

Liability Claims Takeaways

November 2023

Welcome to the 35th edition of 'Liability Claims Takeaways' - our monthly insights from industry stalwarts.

C O N T E N T :

Professional
Indemnity Insurance

Cyber and Data
Security Insurance

Directors and Officers
Liability Insurance





What was the claim?

The insured manufactures cables and wires that are used by their customers to transmit electricity. In addition to manufacturing, the insured also provides installation services at the customer's premises. As part of their business, the insured also accepts contracts from customers to install cables manufactured by other companies. During the installation of one of their own manufactured cables, the insured's subcontractor accidentally caused a fire that damaged the customer's property. The customer filed a claim against the insured to seek compensation for the damaged items. Simultaneously, the customer also filed a claim under its Fire Policy. The insured notified a claim under the Professional Indemnity Policy (PI Policy).

Key aspects to remember:

1. Coverage limited to goods manufactured by the insured:

The insured's multifaceted business model involves manufacturing and installing cables, including those made by other companies. The claim in question, concerning professional services provided to a customer, was reported under the PI Policy.

The insurer, during policy underwriting, restricted coverage to claims exclusively linked to cables manufactured by the insured. This limitation led the surveyor to interpret that only costs associated with the insured's products were eligible for coverage, causing claim repudiation.

We presented a compelling argument to the surveyor, emphasising that the PI Policy's primary aim is to cover the insured's liability towards third parties on account of their professional services. While the insured's liability stems from their products or services, the resultant damage invariably will always affect third parties. Therefore, the policy condition restricting coverage to products and services by the insured can only be interpreted as pertaining to the insured's professional liability to third parties.





The indemnity clause in the policy further supported our standpoint, offering coverage for claims arising from alleged negligence, errors, or omissions committed by the insured, clearly indicating its intention to cover damages or losses incurred by third parties, owing to these specific triggers. Since the PI Policy addresses claims resulting from the impact of negligent services or advice, it isn't designed to cover losses sustained by the insured for their own products.

Our well-established representations, backed by factual evidence, convinced the surveyor to align with our perspective, ultimately resulting in the claim's coverage being approved under the PI Policy of the insured. This also brings out the importance of describing the services of the insured accurately in the policy, as that directly impacts coverage in the event of a claim.

2. Conflict of interest due to same surveyor appointment:

In this case, the same surveyor was appointed for both claims, the claim under the Insured's PI policy for the third-party loss, and the customer's claim under their Fire Policy. While the insurers for the PI Policy of the insured and the Fire Policy of the claimant were different, it coincidentally led to the same surveyor's appointment for both claims.

We clarified to the customer that double benefits for a single loss are not permissible under the concept of insurance indemnity. Therefore, we advised that they could claim under one policy while withdrawing the claim under the other.

The primary responsibility of a surveyor is to examine the reasons behind the loss and assess the magnitude of the loss sustained by both the insured party and the third party involved. When the same surveyor is designated for both distinct policies, the potential arises for the surveyor to develop a prejudiced perspective when identifying the cause of the loss and determining the party accountable for the incident. This undermines their role as an impartial third-party authority, and consequently, they may face challenges in efficiently ascertaining the extent of the loss liability under the separate policies of both clients.

Further in the given context, the claim being covered under one policy would necessarily result in the claim in the other policy being reduced by the sum covered in the first policy. This also impacts the loss assessment process.

When two separate policies from different entities are involved, appointing independent surveyors for each is essential to fairly determine the cause of loss and liability, facilitating efficient claims settlement.



What was the claim?

The insured, a prominent IT services company, encountered a ransomware attack over the holiday period. In this breach, threat actors successfully encrypted a significant portion of the insured's services and data, demanding a ransom for the decryption key's release. The insured promptly reported the incident to their cyber insurer.

Key aspects to remember:

1. Importance of early forensic engagement:

Upon learning of the ransomware attack, the insured promptly notified us, and we immediately informed the insurer. The insurer's guidance on appointing a forensic expert and other relevant matters was sought to ensure timely action.

Acting swiftly to prevent further damage and minimise business interruption losses, the insured, insurer, and hired third-party specialists initiated corrective measures without delay. The insured's proactive engagement with the insurer from the moment the issue surfaced ensured the insurer's swift authorisation of expenses, consultant hiring, and the commencement of a forensic investigation. This proactive approach significantly eased the situation for the insured during a challenging time.

