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RISKALERT

MAY 2012 ISSUE NO 2/2012

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RISK MANAGER'S COLUMN

IMPORTANT NOTICE: Please note that the postal address for all correspondence with the AIIF's managers has changed to: P O Box 1874, Parklands, Johannesburg 2121

AIIF STAFF NEWS

Alison Smit

Regrettably Alison Smit, the Systems Manager of the AIIF's Prescription Alert Unit has resigned to spend more time with her family. She has calmly and efficiently served the unit for over thirteen years and her presence will be missed by her AIIF colleagues and the many members of the profession who dealt with her over the years.

Lucia Snyman

Fortunately, Lucia Snyman, who has been with the unit for fourteen years, has agreed to take over the reins from Alison.

Thomas Harban

Thomas Harban has been promoted from the position of Claims Manager, to that of General Manager.

Zodwa Tshimbane

Zodwa Tshimbane has been promoted from the position of Assistant Claims Manager to that of Claims Manager.

Bianca Fearick

We warmly welcome Bianca Fearick, who joined the AIIF team as a Legal Adviser in February 2012. She obtained her LL.B at the University of KZN and thereafter served articles at Woodhead, Bigby & Irving Incorporated (WBII) in Durban from 2008. After being admitted as an attorney in 2009, Bianca continued working at WBII as an associate in their litigation department. She has now relocated to Johannesburg.

RISK MANAGER'S COLUMN continued...

CLAIMS TRENDS

NUMBERS OF CLAIMS BY CLAIM TYPE FOR 2011 YEAR AS AT 31 DECEMBER 2011

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

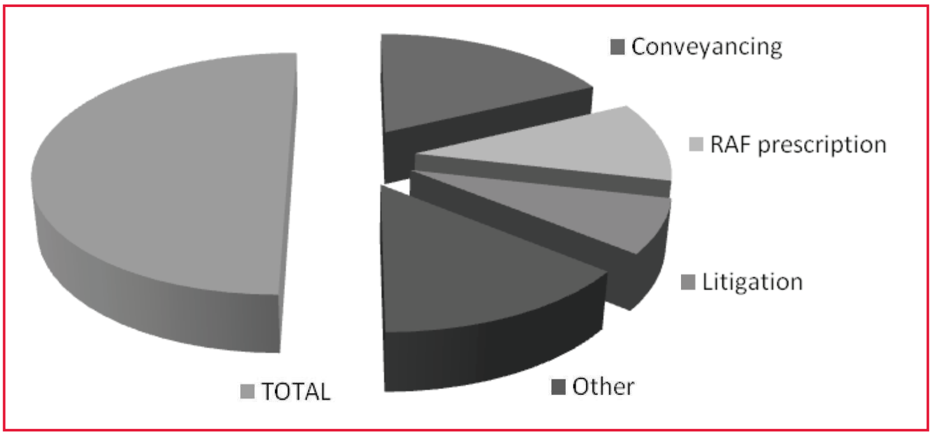

Table 1: Comparative Analysis : 2011, 2010, 2009, 2008 and 2007 *as at 6 months*

Number of claims notified

YEAR	2011		2010		2009		2008		2007	
Conveyancing	**103**	36%	105	38%	142	47%	153	55%	41	26%
RAF prescription	**61**	22%	50	18%	60	19%	42	15%	27	17%
Litigation	**41**	14%	45	16%	24	8%	28	10%	37	24%
Other	**80**	**28%**	78	28%	80	26%	55	20%	53	33%
TOTAL	**285**	**100%**	**278**	**100%**	**306**	**100%**	**278**	**100%**	**158**	**100%**

Table 1 above compares the numbers of claims per claim type in the past 4 years.

