissions.

We are confident that the anecdotes held your interest and provided some valuable lessons.

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 consists of members with underwriting experience and the largest number of lawyers who can assist 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 one of the largest claims teams 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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CIN No.: U70100MH1982PTC027681 I License No. 291 (Validity: 18th February 2023 to 17th February 2026)