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RISKALERT

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Attorneys Fidelity Fund, 5th Floor, Waalburg Building,
28 Wale Street, Cape Town 8001.
PO Box 3062, Cape Town, 8000,South Africa, Docex 154.
Tel: (021) 424 5351 Fax: (021) 423 4819
E-mail: attorneys@fidfund.co.za Website: www.fidfund.co.za

Prescription Alert, 2nd Floor, Waalburg Building, 28 Wale Street,
Cape Town 8001.
PO Box 3062, Cape Town, 8000, South Africa, Docex 149.
Tel: (021) 422 2830 Fax: (021) 422 2990
E-mail: info@aiif.co.za Website: www.aiif.co.za

RISK MANAGER'S COLUMN

1. THE CONVEYANCING SCAM!
(For more information see the July Bulletin, 3/2012)

Since we first warned the profession about this scam, we have been advised of more attempts, almost on a daily basis. Fortunately, most practitioners have heeded the warnings in the Bulletin, GhostDigest and the LSSA's newsletter of 24 May 2012 and have avoided being duped by these unscrupulous crooks!

Thank you to those conveyancers who have given us valuable feedback. We are continuing with our investigations.

2. ADDRESS FOR CLAIMS NOTIFICATIONS

We are still getting notifications sent to our old address, *which will soon no longer be operational. We are concerned that your notifications and correspondence will not reach us.* Please note our new contact details as they appear in the current Scheme Policy, for purposes of notification of claims. Our full contact details can be found on the AIIF website at *www.aiif.co.za*.

Aon Professional Risks
PO Box 1874
Parklands, 2121
Docex 34 Randburg
Telephone No. (011) 944 7966/ 8127
Fax No. (011) 944 8065/ 086 6392893

RISK MANAGER'S COLUMN continued...

3. CERTIFICATES OF INSURANCE
(Practitioners on banks' panels please note!)

As most practitioners will know, the professional indemnity cover provided through the Attorneys Insurance Indemnity Fund (AIIF) is **automatically** in place for all practising attorneys who are obliged to be in possession of a Fidelity Fund Certificate.

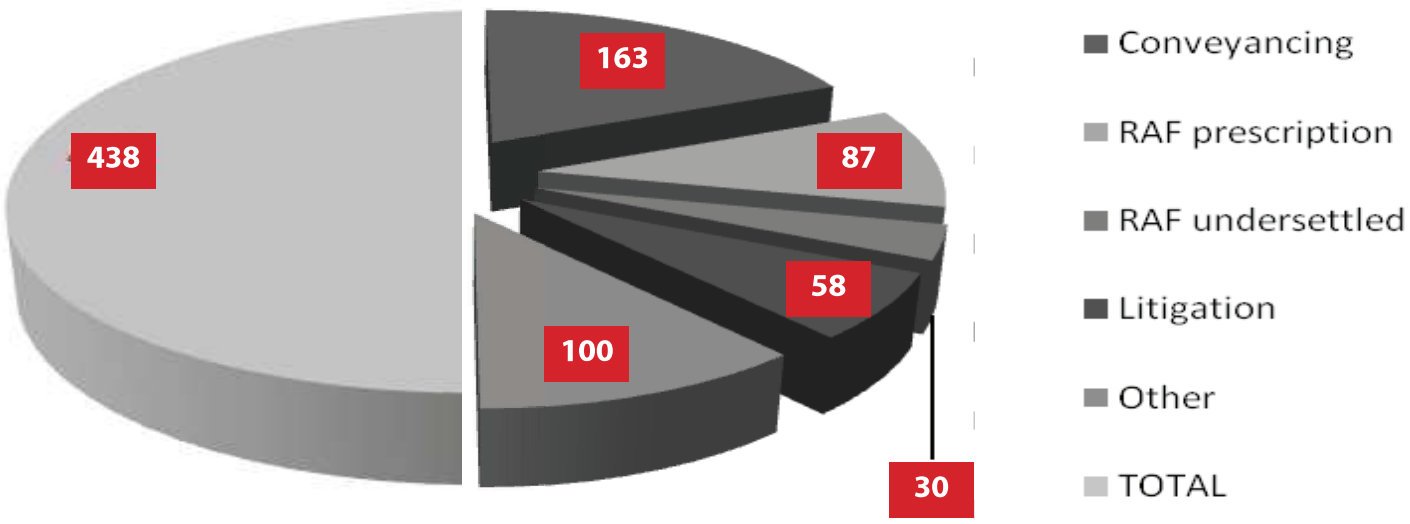
Despite the fact that the cover is **automatic**, banks continue to demand proof of insurance from practitioners who wish to be on their panels. Given the small size of our company and the size of the profession (at last count 20769 practitioners) this has become an administrative nightmare for us.

