UNIVERSITY OF THE WITSWATERSRAND, JOHANNESBURG

FACULTY OF COMMERCE LAW AND MANAGEMENT

AN ANALYSIS OF CLAIM SERIES CLAUSES IN LIABILITY INSURANCE

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DECLARATION

I, Stephanie Fienberg declare that this research report is my own, unaided work, the substance of or any part of which has not been submitted in the past or will be submitted in the future for a degree in to any university and that the information contained herein has not been obtained during my employment or working under the aegis of, any other person or organization other than this university.

_____ _____

(Name of candidate) Signed

Signed this _____ day of _____ 2012 at Johannesburg.

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ABSTRACT

This research report provides an analysis on the application of claim series clauses in liability insurance; demonstrating the financial impact that a series of claims may have upon either the insurer or the insured. The application of claim series clauses is analysed as applied in the USA, UK, Australia, Canada and South Africa. It was found that the aggregation of a plurality of losses is predominantly based upon the policy wordings of the claim series clause, which serve to benefit either the insured or the insurer.

Keywords: claim series clause, occurrence, event, cause.

1. INTRODUCTION

Claim series clauses in liability insurance policies dictate what level of recovery the insured is entitled to arising from the occurrence of several losses (Insurance Day, 2001). The subtle differences in the claim series wordings determine whether several claims made constitutes one single claim, or, if the claims constitute several separate claims (Allens Arthur Robinson [AAR], 2009).

2. INSURANCE

Insurance is a contract in which one party (the insurer) indemnifies the insured or a third party by promising to pay compensation for a loss in exchange for a sum of money (premium). Hence, insurance is a contract in which the insured pays a premium now, to receive a payment at some future point, contingent upon the occurrence of the insured event (Maclennan, 1897; Arrow, 1971; Stettler, Eugster & Kuhn, 2005; Berry, 2009).

3. LIABILITY INSURANCE

Liability insurance indemnifies an insured who is legally liable to pay compensation to a third party as a result of the insured's negligence, arising from the actions of the insured (Mahomedy, 2008). Liability insurance is distinct from other lines of insurance, providing cover for unknown or unexpected risks, offers long-tail liability coverage and whose policy wordings are found to contain claim series clauses. Furthermore, liability insurance expands into the fields of professional indemnity insurance, public liability, products liability and medical malpractice (AAR, 2003).

4. CLAIM SERIES CLAUSES

4.1 Definition

Claim series clauses enable a number of separate losses, arising from a unifying factor, to be regarded as a single loss for the application of the deductible[1] or limit of indemnity[2] (Croly, 2002; Burns, 2003).

4.1 Importance of Claim Series Clauses

Taken from the above definition, claim series clauses determine the allocation of the deductible or limit of indemnity, thereby benefiting either the insurer or insured. The number of deductibles payable may be primarily determined by the claim series clause. If several claims can be aggregated, according to the policy wordings, to form one single claim; only one deductible is payable. On the other hand, if several claims may not be aggregated, due to the lack of a unifying factor, a deductible will have to be paid for each claim made (Barlow, Lyde & Gilbert, 2004).

The limit of indemnity can either apply to all the claims made within the policy period or to any one claim made during the policy period. If the limit of indemnity is per policy period, then each claim made during the policy period reduces the allocated limit of indemnity for subsequent claims, as depicted in Figure 1 (a) below. Once this limit of indemnity has been reached, the insured bears any further losses if no additional policies (excess layer policies[3]) are in place. However, should the limit of indemnity apply to any one claim made within the

[1] The deductible is a policy condition requiring the insured to pay a portion of the loss. Usually this amount represents the first amount which is payable by the insured in respect of any one claim with the insurer paying the balance over that amount up to limit of indemnity (Vero Profin, 2012: 3).

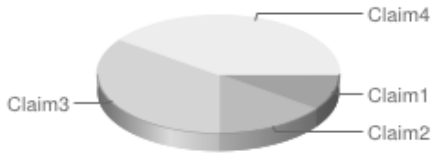
[2] The limit of indemnity is the maximum amount the insurer will pay for compensation and claimant's costs and expenses arising from any one claim and all claims in the aggregate made by the insured under a policy during the period of insurance (Vero Profin, 2012: 4).

[3] An excess layer policy is an additional policy bought 'on top' of a primary policy, providing an increased limit of liability (http://www.scruttonblandinsurance.co.uk/liability/excess_layer.php).

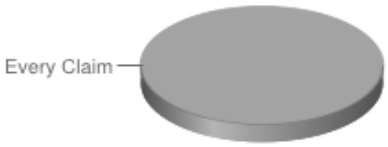
period, the full limit of indemnity is allocated for each and every claim that is made within the policy period, as can be seen in Figure 1 (b) (Heath, 2010).

Figure 1: Limit of Indemnity

(a) per policy period



(b) per any one claim



(Heath, 2010[4])

Illustrative Example of a Claim Series Clause

The application of claim series clauses may either benefit the insured or the insurer, depending upon the situation at hand. The following example illustrates two scenarios: (i) benefit to the insured, and (ii) benefit to the insurer (Barlow *et al*, 2004).

Scenario 1: Benefit to the Insured

An insured individual has numerous claims; each with an amount of R350 000, R500 000, R750 000 and R800 000 respectively. Each claim is less than the limit of indemnity, but when summated exceed the per claim limit of indemnity. From the insured's standpoint, the insured would prefer to have all the claims aggregated in order to reduce the number of deductibles payable, i.e. only pay one deductible (Barlow *et al*, 2004).

Deductible: R 250 000

Limit of indemnity (L.O.I): R2 000 000

[4] http://www.jhib.co.uk/articles/professional-indemnity-aggregate-or-any-one-claim-basis/215/

As seen in Table 1 below, with no claim series clause in place, four deductibles of R250 000 are payable by the insured. Hence, the insured pays a total deductible of R1 000 000 and the insurer pays four separate limits of indemnity with a total of R1 400 000. However, with a claim series clause in place, this scenario is drastically different; the insured only pays one deductible of R250 000 and any amount which exceeds the per claim limit of indemnity. Thus, the insured pays a deductible of R250 000 and the uninsured amount exceeding the limit of indemnity of R150 000. The insurer is then required to pay the full limit of indemnity of R2 000 000. Therefore, the claim series clause has served to benefit the insured, as the insured incurs a total expense of R400 000 as opposed to R1 000 000.

Table 1: Benefit to the Insured

			No claim series clause			**Claim series clause**		**Amount uninsured**
	Claims (R)	**No. of Claims**	**Deductible paid by Insured (R)**	**Amount paid by Insurer (R)**	**No. of Claims**	**Deductible paid by Insured (R)**	**Amount paid by Insurer (R)**	
	350 000	1	250 000	100 000	1	250 000		
	500 000	1	250 000	250 000				
	750 000	1	250 000	500 000				
	800 000	1	250 000	550 000				
Total	**2 400 000**	**4**	**1 000 000**	**1 400 000**	**1**	**250 000**	**2 000 000**	**150 000**

Scenario 2: Benefit to the Insurer

Under this scenario, assume that each of the insured's four claims exceed the per claim limit of indemnity. The insurer would wish to aggregate the claims into one claim in order to only pay up to one limit of indemnity, thereby reducing liability under the policy.

In Table 2 below, there is still a deductible of R250 000 and limit of liability of R2 000 000, however, the amount of each claim now exceeds the limit of indemnity; with the claims equalling R2 250 000, R2 500 000, R3 000 000 and R3 500 000 respectively. The limit of indemnity applies to each and every claim. With no claim series clause in place, the insurer is required to pay out an amount equal to the limit of indemnity for each and every claim. Thus, the insurer would pay a total of R8 000 000.

With a claim series clause in place, the four claims are aggregated to constitute a single claim, and the insurer is required to pay the full limit of indemnity only once, of R2 000 000. Hence, the application of a claim series clause has significantly reduced the insurer's exposure to liability. In respect of the insured, while only a single deductible of R250 000 is payable; the consequence of the claim series clause reducing the insurer's exposure to liability is a greater portion of the total claim remaining uninsured. Thus, the insured bears the uninsured amount of R9 250 000.

Table 2: Benefit to the Insurer

			No claim series clause			**Claim series clause**		**Amount uninsured**
	Claims (R)	**No. of Claims**	**Deductible paid by Insured (R)**	**Amount paid by Insurer (R)**	**No. of Claims**	**Deductible paid by Insured (R)**	**Amount paid by Insurer (R)**	
	2 250 000	1	250 000	2 000 000	1	250 000		
	2 500 000	1	250 000	2 000 000				
	3 000 000	1	250 000	2 000 000				
	3 500 000	1	250 000	2 000 000				
Total	**11 250 000**	**4**	**1 000 000**	**8 000 000**	**1**	**250 000**	**2 000 000**	**9 250 000**

5. THE INTERPRETATION OF CLAIM SERIES CLAUSES RESULTING FROM ASBESTOSIS CLAIMS

Throughout most of the 20th century asbestos was used in the manufacture of numerous building materials due to its favourable building properties. An estimated 100 million Americans were occupationally exposed to asbestos. During the 1970s the American Occupational Health and Safety Administrator began to regulate the use of asbestos due to the adverse health conditions found to arise from exposure to the building material. Following exposure to asbestos, the adverse health conditions were found to only manifest themselves several years later; by its very nature, much difficulty and uncertainty arises in determining when the exposure to asbestos occurred. The bodily injury caused by asbestos exposure resulted in countless liability claims being made against asbestos manufacturers (Stiglitz, Orszag & Orszag, 2002; Zevnick, Horton & Raskin, 2007).

The case of *Keene Corporation v. Insurance Company of North America* [INA] (1981) was one of many to deal with liability claims arising from the exposure to asbestos. Keene Corporation [Keene] was a manufacturer of asbestos and asbestos-related products. Keene was indemnified by several insurance companies, all of which provided identical general liability policies. During the late 1970s numerous liability claims were made against Keene, where exposure to asbestos had resulted in bodily injury. When Keene sought compensation under the various policies in place, the insurance companies either refused to pay out or agreed to only pay out in part, as the insurers contended that for indemnification under the policy to take effect, the 'injury' must occur during the policy period. This matter was pursued in court, where the judge found that although the claims constituted a single occurrence, in terms of the policy wording, the *'injury'* and not the '*occurrence*' must fall within the policy period (*emphasis added*). This meant that bodily injury arising from asbestos was to occur within the policy period and therefore, Keene was not covered under all the policies; it was held that Keene may seek cover under one policy only in order to prevent the stacking of limits[5].

Following the judgment in *Keene Corporation v. INA* (1981) and the increasing number of asbestos liabilities in the 1980s, the wording of liability policies were revised in order to limit insurers' exposure to liability. This resulted in the rewording of policies to prevent the stacking of limits, and to permit the aggregation of losses. Furthermore, policy wordings were amended, stating that the 'injury' rather than the 'occurrence' must fall within the policy period to reduce exposure to long-tail liability claims and allow for the application of claim series clauses. An illustration of the amended policy wordings is seen in the asbestos case of *Owens-Illinois, Inc. v. Aetna Casualty & Surety Co.*, (1984) which followed shortly after *Keene Corporation v. INA* (1981).

[5] "When a person is insured over multiple policy periods with multiple policies and incurs a loss that caused damage over two or more policy periods the procedure of applying the policy limit of each policy to the loss is known as stacking. Although the loss is, by definition, a single occurrence the limits available to the insured can be multiplied by the number of policies available" (Zalma, 2003:1).

In *Owens-Illinois Inc. v. Aetna Casualty* (1984) the policy wordings stipulated that in order for asbestos bodily injury coverage to have applied, the occurrence of an asbestos injury must take place during the policy period. The limit of indemnity was provided on a per occurrence basis. The specific inclusion of the term 'occurrence' resulted in much debate between the two parties. The insured argued that each individual harmed by asbestos constituted a separate occurrence, such that the limit of indemnity may be applied to each and every claim, and hence will not exhaust under the policy. Conversely, the insurers argued that the manufacture, distribution or installation of asbestos is a single occurrence; hence, only one limit of indemnity was applicable (Zevnick *et al*, 2007).

The court was to resolve the issue of what constituted an occurrence to determine the limit of indemnity applicable under the policy which was written on a per occurrence basis. The policy defined an occurrence as "bodily injury arising out of the same continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence" (*Owens-Illinois Inc. v. Aetna Casualty & Surety Co.*1984: 10). Upon the application of this definition a single occurrence was deemed to have occurred. Therefore, only one limit of indemnity of $20 000 000 was applicable and hence one deductible of $250 000 was payable by the insured to cover a plurality of losses. This outcome emphasises the above argument presented in case 2 of the scenario; where the insurer's exposure to liability has been reduced, and any amounts which exceed the $20 000 000 limit of indemnity is borne by the insured. Thus, the application of the claim series clause provided benefit to the insurer.

Zevnick *et al* (2007) observes that while in *Owens-Illinois Inc. v. Aetna Casualty & Surety Co.* (1984) a single occurrence was deemed to have arisen from the manufacture, distribution or installation of asbestos, it was found that other courts have exercised different definitions when classifying an 'occurrence'. In *Commercial Union Ins. Co. v. Porter Hayden Co.* (1997) and *Stonewall Ins. Co. v. Asbestos Claims Management* (1995) it was ruled that the bodily exposure to asbestos is unique and thus, each exposure constitutes a separate occurrence. Moreover, in *Metropolitan Life Ins. Co. v. Aetna Casualty & Surety Co.* (2000)

the court acknowledged this definition of an occurrence where each exposure to asbestos is unique, but it then went on to clarify that if the exposure occurs at approximately the same place and time, the exposure of asbestos is deemed to constitute a single occurrence. Based upon the above three cases it is evident that much ambiguity exists when interpreting what constitutes an occurrence, and thus particular reference must be made to the applicable policy wordings.

6. ACCIDENT, EVENT, OCCURRENCE OR CAUSE

Claim series clauses are defined to arise out of a single event, occurrence, or cause; or series of related events, occurrences, or causes. Courts throughout the world interpret the terms event, occurrence, and cause differently. Thus, various definitions for each term exist; hence, the interpretation and manner in which these terms are applied differ across multiple jurisdictions (AAR, 2009; Traub, Liebermann, Straus & Shrewsberry, 2010).

The application of claim series clauses in the following countries will now be considered: USA, UK, Australia, Canada and South Africa.

