



October 2010

Address by Laurence K. Shields

Chairman of the SMDF



Laurence K. Shields
Chairman

Dear Colleague,

We are once again approaching PI renewal – it seems like last year's renewal was only a few months ago! No one in the legal profession is expecting an easy renewal this year. We have been working very hard in the Fund to ensure that we are well prepared to support our members and our former members in October and November.

Since the last newsletter, the directors of your Fund, Tom Shaw, Elma Lynch, Geraldine Clarke, Michael Houlihan, Patrick Dorgan and myself together with panel solicitor John P. Shaw and our claims managers, Jim Graham, Aidan Glendon and Paddy Oonan have travelled around the country to just about every Bar Association and county in the country over a 6 week period. We have met with over 1,000 colleagues, members, former members and we hope prospective members. Thank you to the Presidents, Secretaries and CPD Co-ordinators of the Bar Associations in Carlow, Clare, Cavan, Cork, Wexford, Donegal, East Cork, Galway, Kerry, Kildare, Kilkenny, Leitrim, Limerick, Longford, Louth, Mayo, Meath, Midlands, Monaghan, Sligo, Tipperary, Waterford, West Cork and Wicklow for all the work behind the seminars.

We were anxious to meet with you face to face to explain what happened last renewal, and the difficult combination of circumstances which left colleagues disappointed last year. We also wanted to explain the thinking behind the launching of our risk management standard, the SMDF LQ Basic and how we believe that it will assist members in this renewal.

The loss ratios for the Legal Profession in Ireland are indeed frightening. The numbers and value of claims against solicitors in Ireland ensures that indemnifiers are approaching the legal market with extreme caution. We must reduce claims. We need to adopt a different approach this year to reassure underwriters that as a profession we have taken control of our businesses and our future.

The SMDF LQ Basic Standard is an important part of this new approach. The Standard sets out the basic requirements for practising safely. There is undoubtedly a lot of work involved in complying with the Standard, particularly for firms which have never had written procedures and have to implement them from scratch. However, once this is done initially, implementing and improving those standards will be much easier.

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Contact Information
www.smdf.ie
01 - 676 3118

I want to make a few points about the SMDF LQ Basic at this point:

- The results of the audit are completely confidential as between the firm and the auditor – the SMDF are not given any information about what transpires
- The very fact of a firm having signed up for the SMDF LQ Standard is kept confidential and is not disclosed to the Fund – we do not know who has signed up unless they tell us directly
- It is up to the firm then to decide whether to attach its Certificate, Report and Score with the renewal application
- Accreditation or even registration for the SMDF LQ Basic is not a condition for professional indemnification this year; its purpose is to assist firms improve their operating standards. The SMDF LQ Basic also permits firms to distinguish themselves and put forward a good case for PI renewal

Our task is now to show the link between a good score on the Standard and fewer claims.

I hope to count on your support again this renewal and I look forward to welcoming back our current members and many of our former members.

Yours Sincerely

Laurence K Shields
Chairman





Changes to PI Regulations 1st December 2010

Succeeding Practices:

The regulations governing succeeding practices will be changed with effect from 1st December 2010. These changes will be of interest to practitioners considering

- retiring
- winding down their practice
- acquiring a practice
- acquiring files from a practice winding down
- partnership breakup and setting up a new firm
- partnership breakup and joining another existing firm

The current regulations governing succeeding practices have serious implications. For example, if a solicitor wants to retire, any firm taking over his practice, or even taking over a number of files, may fall under the definition of a succeeding practice. This means that the claims history of the preceding practice becomes a consideration for insurance purposes and may affect the succeeding firm's PI premiums, or indeed have implications for renewal. These are very complicated situations. The Law Society has commented that "the PI regulations on succeeding practices have proved to be problematic for the profession as no firm wants to acquire a practice in difficulty if the result would be a negative impact on a previously good claims record". We believe that the issue has become even bigger than this, because firms have been reluctant to acquire any practice at all, even if it apparently has no problems, because of the fear of hidden claims.

These rules have implications for run off cover for firms winding down. In this difficult environment, some firms have not been able to find affordable PI and have had to wind down and buy run off cover. Some of these firms are viable businesses and the partners want to move to another firm and bring their clients and files with them. Under the current regulations, this is very difficult.

So, the Law Society is changing the succeeding practice rule in order to allow the preceding firm and succeeding firm to elect whether run-off cover or the succeeding practice rule will apply. If the firms make an election, it must be made prior to the merger or acquisition taking place. If no election is made, the default position will be that the succeeding practice rule applies.

This is a very complex area, and you may need specialist advice if these rules apply to you.

Assigned Risks Pool

The Law Society is re-introducing the Assigned Risks Pool in December of this year albeit in a more limited form:-

- a) An aggregate limit of €1.5 million.
- b) Exclusion for all claims by financial institutions.
- c) Default status for any firm in respect of which the ARP premium has not been paid.

