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RISK MANAGEMENT COLUMN

- Reflections on 2021 1

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Legal Practitioners' Indemnity Insurance Fund NPC
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LEGAL PRACTITIONERS' FIDELITY FUND
SOUTH AFRICA

Your Champion in the Legal Profession Since 1941

RISK MANAGEMENT COLUMN

REFLECTIONS ON 2021



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Welcome to the first edition of the Risk Alert Bulletin for 2022.

By the time this edition is published, legal practitioners will be well into the new year. In this first edition of the year, I thought it apposite to commence with a risk management reflection on what transpired in 2021. The beginning of the calendar year is an opportune time to reflect on what transpired in the previous year, consider the lessons learned and to plan for the year ahead.

The Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF) was notified of 95 claims in the 2021 calendar year. The provision for all outstanding claims as at 31 December 2021 is R692, 964,800 according to the latest actuarial assessment. The corresponding figure was R665,566,300 at the end of December 2020. The increase of R27, 398, 500 in exposure for an insurer of the LPIIF's size and mandate is significant.

My focus on a calendar year rather than on an insurance scheme year is purely a matter of timing and context. The insurance scheme year runs from 1 July of each year to 30 June of the following year. More than ever, special attention must be paid to

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how the 2021/2022 insurance scheme year develops. For the first time since the inception of the company, the LPIIF has not received an annual premium from the Legal Practitioners' Fidelity Fund (the Fidelity Fund) and will thus have to use the reserves built up over the years to fund its operating costs and to pay claims. One of the reasons advanced by the Fidelity Fund for the non-payment of the premium is the decline in its own revenue in the period since the start of the pandemic.

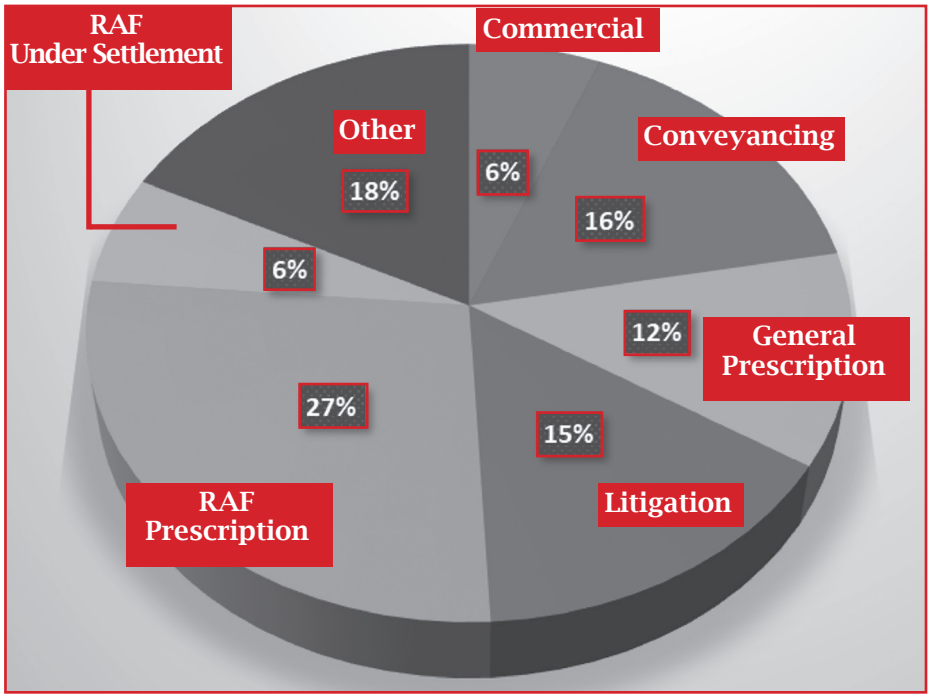
Claims notified in 2021

The breakdown of claims notified to the LPIIF in the year ended 31 December 2021 is shown in the graph on the right.

The main claim types have remained consistent over the years. From a risk management perspective, this requires that firms pursuing these high-risk areas of practice increase their focus on the risk mitigation measures they have in place. In some instances, the internal controls and other risk mitigation measures will need to be enhanced.

