PRUDENT
THE FUTURE OF INSURANCE

LIABILITY CLAIMS TAKEAWAYS

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

November 2022

Content

Directors' and Officers' Liability Insurance Policy (D&O Policy)

What was the claim?

The Insured is a leading manufacturer and seller of electronic items with a prominent global presence. The Insured received a summons from the Enforcement Directorate (ED) seeking information regarding the Insured's activities and appearance of their directors before the authority. The summons named the Insured entity and its directors as a party. The matter further progressed and resulted in a complaint being lodged against the Insured and its directors and officers. The Insured lodged a claim under its Directors' and Officer's Liability Insurance (D&O Policy).

Key aspects to remember:

1. **Importance of claim intimation in a timely manner**

   The Insured received summons in the name of the Insured entity and its D&O sometime around July 2021, while the policy was still active. At this stage, the Insured appointed a team of defence counsels to represent the Insured before the authority. During this stage, not only did the Insured appoint a defence counsel without seeking the Insurer's consent, but also did not intimate the matter as a claim to the Insurer.

   Subsequently, around April 2022, the authority lodged a complaint against the Insured impleading 7 of its directors, including the managing director and the Insured entity as a party to the complaint. At this stage, after nearly nine months, the Insured intimated the claim to the Insurer.

   While the Insurer acknowledged the claim intimation, the Insurer also raised a concern regarding the delay in intimation of the claim after nearly nine months, which is a breach of policy conditions, as the Insurer is required to be informed of any circumstance/incident that is likely to result in a claim against the Insured at the earliest. Such breaches can result in deductions being made from the claim to be paid by the Insurer.

2. **Seeking the Insurer's consent before incurring defence costs**

   It is a condition of the Policy that no cost is to be incurred by an Insured, with respect to a claim, without prior consent of the Insurer. If such a cost is incurred, the Insurer has the right to not pay that part of the cost that was incurred without their consent.

   In this case, lawyers were engaged without the Insurer's consent and costs were incurred for over nine months without giving the Insurer a right to participate in the Insured's defence. After detailed discussions on the claim, including admissibility and urgency of an ED investigation, the Insurer agreed to accept the cost incurred, post facto, only as an exception.

   It is, therefore, highly recommended that no costs be incurred in the defence of a claim or any other form, without the Insurer's prior consent.

3. Allocation of costs between entity and D&O

As mentioned above, the D&O policy covers costs incurred in the defence of the Insured's D&O and not the entity itself. Therefore, while the defence counsel may release invoices in the name of the entity, the Insurer will apply the principle of allocation and the costs, that can be attributable to the defence of the directors and officers of the Insured, will be reimbursed under the policy and the costs attributable to the defence of the entity will be excluded.

Multi-Modal Transporters Liability Insurance

What was the claim?

The Insured was in the business of providing logistics and warehousing services to its customers. The Insured stored goods of its customer in its warehouse and engaged with a transport carrier to move the goods from one location to another. The goods were verified upon loading, however, during unloading at the designated warehouse, the Insured's officials realised that the quantity of the goods did not tally. The customer claimed the value of missing goods from the Insured as the transportation was the Insured's responsibility.At this stage, the Insured lodged a claim under their multimodal transport operator's policy **("MTO Policy")**.

Key aspects to remember:

1. **What does an MTO Policy cover**

   An MTO Policy covers physical loss or damage to cargo while in the care, custody, and control of the Insured, or a party who has contracted or sub-contracted to provide transport services.

   Additionally, the MTO Policy also provides cover for any legal liability imposed upon the Insured on account of their errors and omissions in the course of their operations following a negligent act, error or omission by the Insured, its agent, or sub-contractor.

   The MTO Policy further provides an extension for third-party liability, which covers physical loss or damage to property, bodily injury or death or illness and legally recoverable consequential loss arising out of the operations of the Insured.

2. **Mysterious disappearance exclusion**

   The Policy specifically excludes loss suffered by the Insured on account of mysterious disappearance or unexplained loss or shortage upon taking stock or similar inventory check.

   Traditionally, Insurers use to minimise their exposure by issuing "named perils" policies that would list all covered perils. In order to claim successfully under this type of policy, the assured must prove that the loss was caused by an Insured peril.

   The mysterious disappearance exclusion is an extension of the above philosophy whereas the policy covers loss arising from determined risks and any loss due to undetermined causes would be excluded.

   In the instant matter, since the Insured did not have any proof to reconcile the loss or explain how the goods disappeared, the Insurer applied this exclusion to the Insured's claim and the claim was rejected.

What was the claim?

The Insured is in the business of manufacturing and supplying goods to their clients. The Insured has a contract with the transportation company which provides them vehicles to transport the goods to the client's premises. However, one day, the boundary wall of the Insured's premises fell on the vehicle of the transporter resulting in damage to it. The transportation company filed a claim on the Insured seeking the cost of repairs to its damaged vehicle. However, the transportation company while getting the vehicle repaired, got additional features added to it and claimed the cost of the improvement from the Insured as a part of the repair cost which the Insured paid. The Insured filed a claim under their commercial general liability policy **("CGL Policy")** covering damage to a property on their premises.

Premises liability under the CGL policy

Key aspects to remember:

1. **Actual cost of repairs vs cost of improvement**

   The CGL policy aims to reimburse to the Insured for any damages that they become legally liable to pay on account of injuries to third parties or damage to their property and offers a combined coverage for liability occurring on the Insured's premises and out of the Insured's products.

   In the present claim, the accident occurred on the Insured's premises causing property damage to the vehicle of the third party, thus, triggering the Insured's CGL policy. However, the transportation company had also claimed the cost of beautification of their vehicle from the Insured which would not be covered by the CGL policy.

   The CGL policy would only cover the cost incurred to repair the actual damages as the insurance policy is based on the principle of indemnity that insurance is done only for the coverage of the loss. In other words, the Insured should be compensated the amount equal to the actual loss and not the amount exceeding the loss.

   The cost of beautification and remodeling the damaged vehicle which the Insured has 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. As there is no legal liability of the Insured towards the transportation company for beautifying the damaged vehicle, the CGL policy would not cover such part of the loss.

2. **Settlement done without consent of the Insurers**

   The CGL policy specifically mandates that the Insured will not, except at Insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without the consent of the Insurers. The condition provides that if the Insured makes or offers to make any payment without Insurer's consent, that cost would be borne by the Insured and the Insurers would not be liable to reimburse it.

   It is a condition precedent to Insurer's liability under the policy, i.e., the failure to adhere to it gives the Insurer the right to deny its liability under the policy.

In this case, the Insured paid the cost of repairs to the transportation company and did not take the prior approval of the Insured, thus violating a policy condition in the contract of insurance. This entitled the Insurer to deny their liability under the policy and to repudiate the claim on the ground of violation of policy conditions.

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.

PRUDENT
THE FUTURE OF INSURANCE

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

CIN No.: U70100MH1982PTC027681 I License No. 291 (Validity: 18th February 2020 to 17th February 2023)

Insurance is a subject matter of solicitation