

LIABILITY CLAIMS TAKEAWAYS

Welcome to the 29th edition (May 2023) of 'Liability Claims Takeaways' - our monthly insights from industry stalwarts.

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What was the claim?

The Insured is an e-payment gateway through which they allow their customers to transfer money via their credit card/debit card to online merchants/websites. During one transaction on January 02, 2023, the Insured realised that the Insured's bank account was being debited for payments made through the customer's debit card. Further investigation found that there were 40 earlier transactions where a similar pattern had taken place. It was also found that one of the customers had become aware of this glitch and misused it for his financial benefits. The Insured immediately contacted the concerned customers to inform them about the issue and recover the amount. However, out of the total loss, only 20% was recovered and the rest was a loss that the Insured suffered. The Insured filed a claim under their Commercial Crime Policy (Crime Policy) to claim their loss.

Commercial Crime Insurance

Key aspects to remember:

1. Coverage under Commercial Crime Policy:

As the name suggests, commercial crime policy aims to protect the Insured against losses that they may suffer on account of a covered crime under the policy committed against them, whether by an employee or a third-party, with or without collusion with the employee.

In particular, the relevant coverage under which the Crime Policy was being triggered was Computer Fraud. It provides that there must be a fraudulent or dishonest misuse or manipulation by a third-party of the computer systems, programmes or funds transfer systems owned or operated by the Insured. In the subject matter, initially, one transaction initiated by the perpetrator resulted in the amount being debited from the Insured's account.

However, the subsequent 25 transactions committed by the perpetrator, in a quick sequence show that after the perpetrator became aware of the glitch, the system was used with the intent of exploiting it to their advantage. The perpetrator committed a dishonest misuse of the Insured's fund transfer system where he purposely initiated the transactions to gain monetary advantages as he was able to complete the purchase of goods via online platforms without any funds being deducted from his account.

2. Claim is not covered under the Cyber Policy and Professional Indemnity Policy

While in this case the fraud was committed using the glitch in the computer systems, there was no unauthorised access into the systems of the Insured. For a cyber policy to trigger, it is essential that a cyber event must occur where the control of the Insured's system is gained to commit a fraudulent act. In this matter, since the issue occurred because of a technical error within the Insured's system which was abused by the perpetrator, the cyber policy did not trigger.

Further, another policy under which the coverage was examined was the Professional Indemnity Policy (PI Policy). The PI Policy picks up those losses that the Insured becomes legally liable to pay to another person due to any error, omission, negligence, or breach of any professional service being rendered by the Insured to its customers. In the subject matter, the professional service of the Insured was to provide a payment gateway to the



customers who could make payments using their own credit card/debit card. In this case, there was no breach of any professional service of the Insured, therefore the PI Policy did not trigger.

3. Delay in notifying the Insurer about the matter:

Under the Crime Policy, the Insured must notify the Insurer about the fraudulent incident at the earliest. This enables the Insurer to be involved in the investigation process from the start and ensure full cooperation in covering the costs of losses incurred.

However, in the current matter, the Insured notified the Insurer almost after three months, making the Insurers apprehensive regarding the genuineness of the claim as well as the prejudice that may have been caused to the chances of recovery. Our team using its experience in handling various matters under the Crime Policy and the expertise of our team of legal experts made a representation to the Insurer regarding the reason for the delay in the notification from the Insured's end.

Our team was able to explain to the Insurer that the Insured was internally investigating the matter to understand the quantum of the amount involved along with the modus operandi to understand if any fraud had occurred. Further, the Insured initiated the recovery process to ensure that the loss was reduced as much as possible.

Hence, the Insured initiated recovery in many ways such as calling the concerned customers, sending them a legal notice, and also filing a police complaint against the customer who found out the glitch and still initiated the transactions. The Insurer agreed with our view that the Insured did take steps towards minimising the loss and thus, waived the issue of delay in notification.



What was the claim?

The Insured is a part of the supply chain industry, and their business involves procuring goods from manufacturers/suppliers and then supplying them onwards to the customers of the said manufacturers. Essentially, the Insured offers its services as a third-party coordinator thereby, eliminating the logistical hassle of its customers, and catering to their shipping requirements. A lot of the Insured's processes are automated, therefore, upon submission of the necessary shipping documents, the goods are automatically released to the end recipient.

While handling one such order, one of the employees of the Insured erroneously released incorrect quantities to a party, who was not the intended recipient of those goods. As a result, the actual customer received insufficient quantities and significant monetary losses.

The customer preferred a claim against the actual supplier, who in turn claimed the loss from the Insured. The Insured filed a claim under its Multi-Modal Transporters Liability Insurance Policy (MMTL Policy).

Multi-Modal Transporters Liability Insurance

Key aspects to remember:

1. Errors and omissions covered under the Multi-Modal Transporters Liability Insurance:

A legal liability policy such as a MMTL policy serves as a boutique policy for policyholders since the covers available, thereunder, are explicitly curated to cover the Insured's business risks. Many policyholders have multiple business operations and the legal liability-related exposures arising therefrom may not be exhaustively captured by a conventional liability policy. Therefore, legal liability policies including these come to the aid for businesses where there is a need for overlapping insurance.

The Insured's instant claim was picked up under the errors and omissions cover of the policy since the loss suffered by the Insured was due to an erroneous release of goods to an incorrect recipient by the Insured's employee while providing its professional services.