Table 2: Comparative Analysis: 2011, 2010, 2009, 2008 and 2007 *as at 6 months*

Total incurred value

YEAR	**2011**		**2010**		**2009**		**2008**		**2007**	
	R		**R**		**R**		**R**		**R**	
Conveyancing	**19 350 300**	43%	**11 940 785**	39%	**17 661 753**	52%	**17 002 175**	46%	**8 729 985**	28%
RAF prescription	**6 831 849**	15%	**6 498 000**	21%	**6 382 200**	19%	**5 511 626**	15%	**4 337 980**	14%
Litigation	**4 090 100**	9%	**3 664 550**	12%	**2 952 658**	9%	**2 798 096**	7%	**8 639 945**	27%
Other	**15 012 901**	33%	**8 364 161**	27%	**7 080 651**	21%	**11 943 470**	32%	**9 826 997**	31%
TOTAL	**45 285 150**	100%	**30 467 496**	**100%**	**34 077 262**	**100%**	**37 255 397**	**100%**	**31 534 907**	**100%**

Table 2 above shows the value of claims registered in the first half of the past 5 years.

RISK MANAGEMENT TIPS

RISK MANAGEMENT RED FLAGS

Beware: High risk claims circumstances!
29 of the 103 conveyancing claims (28%) arose out of unauthorised payments of trust money. The total incurred value of these 29 claims is R6 174 906 which is about 14% of the total incurred value of all claims registered in the six-month period. This represents almost the same percentage as that for prescribed RAF matters! Please see my discussion of this topic under "Risk Management Red Flags".

Warning: Claims for undersettlement of RAF matters are on the increase. These claims are some of the most expensive in terms of the quantum claimed and they are generally avoidable. The Board of the AIIF is presently considering either excluding such claims or applying penalty deductibles to them.

Unauthorised and/or premature payments of trust money.

As can be seen from the above discussion of claims trends, unauthorised and/or premature payments of trust money are a cause for concern. There are various instances where this occurs, as discussed in my column in the previous Bulletin (1/2012).

In this article, I look at one particular instance – payment to the incorrect party after registration as a result of fraud on the part of the payee. This seems to be a growing trend. In one such matter which we have had to consider:

The conveyancer received specific written instructions from the sellers of an immovable property, Mr and Mrs M, to pay the proceeds of the sale into the account of Mrs M at X bank.

On the day before registration, the conveyancer received a telephone call purportedly from Mrs M, with instructions to make payment into her new account at Y bank. She undertook to send the new banking details to the conveyancer via e-mail. On the following day, he received the e-mail with the new banking details and the proceeds were thereafter paid into the new account with bank Y.

Several days later, the conveyancer was advised by the sellers that the money had not been received into the account at bank X. The sellers were adamant that they had no accounts at Y bank and had not instructed him to pay into an account at Y bank. They alleged that neither the telephonic nor the e-mail instruction had come from them.

Lessons learned: In this particular case, the fraudster clearly had inside information about the

RISK MANAGEMENT TIPS continued...

transaction. The problem is that it is difficult to pinpoint how the information was obtained and by whom. It could have come from within the conveyancer's practice or perhaps from the sellers themselves. There is also possible collusion on the part of an employee of Y bank.

Do you think that the conveyancer acted reasonably? Did he do all that he could to protect his own and his clients' interests?

What might he, with the benefit of hindsight have done to prevent this fraud?

There are precautions that might have been taken, particularly if the conveyancer had been aware of the prevalence of scams such as this one:

a. He could have insisted that the clients both come into his offices to sign written confirmation of the change in the payment instruction. (Unless he could personally verify the identity of both clients, he should also have insisted that they again produce their identity documents) and

b. He could have insisted that Mrs M produce documentary proof relating to the new bank account or

c. If for some reason neither a) nor b) were possible, then at the very least, he should have verified the e-mail address from which the instruction was received and telephoned Mr M to ensure that he agreed with his wife's instructions to change the banking details. (As an additional precaution, he could also have telephoned Mrs M to confirm that the initial call and instruction had indeed come from her).

It may seem overly cautious to suggest that both husband and wife should verify the instruction. But it is not really so, if viewed against the background of the number of claims we have had, that have resulted from one of the spouses giving instructions to the attorney contrary to the wishes of the other. In several such cases the husband has brought a woman pretending to be his wife, to sign documents in the attorney's office. This is just one of the many reasons why it is essential to properly "FICA" all clients.

