



Bulletin

Risk Alert

A joint publication of the Attorneys Fidelity Fund and the Attorneys Insurance Indemnity Fund (Association incorporated under S21 of Act 61 of 1973)

July 2010 – No. 1/2010

In this edition

RISK MANAGER'S COLUMN

GUIDELINES FOR LETTERS OF
UNDERTAKING IN BRIDGING
FINANCE MATTERS

SCHEME POLICY

SPECIAL EDITION: THE ATTORNEYS PROFESSIONAL INDEMNITY INSURANCE SCHEME 2010/2011 POLICY

Risk Manager's Column

The Scheme Policy is usually published in the August edition of the *Risk Alert Bulletin*. We have decided to circulate this special edition of the *Bulletin*, thereby timing the publication of the new policy to coincide with the start of the new insurance year, which runs from 1 July 2010 to 30 June 2011.

The only significant changes to the policy are as follows:

1. *The Definitions Clause (2) has been expanded, by the introduction of definitions of "a conveyancing transaction" and "bridging finance" in clauses 2.8 and 2.9, respectively.*
2. *The Exceptions Clause (5) has been amended by the introduction of a further clause (5.1.11) which introduces a new exception, excluding certain bridging finance matters from cover.*

As has been discussed in previous *Bulletins*, the exclusion from cover, of certain types of bridging finance matters, became necessary because of the inordinately large number of claims made by bridging finance companies against conveyancers, over the past few years. The Company has consulted extensively with various role players in the profession and the industry and we have alerted the profession to the problems arising out of the provision of Letters of Undertaking to bridging financiers (and to the likelihood that such matters would be excluded from cover).

Please note that the exclusion does not apply where bridging finance has been obtained for the sole purpose of paying the following:

- *transfer duty and costs;*
- *municipal or other rates and taxes relating to the immovable property which is to be transferred; and*
- *levies payable to the body corporate or homeowners' association relating to the immovable property which is to be transferred.*

In the above limited circumstances, it is nonetheless essential to observe and apply the following **guidelines**, to ensure that you protect your practice from any liability.

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Guidelines for letters of undertaking in bridging finance matters

1. The Letter of Undertaking or guarantee ("the undertaking") must be designated as being "revocable" if circumstances in relation to the finances of a transaction change (e.g. the amended cancellation figures exceed the initial amount requested by the existing mortgagee and the surplus value in the transaction makes the payment of the amount stipulated in the undertaking impossible). If the undertaking is not expressly made revocable then the conveyancer will be at risk to perform in terms of the undertaking, despite the finances not being available to satisfy the payment due to the bridging finance institution.
2. Likewise, the undertaking should be revocable if the transaction does not proceed or if the signatory's mandate is terminated.
3. The conveyancer must attend to a detailed breakdown of all the financial aspects of the transaction prior to issuing any undertaking in favour of a bridging finance institution. If there are linked conveyancing transactions attended to by multiple firms of attorneys on behalf of one or more of the parties to the conveyancing transaction, then those firms must be required to similarly furnish confirmation of the financial aspects under their control.
4. The conveyancer must ensure that there will be enough funds available, on registration, to cover the amount advanced and must be particularly vigilant where more than one amount is advanced on any one transaction.
5. Conveyancers should refrain from providing undertakings in circumstances where registration is not imminent. In other words, only once all conditions and requirements of a transaction have been complied with (where rates clearance figures have not been issued by the local authority this can cause a significant delay in the registration of the transaction).
6. The conveyancer should only confirm that the transaction is unconditional once she/he has properly satisfied herself/himself that there are no conditions or impediments to the registration.
7. When a new or further undertaking is requested by the conveyancing client to be issued to another creditor, or even in replacement of the previous letter of undertaking, the conveyancer must again attend to a preliminary reconciliation of the finances of a transaction.
8. It follows that, once an undertaking is issued in substitution of an earlier undertaking to the same or another bridging finance institution, the conveyancer should only then issue the replacement or substitution undertaking once the previous original undertaking has been received back and cancelled.
9. It is prudent to put in a proviso that the undertaking is subject to any payment that may be required to be made to SARS in terms of the Income Tax Act.
10. It is suggested that all requests for bridging finance are vetted and undertakings signed by one designated partner/director.
11. In the case where the client is a juristic person, or a co-owner/joint owner of a property, the conveyancer should ensure that the person instructing her/him has been properly authorised to apply for the financing.
12. All conveyancing practices should make sure that there are checks and balances in place to ensure that the bridging finance company is paid out on registration, before the rest of the proceeds are disbursed.
13. The conveyancer must ensure that the bridging finance company is notified if the transaction is cancelled or delayed or if her/his mandate has been withdrawn.
14. The conveyancer should avoid committing to a specific date on which transfer can be expected.



