



JURISK!

September 2010 Vol 6 Issue 3
Risk Management Quarterly

A quarterly publication of Professional Indemnity Insurance Committee, Bar Council Malaysia

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REDUCTION IN PII BASE PREMIUM FROM RM1,300 TO RM1,200

Editorial

We are pleased to report that Bar Council's efforts with our Risk Management Programme and endeavours to increase awareness of a sound work culture, has paid off, resulting in reduced 2011 PI premiums!

The 2011 PI premium is RM1,200 (2010 PII premium was RM1,300 per lawyer). In addition to the 7.7% reduction in premium, we have also successfully maintained cover for 2011 PII Policy as per the expiring 2010 terms. Please see Bar Council Circular 225/2010 for the salient details.

I would like to take this opportunity to encourage Members to start applying for their PII early and avoid the usual last minute headaches! The first step to using the Online Proposal Form is to nominate an individual from your firm e.g. managing partner, office manager, to whom a login name and password (Firm Code and Certification Number) will be emailed for access to the Online Proposal Form. Do note that for security reasons, the login name and password will be different from that used to access the 2010 Online Proposal Form. All firms should have received an email from the Broker, Jardine Lloyd Thompson Sdn. Bhd. (JLT), on online submission of your 2011 Proposal Form.

Members are strongly urged to use the Online Proposal Form. It is very easy to use, and an added incentive is that your firm's information has been entered for you. No more filling in the same details again and again. Members who have yet to receive an email from JLT on renewals or who encounter any problems with the Online Proposal Form, do please contact JLT at 03 2723 3388 or the PII & RM Department for assistance.

Moving on to this issue of Jurisk, our 'claims' issue.

Two main features are:

1. 'What is a Claim?' that explores the 'when, what and why' does a firm disclose in their Proposal Form and to the PII Scheme Broker;
2. *PII FAQ on Claims*, which touches on to-do questions should a circumstance or claim arise.

Also featured is the 'Claims Notification Flow Chart' which sets out the process and parties involved in a notification of a circumstance or claim. On Page 3, we have the conclusion to the SIF FAQ Series '*Bar Council's Self Insurance Fund: In A Nutshell*'.

To end, whilst usage of our risk management tools and practice area checklists are still **not** at a desirable rate, our Risk Management Programme and related initiatives have gained the confidence of our insurers which has led to a reduction in premiums for 2011. We intend to work harder **and** need your all-round support to embrace our risk management efforts, which would be extremely useful to your practice in making it more profitable and less susceptible to claims!

Ragunath Kesavan

President/ PII Committee Chairperson Malaysian Bar

Editor's Note: Launch of the Best Practice Guides, *Accounts for Lawyers* and *Setting Up Practice* initially set for July 2010 has been rescheduled to October 2010 due to unavoidable circumstances. Members will be kept informed of the launch via Bar Council Circulars. Any inconvenience caused is deeply regretted.

SIF FAQ 4 BAR COUNCIL'S SIF: IN A NUTSHELL

Concluding our FAQ Series on the Self-Insurance Fund (SIF), we sum up Bar Council's aspirations in implementing the SIF.

In summary, Bar Council intends to take control of the Scheme and ensure that the interest of the Members are safeguarded with stable and affordable premiums, coverage is relevant to the needs of the Members and to return income derived from the SIF for the benefit of the Members. Based on the feasibility study conducted by the SIF consultant, Echelon Risk Consulting Asia Pte Ltd, Bar Council believes that the SIF structure is the best way to ensure this objective.

Through the SIF, Bar Council would maintain a portion of the risk and progressively the level of retention would increase. This means, for the retained risk we maintain, Bar Council will retain portions of the premium paid by Members and this would increase as the risk retention increases over the years. In time the purchase and reliance on commercial insurance would be reduced. We will avoid situations where premiums fluctuate as insurers arbitrarily increase premiums due to challenges in their own business. This is evident based on the United Kingdom and Hong Kong experiences.¹

Commercial Insurers charge premiums based on statistical data derived from claims experience. The premiums received are invested which is a source of income for the Insurers. Likewise, in the SIF, the fund would be used to settle claims but these usually materialise some years after the matter is reported. In the meantime the fund would be invested to generate income which will become an additional and new

source of income under the SIF. This additional income would in the long run be passed on to Members through lower costs for protection under the SIF.