- d) The adoption of a formal rating schedule for the pricing of firms in the ARP, and;
- e) Where a qualified insurer undergoes an "insolvency event" the other qualified insurers are not required to close the gap and take up that insolvent insurer's share of the ARP.

Cancellation of Run Off Cover for non payment of premium

Insurers can cancel Run Off Cover for non payment of premium subject to the following:-

- Insurers must give 20 working days notice of cancellation to the firm concerned and the Law Society of Ireland.
- The former principals of the firm will be legally obliged to pay Run Off Cover.
- Insurers are required to re-instate Run Off Cover back dated to the date of cancellation if payment is made in arrears subject to certain rules.

Commercial Undertakings

Substantial changes have been introduced in relation to Commercial Undertakings. In the current insurance year a separate insurance had to be obtained for the provision of Commercial Undertakings. Subsequent to this the Law Society recommended that firms should not provide Commercial Undertakings regardless of whether they had paid for separate PI cover.

The position as of 1st December 2010 will be as follows:-

- Non Commercial Undertakings are permitted and covered under PI policies.
- Commercial Undertakings issued before the 1st December 2009 are covered unless they result from a wrongful act or omission.
- Commercial Undertakings issued on or after the 1st December 2009 but before the 1st December 2010 are covered only if separate additional cover was obtained.
- Commercial Undertakings after the 1st December 2010 will not be covered and are prohibited.
- Commercial Accountable Trust Receipts issued after the 1st December 2010 are permitted and covered.
- Commercial Undertakings with the maximum limit of liability of €75,000 are permitted and covered.

Stamp Duty

The Insurers will be allowed to notify the Law Society of the discovery of any failure to pay stamp duty on the part of any member firm.

Complaints

Insurers may report principals of law firms to the Law Society if they believe that principal is failing to co-operate in dealing with claims.

Practice Notes on Undertakings

There are two types of undertakings which we wish to bring to our members attention:

1. An unconditional undertaking to furnish part of sale proceeds to a third party

This particularly relates to Accountable Trust Receipts where there is a substantial equity of redemption. The client may want to use the equity of redemption as security for some other borrowing and asks his solicitor to give an unconditional undertaking to a second financial institution to furnish the net proceeds of sale after the first institution has been paid off.

This type of undertaking should never be given, because the solicitor has no control over matters. The first institution is entitled to look for the return of the documents at any time. The only safe way to deal with such a situation is for the second financial institution to register a charge against the property.

2. Negative Equity situations

Negative Equity is the situation where someone has a house worth a certain sum, but has a mortgage on the property which exceeds that sum (for example a house worth €250,000 and a mortgage worth €350,000.)

There are two separate pitfalls to be avoided:

1. If a solicitor takes deeds on accountable trust receipt, he is undertaking either to return those deeds or to pay off the liability secured by these deeds. Where there is negative equity, he cannot pay off the liability. Also, the solicitor will be giving an undertaking to the purchasers solicitor to furnish a vacate of the existing mortgage. Without being paid in full, the financial institute will not furnish the vacate.
2. If there is negative equity, the solicitor cannot get involved in the transaction unless he has the express agreement of the financial institution. The solicitor must satisfy himself that he can comply with that agreement.

The simpler way is for the financial institution to sell pursuant to its power of sale in the mortgage. Many thanks to Owen Binchy of James Binchy & Son, Charleville Co. Cork, former President of the Law Society for this advice.

The SMDF LQ Basic Update

In just under a year we have seen the understanding and implementation of risk management standards rise significantly. Certain procedures, such as undertakings registers were virtually unheard of last year and now these are being implemented at a very sophisticated level in the majority of firms who have signed up for the SMDF LQ Basic. Average scores on the standard have risen from the 50%+ to 65%+. In fact, a few outstanding firms have achieved a perfect or almost perfect score on the Standard. If those firms combine those scores with a good claims history, they will present an outstanding PI application this year.

The management tools recommended by the Standard have helped firms gain a completely different perspective on their risk exposure. One firm explained that before implementing these management tools, they had perceived their risk exposure on their undertakings to be far higher than it actually was. Another firm told us that when they received a letter from a lending institution listing over 100 outstanding undertakings, they were able to reply within the hour with a full progress report on each undertaking. The financial institution was so impressed that the firm was subsequently invited in to advise the lending institution on its own internal procedures. So, there are business opportunities opening up in new areas which we as solicitors have not explored up to now.

The SMDF LQ Basic has a lot to offer firms who have operated to high standards over many years. The Standard has given them the opportunity to consolidate and improve their existing systems. These firms are scoring in the high 90's on the Standard, as they are refining existing systems. The big advantage is that they can now distinguish themselves through an objective accreditation and demonstrate to indemnifiers what they have been doing over the years. But in addition, they see the Standard helping their business, improving their standards, lowering their risk and increasing their profitability.

