

RISKALERT

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RISK MANAGEMENT COLUMN

- Frequently asked questions on the Master Policy 1

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**Legal Practitioners'
Indemnity Insurance
Fund NPC**

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**LEGAL
PRACTITIONERS'
FIDELITY FUND**

SOUTH AFRICA

RISK MANAGEMENT COLUMN

FREQUENTLY ASKED QUESTIONS ON THE MASTER POLICY

Introduction

This is the last edition of the Bulletin for the current policy year (the 2021/2022 insurance year).

The 2022/2023 insurance year commences on 1 July 2022. The Master Policy for the upcoming year will be published in the July 2022 edition of the Bulletin and will also be available on the Legal Practitioners Indemnity Insurance Fund NPC's (the LPIIF) website (www.lpiif.co.za). No changes will be made to the policy for the upcoming insurance year.

FREQUENTLY ASKED QUESTIONS

In this edition of the Bulletin, I address 10 questions frequently posed by legal practitioners (and members of the public, sometimes) to the LPIIF team:

1. 'Who does the LPIIF insure?'

The statutory framework for the insurance cover provided by the LPIIF is set out in section 77 of the Legal Practice Act 28 of 2014. The LPIIF issues one Master Policy annually setting the terms on which the insurance cover is provided in the relevant scheme year.

The LPIIF insures all practising attorneys and trust account advocates (that is, advocates prac-



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tising in terms of section 34(2) (b) of the Legal Practice Act) (collectively referred to as 'the insureds') provided that the insured had a Fidelity Fund certificate on the date that the cause of action arose. By date of the cause of action, I refer to the date of the circumstance, act, error or omission giving rise to a claim. Clauses 5 and 6 of the policy (quoted in full below) set out who is insured by the LPIIF.

Only insureds conducting legal practice as either:

- (a) a sole practitioner;
- (b) a partnership of attorneys;

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- (c) an incorporated legal practice as contemplated in section 34 (7) of the Legal Practice Act; or
- (d) as a trust account advocate are covered by the LPIIF.

Legal practices conducted in any other form are excluded from the LPIIF cover (see clauses 5, 6 and 16(t) of the policy). If, for example, the legal practice was conducted in the form of a trust, state owned entity or a private company falling outside of the entities listed above, it will not be covered. Banks, estate agents, financial services providers, legal expense insurance companies and other entities who may offer some form of legal services are also thus not covered by the LPIIF.

Previous practitioners will be covered by the LPIIF if they were in possession of a Fidelity Fund certificate when the cause of action arose. Employees of the legal practice are also covered under the limit of indemnity afforded to the firm.

Members of the public are urged to ask to see the current Fidelity Fund certificate of an attorney or trust account advocate before instructing the practitioner or paying any funds to the practitioner. Practising without a Fidelity Fund certificate is a breach of the Legal Practice Act and the Legal Practitioners' Fidelity Fund (the Fidelity Fund) will not indemnify third parties who suffer losses after purportedly entrusting funds to such practitioners. The LPIIF, similarly, will not indemnify such practitioners in the event of a professional indemnity claim being brought against them.

For more information, see:

- Sithembinkosi Joseph Kunene, 'Succession planning for sole practitioners in incorporated practices and pointers on the authorised forms of practice', *De Rebus* (April 2022) (www.derebus.org.za/succession-planning-for-sole-practitioners-in-incorporated-practices-and-pointers-on-the-authorised-forms-of-practice/);
- 'Is your firm the type of entity it pur-

ports to be?', *De Rebus* (March 2018) (www.derebus.org.za/firm-type-entity-purports/); and

- *NW Civil Contractors CC v Anton Ramaano Inc & Another* (1024/2018, 1076/2018) [2019] ZASCA 143; 2020 (3) SA 241 (SCA) (14 October 2019).

2. 'What must a legal practice do to be insured by the LPIIF?'

Cover under the LPIIF policy is granted automatically to firms who meet the definition of an insured in the policy. An insured is defined in clause XVI as 'the persons or entities referred to in clauses 5 and 6 of this policy.'

For ease of reference, the relevant clauses of the policy are quoted in full below.

'What cover is provided by this policy?'

