



LIABILITY CLAIMS *TAKEAWAYS*

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JANUARY 2022

Welcome to the January 2022 edition of 'Liability Claims Takeaways' – our monthly insights from industry stalwarts.

A Directors and Officers Liability Insurance

WHAT WAS THE CLAIM?

A first information report was registered against the directors and officers of the insured company in November 2020. The Director and Officers Liability Insurance Policy ("D&O Policy") was to be renewed in December 2020. The accused officers received the FIR around February 2021 and notified the matter under the D&O Policy.

KEY ASPECTS TO CONSIDER:

1. Importance of control group clause

A control group clause is intended to create a narrow pool of people whose knowledge of a claim is imputed as the knowledge of the insured person. This implies that the notification obligation under the policy commences only once the knowledge of a claim is received by any of the persons mentioned in the control group.

The D&O policy in question had a control group clause which named five specific officers of the company as forming the control group. While the FIR was registered in November 2020, the first time a member of the control group received knowledge of the FIR was only in February 2021, and soon thereafter, the matter was reported to the Insurer.

This saved the Insured's claim from being prejudiced on account of alleged non-disclosure and delayed reporting. Therefore, when placing/renewing your D&O policy, please ensure that the control group clause is included, and the group is kept as narrow as practicable in order for the clause to be effective.

2. Hammer clause

Hammer clause, as the name suggests, is the ability of an Insurer to insist that a claim against the Insured be settled at a certain value. This means that if the claimant is willing to settle at a sum which the Insurer also agrees to, but the Insured wishes not to settle, then the Insurer can insist that settlement be affected at the value agreed to by them. And if the Insured were to disagree, the Insurer can restrict their liability for that claim under the policy, to the sum of settlement that was originally agreed to by them.

This critical clause specifically for large corporates and impact thereof, ought to be evaluated when placing/structuring the insurance policy.



B Product Liability Insurance/ Product Guarantee:

WHAT WAS THE CLAIM?

The insured is engaged in the business of manufacturing valves for passenger vehicles. The valves manufactured by the Insured and supplied to their customer outside India, were collected by the customer. However, once the valves were put to use, they broke instantly. This was observed across several valves. Upon testing, it was revealed that the valves could not be used for the purpose for which they were manufactured and supplied. Resultantly, the customer rejected all the valves supplied by the Insured. The Insured notified this incident in their Commercial General Liability Insurance Policy ("CGL Policy") under Product Guarantee extension.

KEY ASPECTS TO CONSIDER:

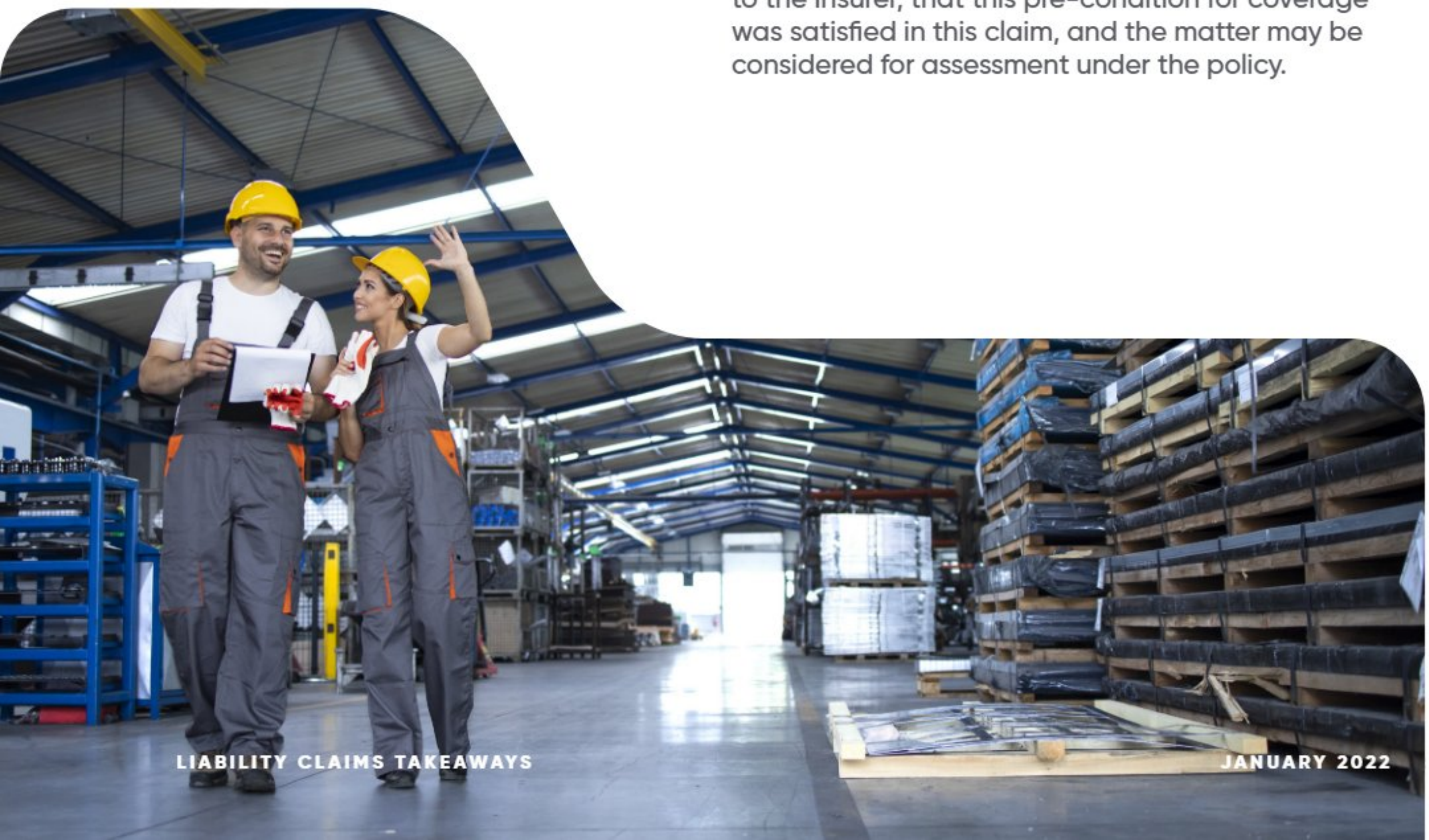
1. Product Efficacy exclusion

Typically, CGL policies under the product guarantee cover, have a Product Efficacy exclusion. The Insurer was relying upon the said exclusion and argued that the current claim is therefore excluded. Our team of lawyers was able to demonstrate to the Insurer, the intent of the exclusion versus the intent of the product guarantee cover. We explained to the Insurer that the cover intended to include claims wherein the product supplied fails to perform the functions it was manufactured and supplied for, whereas the exclusion is limited to excluding claims which are based on the allegation of product not performing its function to the 100% ability. On this basis, the Insurer proceeded with their assessment of the claim.

2. Unqualified acceptance of the supplied goods is a pre-condition to trigger product guarantee cover

In most policies, it is a condition precedent to coverage under the product guarantee extension that the goods forming part of the claim, ought to have been delivered to the customer and accepted in an unqualified manner.

The terms of contract between the insured and their customer provided for deemed acceptance by the customer upon delivery. Therefore, relying on the terms of the contract, we were able to demonstrate to the Insurer, that this pre-condition for coverage was satisfied in this claim, and the matter may be considered for assessment under the policy.



Commercial Crime Insurance

WHAT WAS THE CLAIM?

The Insured is in the business of providing an online marketplace coupled with storage hub. The business is handled across different companies in the group wherein the goods are owned by an entity in the group, the online platform is owned by another entity, and the invoicing and delivery is owned by another entity. The goods kept in storage were found missing upon a regular check and it was found that the goods had been stolen. A police complaint was filed, and a claim was intimated under the commercial crime policy.

KEY ASPECTS TO CONSIDER:

1. All subsidiaries must be specifically added as insured

The commercial crime policy usually provides cover only to the named Insured i.e., if multiple entities of the same group are required to be covered under a single policy, it is expected that ahead of placement/renewal, organisation structure and shareholding pattern are submitted such that all entities may be mentioned in the policy for coverage.

In this instance, details of all group entities intended to be covered were not submitted. When the above claim was made, and it was found that the goods were owned by an entity not specifically covered in the policy, the Insurer aimed at rejecting the claim.

We, as brokers for the Insured, had, at the time of placement, ensured that the policy has a care, custody, and control cover up to limit of liability. This allowed the claim to be made by the entity, in whose custody the goods were stolen from. On that basis, the claim was considered under the policy.

Having said the above, it is important to ensure that details of all entities intended to be covered, are shared with the Insurer in a timely manner ahead of placement/renewal of the policy, to ensure comprehensive and meaningful coverage under the policy.

2. Waiver of subrogation clause – how does it work?

Many times, entities forming a part of the same group provide complimentary services to each other. In such cases, if the action or omission of one entity results in a loss to the other, and the latter claims the loss from an insurance policy, the Insurer who pays, is allowed to subrogate themselves into the position of the non-defaulting party and claim from the defaulting party.