Even if your firm has never had a claim against it in the past, you may still be affected by the number and value of claims against legal practitioners. An increase in claims notified to the LPIIF puts a strain on its long-term sustainability and this threatens the current professional indemnity model. Those firms who have taken out top-up insurance in the commercial market will recall that insurance premiums increased by between 50% and 500% in 2021. The reasons for the significant increase, according to the commercial insurers, were a hardening of the reinsurance market, the increase in losses arising from cyber-related claims, a decline in investment performance because of the pandemic and the increasing number and value of professional indemnity claims in general. In other jurisdictions, most notably the United Kingdom, the professional indemnity market for legal practitioners experienced several significant disruptions with some of the insurers pulling out of the market and others increasing their premiums significantly or tightening the conditions under which they were prepared to provide cover. The result was that many firms experienced significant challenges in securing professional indemnity insurance. This put the ability of the firms concerned to continue operating at risk. South Africa is not immune to such seismic events. There is a responsibility on all stakeholders to try to curb the increase

Breakdown of claim notifications by type



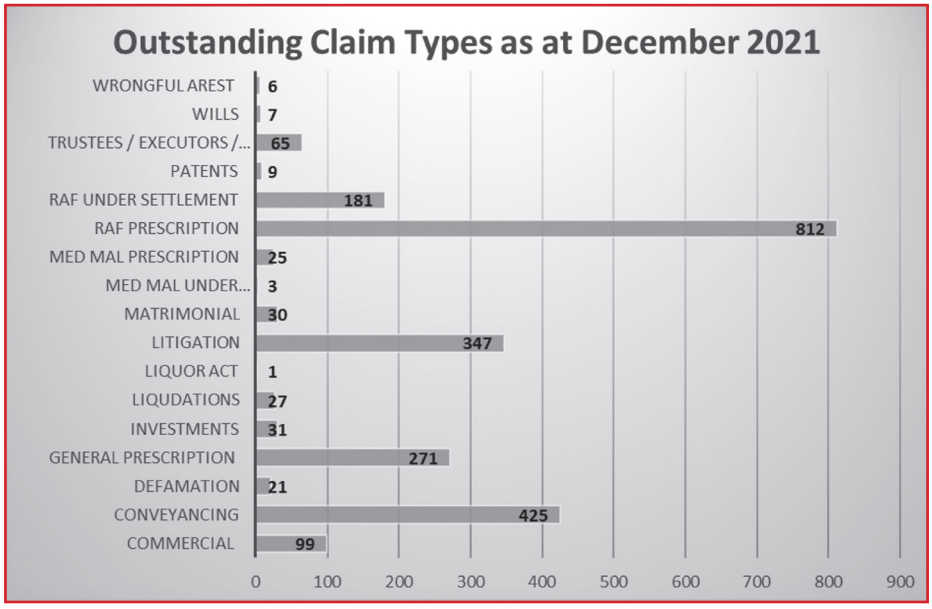
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in claims and to promote a risk management culture.

One of the first steps that you can consider taking in 2022 is to arrange a risk management education session for all professional and support staff in your firm. Even if you are of the view that the risk management measures that you have implemented in your firm are adequate to meet the identified risks, a risk management session will assist in benchmarking your internal measurers against the rest of the market. You can then also use the training session to do a gap analysis to ensure that you have covered all the basis and are not blind-sided by a risk that you had not adequately considered. Please contact the LPIIF's Practitioner Support Executive at Risk.Queries@LPIIF.co.za to arrange a training session. These training sessions are provided at no cost and offered to all insured legal practitioners. In the current operating environment, the training sessions can be conducted using any of the online platforms if face-to-face training is not feasible.

Outstanding claims

The assessment of professional indemnity claims is not straight forward and takes up a significant amount of time and resources. It will be appreciated that the assessment of liability on the part of a legal practitioner involves, amongst others, consideration of a host of factual and legal considerations. These considerations include assessing whether the claim falls within the indemnity afforded under the Master Policy. A copy of the Master Policy is available on the LPIIF website www.lpiif.co.za. Professional indemnity claims against legal practitioners are mainly litigious in nature and this compounds the long-tail nature of such claims (the oldest active claim was registered in the 2004/2005 insurance year), resulting in matters taking many years to be finalised in many instances. A breakdown of all outstanding claims (not only those registered in the 2021 calendar year) at the close of last year is depicted in the picture above.