6.1 USA

The 9/11 attack on the World Trade Centre has had a significant impact upon the writing of liability policies with particular attention being paid to the wordings of claim series clauses. The determination of the number of occurrences in the New York case *SR International Business Insurance Co. Ltd. [SR Int'l] v. World Trade Center Properties, LLC,[WTC Prop] et al.,* (2003) was the difference between the insurer paying either US$3.5billion or US$7billion insured loss. The limit of indemnity payable by *SR Int'l* was on a per occurrence basis. The policy wordings in place were found to be ambiguous, failing to adequately define an occurrence. Taken from the perspective of the insurers, only one occurrence was considered to have occurred as the 9/11 attack arose from a one single co-ordinated plot (which led to the collapse of two towers). Based on this view, only one cause would be found and hence only one single amount of US$3.5billion should have been payable. Conversely,

the court in New York applied a different approach when determining the number of occurrences and ruled that damage had resulted from two separate aeroplanes crashing into two separate buildings. Therefore, the attack constituted two separate occurrences. *SR Int'l* was liable to pay a sum of US$7 billion (Aylward, 2002; Maloney, 2002; Bloomberg, 2011).

The ruling delivered in *SR Int'l v. WTC Prop.* (2003) had a significant impact upon the drafting of insurance policies. Following the outcome of *SR Int'l v. WTC Prop* (2002) insurers allocated cover on a per occurrence basis and with particular attention being paid to the wording of claim series clauses, in defining what constitutes an occurrence (Alyward, 2002).

The terms 'occurrence' and 'cause' are commonly used by most U.S. states in claim series clauses. These two terms are interpreted very broadly and have distinct meanings; where the number of occurrences determines the number of claims that is whether or not the claims may be aggregated to form a single claim, or if each claim constitutes a separate claim. For example: do five occurrences constitute five separate claims or, can the five occurrences be aggregated to form a single claim? The courts sought to determine how many claims arose out of a single occurrence. If the occurrences have a common cause (unifying factor) then the claims may be aggregated. Therefore, if the five occurrences are found to originate from the same cause, the five occurrences may then be aggregated to form a single claim. If however, the five occurrences are found to originate from different causes then each occurrence constitutes a separate claim. Therefore, the cause determines how many occurrences have taken place. Furthermore, by identifying the cause, one is able to deduce if the occurrences arose from the same source (Masters, 2005; Blame & La Barbera, 2009; Traub *et al* 2010).

The 'cause' test, 'effects' test, and 'unfortunate events' test are three tests which have been devised to determine whether multiple losses of bodily injury or property damage should constitute a single occurrence or multiple occurrences, and hence the amount of the limit of

indemnity applicable (Alyward, 2002). Each of these tests and their application from case law will now be considered.

6.1.1 The Cause Test

This test explains that for a single occurrence to arise, all the injuries and damages must result from a single, uninterrupted cause. However, if there is the interruption of or replacement by another cause, the chain of causation is broken and then more than one occurrence has taken place. Therefore, the cause test is concerned with identifying the cause which sets in motion the sequence of events leading to the occurrence(s) (Masters, 2005). This is the notion of the doctrine of proximate cause. The legal definition of a proximate cause was first given in *The Scottish Union and the National Insurance Company v. Alfred Pawsey and Company* (1908) as "the active, efficient cause that sets in motion a train of events which brings about a result, without the intervention of any force started and working actively from a new and independent source".

The incident in question in *Appalachian Ins. Co. v. Liberty Mutual Ins. Co.*, (1982) dealt with the number of occurrences in which Liberty Mutual Ins. Co. employment practices policy was found to discriminate against its female employees. In this case, a number of employees claimed for damages which arose from sexual discrimination. With respect to determining the number of occurrences, the court commented that it is the cause of the loss or damage which determines the incidents of liability and not the bodily injury or property damage which resulted. Furthermore, the court stated that the number of occurrences depends upon the number of causes which resulted in the loss or damage. It was held that the adoption of discriminatory employment policies was the underlying cause that led to the discriminatory practices which had occurred.

The application of the cause test found the adoption of the discriminatory employment practices to be the proximate cause. The courts defined a cause as the "proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage"

(*Appalachian Ins. Co. v. Liberty Mutual Ins. Co. 1982: iv).* Therefore, regardless of the fact that numerous injuries were suffered by several individuals over an extend period of time the adoption of the discriminatory employment practices policies was seen as the proximate cause. Thus, there was one cause and hence only one occurrence; therefore several claims from several employees were aggregated to constitute a single occurrence. The implication of this outcome was that only one deductible of $25 000 was payable by the insured, as opposed to several individual deductibles of $25 000.

Table 3: State by State Analysis: Definition of Occurrence Under the Cause Test

State	Definition of Occurrence	Case law
Alabama	"An accident, including continuous or repeated exposure to substantially the same general harmful conditions, that results in 'bodily injury' or 'property damage".	United States Stove Company v. Steadfast Insurance Company (2012: 3).
Arizona	"An occurrence is a 'series of related' acts or omissions".	Arizona Property & Cas. v. Helne, (1987:136).
Arkansas	"Occurrence means an accident including continuance [of] or repeated exposure to conditions which result in bodily injury neither expected nor intended from the standpoint of the insured".	Travelers Indemnity Co. v. Olive's Sporting Goods, (1989: 764).
California	"Occurrence means injurious exposure to asbestos not the manufacture and distribution of these products".	London Market Insurers v. The Superior Court of Los Angeles County Truck Insurance Exchange *et al*. (2007: 155).

District of Columbia	"An accident, including continuous or repeated exposure to conditions, which results in personal injury…which is neither expected nor intended from the standpoint of the Insured".	Owens-Illinois, Inc., v. Aetna Casualty and Surety Company (1984: 9).
Florida	"An accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured".	Travelers Insurance Co. v. Gayfer's & Co. *et al* (1979:1202).
Georgia	Employs the Cause Test. Ruled on the basis of: "…that there is one 'occurrence' where two persons are injured in an automobile collision, then it is a mistake to say of such a case that there are two 'accidents'; for in a general sense every automobile accident is an occurrence".	Saint Paul- Mercury Indemnity Company, v. Calvin T. Rutland (1953: 42).
Hawaii	Defined in terms of a loss: "Claims based on or arising out of the same act, Interrelated acts, or one or more series of similar acts, of one or more of the Directors or Officers shall be considered a single Loss...".	Okada v. MGIC Indem. Corp. (1985: 388).
Illinois	"Occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions".	Addison Insurance Company v. Fay *et al*. (2009: 5).
Indiana	"Occurrence means an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or	Indiana Gas Company. v. Aetna Casualty & Surety. Co. (1996: 775).

	property damage neither expected nor intended from the standpoint of the insured".	
Louisiana	"Repeated tortious exposures resulting in continuous, on-going damages".	Cole v. Celotex Corp. (1992: 1066).
Maine	"An accident, including continuous or repeated exposure to conditions, which results in ... property damage ... neither expected nor intended from the standpoint of the insured."	Honeycomb Systems, Inc. v. Admiral Ins. Co. (1983: 1404).
Maryland	"…all personal injury…arising out of continuous or repeated exposure to substantially the same general condition existing at or emanating from one location or source shall be considered as arising out of one occurrence."	CSX Transportation, Inc. v. Continental Ins. Co. (1996: 1086).
Massachusetts	No formal definition given, but has adopted this definition from case law: "If there is one, uninterrupted proximate cause which results almost immediately in more than one impact or event, courts generally find there is one 'accident' or 'occurrence'".	Slater v. United States Fidelity & Guaranty Co. (1980: 805).
Michigan	"An accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same	Michigan Chemical Corp v. American Home Assurance Co. *et al* (1984: 14).

	general conditions existing at or emanating from one premises location shall be deemed one occurrence".	
Minnesota	"[O]ccurrence means . . . an accident, event or happening, including injurious exposure to conditions, which results, during the policy period, in . . . property damage neither expected nor intended from the standpoint of the insured".	Cargill, Inc. v. Liberty Mut. Ins. Co. (1979: 53).
Mississippi	"An occurrence is determined by the cause or causes of the resulting injury".	Universal Underwriters Insurance Company v. Ford (1999: 20).
Missouri	"Any such act or omission together with all related acts or omissions in the furnishings of such services to any one person shall be considered one medical incident".	RCA Mutual Insurance. Co. v. Sanborn (1996: 895).
Nevada	"One proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage".	Insurance Corp. of America v. Rubin (1991: 391).
New Jersey	Employs the cause test, thus an occurrence is defined as "…an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured" (*Indiana Gas Company. v. Aetna Casualty & Surety. Co.* (1996: 775).	Wilkinson and Son Inc. v. Providence Washington Ins. Co. (1973).

North Carolina	"All loss involving a single act, or series of related acts, caused by one or more persons is considered one occurrence".	Christ Lutheran Church v. State Farm Fire & Casualty Co. (1996: 125).
Ohio	"Occurrence" is defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured".	Morton International, Inc. and Thiokol Corp. v. Aetna Casualty. & Surety Co. (1995: IV, 657).
Oklahoma	"As respects any one employee, dishonest or fraudulent acts of such employee during the policy period shall be deemed to be one occurrence for the purpose of applying the deductible".	Business Interiors, Inc. v. Aetna Casualty & Surety. Co., (1984: 364).
Oregon	No formal definition given, therefore in terms of the policy, "…the meaning of the term "occurrence" in the policy…could refer to each treatment that the defendant underwent, or it could mean the entire course of coccyx adjustments…".	National Chiropractic Mutual. Insurance Co. v. Morgan. (1992: 733).
Pennsylvania	Defined in terms of an accident, "...'each accident' as being all such damages arising out of one lot of goods or products prepared or acquired by the named insured . . . shall be considered as arising out of one accident".	Union Carbide Corp. v. Travelers Insurance. Co. (1975: 16).

Rhode Island	"Occurrence" means "an accident, including continuous or repeated exposure to conditions, which results in personal injury or property damage neither expected nor intended from the standpoint of the insured".	Bartholomew v. INA *et al* (1980: 251).
Texas	"Occurrence" is "all loss caused by, or involving, one or more 'employees', whether the result of a single act or series of acts".	Ran-nan Inc., v. General Accident Insurance Company of America (2001: 8).
Virginia	"…all bodily injury and property damage arising out of a continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence".	S.F. v. West American Ins. Co, (1995: 452).
West Virginia	"Injury or damage arising out of continuous or repeated exposure to substantially the same general conditions".	Shamblin v. Nationwide Mutual Insurance Co. (1985:643).
Wisconsin	"Occurrence" as an "accident, including continuous or repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage, neither expected nor intended from the standpoint of the insured".	Plastics Engineering Company v. Liberty Mutual Insurance Company. (2009: 617).

(Insurance Coverage Analysis, n.d)

In summary, 31 US states are found to employ the cause test in determining the number of occurrences. In cases where the policy in question failed to define the term 'occurrence',

courts were found to either apply the doctrine of proximate cause or by means of case law, made use of the widely accepted definition of an occurrence. As evidenced by Table 3 this definition is found to consistently make reference to the words "…continuous or repeated exposure to conditions…" (Insurance Coverage Analysis, n.d).

6.1.2 The Effect Test

The effect test examines the results of an incident in order to determine the number of occurrences. The number of occurrences is based upon the effect of the event which results in the insured loss. In other words, the number of occurrences can be measured by how many individual claims or injuries have resulted from the event in question. Therefore, an incident resulting in numerous injuries or damages is likely to contain multiple occurrences (Kalis, Reiter & Segerdahl, 2004; Casey, 2009).

Elston-Richards Storage Co. v. Indemnity Insurance Co, (1960), was heard before the District Court of Michigan which at the time made use of the effects test to evaluate the number of occurrences. The court argued that although the damage to 4 000 appliances arose from the same single cause, according to the policy, damage done to each appliance was a separate accident and thus, each accident constituted a separate occurrence. In light of this ruling, each of the 4 000 claims could not be aggregated to form a single claim as each claim arose from a separate accident. Consequently, a separate limit of indemnity would apply to each of the 4 000 claims. In monetary amounts, the limit of indemnity was $250 000, with a deductible of $2 500 per claim. Each of the 4 000 claims were less than $2 500 deductible and thus the insurer was not liable to pay out any amount under the policy.

Following the ruling of *Elston-Richards Storage Co. v. Indemnity Co.* (1960) Michigan has subsequently changed its approach in determining the number of occurrences. This is seen in *Michigan Chemical Corp v. American Home Assurance Co.*,(1984), which dealt with claims arising from the contamination of animal feed. More than 40 000 livestock were harmed by the contaminated animal feed. Countless claims were made against the supplier by farmers

across the state of Michigan, totalling $45 000 000. The number of occurrences was based upon the cause of the damage as opposed to the effect or number of injuries incurred. Under the cause test the court ruled that there was only one occurrence and thus only one limit of indemnity applied. Thereby, the insurers paid $28 000 000 per the occurrence, leaving the insured to fund the remaining portion of the claim(s) of $17 000 000.

Table 4: State by State Analysis: Definition of Occurrence Under the Effect Test

State	Definition of occurrence	Case law
Idaho	"A closely related series of repetitive events constitutes a single "occurrence" within the meaning of a liability insurance policy".	Unigard Insurance Co. v. USF&G, (1986: 781).
Tennessee	Interpreted as an "accident" occurring over an extended period of time does not constitute a single accident. Therefore, two claims, separated by time, are found to constitute two separate accidents.	Kuhn's of Brownsville, Inc. v. Bituminous Casualty Co. (1954).

(Insurance Coverage Analysis, n.d).

The Insurance Coverage Analysis (n.d) maintains that Idaho and Tennessee are two US states which continue to apply the effects test in determining the number of occurrences. The previously mentioned outcome in *Elston-Richards Storage Co. v. Indemnity Co.* (1960), may explain why the majority of US states do not apply the effects test.

6.1.3 The Unfortunate Events Test

Certain jurisdictions apply neither the cause test nor the effect test, arguing that the definition of an occurrence applied under each test is not suitable for their purpose. Such an occurrence is said to have arisen without any foresight. Where no common element exists between

occurrences, a separate occurrence is said to have arisen from an event or events of an unfortunate nature (Masters, 2005). The terminology applied in determining the number of occurrences, that of an 'accident', is taken from the much quoted case *Arthur A. Johnson Corporation v. Indemnity INA* (1959). An accident is understood as the "common sense of an event of an unfortunate character that takes place without one's foresight or expectation" or "an unexpected, unfortunate occurrence" (*Arthur A. Johnson Corporation v. INA*, 1959: 228).