In the medium-to-long term, Bar Council wants the SIF to build sufficient cash reserves such that it can always ensure that Members only pay affordable and stable costs for protection under the mandatory PI Scheme. Bar Council wants to avoid situations where premiums vary widely from year-to-year, putting further financial pressure on Members.

The obvious means by which cost is managed for the benefit of the Members is to avoid situations which can give rise to claims. Whilst the intention of Insurance/SIF is to protect Members and the public, investment in risk management initiatives would be critical to ensure that the SIF meets the objectives set out by Bar Council when considering the move to the SIF. Every successful SIF in the various jurisdictions has benefitted with improved risk management within the profession. This benefits everyone – Members and the general public. Bar Council sees this as a tremendous positive to further promote professional standards within and across the profession.

Over the last two years, every discussion the PII Committee has had with the SIF consultant and our insurance broker has shown that the SIF is financially viable and capable of meeting the objectives of Bar Council.

The Legal Profession (Professional Liability) (Insurance) Rules 1992 (Draft PIF Rules) has been amended and submitted to the Attorney General's Chambers for their consideration and approval. Once approved, Bar Council will continue with the final necessary arrangements to implement SIF.

Members will be kept informed via Jurisk!, the PI Bulletin and Bar Council Circulars.

¹ To read more about the United Kingdom and Hong Kong Schemes' experiences, go to SIF Discussion Board at the Malaysian Bar website, www.malaysianbar.org.my (go to 'Links').

What is a Claim?

When, What & Why Does a Practice Disclose in a Proposal Form and to the PII Scheme Broker?

By Carolyn Richards

This article first appeared in Infoline (June 2003, Pages 13 - 14). The contents of the article were accurate per the terms of the 2003 Certificate of Insurance. Thereafter, some terms and conditions of the Malaysian Bar's Professional Indemnity Insurance have changed. Where applicable, the revised terms have been incorporated. The changes in *italics* are based on the 2010 Certificate of Insurance and Proposal Form 2010.

It is most common when thinking of making a claim in the context of insurance to think of the situation where an insured person fills in a claim form, sends it to the Insurance company or adjuster and then receives payment for the insured damage or loss. The motor vehicle accident is the simplest example.

That is only one category of claim. It is a claim by an Insured on the Insurer.

The Malaysian Bar Professional Indemnity Insurance Scheme ("The Scheme") is a 'claims made' Scheme. 'Claim' used in this context refers to a claim made by a third party on or against a Firm or a lawyer in the Firm. A third party is anyone who is a third party to the contract of Insurance and is called 'the Client' in this article.

The Contract of Insurance



The insuring *Clause 2* of the Certificate of Insurance issued by Insurers of the Scheme to all lawyers says relevantly:

'We agree to indemnify you against civil liability for a **claim** that:

- (a) arises from your **legal practice**¹; and
- (b) is first made against you during the **Period of Insurance**²'

The entitlement of a Firm to be indemnified arises from and attaches to the Insurers by the action of a Client making a claim against the Firm (this article refers to that situation as a 'Client Claim'). The Firm then must make its own claim against the Insurers (called in this article 'the Firm Claim').

¹ 'Legal practice' is defined in Clause 36(g) to mean the 'provision of such services as are provided in the normal course of carrying on the profession as advocate or solicitor in private practice anywhere in Malaysia.'

² 'Period of insurance' is defined in Clause 36(l) as the 'period specified in Item 6 of the Schedule.'

How Does a Firm Make a Claim?

Clause 14(c) of the Scheme's Certificate of Insurance says that the ONLY way for a Firm to make a claim is by *giving notification in writing to Jardine Lloyd Thompson Sdn. Bhd. (Jardine):*

'Notice under this Policy shall be given in writing addressed to:

Jardine Lloyd Thompson Sdn. Bhd.

Suite 10.2 10th Floor

Faber Imperial Court

21A Jalan Sultan Ismail

50250 Kuala Lumpur

Telephone No : + 603 2723 3388

Facsimile No : + 603 2723 3301'



Jardine is the broker appointed by Bar Council Malaysia to represent the Members and the Bar's interest. As your representative, Jardine will ensure that all notification(s) made to them will be forwarded to the Insurers.

What is a Claim?

What is a Client Claim?