A focus on prescription

Prescription related claims make up the highest number and value of claims notified to the LPIIF. A significant number of resources have been dedicated to dealing with this risk. Please have regard to our previous publications and the website for tips aimed at mitigating this risk. Prescription (and compliance with all other statutory time limits) must be central to every action you take in a matter and must be one of the considerations when deciding whether or not to accept an instruction. Do you have the appetite, time, resources and capacity to pursue the matter timeously? Has the client provided you with all the relevant information and

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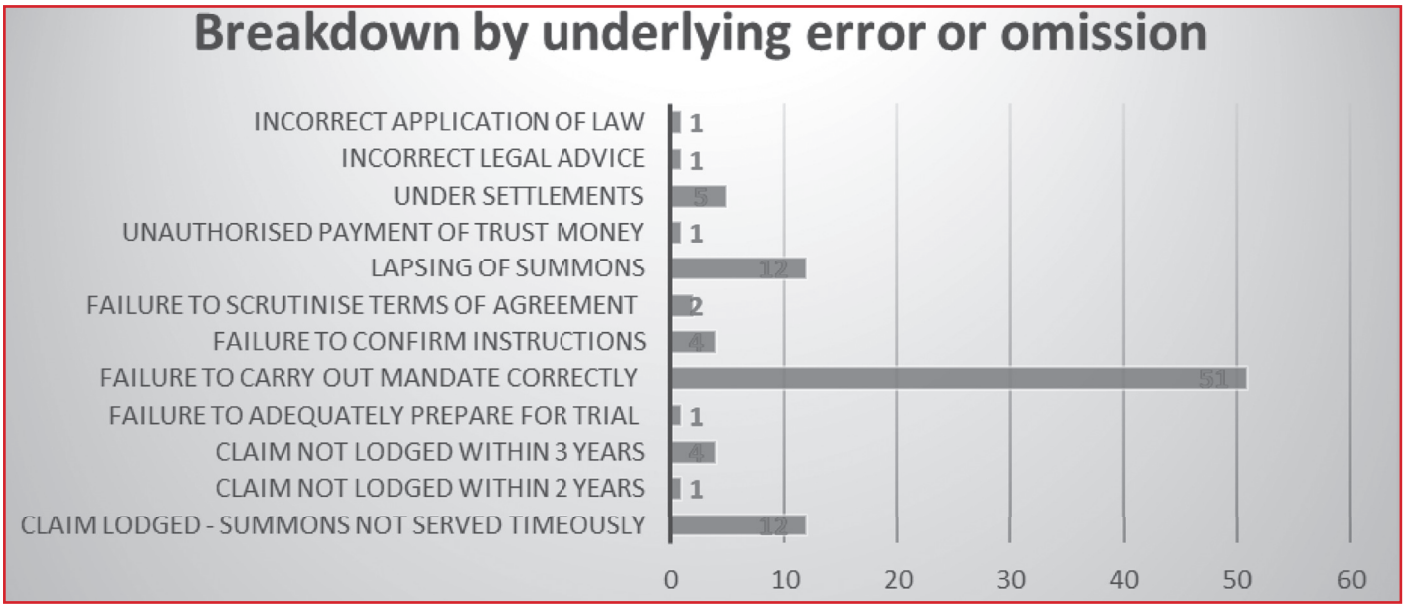
documents to carry out the instruction? Will you require the assistance of counsel, a correspondent or some other expert in order to draft the pleadings timeously and then have them served in time to interrupt prescription? Has the client consulted with any other legal practitioner previously in respect of the same matter? If so, when and why was the mandate of that legal practitioner terminated and has the client's file been retrieved from the previous legal representative? These are some of the questions that you must consider before you accept the instruction.

