LIABILITY CLAIMS TAKEAWAYS

Welcome to the 27th edition of 'Liability Claims Takeaways' - our monthly insights from industry stalwarts.

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What was the claim?

The Insured was in the business of providing warehousing and logistic services with a pan-India presence. Owing to the Insured's large-scale operations, they had multiple warehouses across India with over a thousand employees including temporary workers. The Insured's operations included looking over the demand and supply of the goods by its customers.

The Insured's customers would place an order via an online portal for moving goods and Insured's employees would act as delivery agents who supply the goods to the end customer. While working on dispatching an order for its customer, the Insured noticed that the goods were short by 250 units. The Insured notified the matter under its Commercial Crime Insurance Policy **(Crime Policy).**

Commercial Crime Insurance

Key aspects to remember:

1. **Importance of filing FIR:**

   A Commercial Crime Insurance Policy plays a critical role in protecting the Insured's business by providing cover against a series of acts of dishonesty, theft, or fraud of the Insured's employees or third-parties.

   A First Information Report (FIR) is the first document required in any criminal proceeding, as proof of there being a proceeding in motion. This documentation is registered by the police and serves as a record of the incident. An FIR acts as a tool for the police authorities which provides a base to carry on the investigation. It also helps to establish that:

   - the Insured suffered a loss
   - the Insured took the relevant measures to notify the authorities of the incident. (This not only proves that the Insured has suffered a loss, but it also demonstrates that the Insured was not sleeping on its duties and has taken actions towards the recovery of the loss.)

   In this matter, apprehending loss of reputation and being engulfed in a litigious process the Insured was reluctant to file a complaint with the police and did not exercise its duty to do so for a long period. As a result, since significant time had lapsed, without the police investigation, there were no means available to verify the loss or attempt any recovery leading to the closure of the claim from the insurance company as there was no development on the matter. Hence, they were not in a position to provide their comments on the coverages or admissibility of the claim.

2. **Proof of loss – the importance of maintaining proper records:**

   The unfortunate aspect of the Insured's loss was that the defrauding employees/third-parties involved in the matter ensured that records of the stock on paper were tallied while the actual goods were stolen.

   However, there was no proof of this loss: neither there was any eyewitness to confirm the incident nor did the Insured's CCTV cameras capture any activity which could establish the loss.

In cases of losses arising due to a crime, it is paramount that sufficient measures are built in the premises to help identify the person(s) committing the crime and help in recovery. This bolsters the Insured's rights under the policy and also supports the Insurer in mitigating further losses.

3. **Exclusion of discovering loss during inventory records:**

   Typically, most commercial crime policies would exclude losses, which are solely proved by means of:

   - A profit and loss computation or comparison; or
   - A comparison of inventory records with an actual physical count

   The intent of adding such clauses to an insurance policy is to ensure that the Insured implements sufficient measures to monitor its employees/third-parties to the best of its ability such that any deviation from the regular process is flagged off at the earliest.

   In this instance, the Insured only became aware of the said loss at the time of preparing the dispatch order. The Insured was in receipt of these goods seven to nine months prior to receiving instructions for releasing the goods, however, the Insured only carried out physical stock verification of the goods while preparing the outward goods order. This was clearly in violation of their standard of care and the good faith obligation to check the goods when they are received.

What was the claim?

The Insured was in the construction business and required a fleet of trucks and other equipment to be used during its business. These trucks were divided into vehicles owned by the Insured and those that were rented by the Insured. While commissioning one of its projects, the Insured deployed certain vehicles at its customers site to deliver raw materials and equipment. While returning to the Insured's site after delivering the goods, one of the truck drivers accidentally damaged the customer's vehicle.

On account of the accident, the vehicle used by the Insured and the third-party owned vehicle of the customer was damaged. The customer along with the truck owner respectively, filed a claim against the Insured for the damages. This claim was reported by the Insured under its Commercial General Liability Insurance **(CGL Policy).**

Commercial General Liability Insurance

Key aspects to remember:

1. **What is the non-owned and Hired Automobile Liability Cover?**

   Non-owned and hired automobile liability insurance covers bodily injury and property damage caused by the use of vehicles that (i) the Insured hires; (ii) rents; or (iii) does not own but uses in the course of its business.

   In the instant matter, one of the vehicles that were damaged in the accident (the truck used to deliver the goods to the customer's construction site) was hired by the Insured for his business purpose.

   Therefore, the loss suffered on account of this accident by the third-party vehicle was specifically covered in the CGL policy under this extension.

2. **Cost for enhancement not covered under Policy:**

   As mentioned above, the claim was covered under the CGL Policy extension - non-owned and hired automobile liability, therefore, at the time of assessing the claim, the Insurer requested complete documentation on the matter including copies of all invoices regarding the repair of the vehicle.

   On perusal of the invoices, the Insurer noticed that not only were costs incurred for replacing and repairing the damaged parts of the vehicle but also towards modifying/-improving existing parts of the vehicle which were not impacted in the accident.