One of the dangers of failing to obtain documentary proof of the new bank account is that, where an internet transfer is done, the bank will not compare the account number with the name of the account holder. If the account details are incorrect the error will not necessarily be picked up

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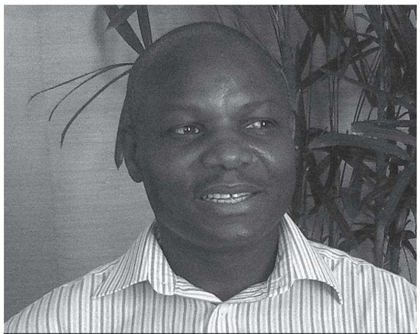
MANAGING THE RISKS POSED BY A FEE EARNING PARTNER



Shadrack Maile

Are there risks attendant on placing reliance on a fee generator? Are there solutions to any such risks? In this article Shadrack Maile identifies some risks and proposes measures to manage them.

1. Risks posed by revenue earning partners

Recently the Attorneys Fidelity Fund (AFF) had to consider a claim lodged in terms of section 26 of the Attorneys Act 53 of 1979 where theft

RISK MANAGEMENT TIPS continued...

was committed by a fee-earning partner in the firm. He worked virtually on his own. No system was in place to monitor what he was doing or how he was doing it. His fellow partners were happy to draw fees from the "labour" of this partner without ever questioning his capacity to do the volumes of work he was ostensibly carrying out. In the meantime this "hard-working" partner was debiting fees for work not done. This constitutes theft.

Such a partner is otherwise known as "revenue controlling partner" who tends to be the trigger in the downward spiral of a firm when he becomes disaffected with leadership. Generally he is your high producer who brings in a lot of business and maintains revenue-generating customers. Sometimes he actually has some sort of hold on the work which is usually based on personal connection. He can threaten to leave the firm and take the work with him. Overdependence on such a partner represents a risk to the firm: if he goes, the clients go as well.

Dissatisfaction may arise because of his perception that he is being underpaid, a loss of confidence in management, loss of respect for management on a personal or professional level and/or the absence of a transitional plan by which he will be elevated in his career.

The spiral begins when the disaffected revenue controlling partner starts stealing from the firm's clients and/or the firm. Where the victim of the theft is a client this poses the risk of a claim or claims that could potentially see the firm and its partners lose everything. This may result in a claim which is ultimately faced by the AFF.

The firm's problems become compounded when the disaffected partner leaves the firm for greener pastures. This can create financial distress that shows soon and possibly in the following ways, where the leaving partner:

- strips out his capital immediately or through a balance sheet adjustment,
- takes with him/her as many of the paying clients' accounts as possible,
- leaves behind overheads in the form of vacant office, unnecessary associates and staff.

If cash-constrained, a law firm will experience immediate cash flow pressure as a result. If not contained, the financial stress will overwhelm the business leading to falling profits and forcing eventual closure.

A fee generating partner is often described as a free agent who moves freely and frequently from platform to platform. Analysts are of the opinion that the reality of the law business is that revenue generating partners can and often do decide the firm's fate regardless of whether or not they have any management role whatsoever.

They are also seen as shadow government as they have functional control of the business without having a formal management role.

2. Managing risks posed by fee generating attorneys

A. Diversification

Diversification should be used to lessen the power and influence of the revenue controlling/generating partner/attorney. A firm's revenue stream should be diversified. The firm should retain a number of relatively equal revenue generators.

These attorneys should be strategically spread across geographic and or practice sectors. There are at least three discernible potential benefits to diversification, namely:

- the firms' revenue stream is smoothed out,
- political power and influence is dispersed across the organisation,
- a measure of structural stability is encouraged by the above two potential results.

RISK MANAGEMENT TIPS continued...