GLENRAND M.I.B

THE ATTORNEYS FIDELITY FUND
PROFESSIONAL INDEMNITY INSURANCE SCHEME

1 JULY 2010 TO 30 JUNE 2011

PROFESSIONAL INDEMNITY INSURANCE

In consideration of the **Attorneys Fidelity Fund**, for and on behalf of every insured (as defined in this Policy), having paid or agreed to pay the insurer named in the schedule the premium stated in the Master Policy:

The insurer agrees to provide an indemnity in the manner and to the extent stipulated, subject to the terms contained in this policy and the schedules hereto.

1. INDEMNITY

- The indemnity granted in this policy is in respect of:
- 1.1 the insured's legal liability to any third party arising out of the conduct of the profession by the insured which legal liability is the subject of a claim first made on the insured during the period of insurance irrespective of when or where such liability arose;
 - 1.2 approved costs in connection with any claim under 1.1;
 - 1.3 approved costs of investigating and of being represented at any professional or judicial inquiry into any event or occurrence that may have given rise to or may reasonably be expected to give rise to a claim under 1.1.

2. DEFINITIONS

- 2.1 "the Act" – the Attorneys Act, No. 53 of 1979 (as amended);
- 2.2 "the Attorneys Fidelity Fund" – the Attorneys Fidelity Fund referred to in Section 25 of the Act;
- 2.3 "practitioner" – any attorney notary or conveyancer as further defined in the Act;
- 2.4 "approved costs" – all legal and similar costs and expenses which the insured may incur with the insurer's written consent which shall not be unreasonably withheld;
- 2.5 "the insured":
 - 2.5.1 (a) every individual practitioner; and
 - (b) every firm, partnership or incorporated practice consisting of one or more practitioners who, on the date on which the claim is made:
 - 2.5.1.1 is practising as such in the Republic of South Africa; and
 - 2.5.1.2 is in possession of or would have been obliged to apply for a current Fidelity Fund Certificate in terms of Section 42 of the Act;

- 2.5.2 any former sole practitioner and any former principal, partner, director or consultant of the firm, partnership or incorporated practice referred to in 2.5.1, who is no longer a practising practitioner when the claim is made against her/him, provided that the claim arises out of the conduct of the profession by such person or such firm, partnership or incorporated practice at a time when she/he was:
 - 2.5.2.1 practising as such in the Republic of South Africa; and
 - 2.5.2.2 in possession of or obliged to apply for a current Fidelity Fund Certificate in terms of Section 42 of the Act;
- 2.5.3 in the event of the death, incapacity, insolvency or dissolution of any person or entity referred to in 2.5.1, 2.5.2 and 7, her/his estate, legal representative, heir or successor in title in respect of any claim arising out of the conduct of the profession;
- 2.6 "partner or director" includes any person who is:
 - 2.6.1 *de facto* a partner or director of the insured; or
 - 2.6.2 who is publicly held out to be a partner or director of the insured;
- 2.7 "conduct of the profession" – the activities of the insured acting as a practitioner and such activities which are legitimately conducted as part of a legal practice. In the event of a dispute as to whether a particular act or activity is conducted as aforesaid the matter shall be referred to the president of the statutory law society having jurisdiction over the insured whose decision shall be binding on the parties to this policy;
- 2.8 "conveyancing transaction" – a transaction which:
 - involves the transfer of legal title to immovable property from a legal or natural person to another;
 - involves the registration of any mortgage bond over immovable property;
 - is required to be registered in any Deeds Registry in the Republic of South Africa, in terms of any relevant legislation;
- 2.9 "bridging finance" – the provision of short-term finance to a party to a conveyancing transaction prior to the registration of the conveyancing transaction in the Deeds Registry.

3. LIMIT OF INDEMNITY

- 3.1 The liability of the insurer in respect of all claims and claimants' costs and expenses and approved costs shall not exceed the limit of indemnity specified in Schedule A.
- 3.2 All claims arising out of one act or omission or out of the dishonesty of any one person or any number of persons together or in collusion shall be deemed to arise out of one event or occurrence.

4. THE DEDUCTIBLE

The insured shall be responsible for the first amount of any claim and claimant's costs and expenses arising out of one event or occurrence, but not exceeding the deductibles specified in Schedule A. The deductibles shall only apply in respect of claims for breach of professional duty, but shall not be applied to approved costs.