Webster's New World Dictionary defines a claim as:

- (i) A demand of a right or a SUPPOSED right
- (ii) Calling on another for something due or SUPPOSED to be due
- (iii) A demand for compensation benefits or payment.

The Oxford Dictionary includes a definition: an assertion of a right to something.

A Client makes a Claim merely by asserting that a lawyer or a Firm owes the Client some compensation, or asserting that the Firm has an obligation to make some payment or give some redress or service for the Client's benefit.

Under Clause 36(b) of the Certificate of Insurance, a 'claim' means:

- (i) *a demand for, or an assertion of a right to, compensation or damages; or*
- (ii) *an intimation of an intention to seek compensation or damages.'*



When Must a Firm Notify Insurers' Representatives?

no later than
60 days

Clause 14(a) of the Scheme's Certificate of Insurance requires 'the Practice' to give Notice 'in writing as soon as practicable:

*(a) but no later than 60 days of any claim first made against you during the **Period of Insurance**;...*

(Use of the definition 'Practice' means there is a joint and several obligation on every Partner to ensure the notice is given.)

Comment

Lawyers are accustomed to sending letters of demand; of hearing and making oral assertions about a client's rights and intentions to take action to pursue those rights. Often those expressed intentions are not pursued.

Because of this overexposure, when an assertion is made against a Firm or a lawyer; there is a tendency to not take it seriously; to consider that the assertion has no basis in fact or law, and to dismiss it if the threat is unmeritorious or unfounded.

To follow that inclination and to hold off notifying Insurers because the Client Claim is baseless could result in the Firm losing the right to indemnity if the Client proceeds with the claim. A Firm is entitled to have the costs of defending an unjustified claim paid by the Insurers (subject to an excess) and a Firm could at the very least lose that entitlement.

Continued on Page 8

Mandatory Professional Indemnity Insurance (PII) Scheme Claims Process Flow Chart 2010

by Echelon Claims Consultants Sdn. Bhd.

Firm notifies JLT formally, **in writing** of a claim, a potential claim, any notifiable circumstance.
(To comply with Clause 14, COI 2010)

JLT reviews notification and ensures Firm has included relevant documents.

JLT forwards Firm's notification and documents to Echelon and Insurer.

JLT sends Firm a letter of acknowledgement and the Claim Notification Form.

Echelon receives notification and will immediately do the following:

1. Telephone the Firm for a discussion;
2. Issue a letter of acknowledgement explaining coverage, policy limits, base excess, policy terms, Insurer's and Firm's obligations;
3. Appoints PS where notification requires one.

Thereafter, Echelon manages the notification with Insurer's instructions.

Firm	Insured Practice/the Legal Firm insured under the PII Scheme
JLT	Jardine Lloyd Thompson Sdn Bhd (Broker appointed by Bar Council)
Echelon	Echelon Claims Consultants Sdn Bhd (Third Party Claims Administrator appointed by Insurers)
Insurer	Pacific and Orient Insurance Co Bhd (Mandatory Insurer)
COI	Certificate of Insurance
PS	Panel Solicitor

NB. When a Firm's claim amount exceeds the Mandatory Limit and triggers the Top-Up, Echelon only manages the top up claim if Firm has bought Top-Up from the Scheme (through JLT).

NOTIFICATION OF WRIT/SUMMONS

1. PS is appointed within 14 days of Firm's notification (Clause 20, COI 2010).
2. Usually appointment is within two to three days if Firm has included the cause papers in the notification.
3. PS contacts Firm for an interview and to obtain all information and/or documents necessary to conduct defence.

NOTIFICATION OF NOTICE OF DEMAND

1. PS will be appointed:
 - a. If Insurer believes the PS can assist to resolve the situation; or
 - b. On request from Firm; or
 - c. If the situation requires the assistance of a PS.
2. If PS is not required at this stage, the Firm is advised to provide regular status updates, and to immediately contact Echelon if a writ is served so that a PS can be appointed at that stage.

NOTIFICATION OF CIRCUMSTANCE

1. The development of the notification will be monitored periodically. Necessary action will be taken when a letter of demand or suit materialises.
2. Firm is advised to
 - a. Provide regular status updates, and
 - b. Immediately contact Echelon if a writ is served so that a PS can be appointed at that stage.

What is a Claim?

