



CASUALTY INSURANCE PRACTICE

Summary of modules

MODULE 1 – INTRODUCTION TO INSURANCE LEGISLATION AND REGULATION IN SOUTH AFRICA

The main purpose of this Module is to provide the student with a bird’s-eye view of the legal and regulatory framework applicable to the South African insurance industry and specifically to consider where casualty insurance fits into this framework.

We provide an overview of the concept of insurance as well as the history of insurance legislation in South Africa. We briefly discuss the legislation that specifically governs short-term insurance business, which includes casualty insurance. We also cover what casualty or third-party insurance means, and we provide a breakdown of the main differences between first-party and third-party insurance. Finally, we briefly consider the current regulatory framework and discuss some relevant aspects thereof such as TCF, the FAIS General Code of Conduct and the Policyholder Protection Rules.

MODULE 2 – THE ROLE PLAYERS

In this Module we examine the different role players or parties that are involved in Casualty insurance, in more detail.

We consider what is meant by the concept “Third Party” and explain that Third Parties could either be a natural person or a juristic person. We analyse the concept of legal subjectivity, when it commences and comes to an end for natural persons. We look at the concept of a “juristic person” and explore a few examples such as companies, state owned entities, body corporates, partnerships, and joint ventures.

We then look at the Insured or policyholder where we will discuss a natural person’s contractual capacity, and we learn how the law provides for any deficiency in a person’s contractual capacity. In the case of Insureds who are juristic persons, we briefly discuss the contractual capacity of some juristic entities and who is authorized to enter into insurance contracts on a juristic person’s behalf.

We also discuss different insurance structures such as reinsurance, co-insurance, cell captive insurance, fronting etc. and the various roles which Insurers can play within these structures.

Lastly, we discuss and highlight the important roles which insurance brokers, underwriting managers, loss adjusters, attorneys and experts respectively play in the Casualty insurance environment.

MODULE 3 – THE THREE MAIN SOURCES OF LIABILITY

In this Module we discuss the three main sources of legal liability in South African law being the law of delict, the law of contract and then some selected statutes.

We explore the five elements of a delict in more detail. Each element is discussed and explained by using every-day, practical examples and case law to guide the student through the various tests and thought processes which one must apply to determine whether a person is delictually liable for another's loss, in a specific scenario.

We discuss the requirements for the formation of a valid contract and the different persons who could be a party to a contract. We also discuss the main differences between the terms and conditions of a contract whereafter we have a closer look at contractual terms that may have an effect on the legal liability of a person such as exclusions of liability, exemption clauses, indemnities, limitation of liability clauses and disclaimers.

The final lesson in this Module deals with legal liability which is imposed by legislation or acts of Parliament and we focus on 7 selected pieces of legislation which are commonly found in the Casualty insurance environment namely:

- (a) The Consumer Protection Act
- (b) The National Environmental Management Act
- (c) The Compensation for Occupational Injuries and Diseases Act
- (d) The Occupational Health and Safety Act
- (e) The Foodstuffs, Cosmetics and Disinfectants Act
- (f) The Road Accident Fund Act (as amended)
- (g) The National Veld and Forest Fire Act

MODULE 4 – LEGAL AND INSURANCE CONCEPTS

In Module 4, we look at a few legal and insurance concepts which underpin Casualty insurance and which one encounters regularly when working in this interesting field of insurance.

Some of the legal concepts that are covered in this Module are concepts such as *locus standi*, strict liability, vicarious liability, the onus of proof, conflict of interest, prescription, cession, estoppel and waiver.

We also discuss some insurance concepts that are commonly used such as insurable interest, proximate cause, subrogation, indemnity, the rejection and repudiation of claims, the voidance and cancellation of policies, aggregation - to name but a few.

We explain the difference between the concepts of damage and damages and we also look at the differences between patrimonial and non-patrimonial damages, what special damages, general damages and pure economic losses are, what the difference is between a direct loss and an indirect or consequential loss and why certain non-compensatory losses or damages are usually not covered by a Casualty policy.

MODULE 5 – POLICY READING AND INTERPRETATION

In Module 5, we highlight a few general rules of interpretation of contracts that have been clarified by our courts over the years. We briefly look at the various documents which all form part of the Casualty policy or contract.

