

Liability Claims Takeaways

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Welcome to the 31st edition of 'Liability Claims Takeaways' - our monthly insights from industry stalwarts.

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Commercial General Liability Insurance

Manufacturing defect or customer negligence?



What was the claim?

The insured was a manufacturer of flexitanks where the loading of the customer's liquid and transportation was the responsibility of the customer. In an incident, the flexitank burst and the customer's liquid spilled out on the road. This led the customer to file claims under their Marine Insurance Policy and on the insured, alleging a manufacturing defect in the flexitank. Following this, the manufacturer filed a claim under their Commercial General Liability Insurance (CGL Policy).

Key aspects:

1. Notifying claim under the customer's Marine Policy vs the insured's CGL Policy

Claims that arise on account of an accident during transit, usually fall under non-liability policies, such as Marine Policies, which cover losses due to accidents/accidental jerks. For a liability policy to trigger, a liability claim against the insured ought to be alleged.

In this matter, the cause of damage could have been:

1. Manufacturing defect
2. Accidental jerks/urgent break/jumping off the breaker

Post the notification of the claim, a joint survey was conducted by the marine surveyor and the CGL Policy-appointed surveyor. The survey's prime focus was to analyse if the flexitank burst on its own due to a manufacturing defect or if it was damaged during transit, determining under which policy the claim would be appropriately made.

2. Defect in the product is mandatory to be established

The marine surveyor concluded that there was a defect in the manufacturer's flexitank, leading to the customer demanding compensation from the manufacturer.

The manufacturer submitted the marine surveyor's report to its insurer requesting claim approval. However, the insurer was of the view that the claim filed under the CGL Policy cannot be made admissible solely based on the surveyor's report.

Since the essence of the CGL Policy is to protect the insured from third-party losses, here the insured must prove that the loss occurred due to a defect in their product and it falls within the policy coverage.

To establish a claim of product liability under the CGL Policy, the insured needs to demonstrate that:

1. The product in question is defective.
2. The product was being used by the third-party for its intended purpose.
3. During the use of the product, the third-party suffered bodily injury/property damage.
4. The third-party is demanding compensation from the insured.

The insured submitted a root cause analysis report confirming a manufacturing defect in their product, causing it to burst under fluid pressure, thus triggering the CGL policy and establishing cover.

B

Director's and Officer's Liability Insurance ("D&O Policy")

How did a chemical manufacturer protect itself after a tragic incident?



Background:

The insured was a global manufacturer of chemicals and pharmaceutical products. At the insured's Singapore factory site, an employee suffered a fatal fall from a two-storied rack despite having appropriate safety gear. The police authorities immediately filed a report, and the factory operator was summoned to appear for a statement. Following this, the insured notified its D&O liability insurer about this matter.

Key aspects:

1. Understanding D&O Policy's absolute bodily injury exclusion

Typically, D&O Policy excludes costs and claims made for a bodily injury because Bodily Injury/Property Damage ("BI/PD") risks are generally covered by Commercial General Liability policies. A D&O Policy covers the insured for specific risk exposures that an organisation's D&O/employee face in the course of performing their duties. Since there are specific liability policies available in the market to cover claims against the insured entity arising out of

third-party BI/PD, an absolute exclusion of this nature is witnessed in the D&O policies.

However, a well-negotiated D&O policy will provide coverage for defence costs arising out of a claim for BI/PD, despite the legal liability in connection thereto being excluded. In view of this, our team of liability insurance experts at Prudent ensured that our client was able to seek reimbursement for the defence costs incurred for engaging the legal counsel in defending the D&O in the matter.