Fortunately, sanity is finally starting to prevail and **ABSA** has notified its panel that they need not provide a certificate from the AIIF/Aon. ABSA now requires practitioners to complete a Professional Indemnity Basic Cover Declaration. **FNB** also no longer require certificates.

Hopefully the other banks will follow suit shortly, particularly in view of the fact that the AIIF has resolved not to supply such certificates after the 2012/2013 year of insurance.

4. CLAIMS TRENDS AS AT 31 MARCH 2012

Numbers of claims by claim type for 2011 insurance year



The above pie graph shows the distribution of claims by claim type for the first nine months of the 2011 year of insurance.

RISK MANAGER'S COLUMN continued...

Table 1: Comparative Analysis : 2011, 2010, 2009, 2008 and 2007 as at 31 March

Number of claims notified

YEAR	2011		2010		2009		2008		2007	
Conveyancing	163	37%	123	35%	190	45%	214	55%	70	31%
RAF prescription	87	20%	77	22%	79	19%	59	15%	48	21%
RAF undersettled	30	5%	23	7%	25	6%	15	4%	11	5%
Litigation	58	13%	55	15%	38	9%	49	13%	52	23%
Other	100	22%	74	21%	87	21%	50	13%	45	20%
TOTAL	438	100%	352	100%	419	100%	387	100%	226	100%

Table 1 (above) compares the *numbers* of claims per claim type registered in the first nine months of the past 5 years.

The number of claims notified three-quarters of the way through the 2011 year was higher than the numbers for the same period in all previous years. This is **an increase of 24%** on the number for the same period in the 2010 year.

The number of *Conveyancing* claims has increased by **32%** year on year. **Very many of these claims have arisen out of the negligent payment of trust funds to the incorrect party.**

There are 37 *General Prescription* matters which form part of the *"Other"* claims. **The problem of matters prescribing in the hands of practitioners appears to be on the increase.** (See more in the Risk Management Tips column).

RISK MANAGER'S COLUMN continued...

Table 2: Comparative Analysis: 2011, 2010, 2009, 2008 and 2007 as at 31 March

Total incurred value

YEAR	2011		2010		2009		2008		2007	
	R		R		R		R		R	
Conveyancing	28 868 888	44%	16 207 655	39%	25 624 974	52%	24 543 746	52%	11 471 153	25%
RAF prescrip	10 845 321	16%	10 012 001	24%	8 339 547	17%	6 991 139	15%	8 692 337	19%
RAF U/S	3 240 010	5%	3 920 853	10%	2 979 825	7%	2 446 000	5%	3 440 000	7%
Litigation	8 006 543	12%	4 497 940	11%	3 582 281	9%	4 102 644	9%	11 419 247	25%
Other	15 077 067	23%	7 069 210	17%	8 528 817	17%	9 176 914	19%	11 363 218	24%
TOTAL	66 037 829	100%	41 707 659	100%	49 055 444	100%	47 260 443	100%	46 385 955	100%

Table 2 (above) shows the *total incurred value** of claims registered in the first three quarters of the past 5 years.

(*This is the sum of the amounts reserved and payments made.)

At 9 months, the 2011 year shows **a 58% increase** on the total incurred value for the same period in the 2010 year.

COMMENT ON THE INCREASE IN CLAIMS.