Early engagement with the incident response team also ensured early recognition of the root cause resulting in the insured being able to implement the recommended actions in time to avoid a similar future vulnerability.

2. Exclusion of system improvement costs from coverage:

Typically, a Cyber Policy does not extend coverage to costs incurred by the insured for system improvements or enhancements that go beyond the immediate recovery needs. In simpler terms, if the insured invests in a permanent asset during the claim process, the insurer will only cover the costs necessary to restore the insured to the pre-loss state. Costs associated with system upgrades or

advancements, even if they result from the cyber-attack, are generally not eligible for coverage under the policy.

In this case, the insured purchased new servers to replace the ones that were encrypted, and these new servers were significantly more advanced than the ones that were affected. Additionally, servers typically have a long lifespan, allowing the insured to use them for an extended period.

The surveyor applied a deduction to the server's value, ensuring the insured was reimbursed only for the pre-claim position without covering improvements such as purchasing a better server.



Directors and Officers Liability Insurance (D&O Policy)



What was the claim?

The insured, a major manufacturing company with a substantial global footprint, faced a legal challenge when one of its senior managers, who had recently joined from a competing firm, became the target of a lawsuit. The previous employer made various allegations, including breach of contract, breach of fiduciary duty, misappropriation of trade secrets, tortious interference, civil conspiracy, and unfair competition on both the employee as well as the insured entities. In response, the insured promptly notified the claim under the D&O Policy.

Key aspects to remember:

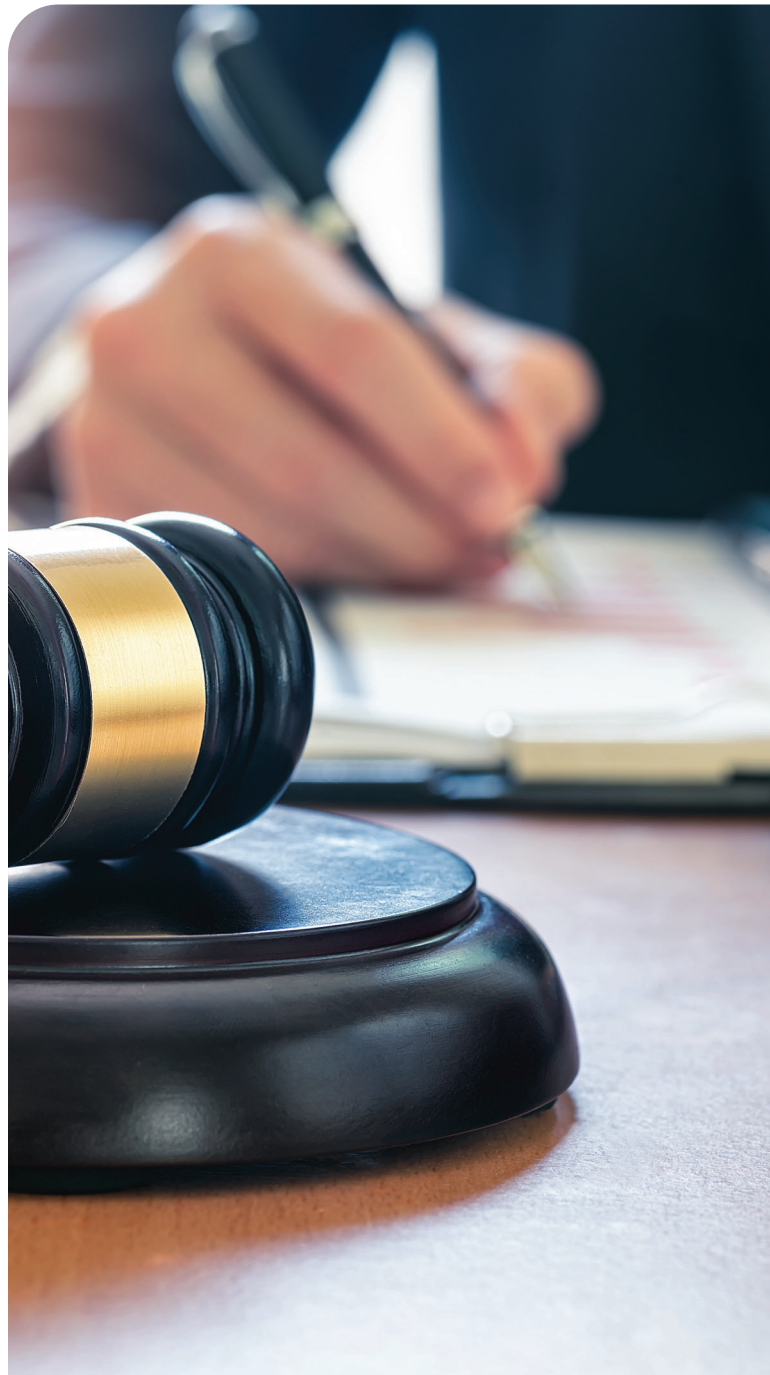
1. **A D&O Policy provides coverage for wrongful acts committed by an insured individual in their capacity as the insured's D&O and not personal capacity.**