2. Availing appropriate insurance coverages trumps availing higher limit of liability:

- In the instant matter, the policyholder availed significantly higher limit of liability in their D&O policy but did not procure a Workman Compensation/employer's compensation Policy ("WC Policy"), which is tailored to cover losses of this nature
- If the insured had taken a WC policy and a D&O policy, the claim would be notified under both the policies and the claim payout would be divided in the following manner:
 - Claim for compensation for bodily injury would be subsumed by the WC policy;
 - Reimbursement of defence costs for D&O would be picked up under the D&O policy, once the costs have crossed the policy deductible; and
 - The insured entity would bear the costs incurred in its defense out-of-pocket, as neither policy includes coverage for such expenses. In some jurisdictions, the WC policy may cover defence cost of entity.

3. Does an out-of-court settlement for a bodily injury claim cover defence costs?

- An out of court settlement is covered under a D&O Policy to the extent it is a settlement by the D&O and is undertaken with the prior written consent of the insurer. To obtain consent, the insurer must be given sufficient knowledge of the reason for the settlement, the rationale and merits of settlement, and an opportunity to review the matter thoroughly.
- The above is subject to the claim itself being covered. In this case, if the entire settlement is towards the main issue of bodily injury, the settlement would not be covered in the D&O Policy on account of the BI/PD exclusion. Therefore, when the insured intended to initiate discussions regarding a settlement with the claimant's family for reducing the costs and mitigating the further risk of loss, we cautioned them of the policy scope and cover, enabling them to make an informed decision.



Commercial Crime Insurance

System lacuna reveals massive fund misappropriation in fin-tech company



Background:

The insured was a large fin-tech company with over 1200 employees that provided services to e-commerce companies. The employees of the insured were deployed to customers of the insured such as e-commerce entities, to handle their product returns and refund processes online. As per the standard operating procedure (SOP), upon receiving a return request, the employee of the insured was required to verify the purchase, identify details of the buyer, and refund the MRP value of the goods to the respective original buyers.

One of the employees of the insured breached the SOP to achieve improper financial gain. For all UPI (Unified Payment Interface) transactions recorded by the insured's customer, where a refund ticket was raised, the employee manipulated the system and replaced the UPI address with that of her own. By following this modus operandi, funds worth approximately 1.5 crores were siphoned by the defrauding employee. The insured discovered this loss after over 18 months owing to a lacuna in their systems which posed a serious challenge with handling the insurance claim.

Key aspects:

1. It's never too late to review your internal systems and processes

- UPI payments have revolutionised India's online payment hemisphere. In India over 68% of total payments are made through UPI. However, the online payment system has also become a prominent base for online fraud.
- Therefore, it is recommended that every quarter, a hygiene check is carried out and measures such as increasing additional checkers are deployed, access to software is restricted to authorised personnel, etc.

- One must bear in mind that insurance companies do not view claims favourably where the insured has not taken bare minimum measures to protect itself and mitigate losses.

2. Documentation and internal records ought to be maintained

- In this case, a lot of the insured's paperwork regarding onboarding the employee, SOP to be maintained and followed, maker and checker system details, etc., were not available for review. This posed a significant challenge to the insurance company and the surveyor deployed to investigate the incident and the consequent loss.

- While the courts of India have taken a strong position on insurance companies being prohibited from repudiating claims for lack of documentation, this does not preclude them from seeking the bare minimum information to understand the issue at hand.
- Owing to this delay in the submission of the documents, a straightforward claim was prolonged extensively.

3. Claims support beyond claim intimation

- Once our team was involved in the matter, not only did we support them by reviewing their records, but we also supported them by assisting in drafting the statement of loss, internal investigation report, remedial SOPs, etc., which (a) helped the insurance company and surveyor understand the exact loss scenario (b) gave the policyholder a significant relief.
- With our team's experience in handling similar claims, we prepared a repository of commonly sought information for claims of this nature. Once we had visibility on the claim and documentation available, we prepared the insured beforehand to collate information likely to be requested by the insurance stakeholders upon further review.
- Therefore, as advisors and partners to our clients, our role extends beyond liaising with the insurance company/surveyor, and it is that of supporting them in the end-to-end claim process.



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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