There seem to us to be several factors leading to the increase in the number and value of claims in recent years, *inter alia*:

1. Inflation;
2. An increase in the size of the profession;
3. The increasingly litigious nature of both the profession and public;
4. General lack of adherence to risk management procedures, either because none are in place or because there is inadequate supervision taking place.

There is little that we as practitioners can do about the first three factors, but many claims could be avoided if we put in place and adhere to sensible risk management procedures.

This is one of the reasons why the AIIF has compiled a compulsory Risk Management Self-assessment Questionnaire which needs to be completed by all practices, before they will be entitled to the indemnity provided by the company. (*In this regard, please see the previous Bulletin 3/2012 or visit our website www.aiif.co.za*)

RISK MANAGEMENT TIPS

RISK MANAGEMENT RED FLAGS

GENERAL PRESCRIPTION MATTERS

As discussed under 'Claims Trends' on page 3, claims arising out of the prescription of client's matters are on the increase.

Prescription is usually avoidable if a functioning **diary system** is in place and it is properly adhered to by all staff. Failure to use an effective diary system is often the cause of prescription. There are of course many other reasons, some of which I mention below:

- **The incorrect prescription date is used**. Avoid this by ensuring that:
  - you are familiar with any statutory prescription periods that may be applicable to your client's matter ;
  - you are familiar with any contractual prescriptive periods applicable to your client's matter (for example an insurance contract);
  - you are familiar with the Prescription Act 68 of 1969 (especially section 11 - the periods of prescription of debts, section 12 – when prescription begins to run, section 13 – prescription delayed in certain circumstances and section 14 – interruption of prescription by acknowledgement of liability); and
  - you are fully conversant with all the facts pertaining to your clients matter and have taken them into account in calculating the prescription date.

- **The proceedings are instituted in the incorrect court/forum. (By the time this is discovered, the claim has become prescribed.)** Avoid this by ensuring that the court/forum has jurisdiction in respect of the type of matter concerned, the quantum claimed and the parties.

- **The incorrect parties are cited in the proceedings*. (By the time this is discovered, the claim against/on behalf of the correct party has become prescribed.)** Avoid this by ensuring that;
  - you have established who the true defendant is by doing all the necessary checks; and
  - you know exactly who your client is and have established that s/he has *locus standi*. (This may sound obvious, but many claims arise where this has not been done).

- **Counsel holds on to the particulars of claim/application and fails to settle them timeously.** Avoid this by ensuring that counsel is briefed in good time and follow up/instruct another counsel.

- **The documents are sent to court before prescription, but your messenger fails to have them issued in time or the sheriff fails to follow your instructions and does not serve in time.** Avoid these situations by ensuring that your client's documents are prepared, issued and served well before prescription. If this is not possible, then follow up with your messenger/the sheriff to ensure that your instructions are followed. Make sure that the address for service is correct and if necessary, give the sheriff detailed instructions on how to find the person on whom the documents must be served.

- **A new attorney takes over the file and the claim has already become prescribed and s/he allows the claim to prescribe because it is unclear from the file when it prescribes.** Where the file is taken over by someone within the same practice, this situation can be prevented to a large extent by:
  - regular supervision of both junior and senior staff ;
  - regular file audits; and
  - strict rules and procedures for file order, checklists, working plans, reporting to client and the making of comprehensive file notes.

Where a file is taken over from another practice, it must be carefully checked to ensure that prescription is not imminent, before accepting the mandate.

- **The attorney takes on a matter were prescription is imminent and is unable to institute proceedings prior to prescription.** This can be avoided by refusing to take on such matters (making sure that you have explained the prescription problems to the prospective client). If you do take on the matter, explain the problems to client and obtain a written indemnity before accepting the mandate.

- **The file goes missing.** This can usually be avoided by ensuring that:
  - Together with a foolproof diary system, you have safe and efficient storage systems for both paper files and electronic copies;
  - If you are moving offices, you are especially careful with planning and executing the move, as this is the time when files most often get mislaid;

RISK MANAGEMENT TIPS continued...