1. On the basis set out in this policy, the **Insurer** agrees to indemnify the **Insured** against professional legal liability to pay compensation to any third party:
 - a) that arises out of the provision of **Legal Services** by the **Insured**; and
 - b) where the claim is first made against the **Insured** during the current **Insurance Year**.

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Who is insured?'

5. Provided that each **Principal** had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**, the **Insurer** insures all **Legal Practices** providing **Legal Services** in the form of either:
 - a) a sole **Practitioner**;
 - b) a partnership of **Practitioners**;
 - c) an incorporated **Legal Practice** as referred to in section 34(7) of the [Legal Practice] Act; or
 - d) an advocate referred to in section 34(2)(b) of the [Legal Practice] Act. For purposes of this policy, an advocate referred to

in section 34(2)(b)..., will be regarded as a sole practitioner.

6. The following are included in the cover provided to the **Legal Practice**, subject to the **Annual Amount of Cover** applicable to the **Legal Practice**:

- a) a **Principal** of a **Legal Practice** providing **Legal Services**, provided that the **Principal** had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**;
- b) a previous **Principal** of a **Legal Practice** providing **Legal Services**, provided that the **Principal** had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**;
- c) an **Employee** of a **Legal Practice** providing **Legal Services** at the time of the circumstance, act, error or omission giving rise to a **Claim**;
- d) the estates of the people referred to in clauses 6(a), 6(b) and 6(c);
- e) subject to clause 16(c), a liquidator or trustee in an insolvent estate, where the appointment is or was motivated solely because the **Insured** is a **Practitioner** and the fees derived from such appointment are paid directly to the **Legal Practice**.'

The words and phrases in bold print are defined in the policy.

A short answer to question 2 is that the legal practice must ensure that the manner in which it is conducted meets the requirements of clauses 5 and 6 to be an insured in terms of the LPIIF policy.

3. 'How much insurance cover does the firm have under the LPIIF policy?'

The amount of cover (limit of indemnity) afforded to each insured legal

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practice is provided an annual aggregate basis. Some policies in the commercial insurance market provide cover up to a specified limit per claim. The annual amount of cover is defined in the policy as:

'II Annual Amount of Cover: The total available amount of cover for the **Insurance Year** for the aggregate of payments made for all **Claims, Approved Costs** and **Claimant's Costs** in respect of any **Legal Practice** as set out in schedule A;'

The annual amount of cover afforded to a legal practice is determined by the number of directors/ partners (called principals in the policy) in the firm on the date that the cause of action arose. The annual amount of cover afforded to insured practices is as follows:

SCHEDULE A

Period of Insurance: 1 July 2020 to 30 June 2021 (both days inclusive)

No of Principals	Annual Amount of Cover for Insurance Year
1	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

The annual amounts of cover will remain the same in the upcoming insurance year. Each time a claim, approved costs or claimant's costs are paid the amount of cover available is eroded and could be expunged in an insurance year. The legal practice will then be self-insured if it does not have top-up insurance cover available. Top-up cover is addressed in question 5 below.

For more information on the amount of cover afforded under the LPIIF policy, see:

□ 'Who does the LPIIF cover and for how much?', *Risk Alert Bulletin* (November 2020) (https://lpiif.co.za/wp-content/uploads/2020/10/WEB_RAB_NOV2020.pdf)

4. 'Is there an excess payable under the LPIIF policy and, if so, how much is it?'

The excess is defined in clause XIII the policy as 'the first amount (or deductible) payable by the **Insured** in respect of each and every **Claim** (including **Claimant's Costs**) as set out in Schedule B.'

The excess payable is also determined by the number of principals in the legal practice on the date that the cause of action arose. The current schedule of excesses payable is as follows:

'SCHEDULE B

Period of Insurance: 1 July 2020 to 30 June 2021 (both days inclusive)

No of Principals	Column A Excess for prescribed RAF* and Conveyancing Claims**	Column B Excess for all other Claims**
1	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

*The applicable **Excess** will be increased by an additional 20% if **Prescription Alert** is not used and complied with.

The applicable **Excess will be increased by an additional 20% if clause 20 of this policy applies.'

