

# NEWSLETTER

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## TRUST ME, I AM AN ATTORNEY

Attorneys and Advocates referred to in section 34 (2) (b) of The Legal Practice Act 28 of 2014 are automatically indemnified through the Legal Practitioners Indemnity Insurance Fund NPC (LPIIF). The LPIIF provides cover at no costs to practitioners. The LPIIF issues a Master Policy which renews on the 1<sup>st</sup> of July each year. Cover is extended to all practitioners defined in their policy provided that such practitioner are in possession of a valid fidelity fund certificate.

The covered afforded under the LPIIF is referred to as the “primary” or “base” layer of professional indemnity claims. The LPIIF has a Limit of Indemnity applicable (annual amount of cover) which has proven in many instances insufficient as claims exceed the primary cover provided by the LPIIF.

It is imperative that practitioners understand the risks which may affect their business and mitigate such risk by ensuring that they purchase additional (Top Up) Professional Indemnity cover and arrange other insurances where the LPIIF does not provide cover (Difference in Conditions).

### Cover and Claims – Professional Indemnity Insurance

There has been a surge in professional indemnity claims in the last few years. Research has shown that prescription claims continue to present the highest number of claims, however, claims trends relating to errors made by attorneys in the Litigation and Conveyancing space are increasing in number and value.

The LPIIF’s Limit of Indemnity (see: [www.lpiif.co.za](http://www.lpiif.co.za)) is determined by the number of partners a firm consists of at the time the cause of action arose. A firm of 1 to 6 principals has an aggregate limit of R 1 562 500 which has time and time again proven insufficient to satisfy claims instituted against a professional. A lack of, or insufficient Top Up cover could result in a practitioner being financially exposed if the LPIIF’s limit of indemnity is depleted. An attorney should ensure that the Top

Up cover in place is commensurate to the work that they carry out and the risk that they are exposed to in the areas that they practice.

All attorneys should have a look at their insurance (LPIIF & Top Up) to ensure that they are adequately covered should a claim arise.

Practitioners should have proper cover in place to PROTECT their **reputation, pockets** and their **client's interests**.

### **Cover and Claims – Impersonation Fraud**

The LPIIF has as from 1 July 2016 excluded all cyber related risks. The effect of this exclusion is that if the attorney does not have additional cover (Top Up) to specifically cover such eventuality, the attorney would be required to cover the claim from his / her own pocket.

Claims arising from Impersonation Fraud is on the rise. Practitioners are susceptible to being victim to this crime and thus important to have proper risk mitigation measures in place to limit the risk.

Note exclusions in the LPIIF Policy.

### **Cover and Claims – Misappropriation of Trust Funds Cover**

Misappropriation of trust monies has become extremely prevalent. This may be attributed to the difficult economic environment. Misappropriation of trust money or property are excluded from the LPIIF Policy. The Legal Practitioners Fidelity Fund (LPFF) does not indemnify a practitioner that has misappropriated trust money or property. The third party / claimant has to pursue a claim against the practitioner and exhaust all their rights in this regard before approaching the LPFF (see: [www.fidfund.co.za](http://www.fidfund.co.za)). It is for this reason that it is extremely important for practitioners to have Misappropriation of Trust Funds Cover in addition to PI Cover.

Misappropriation of Trust Funds Insurance provides cover for theft and misappropriation by any principal or employee of trust money as defined in the Attorneys Act. In addition, a practitioner should also consider coverage for the theft of any money or property belonging to the attorney or for which the attorney is responsible for.

This form of cover is essential. In the absence of such cover misappropriation could result in a practitioner's entire personal estate being at the disposal of the creditors in the event of there being theft perpetrated.

### **How can claims be prevented – Risk Management**

Practitioners should ensure that they have adequate risk management measures in place. It is vital that practitioners implement a risk management strategy which if done correctly, can most certainly minimize the risk of a claim.

