Liability Claims Takeaways

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Welcome to the 37th edition of 'Liability Claims Takeaways' - our monthly insights from industry stalwarts.

WE WISH YOU A HAPPY NEW YEAR!

CONTENT:

A Multi-modal Transport Operators Liability Insurance (MTO Policy)

What was the claim?

The insured operates in the business of providing transportation, logistics, and warehousing services to its customers. In the recent incident, the insured served as the end-mile transporter for one of its customers, tasked with ensuring the dispatch of approximately 4,500 kgs of goods. These goods, intended for use in the manufacturing of automotive components by the end customer, comprised 4,000 kgs of the correct raw material and an erroneous dispatch of 500 kgs of the incorrect raw material. Consequently, the end customer produced a faulty product. A claim for damages was filed against the insured's customer, who, in turn, sought compensation from the insured. The insured reported this loss under its MTO policy.

Key aspects to remember:

1. **Coverage under an MTO policy:**

   An MTO policy is specialised insurance tailor-made to address the unique risk mitigation requirements of the insured based on their business activities. Typically, an MTO policy encompasses the following coverages, among others:

   - Loss of cargo
   - Physical loss or damage to cargo while under the responsibility, care, and supervision of the insured
   - Physical loss or damage to equipment/products owned or operated by subcontractors or customers
   - Fines and penalties levied on the insured
   - Errors, omissions, and negligence committed by the insured in the course of providing their professional services
   - Third-party liability imposed on the insured

   It is imperative that such specialised policies be understood in-depth and interpreted in accordance with the insured's specific business requirements.

2. **Distinction between a professional indemnity claim and a product liability loss:**

   In the specific case at hand, the claim against the insured stemmed from their negligence in delivering the correct goods to the end

customer. The insured had received a Purchase Order (PO) outlining the entire transaction, including specific details about the recipient of the goods. Unfortunately, the insured's employees failed to verify the details of the goods before dispatch, resulting in the delivery of incorrect goods. Consequently, the end customer used these incorrect goods in the production of faulty items.

During the claim review process, the insurer misinterpreted the allegations against the insured, perceiving them as 'supplying' incorrect material rather than understanding that the insured 'erroneously dispatched' the wrong goods, thereby considering the claim as "product liability". It is crucial to note that the insured's primary business function was not the manufacturing and sale of raw materials; rather, they acted as the last-mile delivery executives for their customers. It became necessary to separate the two sides: (i) the act of supplying incorrect material, which was part of their professional services, and (ii) the incorrect manufacture of the final product.

By dissecting the insured's business processes and disassociating them from the claim against the insured's customer, we accurately represented the insured's case before the insurer. This clarification prompted the insurer to appreciate the insured's claim as a deficiency of service, resulting in a successful assessment of the loss under the errors and omission's section of the insured's policy.

Critical importance of thorough documentation for verifying loss and liability:

The resolution of the insured's claim encountered a significant obstacle due to a misconstrued understanding of the actual loss. In such instances, our role as the insured's advisors becomes pivotal. Our objective extends beyond merely facilitating the exchange of documentation among stakeholders; rather, it is to ensure that a valid claim of the insured is not rejected on grounds that are deemed unacceptable. Moreover, aiding insurance companies and surveyors in comprehending the insured's business, their role, and the liabilities arising from an incident leading to the loss is paramount to the entire claims process.

In this particular case, our assistance not only enabled the insurer to grasp the intricacies of the claim but also supported the insured in gathering, reviewing, and identifying pertinent documentation and information. This meticulous approach served to substantiate the loss, clarify critical aspects of the incident, and document the entire process, thereby ensuring a seamless claims process thereafter.

B Commercial General Liability Insurance Policy

What was the claim?

The insured, engaged in the manufacturing of paints, encountered a claim scenario involving one specific buyer. This particular buyer operates in the business of supplying cylinders to gas distributors across Southeast Asia. The buyer purchased a particular tint of red paint from the insured to paint the cylinders, intending to sell them to gas distributors for filling and subsequent distribution.