It will be noted that the riskier areas of practice attract a higher excess. The excess will become payable when the insurer pays a claim and/or claimant's costs. The excess payable will not change in the coming insurance year. You can read more about the excess payable in the following article:

□ 'The excess payable in terms of the LPIIF policy explained', *Risk Alert Bulletin* (December 2020) (<https://lpiif.co.za/wp-content/uploads/2020/11/RISK-ALERT-BULLETIN-DECEMBER-2020.pdf>).

The payment of claims and/or excesses is a matter that can be addressed in your partnership agreement. The liability for a claim will be a significant debt for the practice. Experience shows that the payment of the excess or an uninsured amount by the firm can lead to significant internal disagreements in a legal practice. This is exacerbated when the party who the parties in the firm allege is responsible for the claim has left the practice. See:

□ 'Until a claim do us part: Does your partnership agreement address the event of a claim against your firm?', *De Rebus* (October 2017) (www.derebus.org.za/wp-content/uploads/2017/10/De-Rebus_October_2017.pdf).

5. 'My firm requires additional insurance cover. Is this provided by the LPIIF and what is the premium for the additional insurance cover?'

The LPIIF only provides the primary layer of insurance cover - this is sometimes referred to

as the base layer of profession indemnity insurance cover. The additional amount of professional indemnity insurance cover is commonly referred to as 'top-up' insurance and can be purchased in the commercial market. Speak to your specialist insurance broker or insurer regarding top-up insurance. The LPIIF does not have any formal relationship with any of the companies that offer top-up insurance and does not endorse or recommend any insurer over the others. The purchase of top-up insurance is done entirely independently of the LPIIF.

The differences between the LPIIF and commercial insurers are set out in the following judgement:

□ *Propell Specialised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC and others* (16864/2013) [2017] ZAWHC 71; [2017] All SA 1005 (WCC) (30 June 2017).

6. 'Is the LPIIF insurance cover granted by the law society or Legal Practice Council?'

No, the insurance cover afforded under the LPIIF policy is not provided through the Legal Practice Council (under the Legal Practice Act, currently) and was not previously provided through the law societies under the now repealed Attorneys Act 53 of 1979. The LPIIF is, and always has been, independent of the Legal Practice

Council or its predecessors in the statutory law societies. As stated above, the LPIIF provides the insurance services as contemplated in section 77 of the Legal Practice Act. The LPIIF is a non-profit company that does not have any issued share capital and thus does not have any shareholders. The company, however, has one member being the Fidelity Fund. The LPIIF is a licenced short-term insurer in terms of the Insurance Act 18 of 2017. The licence authorises the company to provide two lines of insurance, being liability (the professional indemnity insurance provided under the Master Policy) and guarantees (the bonds of security in favour of the Master of the High Court). The two lines of insurance business are in line with the provisions of section 77 of the Legal Practice Act and the Memorandum of Incorporation of the company. The LPIIF thus carries out a *quasi*-statutory function.

7. 'My firm has received a summons alleging that we did not properly carry out our mandate. The plaintiff is seeking compensation from the firm. How do I go about notifying the LPIIF of the claim?'

The procedure for notifying the LPIIF of a claim is set out in the policy and on the LPIIF website. It can be summarised as follows:

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Receipt of trigger document

The insured receives a written demand, summons, counterclaim or application in which a demand to pay compensation is made.

Notification to the insurer

The LPIIF must be notified in writing within one week of receipt of the trigger document.

Send a copy of the trigger document to the LPIIF, complete and submit the risk management questionnaire and claim form.

Prepare a detailed background report including full details of the circumstances, error or omission that led to the claim.

The LPIIF will also request your complete office file.

If the firm has top-up insurance, it is prudent to notify your top-up insurer/ broker simultaneously with the notification to the LPIIF.

LPIIF Assessment of the claim

The assessment includes whether the claim is indemnified in terms of the Master Policy, the applicable scheme year and whether insured has a valid defence to the claim or is liable for the amount claimed and on the basis alleged in the trigger document.

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In the question, as posed, the summons is the trigger document. The summons must be sent to the LPIIF when the claim is notified (email claims@lpiif.co.za) within one week after it has been served on the insured legal practice (see clause 20 of the policy).