We have previously published several tips that legal practitioners can implement to mitigate the risk of prescription. These tips can be accessed in the publications on the LPIIF website and in the practice management column in *De Rebus*. The suggestions are mainly internal controls that can be implemented in the respective practices. In addition, you must also consider the law in respect of the prescription point that you are faced with. Do not simply accept an allegation that the claim has prescribed without considering all the relevant facts and the applicable legal principles. There were several significant judgements handed down in 2021, which have an impact on different aspects of the prescription risk. The judgements include:

- *NMZ obo SFZ v MEC for Health and Social Development of the Mpumalanga Provincial Government* (Case no 1149/2020) [2021] ZASCA 184 (24 December 2021). The issue considered by the Supreme Court of Appeal (SCA) was whether the Mpumalanga Division of the High Court was correct in dismissing the appellant's application for condonation of the failure to give timeous notice under section 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. The SCA upheld the appeal and granted the application for condonation as good cause had been established. The SCA restated the requirements for condonation;
- *Van Zyl N.O. v Road Accident Fund* [2021] ZACC 44- in this matter the Constitutional Court considered sections 23(1), 23(2)(b) and (c) of the Road Accident Fund Act 56 of 1996 in respect of claimants of unsound mind. The court found that prescription only begins to run from the date of appointment of the *curator ad litem*. The judgment was delivered on 19 November 2021;
- *Jugwanth v MTN (Case no 529/2020)* [2021] ZASCA 114 (9 September 2021). The case concerned an exception to particulars of claim for not disclosing a cause of action on the basis that *ex facie* the claim had prescribed. It was found that the party relying on prescription must invoke and prove it. There was no requirement that the particulars of claim pre-emptively plead a basis to defeat a possible plea of prescription;
- In *Legal Practitioners Indemnity Insurance Fund NPC v The Minister of Transport and Another* (GP) (case no 26286/2020, 21 June 2021) (Janse Van Nieuwenhuizen J) the LPIIF successfully challenged the constitutionality of Regulations 2 (1) (b) and 2 (2) issued in terms of the Road Accident Fund Act in so far they relate to the two-year prescription period for minors and persons under legal disability in matters where an unidentified vehicle is involved ('hit-and-run' claims); and
- In *Van Heerden & Brummer Inc v Bath* (356/2020) [2021] ZASCA 80 (11 June 2020) and *McMillan v Bate Chubb & Dickson Incorporated* (Case no 299/2020) [2021] ZASCA 45 (15 April 2021) the SCA considered when prescription begins to run in an action for damages against an attorney.

It would not be possible to list all the judgements handed down on the prescription question in this article. Practitioners are urged to study the individual matters where

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they are dealing with prescription and to carefully consider whether there are any grounds on which a special plea of prescription can be challenged.

If you come across any cases where a novel legal point on prescription (or any other area that may affect the liability of legal practitioners) arises please bring it to our attention. There are many proverbial grey areas in this interesting legal subject.

Errors and omissions that resulted in claims

What errors and omissions are firms making that ultimately result in claims? Drilling down into the underlying reasons for the claims, the LPIIF team has identified the underlying causes listed in the picture above as the main reasons for claims notified last year.

Exclusions

Some of the claims notified to the LPIIF have not been indemnified. In the past five years, claims have mainly been excluded because (the percentage of the overall exclusions and the applicable clause of the policy are indicated next to each category) the claim for compensation –

- does not arise out of the provision of legal services by the insured legal practitioner (4%) (clause 1);
- relates to a trading debt of the legal practice (9%) (clause 16 (a));
- arises from or is in connection with misappropriation or unauthorised borrowing of trust money or property (17%) (clause 16(b));
- arose from or was connected to a fine, penalty, punitive or exemplary damages against the insured or an order to that the insured pay costs de *bonis propriis* (3%) (clause 16(g));
- arose from circumstances where the insured legal practitioner either received or paid out funds, in trust or otherwise, where the receipt or payment of the funds was unrelated an existing direct instruction to provide specific legal services or where the insured merely acted as a conduit for the transfer of funds to the payee. This exclusion applies, for example, in circumstances where the

legal practice merely acts as a so-called paymaster or where the practice merely acts as a conduit for funds unrelated to an existing/ current instruction to carry out legal services (4%) (clause 16 (m));

- is in respect of a defamation claim brought against the insured (5%) (clause 16(n)); or
- arises out of cybercrime (52%) (clause 16(o));

The remaining 6% of claims not indemnified relate to other grounds stated in the policy.