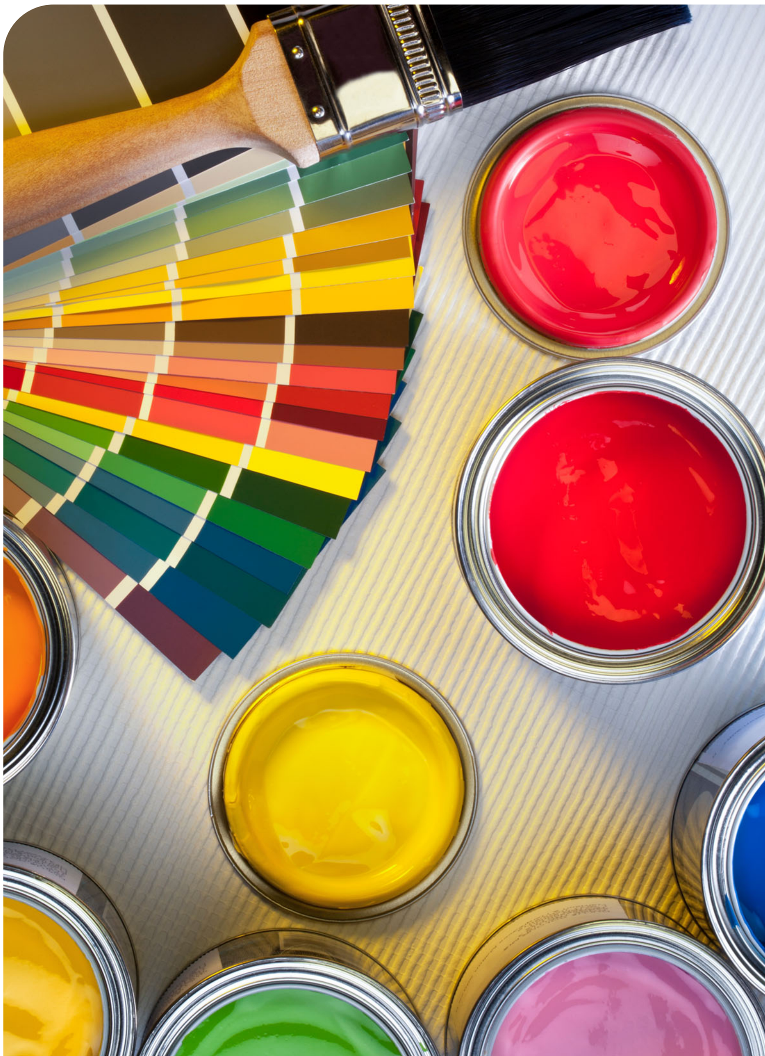
However, a significant issue arose when the buyer received a complaint from the largest gas distributor in Southeast Asia. The complaint highlighted that the painted cylinders exhibited signs of pre-mature fading, with patches of cracked paint, leading to complaints from the distributor's end customers. Consequently, the distributor insisted on a large-scale recall of the cylinders for repainting. Additionally, the gas distributor cancelled several future orders, resulting in substantial financial losses for the cylinder distributor. Seeking redress, the distributor claimed reimbursement for the expenses related to repainting and compensation for the financial losses incurred due to the cancelled orders. In response to this claim scenario, the insured promptly notified their insurance carrier under their Commercial General Liability Insurance (CGL policy).

Key aspects to remember:

1. **Coverage limited to third-party claims arising from actual or alleged bodily injury or property damage (BI/PD) due to insured product:**

   The CGL policy, among other aspects, specifically addresses third-party claims arising from actual or alleged BI/PD resulting from a defective insured product. However, in the current claim, there was no discernible BI/PD due to the defective paint. Although the paint failed to fulfil its intended function, there was no indication of potential injury resulting from the alleged defect.

   During the coverage assessment under the policy, the broker informed the insured about the challenges associated with the trigger under the CGL policy. Given that the product liability section of the CGL policy was confined to claims arising from third-party BI/PD, a notable concern arose regarding whether the policy would extend any coverage to the claim raised by the third party. While the third party might have incurred financial losses and expenses related to reworking the cylinders, there was no claim stemming from actual or alleged BI/PD.



2. **Inefficacy exclusion:**

   The CGL policy incorporated an inefficacy exclusion, specially designed to exclude losses solely arising from, based upon, or attributable to the improper or inadequate performance of the insured's product(s). This exclusion also extends to the failure of the insured's product(s) to fulfill their intended use or function or meet the warranted or represented level of quality, fitness, or durability.