5. EXCEPTIONS

5.1 Unless specifically stated to the contrary this policy does not cover any loss, destruction or damage whatsoever or any legal liability of whatever nature:

5.1.1 directly or indirectly, caused by or arising from or in consequence of or contributed to by nuclear weapons materials or by ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel. Combustion shall include any self-sustaining process of nuclear fission;

5.1.2 which is insured or would but for the existence of this policy be insured by any other policy or policies or guarantees, except in respect of any excess beyond the amount which would be payable under such policy or policies or guarantees had this insurance not been effected;

5.1.3 arising from any event or occurrence, which has been notified under any insurance in force prior to the inception of this policy;

5.1.4 arising out of or in connection with any trading losses or trading liabilities incurred by the insured or by any practice or business managed by or carried on by the insured;

5.1.5 arising from theft by any principal, partner, director, candidate attorney, employee or “in-house” consultant of the insured or of the insured’s predecessors in practice of any money or other property referred to in Section 26 of the Act;

5.1.6 arising from or in terms of any judgement delivered or obtained in the first instance otherwise than by a court of competent jurisdiction within the Republic of South Africa;

5.1.7 arising out of or in connection with the provision of investment advice or the administration of any funds in contravention of the Banks Act, 94 of 1990 (as amended), or as a liquidator in terms of the Agricultural Credit Act, 28 of 1996 (as amended);

5.1.8 arising out of or in connection with an order made against the insured to pay costs *de bonis propriis* in circumstances where the insured is acting in a capacity as attorney for one of the parties before the court which makes such order;

5.1.9 arising out of or in consequence of an instruction to the insured to invest money on behalf of any person other than an instruction to pay money into an account contemplated in Section 78 2(A) of the Act, if such payment is for the purpose of investing such money in such account on a temporary or interim basis only, pending the conclusion or implementation of a particular matter or transaction which is already in existence or about to come in to existence at the time the investment is made. This exclusion does not apply to money which the insured is authorised to invest in her/his capacity as executor, trustee or curator or in any other similar capacity;

5.1.10 arising out of or in connection with any work done on behalf of an entity defined in the Housing Act, 107 of 1997, or its representative, with respect to the National Housing Programme provided for in the Housing Act, 107 of 1997;

5.1.11 arising (whether directly or indirectly) out of, in connection with or as a consequence of the provision of bridging finance in respect of a conveyancing transaction where the insured is acting or it is intended that she/he should act as conveyancing attorney. This exclusion does not apply where bridging finance has been provided for the payment of:

- transfer duty and costs;
- municipal or other rates and taxes relating to the immovable property which is to be transferred;
- levies payable to the body corporate or homeowners association relating to the immovable property which is to be transferred.

5.2 Unless specifically stated to the contrary this policy also does not cover:

5.2.1 any person who was in any way and at any time dishonest in relation to or in connection with any claim under this policy;

5.2.2 costs and expenses of litigation recovered by any claimant from the insured which are not incurred in and recoverable in the Republic of South Africa;

5.2.3 loss or destruction of or damage to any property whatsoever (including a computer) or any loss or expense whatsoever resulting or arising therefrom;

5.2.3.1 any legal liability of whatsoever nature;

5.2.3.2 any consequential loss, directly or indirectly, caused by or contributed to or consisting of or arising from the incapacity or failure of any computer:

- (i) to treat any date before, during or after the year 2000 as the correct date or true calendar date, or correctly or appropriately to recognise, manipulate, interpret, process, store, receive or to respond to any data or information, or to carry out any command or instruction, in regard to or in connection with any such date; or
- (ii) to capture, save, retain or correctly to process any data as a result of the operation of any command which has been programmed into any computer, being a command which causes the loss of data or the inability to capture, save, retain or correctly to process such data in regard to or in connection with any such date.

A computer includes any computer, data processing equipment, micro-chip, integrated circuit or similar device or any computer software tools operating system or any computer hardware or peripherals and the information or data stored in or on any of the above, whether the property of the insured or not.

6. CONDITIONS

6.1 The insured shall give immediate written notice to the insurer of any claim or intimation of a claim. Once the insured has notified the insurer in terms of this clause the insurer may submit to the insured a claim form requiring the insured to provide all further information reasonably required by the insurer in respect of the claim or intimation of a claim. The insured shall not be entitled to the indemnity afforded by this policy until the insurer’s claim form has been properly completed by the insured and returned to the insurer.

