

# LIABILITY CLAIMS TAKEAWAYS

Welcome to the 25th edition (January 2023) of 'Liability Claims Takeaways' - our monthly insights from industry stalwarts.

January 2023

**WE WISH YOU A HAPPY NEW YEAR!**

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## Cyber Security Insurance

### What was the claim?

The Insured is a manufacturer of goods and was in discussions with their customers regarding the settlement of their due invoices. As a part of the Insured's business practice, the payment to be received from their customer will be used to pay the Insured's vendors for procuring raw materials.

While the correspondence with the customers was ongoing, a third-party perpetrator, intercepted the network of the Insured and gained access to their correspondences. The perpetrator, posing as Insured, sent incorrect bank account details to the customers, requesting the payment of the invoices credited to a new bank account. Some of the Insured's customers, relying on the perpetrator's instructions, remitted the complete invoice value to this new bank account. In the meantime, the Insured continued to follow-up for payment with the said customer.

Upon receiving such reminders, the customer informed the Insured that the payment had been already released to the new bank account purportedly mentioned by the Insured (the perpetrator, in this instance). The Insured on receiving such communication, checked with their bank and were informed that no amount from the customers was received. During an internal investigation, it was found that the new bank details were shared by a third-party perpetrator who had intercepted the communication between the Insured and their customer.

The payment by the customer was credited into the perpetrator's account and the loss of the invoice value was suffered by the Insured. Additionally, they also had to pay their vendors with their own funds. The Insured filed a claim under their Cyber Security Insurance policy ('Cyber Policy').

### Key aspects to remember:

#### 1. Coverage under the Cyber Policy

A Cyber Policy includes a cover for inter alia, an E-communication Loss which aims to cover the loss resulting directly to, inter alia, a client or financial institution having transferred, paid, or delivered any funds or property, on the faith of any fraudulent communication, purporting to have been directed by an Insured to any of the foregoing for the purpose of initiating, authorising, or acknowledging the transfer, payment, delivery, or receipt of funds or property, but which communication was either not sent by an Insured or was fraudulently modified during electronic transmission and for which loss an Insured is held to be legally liable.

In this case, the customers transferred the invoice value into the perpetrator's bank account based on a communication the customer thought was sent to them by the Insured. On account of the incident, the Insured was held accountable because the interception happened at their end. Accordingly, the Insured invoked the E-communications clause.

#### 2. Information to be given to the authorities

For a claim to be maintainable under a Cyber Policy, especially the ones stemming from a crime, it is essential that the Insured on becoming aware of the incident, immediately files a written complaint with the police officials.

In case the Insured fails to file a complaint or there has been a delay, an explanation would have to be provided justifying the same.

In cases of a cyber-attack or involvement of a computer system, a complaint needs to be submitted to the cyber cell also. It is essential to get an acknowledgement from the cyber cell, post-filing the complaint.

Furthermore, owing to the recently issued and implemented guidelines by the Ministry of Electronics and Information Technology (MeitY), a report also needs to be sent to the CERT-In i.e., the Indian Computer Emergency Response Team.

In all cases of a cyber incident, the Insured needs to cooperate with the police and/or cyber cell and/or CERT-In with all the required information/documents to conduct the investigation smoothly and ensure that the perpetrators are caught. The Insured is required to keep the Insurers fully informed of the police investigation and provide timely updates. In case the perpetrators are taken into custody and any recovery is made by the Insured, the same needs to be intimated to the Insurers and will be deducted from the overall loss assessment under the Cyber Policy.

### 3. Claims series clause

The Cyber Policy provides that one or a series of circumstances and/or cyber events, having the same originating cause or source shall be deemed together as a single event. It will be deemed as first discovered at the time of earlier discovery and a single deductible shall be applied across all such claims arising from a single event covered under the policy.

In the present scenario, though there were multiple customers to whom the perpetrators shared the new bank account details and payments were made separately by them, but because they were by the same perpetrator and the same cyber-attack was used to intercept all these communications, these were treated as a single event and single deductible was applicable.





## Commercial General Liability Insurance

### What was the claim?

The Insured is in the business of providing hospitality services and offers the facility of service apartments to its guests. On one occasion, one of the guests staying at the Insured's service apartment, post-check-out in the morning, requested the Insured's manager to keep his luggage at the apartment as his flight was scheduled for late evening and he did not want to carry his luggage throughout the day. The Insured agreed to take care of his luggage and did not charge any amount for the same as a goodwill gesture.