Continued from Page 5

Why a Firm Needs to Notify Even Unfounded Client Claims

The Insuring Clause obliges the Insurer to indemnify a Firm for a CLAIM FIRST MADE during the period of insurance.

If in 2006, a mere assertion of a right is made by a client, that claim is FIRST made in 2006. *The Firm is obliged to notify Jardine in 2006 (as per Clause 14(a) of the Scheme's Certificate of Insurance above).*

If the Firm concludes that the Client Claim is unmeritorious and decides not to notify Jardine until 2007, the Firm may become its own insurer of that potential claim.

Why?

1. The Insurers in 2007 will deny the Firm's Claim because it was FIRST made in 2006. Further, if the Proposal Form (for the 2007 Renewals) does not disclose the Client Claim and the failure to disclose it was other than innocent, the Insurers can refuse any payment as well.
2. Also, the 2006 Insurers may not provide indemnity for breach of the Notification Clause (Clause 14(a) above) and because the 2006 Policy has expired.



Potential Claims

The Scheme's Certificate of Insurance also relevantly says in Clause 14(b):

'You must notify us in writing as soon as practicable...

*(b) but no later than 60 days of any **notifiable circumstances** of which you first become aware of during the **Period of Insurance**. We will treat any subsequently resulting claim as if it had been made against you during this **Period of Insurance**.'*

'Claim' in this Clause refers to both a Client Claim, as well as a Firm Claim. In *Joel v Law Union & Crown Insurance* (1908) 2 KB 863 at 864, Moulton J said:

'...the obligation to disclose...necessarily depends on the knowledge you possess. Your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognized that it was material to disclose the knowledge in question, it is no excuse that you did not recognize it to be so'.

Section 150(1)(b) of the Insurance Act 1996 repeats the concept in that dictum.

Firms have an obligation to notify circumstances that come to their knowledge even if there is no Client Claim made. If a judgment in default is entered against a client because the Firm was

not at Court, or failed to file a defence in time, the Firm will know about it before the client.



What is a Claim?

The Proposal Form

There is a direct link in the Scheme between the obligation to notify and the questions asked in the Scheme Proposal for Insurance.

Question 6 asks about claims already made

Question 6 is asking about Client Claims (not Firm Claims). Even the mere assertion by a Client of a totally unjustified intention to claim from the Firm means that the correct answer to Question 6 is 'Yes'. If the answer given is 'No', the Firm is electing to be self-insured for any such Client Claim first made earlier than the date on the Proposal Form.

Question 7 asks about potential Client or Firm claims

as discussed above. A further statement of the duty to disclose potential Client Claims or circumstances that might lead to a Claim is that of Mr. Justice Atkinson (as he then was) in *Simon v Ors & Beer* (1945) 78 Ll. L R 337 at 355:

'The question is: Would a reasonable solicitor of utmost good faith think it right to disclose any facts which were within his knowledge? Again, the mere fact that a solicitor has been guilty of such act or omission of negligence in the past is not necessarily a material fact to be

disclosed; the materiality must depend on the possibility of a claim'

Section 150(1)(b) of the Insurance Act 1996 specifies that any fact material either to the acceptance of the risk OR to the amount of the premium must be disclosed.

Comment

Careful consideration of these issues and concepts is warranted by Firms when completing their Proposal Form. The Execution Clause of the Proposal Form also needs to be borne in mind. That Clause is in the following relevant terms:

'I/We warrant that all the above statements are true and complete and, in relation to the answers to Questions 6 and 7, I/we have obtained written confirmation from each of the legal practitioners named in Questions 2(a) and 2(b). I/we agree that this completed Proposal shall be the basis of the contract between the Firm and the Insurers.'

Those words mean what they say!

Carolyn Richards was formerly the Risk Management Consultant for Willis (Malaysia) Sdn. Bhd. She is currently the Ombudsman for the Northern Territory and Commissioner, Health & Community Services – Complaints Commission, in Australia.

OCTOBER INITIATIVE WORKSHOP: *Getting Started!*
For those starting up a firm, recruiting a partner or who want a refresher. See Page 12

MALAYSIAN BAR PROFESSIONAL INDEMNITY INSURANCE (PII) SCHEME

By Charles Perera, Jardine Lloyd Thompson Sdn Bhd

CLAIMS FAQs

**Client threatening to sue? Lawyer missed court? Judgment in default entered?
Didn't file appeal in time? Employee embezzlement?**

Lawyers are faced with numerous risks daily.