- 6.1.1 Every letter, claim, summons or process received by the insured, which evidences a claim or an intention to claim, shall be forwarded to the insurer immediately.
- 6.1.2 If the insured gives notice of any event or occurrence of which the insured becomes aware during the period of insurance which may give rise to a claim, then any claim in respect of that event or occurrence which is subsequently notified against the insured after the expiry of the period of insurance shall for the purpose of this policy be treated as having been made during the period of insurance.
- 6.2 The insurer waives any right of subrogation against any partner or director of the insured, unless such person has committed a dishonest or criminal act in relation to matters, which are the subject of a claim under this policy.
- 6.3 In the event of a claim arising out of any dishonest act or omission of any partner, director or employee of the insured, the insured shall take all possible action to sue for and obtain reimbursement from any such person or from the estate or legal representatives of such person and any monies which but for such dishonesty would be due to such person from the insured or any monies of such person held by the insured, shall to the extent allowable by law be deducted from the insured's loss.
- 6.4 Any dispute or disagreement between the insured and the insurer as to any right to indemnity in terms of this policy or as to any matter arising out of or in connection with this policy, shall be referred for a final decision to a senior counsel agreed upon between the insured and the insurer or failing such agreement, nominated by the president of the statutory law society having jurisdiction over the insured.
- 6.5.1 Subject to the exceptions, the deductible and 6.1, 6.7.2 and 6.9 hereof, the insurer shall not seek to avoid, repudiate or rescind this insurance upon any ground whatsoever, including in particular non-disclosure or misrepresentation.
- 6.5.2 Where the breach of or non-compliance with any term of this policy by the insured other than 6.1, 6.7.2 and 6.9 has resulted in substantial prejudice to the handling or settlement of any claim against the insured, the insured shall reimburse to the insurer the difference between the sum payable by the insurer in respect of that claim and the sum which would have been payable in the absence of such prejudice. Provided always that it shall be a condition precedent of the right of the insurer to seek reimbursement that they shall have fully indemnified the insured in accordance with the terms of this policy.
- 6.6 The insured shall not without the written consent of the insurer repudiate liability, negotiate or make any admission, offer, promise or payment in connection with any claim and the insurer shall be entitled, if it so desires, to take over the conduct in the name of the insured of the defence of any claim or to prosecute in the name of the insured at its own expense and for its own benefit any claim for indemnity or damages or otherwise against any person and shall have full discretion in the conduct of any proceedings and in the settlement of any claim.
- 6.7.1 The insured shall render at his or her own cost such assistance as the insurer may reasonably require and shall arrange to be available at her/his own cost for such interviews as may reasonably be required by the insurer or the legal advisers of the insurer.
- 6.7.2 Notwithstanding anything else contained in this policy, should the insured fail or refuse to provide assistance or to attend interviews stipulated in 6.7.1 and remain in breach of such clause for the period of ten (10) days after receiving written notice from the insurer to remedy such breach, all benefits afforded by this policy may be withdrawn by the insurer.
- 6.8 Unless otherwise expressly stated nothing contained in this policy shall give any rights against the insurer to any person other than the insured.
- 6.9 If any claim by the insured be in any respect fraudulent or any fraudulent means or devices be used by the insured or anyone acting on his or her behalf with her/his knowledge or authority to obtain benefits in respect of that claim all benefit under this policy shall be forfeited.
- 6.10 Whenever this policy provides for notice to be given to the insurer, such notice shall be given to:
- Glenrand M.I.B Professional Services**
PO Box 2544
Randburg, 2125
Docex 34 Randburg
Tel: (011) 329 1140
Fax: (011) 329 1984
- 6.11 The insurer may in its sole discretion, in the case of any claim for indemnity, pay to the insured or to the claimant, the limit of indemnity (but deducting in such case any sum or sums already paid as indemnity) or any lesser sum for which the claim or claims arising from such claim for indemnity can be settled and the insurer shall thereafter be under no further liability in respect of such claims for indemnity, except for the payment of costs and expenses of litigation incurred prior to the date of payment of such limit of indemnity or such lesser sum.
- 6.12 If the insured reasonably so requires he or she shall not be obliged to contest or prosecute any legal proceedings unless a senior counsel shall advise that there are reasonable grounds for contesting or prosecuting such proceedings, such senior counsel to be agreed upon between the insured and the insurer or failing such agreement, nominated by the president of the statutory law society having jurisdiction over the insured.
- 6.13 In the case of any conflict or divergence between the English and Afrikaans texts of this policy, the English text shall prevail.
- 6.14 All recoveries made in respect of any claim under this policy shall be applied (after deduction of the costs, fees and expenses incurred in obtaining such recovery) in the following order of priority:
- (i) the insured shall first be reimbursed for the amount by which its liability in respect of such claim exceeded the amount of indemnity provided by the policy or any other policy;
 - (ii) the insurers shall then be reimbursed for the amount of their liability under the policy in respect of such claim;
 - (iii) any remaining amount shall be applied towards the amount of the deductible borne by the insured in respect of such claim.