However, while keeping the luggage in their storeroom, one of the Insured's staff members wrote the room number of the guest on his bag with a permanent marker. In the evening when the guest returned to collect his luggage, he saw that a number was written on his bag and informed the Insured that they had caused damage to his expensive bag, demanding compensation from them. The Insured filed a claim under their Commercial General Liability Policy ('CGL Policy').

### Key aspects to remember:

#### 1. Care, custody, and control exclusion

Typically, the CGL policy provides coverage for third-party liabilities, bodily injury, or property damage arising due to accidents in the Insured's premises or out of the Insured's product.

However, under this policy, there is an exclusion for the goods kept under the care, control, and custody of the Insured and have been damaged/destroyed on the Insured's premises. The policy pays for damages payable by the Insured, caused to another person's property; however, if that property is in the temporary safekeeping of the Insured, the policy excludes such losses.

For the exclusion to apply, the following conditions must be met:

- The Insured must be temporarily in-charge of another person or company's property i.e., care, or
- The Insured must be responsible for safeguarding another person or company's property i.e., custody, or
- The Insured must have the power or authority to manage, direct, or oversee another person or company's property i.e., control

In the present scenario, the guest's bag was damaged by one of the Insured's staff members when it was on the Insured's premises due to which the Insured became legally liable to pay the guest for his loss.

However, as the goods were in the temporary care and custody of the Insured, the amount payable in relation to the damaged bag did not find cover under the CGL Policy by virtue of the Care, Control and Custody Exclusion.



## 2. CGL policy – a broader form of Public Liability Insurance

A Public Liability Policy provides coverage for third-party liabilities for bodily injury, or property damage **arising due to accidents within the Insured's premises**. The policy aims to indemnify the Insured against their legal liability to pay compensation to the third parties whose tangible property has been damaged/destroyed in the premises of the Insured. Unlike the CGL policy, the Public Liability does not extend coverage for bodily injury or property damage arising due to the products of the Insured.

Defence costs which the Insured incurs in the investigation, defence or settlement of any claim made against the Insured are covered under both, CGL and Public Liability Policy, however, these costs must be incurred with the prior consent of the Insurers.



### What was the claim?

The Insured entity is engaged in the entertainment industry and is also a listed company at one of India's leading stock exchanges. One of their Directors received a show cause notice from the Securities and Exchange Board of India (SEBI) alleging violation of insider trading regulations. The concerned Director made his submissions and decided to settle the matter pursuant to the SEBI settlement regulations. The matter was settled for a penalty of INR 25 lacs and the lawyer's fee was incurred by the director in his defence as well as for the settlement process. A claim was notified under the Insured entity's Directors' and Officers' Liability Insurance ('D&O Policy').

## Directors' and Officers' Liability Insurance

### Key aspects to remember:

#### 1. Civil fines and penalties – covered, if insurable by law

Most D&O Policies exclude fines and penalties in their base form but coverage for civil fines and penalties insurable by law is easily available by way of an endorsement of the policy.

In this case, while the penalty, if civil in nature, could have found cover under the policy, the settlement itself was made on the condition that the applicant will not claim the settlement from any insurance or indemnity. Due to this condition, the settlement amount paid to SEBI did not find cover under the policy as it fell outside the purview of 'fines insurable by law', which is required under the policy.

#### 2. Conduct Exclusion

In cases where settlement does not happen and a penalty is levied accompanied by the Noticee being held guilty of the alleged violation of law, typically, D&O policies also exclude claims arising from such findings. The Policy aims to exclude any claim arising from a violation of law by an Insured person. Therefore, if an Insured person is found guilty of violating any law and a penalty ensues, such penalty, defence cost and the entire claim, would usually be excluded from the policy. The only requirement to trigger this exclusion (which is present in most policy wordings) is that the guilt ought to be established through a final adjudication of the matter.





### 3. Other Policy breaches

Even otherwise, in this claim, several other policy terms were breached, namely:

- The claim arose in 2020 but was only informed to the Insurer in 2022; two renewals were completed in the interim. The matter was not disclosed at any renewal. The Insurer alleged non-disclosure and misrepresentation against the Insured.
- D&O policies are usually claims-made policies i.e., they cover claims first made against an Insured person, during the policy period, and reported to the Insurer during the policy period, which is usually 1 year. In this case, while the claim first arose against the director during the 2020 policy, it was only notified to the Insurer during the 2022 policy.
- Lastly, the settlement concluded with SEBI, was done without taking the Insurer's prior consent. This was in breach of the policy's terms which requires that consent from the Insurer be obtained before settling any claim.



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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- 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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