For the most part, these issues can be resolved, but sometimes claims can arise.

In this instalment, we touch on claims – the 'how, what, when and who' in managing a claim.

What is a claim?

A claim is

1. A demand for, or an assertion of a right to, compensation or damages; or
2. An intimation of an intention to seek compensation or damages"
(Clause 36(b), Certificate of Insurance (COI)).

What is a notifiable circumstance?

A notifiable circumstance is "a fact, circumstance or event which may reasonably be anticipated to give rise to a claim" (Clause 36(j), COI).

What if I am not sure whether a circumstance may result in a claim?

You would be advised to report the circumstance to the Broker who would then address the matter with Insurers and confirm if it is a notifiable circumstance.

When do I report a claim/notifiable circumstance?

You have 60 days to notify a claim/notifiable circumstance (Clause 14, COI).

It is however encouraged that when you become aware of a claim/notifiable circumstance you immediately report it.

What is Claims Loading and when is it applied?

Claims Loading is the amount Insurers add to the base premium when a claim is reported and Insurers incur cost/expense/damages. It is **applied only** when Insurers incur cost/expense/damages which is in excess of the Firm's base excess, subject to terms agreed with Insurers.

Whom do I report a claim/notifiable circumstance to?

You would report the claim/notifiable circumstance to the Broker (Clause 14(c), COI).

Would I be imposed Claims Loading for notifying?

No. Claims Loading is only imposed when Insurers incur cost/expense/damages.

How is Claims Loading for the Firm calculated?

Since 2007, the Claims Loading applicable is
 1. 5% of the amount paid by Insurers, or
 2. 5 times the Firm's base premium
whichever is the lower.

As agreed Insurers can only apply Claims Loading for a period of 5 years from the date of the notification of the claim with the proviso that Insurers incur cost/expense/damages.

Can I defend a claim made against my Firm?

It is only when a claim is within the Firm's base excess that Insurers may allow you to take conduct of the matter with their written consent (Clause 21, COI).

Otherwise, Insurers have the right to take over conduct of a claim made against the Firm including the defence or settlement of the claim (Clause 19, COI).

What is the procedure when I notify a claim to the Broker?

The Broker would

1. Notify the Insurers (or their representative) of the claim.
2. Forward a Claim Notification Form to you. You are required to complete and submit it to the Insurers (or their representative).

The Claims Administrator, usually within 24 hours, will also contact you to obtain key information and determine if there is any urgent matter which requires addressing.

Where a claim relates to a Writ, the Insurers would appoint their panel solicitor to take over conduct of the matter, even if you have already appointed a Firm to act on your behalf.

See Page 6 for the Claims Process Flow Chart.

I intend to sue another lawyer; may I notify the proposed claim to Insurers?

This is termed a third party notification. Insurers **do not accept** a third party notification. It is the Firm who is being sued who has to notify the claim in accordance with the terms of the COI.

For the purpose of this FAQ Series, 'the Broker' refers to the Malaysian Bar PII Scheme Insurance Broker.

The 2010 PII Scheme Insurance Broker is Jardine Lloyd Thompson Sdn. Bhd., Suite 10.2, 10th Floor, Faber Imperial Court, 21A Jalan Sultan Ismail, 50250 Kuala Lumpur. Tel: 03 2723 3388. Fax: 03 2723 3301

OCTOBER INITIATIVE

TRAINING: Risk Management for Staff

Best work practices, risk management tactics and good work culture for all staff. See Page 12

OCTOBER INITIATIVE

LAUNCH: Best Practice Guides

2 new titles: 'Setting Up Practice' and 'Accounting for Lawyers'. See Page 12

Contact us @ PII & RM DEPARTMENT:

Department fax: 03 2031 6124

Department email: pirm@malaysianbar.org.my

Wong Li Chin, Executive Officer

03 2031 3003 ext 150

03 2032 4511

lcwong@malaysianbar.org.my

For more information, contact Suleka (03 2032 1870)
or complete the registration form enclosed with Jurisk!
and fax it to us at 03 2031 6124.

THE OCTOBER INITIATIVES

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Launching
Two New Books
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Setting Up Practice:
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