



LIABILITY CLAIMS **TAKEAWAYS**

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MARCH 2021

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

A Directors and Officers Liability Insurance

WHAT WAS THE CLAIM?

The Insured is a system integration and distribution company. They provide distribution of technology, mobility, and consumer products. Due to their size, they receive several notices each month and almost all of them name their directors or officers in some form or the other. The Insured, therefore, shared a list of all their cases with their Insurer each year at the time of renewal, under the assumption that all those cases were 'notified' as a claim under the policy and any costs related to those would be picked up by the policy. This practice was followed particularly for directors' and officers' (D&O) liability insurance.

KEY ASPECTS TO CONSIDER:

1. Cases filed 'by' the Insured are not covered

The Insured's team shared their complete ongoing litigation database with the Insurer in the form of claim intimation. The Insured did not bifurcate the list into cases filed against them and cases filed by them. Therefore, while the Insured's team assumed that all that is shared with the Insurer is automatically notified and covered under the policy, the fact was that any claim pertaining to a dispute/case initiated by the insured, with no claim against the insured, would not be covered in the policy.

It is, therefore, essential for organisations to consult with industry experts/insurance brokers regarding their insurance needs, such that policy-specific advice may be obtained and claims & related matters can be dealt with appropriately.

2. Bifurcation of cost among different insured persons

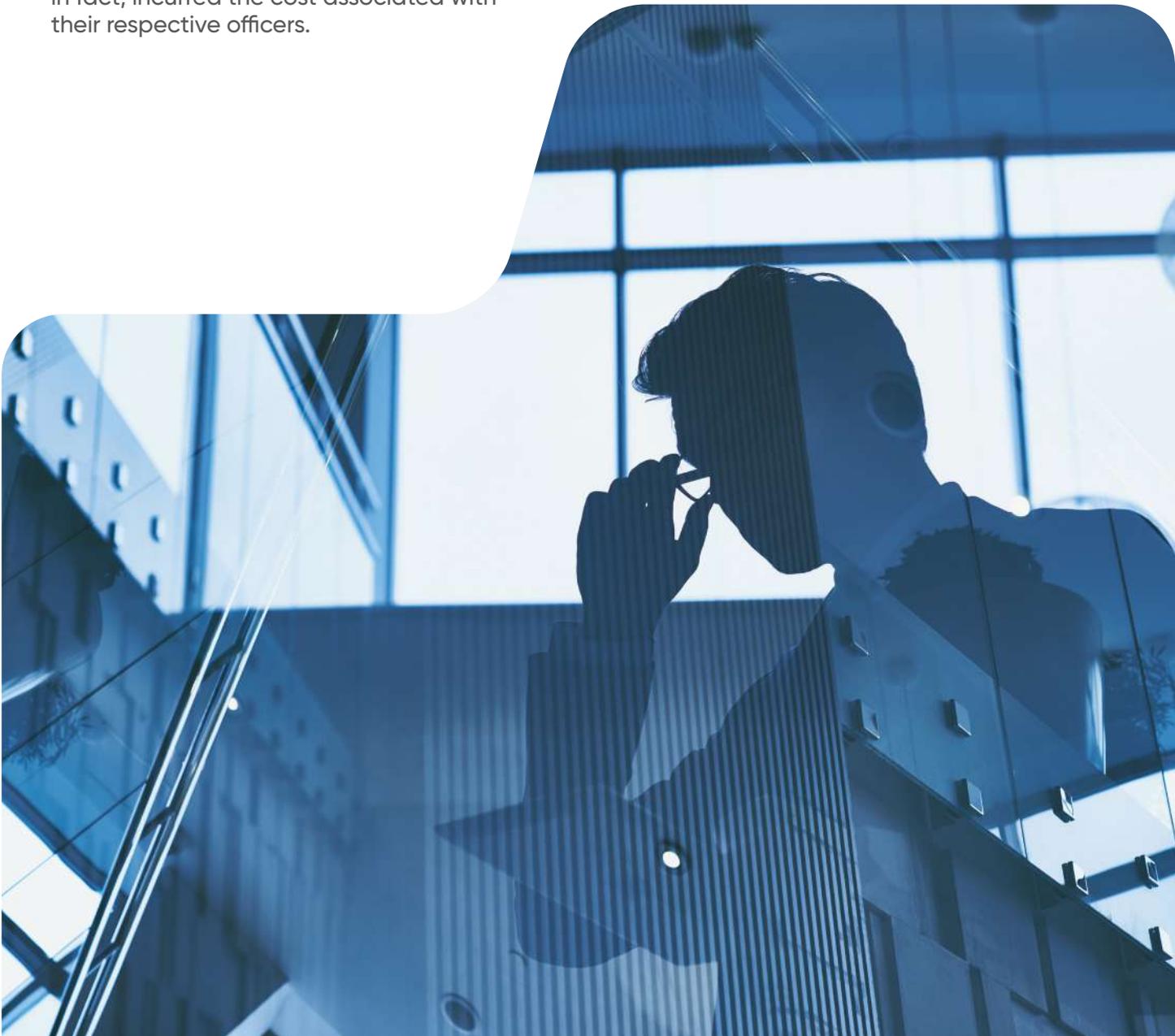
In this matter, while the Insured's subsidiaries were covered under their policy, there was a corporate restructuring that resulted in some erstwhile subsidiaries no longer remaining in the group. For such companies, separate insurance policies were obtained. However, the litigations pertaining to both the original insured as well as the new entities were still being handled by the same lawyers and a common database was being maintained for ease.