2. Recovery might be possible but not attempted by the Insured; hence, the Insurer is not liable to reimburse the same:

In this matter, after releasing the goods to the incorrect recipient, the Insured did not make any attempt to recover the loss. Owing to a delay by the Insured in informing the incorrect recipient that they have received extra quantities of the goods, these goods were used by them in their production therefore, recovery of the goods as no longer an option for the Insured. However, the Insured could demand compensation for the value of the additional goods delivered.

Since no action was taken by the Insured, the Insurer at the time of assessing the claim, raised this as one of the preliminary concerns for admissibility of the claim. In such instances, the Insurer is not obliged to compensate for the loss suffered by the Insured. The purpose of insurance is to restore the policyholder to the same position as they were in before the loss and not to support the Insured who sleeps on their rights.

Insurance contracts are based on the foundation of utmost good faith. There is a likelihood for the Insured to claim these costs from its insurance carrier and separately claim these amounts from the incorrect recipient, this puts the Insured in a position of making profit, which is not only unethical and fraudulent but against the very spirit of good faith practice in insurance. We, therefore,



advised our client to make necessary attempts of recovering the loss from the incorrect recipient in order to abide by good practices by exercising its rights and performing their duty and also prevent the Insured from being considered as a bad risk.

3. In order for the policy to trigger wrongful acts must be established:

For a legal liability policy to trigger, the wrongful act in question must be established by the Insured. In the instant matter, while the Insured commenced the process for claiming under its policy, its internal position was that there was no negligence committed by its employee. If negligence on account of the Insured actions/errors/omissions is not established, a valid claim to trigger the policy for reimbursement of losses is absent.

The Insured apprehended that admitting this wrongful act may result in unforeseen repercussions against it. Our team then helped the client understand the difference between admission of liability to the claimant and establishing a claim for a wrongful act.

While the admission of liability without the Insurer's consent is a breach of the policy's terms and may impact the entire claim assessment, determining the exact actions of the Insured which resulted in the claim against the Insured will support the Insurer's position to reimburse the losses. Subsequently, the Insured issued a detailed investigation report highlighting the exact incident and errors committed by the employee. This resulted in a successful claim pay-out.



What was the claim?

The Insured is in the IT sector with a significant pan-India presence and caters to private clients and government agencies. In this matter, the Insured signed a contract with one of the government sectors ("Client") for a period of five years. Around the third year of the agreement, the Insured invoked arbitration against its Client for breach of agreement terms for non-payment of its fees. After a few months of this claim being filed by the Insured, the Client filed a counterclaim against the Insured and its D&O for non-performance of its obligations under the agreement. The Insured notified this claim under its Directors' & Officers' Liability Insurance (D&O Policy).

Directors' & Officers' Liability Insurance

Key aspects to remember:

1. D&O Policy covers Claims made against the Insured and not of claims made by the Insured:

A legal liability policy such as a D&O Policy, is intended to cover the Insured person's legal liability arising from claims made against them and the defence cost incurred in its defence, with the prior consent of the Insurer.

However, the policy is not meant to cover the cost incurred by the Insured in claims made by the Insured against third-parties. The initial claim was notified by the Insured based on the case filed by them against their customer. Therefore, the Insurer was of the view that a legal proceeding by the Insured is not intended to be covered under a D&O policy.

Having said that, when the customer filed a counterclaim against the directors and officers of the Insured, the Insurer did recognise that part of the cost was in fact being incurred in the defence of the Insured. Therefore, the defense cost was allocated between covered and uncovered aspects of the claim and the covered aspects were considered for reimbursement.

2. Professional indemnity exclusion, with defence cost carve back:

Typically, when a claim is made against an entity and its directors and officers alleging a wrongful act in relation to their professional services, the claim is notified under Professional Indemnity Insurance. For this reason, most D&O policies exclude claims arising from the professional service of the Insured.

However, our team uses their experience to ensure that the defence cost of such matters continues to be covered by way of a carve back to the exclusion. This allows for the D&O policy to at least cover the cost of lawyers



appointed by the directors and officers in such proceedings. All the same, the claim against the entity and any legal liability on the entity as well as its directors would still be excluded from the purview of the D&O policy. In this case, the counterclaim filed against the Insured was a result of an alleged non-performance of professional services by the Insured.

Therefore, the defence cost of the Insured persons was covered under the carve back provision, while the rest of the claim against them and the entire claim against the entity, was notified under the Professional Indemnity insurance.



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.





www.prudentbrokers.com

FOR MORE QUERIES, PLEASE REACH OUT TO:

Tanuj Gulani
tanuj.gulani@prudentbrokers.com

Neha Anand
neha.anand@prudentbrokers.com

Richa Dhasmana
richa.dhasmana@prudentbrokers.com

Jyoti Krishnan
jyoti.krishnan@prudentbrokers.com

Nishant Kashyap
nishant.kashyap@prudentbrokers.com

Mayank Sharma
mayank.sharma@prudentbrokers.com

Arun Prasadh
arun.prasadh@prudentbrokers.com

Hemangi Jhaveri
hemangi.jhaveri@prudentbrokers.com

Shreya Dave
shreya.dave@prudentbrokers.com

PRUDENT INSURANCE BROKERS PVT. LTD.

Registered Office: 101, Tower B, Peninsula Business Park, G.K Marg, Lower Parel, Mumbai - 400013

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