RISK ALERT BULLETIN NOVEMBER 2004 NO.4\2004

1. GENERAL MANAGER'S COLUMN
2. POLICY QUERIES
3. PARATE EXECUTIE CLAUSES IN PLEDGE AGREEMENTS
4. USEFUL TIPS FOR MVA PRACTITIONERS
5. LITIGATION DO'S AND DON'TS

1. This is our last edition for 2004- a year that has been quite eventful, particularly for MVA practitioners and their clients. (Perhaps, on second thoughts, I should say that it has been uneventful - given the RAF's moratorium on payments). I wish all readers a happy and restoring end of year holiday season.

RAF Matters

In our August Bulletin, we reported on the measures undertaken by the RAF to stabilise their current financial crisis.

On 22 July 2004, our editorial committee attended a stakeholders meeting at the RAF's offices. Dr. Saths Cooper (the acting co- chairperson of the Fund) opened the meeting by commenting on the fact that the accident rate had come down, but the number of claims had increased by 20%. The latter was thought to be due to an increase in fraudulent claims.

A member of the audience raised the question of the amendment Bill and its possible retrospectivity. Dr. Cooper indicated that he was not aware of any amendment Bill that was to be presented to Parliament and could therefore not comment on its retrospectivity.

In any event, it has recently come to our attention that a new draft Bill is to be presented to the Portfolio Committee of Transport and that it will be based on the model used in the State of Victoria in Australia. According to the Johannesburg Attorneys Association the Australian model has "nothing in common with South Africa" and is "not working very well there either."

The JAA has advised its members to:

- exercise extreme caution when taking on new claims
- ensure that they are members of SAAPIL (Docex 300, Randburg/ Tel. 011 380-3780)
- pass on any information to raf@jaa.org.za or saapil@mweb.co.za

It has also very recently come to our attention that the Cape Town branch seems to be making some offers and that the Johannesburg branch may follow suit.

We will do our best to keep you further informed of developments, but from a risk management point of view, we urge all MVA practitioners not to 'take their eyes off the ball' and allow any client's claim to become prescribed during this difficult period.

Prescription Alert

Prescription Alert is a computerised diary system, which records particulars of all time barred matters. Upon registration of your firm and claim/s, the Prescription Alert unit will timeously alert you before the prescription date.

Many practitioners are aware of the services offered by the unit, but there are still firms who are not using the service, which is provided at no cost to practitioners.

To register with Prescription Alert please contact Alison Smit:
Tel.no. 021 422 2830 or info@aiif.co.za

Litigation do's and don'ts

Over the past few years, the scheme has noted a sharp increase in claims arising out of litigation. In an attempt to manage this risk, we isolated the litigation claims from 1999-2002 and then looked at the circumstances giving rise to these claims. The results of our exercise were published in our August 2002 Bulletin.

However, due to the continued increase in the number of litigation claims, we are re- publishing the list (in a two-part series) and have further added a recommended do's and don'ts list. We hope that this will assist practitioners to manage the risks inherent in their practices.

Due to a shortage of space we will not be publishing our regular "Prescription Matters" in this issue.

Letters Column

Thank you to those people who have taken the trouble to communicate with us during the past year. We ask that readers please continue to communicate with us in the year to come. We rely on your feedback to make our Bulletin relevant to the profession.

Policy Queries

Are trustees, liquidators and curators covered by the Attorneys Fidelity Fund Professional Indemnity Insurance Scheme?

The Policy, which governs the scheme, does not specifically mention the position of trustees, liquidators and curators *per se*. However, it does provide an indemnity to practising attorneys for liabilities which they may incur to third parties arising out of the conduct of the profession.

"Conduct of the profession" is further defined as "activities of the insured acting as a practitioner and such activities, which are legitimately conducted as part of a legal practice."

The managers of the scheme have always accepted that attorneys are regularly appointed to act as liquidators/trustees/curators due to their professional expertise. We accordingly have no difficulty with the idea that an attorney acting as a liquidator/trustee/curator as part and parcel of his/her legal practice would in the normal course be acting "in the conduct of the profession" as envisaged by the Policy.