The above case illustrates the application of the unfortunate events test, where the collapse of two walls resulting from the same cause was said to constitute two separate accidents, for the purpose of determining the number of claims payable by the insurer. Two walls were built in parallel to one another, and following heavy rainfall the walls collapsed. The court ruled that this incident must be interpreted as an accident in the sense that the ordinary man would have anticipated the event when taking out such a policy. The court explained that had the walls been constructed in a different location and been subjected to the same conditions i.e. heavy rainfall, the collapse of the walls would constitute two separate accidents not due to heavy rainfall, but rather due to negligence in the construction of the wall. Thus, the collapse of the walls was the result of an unfortunate event.

Based upon this result, the insurer was liable to pay only up to two limits of indemnity of $50 000. Therefore, any uninsured cost would be borne by the insured.

In *Metropolitan Life Insurance Company v. Aetna Cas. & Sur. Co.et al.* (2001), it was put forward that the courts ought to look to the event from which liability arises and not to some previous point in the causal chain. The unfortunate events test is not at all concerned with the cause or what the doctrine of proximate cause dictates. The unfortunate events test is concerned with the event which triggers the liability on the part of the insured. Therefore, this test differs to the cause test as it is concerned with the (most) immediate cause that has resulted in bodily injury or property damage. The unfortunate events test looks to the cause at

the end of the causal chain as opposed to the remote cause which triggers a sequence of events leading to the bodily injury or damage (Baumunk, 2003).

Table 5: State by State Analysis: Definition of Occurrence Under the Unfortunate Events Test

State	Definition of occurrence	Case law
Connecticut	Applied the definition given in *Arthur A. Johnson Corporation et al, v. Indemnity* (1959: 228): "Accident" in its "common sense of 'an event of an unfortunate character that takes place without one's foresight or expectation".	Metropolitan Life Insurance Co. v. Aetna Cas. & Sur. Co. (2001).
New York	"Accident" in its "common sense of 'an event of an unfortunate character that takes place without one's foresight or expectation".	Arthur A. Johnson Corporation *et al*, v. Indemnity INA (1959: 228).

(Insurance Coverage Analysis, n.d).

While Table 5 demonstrates that only two US states make use of the unfortunate events test, its application has had a significant impact upon the manner in which claim series clauses are applied; particularly in the outcome of *SR International Business Insurance Co. Ltd. [SR Int'l] v. World Trade Centre Properties, LLC,[WTC Prop] et al.*, (2003) which dealt with the 9/11 attack (Baumunk, 2003).

Table 6: Comparison of Cause, Effect and Unfortunate Events Tests

	Cause Test	**Effect Test**	**Unfortunate Events**
Definition	Occurrence arising from an accident, including continuous or repeated exposure to conditions.	Effects of the loss causing the event.	Accident in its common sense of an event of an unfortunate character that takes place without one's foresight or expectation.
Number of occurrences	Determined from the standpoint of the insured.	Determined from the standpoint of the injured party.	Determined by event(s) which trigger liability on the part of the insured.
Test source	Look to the proximate cause.	Look to the effects of loss causing event.	Look to the 'accident' as interpreted by the ordinary man.

(*Metropolitan Life Insurance Company v. Aetna Casualty and Surety Company et al*., 2000).

According to Insurance Coverage Analysis (n.d), 50 State Analysis, there are no recorded cases dealing specifically with the issue of the number of occurrences, in the following US states: Alaska, Colorado, Delaware, New Mexico, North Dakota, North Carolina, Vermont, Washington and Wyoming.

Additionally, in terms of the Insurance Coverage Analysis (n.d) the following US states: Kansas, Kentucky, Montana, Nebraska, New Hampshire and South Dakota are found to deal with the issue of a number of occurrences. However, it is unclear as to which test is employed in determining the number of occurrences.

In summary, 31 US states employ the cause test, 2 make use of the effects test and 2 states apply the unfortunate events test in determining the number of occurrences forming a series of claims (Insurance Coverage Analysis, n.d). The cause test is employed by the majority of the US states as it is considered to be the most logical, and offers the broadest possible wording for aggregating losses (Trocke & Dillion, 1993). To further illustrate the significance of the cause test an illustrative scenario is given below.

Scenario:

Two employees working at a financial institution are receiving 'kickbacks' due to dishonest acts. A fidelity liability policy[6] is in place. These dishonest acts are covered by the fidelity liability policy. It is necessary to determine how many occurrences have taken place in order to establish the amount payable under the policy.

The effect tests, unfortunate events test and the cause test have been applied to this scenario to demonstrate their respective applicability.

The effects test is inadequate in determining the number of occurrences; as the test evaluates the number of occurrences with respect to the injured party, as summarised in Table 6 above. Thus, in the context of this scenario, no inferences can be made as to the number of occurrences as it involves a single party (the two employees) of the financial institution. Therefore, regardless of the amount of the loss, one is unable to determine the number of occurrences which resulted in the loss (Trocke & Dillion, 1993). Furthermore, Kalis *et al* (2004) state that under the effects test the number of occurrences is measured by the amount of claims or injuries which arise from the event in question. The cause of the losses suffered is due to the act of receiving kickbacks, and not from the number of dishonest acts committed by the employees. Hence, in this scenario, irrespective of the number of

[6] Fidelity liability policy provides coverage against financial loss which may arise during the operation of financial institutions (Camargue, 2012).

claims which may arise from either the financial institution or one of its clients, the number of occurrences would depend upon the number of times the two employees received kickbacks.

The unfortunate events test is primarily concerned with the acts of the insured as explained in Table 6 above. With respect to this scenario, assessing the acts of the financial institution would serve no purpose, as cover under a fidelity liability policy is generally triggered as a result of employee dishonesty and not as a consequence of the insured's negligence. Therefore, the acts of the insured are immaterial in determining the number of occurrences (Trocke & Dillion, 1993).

Therefore, in the light of the outcomes of the effect test and the unfortunate events test, it may be said that the cause test would prove to be the most appropriate test in determining the number of occurrences. The cause test looks to the proximate cause and acknowledges that occurrences may take place over an extended period of time. Thus, the cause test would identify the act of employee dishonesty to be the cause of the loss. Furthermore, should collusion between the two employees be found, one may then find reason to aggregate the number of occurrences resulting in the loss (or series of losses) caused by each employee to constitute a single occurrence or to permit the aggregation of the series of losses into one claim (Trocke & Dillion, 1993).

This scenario has effectively demonstrated how the cause test is a far more practical test in its application, demonstrating why the majority of US states have adopted this test when dealing with the issue of the number of occurrences.

6.2 UNITED KINGDOM

The wording of claim series clauses in the UK are not standardised as seen in the USA, where much attention is focused upon the interpretation of a 'cause' and an 'occurrence'. No

standard liability policy wording is used in the UK. Thus, the allocation of claim series clauses in liability policies are determined by the precise wordings of each clause defining the unifying factor, permitting the aggregation of losses (Burns, 2003; Lewis, 2011).

The judicial interpretation of the claim series clause is dependent upon the description of the unifying act or event. Burns (2003) acknowledges that a narrow and specific description of the unifying act or event leaves little room for the analysis of claims, making it more difficult to trigger a claim series clause. Conversely, a wide and general description of the unifying act or event allows for the easy aggregation of losses.

In light of this, it is important to give particular attention to the language used in claim series clauses as different policies exercise different language. Since much depends upon the specific policy wording and circumstances at hand, it is important to analyse case law to establish the basis on which claim series clauses take effect (Burns, 2003; Lewis, 2011).

6.2.1 The Unities of Time, Place and Cause

Under English law it was held that the words 'event' and 'cause' are one and the same (Barlow, Lyde & Gilbert, 2007). However, this statement has been contested in *Axa Reinsurance (UK) plc. v. Field [1996] 3 All ER 517,* an 'event' and cause' are shown to have different meanings. Thus, the unities test of time, place and cause (unities test) has been construed to distinguish an event from a cause. The case of *Axa v. Field* (1996) illustrates the distinction between these two terms. It was queried if the negligent acts by three underwriters could be aggregated to constitute a single claim. Two policies were in question, an error and omissions (E&O) policy and an excess layer policy.

Under the E&O policy, the aggregation of claims wording was given for losses "arising from one originating cause" (*Axa v. Field 1996:*518). Under the excess layer policy, aggregation of losses was provided on the basis of "each and every loss…arising out of one event" (*Axa v.*

*Field 1996:*518). Three originating causes were found under the E&O policy. This led to the appeal that if three originating causes were found under the E&O policy then, three separate events must be found under the excess layer policy. Lord Mustill objected to this statement, arguing that "a 'cause' was not the same as an 'event', since an 'event' was something which happened at *a particular time, at a particular place and in a particular way*, where a cause could be a continuing state of affairs or the absence of something happening" (*emphasis added*) (*Axa v. Field 1996:*518). This statement made reference to the unities test. This signifies that when classifying an event there must be a relationship to a specific time frame, place or manner (cause) in which the event occurred.

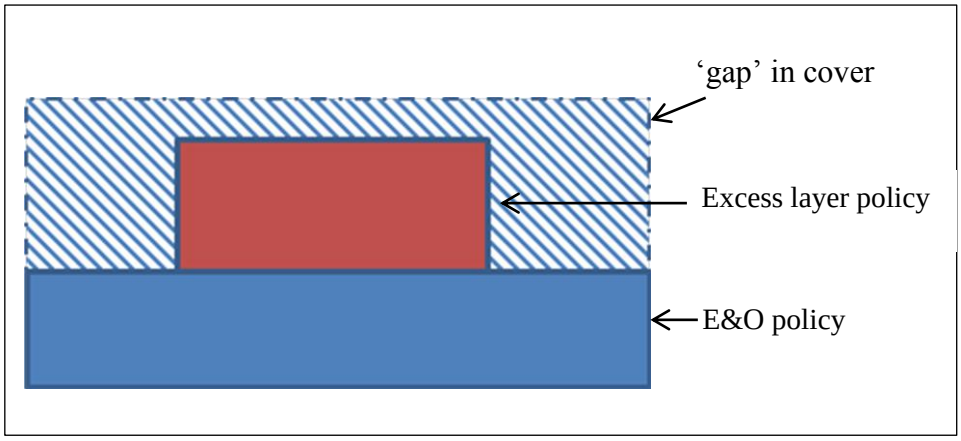
Table 7: Lord Mustill's Definition of an 'Event' and 'Cause'

Term	Definition
Cause	A continuing state of affairs, arising from an originating cause.
Event	Something which happened at a particular time, at a particular place and in a particular way.

(*Axa v. Field*, 1996).

Therefore, in terms of the definitions of a 'cause' and 'event' Figure 2 below portrays how the two policies have responded to the claim. The E&O policy applied Lord Mustill's definition of a cause, and hence all three claims were aggregated to constitute a single claim. However, the excess layer policy, which is a far narrower wording due to the constraints of the unities test, did not permit the aggregation of the losses; and were considered as three separate events. Thus, as Figure 2 indicates, essentially a 'gap' in cover had resulted. Consequently, the E&O policy will pay for the amount of the loss as per the policy limit, however, the excess layer policy does not pay, resulting in a 'gap' in cover. The amount not paid under the excess layer policy was deemed to be uninsured and the insured carried the burden of the associated costs.

Figure 2: Aggregation of Claims, 'Event' and 'Cause' Interpreted According to *Axa v. Field* (1996)



In the interpretation of *Axa v. Field* (1996), the court acknowledged that the claim series clause in both the primary policy and excess layer policy are intended to have the same effect. Due to the difference in terms of an 'event' and 'cause' the excess layer policy did not pay for all three claims. Thus, to prevent the eventuality of a difference in claim series wordings, the primary and excess layer policy should be construed accordingly.

In *Midland Mainline Ltd. & Ors v. Commercial Union Assurance Company Ltd. & Ors* (2003) claims were made against owners of railway networks whose speed restriction and line closure adversely affected the operation of train companies. In this particular case it was queried whether each speed restriction or line closure constituted a separate cause or event, and whether such occurrences or events may be aggregated on the grounds that the 'losses or series of losses' resulted from 'a single event' or 'one event', where only one deductible of £5,000 would apply (*Midland Mainline Ltd v. Commercial Union*, 2000:13).

The court's decision arose from the application of the unities test. This test stipulated that in order to constitute the claims as arising from one event the unities of time, place and cause and, where a human agent is involved, intention must exist (*Axa v. Field,* 1996). No unity of

time existed as the speed restrictions and line closures were found to have occurred over an extended period of time. In additiony, no unity of place existed either as the speed restrictions and line closures were imposed great distances apart. Hence, the claim constituted separate events. Therefore, a deductible of £5,000 was payable by the insured for each loss suffered (*Midland Mainline Ltd v. Commercial Union,* 2000).

The outcome of the pension mis-selling case of the 1990s, *Lloyds TSB General Insurance Holdings and others v. Lloyds Bank Group Insurance Company Ltd* (2003), has had a significant impact upon the manner in which subsequent claim series clauses have been interpreted and applied in insurance and reinsurance markets. In this case, 22 000 claims arose from the pension mis-selling which resulted from the lack of a management training system and monitoring of the advisors. None of the individual claims exceeded the £35 000 deductible. Each individual mis-selling was found to be the proximate cause and a claim in terms of the claim series clause (AAR, 2003; Barlow *et al*., 2004).

Lord Hoffman acknowledged that the wording of a claim series clause specifies the availability of coverage. He noted that the words: event, cause and act or omission, each have different meanings. The manner in which these are interpreted determines if a claim series clause is triggered (*Lloyds TSB General Insurance Holdings and others v. Lloyds Bank Group Insurance Company Ltd,* 2003).

The particular wording in question was the phrase ‘arising from a single act or omission’ or ‘series of related acts or omissions’. The House of Lords concluded that the act or omission giving rise to a civil liability claim in respect of each claim was the sales representatives’ failure to administer accurate advice to each insured. This advice was different in each case. No common causal relationship was found to exist which would demonstrate that the act or omission was related, triggering the ‘related series of acts or omissions’ phrase found in the policy wording. Due to the absence of the causal relationship the claims did not arise from a ‘single act or omission’ or ‘a series of acts or omissions’. It was ruled that each claim arose

from a separate act. No claim series clause took effect, consequently Lloyds TSB was not liable to pay out any amount as none of the claims exceeded the £35 000 deductible (AAR, 2003; Barlow *et al*., 2004).

Table 8: Lloyds TSB General Insurance Holdings and Others v Lloyds Bank Group Insurance Company Ltd Definitions

Term	Definition
Act or omission	A breach in respect of which civil liability arises on the part of the insured.
Event	Something that happens at a particular time, at a place, in a particular way.
Cause	Refers to the 'single act or omission', or 'a related series of acts and omissions'.

(*Lloyds TSB General Insurance Holdings and others v. Lloyds Bank Group Insurance Company Ltd*, 2003).