   In clarifying this provision to the insured, it was emphasised that the costs claimed by the distributor stemmed from consequential financial losses due to the cancellation of future orders and the expenses associated with recalling and repainting the cylinders. The distributor asserted that the insured's product proved ineffective in fulfilling its intended purpose. Consequently, the nature of the claim was not centered on actual or alleged BI/PD to a third party but was anticipated to fall under the inefficacy exclusion due to the product's failure to perform as intended.

3. **Concerns regarding delayed intimation:**

   Prior to serving the demand notice to the insured, the distributor had lodged complaints about the chipping and fading of the paint on multiple occasions spanning almost 18 months. The customer relationship team diligently attempted to engage with the distributor and address their concerns. However, despite the awareness of the complaint by members of the control group, the matter was not communicated to the insurer or the broker. This situation raised concerns about delayed notification, particularly in the context of the subsequent renewal of the policy without informing the insurer of the potential claim.

The broker made diligent efforts to scrutinise and inform the insured about the issues surrounding the claim in light of the policy terms. It was underscored to the insured that not all costs claimed by the third-party would necessarily trigger the CGL policy.
A comprehensive rationale was presented to the insured, empowering them to make an informed decision about whether to proceed with or withdraw the claim notification.

While a CGL policy serves as a vital safeguard against unforeseen claims, offering protection against various business liabilities, it is imperative to conduct a thorough review of the policy in collaboration with the insurance broker. This ensures a clear understanding of the coverage, exclusions, and their potential impact in the event of a claim.

C Cyber and Data Security Insurance

What was the claim?

The insured, a consultancy firm offering technical expertise to new entrepreneurs in exchange for predetermined fees, faced a unique claim scenario. To streamline their promotional activities, billings, and payments received, they outsourced these functions to another company. This external entity was responsible for generating invoices, maintaining payment details, and disseminating promotional messages to entrepreneurs. The outsourced vendor billed the insured based on the hours of work performed.

During one month, the outsourced vendor received details of additional entrepreneurs, leading to an inflated bill issued to the insured. Upon investigation, it was discovered that a malicious actor had manipulated the system, providing additional data to the outsourced vendor. Recognising the potential for a cyber-attack, the insured promptly initiated a notification under their Cyber and Data Security Insurance policy (Cyber policy).

Key aspects to remember:

1. **How will the cyber policy trigger?**

   A Cyber policy primarily offers coverage against losses resulting from cyber-attacks, encompassing various risks such as data breaches, cyber extortion, ransomware, and business interruption due to a cyber event.

   For the cyber policy to be triggered, it is imperative that the cyber event must have taken place on the insured's system. For instance, if a cyber-attack occurred on a third party's system, leading to the insured experiencing data loss and incurring associated costs, it would be the cyber policy of that third party that would trigger, as the attack happened on their system. In this case, the Insured's policy was so structured that, to activate the insured's cyber policy, the cyber-attack must specifically target the insured's system.

   In this case, involving two parties, the possibility for a cyber-attack existed on either system. Consequently, the crucial and emergent first step involved initiating a forensic investigation to definitively establish on whose system the attack occurred. This determination was achieved by analysing the logs of the insured.

   Once the investigation conclusively demonstrated that the attack had indeed taken place on the insured's system and not on the system of the outsourced vendor, the policy triggered, enabling the insured to avail of the coverage provided under their Cyber and Data Security Insurance policy.

2. **Network Usage Fraud Endorsement**

The Cyber policy offers an optional endorsement known as Network Usage Fraud, which addresses costs and extra charges incurred by the insured. This coverage applies to expenses that the insured's information technology, internet, or telephony provider has refused to write off upon the insured's verifiable request. These costs result directly from the unauthorised use of

(a) The insured's system, or

(b) Any telephone systems operated and administered by the insured for its business

While the Cyber policy primarily covers first-party and/or third-party losses stemming from a cyber event, including emergency response costs, event management costs, notification costs, monitoring costs, recovery costs, damages, regulatory fines, and penalties, defence costs, and investigation costs, the Network Usage Fraud endorsement specifically addresses excessive billing issues incurred by the insured. Notably, for this coverage to be applicable, the cyber event must occur on the insured's system.

It's essential to emphasise that this endorsement needed to be explicitly selected, as it was not automatically included in the primary coverage of the insured's base cyber policy. In the case at hand, our team of experts secured the Network Usage Fraud endorsement for the client, enabling the settlement of the claim related to excessive billing under this specific provision.

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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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:

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- 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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