It is however of prime importance that the attorney concerned should be a **practising** attorney and any fees debited in respect of the appointment as liquidator/trustee/curator should be for the benefit of his/her legal practice. If an attorney conducts business as a trustee/liquidator/curator outside the ambit of a legal practice, then the indemnity will not apply.

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PARATE EXECUTIE CLAUSES IN PLEDGE AGREEMENTS

***Bock and others v Duburoro Inv (Pty) Ltd* 2004(2) SA 242 (SCA)**

The *parate executie* clause empowers the pledgee (creditor) in possession of the pledged goods to sell the goods without a Court order should the pledgor (debtor) default.

Although these clauses are commonly found in pledge agreements, the Court in *Findevco(Pty) Ltd v Faceformat SA (Pty) Ltd* 2001(1) SA 251 (E) ruled that a *parate executie* clause is void because it is unconstitutional. The reasoning of the Court was that a clause of this nature allows a creditor to take the law into its own hands without first obtaining a court order. The *Findevco* case raised the concern that it could seriously jeopardise the use of pledge as security.

In *Bock and others v Duburoro Inv (Pty) Ltd*, company M borrowed money from 3 banks. The loans were secured by the pledging of M's shares to the banks and the appellants bound themselves as sureties for the debts of M.

When the loans were made, the shares were trading above R5 on the JSE. However, on the due date for payment, M defaulted. The share price at that stage had dropped to 160c. The dilemma faced by the banks, as the pledgee was that if they disposed of the pledged shares to realise their security, the sheer number of the shares being sold would cause panic amongst investors. This would further reduce their price. The banks decided to retain the shares.

Company R purchased certain of the businesses of M and reached an agreement with the banks whereby the latter undertook to take possession of and execute all the shares held by them. A voluntary winding- up of M was contemplated and the banks took over the shares at 105c. They then turned to the appellants as the sureties to make good the difference between the amounts owed by M and the amounts realised for the shares.

The sureties raised several defences, one of which was that the banks were relying on a *parate executie* clause which was void. Reference was made to the *Findevco (Pty) Ltd* case (discussed above)

Held:

-That the banks were not exercising any right of *paratie executie* as they did not sell the shares pledged, but merely took them over.
- That such a clause in a pledge agreement was not unconstitutional and that *Findevco* was wrong.
- That the banks took over the shares in a manner which was contrary to the agreement, but that this breach did not discharge the principal debtor (M) from its liability. However, they (M) were entitled to be placed in the same position that they would have been in had the agreement not been breached i.e. they were entitled to be credited with the true value of the shares as at take over. The position of the sureties was the same and their indebtedness was not increased or changed as a result of the banks' breach.

***The SCA in the above case stressed that a clause in a pledge agreement is void if it entitles the pledgee to keep the security as his own property should the pledgor default. A parate executie is only valid if it entitles the creditor to keep the pledge upon the debtor's default at a <u>fair price</u> then determined*.**

Practitioners should therefore be careful about the wording when including such clauses as you may be faced with a professional indemnity claim by a creditor whose claim has not been adequately secured.

(This note is with the consent of the Bureau for Mercantile Law, University of Port Elizabeth, based on the discussion of the judgment in the 2004 (21.6) Commercial Law Bulletin, published by the Bureau.)

USEFUL TIPS FOR MVA PRACTITIONERS

RAF matters in relation to the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (the Compensation Act)

Road Accident Fund v Maphiri 2004 (2) SA 259 (SCA)

M sued the RAF for damages sustained in a motor vehicle collision. The parties agreed on a 50% apportionment and ultimately, the only issue in dispute was the method to be used in calculating the award to be made to the plaintiff having regard to the apportionment of 50% and the award by the Compensation Commissioner ("CC").

In considering s 36 of the Compensation Act, Harms JA pointed out the distinction to be drawn between 'compensation' provided for by the act and 'damages' in delict. He also held that the 'like from like' principle (in terms whereof an amount paid by the Compensation Commissioner under a certain heading, such as medical expenses, has to be deducted from an amount payable by the RAF under a similar heading) could not be reconciled with the section. He expressed the view that it led to confusion and inconsistent results and should no longer be used.