This resulted in common invoices being raised by the lawyers for all defendants, irrespective of the individuals they were employed to represent. However, since a claim is processed in accordance with the policy terms specific to that claim, the Insurer insisted on dividing the invoices between the representation of officers of each entity, as separate policies were meant to reimburse these costs.

Additionally, since policy for entity A would only pay for defense of A's officers and given these policies were reimbursement-based policies, it was necessary to show that each entity had, in fact, incurred the cost associated with their respective officers.

This post facto bifurcation along with sharing of expenses, led to more time being spent, consequently creating a time lag. Therefore, we recommend, that if the same lawyer represents the insured persons under different policies (even if within the same organizational structure), separate invoices be raised on each policyholder to avoid confusion on cost-sharing and reimbursement ratio. This, of course, remains subject to the Insured having obtained the Insurer's consent before incurring the costs in the first place.



B Professional Indemnity Insurance

WHAT WAS THE CLAIM?

A doctor who was employed by a hospital had performed a certain surgery on a patient. After a few days, the patient experienced discomfort, and during the X-ray, a needle was discovered in the patient's chest cavity. The said needle was removed, and the patient recovered completely. The patient and their family sent a legal notice and filed legal proceedings, against the doctor as well as the hospital, for medical negligence and claimed compensation. The hospital had taken a professional indemnity policy and a claim was notified under the same.

KEY ASPECTS TO CONSIDER:

1. Coverage for the entity as well as the employee

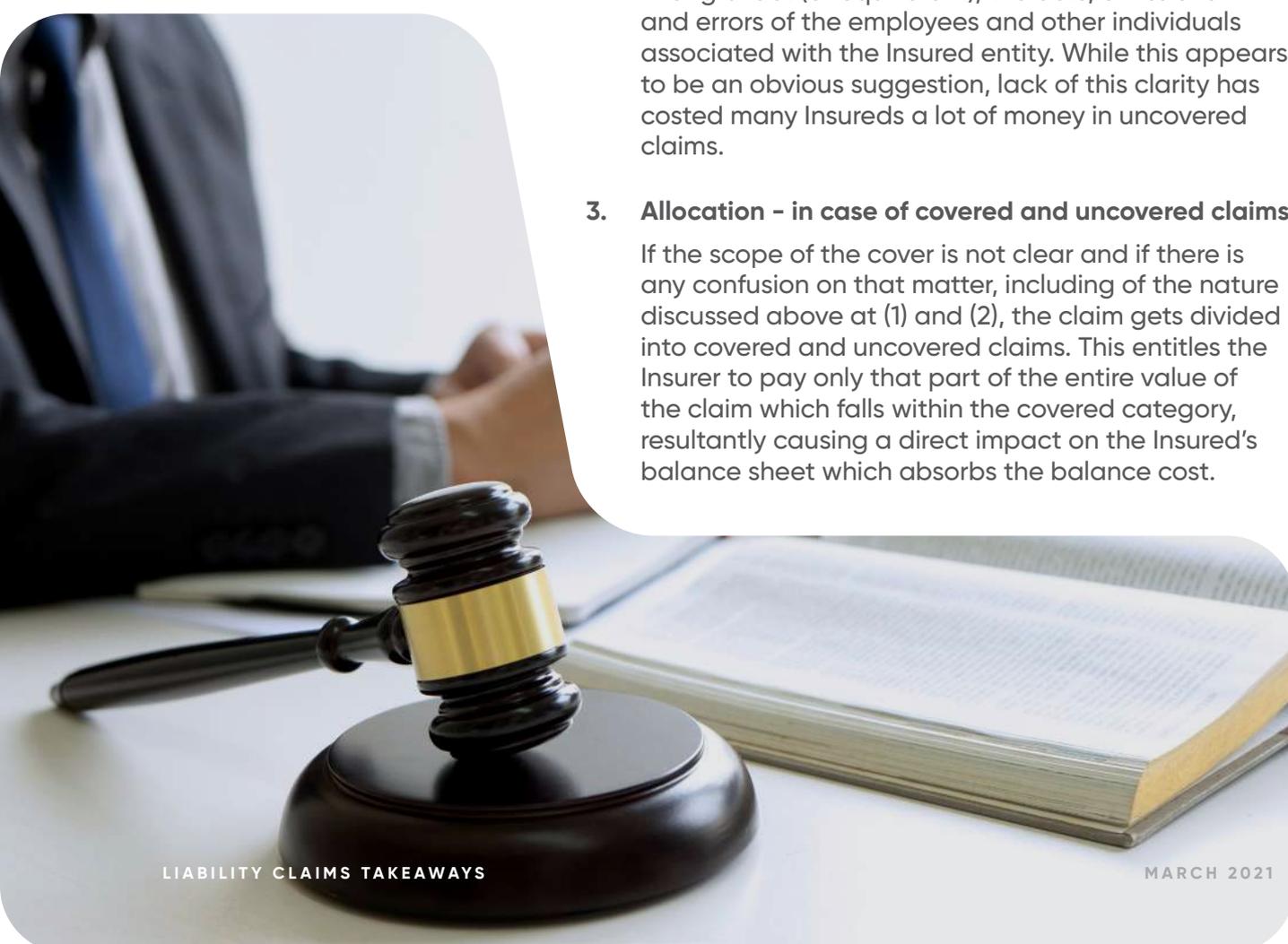
In this case, the policy had only mentioned the company's name as Insured. Employees of the entity were not included in the definition of Insured. Therefore, by a literal interpretation of the coverage clause, the Insurer had to indemnify only the claims made against the Insured (Company) due to error or omissions, and not the claim made against the employees of the Insured. It is, therefore, recommended that the insuring clause of the policy be reviewed carefully along with the definitions to ensure all employees as well as other individuals associated with the insured entity are also covered in the scope of the insurance policy.

2. Policy will be triggered by act or omission of entity and employee

Similar to point 1 above, the indemnity clause should also be reviewed to carefully examine as to whose wrongful act gets covered. Since an entity cannot act on its own and will always act through its employees, it is important to include within the definition of wrongful act (or equivalent), the acts, omissions and errors of the employees and other individuals associated with the Insured entity. While this appears to be an obvious suggestion, lack of this clarity has costed many Insureds a lot of money in uncovered claims.

3. Allocation - in case of covered and uncovered claims

If the scope of the cover is not clear and if there is any confusion on that matter, including of the nature discussed above at (1) and (2), the claim gets divided into covered and uncovered claims. This entitles the Insurer to pay only that part of the entire value of the claim which falls within the covered category, resultantly causing a direct impact on the Insured's balance sheet which absorbs the balance cost.





Employment Practices Liability Extension in a D&O Insurance

WHAT WAS THE CLAIM?

A few employees of the Insured were terminated in accordance with the applicable statute. However, aggrieved by such termination, the employees had initiated labour court proceedings against the entity and had also impleaded the director and human resource official of the company.