Table 8 presents a new wording, 'act or omission', with which a claim series clause may take effect. Thus, where a causal relationship is found to exist between numerous acts or omissions, the claims may be said to have arisen from a series of acts or omissions (AAR, 2003). The term event employs the same definition given by Lord Mustill in *Axa v. Field* (1996). A cause has been defined in order to encompass the wording found in the claim series clause of the policy.

In light of the above definitions, it must be stated that the basis for the aggregation of claims in this case was based upon the narrow and specific wording of 'related series of acts or omissions'. Had the policy defined a claim series clause to rely upon the term event, the outcome of *Lloyds TSB v. Lloyds Bank Group* (2003) may have been very different (Brook, 2002; AAR, 2003; Burns, 2003; Barlow *et al*., 2004).

As evidenced by the above mentioned cases, courts construe the terms event, cause, occurrence and act or omission differently. Some courts interpret these terms more broadly than others. Therefore, the provision made for claim series clauses will also differ; the aggregation of claims may arise from an act or omission or from an event, occurrence or cause (Burns, 2003; Traub *et al*, 2010; Lewis, 2011).

6.3 AUSTRALIA

Australian law is strongly influenced by English case law, thus the interpretation and application of claim series clauses in Australia is addressed in a similar manner to the UK treatment. The aggregation of a series of losses is determined by the policy wordings and hence, the interpretation, of the terms 'event', 'cause' and 'occurrence' found in the claim series clauses. Where a policy fails to define these terms or policy definitions are ambiguous Australian courts are found to follow UK precedent (AAR, 2003).

6.3.1 Occurrence and Event

In *QBE Insurance Ltd v. MGM Plumbing Pty Ltd* (2003), MGM Plumbing was negligent in its installation of waterproof membranes in the bathrooms of 47 homes. The total amount of damages claimed against MGM Plumbing totalled A$77 000. MGM Plumbing made a claim against its insurers. In response the insurers, QBE Insurance, held that MGM Plumbing was liable to pay a deductible of A$300 per claim, as stipulated under the policy conditions. This totalled a deductible of A$14,100 to be paid by MGM Plumbing. MGM Plumbing contested this response arguing that only one deductible was to be paid. In resolution of this matter Justice Ambrose made reference to the policy wording. It was observed that the policy was written on a per occurrence basis. Therefore, a deductible of A$300 was to be paid per occurrence. The policy defined an occurrence as "an event including continuous or repeated exposure to substantially the same general conditions, which results in Property Damage neither expected nor intended" (*QBE Insurance Ltd v. MGM Plumbing Pty Ltd*, 2003:12).

Upon the interpretation of the above definition, reference was made to *Windsurf Pty Ltd v. HH Casualty & General Insurance Limited* (1999) in order to determine the number of occurrences; the policy contained a similar definition for an occurrence as defined in the *QBE Insurance Ltd v MGM Plumbing Pty Ltd* (2003) policy wording. In *Windsurf v. HH Casualty & General Insurance Limited* (1999) the court held that the policy wording was meant for much broader application, thus the wording of "continuous or repeated exposure" did not apply. Instead the term event was interpreted. The interpretation of an event employed the views delivered by Lord Mustill in *Axa v. Field* (1996), which dealt with the unities test.

Following the application of the unities test, Justice Ambrose ruled that the application of the waterproof membranes in each bathroom constituted a separate occurrence. Thus, 47 occurrences were deemed to have taken place. MGM Plumbing was liable to pay a total deductible of A$14,100.

6.3.2 Original Cause and Series

Distillers Co Bio-Chemical (Aust) Pty Ltd v. Ajax Insurance Co Ltd, (1974), dealt with the proceedings of the High Court construing a public liability policy[7] for claimants who had consumed the drug Distaval. Distaval was prescribed to pregnant women; the drug contained a chemical agent called thalidomide which resulted in birth defects in their babies. Under the policy Ajax agreed to indemnify Distillers Co up to a maximum amount of $100 000 per claim. Distillers Co argued that a limit of indemnity for each and every claim should be included under the policy. Ajax held that the $100 000 would apply to the event as a whole. The court upheld this statement, and further emphasised the condition of the policy that such an amount will only be payable "to any claimant or number of claimants in respect of or arising out of all occurrences of a series consequent on or attributable to one source or

[7] "Public liability insurance protects individuals, businesses and organisations against the financial risk of legal liability to third parties for death or injury, loss or damage to property, or 'pure economic' loss in areas not specifically excluded or covered by statutory schemes" (Productivity Commission 2002: 9).

original cause" (*Distillers Co Bio-Chemical (Aust) Pty Ltd v. Ajax Insurance Co. Ltd*, (1974: 1).

From this policy condition the court defined the term 'series' to mean a "temporal sequence and similar in nature" (*Distillers Co Bio-Chemical (Aust) Pty Ltd v. Ajax Insurance Co Ltd*, 1974: 25). The original cause or source was considered to be the composition of the drug which consisted of thalidomide. Therefore, the occurrence(s) were considered to be precedent to the bodily injury done to the unborn babies. In light of this, all claims were considered to have arisen from a common source, and thus may be aggregated to constitute a single occurrence. The claims were similar in nature and arose in temporal succession after one another. Therefore, a single amount of $100 000 was payable by the insurer.

The terms 'event' and 'originating cause or series' took on the definitions provided by Lord Mustill in *Axa v. Field* (1996). This indicates that the Australian law has been influenced by English law. In addition to this, Australian law may also be observed to have been influenced by the US decisions. This was evident in the judgment of *QBE Insurance Ltd v. MGM Plumbing Pty Ltd* (2003), whose policy defined an occurrence to mean a "…continuous or repeated exposure…" Additionally, it is further observed that no precise definition of the term 'occurrence' has been given under English Law, which may explain the application of the USA's definition of an occurrence under Australian law (AAR, 2009).

6.4 CANADA

Rhone and Branch (2008) acknowledge that very little Canadian case law has contributed to the matter of claim series clauses and the issue of the determination of the number of occurrences. Whilst the various US states employ either the cause, effects or unfortunate events test in determining the number of occurrences, no specific stance has been adopted by the Canadian courts to determine the number of occurrences and hence the application of claim series clauses. Instead, the specific policy wordings in question and the facts presented

in the case at hand are interpreted to deduce the number of occurrences and whether or not aggregation of losses may be permitted.

In *Canadian Gas Association v. Guardian Insurance Co*. (1998) a class action[8] was made against the insurers, Guardian Insurance Co. for damages suffered by 10 000 homeowners. It was argued that the insurer's had no duty to pay out any amount under the liability policy, since none of the 10 000 claims exceeded the deductible of $25 000. The court then questioned if the deductible of $25 000 "applies once to the claims made or does it apply separately and repeatedly to each individual claim" (*Canadian Gas Association v. Guardian Ins. Co.,* 1998: 3*).*

With reference to the precise policy wordings the limit of indemnity was "applicable to 'each occurrence' … for loss on account of all claims made against the insured arising out of any one occurrence" (*Canadian Gas Association v. Guardian Ins. Co.,* 1998:17a). Based upon this wording, it was held that a deductible of $25 000 applied to each loss; however, before passing judgment, reference was made to the US case *Horace C. Lamberton, Jr., et al. v. The Travelers Indemnity Company* (1975). In *Horace C. Lamberton, Jr., et al. v. The Travelers Indemnity Company* (1975) it was held that although each injury arose from the same cause, a deductible was applicable to each claim against the insured and not to each injury caused.

Thus, in resolution of *Canadian Gas Association v. Guardian Ins. Co*.(1998) and in light of the above judgment in *Horace C. Lamberton, Jr., et al. v. The Travelers Indemnity Company* (1975) the court ruled that only one deductible was payable by the insurers.

[8] "A class action is a procedure enacted to provide a means for a large group of injured persons to sue wrongdoers without identifying every group member in the lawsuit" (OECD, 1999: 97).

Based upon this judgment, one may observe that the claims were found to have originated from the same cause. Therefore, there was one occurrence which permitted the aggregation of losses, hence only one deductible was payable.

In *Canadian Lawyers' Insurance Association v. Yang*, (1997) a lawyer was found negligent in the management of money for the purpose of an immigration investment programme of seven clients. Each client had individually invested $250 000, and thus suffered damages equivalent to this amount. The court held that the lawyer had committed seven negligent acts, in which each client had "received a separate and distinct professional service" (*Canadian Lawyers' Insurance Association v. Yang,* 1997:1). Hence, the claim made constituted several occurrences. The insurers maintained that the investments of the seven clients was to be grouped together in order to purchase a shopping centre. This entailed one real estate transaction and hence constituted a single occurrence. Therefore, the issue at hand was to determine the number of occurrences.

The liability policy in question defined an occurrence as "any alleged act, error or omission of an insured…and which occurs in the performance of Professional Services for others, provided, however, that if more than one act, error or omission occurs or is alleged to have occurred in relation to the same professional service than all such acts, errors and omissions shall be deemed to be a single occurrence" (*Canadian Lawyers' Insurance Association v. Yang, 1997:35).*

In light of the above definition of an occurrence, it was held that the lawyer provided each client with a professional service in which the lawyer respectively acted for the purpose of the investment of funds. The pooling of the investments to pursue a real estate transaction was not considered to be a separate act. Therefore, each of the seven acts was considered to be committed in relation to the same professional service. On this basis, the court ruled that the claim constituted one occurrence (*Canadian Lawyers' Insurance Association v. Yang,* 1997). As a result only one limit of indemnity of $1 000 000 was payable. The judge awarded

damages of $237 000 as well as interest on the initial investment of $250 000. Thus, the total cost of the claim exceeded the limit of indemnity and was not recoverable under the insurance policy in question.

6.5 SOUTH AFRICA

The application of claim series clauses differs somewhat from that seen in the US or UK. While claim series clauses are included in the policy wordings to limit the liability of the insurer, the construction of the clause is found to differ when looking at a standard policy and a specialised liability policy (Colman, 2012).

The standard policy is commonly referred to as the Multimark policy. This policy came into effect in the late 1980s, due to the rapidly increasing number of short-term insurers in the South African industry. Each of these insurers issued their own policy wordings. These policy wordings were found to be inconsistent, and thus made it difficult to identify the benefits under a policy among the various short-term insurers. In response to this, the South African Insurance Association (SAIA) introduced the Multimark policy. The Multimark policy was to provide a framework to guide short-term insurers on the underwriting of their policies. Thus, the Multimark policy essentially acted as a benchmark (Liebenberg, 2012).

Due to the rapid development and increasing competiveness of the insurance industry, SAIA believed the Multimark policy to be in conflict with certain sections of the Competition Act No. 98 of 1998. In 2007, SAIA has recommended that application of the Multimark policy be discontinued; and has been replaced by the Standard Business Policy Guidelines (Colman, 2009).

Colman (2009: 1) acknowledges that although the Multimark policy is no longer viewed as a "market agreed" policy numerous insurers continue to apply the Multimark wording and have subsequently rebranded the wording under the respective company name. The continued use

of the Multimark policy has been seen to be applied by the large industry insurers who sell more general liability cover. On the other hand, smaller more specialised underwriters have followed the advice of SAIA and subsequently excluded the Multimark policy from their policy wording.

Due to insufficient case law dealing with claim series clause in South Africa, the Multimark policy wording and that of specialised underwriters provide an adequate framework to analyse the application of claim series clauses. Two types of policies will be looked at to illustrate the use of claim series wording in South Africa; namely the Attorneys, Notaries and Conveyancers' professional indemnity policy and its corresponding excess layer policy.

Attorneys, notaries and conveyancers' professional indemnity insurance is available under two separate policies. The first policy, known as a primary policy which affords compensation to an injured third party arising out of acts such as negligence and fraud committed by an attorney, notary or conveyancer. This primary policy is not issued by an insurer but by the Attorneys Fidelity Fund.[9] The second policy is an excess layer policy which provides coverage for civil liability, obtainable from an insurer.

An analysis of the claim series clauses in the relevant sections of each policy will now be considered.

[9] The Attorneys Fidelity Fund is a statutory body governed by the Attorneys Act No. 53 of 1979 (Attorneys Fidelity Fund, 2010).

6.5.1 Policy Example – Attorneys, Notaries and Conveyancers

Primary policy clauses (Annexure 1)

Limit of Indemnity: "All claims *arising out of one act or omission* or out of the dishonesty of any one person or any number of persons…shall be deemed to *arise out of one event or occurrence*" (*emphasis added)* (Glenrand M.I.B, 2009: 3).

Deductible: "The insured shall be responsible for the first amount of any claim…*arising out of one event or occurrence*…" (*emphasis added)* (Glenrand M.I.B, 2009: 3).

Excess layer policy clauses (Annexure 2)

Limit of Liability: "*Per Claim or series of claims arising from one originating cause or source*…" (*emphasis added*) (Santam, 2006:2).

Deductible: "*Per Claim or series of claims arising from one originating cause or source…*" (*emphasis added*) (Santam, 2006:3).

The primary policy wording makes reference to an 'event or occurrence' while the excess layer policy refers to an 'originating cause or source'. These two policies are administered by two different institutions. Thus, should each of these institutions regard this choice of words to have separate meanings and not be interpreted in the same manner, the following scenario illustrated below may result, as seen in *Axa v. Field* (1996).

Axa v. Field demonstrated that the terms 'event' and 'cause' have different meanings. As summarised in Table 7, it was ruled that an event is something that happens at a particular time, in a particular place and in a particular manner; hence was subject to the unities test. A

cause was defined as a continuing state of affairs, arising from an originating cause (*Axa v. Field*, 1996).

As observed by Burns (2003) the choice of words in the claim series clause may allow for easy aggregation of losses if a wide wording is employed. Conversely, if a more narrow wording is used it becomes more difficult to aggregate a plurality of losses. With respect to the terms an 'event' and 'cause', an event is deemed to be a far narrower wording as it is constrained by the unities test, effectively making it more difficult to trigger the claim series clause.

On the other hand, the definition of a 'cause' is a much wider wording, and is ultimately subject to the proximate cause test. This allows for a far wider interpretation of the sequence of events resulting in numerous losses, allowing for the easy aggregation of such losses (Burns, 2003).

To illustrate the impact of the different wording of an 'event' and 'cause' two cases are presented, (i) 'event' and 'cause' interpreted to have the same meaning; and (ii) 'event and 'cause' interpreted to have different meanings.

Scenario:

An insured individual makes four claims. Two policies are in place, a primary policy with a limit of indemnity of R5 000 000, and an excess layer policy with a limit of indemnity of R5 000 000.[10]

[10] Assumptions: no deductible payable and no reinstatement under the policies.