It is prudent to also do the following:

- Prepare a comprehensive background report setting out the full details of the firm's handling of the matter. The background report must also cover the details of the alleged breach of mandate (if the claim is framed in contract), failure to meet the standard of care expected of a reasonable legal practitioner (if the delictual claim is framed as a breach of a duty of care) or the breach of the fiduciary duty. If the firm has a defence to the claim that must also be set out in full;
- Complete and submit the risk management questionnaire and the claim form as required in clause 23. If you have completed a risk management questionnaire when you applied for a Fidelity Fund certificate, you can provide that document;
- Send the Fidelity Fund certificate applicable in the year that the cause of action arose. Remember the provisions of clauses 5 and 6 that refer to the date that the cause of action arose;
- Send your full file of papers (including all file notes) to the LPIIF;
- Remember not to cede or assign any rights in terms of the policy. Do not, without the LPIIF's written consent:
 - (i) admit or deny liability for a claim;
 - (ii) settle a claim; or
 - (iii) incur any costs or expenses in connection with a claim unless the quantum of the claim and the claimant's costs fall within your excess.
- Refer the client to another legal practitioner. You are conflicted and cannot continue to act for the client;
- If you have top-up insurance, inform your broker and/or insurer of the claim simultaneously with the notification to the LPIIF. Check the wording of your top-up insurance policy to see what your obligations are. You have the responsibility to notify your top-up insurer. The LPIIF has no knowledge whether or not you have top-up insurance and has no obligation to notify the insurer on your behalf. The quantum of the claim may exceed the amount of cover available under the LPIIF policy and you should not risk the top-up insurer repudiating your application for indemnity on the basis of late notification. Top-up insurers sometimes re-

pudiate/reject claims on the basis that they were not disclosed at the time that the proposal form for the renewal of the policy was submitted;

- Throughout the claim (and litigation) process provide your assistance and co-operation to the LPIIF and any other insurer that is on risk; and
- If the firm is liable, prepare the necessary funds to pay the excess when it becomes due.

8. 'My client's claim prescribed in the hands of another attorney. Can we have a claim form and can the summons to be served on the LPIIF?'

Only insured legal practitioners have rights to apply for indemnity in terms of the LPIIF policy. The policy does not give any rights to former clients or any other third parties to claim directly from the LPIIF (see clause 39). In the circumstances set out in this question, action will need to be instituted against the former attorney. If the practitioner is struck-off or suspended when the claim is brought, the claim must still be brought against that practitioner. The practitioner against whom the action is brought must then notify the LPIIF of the claim and apply for indemnity in terms of the policy. The executor of the estate of a deceased practitioner needs to

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notify the LPIIF of a claim against the late practitioner (see clause 6(d) of the policy).

The client cannot claim directly from the LPIIF and will thus not be issued with a claim form. The action should also not be instituted against the LPIIF, and it follows that the insurer must thus not be cited as a party to the proceedings. The summons must not be served on the LPIIF. If the plaintiff cites the LPIIF in the circumstances set out in this question, the company will seek a punitive costs order against the plaintiff and his/her legal representative. There is no legal relationship between the LPIIF and the plaintiff and there can be no basis for claiming compensation from the company. Remember the *res inter alios acta* and *aliis nec nocet nec prodest* maxims.

Your client's claim against the correct defendant (the former attorney) may prescribe in your hands while you are vigorously pursuing the incorrect defendant. You will then be faced by a professional indemnity claim from your client.

The only circumstances where a claimant may have a right to claim from an insurer is where section 156 of the Insolvency Act 24 of 1936 applies. Legal practitioners acting for plaintiffs against sequestrated or liquidated insureds, as the case may be, must read section 156 and the judgements that have dealt with the requirements

of that section very carefully before instituting a claim.