Cybercrime

It will be noted that most of the excluded claims relate to the cybercrime. It is concerning that several legal practices are still falling victim to cybercrime despite the numerous warnings published by the LPIIF and many other entities regarding cyber-risk. Insurers internationally have reported a sharp increase in cybercrime activity in the last 22 months as legal practitioners transitioned to remote or hybrid working environments in the wake of the coronavirus pandemic. It is important that legal practitioners ensure that there is a heightened awareness of cybercrime in their firms and that there are appropriate measures in place to respond to this increasing risk. The value of cybercrime claims rejected by the LPIIF in terms of clause 16(o) was R142,691,667 as at 31 December 2021. Cybercrime claims with a total value of R11,266,003 were rejected in the 2021 calendar year. Legal practitioners and their staff are urged to have regard to the following for information on cyber risks faced by practices:

- "The professional indemnity claims trends", *De Rebus*, November 2021;
- "Ongoing cybercrime threats", *De Rebus*, May 2021;
- The December 2020, November 2019, August 2019 and August 2018 editions of the Risk Alert Bulletin;
- *Fourie v Van Der Spuy and De Jongh Inc and Others* 2020 (1) SA 560 (GP);
- *Jurgens and Another v Volschenk* (ECP) (unreported case no 4067/18, 27 June 2019) (Tokota J);
- *Galactic Auto (Pty) Ltd v Venter* (LP) (unreported case no 4052, 14 June 2019) (Makgoba JP); and
- *Lochner v Shaefer Incorporated and Others* (ECD) (unreported case no 3518/16, 24 January 2017) (Plasket J).

Prior editions of the Risk Alert Bulletin are available on the LPIIF website on the risk management page. The articles previously published in *De Rebus* can, likewise, be accessed on the website of that publication at www.derebus.org.za

A coordinated, concerted effort by all stakeholders is required to stem the ongoing cybercrime pandemic. We have made several attempts to get the law enforcement and prosecution agencies to prioritise the cybercrime matters. Unfortunately, our efforts have not yielded much success. We call on all legal practitioners and the various bodies in the profession, the regulators and the voluntary associations, to assist wherever they can to get the authorities to recognise the significant risk posed by cybercriminals to legal practitioners, their clients, the property industry and society in general. The reports in the media on the arrest of some cyber syndicates in the last quarter of 2021 are noted. This is a welcome development, and we will monitor how the matters play out in the court system.

The extent posed by cyber criminals to conveyancing practices in particular can be seen from the suggestion by one regulatory body abroad that consideration be given to making cyber insurance mandatory for conveyancers- see https://www.legalfutures.co.uk/latest-news/conveyancers-might-be-forced-to-buy-cyber-insurance-in-pii-rejig

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The coronavirus pandemic

The coronavirus pandemic, state of national disaster and the new normal have now been with us for almost two years. Many of the measures implemented by firms to operate in the current environment may be permanent.

The new way of working forced firms to rely on technology to a larger extent. The new manner of operation has, however, introduced its own risks. Some of the challenges facing legal practitioners were addressed in the article "Is a perfect storm on the way?" which was published in the March 2021 edition of *De Rebus*. The article "Take time to check that all the basics are done correctly" in the January/February 2022 edition of *De Rebus* makes some risk management suggestions for firms to consider in the current operating environment.

At the time of writing, I am not aware of a comprehensive study that has been conducted on the impact of the coronavirus pandemic on the legal profession in South Africa. Nevertheless, legal practitioners have been impacted by the pandemic in their professional and personal lives in some way or another.

I also write at a time when the offices of the Master of the High Court have not reverted to full operating capacity yet in the wake of the cybercrime attack that occurred on 7 September 2021. The impact of this has been significant for the members of the public who require various services to be provided by the Master's office. Those legal practitioners who deal with the administration of estates have also been significantly affected. The timing of the interruption of services could not have come at a more inopportune time as many practitioners were already facing vulnerabilities as the county was just emerging from the third wave of the pandemic and entering its 18th month under lockdown and the national state of disaster.