- All files are properly signed out to the person removing them;
- Where possible, avoid removing files from the office and be particularly vigilant where an employee leaves the practice (especially where this is not an amicable parting of the ways).

*An example of the citation of the incorrect plaintiff, is where the practitioner has been instructed by his client Mr X, in his capacity as a trustee of X Trust and the summons cites Mr X as plaintiff (and not in his representative capacity). This sounds obvious, but happens often. This is one of the many reasons why it is crucial to know who your client is.

Ann Bertelsmann
Ann.bertelsmann@aon.co.za

RAF MATTERS

ROAD ACCIDENT FUND ACT 56 OF 1996: Adjustment of statutory limit in respect of claims for loss of income and loss of support to **R196 636.00** (One Hundred and Ninety Six Thousand Six Hundred and Thirty Six Rand) with effect from 3 April 2012.

IMPORTANT CASE ON PRESCRIPTION AND THE RAF 4 FORM!!

Readers may recall correspondence by Professor Hennie Klopper, that we published in the May Bulletin, 2/2011, in which he argued persuasively that the RAF 4 form need not be submitted within the time periods specified for the lodging of the claim.

In a recent South Gauteng High Court judgment handed down on 11 June 2012, Satchwell, J quoting from Professor Klopper's writing, supports this view.

***Van Zyl MM v Road Accident Fund*, case number 34299/2009, SGHC**

FACTS:

The plaintiff was injured in a motor vehicle accident which occurred on **2 August 2008**, and therefore fell to be dealt with in terms of the amended Road Accident Fund Act 56 of 1996 ('the Act'). The claim was lodged timeously, within the three-year period which expired on **1 August 2011**, but the RAF 4 form was only provided on **6 February 2012**, some six months after the expiry of the three-year period (and after the summons had already been served - on 19 August 2009).

The RAF contended, in a special plea, that the plaintiff's claim for general damages had become prescribed as the RAF 4 form had not been submitted within three years from the date of the accident. The RAF contended that section 23 of the Act and Regulation 3(3)(b)(i) required both the RAF 1 Form and the RAF 4 Form to be submitted within the prescribed period.

The court was only asked to adjudicate on this special plea. Satchwell, J stated that, in essence, she needed to determine whether or

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not the initial lodgment (of the RAF 1) was sufficient to constitute a claim for general damages, or whether that portion of the claim would only arise once the RAF 4 form ("serious injury report") had been submitted or 'lodged'.

JUDGMENT:

Firstly, Satchwell, J considered the meaning and interpretation of the word '**claim**' in relation to the Act and the requirements for lodging the claim.

She made the following observations and findings:

- The Act refers to a claim for compensation in the singular rather than to a plurality of claims and that this singular claim is in respect of 'any loss or damage' suffered. In this regard she quoted, *inter alia*, Corbett JA in *Evins v Shield Insurance company* 1980 (2) SA 814 (A) as follows:

> "[a] plaintiff who suffers bodily injury will at common law and under legislation have a single cause of action in respect of the damages claimable by him whether such damages relate to patrimonial loss or constitute a *solatium* for pain and suffering, disfigurement, disability, etc."

- The proviso to section 17 does not create separate and distinct claims, but merely introduces a **limitation** in respect of a particular type of compensation. 'A/the claim' refers to a unitary claim that cannot be subdivided into sub-divisible claims to which different procedures for lodgment apply.

- The Act contemplates **only one procedure for lodgment of the claim** and only **one claim form**:
  - the procedure is set out in section 24(1)(a) of the Act (which makes no reference to any other documentation or reports) and
  - Regulation 7 (which peremptorily makes it clear that the only documentation which shall comply with Section 24 'shall be in the form RAF 1').

- The RAF 1 claim form imposes an obligation on the claimant to complete such form 'in all its particulars' and amongst these is notification of whether or not compensation is sought for non-pecuniary loss (or general damages) and the amount claimed. If the form is properly completed in all its particulars and lodged with the RAF the claimant would *prima facie* be compliant with the provisions of section 24 of the Act.