Claims	R
1	4m
2	2m
3	3m
4	1m
Total	10m

Case 1: 'Event' and 'Cause' Interpreted to have the Same Meaning

Claims	R
1	4m
2	2m
3	3m
4	1m
Total	10m

Aggregated to constitute one claim →

Claims	R
1	10m
Total	10m

If the terms 'event' and 'cause' are interpreted in the same manner then the assumption is made that both the primary policy and the excess layer policies aggregate the four claims to constitute a single claim of R10m. There is no deductible payable under this policy arrangement. The primary policy has a limit of indemnity of R5m. Thus, the excess layer policy is then triggered and the remaining R5m is covered. No amount is left uninsured. This is shown in Table 9.

Table 9: Aggregation of Claims, 'Event' and 'Cause' Interpreted to have the Same Meaning

	Claim series wording	**L.O.I (R)**	**No. of claims aggregated/covered**		**Amount covered under policy (R)**
			Event	**Cause**	
Primary Policy	'event'	5m	4		5m
Excess layer policy	'cause'	5m xs 5m		4	5m xs 5m

Table 9 may also be demonstrated graphically:

Figure 3: Aggregation of Claims, 'Event' and 'Cause' Interpreted to have the Same Meaning

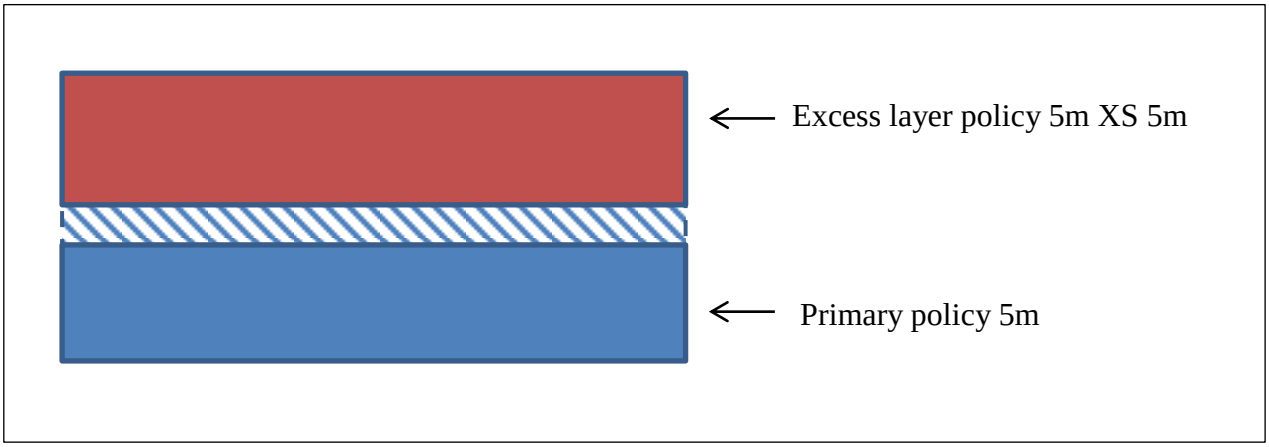


Figure 3 illustrates that both the primary and excess layer policies allow for the aggregation of all four claims to constitute a single claim. Thus, each policy provides an equal scope of cover.

Case 2: 'Event' and 'Cause' Interpreted to have Different Meanings

However, if the terms 'event' and 'cause' follow the definitions as provided by *Axa v. Field,* (1996) then under the primary policy claims one and two are deemed to be one event and hence, constitute one claim. Claims three and four are seen to be separate events and are not aggregated to form a series of claims. Thus, the following situation would result:

Claims	**R**
1	4m
2	2m
3	3m
4	1m
Total	10m

Aggregated to constitute three separate claims →

Claims	**R**
1	6m
2	3m
3	1m
Total	10m

Under this scenario, only the first two claims have been aggregated to form a single claim of R6m. The excess layer policy is then triggered and covers the remaining amount of R1m. Now the problem of having two differently worded aggregation clauses becomes apparent. The remaining two claims, the reconstituted claims two and three, were not found to satisfy

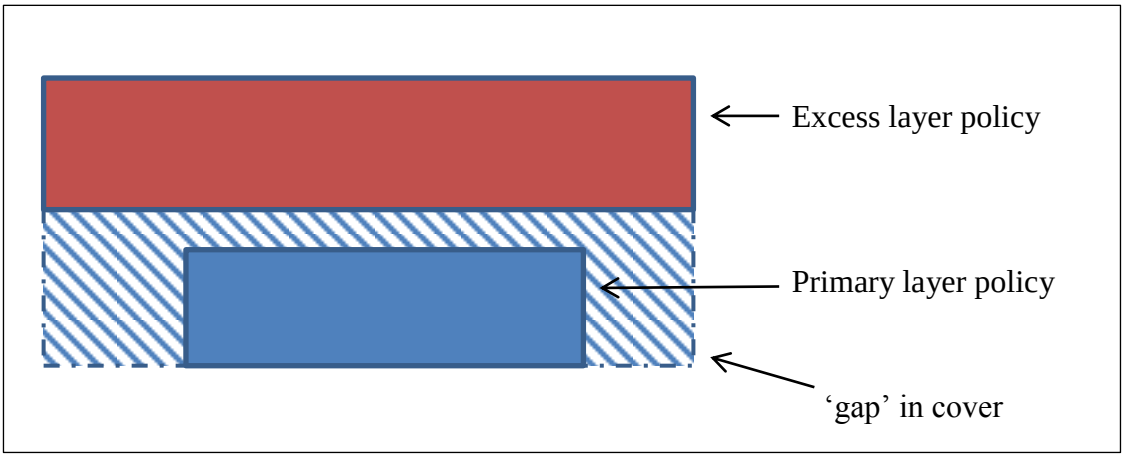
the unities test. Thus, these two claims may not form part of the claim series; therefore claims two and three constitute separate claims. The effect of this is that the limit of indemnity of the primary policy has been exhausted, and the insured now bears the expense of R4m of the remaining two claims.

Table 10: Aggregation of Claims, 'Event' and 'Cause' Interpreted to have the Different Meanings

Claim		**Claim series wording**	**L.O.I (R)**	**No. of claims aggregated/covered**		**Amount covered under policy (R)**
				Event	**Cause**	
1	Primary Policy	"event"	5m	2		5m
	Excess layer policy	"cause"			4	1m
2	Primary Policy	"event"		2		4m
3	Excess layer policy	"cause"			2	

Essentially this contrast in the claim series clause of the primary and excess layer policy has resulted in a 'gap' in cover. This is demonstrated by Figure 3 below, where cover is available, but due to the difference in policy wording of the claim series clause, this excess layer cover is consequently not triggered.

Figure 4: Aggregation of claims, 'event' and 'cause' interpreted according to *Axa v. Field* (1996)



The outcome of this scenario emphasises Lord Mustill's statement in *Axa v. Field (1996)* in which he commented that where primary and excess layer policies are intended to be back-to-back, the requirements for aggregation are to be identical. That is, both policies should employ the same claim series clause wording; and hence a 'gap' in cover should not arise.

Thus, the subtle difference in the wording of the claim series clause in the primary and excess layer policy can result in the above scenario; where the main cause of concern is the effect it may have on the availability of cover.

7 SUMMARY OF CLAIM SERIES WORDING BY COUNTRY

Table 11: Summary of Claim Series Wording by Country

Country	Claim series wording	Definition	Test source
USA	Cause	Proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage.	Doctrine of proximate cause.
	Occurrence	An accident including continuous or repeated exposure to substantially the same general harmful conditions, that results in bodily injury or 'property damage which is neither expected nor intended from the standpoint of the insured.	Cause test.
	Occurrence	A closely related series of repetitive events constitutes a single 'occurrence'.	Effects test.
	Accident	An unfortunate character that takes place without one's foresight or expectation.	Unfortunate events test.
United Kingdom	Event	Something which happens at a particular time, at a particular place and in a particular way.	Unities test
	Cause	A continuing state of affairs, arising from an originating cause.	
	Act or Omission	A breach in respect of where civil liability arises on the part of the insured.	

Australia	Occurrence	An event including continuous or repeated exposure to substantially the same general conditions, which results in property damage.	
	Event	Something which happened at a particular time, at a particular place and in a particular way.	
	Series	A temporal sequence and similar in nature.	
Canada	Not defined	Based upon policy interpretation.	Proximate cause test.
South Africa	Event	Something which happened at a particular time, at a particular place and in a particular way.	
	Cause	A continuing state of affairs, arising from an originating cause.	

8 CONCLUSION

In summary, the claim series clause is employed to determine the amount of coverage the insured is entitled to when a series of losses have given rise to a claim. As this research report has demonstrated, across different countries different tests and terms are used in various contracts, to define what may constitute a single or multiple occurrences, and hence permit the aggregation of losses.

However, irrespective of the differing terms used in the construction of the claim series clause it may be stated that there exists only one common feature which must be identifiable when evaluating the number of occurrences. This common feature is the existence of a unifying factor. Without the identification of a unifying factor no mutual element may be

found on which to allow the claim series clause to take effect. Thus, it is concluded that the different wording of claim series clauses merely serve as a parameter for the aggregation of a series of losses.

The significance of claim series clauses is most apparent when the insured is exposed to a plurality of losses and either the deductible(s) payable by the insured or sums indemnifiable by the insurer are substantial.

9 LIMITATIONS OF THE RESEARCH

In regard to South Africa, little case law was found to document disputes arising from the issue of the number of occurrences, and more specifically the application of claim series clauses within the South African liability insurance market.

10 FUTURE RESEARCH

The role of claim series clauses in the reinsurance market: where the reinsurance market predominantly serves to absorb unexpected liabilities arising from catastrophe losses or a series of large losses in which the sums insured are too great for individual firms to solely indemnify.

11 REFERENCES

Allens Arthur Robinson. (2003). "Many claims or a single claim – the importance of aggregation clauses" Sydney, Australia.

Allens Arthur Robinson. (2009). "Aggregation in Insurance and Reinsurance Contracts: Claims arising out of one event or occurrence". Sydney, Australia: Edmond, J., Mendoza-Jones, D.

Arrow, K.J. (1971). Insurance, Risk and Resource Allocation *In Foundation of Insurance Economics: Readings in Economics and Finance.* Boston: Kluwer Academic Publishers.

Attorneys Fidelity Fund. (2010). *Attorneys Fidelity Fund.* Retrieved May 13 2012, from http://www.fidfund.co.za/

Aylward, M.F. (2002). Twin Towers: The 3.6 Billion Question Arising from the World Trade Center Attacks. *Defense Council Journal*, 169 -179.

Barlow, Lyde & Gilbert. (2004). *Counting Claims after Lloyds TSB*. London: Mondaq Business Briefing.

Barlow, Lyde & Gilbert. (2007). United Kingdom: A-Z of Reinsurance: Aggregation and Allocation. London: Mondaq Business Briefing.

Baumunk, J.A. (2003). New York's "Unfortunate Event" Test: It's Application Prior to the Events of 9/11. *California Western Law Review* 39, 323 -348.

Berry, C. (2009). 'The Determination of Revised Increased Limit Factors and Deductible Credit for S.A. Professional Indemnity and Fidelity Guarantee Insurance Business". Unpublished Honours Research Report, University of the Witwatersrand.

Blame, B.A. & La Barbera, J.D. (2009). Wisconsin Supreme Court rules on Number of Occurrences Allocation. *The National Law Review*. Retrieved March 22, 2012, from http://www.natlawreview.com/article/wisconsin-supreme-court-rules-number-occurrences-allocation

Bloomberg. (2011). Law Reports, Insurance Law: *The Insurance Aftermath of Earthquakes and Tsunami in Japan, Flooding along the Mississippi River, and Tornadoes in the*

South: Addressing the 'Number of Occurrences' Question. Bloomberg Law Reports: Kornfeld & Thayer.

Brook, N. (2002). *Aggregation of Losses: Pension Mis-selling Lloyds TSB v Lloyds Bank Group Insurance Co Court of Appeal*. United Kingdom: Mondaq Business Briefing.

Burns, A. (2003). *Watch your Words: Aggregation of Insurance Claims*. Presented at the Meeting of Deductible Layer Reinsurers Countrywide, by Devereux Chambers.

Camargue. (2012). Financial Institutions Liability Cover. http://www.camargueum.co.za/product/financial-institutions-liability-cover. Retrieved August 15 2012.

Casey, T.F. (2009). The Number of Occurrences. *The Journal of Insurance and Indemnity Law*, 2 (1), 2-3.

Clarke, M. (1981). Insurance: The Proximate Cause in English Law. *Cambridge Law Journal*, 40(2), 284 – 306.

Colman, S. (2009). Breaking the Liability Insurance Mold – the broad-form of conversion. Camargue Underwriting Managers, South Africa.

Colman, S. (2012). Personal communication. May 29 2012.

Croly, C.V. (2002). The Reinsurance Implications of the Enron Collapse. *FDCC Quartley*, 53(1), 99-116.

Heath, S. (2010). Professional Indemnity, Liability and Small Business Insurance. *John Heath Insurance Brokers LLP*. Retrieved March 15 2012, from http://www.jhib.co.uk/articles/professional-indemnity-aggregate-or-any-one-claim-basis/215/..

Insurance Coverage Analysis. (n.d.) 50 State Coverage Analysis: State by State Survey. Retrieved April 15 2012, from http://coverageanalysis.com/

Insurance Day (2001) "Courts Make Rulings in Two Cases on the Aggregation of Losses". Retrieved April 21 2012, from http://www.i-law.com/ilaw/doc/view.htm?id=95905.

Kalis, P.J., Reiter, T.M., & Segerdahl, J.R. (2004). *Policyholder's Guide to the Law of Insurance Coverage.* United States of America: Aspen Publishers Inc.

Lewis, R. (2011). Aggregation and Divisibility of Damages in England and Wales: Insurance. Working Paper Series, Cardiff University.

Liebenberg, F. (2012). Personal Communication. July 16 2012.

Maclennan, R.J. (1897). *A Handy Book on Fire Insurance Law: Affecting the Company and its Customer,Being the Fire Sections of the Ontario Insurance Act 1987,with the Ontario Decisions Since 1876 and the Decisions of the Supreme Court of Canada.* Toronto: The Carswell Co. Ltd, the Law Publishers.

Mahomedy, J. (2008). 'An Examination of the Position of the so-called Incurred But Not Enough Reported Claims Provisions within the South African Professional Indemnity market'. Unpublished Honours Research Report, University of the Witwatersrand.

Maloney, F.J. (2002). The Application of "Per-occurrence" Deductible Provisions in First-Party Property Claims. *Tort & Insurance Law Journal,* 37(2) 921-947.