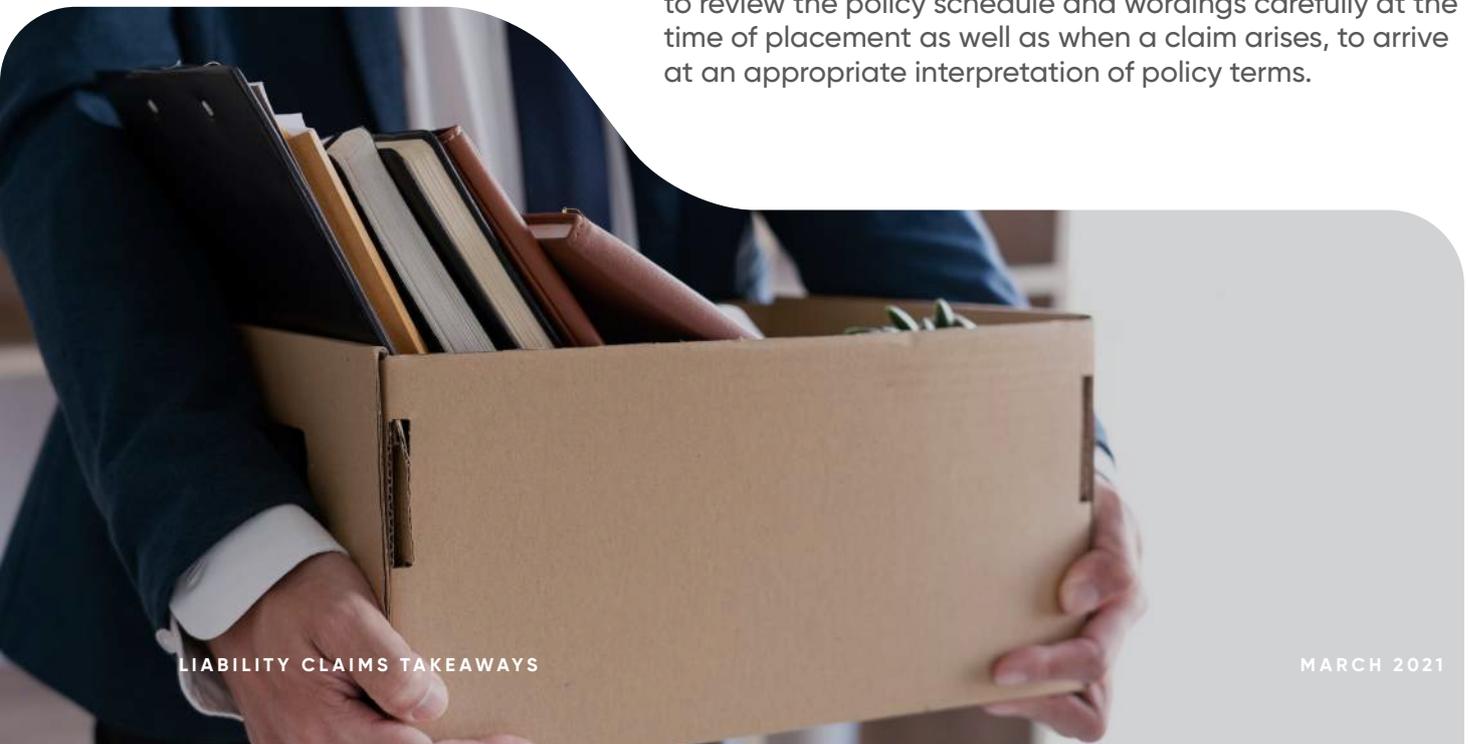
KEY ASPECTS TO CONSIDER:

1. Entity EPLI cover is separate from a standard D&O cover

A D&O cover is meant for directors and officers of the company and claims against the entity itself are not covered under a standard D&O policy. However, an additional cover is available for claims against entities in relation to employment practice violation, namely, Employment Practice Liability Insurance (EPLI). This includes inter alia employment discrimination, wrongful termination, sexual harassment, etc. Given the rise in workplace disputes, this cover is highly recommended as a shield to protect the entity to some extent and Insureds ought to review their D&O policies and seek this extension from their respective Insurers.

2. Application of separate deductibles

Since the EPLI cover is separate and distinct from a D&O cover, the applicable deductible is also different and separate, unless mentioned otherwise. Most policies mention a D&O deductible and an entity EPLI deductible and at the time of an EPLI claim, it is assumed that the total cost associated with the legal proceedings, will be subjected to the deductible applicable to the EPLI extension, which is usually on the higher side. It is, however, paramount to review your policy and check how the deductible has been mentioned. If the entity EPLI extension only talks about a claim against an entity, and then if a director is impleaded in the same action, as regards the director, the claim is not an EPLI claim but a standard D&O claim and ought to be subjected to lower D&O deductible. It is, therefore, crucial to review the policy schedule and wordings carefully at the time of placement as well as when a claim arises, to arrive at an appropriate interpretation of policy terms.



We are sure you found the anecdotes interesting and got some key points to take away.

Stay tuned for the next edition!

