15 November 2024

Attention	:	**Mr Hannes Gouws**
E-mail/Facsimile	:	**hannes@blackhoundenterprises.com**

Dear Sir/Madam,

Participant	:	**Hollard Group**
Our reference	:	**0023612**

The complainant approached our office following the rejection of a claim for the recovery of documents which were stored on two (2) hard drives that crashed. The claim was rejected on the grounds that the claim does not fall within the ambit of the complainant's policy. We have considered the representations made by both parties to the complaint.

The complainant submitted that the office server stopped working on 7/8 March 2024 and they lodged a claim with the participant for same. It is not in dispute that the server was not specified under the electronic equipment section of the policy. The complainant is of the view that the data reinstatement costs should be covered under the sub-section "Documents" under the "Office Contents" section.

The complainant further submitted that they were only provided with the full policy documents after they submitted this claim.

The complainant provided two damage reports issued by Intratec Group which states the following:

REPORT

Upon inspection of the above-mentioned HDD's, it was determined that the HDD's were not functioning correctly to extract the data in its current environment.

In preparation for our data recovery procedures, the HDD's components need to be re-tested and the necessary repairs need to be done. We would also need to create a virtual environment to extract the data from the HDD's.

The failure was electro-mechanical causing the hard drives to function incorrectly.

The drive is irreparable and requires data recovery.

We sincerely hope that this information will be of some assistance to you.

Please do not hesitate to contact us if we can be of any further service.

And;

REPORT

Upon inspection of the above-mentioned HDD's, it was determined that the HDD's were not functioning correctly to extract the data in its current environment.

In preparation for our data recovery procedures, the HDD's components need to be re-tested and the necessary repairs need to be done. We would also need to create a virtual environment to extract the data from the HDD's.

The hard drive fails to spin up when power is applied. The hard drive requires data recovery. They fitted the working spare and repaired all the modules but the surface area has underlying platter damages which is stopping the team from gaining access to the surface area.

We unfortunately, have to deem this job a no recovery due to the underlying platter damages.

We sincerely hope that this information will be of some assistance to you.

The participant submitted that the two 3TB hard drives installed in the server were 13 years old and were originally purchased in 2011 and electro-mechanical failure is the sudden and unexpected failure of a part within the hard drive being either a mechanical component or an electrical component and would be a failure resulting from ordinary usage. This is specifically excluded in terms of the policy.

The participant provided our office with a copy of the email sent to the complainant on 29 November 2022 which included the complainant's updated policy schedule and the full policy wording.

Furthermore, the participant submitted that loss or damage caused by erasure of electronic or magnetic recording is an exclusion under the sub-section "Documents" as follows:

SPECIFIC EXCEPTION FOR DOCUMENTS:
This Sub-Section **does not cover:**

1. loss or damage caused by:

    - electric or electronic or magnetic injury, disturbance or erasure of electronic or magnetic recordings except by lightning;
    - vermin or inherent defect or by processing, copying or other work upon the documents;
    - the dishonesty of any principal, partner or director of the Insured whether acting alone or in collusion with others. This Exception shall not apply to any director who is also an employee of the Insured and whom the Insured have the right at all times to govern, control and direct in the performance of his/her work in the service of the Insured and in the course of the business;

2. wear and tear or gradual deterioration

In addition, the policy states that duplicate records of such documents must be maintained away from the insured premises in the Schedule.

Irrespective of the rejection of the claim, the participant offered the complainant R10,000 for the reinstatement of data.

The issue for determination is whether the participant is liable to cover the data reinstatement costs up to R50,000 under the “Office Contents” section. It must be noted that the onus rests on the complainant to bring the claim within the ambit of the policy by demonstrating that an insured peril operated. Should the participant rely on an exclusion to avoid liability, the onus rests on the participant to prove the exclusion.

Having regard to the policy wording we are of the view that the documents which were stored on the hard drives fall under the definition of “documents”. We are further of the view that the documents being backed up to Google Drive shows compliance with the requirement to maintain duplicate records of such documents away from the insured premises.

Regarding the cause of failure, Intra-Tec Group explained the electro-mechanical failure as follows:

From: Brandon Koopman <brandon.k@intratecgroup.co.za>
Sent: Friday, May 3, 2024 12:07 PM
To: dewald@blackhoundenterprises.com; Brandon Baker <brandon.b@intratecgroup.co.za>; info <info@intratecgroup.co.za>
Cc: Accounts - Intratec Group (Pty) ltd <accounts@intratecgroup.co.za>
Subject: RE: 20240502_ DATA RECOVERY_Job LD2695

Good Day Dewald,

I trust this email finds you well.

An Electro-mechanical hard drive failure is typically associated with a clicking or noisy disk drive, the drive is no longer detected, or the drive is slow to respond to read and write requests.

Hence the reason why we need to intervene to attempt extract the data from the hard drive.

Thank you.

Best Regards/Groete

INTRATEC GROUP

Brandon Koopman
Sales & Marketing Manager | INTRATEC GROUP

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T: 021 551 0470
E: brandon.k@intratecgroup.co.za

CPT
Unit S11, Spearhead Business Park
Montague Gardens, Cape Town

JHB
Block 2, Elevation Gardens Waterfall
Office Park, Bekker Road, Midrand

Mechanical components wear out over time and since the hard drives were 13 years old when the failure occurred, we are of the view that it has been established, on a balance of probabilities, that the failure occurred due to wear and tear or gradual deterioration.

Additionally, the policy specifically excludes loss or damage caused by “*…erasure of electronic or magnetic recordings except by lightning;*”

The documents were not erased by lightning, and it is therefore our view that the claim falls squarely within the exclusions relied on by the participant.

Accordingly, we are unable to fault the participant's rejection of the claim.

This recommendation is made based on the facts submitted by the complainant together with the facts submitted by the participant. In order to reverse this recommendation, the complainant must provide facts to disprove, contradict or disagree with the evidence provided by the participant. Please bear in mind, however, that if the information provided by the complainant gives rise to a material dispute of fact, this office will in any event be unable to resolve the complaint as it lacks jurisdiction to determine matters where such a dispute of fact has arisen.

Should the complainant wish to submit new information for our consideration, this must be done **in writing and within 7 days** of receipt of this letter. If we do not hear from the complainant within 7 days, this Provisional Recommendation will become final.

The decision reached by this office is not binding on the complainant and should the complainant wish to do so, the complainant is at liberty to pursue the matter further through litigation. Should the complainant wish to pursue this matter further against the participant, the complainant is advised to consult with an attorney without delay and to give instructions to proceed with the issuing of summons. We again draw the complainant's attention to the provisions of the time-bar clause in the policy. The time-bar clause governs the period of time in which legal proceedings may be instituted against the participant to challenge the rejection of a claim and the consequences of a summons not being issued timeously.

In terms of Section 216 of the Financial Sector Regulation Act, 2017, receipt of the complaint by an Ombud suspends any applicable time-barring terms, whether in terms of an agreement or any law, or the running of prescription in terms of the Prescription Act, 1969, for the period from the receipt of the complaint until the complaint has either been withdrawn or finally determined. According to Clause 6.1 of our Terms of Reference, the complainant has until 30 days after the closure of the complaint or the remaining period of the time-bar provision of the policy, whichever is the longer, to institute legal proceedings against the insurer. Therefore, if we are unable to make a decision in the complainant's favour, any rights to take legal action are to that extent preserved. This means that 30 days after the matter has been closed, the time-barring provision contained in the policy will start to run from where it left off on the date that the complaint was registered.

Yours faithfully,

Ilze van Wyk
Adjudicator: Non-life Insurance Division