Masters, L. S. (2005) Cause – or Effect? The Legal Tests and Strategies Governing Number of Occurrences. *Evironmental Claims Journal,* 17(2) 109-132.

Mondaq Business Briefing. (2003). *Aggregation of Losses: Recent Developments in English Law*. London, UK.

OECD. (1999). *Glossary of Insurance Policy terms.* Paris, France.

Productivity Commission. (2002). *Public Liability Claims Management*, Research Report, Canberra, Australia.

Reinsurance Association of America (2012) *Glossary of Reinsurance Terms A-Z.* Accessed April 29 2012, from http://www.reinsurance.org/i4a/pages/Index.cfm?pageID=3477

Republic of South Africa. (1979). Attorneys Act No. 53 of 1979.

Republic of South Africa. (1998). Competition Act No. 98 of 1998.

Rhone, C. & Branch, W.R. (2008). *Insurance Issues in Class Actions - How Many Occurrences or Claims?* Branch MacMaster LLP, Canada. Retrieved April 28 2012, from http://www.branchmacmaster.com/insurance-blog/2008/7/25/insurance-issues-in-class-actions-how-many-occurrences-or-cl.html

Scruttonbland. (2012) *Excess Layer*. Insurance Brokers. Retrieved August 28 2012, from http://www.scruttonblandinsurance.co.uk/liability/excess_layer.php

Stettler, H., Eugester, F., & Kuhn, M. (2005). *Reinsurance Matters: A manual of the non-life branches,* 2ed Zurich, Swiss Reinsurance Company.

Stiglitz, J.E., Orszag, J.M. & Orszag, P.R. (2002). The Impact of Asbestos Liabilities on Workers in Bankrupt Firms. Sebago Associates.

Traub, Liebermann, Straus & Shrewsberry. (2010). *The Financial Crisis: Insurance and Reinsurance Legal Developments, Notification, Disclosure, Aggregation/One Event, Fraud, Follow the Fortunes*. Paper presented at the Associaion Internationale de Droit des Assurances World Conference Paris 2010 Conference. New York, New York.

Trocke, M. & Dillon, T.P. (1993). "The Devils Dilemma" Fidelity Bond Deductibles: Two employees getting kickbacks from the same supplier – one or two deductibles?

Vero Profin. (2012). Professional Indemnity Glossary of Terms. Retrieved August 28 2012, from http://www.vero.com.au/vero/sites/default/files/fm/pdf/profin/vero-profin-professional-indemnity-glossary.pdf

Zalma, B. (2003). *Stacking Insurance Limits*. Retrieved April 15, 2012 from http://www.zalma.com/stacking.htm.

Zevnick, P.A., Horton, M.Y. & Raskin, J.S. (2007). *The Application of Policy Limits for Asbestos Bodily Injury Claims – a Policyholder's Perspective of California Law on (i) Products vs Operations Claims and (ii) Number of Occurrences*. Paper presented at the meeting of the Nineteenth Annual Insurance Coverage Litigation Committee CLE Seminar Insurance Coverage Litigation Committee of the ABA's Section of Litigation. Philadelphia, USA.

CASE LAW

AUSTRALIA

Distillers Co Bio-Chemicals (Aust) Pty Ltd v. Ajax Insurance Co Ltd [1974] HCA 3; (1974) 130 CLR 1.

QBE Insurance Ltd v. MGM Plumbing P/L [2003] QSC 27.

Windsurf Pty Ltd v. HIH Casualty & Gen Ins Ltd [1999] QCA 360.

CANADA

Canadian Gas Association v. Guardian Insurance Co. [1998] O.J. No. 5260.

Canadian Lawyers' Insurance Association v. Yang, 1997 ABCA 178 (CanLII).

Kelly v. J.J. Lacey Insurance Ltd. [1997] N.J. No. 182.

UNITED KINGDOM

Axa Reinsurance (UK) plc. V. Field [1996] 3 All ER 517.

Lloyds TSB General Insurance Holdings and others v. Lloyds Bank Group Insurance Company Ltd. [2003] UKHL 48.

Midland Mainline Ltd. & Ors v. Commercial Union Assurance Company Ltd. & Ors [2003] EWHC 1771 (Comm) (17 July 2003)

The Scottish Union and the National Insurance Company v. Alfred Pawsey and Company (1908).

USA

Addison Insurance Company v. FAY et al No.105752. (2009)

Appalachian Ins. Co. v. Liberty Mutual Ins. Co., 676 F.2d 56, 61 (3d Cir. 1982).

Arizona Property & Cas. v. Helne, 153 Ariz. 129, 725 P.2d 451 (1987).

Arthur A. Johnson Corporation *et al*, v. Indemnity Insurance Company of North America, 7 N.Y.2d 222 (1959).

Bartholomew v. INA, St Paul Fire and Marine Insurance Company, Appalachian Insurance Company and Affiliated FM Insurance Company. 502 F.Supp. 246 (D. R.I. 1980), aff'd sub nom, 655 F.2d 27 (1st Cir. 1980).

Business Interiors, Inc. v. Aetna Casualty. & Surety. Co., 751 F.2d 361 (10th Cir. 1984).

Cargill, Inc. v. Liberty Mut. Ins. Co. 488 F.Supp. 49 (1979).

Christ Lutheran Church v. State Farm Fire & Casualty. Co.471 S.E.2d 124 (1996).

Cole v. Celotex Corp. 599 So.2d 1058 (1992).

Commercial Union Ins. Co. v. Porter Hayden Co. (1997) 116 Md.App. 605, 698 A.2d 1167

CSX Transportation, Inc. et al. v. Continental Insurance Company *et al*. No. 49, 680 A.2d 1082 (1996) 343 Md. 216 Court Of Appeals of Maryland. (1996).

Elston-Richards Storage Co. v. Indemnity Insurance Co. 194 F.supp. 673 (1960).

Exxon Corporation v. St Paul Fire & Marine Insurance Co., 129 F.3d 781 (5th Cir. 1997).

Honeycomb Systems, Inc. v. Admiral Insurance Company. Civ. No. 80-0439 P 567 F.Supp. 1400 (1983).

Horace C. Lamberton, Jr., et al. v. The Travelers Indemnity Company, a Connecticut Corporation, Supreme Court of Delaware 346 A.2d 167; 1975 Del. Lexis 507.

Indiana Gas Co., Inc. v. Aetna Casualty & Surerty Co. 951 F.Supp. 773 (1996) No. 1:95-Cv-101. United States District Court, N.D. Indiana, Fort Wayne Division.

Insurance Corporation of America v. Rubin 818 P.2d 389 (1991).

Johnson Corporation. v. Indemnity Insurance. Co. (1959).

Keene Corporation, Appellant, v. Insurance Company of North America, et al. (1981) United States Court of Appeals, District of Columbia Circuit 667 F.2d 1034

Kuhn's of Brownsville, Inc. v. Bituminous Cas. Co., 270 S.W.2d 358 (Tenn. 1954).

London Market Insurers v. The Superior Court of Los Angeles County, Truck Insurance Exchange et al., 53 Cal.Rptr.3d 154 (2007) 146 Cal.App.4th 648 Court of Appeal of California, Second District, Division Four.

Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co. *et al* (2001) 255 Conn. 295, 765 A.2d 891, 896 909.

Michigan Chemical Corp v. American Home Assurance Co, 728 F.2d 374 (1984*).*

Michigan Chemical Corporation, and American Mutual Reinsurance Company v. American Home Assurance Company, Insurance Company of North America, Aetna Casualty & Surety Company, v. Midland Insurance Company. United States Court of Appeals, Sixth Circuit. 728 F.2d 37414 Envtl. L. Rep. 20,290 (1984).

Morton International Inc. v. Aetna Casualty & Surety Company.106 Ohio App.3d 653 (1995).

National Chiropractic Mutual. Ins. Co. v. Morgan, 840 P.2d 732 (Or. App. 1992).

Okada v. MGIC Indem. Corp. 608 F.Supp. 383 (1985).

Owens-Illinois, Inc. v. Aetna Casualty & Surety Co., 597 F. Sup. 1515, 1525 (D.D.C 1984).

Plastics Engineering Company v. Liberty Mutual Insurance Company, 2009 WI 13, 759 N.W.2d 613 (2009).

Ran-nan Inc., Doing Business As Vinces Imports, Doing Business As Guy's Drive in #3 v. General Accident Insurance Company of America, Also Known As Cgu Insurance Company, F.3d 738 CIRCUIT - 252 F.3d 738 (2001).

RCA Mutual. Ins. Co. v. Sanborn *918 S.W.2d 893 (1996).*

S.F. v. West American Ins. Co. 463 S.E.2d 450 (1995).

Saint Paul- Mercury Indemnity Company, v. Calvin T. Rutland, 25 F.2d 689. (1953)

Shamblin v. Nationwide Mut. Ins. Co., 332 S.E.2d 639 (W. Va. 1985).

Slater v. United States Fidelity & Guaranty Co. 379 Mass. 801 (1980) 400 N.E.2d 1256.

SR International Business Insurance Co. Ltd. v. World Trade Center Properties, LLC, et al., 2003 WL 1163577 (S.D. N.Y. 6/3/2002).

Stonewall Ins. Co. v. Asbestos Claims Management Corp. (2d Cir.1995) 73 F.3d 1178, 1212 1214

Travelers Indemnity Co. v. Olive's Sporting Goods, Inc. *764 S.W.2d 596 (1989)* 297 Ark. 516 No. 88-165. Supreme Court of Arkansas. (1989).

Travelers Insurance Company, v. C.J. Gayfer's and Co., Inc., et al. 366 So.2d 1199 (1979).

Unigard Ins. Co. v. USF&G, 111 Idaho 891, 728 P.2d 780 (1986).

Union Carbide Corp. v. Travelers Ins. Co., 399 F.Supp. 12 (W.D. Pa. 1975).

United States Stove Company v. Steadfast Insurance Company (2012) No. 10-14983.

Wilkinson and Son Inc. v. Providence Washington Ins. Co., 124 N.J. Super 466, 307 A.2d639 (1973).

ANNEXURE 1

THE ATTORNEYS FIDELITY FUND

PROFESSIONAL INDEMNITY INSURANCE SCHEME

1 JULY 2009 TO 30 JUNE 2010

PROFESSIONAL INDEMNITY INSURANCE

In consideration of the **Attorneys Fidelity Fund**, for and on behalf of every insured (as defined in this Policy), having paid or agreed to pay the insurer named in the schedule the premium stated in the Master Policy:

The insurer agrees to provide an indemnity in the manner and to the extent stipulated subject to the terms contained in this policy and the schedules hereto.

1. INDEMNITY

The indemnity granted in this policy is in respect of:

1.1 the insured's legal liability to any third party arising out of the conduct of the profession by the insured which legal liability is the subject of a claim first made on the insured during the period of insurance irrespective of when or where such liability arose.

1.2 approved costs in connection with any claim under 1.1.

1.3 approved costs of investigating and of being represented at any professional or judicial inquiry into any event or occurrence that may have given rise to or may reasonably be expected to give rise to a claim under 1.1.

2. DEFINITIONS

2.1 "the Act" - the Attorneys Act No. 53 of 1979 (as amended);

2.2 "the Attorneys Fidelity Fund"- the Attorneys Fidelity Fund referred to in Section 25 of the Act;

2.3 “practitioner” - any attorney notary or conveyancer as further defined in the Act;

2.4 "approved costs" - all legal and similar costs and expenses which the insured may incur with the insurer’s written consent which shall not be unreasonably withheld;

2.5 "the insured"-

2.5.1 (a) every individual practitioner and

(b) every firm, partnership or incorporated practice consisting of one or more practitioners who, on the date on which the claim is made:

2.5.1.1 is practising as such in the Republic of South Africa, and

2.5.1.2 is in possession of or would have been obliged to apply for a current Fidelity Fund Certificate in terms of Section 42 of the Act;

2.5.2 any former sole practitioner and any former principal, partner, director or consultant of the firm, partnership or incorporated practice referred to in 2.5.1, who is no longer a practising practitioner when the claim is made against him provided that the claim arises out of the conduct of the profession by such person or such firm, partnership or incorporated practice at a time when he was:

2.5.2.1 practising as such in the Republic of South Africa and

2.5.2.2 in possession of or obliged to apply for a current Fidelity Fund Certificate in terms of Section 42 of the Act;

2.5.3 in the event of the death, incapacity, insolvency or dissolution of any person or entity referred to in 2.5.1, 2.5.2 and 7, his or her estate, legal representative, heir or successor in title in respect of any claim arising out of the conduct of the profession;

2.6 “partner or director” includes any person who is

2.6.1 de facto a partner or director of the insured or

2.6.2 who is publicly held out to be a partner or director of the insured;

2.7. "conduct of the profession"- the activities of the insured acting as a practitioner an such activities which are legitimately conducted as part of a legal practice. In the event of a dispute as to whether a particular act or activity is conducted as aforesaid the matter shall be referred to the president of the statutory law society having jurisdiction over the insured whose decision shall be binding on the parties to this policy.

3 LIMIT OF INDEMNITY

3.1 The liability of the insurer in respect of all claims and claimants' costs and expenses and approved costs shall not exceed the limit of indemnity specified in Schedule A.

3.2 All claims arising out of one act or omission or out of the dishonesty of any one person or any number of persons together or in collusion shall be deemed to arise out of one event or occurrence.

4 THE DEDUCTIBLE

The insured shall be responsible for the first amount of any claim and claimant's costs and expenses arising out of one event or occurrence, but not exceeding the deductibles specified in Schedule A. The deductibles shall only apply in respect of claims for breach of professional duty, but shall not be applied to approved costs.

5 EXCEPTIONS

5.1 Unless specifically stated to the contrary this policy does not cover any loss, destruction or damage whatsoever or any legal liability of whatever nature:

5.1.1 directly or indirectly caused by or arising from or in consequence of or contributed to by nuclear weapons materials or by ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel. Combustion shall include any self-sustaining process of nuclear fission.

5.1.2 which is insured or would but for the existence of this policy be insured by any other policy or policies or guarantees except in respect of any excess beyond the amount which would be payable under such policy or policies or guarantees had this insurance not been effected.

5.1.3 arising from any event or occurrence, which has been notified under any insurance in force prior to the inception of this policy.

5.1.4 arising out of or in connection with any trading losses or trading liabilities incurred by the insured or by any practice or business managed by or carried on by the insured.

5.1.5 arising from theft by any principal, partner, director, candidate attorney, employee or "in-house" consultant of the insured or of the insured's predecessors in practice of any money or other property referred to in Section 26 of the Act.