Below is a list of risk management measures that can be included into the firms Minimum Operating Standard (MOS):

- **Supervision of Staff** – Lack of supervision is the primary reason for claims. Ensure that rules in this regard are in place;
- **File Audits** – Conduct regular file audits. This can alert one to potential problems or internal deficiencies;
- **Communication with clients & Staff** – Communicate with your clients on a regular basis and keep records of communication;
- **Diary Systems** – Ensure that you have an effective diary system in place. This will prevent claims from prescribing;
- **File Notes** – Keep records of all attendances;
- **Letters of Engagement** – This essentially sets out the terms and conditions of the contract between the attorney and his client. This will cover the scope of work;
- **Training** – Vocational training for staff is vital;
- **FICA** – An attorney is required to have policies in place to deal with FICA. For example, banking details cannot be amended by means of an e-mail.
- **Payments** – It is crucial to have a robust protocol with embedded separation of duties when making any payment or receiving funds. This must also include a thorough process of identifying third parties to whom payments are made or received from to ensure they are who they say they are and that bank details are independently confirmed. Auditors can help with this process.

### **Who can I contact to obtain further information regarding Professional Indemnity Insurance cover?**

Leppard Underwriting provides PI cover to Attorneys. Should you require further information please direct your query to [Vanessa@leppard.co.za](mailto:Vanessa@leppard.co.za) or contact us on 011 459 1640.

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### **PRACTICAL EXAMPLES OF CLAIMS**

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1. The Plaintiff was injured in a motor vehicle accident on or around 2009. At the time of the accident the Plaintiff was a passenger in the vehicle. The Plaintiff instructed the attorney (insured) to pursue a claim with the Road Accident Fund (RAF). The insured failed to lodge the claim with the RAF timeously and the claim prescribed. After considering all the medico legal report the claim was computed in the amount of R 1 608 869.00 excluding costs. The claim exceeded the AIF's Limit of Indemnity and Top Up responded to the portion of the claim that exceeded the primary insurers Limit of Indemnity.
2. The attorney (insured) specialized in conveyancing matters. He incurred a legal liability to his clients because of proceeds from the sale being made erroneously to the incorrect person. The insured was a victim of a cyber crime (impersonation fraud) and was negligent in failing to carry out his FICA duties in inter alia establishing that the bank details provided in the fraudulent e-mail was that of his clients.

The claim was excluded by the AIF in terms of their new policy and the Top Up insurer paid the claim in the amount of R 447 471.66.

3. An employee of the attorney (insured) acted outside her scope of employment and negotiated settlements agreements with defendants out of her own accord. The “settlement” amounts that were paid by the defendants were paid into the employees account. The employee’s intentional and unlawful actions culminated in a loss of over R 1.3 million. The attorney became aware of the theft after his client advised that the defendant had confirmed that the settlement amount was paid into trust.

This was an example of cover extended by virtue of the Misappropriation of Trust Funds Insurance.

4. An attorney (A) received instructions from his client that he would be receiving an amount of R 3.1 million into his trust account where after he will be instructed how to disburse the funds. The funds were received into trust by a third person (B) who happened to also be an attorney.

B was part of an elaborate fraud scheme. He believed that he was investing in a scheme for the purchase of gold bullion.

B at no time advised A (attorney) that he (B) was the depositor or the reason for the payment.

A paid the monies (3.1 million) received to various parties on the instructions of his client.

After B realized he was a victim to a fraud, he sued attorney A for his money.

The court held that Attorney A had a legal duty to deal with the money without negligence. The judgment confirms that an attorney has a duty to identify persons who deposit money into their trust account and to dispose of such funds only in accordance with such instructions.

The court however found that A was liable for 60% of the claim and that B was liable for 40% of the claim. B’s liability was based on the fact that he mistakenly relied on the assurances provided by A’s client and a reasonable person would not have accepted those assurances on such an important issue from someone he knew over the telephone.

**Fatima Ebrahim**