Many firms who registered have started risk management procedures from scratch. It is hard work to set up and implement these systems, but once set up, firms feel more organised and more in control of their business.

SMDF LQ Basic Programme and Free Workshops 2010/2011

Programme Introduction and Registration October/November 2010

- Register for the SMDF LQ Basic Standard
- Receive a Certificate of Registration to confirm that you are registered
- Receive the Risk Management Manual, which is a guide to the SMDF LQ Basic Standard and contains
- 41 worksheets and precedents on a CD Rom

Standard One and Two –Workshop March/April 2011

- Attend a workshop in March 2011 and cover Standard One and Standard Two, which contain the most important elements of the SMDF LQ Basic Standard.
- Standard One deals with Critical Registers
- Standard Two deals with limitation of liability
- The workshop will cover the worksheets and precedents 1 – 16 in the Risk Management Manual and firms will start preparing their audit folder.

Standard Three and Four Workshop May/June 2011

- Attend a second workshop dealing with Standard Three and Four.
- Standard Three covers File Reviews and Supervision. We will work through precedents 17 – 27 in the Manual
- Standard Four covers Risk Management Procedures, precedents 28 – 41 in the Manual.

To register email anne@anneneary.ie or phone us on 01 4911866

Preparing for the 2010 Renewal

- You will find an application form and covering letter in this envelope. You will see that the SMDF application form is by far the simplest form in the market place. We are conscious of the pressures on you this renewal period, and we have tried to make it as simple as possible. If you are a current SMDF member, you will also receive a printout of your claims and notifications. If you are currently not a member, you will need to obtain a claims history from your current indemnifier and send it to us with your application form.
- We have not set a formal deadline for receipt of applications. However, we suggest that you try to send us the completed application form within 7 working days.
- As soon as we receive your application, we will vet and assess it. If there are issues to clarify or there is information missing from your application form, we will contact you, time permitting.
- An early submission is good for us and good for you.
- Applications which are sent in after mid November are generally viewed as distressed or problematic by indemnifiers. Try not to submit your application after this time. However, we know that there are circumstances where firms have no choice but to send in late submissions and we will do our utmost to process them for you.
- If you are a current member, read your claims printout carefully and update us on any developments. We will close off any notifications which you have sent us if we believe that no further action will be taken. Please let us know if you disagree, or if there are notifications which you would like us to close.
- For non-members, please provide a detailed claims history from your current and previous insurers detailing all payments and reserves. It would be helpful if you also enclosed a short, clear explanation of any claims or notifications appearing on your claims history, together with a description of the action which you have taken to ensure that the circumstances which permitted the claim to arise have been rectified.
- Your covering letter is very important. If you do not put a great application together for your firm, how is the underwriter to distinguish your firm from hundreds of others? You are the advocate for your own firm. You might also want to put additional points in support of your application which are not required by the form. Remember that your indemnifier is effectively covering your past history. It is critical to adopt good risk management procedures going forward, but you must also be able to satisfy indemnifiers about your past practices. There is a lot of remedial work you can carry out as part of the SMDF LQ Basic which will go a long way towards this goal i.e. setting up a Register of Undertakings which lists all outstanding undertakings and set up a Register of Critical Dates for your litigation files.
- We suggest that you enclose copies of any documentation with your application form which may help your application, such as
 - A Certificate of Registration for the SMDF LQ Basic
 - A Certificate of Accreditation and your score if you have had your audit
 - A covering letter
 - An explanation of your claims history
- You may find it useful to copy the application form and fill it in as a draft before preparing your final application form.
- Check your application form for errors and maybe have it re-checked by someone else before sending it out. Your Fund has the simplest form in the market, and yet up to 66% of these forms are incorrectly filled out. An underwriter does not have a positive reaction when she or he sees that percentages do not add up to 100%, questions are left blank, or when one answer is ticked, crossed out in pen and the opposite answer ticked. Mistakes on the form cause delay as we may have to return the form to you for corrections or for additional information. So,
 - Check your form for spelling mistakes and inaccurate figures
 - Ensure your form is legible and easy to read
 - Keep a copy of your entire application for your own records
 - Provide all the information requested, such as if you indicate that you would like a quote for top up cover, please indicate how much top up you require.
- Your application should be clear, well presented and comprehensive; underwriters will see the way you present your application as indicative of the way you run your business
- Use the proposal form as an opportunity to convince our underwriters that your firm is a good risk.



Margaret Weber
Manager SMDF

Announcement – SMDF LQ Basic Standard Gold Award

We are introducing the Gold Award for firms which have outstanding scores on the SMDF LQ Basic Standard. Any firm which would like to be considered for this award should contact us by email.



SET UP
BY SOLICITORS
FOR SOLICITORS

Contact details for the SMDF

Phone: 01 - 676 3118, visit our website www.smdf.ie
or contact Margaret Weber margaret.weber@smdf.ie