5.1.6 arising from or in terms of any judgement delivered or obtained in the first instance otherwise than by a court of competent jurisdiction within the Republic of South Africa.

5.1.7 arising out of or in connection with the provision of investment advice or the administration of any funds in contravention of the Banks Act 94 of 1990 (as amended), or as a liquidator in terms of the Agricultural Credit Act No.28 of 1996 (as amended)

5.1.8 arising out of or in connection with an order made against the insured to pay costs de bonis propriis in circumstances where the insured is acting in a capacity as attorney for one of the parties before the court which makes such order.

5.1.9 arising out of or in consequence of an instruction to the insured to invest money on behalf of any person other than an instruction to pay money into an account contemplated in Section 78 2(A) of the Act, if such payment is for the purpose of investing such money in such account on a temporary or interim basis only, pending the conclusion or implementation of a particular matter or transaction which is already in existence or about to come in to existence at the time the investment is made. This exclusion does not apply to money which the insured is authorised to invest in his or her capacity as executor, trustee or curator or in any other similar capacity.

5.1.10 arising out of or in connection with any work done on behalf of an entity defined in the Housing Act 107 of 1997 or its representative, with respect to the National Housing Programme provided for in the Housing Act 1997.

5.2 Unless specifically stated to the contrary this policy also does not cover:

5.2.1 any person who was in any way and at any time dishonest in relation to or in connection with any claim under this policy.

5.2.2 costs and expenses of litigation recovered by any claimant from the insured which are not incurred in and recoverable in the Republic of South Africa.

5.2.3 loss or destruction of or damage to any property whatsoever (including a computer) or any loss or expense whatsoever resulting or arising therefrom;

5.2.3.1 any legal liability of whatsoever nature;

5.2.3.2 any consequential loss;

directly or indirectly caused by or contributed to or consisting of or arising from the incapacity or failure of any computer

i. to treat any date before, during or after the year 2000 as the correct date or true calendar date, or correctly or appropriately to recognise, manipulate, interpret, process, store, receive or to respond to any data or information, or to carry out any command or instruction, in regard to or in connection with any such date; or

ii. to capture, save, retain or correctly to process any data as a result of the operation of any command which has been programmed into any computer, being a command which causes the loss of data or the inability to capture, save, retain or correctly to process such data in regard to or in connection with any such date.

A computer includes any computer, data processing equipment, micro-chip, integrated circuit or similar device or any computer software tools operating system or any computer hardware or peripherals and the information or data stored in or on any of the above, whether the property of the insured or not.

6 CONDITIONS

6.1 The insured shall give immediate written notice to the insurer of any claim or intimation of a claim. Once the insured has notified the insurer in terms of this clause the insurer may submit to the insured a claim form requiring the insured to provide all further information reasonably required by the insurer in respect of the claim or intimation of a claim. The insured shall not be entitled to the indemnity afforded by this policy until the insurer's claim form has been properly completed by the insured and returned to the insurer.

6.1.2 Every letter, claim, summons or process received by the insured, which evidences a claim or an intention to claim, shall be forwarded to the insurer immediately.

6.1.3 If the insured gives notice of any event or occurrence of which the insured becomes aware during the period of insurance which may give rise to a claim, then any claim in respect of that event or occurrence which is subsequently notified against the

insured after the expiry of the period of insurance shall for the purpose of this policy be treated as having been made during the period of insurance.

6.2 The insurer waives any right of subrogation against any partner or director of the insured, unless such person has committed a dishonest or criminal act in relation to matters, which are the subject of a claim under this policy.

6.3 In the event of a claim arising out of any dishonest act or omission of any partner, director or employee of the insured, the insured shall take all possible action to sue for and obtain reimbursement from any such person or from the estate or legal representatives of such person and any monies which but for such dishonesty would be due to such person from the insured or any monies of such person held by the insured, shall to the extent allowable by law be deducted from the insured's loss.

6.4 Any dispute or disagreement between the insured and the insurer as to any right to indemnity in terms of this policy or as to any matter arising out of or in connection with this policy, shall be referred for a final decision to a senior counsel agreed upon between the insured and the insurer or failing such agreement, nominated by the president of the statutory law society having jurisdiction over the insured.

6.5.1 Subject to the exceptions, the deductible and 6.1, 6.7.2 and 6.9 hereof, the insurer shall not seek to avoid, repudiate or rescind this insurance upon any ground whatsoever, including in particular non-disclosure or misrepresentation;

6.5.2 Where the breach of or non-compliance with any term of this policy by the insured other than 6.1, 6.7.2 and 6.9 has resulted in substantial prejudice to the handling or settlement of any claim against the insured, the insured shall reimburse to the insurer the difference between the sum payable by the insurer in respect of that claim and the sum which would have been payable in the absence of such prejudice. Provided always that it shall be a condition precedent of the right of the insurer to seek reimbursement that they shall have fully indemnified the insured in accordance with the terms of this policy.

6.6 The insured shall not without the written consent of the insurer repudiate liability, negotiate or make any admission, offer, promise or payment in connection with any claim and the insurer shall be entitled, if it so desires, to take over the conduct in the name of the insured of the defence of any claim or to prosecute in the name of the insured at its own expense and for its own benefit any claim for indemnity or damages or otherwise against any person and shall have full discretion in the conduct of any proceedings and in the settlement of any claim.

6.7.1 The insured shall render at his or her own cost such assistance as the insurer may reasonably require and shall arrange to be available at his or her own cost for such interviews as may reasonably be required by the insurer or the legal advisers of the insurer.

6.7.2 Notwithstanding anything else contained in this policy, should the insured fail or refuse to provide assistance or to attend interviews stipulated in 6.7.1 and remain in breach of such clause for the period of ten (10) days after receiving written notice from the insurer to remedy such breach, all benefits afforded by this policy may be withdrawn by the insurer.

6.8 Unless otherwise expressly stated nothing contained in this policy shall give any rights against the insurer to any person other than the insured.

6.9 If any claim by the insured be in any respect fraudulent or any fraudulent means or devices be used by the insured or anyone acting on his or her behalf with his or her knowledge or authority to obtain benefits in respect of that claim all benefit under this policy shall be forfeited.

6.10 Whenever this policy provides for notice to be given to the insurer, such notice shall be given to:

Glenrand M.I.B Professional Services
PO Box 2544
Randburg, 2125
Docex 34 Randburg
Telephone No. (011) 329-1140
Fax No. (011) 329-1984

6.11 The insurer may in its sole discretion, in the case of any claim for indemnity, pay to the insured or to the claimant, the limit of indemnity (but deducting in such case any sum or sums already paid as indemnity) or any lesser sum for which the claim or claims arising from such claim for indemnity can be settled and the insurer shall thereafter be under no further liability in respect of such claims for indemnity, except for the payment of costs and expenses of litigation incurred prior to the date of payment of such limit of indemnity or such lesser sum.

6.12 If the insured reasonably so requires he or she shall not be obliged to contest or prosecute any legal proceedings unless a senior counsel shall advise that there are

reasonable grounds for contesting or prosecuting such proceedings, such senior counsel to be agreed upon between the insured and the insurer or failing such agreement, nominated by the president of the statutory law society having jurisdiction over the insured.

6.13 In the case of any conflict or divergence between the English and Afrikaans texts of this policy, the English text shall prevail.

6.14 All recoveries made in respect of any claim under this policy shall be applied (after deduction of the costs, fees and expenses incurred in obtaining such recovery) in the following order of priority:

i) the insured shall first be reimbursed for the amount by which its liability in respect of such claim exceeded the amount of indemnity provided by the policy or any other policy;

ii) the insurers shall then be reimbursed for the amount of their liability under the policy in respect of such claim;

iii) any remaining amount shall be applied towards the amount of the deductible borne by the insured in respect of such claim

7 SPECIAL EXTENSIONS

7.1 Indemnity under this policy shall be extended to any candidate attorney or other person employed by the insured in an employer/employee relationship in the conduct of the profession by the insured, and such person shall be deemed to be an insured for the purposes of indemnity in terms of this policy subject to the terms, limits and conditions thereof.

8 SCHEDULE A

	Insurer:	Attorneys Insurance Indemnity Fund (Association incorporated under Section 21) (Reg. No. 93/03588/08)
8.1	Master Policy:	No. AIIF/MP/06/09
8.2	Period of Insurance:	1 July 2009 30 June 2010 (both days inclusive)

8.3 Situation risk: World-wide (subject to exceptions 5.1.6 and 5.2.2)

8.4 Limit of Indemnity:

8.4.1 The limit of indemnity in respect of 1.1 and 1.2 is determined by the number of partners or directors of the firm, partnership or incorporated practice referred to in 2.5.1 (b) on the date on which the event or occurrence occurred which gives rise to a claim against the insured in accordance with the following schedule:

No. of partners/directors	Limit of indemnity per period of insurance
1 (Sole practitioner)	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

8.4.2 The limit of indemnity in respect of 1.3 is 25% of the limit of indemnity specified in the Schedule against 8.4.1.

8.5.1 The deductible:

8.5.1 The deductible is determined by the number of partners or directors of the firm, partnership or incorporated practice referred to in 2.5.1(b) on the date on which the event or occurrence occurred which gives rise to a claim against the insured and the type of matter which gave rise to the claim in accordance with the following schedule:

No. of partners/directors	Column A Prescribed MVA claims Deductible	Column B Other claims Deductible
1 (Sole practitioner)	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

8.5.2 In the case of a claim for loss or damage in respect of bodily injury or death caused by, arising from or in any way connected with the driving of a motor vehicle (being a motor vehicle as defined in the Road Accident Fund Act 56 of 1996 or any predecessor or successor of the aforementioned Act) at any place within the Republic of South Africa, which has become prescribed in the hands of the insured, the deductible set out in 8.5.1 (Column A) will apply. Provided that if Prescription Alert a computerised diary system available to the insured has not been utilised or adhered to by the insured, the deductible as specified in 8.5.1 (Column A) will be increased by an additional 15%.

8.5.3 If a claim arises for reasons other than those set out in 8.5.2 the applicable deductible

shall be as set out in 8.5.1 (Column B).

8.6 Agreed reduction in limit of indemnity and deductible

8.6.1 It is recorded that prior to the inception of this policy, certain firms, partnerships or incorporated practices referred to in 2.5.1 (b) entered into agreements with the insurer in terms of which such firms, partnerships and incorporated practices accepted a reduced limit of indemnity of 50% or 25% (as the case may be) of the indemnity otherwise afforded in terms of 8.4.1, on condition that such firms, partnerships or incorporated practices, would be liable for 50% or 25% (as the case may be) of the deductible specified in 8.5.1, for all claims made by these firms, partnerships or incorporated practices in terms of this policy.

8.6.2 Notwithstanding anything else contained in this policy, the terms of the agreements referred to in 8.6.1 shall be binding on the insurer and the firms, partnerships or incorporated practices concerned.

ANNEXURE 2

Reg.No.1918/001680/06 SANTAM BPK/LTD

Professional Indemnity Insurance

for

ATTORNEYS, NOTARIES & CONVEYANCERS

This is to certify that in accordance with the authorisation granted to

ADMIRAL PROFESSIONAL UNDERWRITING AGENCY (PTY) LTD

(The "Underwriters")

by

SANTAM LIMITED

(The "Insurers")

and in consideration of, and conditional upon, the prior payment of the Premium by or on behalf of the Insured and receipt thereof by or on behalf of the Insurers, the Insurers are hereby bound to insure in accordance with the terms, Exclusions, Conditions and limitations contained herein or endorsed hereon.

The Insurance Contract is conditional upon and will only come into effect following payment of the Premium by the Insured and the receipt thereof by or on behalf of the Insurers.

1. PREAMBLE

The Insured having made a written proposal to Insurers, dated as stated in the Schedule, and/or otherwise submitted particulars and statements constituting the risk profile, which proposal and/or risk profile shall form the basis of this insurance, the Insurers will indemnify the Insured in accordance with the terms, Exclusions, Conditions and limitations contained herein or endorsed hereon.

2. INSURING CLAUSE

The Insurers will indemnify the Insured in respect of their civil liability to pay compensation (including claimants' costs, fees and expenses) in accordance with the law of any country but not in respect of any judgement, award, payment or settlement made within countries which operate under the laws of the United States of America or Canada (or to any order made anywhere in the world to enforce such judgement, award or settlement either in whole or in part) arising out of the conduct of the Profession.

The indemnity granted herein applies only to claims first made against the Insured and notified to the Insurers during the Period of Insurance, subject to the provisions of Condition 7.2.

3. DEFENCE COSTS

3. 1 The Insured shall render at their own cost all such assistance as the Insurers may require in order to investigate defend or settle any claim and shall arrange to be available at their own cost for such interviews as may be required by the Insurers or any advisers or legal representatives appointed by the Insurers.

3. 2 The Insurers will pay any expenses incurred by the Insured (excluding such costs mentioned in 3.1) in order to assist with the investigation defence or settlement of any claim made against the Insured and the costs of representation at any inquest, inquiry or other proceedings in respect of matters which have a direct relevance to any claim made or which might be made against the Insured, provided such claim or claims are the subject of indemnity by this Policy and the Insurers prior written consent is obtained.

3.3 All costs, fees and expenses incurred by the Insurers or at their instance in the investigation defence or settlement of any claim made against the Insured and the costs of representation at any inquest, inquiry or other proceedings in respect of matters which

have a direct relevance to any claim made or which might be made against the Insured shall be deemed to be costs, fees and expenses incurred by the Insured with the prior consent of the Insurers.

4. **LIMIT OF LIABILITY**

The total liability of the Insurers, in terms of the Insuring Clause:

(a) Per Claim or series of claims arising from one originating cause or source, including interest thereon, all claimants' costs, fees and expenses and Defence Costs;

(b) in respect of all claims Per Policy Period;

shall not exceed the Limit of Liability stated in the Schedule.

5. **DEFINITIONS**

For the purposes of this insurance :

5.1 "The Insured" shall include :

a) the Company, Partnership, Close Corporation, Association, Firm or Person named in the Schedule (hereinafter referred to as the "Named Insured");

b) any present (including appointments made during the Period of Insurance) or former Director, Partner, Member, Principal or "In-house" Consultant of the Named Insured;

c) at the request of the Directors, Partners, Members or Principals of the Named Insured, any present or former Employee of the Named Insured;

d) any predecessors of the Named Insured but only to the extent that liability attaches to the Named Insured;

e) In the event of the death, incapacity, insolvency or bankruptcy of any person treated as the Insured (in respect of claims against such person) his estate, legal representatives and/or heirs;

f) any limited liability company owned and controlled by the Insured or the Insured's predecessors in the practice but only to the extent that the professional duties assumed by the Insured or such predecessors are performed by or through such company.