B. Auditing System

A system of supervision and monitoring that provides general oversight and periodic reviews of the work of every attorney and fee earner should be in place. An effort to impose supervision and monitoring over their activities might cause some attorneys to resent the perceived loss of professional independence. It is recommended that where possible, the use of technology to supervise in a subtle, supportive and welcoming manner should be preferred

The following measures are suggested as part of the auditing process:

1. Have in place written policies and procedures for conducting peer reviews.

2. Conduct peer or quality control reviews of partners and attorneys.

3. Conduct a peer or quality control review of any client/matter controlled by a partner or attorney.

4. Conduct regular reviews of bills to check for any form of overcharging by the partner or those supervised by the partner,

5. Questions must be raised about debiting of fees in circumstances where such fees could not have been earned,

6. Hold regular meetings with either a more senior partner in the same area or office, or a reviewing committee, to consider the following:

- performance (by reference to specific criteria, including compliance with firm's policies as to billing, appropriate use of firm's resources, etc.)
- work satisfaction,
- level of billing and hours worked: there should be policies or procedures for reviewing of bills before they are sent out.
- involvement in the firm's governance,
- long-term planning for the partner/attorney's role in the firm

6. Use client satisfaction questionnaires

7. Have in place Wellness Programme to deal with among others:

- Depression/drug/alcohol problems,
- Policies and procedures to encourage all employees to identify and report suspected alcohol or drug impairment problems involving any employee.

C. Ratio of Work to Capacity

As much as it is pleasing to a law firm when instructions increase, there is a level beyond which it becomes unhealthy to keep on accepting instructions without increasing capacity. There is risk for both the client and the firm. For clients there is the risk that their instructions will not be attended to in time. It is conceivable that matters may prescribe whilst awaiting the attention of an attorney. Conceivable also is the possibility of an attorney failing to defend a matter or missing a deadline simply because s/he is swamped with work. Failure in either of the above scenarios will lead to a claim based on negligence. This poses a risk for both the firm and the Attorneys Insurance Indemnity Fund (AIIF).

Another risk is theft of trust funds under the guise of fees earned when no work is done. This poses a risk to the AFF.

The firm's management should never allow a situation where an attorney carries more work than he can handle. Auditing of workloads should be done regularly.

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(Please note that this article was written by Mr Maile in his personal capacity and does not necessarily express views held by the AFF.)

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 R194 043.00 (One Hundred and Ninety Four Thousand and Forty Three Rand) with effect from 31 January 2012

A WORD OF WARNING: I have been advised that the RAF is taking the judgments on general damages on appeal. Practitioners are urged to keep up with developments in this regard and not to rely too heavily on the contents of these judgments pending the outcome of the appeals process.

APOLOGY: I was suitably mortified when I received an e-mail from a reader advising me that Judge Weiner is a woman. (In ignorance, I referred to Judge Weiner as "he" in my discussion of *Akai v RAF* in the previous *Bulletin* 1/1012). It seems that I fell into the old sexism trap! I extend my apologies to Judge Weiner and readers for that blunder.

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WHY YOU SHOULD BE TALKING TO YOUR ACTUARY

As Road Accident Fund (RAF) practitioners will know, certain provisions of the 2005 amendment to the Road Accident Fund Act (the Act) were upheld by the Constitutional Court in November of 2010. One of those is the provision limiting the amount of compensation that the RAF is obliged to pay for claims for loss of income or a dependant's loss of support arising from the bodily injury or death of a motor accident victim. Often referred to as the CAP, it applies to all claims resulting from motor vehicle accidents that occurred on or after 1 August 2008. A new CAP amount is published every quarter in the Government Gazette to take into account the effects of inflation. The amount applicable to a claim is that amount set out in the last notice issued in the Gazette prior to the date on which the cause of action arose, which is the date of accident.

The topic becomes interesting when one considers how the CAP is applied and the implications it may have for a claim.

The Act is clear that the CAP applies to the annual/yearly loss suffered by the claimant. The beginning of that year is set by the date the last CAP amount was published just prior to the accident and a new year begins on every anniversary of this date.