The risk transfer measures that have been brought to the fore by the coronavirus pandemic include business interruption insurance. I am not aware whether any legal practices have managed to obtain indemnification from their respective insurance companies under their business interruption policies. The judgements handed down in *Santam Limited v Ma-Africa Holdings (Pty) Ltd & Another* (255/2021) [2021] ZASCA 141 (7 October 2021) and *Guardrisk Insurance Company v Café Chameleon* [2020] ZASCA 173; [2021] 1 All SA 707 (SCA; 2021 (2) SA 323 (SCA) relate to indemnification for losses suffered by businesses in the wake of the declaration of the national state of disaster and the implementation of the lockdown measures. The cases have received a lot of media coverage. The pandemic forced many insured entities to scrutinise the wording of their respective business interruption policies. Some insurers have also reconsidered their policy wording and, where necessary, amended the wording to specifically exclude losses that arise from a pandemic. Legal practitioners must consult with their insurance brokers and intermediaries, do a comprehensive assessment of the cover they have in place and, where necessary, ensure that any potential gaps in cover are addressed.

One of the main concerns raised by legal practitioners at the outset of the pandemic related to prescription. The risk management suggestions published in the April 2020 edition of the Risk Alert Bulletin and the suggestions for legal points to be considered in response to a prescription point raised ("Arguments for a delay in the completion of prescription and expiry periods during the lockdown period") in the June 2020 edition remain relevant.

There are currently a lot of debates going on across the globe on the future operating models for law firms. Various opinions have been expressed ranging from those who advocate a return to offices on a full-time

basis, proponents of a hybrid operating model with time split between offsite and in-office working and those who prefer a remote working arrangement on a permanent basis. There is no one size fits all approach to this question. Each firm will need to decide on an appropriate model based on its own unique requirements. Not all types of legal work can be carried out remotely, though some types of work and some components of the legal service can readily be carried out offsite. Issues regarding supervision of staff, training and monitoring the quality of the output must be considered. Invest in the appropriate secure information and technology solutions. It is important that the internal controls are still applied whether the team is working remotely, in a hybrid model or at the office.

One of the points raised in other jurisdictions is that some practitioners decried the isolation felt during the hard lockdown periods. Some areas of legal practice are not as well suited to working in silos than others. Similarly, some legal practitioners prefer working on their own while others do not. One of the points raised was that the remote working conditions took away the ability of practitioners to run problems by their colleagues in the firms, that the collegial atmosphere and cooperation were lost and younger practitioners felt that they were left to their own devices (literally and figuratively) in some instances. The longer working hours, the expectation that legal practitioners must always be 'switched on' and the intrusion into personal time are also concerns that have been raised. The increased risk of burnout and other psychological matters has also been raised in the discussions. Please take account of these human factors when you consider the appropriate future operating model for your practice. Remember that these are factors which result in people taking their eyes off the proverbial ball and that is fertile ground for errors and omissions to occur.

Loadshedding

I write this as the threat of loadshedding is, once again, on the horison. A lack of access to electricity for long periods will have a substantial impact on the ability of legal practitioners to operate. This risk must also be considered by legal practitioners and, where necessary, alternate power solutions must be sought. The technological solutions used in legal practices require a reliable power supply. A regular disruption of the power supply will lead to a lot of down time and affect your service offering to clients, the ability to earn an income and your achievement of the milestones in a matter. The risk of losing an instruction because you cannot operate optimally or even facing a claim because you failed to meet a deadline or fulfil your mandate adequately is real. In the last year I have had sight of several cases where loadshedding and the loss of documents due to servers crashing have been raised in applications for condonation of a failure to meet a due date.

Loadshedding and other interruptions to services are some of the business interruptions that must be considered by all firms when assessing risks in the broad operating environment.

Conclusion

It is hoped that 2022 will be a better and more predictable year for legal practitioners, the country and the world. Unfortunately, prior experience shows that each year throws new risk management challenges at the profession. Constant assessment of the operating environment and the development of appropriate measures to deal with the challenges that emerge is one of the best methods for dealing with what lies ahead.

May we all learn from prior mistakes and not take a *laissez-faire* attitude to risk management into 2022.