5.2 "The Profession" shall include :

a) the activities of the Insured acting as Attorney, Notary or Conveyancer.

b) such matters not reserved by law to Attorneys, Notaries and Conveyancers as are legitimately conducted as part of a legal practice, including without prejudice to the generality of the aforegoing the activities of the Insured as a Trustee of testamentary and intervivos trusts, insolvent estates or Liquidator of companies, an Executor or Administrator of a deceased estate, as an Insurance, Building Society, Real Estate, Co-operative Society or similar Agent, as Patent or Trade Mark Attorney and / or Agents, the provision of investment, mortgage or bail bond services and Liquidators in terms of the Agricultural Credit Act, 1966 (Act No. 28 of 1966).

The Insurers agree to abide by the ruling of the President of the Law Societies of the Republic of South Africa as to whether or not a particular function or activity is legitimately conducted, as aforesaid.

c) commissions undertaken under (a) or (b) above in the name of any Principal, Partner, Director, Employee or "in-house" consultant of the Insured, provided that any fees derived therefrom accrue to the practice of the Insured.

5.3 "Primary Group Policy" means the Professional Indemnity Policy arranged on behalf of the Insured by the Attorneys Fidelity Fund in terms of the Attorneys Insurance Indemnity Fund.

5.4 "Documents" shall mean bonds, debentures, scrip certificates, deposit receipts, transfers, coupons, warrants, bills of exchange, promissory notes, title deeds, powers of attorney, deeds, wills, agreements, maps, plans, records (whether on paper, microfilm, magnetic tape or disc) and written and printed documents and forms of any nature, belonging to the Insured or for which the Insured is responsible in connection with the Business.

5.5 "Deductible" shall mean that first amount of each and every claim to be borne by the Insured, it being understood and agreed that if any expenditure is incurred by the Insurers which, by virtue of the Deductible, is the responsibility of the Insured, then such expenditure shall be forthwith reimbursed by the Insured.

The Deductible shall apply Per Claim or series of claims arising from one originating cause or source.

6(a) **EXCLUSIONS**

The Insurers shall not be liable to indemnify the Insured in respect of any claims :

6.1 for any amounts recoverable by the Insured under the Primary Group Policy, which amounts shall be deemed to include all Deductibles payable by the Insured in respect of claims under such Policy;

6.2 or the reimbursement and/or replacement of money and/or other property described in terms of Section 26 of the Attorneys Act, 1979 (Act No. 53 of 1979) where such claims arise out of the misappropriation of such money and/or property;

6.3 arising from breach of contract unless such breach is a breach or alleged breach of professional duty by the Insured or any other person upon whom the Insured has placed reliance;

6.4 arising out of :

a) loss of money (including postal and money orders and Kruger Rands);

b) theft or forgery of cheques and other negotiable documents of title.

6.5 arising out of the investment or handling of funds in contravention of the Banks Act (Act No. 94 of 1990) or any amendments thereto;

6.6 arising out of the death of or bodily injury to or illness or disease sustained by any person under a contract of employment or apprenticeship with the Insured where such death, injury, illness or disease arises out of the execution of such contract;

6.7 arising out of the ownership, possession or use by or on behalf of the Insured of any motor Vehicle or trailer for which compulsory insurance is required by legislation, other than claims:

6.7.1 caused by the use of any tool or plant forming part of or attached to or used in connection with any motor Vehicle or trailer;

6.7.2 arising beyond the limits of any carriageway or thoroughfare caused by the loading or unloading of any motor Vehicle or trailer;

6.7.3 arising out of any motor Vehicle or trailer temporarily in the Insured's custody or control for the purpose of parking.

6.8 for which compulsory insurance is required by legislation governing the use of any motor Vehicle or trailer.

6.9 for damage to property owned, leased or hired or under hire purchase or on loan to the Insured or otherwise in the Insured's care custody or control other than:

a) premises (or the contents thereof) temporarily occupied by the Insured for work therein, or other property temporarily in the Insured's possession for work thereon (but no indemnity is granted for damage to that part of the property on which the Insured is or has been working and which arises out of such work);

b) employees' and visitors' clothing and personal effects;

c) premises tenanted by the Insured (but only to the extent that the Insured would be held liable in the absence of any specific agreement).

6.10 arising out of Pollution unless such Pollution was the direct result of a sudden, specific and identifiable event occurring during the Period of Insurance and did not arise as a result of the Insured's failure to take reasonable precautions.

6.11 for dishonest or fraudulent acts or omissions committed by any person after the discovery in relation to that person of reasonable cause for suspicion of fraud or dishonesty;

6.12 arising out of the ownership possession or use by or on behalf of the Insured of any aircraft, watercraft or hover-craft;

6.13. for the cost of replacing or restoring Documents;

6.14. arising out of loss of or distortion of computer data due to :

a) the presence of magnetic flux;

b) defects in the data tapes or other data media;

c) use or processing whilst mounted in or on any machine;

d) wear, tear, vermin or gradual deterioration;

e) climatic or atmospheric conditions or extremes of temperature.

6.15 arising out of or in connection with any trading losses or trading liabilities incurred by any practice or business managed by or carried on by the Insured;

6.16 in respect of which the Insured is entitled to indemnity under any other insurance except in respect of any excess beyond the amount payable under such other insurance;

6.17 arising out of representations, advice or forecasts given by or on behalf of the Insured in respect of investments which fail to perform in accordance with such representations, advice or forecasts unless negligence can be proven;

6.18 or circumstances which may give rise to a claim, which have been or should have been notified under any other Policy of insurance attaching prior to the inception of this Policy;

6.19 for fines, penalties, punitive, vindictive or exemplary damages;

6.20 arising out of the insolvency of the Insured;

6.21 arising out of any act, error or omission, or such cause of any other risk indemnifiable under this Policy, committed or occurring prior to the Retroactive Date stated in the Schedule;

6.22 arising from the conduct of the business in the United States of America and/or Canada.

6.23 up to the amount of the Deductible.

6(b) COMPUTER LOSS EXCLUSION

Notwithstanding any provision of this Policy including any special Exclusion or extension or other provision not included herein which would otherwise override a general Exclusion, this Policy does not cover any legal liability of whatsoever nature directly or indirectly caused by or contributed to by or consisting of or arising from the incapacity or failure of any computer, correctly or at all,

1. to treat any date as the correct date or true calendar date, or correctly or appropriately to recognise manipulate interpret process store receive or to respond to any data or information, or to carry out any command or instruction, in regard to or in connection with any such date; or

2. to capture save retain or to process any information or code as a result of the operation of any command which has been programmed into any computer, being a command which causes the loss of data or the inability to capture, save retain or correctly to process such data in regard to or in connection with any such date; or

3. to capture, save, retain or to process any data as a result of the action of any computer virus, or other corrupting, harmful or otherwise unauthorised code or instruction including any trojan horse, time or logic bomb or worm or any other destructive code, media or programme or interference.

A computer includes any computer, data processing equipment, microchip, integrated circuit or similar device in computer or non-computer equipment or any computer software, tools, operating system or any computer hardware or peripherals and the information or data electronically or otherwise stored in or on any of the above, whether the property of the Insured or not.

6(c) **WAR / TERRORISM EXCLUSION**

The Insurers shall not be liable to indemnify the Insured in respect of claims directly or indirectly caused by, resulting from happening through or in connection with:

a) war, invasion, acts of foreign enemies, hostilities or warlike operations (whether war be declared or not), civil war, mutiny, insurrection, rebellion, revolution, military or usurped power, or confiscation or nationalisation or requisition or destruction of or damage to property by or under the control of any Government or Public or Local Authority;

b) any act of terrorism regardless of any other cause contributing concurrently or in any other sequence to the loss.

For the purpose of this Exclusion, terrorism means an act of violence or any act dangerous to human life, tangible or intangible property or infrastructure with the intention or effect to influence any government or to put the public or any section of the public in fear.

In any action suit or other proceedings where the Insurer alleges that by reason of this Exclusion a loss is not covered by this insurance the burden of proving that such loss is covered shall be upon the Insured.

6(d) **NUCLEAR EXCLUSION**

This Policy does not cover any legal liability, loss, damage, cost or expense whatsoever or any consequential loss directly or indirectly caused by or contributed to by or arising from:

(i) ionising, radiations or contamination by radio-activity from any nuclear fuel or from any nuclear waste from the combustion or use of nuclear fuel;

(ii) nuclear material, nuclear fission or fusion, nuclear radiation;
(iii) nuclear explosives or any nuclear weapon;
(iv) nuclear waste in whatever form;

regardless of any other cause or event contributing concurrently or in any other sequence to the loss. For the purpose of this Exclusion only, combustion shall include any self-sustaining process of nuclear fission.

6(e) **ASBESTOS EXCLUSION**

Notwithstanding any provision of this Policy including any Exclusion, exception or extension or other provision which would otherwise override an Exclusion, this Policy does not cover any legal liability, loss, damage, cost or expense whatsoever or any consequential loss directly or indirectly caused by, arising out of, resulting from, in consequence of, in any way involving, or to the extent contributed to by, the hazardous nature of asbestos in whatever form or quantity.

7. **CONDITIONS**

Conditions 7.1 to 7.7 are Conditions precedent to the liability of the Insurers to provide indemnity under this Policy.

7.1 Premium is payable on or before the inception date or renewal date or instalment date as the case may be. The Insurer shall not be obliged to accept premium tendered to them more than 15 days after such date but may do so upon such terms as they in their sole discretion may determine.

7.2 The Insured shall give written notice to the Insurers as soon as practicable of any claim made against the Insured (or of any specific event or circumstance which may give rise to a claim being made against the Insured) and which forms the subject of indemnity under this Policy and shall give all such additional information as the Insurers require. Every claim, writ, summons or process and all documents relating to the claim, event or circumstance shall be forwarded to the Insurers immediately they are received by the Insured.

If the Insured notifies the Insurers during the Period of Insurance of any event or circumstance which the Insurers accept may give rise to a claim being made against the Insured, then such claim shall for the purpose of this Policy be treated as having been first made against the Insured during the Period of Insurance.

This policy will allow the Insured the opportunity to notify Insurers of claims made against them or circumstances that may give rise to claims being made against them for up to 30 days after expiry of this insurance provided that the Insured first became aware of the claim or circumstance prior to expiry.

7.3 The Insured shall at all times maintain accurate descriptive records of all professional services which records shall be made available for inspection and use by the Insurers or their duly appointed representatives insofar as they pertain to any claim under this Policy.

7.4 No admission, offer, promise or payment shall be made or given by or on behalf of the Insured without the written consent of the Insurers who, if they so wish, shall be entitled to take over and conduct, in the name of the Insured, the defence or settlement of any claim or to prosecute, in the name of the Insured, any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings and in the settlement of any claim and the Insured shall give all such information and assistance as the Insurers may require.

7.5 The Insured shall give notice as soon as reasonably possible of any fact, event or circumstance which materially changes the information supplied to the Insurers at the time when this Policy was effected and the Insurers may amend the terms of this Policy according to the materiality of such change.

Whilst this insurance shall remain fully operative in the event of a change in the constitution of the Insured, notice shall be given as soon as reasonably possible of any change in the Principals, Partners, Members or Directors or in the legal constitution of the Insured and the Insured shall supply such further information as the Insurers may require for reassessment of the risk.

7.6 The interpretation and enforcement of the terms, Conditions and Exclusions of this Policy (and any phrase or word contained herein) shall be in accordance with the law of the Republic of South Africa whose courts shall have jurisdiction to the exclusion of the courts of any other country.

7.7 The Policy and Schedule shall be read together as one contract and any word or expression to which a specific meaning has been attached in any part of this Policy or Schedule shall bear such meaning wherever it may appear.

7.8 The Insurers may at any time pay to the Insured in connection with any claim or series of claims under this Policy to which the Limit of Liability applies the amount of such limit (after deduction of any amounts already paid) or any lesser amount for which such

claim or claims can be settled and upon such payment being made the Insurers shall relinquish the conduct and control of and be under no further liability in connection with such claim or claims notwithstanding the fact that the Insured has been only partially reimbursed for their loss due to the amount of any deductible payable in terms hereof.

7.9 In respect of claims arising out of any dishonest act or omission of any person treated as the Insured, the Insured shall take all possible action to sue for and obtain reimbursement from such person and any money or other property held by the Insured which, but for such dishonesty, would be due to such person shall, to the extent allowable in law, be deducted from the Insured's loss.

7.10 All recoveries made in respect of any claim under this Policy shall be applied (after deduction of the costs, fees and expenses incurred in obtaining such recovery) in the following order of priority :

a) the Insured shall first be reimbursed for the amount by which their liability in respect of such claim exceeded the amount of indemnity provided by the Policy;

b) the Insurers shall then be reimbursed for the amount of their liability under the Policy in respect of such claim;

c) any remaining amount shall be applied towards the amount of the Deductible borne by the Insured in respect of such claim.

7.11 Where the premium is provisionally based on the Insured’s estimates, the Insured shall keep accurate records and after expiry of the Period of Insurance, shall declare as soon as possible such details as the Insurers may require. The premium shall then be adjusted and any difference paid by or allowed to the Insured, as the case may be, subject to any minimum premium that may apply. Unless otherwise stated the premium shown in the Schedule shall be the Minimum Premium.

7.12 If indemnity is sought under this Policy by any fraudulent means :

a) all benefit in respect of such claim shall be forfeited;

b) Insurers may cancel the Policy with immediate effect by notice in writing to the last known address of the Insured.

7.13 If the Limit of Liability is increased during the Period of Insurance, the liability of the Insurers in respect of claims made against the Insured or for circumstances notified, or which should have been notified, to the Insurers prior to such increase, shall not exceed the Limit of Liability applicable prior to such increase.

7.14 In the event of reduction or exhaustion of any aggregate limit of indemnity under the Primary Group Policy by reason of claims paid thereunder, this policy shall :

a) in the event of reduction pay in excess of the reduced underlying limit;

b) in the event of exhaustion continue in force as if this Policy was the underlying insurance;

provided always that the liability of the Insurers :

(i) shall not be increased beyond the Limit of Indemnity stated in the Schedule;

(ii) shall be subject to the specified Deductible stated in the Schedule.

7.15 Whenever this Policy provides notice to be given to the Insurers such notice shall be given to :

ADMIRAL PROFESSIONAL UNDERWRITING AGENCY (PTY) LIMITED

29 QUEENS ROAD

PARKTOWN

JOHANNESBURG

2193

P.O. BOX 72057

PARKVIEW

2122

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