7. SPECIAL EXTENSIONS

7.1 Indemnity under this policy shall be extended to any candidate attorney or other person employed by the insured in an employer/employee relationship in the conduct of the profession by the insured, and such person shall be deemed to be an insured for the purposes of indemnity in terms of this policy subject to the terms, limits and conditions hereof.

8. SCHEDULE A

Insurer: Attorneys Insurance Indemnity Fund
(Association incorporated under
Section 21)
(Reg. No. 93/03588/08)

8.1 Master Policy: No. AIIF/MP/06/10

8.2 Period of Insurance: 1 July 2010
30 June 2011
(both days inclusive)

8.3 Situation: World-wide (subject to exceptions
Risk 5.1.6 and 5.2.2)

8.4 Limit of Indemnity:

8.4.1 The limit of indemnity in respect of 1.1 and 1.2 is determined by the number of partners or directors of the firm, partnership or incorporated practice referred to in 2.5.1(b) on the date on which the event or occurrence occurred which gives rise to a claim against the insured in accordance with the following schedule:

No. of partners/directors	Limit of indemnity per period of insurance
1 (Sole practitioner)	R1 562 500
2	R1 562 500
3	R1 562 500
4	R1 562 500
5	R1 562 500
6	R1 562 500
7	R1 640 625
8	R1 875 000
9	R2 109 375
10	R2 343 750
11	R2 578 125
12	R2 812 500
13	R3 046 875
14 and above	R3 125 000

8.4.2 The limit of indemnity in respect of 1.3 is 25% of the limit of indemnity specified in the Schedule against 8.4.1.

8.5.1 The deductible:

8.5.2 The deductible is determined by the number of partners or directors of the firm, partnership or incorporated practice referred to in 2.5.1(b) on the date on which the event or occurrence occurred which gives rise to a claim against the insured and the type of matter which gave rise to the claim in accordance with the following schedule:

No. of partners/directors	Column A	Column B
	Prescribed MVA claims Deductible	Other claims Deductible
1 (Sole practitioner)	R35 000	R20 000
2	R63 000	R36 000
3	R84 000	R48 000
4	R105 000	R60 000
5	R126 000	R72 000
6	R147 000	R84 000
7	R168 000	R96 000
8	R189 000	R108 000
9	R210 000	R120 000
10	R231 000	R132 000
11	R252 000	R144 000
12	R273 000	R156 000
13	R294 000	R168 000
14 and above	R315 000	R180 000

8.5.3 In the case of a claim for loss or damage in respect of bodily injury or death caused by, arising from or in any way connected with the driving of a motor vehicle (being a motor vehicle as defined in the Road Accident Fund Act, 56 of 1996, or any predecessor or successor of the aforementioned Act) at any place within the Republic of South Africa, which has become prescribed in the hands of the insured, the deductible set out in 8.5.1 (Column A) will apply. Provided that, if **Prescription Alert**, a computerised diary system available to the insured has not been utilised or adhered to by the insured, the deductible as specified in 8.5.1 (Column A) will be increased by an additional 15%.

8.5.4 If a claim arises for reasons other than those set out in 8.5.2 the deductible set out in 8.5.1 (Column B) will apply.

8.6 Agreed reduction in limit of indemnity and deductible:

8.6.1 It is recorded that prior to the inception of this policy, certain firms, partnerships or incorporated practices referred to in 2.5.1(b) entered into agreements with the insurer in terms of which such firms, partnerships and incorporated practices accepted a reduced limit of indemnity of 50% or 25% (as the case may be) of the indemnity otherwise afforded in terms of 8.4.1, on condition that such firms, partnerships or incorporated practices, would be liable for 50% or 25% (as the case may be) of the deductible specified in 8.5.1, for all claims made by these firms, partnerships or incorporated practices in terms of this policy.

8.6.2 Notwithstanding anything else contained in this policy, the terms of the agreements referred to in 8.6.1 shall be binding on the insurer and the firms, partnerships or incorporated practices concerned.

DISCLAIMER

Please note that the Risk Alert Bulletin is intended to provide general information to practising attorneys and its contents are not intended as legal advice.
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