The following resources will also assist legal practitioners faced with this question:

- 'Instituting a PI claim on behalf of a client: Some considerations to be taken into account', *De Rebus* (March 2017) (www.derebus.org.za/wp-content/uploads/2017/02/DR_March2017.pdf);
- 'Professional indemnity claims against attorneys: do not cite the AIIIF', *Risk Alert Bulletin* (August 2018) (https://lpiif.co.za/wp-content/uploads/2018/07/RAB_August2018_WEB.pdf);
- *Coetsee v Attorneys' Insurance Indemnity Fund* (126/2001) [2002] ZASCA 94 (02 September 2002), [2002] 4 All SA 509 (SCA), [2002] 4 All SA 1 (SCA);
- *Propell Specialised Finance v Attorneys Insurance Indemnity Fund NPC* (1147/2017) [2018] ZASCA 142 (28 September 2018); and
- *Propell Specialised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC and others* (16864/2013) [2017] ZAWHC 71; [2017] All SA 1005 (WCC) (30 June 2017)

9. 'When should a claim be notified to the LPIIF?'

The prudent approach is to notify the LPIIF as soon as you become aware of circumstances that may

lead to a claim. This is sometimes referred to as the intimation of a claim. At times you may not have the full details yet, but this should not stop you from notifying the claim and informing your insurer/s that you are still investigating the matter. Even though it will be a potential claim at that stage, your insurer can then get involved to assist in protecting your interests and, depending on the circumstances, to mitigate the damages. Do not wait for action to be instituted against your firm. A late notification will put your right to indemnity at risk.

The relevant clauses of the LPIIF policy read as follows:

'The Insured's rights and duties

22. The **Insured** must;
 - a) give immediate written notice to the **Insurer** of any circumstance, act, error or omission that may give rise to a **Claim**; and
 - b) notify the **Insurer** in writing as soon as practicable, of any **Claim** made against them, but by no later than one (1) week after receipt by the **Insured**, of a written demand or summons/counterclaim or application. In the case of a late notification of receipt of the written demand, summons or application by the **Insured**, the **Insurer** reserves the right not to indemnify the **Insured** for

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costs and ancillary charges incurred prior to or as a result of such late notification.'

Once again, the onus is on the insured to check the wording of a top-up policy for its obligations on that layer of cover (if available).

The following articles give useful insight into this question:

- Wim Cilliers, 'Notification of circumstances which may give rise to a claim', *Risk Alert Bulletin* (May 2018); and
- 'What to do in the event of a claim or intimation of a claim', *Risk Alert Bulletin* (March 2019).

10. 'We have been requested to submit proof of insurance. Can the LPIIF provide us with a letter confirming that we are insured?'

This request usually comes from practices that are preparing documents in response to an advertisement calling for expressions of interest from firms that wish to provide legal services to a particular entity.

The LPIIF's position is stated on its website. I quote what is stated there:

'Confirmation of LPIIF cover

Every practitioner, who is in possession of a valid Fidelity Fund Certificate, automatically enjoys

a certain level of professional indemnity cover in terms of the LPIIF policy. (Please refer to the policy for the applicable limits of indemnity and deductibles). The LPIIF has one Master Policy applicable to all insured firms.

In previous years, insurance certificates were issued to firms. This was primarily done at the request of the financial institutions on whose panels the firms served. However, the LPIIF Board of Directors has decided that no insurance certificates will be issued with effect from the 2013/2014 insurance year. This decision and the reasons therefore have been communicated to the major financial institutions, the profession and Docomply.

A copy of the LPIIF policy is available on this website at [<https://lpiif.co.za/wp-content/uploads/2021/07/2021-2022-Master-Policy-Final.pdf>]. In terms of the policy, the limit of indemnity and deductible of an insured is determined by the number of partners/directors in the firm at the time the cause of action arose. The LPIIF does not have records of:

1. The practitioners who have either been issued with Fidelity Fund certificates or who are obliged to apply for such certificates;

2. The names and/or number of practitioners practicing or the number of partners/directors in each firm.

This information is available from the regulators that issue Fidelity Fund Certificates to practitioners and keep records of the practitioners in each of their areas of jurisdiction. The LPIIF only deals with insureds when a claim is notified and indemnity applied for in terms of the policy.

The onus is on the practitioners to satisfy interested third parties that they are in possession of a valid Fidelity Fund Certificate."

Conclusion

I hope that the contents of this Bulletin have provided clarity on the LPIIF and its functions. Should you need any additional information on the LPIIF, the questions above or require risk management training in your firm, please send an email to Risk.Queries@lpiif.co.za. The risk management training is provided at no cost to insured legal practitioners.