In other words if the accident occurred on the 1st of February 2011, the last CAP amount published prior to the accident was in January 2011 and was R182 857. The annual loss will be the loss suffered from 1 January 2011 to 31 December 2011, and then from 1 January 2012 to 31 December 2012 and so on.
The claimant's annual loss is limited to R182 857 for the year 1 January 2011 to 31 December 2011. For each subsequent year into the future the CAP is increased by inflation and the claimant's annual loss for those subsequent years is compared to, and if necessary limited by the CAP for those future years.

These are some of the topics an attorney could be talking to his/her actuary about:

1. It is the annual loss that is capped not the claimant's earnings. In other words a person earning R1 million per year, may as a result of the accident only now be able to earn R800 000 per year. The extent of his/her loss is then R200 000 per CAP year, and it is only that loss to which the CAP is applied.

2. In loss of support claims the CAP is applied to the combined

RAF Matters continued...

loss of the dependants not to each dependant's loss individually.

3. Currently the legislation does not technically allow for the maximum loss to be increased by inflation once the accident has occurred. For example, if the accident was in August 2008 when the cap was R 160 000 per year, a strict interpretation of the Act would imply that the maximum loss in current terms is still R160 000 per year. This cannot be fair and reasonable, nor does it make sense, especially in light of the fact that quarterly updates are published.

4. The claimant's actual future loss is both an after tax loss and an after contingencies loss of income. It is only after the tax and contingencies have been taken into account to determine the loss of income that the CAP is applied. It is therefore vital that attorneys provide their actuary with the contingencies they wish to apply up-front, as these are deducted before the actuary applies the CAP. Contingencies in the post-August 2008 scenario cannot simply be applied in the same way as in pre-August 2008 matters, where attorneys effectively use them as a negotiation tool for settlement purposes to make provision for certain risks or events that may occur in the future.

5. There are broadly two methods as to how the CAP is applied in limiting future loss. Once a future loss has been calculated it must be brought back and reflected in today's terms. This process is called capitalisation.

a. The one method says that projected losses in each future year first need to be capitalised, and then only is the CAP applied to the capitalised loss (Capitalise first and then CAP).

b. The other method argues that the legislation intends to limit the loss in each future year, and the actuarial process of capitalising these future losses occurs after the CAP has been applied in each future year. In other words the CAP must be applied to each related future year of loss, and then only after that must the loss be capitalised (CAP first and then capitalise).

The net effect of the different approaches is that two actuaries given the same set of instructions may end up with results that are significantly different based purely on how each interprets the CAP. Until a ruling is made by a competent court in this regard, the attorney should consult with his/her actuary on how the CAP is being interpreted and the possible implications for their matter.

Rowan Haarhoff
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Munro Consulting Actuaries

LETTERS TO THE EDITOR

We have had a number of written and telephonic requests from the profession for copies of the RAF case law that we have published in previous *Bulletins*. These judgments can be found on our website www.aiif.co.za. Please feel free to contact me, should you require a copy of any of the cases that we have discussed in the *Bulletin*.

We received the following e-mail from counsel acting for the defendant in an action involving a firm of attorneys:

Subject: Latest judgment: Attorneys trust accounts and phishing scams

Please find attached a judgment delivered by Du Plessis J in the North Gauteng High Court on 15 December 2011.

The plaintiff (an attorney) was the victim of a phishing scam – the proceeds of which were deposited into another attorney's trust account and dealt with by the latter on their 'client's' instructions. The court held that the firm was not negligent.

Despite the result on the facts, attorneys should heed caution when dealing with instructions from new clients. The judgment might be of interest to the side-bar.

(The judgment of Du Plessis J in Jaco *Johan Roestof v Cliffe Dekker Hofmeyr Inc*, Case no 34306/2010, North Gauteng High Court, was handed down on 15 December 2011. It sets outs the steps the defendant took and counsel believes that this will be instructive to attorneys in managing their practices and trust accounts.

The judgment can be found on our website at www.aiif.co.za under the tab "Risk Management Red flags".