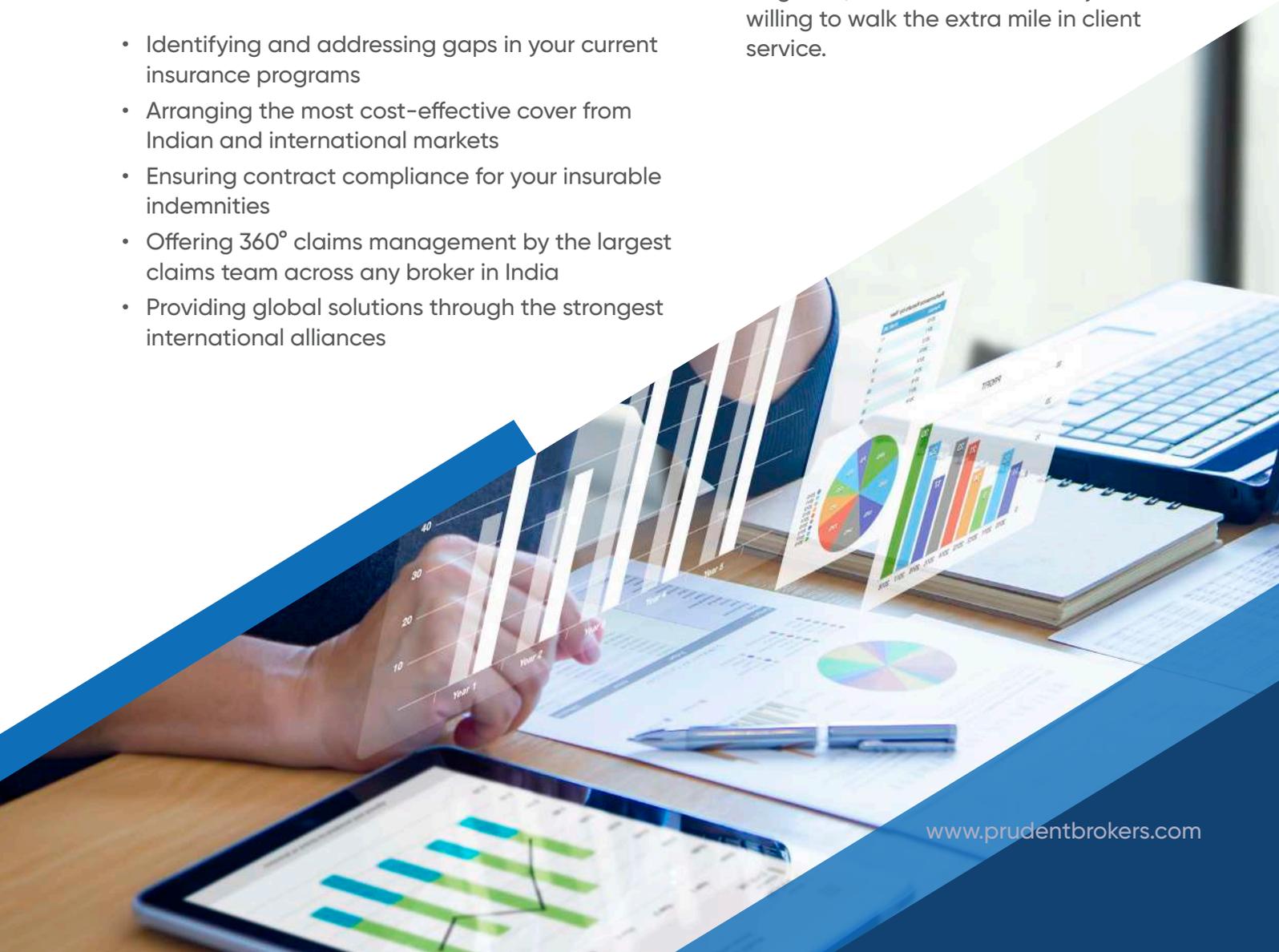
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- Arranging the most cost-effective cover from Indian and international markets
- Ensuring contract compliance for your insurable indemnities
- Offering 360° claims management by the largest claims team across any broker in India
- Providing global solutions through the strongest international alliances

Our Claim-Handling Expertise

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www.prudentbrokers.com

FOR MORE QUERIES, PLEASE REACH OUT TO:

Tanuj Gulani
tanuj.gulani@prudentbrokers.com

Richa Dhasmana
richa.dhasmana@prudentbrokers.com

Nishant Kashyap
nishant.kashyap@prudentbrokers.com

Arun Prasadh
arun.prasadh@prudentbrokers.com

Neha Anand
neha.anand@prudentbrokers.com

Jyoti Krishnan
jyoti.krishnan@prudentbrokers.com

Mayank Sharma
mayank.sharma@prudentbrokers.com

PRUDENT INSURANCE BROKERS PVT. LTD.
Mumbai | Bengaluru | Chennai | Gurugram | Hyderabad | Ludhiana | Pune

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