The method confirmed by the court (where an award by the CC and apportionment is applicable) is therefore to:

- quantify the total common law damages(special and general damages)
- deduct the apportionment
- deduct the final award by the CC

(Please note that this case was fully discussed in De Rebus, March 2004)

LITIGATION DO'S AND DON'TS-part 1

	DO'S	DON'T'S
Incorrect Legal Advice.	- Be familiar with the relevant area of law and any changes through research and continuing legal education. - Refer the client to a specialist if you are unable to give proper advice in the matter through inexperience or lack of knowledge.	- Accept cases outside your areas of expertise e.g. labour disputes, which have stringent time limits that need to be adhered to, complex conveyancing matters etc.
Under settlements	- Ensure in personal injury matters that your client's injury has stabilized and that you have updated medico-legal reports before advising client to settle. - Discuss the issue of fees and reach clear agreement, preferably in writing, on: a. the amount to be charged; b. the basis for such charge; c. whether the fees will be charged at the end of the matter on successful conclusion or otherwise; d. the issue of ongoing disbursements - Canvass in depth the risks inherent in litigation so that your client can make a final decision as to whether an offer should be accepted. Make detailed file notes of your discussion with client especially where he/she agrees to or insists on accepting a lower offer. - Confirm the above instructions in writing.	- Raise your client's expectations about the true value of the claim. - Settle or agree to settle without a full and frank discussion with your client - Use a power of attorney to accept an offer in settlement of a third party claim without discussing the offer fully with your client.
Client's claim\application dismissed, default judgement taken against client for various reasons etc.	- Ensure that a proper diary system is instituted from the date of acceptance of instructions - Ensure that you have all possible contact details for client. - Ensure that all court dates are included in the diary system - Check and adhere to special time limits - Ensure that documents are served in time or obtain an extension for service - Advise clients of time limits for appeals - Ensure the availability of clients and witnesses. - Remember that an attorney has an ultimate responsibility to the court	- Delay or neglect the client's case. It is probably the only one that he\she has. By doing so you open yourself up to allegations of professional negligence. - Withdraw as attorney of record at the last minute before an application or trial if your client has not paid your fees or has failed to provide you with instructions. Rather proceed with the matter and if possible request a postponement in order that you can trace your client and place him/her on terms. (A court can call for an explanation from an attorney who has withdrawn late in the proceedings and could even award the costs against that attorney (costs de bonis propriis)

<u>**Lack of communication with clients'/ colleagues in office, not carrying out mandate correctly, not making file notes etc.**</u>	- Read your letter of instruction carefully and note specifically everything that needs to be done. If in doubt, obtain clarification from your client. - Return all telephone calls and keep the client advised of developments - Use the diary system and devise a practical system of office monitoring of important dates - Encourage the client to communicate with you and ask questions. - Strive to make the client feel comfortable, relaxed and confident as to your ability and good intentions - Make file notes at the end of all telephone conversations and consultations and confirm these in writing. - Ensure that all aspects are recorded in the file so that a colleague can take over the matter in your absence.	- Hesitate to discuss with your client all potential risks, problems and alternatives pertaining to his/her case. - Assume that you always know what is best for your client. - Take it for granted that because your unsophisticated client can speak some English/ Afrikaans that he/she can understand you. Obtain the services of an interpreter to prevent misunderstandings
<u>Undue delays in proceeding with a matter</u>	- Know the court rules. - Make an office policy of retrieving briefs from counsels who do not perform and setting time limits in which counsel must perform - Communicate with the client about the delays in the case and where the client is causing the delays, set out in writing the consequences of continued delay and any relevant time limits - Take active steps to prevent your Magistrate's Court summons from lapsing.	- Let briefs languish with counsel. Find out and act on what further information counsel requires. - Leave the preparation of pleadings and notices for the last minute as delays can occur which may be beyond your control e.g. in the Sheriff's office etc.

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