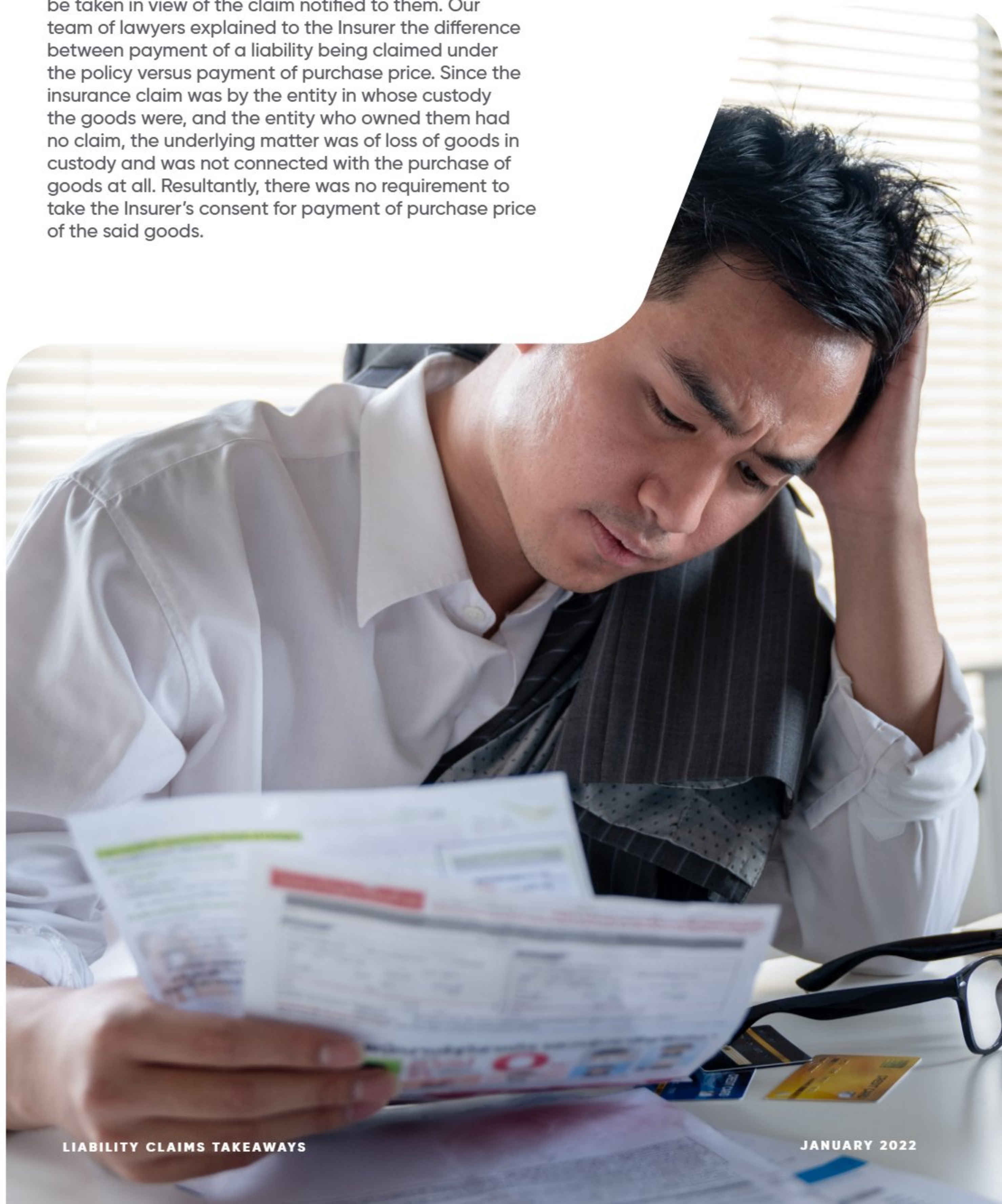
In such a scenario, the purpose of an insurance could potentially become redundant as the loss reimbursed by the Insurer to one group entity is being recouped through another group entity. To avoid this, the contract between the two group entities usually provides for the service recipient entity to ensure a waiver of subrogation in their insurance policies. Coupled with that, it needs to be ensured that the insurance policy of the service recipient entity, in fact, includes a waiver of subrogation from the Insurer. Resultantly, once the insurer pays the non-defaulting entity, they will not be able to claim it from the defaulting entity using subrogation rights.

These clauses are extremely relevant in case of intra-group contracts resulting in claims under an insurance policy.



3. Payment of purchase price is not the same as payment of liability

As mentioned above, the goods in this case were owned by one entity and were in the custody of another. The owner entity had not paid full value for the said goods yet and needed to pay their vendor under the sale contract. The Insurer insisted that their consent should be taken in view of the claim notified to them. Our team of lawyers explained to the Insurer the difference between payment of a liability being claimed under the policy versus payment of purchase price. Since the insurance claim was by the entity in whose custody the goods were, and the entity who owned them had no claim, the underlying matter was of loss of goods in custody and was not connected with the purchase of goods at all. Resultantly, there was no requirement to take the Insurer's consent for payment of purchase price of the said goods.



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 the largest claims team 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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