- Regulation 3(3)(i) refers to such a **claim** being supported by a serious injury assessment **report** (the RAF 4).

- There is a distinction between the **claim** (which is a notification) and the **report** (which is a substantiation of some of the averments in the claim). Similarly, a claim for past medical expenses or loss of earnings requires substantiation. The evidence in support of these damages is not required to be furnished as part of the claim submitted in terms of section 24.

On the issue of **prescription**, it was noted that there are no provisions in the Act which deal with prescription other than those in section 23 and that the latter was replicated in the regulations. Furthermore, if the claimant's claim was properly lodged and valid, it could not prescribe before the expiry of the additional two-year period (i.e. on 1 August 2013).

Satchwell, J held that the wording of regulation 3(3) (b) (i), which deals with the time periods for the submission of the report, was permissive and not peremptory. She supported Professor Klopper's view that the provisions of this sub-regulation allowed for the RAF 4 report to be submitted separately after the submission of the claim and at any time before the claim has become prescribed 'i.e. three years extended by two years'. (In other words within the 5-year period before a claim can become prescribed, if a valid claim has been lodged within the three-year prescriptive period.)

She found that 'the regulations cannot override the Act' and cannot be used to interpret the Act. She concluded that the defendant had relied on an interpretation of the regulations that was not compatible with the Act and that the clear wording of the Act did not appear to sustain the argument of the defendant. Therefore the serious injury report (RAF 4) which was merely a substantiation of the claim lodged in terms of the RAF 1, could be submitted within the initial three years or within the 5 year period. This was in terms of the prescriptive periods provided for in the Act.
Satchwell, J held further that the plaintiff's claim had been submitted timeously and there had been no objection to the validity of the claim, which contained notifica-

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tion of the claim for general damages in the amount of R80 000 and a medical report identifying the injuries sustained. She concluded that the RAF 4 had been submitted within the 5-year period and therefore that the claim for non-patrimonial loss had not become prescribed.

Ann Bertelsmann and Fatima Ebrahim

Ann.bertelsmann@aon.co.za
Fatima.ebrahim@aon.co.za

At the time of writing, we do not know whether or not the RAF is intending to appeal this decision. Although we believe that it is unlikely that another court will reach a different conclusion on the issue of prescription in relation to the RAF 4 form, we would suggest that practitioners adopt **a cautious approach**, where possible and submit the RAF 4 form within the two or three year periods for submission of the claim. If that time period has elapsed, submit the RAF 4 form as soon as possible thereafter and at least within the five-year prescriptive period.

NB. Also ensure that any claim for general damages is contained in the claim form.

LETTERS TO THE EDITOR

In Mr. Jacobson's reply to my article in the May 2012 edition of the Risk Alert Bulletin, he argues that the CAP should increase after the date of accident, with which I agree. The second sentence of paragraph 3 of my article hints at this when it states, "This [the strict-literal interpretation of s17(4)] cannot be fair and reasonable, nor does it make sense, especially in light of the fact that quarterly updates are published". The way I understand it is as follows:

- Use the last published CAP amount prior to the date of calculation as the commencement CAP amount, and
- Increase this CAP amount by inflation (annually) throughout the term of the claimant's (future) losses.

The recent judgment of *Sil and Others v Road Accident Fund* (2011/18773) [2012] ZAGPJHC 117 (11 June 2012) implies that the future losses AFTER CONTINGENCIES should be limited /capped as the annual losses are already calculated soundly. (The court is clear that the application of the CAP does not prescribe a new method of calculating the loss but merely limits the sum to be paid). The remaining issue is to value these future CAPPED LOSSES actuarially – i.e. applying mortality and discounting for each annual capped loss to present day terms. Essentially the RAF is saying to actuaries: "We have a future liability to the claimant, tell us what we must pay the claimant today, to discharge our future liability for good".

Rowan Haarhoff
BA LL.B
Munro Consulting Actuaries

It seems as if both these experts agree that the CAP initially applicable (i.e. the one in force at the time of the accident) must be adjusted thereafter, in respect of remainder of the period, in line with inflation. (Ed.)