PRUDENT
THE FUTURE OF INSURANCE

Liability Claims Takeaways

September 2023

Welcome to the 33rd edition of 'Liability Claims Takeaways' - our monthly insights from industry stalwarts.

CONTENT:

A

Directors and Officers Liability Insurance

How did a fire mishap expose the safety gaps in a factory and how does it impact the D&Os?

What was the claim?

The insured is a manufacturer and supplier of automobile parts for which they have factories in Pune and Aurangabad. On one occasion, there was a short circuit in one of the electrical boards in the factory premises which caused a fire in the northern wing of the factory. However, the alarm system failed to work, and the workers did not become aware of the fire. This resulted in a massive breakout of the fire in the northern wing and many workers got injured while trying to escape the premises. The insured's factory and its occupiers received a summon from the Chief Judicial Magistrate on behalf of the Factory Inspector alleging failure to maintain the factory premises in a safe condition. The insured then filed a claim under their Directors & Officers Insurance Policy ('D&O Policy').

Key aspects to remember:

1. **Coverage for civil fines and penalties under the D&O Policy**

   The difference between a civil fine & penalty and a criminal fine & penalty is that the former generally arises out of a civil action and the latter arises due to criminal actions of the insured and/or its Directors and Officers.

   A D&O Policy generally provides coverage for civil fines & penalties insurable by law. This may either be by way of including it in the base wordings of the policy or by way of an endorsement. The policy does not provide coverage for any criminal fines and penalties.

   Whether the policy will provide coverage for a fine & penalty depends on the question of whether it is possible to recover for a loss that results from the insured's wrongdoings or if any law specifically provides that the insured cannot recover such fines & penalties imposed under the law from an insurance policy.

   Fines and penalties may be imposed on the Directors and Officers for decisions taken in their official capacity.

   The D&O policy will cover only those civil fines & penalties imposed on the Directors and Officers and would not pick up any fines & penalties levied on the insured entity except in cases of specific covers granted to the insured entity.

2. **Concept of final adjudication under the D&O Policy**

   While the definition of loss provides coverage for civil and administrative fines & penalties, there is also an exclusion under the policy where inter alia claims arising out of criminal or deliberate fraudulent activities of the insured's D&O. Such claims would not be covered under the policy if the insured's D&O are held liable by way of a final adjudicating authority.

   This essentially means that the fraudulent, criminal, or illegal act of the insured needs to be established by the final decision of the adjudicating authority for the exclusion to trigger. Until then, the defense cost will be reimbursed to the insured.

   The final adjudication wording creates a significant advantage for the insured since it provides them the right to seek reimbursement of defense costs during the pendency of the legal proceeding even for matters where the claim alleges fraud by the Director or Officer in question.

B

Professional Indemnity (PI) Insurance:

How did our Liability Claims team convert a rejected claim to a paid one?

What was the claim?

The insured was in the business of manufacturing, supplying, and installing cables. As per the arrangement between the insured and its customer, once the cables are ready, they are stored with the insured prior to the dispatch. In this instance, the cables were damaged at the time of storage, and when the goods were delivered and used by the customer, they did not perform their intended function and were accordingly rejected. As a result, the customer filed a claim for these losses from the insured.

Key aspects to remember:

1. **Importance of identifying the appropriate policy for notification of loss:**

   The claim against the insured was made sometime in November 2020. Upon being informed of the loss by the insured, their erstwhile brokers reported the claim under the insured's CGL policy

   - The claim was rejected by the CGL insurer on account of there not being an unqualified acceptance by the customer, which is a pre-condition for product guarantee coverage in the policy. This was because the insured's role involved manufacturing, storing, and installing cables at the customer's site, and until that was complete, the customer would not accept the performance by the insured
   - Our team of liability insurance experts immediately highlighted that the instant matter triggered the insured's professional indemnity policy since this was a pure case of an error by the insured
   - Accordingly, this claim was notified under the insured's PI policy

2. **Scope of compensation under legal liability policies:**

   - The claim from the insured was that of reworking the cables in a manner that they are functioning. It is pertinent to highlight that the customer needed these products and services to fulfill its obligations towards its end customer
   - The definition of the claim under the insured's policy read as, "…a written demand for compensation in respect of a wrongful act of an insured…". Basis the insurer's interpretation of this clause, they limited the reading of compensation only to monetary compensation and did not agree to coverage under the PI policy on these grounds
   - Our team, relying on judicial precedents, was able to demonstrate that compensation is not restricted to merely monetary costs, but it also includes those costs incurred in putting a complainant in the position they were in prior to the loss. In the current matter, this meant that the cost of repairing the cables resulted in the customer being reinstated to the position of having received cables that performed their function

3. **Transition of a rejected claim to a paid claim:**

   - The instant matter came with its own set of issues owing to (i) the claim being notified only under the CGL policy and not under the relevant PI policy; (ii) the claim being rejected the PI policy almost two years after the incident, and (iii) the claim being notified under the PI policy almost two years after the incident, and (iv) the compensation coverage under the PI policy
   - Our team was able to successfully address each query, take over the claim entirely from the erstwhile brokers, and start afresh. We received the claim assessment and ensured that no non-standard deductions were made by the insurer at the time of settling the claim

C

Bankers Indemnity Insurance (BI policy):

To what extent can the conditions in an insurance policy determine your chances of coverage?

What was the claim?

The insured is in the business of providing banking services with multiple branches and ATMs operating nationwide. In the instant matter, a bunch of thieves entered the insured's premises and stole the ATM machine with the cash therein. The loss was captured on the CCTV and the security guard made an incident report. This loss was then intimated to the insurer under the Bankers Indemnity Insurance Policy.

Key aspects to remember:

1. **Coverage under a BI policy:**

   When it comes to money or other assets, the banks run a significant financial risk. There is a likelihood of loss due to fire, riot, strike, burglary, home invasion, theft, robbery, or holdup on their property, amongst others.

   The bank is protected from loss of funds and/or securities on-site and in transit owing to a variety of risks under the BI policy, a combination of different sections of coverage. Moreover, the BI policy offers protection from financial loss brought on by forgery, fraud, and dishonesty.

2. **Distinction of covered vs uncovered loss and its measures:**

   While the insured notified the loss of cash under their BI policy, we also advised them to notify the insurer insuring the ATM such that at the time of loss assessment, the value of the ATM is not excluded, and the insured's loss is adequately assessed.

3. **Policy pre-conditions that can determine the admissibility of a claim:**

   Typically, liability policies come with a set of policy conditions that are required to be met for the claim to be considered for coverage. Policies that provide cover for fidelity, crime, and similar losses specifically come with pre-conditions for maintaining security, monitoring the books of accounts, maintaining internal audits, etc. Therefore, it is crucial to read the policy terms and conditions and the proposal form being submitted to the insurer, as the policy cover is agreed based on the information and conditions agreed to by the policyholder. These policy conditions are tested at the time of assessing a loss under a policy and it provides the insurer with an opportunity to reject a claim for non-fulfilment of these 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 consists of members with underwriting experience and the largest number of lawyers who can assist 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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