   The cover available under the CGL policy is only with respect to the cost incurred in repair of the actual damages as the insurance policy is based on the principle of indemnity. The intent of the policy is to put the claimant in the position it was in, prior to suffering the loss.

   The cost of enhancing the quality of the damaged vehicle which the Insured agreed to pay is an additional cost over and above the actual amount of loss which the Insured is legally liable to pay to the transportation company due to its business activity. Therefore, since the Insured did not have a legal liability to incur costs for enhancing the quality of the damaged vehicle, these costs were excluded by the Insurer from the final assessment.

3. **Loss to the vehicle to be covered only in excess of Motor Vehicle Policy (MV Policy):**

   The Insured's CGL policy had a specific requirement that for any claim for damage to a vehicle, it was mandatory that a claim first be filed under the (MV Policy) of the damaged vehicle. Resulting in, only the portion of the loss that was not covered by the Insurer of the MV Policy would be eligible for reimbursement under the CGL Policy.

   Therefore, we, as the Insured's brokers and advisors supported the Insured in informing the claimant regarding the process involved in the settlement under the MV Policy. Once the requisite formalities thereunder were completed, the CGL Insurer requested copies of all invoices and settlement-related documents to verify its liability and settled the balance liability under the CGL policy.

What was the claim?

The Insured's business was to provide guidance and technical know-how to its customers who wished to expand their business in the hotel and food industry. The Insured would give their support, assistance, advice, and help to the customers in exchange for a pre-agreed revenue in their agreement. The Insured entered into an agreement with one of their customers, who owned a chain of 'Bed and Breakfast' on July 31, 2022 wherein the Insured would provide support and aid in running the hotels, and in exchange get a fixed percentage of the revenue earned by the owner.

As per the agreement, the Insured would take the bookings and after deducting their commission, pay the remaining amount to the owner. However, on November 25, 2022, the owner sent a notice to the Insured alleging wrongful and unjustified deductions in the revenue share. Various discussions were held, and the Insured terminated the agreement on December 27, 2022 without giving a prior and proper notice for the same.

The 'Bed and Breakfast' owner filed a suit against the Insured alleging improper termination, deficiency in providing the services, and claimed damages on account of breach of the agreement's terms and conditions and deficiency in services. The Insured filed a claim under their Professional Indemnity Insurance (PI policy).

Professional Indemnity Insurance

Key aspects to remember:

1. **Coverage under a Professional Indemnity Policy versus a Director's and Officers' Liability Insurance (D&O) Policy:**

   Professional Indemnity Insurance Policy covers the cost of compensating clients for the loss or damage resulting from negligent services or advice provided by a business or an individual. The coverage provided by the Insurance companies focuses on the alleged failure of the services delivered by the company, which has led to financial loss to the customer/client/third-party, due to errors and omissions in the acts or services provided by the Insured. Therefore, any claim made against the Insured alleging any deficiency in their service or consultation or professional capacity would be notified under a PI Policy.

   On the other hand, a Directors' & Officers' Policy offers protection to any director or officer of the Insured for a claim made against them in their official capacity. The policy only provides coverage to the directors, officers, or any employee of the Insured falling under the definition of the Insured Person mentioned in the policy. Therefore, any claim made against the entity is not covered under the same. Further, any claim which is directly related to or arises on account of the professional services of the Insured's entity is usually excluded from a D&O Policy since it is covered by a PI Policy.

   In the present scenario, since the suit was filed only against the Insured and not against any of its directors or officers, the claim was notified under the PI policy and not under the D&O policy.

2. **Beware of specific exclusion based on Insured's business model:**

   Given the business model of the Insured, certain pre-agreed claims were excluded from the policy including any pre-agreed revenue-sharing-related claims.

   Therefore, all claims made against the Insured for non-payment of any lock-in damages, pre-agreed revenues, etc. which confirmed the payment of a certain amount of revenue, be it a fixed amount or a fixed percentage, were excluded from the purview of the PI policy.

   In this particular claim, though the customer made allegations of deficiency in providing the services, however, the compensation which was sought with respect to the unjustified deductions on pre-agreed revenues was excluded from the coverage under the policy.

3. Exclusion of contractual Liability:

The PI Policy also provides an exclusion for any liability assumed by the Insured in the contract, which liability would not exist, if not for such a contract. The intention here is to exclude the claims where the liability arises only because it has been assumed by the Insured under any contract or agreement.

In this claim, the Insured had entered into an agreement with the owner wherein the condition of termination of the agreement specifically stated that in cases where one of the parties terminates the agreement without prior notice of 30 days would be liable to pay the opposite party specified amount.

When the Insured terminated the agreement with the owner, a prior notice of 30 days was not given, and thus, the owner claimed damages from the Insured for breach of the terms and conditions of the agreement while claiming the pre-agreed amount in case of improper termination. Since both these claims were solely a result of contractual liability assumed by the Insured, the claim was excluded under the PI Policy.

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 exunderwriters 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 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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