In today's complex legal landscape, businesses confront elevated risks of liabilities and lawsuits. D&O insurance is a valuable safeguard, particularly as litigation costs continue to rise.

D&O insurance policies are designed to shield company executives from lawsuits and investigations stemming from decisions and actions taken while fulfilling their roles. Consequently, actions or decisions made by a D&O in their personal capacity, unrelated to their position within the insured organisation, fall outside the policy's purview.

In the specific case at hand, the claim against the insured's D&O involves two distinct timeframes: (i) the individual's prior employment with a different company, and (ii) their subsequent role within the insured's business. The allegations revolve around the D&O's alleged breach of non-compete agreements and the sharing of confidential information after joining the insured entity.

When evaluating the claim under the policy, the insurer allocated defence costs to the insured person with due consideration for the portion of allegations tied to the individual's actions in their personal capacity.





2. Reasonability of defence costs:

The policy requires defence expenses to be reasonable, even when the insurer covers them under a D&O Policy. Although the term 'reasonable' is not precisely defined in the policy, it typically factors in considerations like the sensitivity of the case, expertise in the subject matter, the level of experience required, the surrounding circumstances, and the risk of legal action when evaluating the lawyer chosen by the insured.

In this specific case, the insured retained two different law firms to represent them. Given that the insured engaged foreign law firms, their hourly rates were relatively high compared to tier-one law firms in India and the typical defence costs for similar litigations.

The insured initially engaged their existing counsel, who managed the company's legal proceedings and was well-versed in the insured's entire business portfolio, making them the best-suited primary defence counsel. However, the hourly rates of their partners and associates were already on the higher side and if they had to travel to the jurisdiction where the case was heard, these costs would increase further. To enhance cost-efficiency and streamline local legal proceedings, the insured engaged a second law firm from the same jurisdiction where the case was being heard, effectively reducing the overall defence costs.

After presenting these details to the insurer and demonstrating the cost-effectiveness of engaging two law firms, the insurer supported this approach and provided their consent.

The insurer did request that the insured judicially engage senior partners and senior counsels in their legal representation, as the hourly rates, even after discounts, remained on the higher side. The insurer shared proposed rates that they were willing to consider, and the parties mutually agreed on the calculation for determining the defence costs.

3. Understanding legal proceedings across jurisdictions: Ensuring policy adherence

Each judicial jurisdiction follows its unique trajectory for case progression. Familiarity with these processes plays a pivotal role for claim handlers in anticipating the next steps and efficiently managing the claim among stakeholders.

Policyholders, while deeply involved in addressing claims with claimants, may not always be able to prioritise the insurance terms. However, it is vital to adhere to policy terms and conditions. Actions taken without the insurer's participation, such as assumption of liability, promising to pay, offering to settle out of court, or incurring costs without the insurer's consent, is a breach of policy conditions and allows the insurer to exercise its right and reject that portion of the claim.

Staying informed about the likely progression of legal proceedings allows claim handlers to work closely with the insured, collect pertinent information and, keep the insurer informed of developments. This exercise serves as a reminder for policyholders to comply with policy terms throughout the claim process, preventing non-standard deductions from the final claim value.

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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