We consider the various policy formats that are used by Insurers in the South African market and explain the hierarchy of cover issues that need to be considered when interpreting an insurance policy. We again discuss the concept of onus of proof and explain how the onus of proof shifts from the Insured to the Insurer during the claims process. Lastly, we touch on the use of standard form policies versus bespoke policies in the market.

MODULE 6 - THE COMMON FEATURES OF CASUALTY POLICY DOCUMENTS

In this Module we discuss the 6 main policy documents that form part of a Casualty policy, in more detail, namely the preamble, the proposal form, the policy schedule, the policy wording, endorsements and the FAIS disclosure document.

We explain that the preamble serves as an introductory statement to the policy and usually sets out the nature and intent of the policy. The policy schedule usually describes the details of the specific agreement between the Insurer and the Insured and should always be consulted at the onset of the investigation of any claim or when determining the cover that has been arranged for the particular risk.

We discuss some common provisions which are found in most Casualty policy wordings such as the limit of indemnity clause, the application of the deductible, the clause relating to the Insured's legal defence costs etc. We also look at the interaction between the main Operative clause and the relevant Insuring clauses of the sections contained in the policy, and we explain what is meant by the "policy trigger".

We look at some common exclusions that are found in Casualty policies and we also explain why Insurers want to exclude these losses from cover. We look at the various general conditions found in Casualty policies and also touch on a few common extensions which are often added to policies to extend the cover.

The purpose and role of the proposal form is considered, and the importance thereof is explained in more detail. We explain what endorsements are, how it differs from the existing provisions contained in a policy and how it operates when a claim is notified to an Insurer. Lastly, we briefly discuss the FAIS disclosure notice and the information that must be contained therein.

MODULE 7 – AN OVERVIEW OF THE LIABILITY POLICY

We firstly look at some of the most commonly used definitions found in Liability policies and we explain how these definitions interact with certain exclusions or Insuring clauses to limit the cover that the policy provides.

We then have a closer look at the cover provided, the exclusions applicable and some extensions provided for under the General Liability or Public Liability section.

We also discuss the suite of Products Liability covers which are available in the market, namely the basic Products Liability cover, Products Inefficacy, Product Recall and Products Guarantee and we explain which types of losses are covered by each of these covers and how these covers interact with certain provisions of the Consumer Protection Act.

We then discuss some ancillary liability covers such as wrongful arrest and defamation, employer's liability cover, carrier's and warehouseman's liability covers, statutory legal defence costs, pure economic loss and contractor's liability covers in more detail.

MODULE 8 – AN OVERVIEW OF THE PROFESSIONAL INDEMNITY POLICY

In this Module, we look at what is meant by "the long tail nature" of PI risks. We dissect the Insuring or Operative clause of a PI policy more carefully and investigate what "professional duties, services or activities" are.

We discuss the various additional insuring clauses that may be contained in PI policies. We have a closer look at the most commonly used definitions found in PI policies and we explain how these definitions interact within certain exclusions or Insuring clauses contained in the policy.

Thereafter we discuss some frequently used extensions which may be offered by Insurers to widen the cover.

Lastly, we provide a high-level overview of some PI policies issued to built-environment professionals (engineers, architects, quantity surveyors etc), legal and medical professionals, estate agents, professionals in the informational technology space, auditors, accountants and tax practitioners, financial advisors and intermediaries or brokers and PI policies issued in respect of professionals dealing with clinical trials.

MODULE 9 – GENERAL LIABILITY VS PROFESSIONAL INDEMNITY POLICIES

In Module 9, we give some guidelines or "tips" to use when one must decide whether a PI policy or a Liability policy or both should be secured for an Insured, or when a Third Party claim is covered under a Liability or a PI policy.

After a student has completed this Module, he/she will be able to determine which type of policy is more suitable for a specific Insured's needs and will also be able to distinguish between a PI claim and a Liability claim.

MODULE 10 – AN OVERVIEW OF THE FINANCIAL LINES POLICY

Firstly, we will look at Director's & Officers Liability policies or also called D&O policies. We give a brief overview of the relevant provisions of the Companies Act 71 of 2008 and the King Code on Corporate Governance. We look at the basic cover that D&O policies provide to directors and officers and the companies they work for and what would normally be excluded under a D&O policy.

In the second part of the Module, we have a closer look at the cover that is available under a Fidelity Guarantee policy (or FG policy).

Lastly, we discuss Commercial Crime policies and the cover they provide to an Insured.