



BINDER PROBLEMS: PREVENTION AND CURE

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Topics

- A. A reminder of basic principles
- B. Ratification of Coverholder breaches – a bear trap!
- C. Waiver – another bear trap!
- D. Prevention – Monitoring the binder
- E. Cure – Options when things go wrong
- F. Conclusions / Takeaway Points

A. Basic Principles

- Binder = A contract of agency, not a contract of insurance.
- Insurer = principal
- Coverholder = agent
- Agent's primary duty is to act within the limits of authority it has been given. If so, it will bind the insurer as against third parties.

A. Basic Principles [2]

- Different types of authority
 - Actual – Express instructions of the principal (but implied authority to do what is necessary to carry out the express authority).
 - Ostensible (aka Apparent) – The usual authority someone in the position of the coverholder would be expected to have.

A. Basic Principles [3]

Significance of ostensible authority

- Binds the insurer even if no actual authority.
- Effects can be very damaging.
- Unless the insured had knowledge, but difficult to prove.

- Insurer may have a claim against the coverholder (but this involves time and money. Is the coverholder a worthwhile target?).

B. Ratification – Insurers’ bear trap

- Retrospective approval of a breach of authority.
- “*an approval of what has been done...sometimes treated as equivalent to a previous authority to do it*”. *Keighley Maxsted & Co v Durant* [1901].
- Can be used positively
 - Policies written exceeding specified limits or geographical limits but no claims.
- But more often associated with negative acts ie unwanted breaches.
- Care is required to not inadvertently ratify a breach.

B. Ratification [2]

Effect of Ratification

- On the Insurer. Retrospective approval of breach. May be possible to preserve rights against coverholder but care is required.
- On the Coverholder. Needs to establish whether it remains 'on the hook' for breaches or not.
- On the Insured. Usually unaffected because of the concept of ostensible authority.
 - However, it may be necessary to assert that the Insurer has ratified the breach. See for example *ING Re (UK) Ltd v R & V Versicherung [2006]*.

B. Ratification [3]

Ingredients for ratification

“Acquiescence and ratification must be founded on a full knowledge of the facts, and further it must be in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given as against the party by his acquiescence in and adoption of the transaction.”

La Banque Jacques Cartier v La Banque d'Epargne [1888]

- Knowledge
- Conduct – Express or implied? Silence?

B. Ratification [4]

Knowledge

- Full facts of the breach required.
- Burden of proof is on party alleging ratification.
- What is the threshold required?
- *ING v R & V Versicherung* – a case study
 - R & V – Reinsurer
 - ING – Reinsured
 - Risk Insurance & Reinsurance Solutions – broker/coverholder
 - Quota share placed by Risk under R & V's binder, but without authority
 - ING claimed ostensible authority, alternatively ratification.

B. Ratification [5]

Sequence of events

- **6 March 2003** – Risk sign the slip, purportedly as agents of R & V.
- **12 March 2003** - R & V refer to the treaty in an internal underwriting report noting the expected results of the treaty and that premium was due on 31 March 2003.
- **17 March 2003** - ING sign the wording [thereby bringing the contract into effect]
- **31 March 2003** – R & V asked Risk for details of the treaty and were supplied with them.
- **8 April 2003** - ING pay the first tranche of premium to Risk (as agent of R & V)
- **14 April 2003** - R & V obtain an injunction against Risk, including a freezing order over the accounts over Risk, including the one with the ING premium in it.
- **17 April 2003** - ING makes another payment of premium to Risk.
- **30 April 2003** – R & V places an advertisement in Insurance Day announcing that underwriting authority had been withdrawn from Risk.
- **30 April 2003** – Risk asks R & V whether it is still authorised to accept premium under the treaty.
- **8 May 2003** – R & V reply questioning whether it is in fact bound by the treaty and reserves its position.

B. Ratification [6]

ING v R & V Versicherung

- Judge held – no ostensible authority on the facts.
- On ratification:
 - Historic threshold “full knowledge of all material circumstances” per *Suncorp Insurance v Milano Assicurazioni* [1993].
 - Not required to have “knowledge of the legal effect” or “notice of collateral circumstances”.
 - Held “If a principal knows the essentials of what happened...” A watering down?
- Held – R & V had sufficient knowledge.
- NB – Position may be different if lack of knowledge is insurer’s own fault (eg loss of documents).

B. Ratification [7]

Conduct

- Threshold – conduct “*is such as to show that [the principal] adopts the transaction in whole or in part; mere acquiescence or inactivity may be sufficient*” [emphasis added] (per *Suncorp*)
- So silence may be sufficient
- Conduct can be express or implied
- Burden of proof on the party asserting ratification
- R & V escaped liability because its conduct did not meet the threshold (silence between 12 March and 8 May indicated uncertainty).

B. Ratification [8]

Limits on Ratification

- Only the principal can ratify (and undisclosed principals cannot ratify, although unnamed principals can).
- No illegality.
- Ratification must be within a reasonable period.

C. Waiver

- Considerable practical overlap with ratification, but a separate legal concept.
- Effectively an abandonment of rights by the innocent party against the wrongdoer.
- Different types – waiver by election / or by estoppel.
- A different type of bear trap, but still a bear trap.
- Care needs to be taken!

D. Prevention – Monitoring the binder

The Underwriter

- Requisite systems and controls
- Lloyd's Code of Practice for Delegated Underwriting.
- Analyse information
 - termination / legal action against the Coverholder
 - cancel an insurance contract.
- A process to escalate a contentious issue
- Familiarity with regulatory reporting obligations
- A roadmap - procedures inception onwards

D. Prevention – Monitoring the binder

The Underwriter

- Due diligence before and during the life of the binder
- Proactive management
- Measurable standards;
- Control and resources to enter into and manage binder
- Lloyd's Code of Practice – Delegated Underwriting (30 March 2015).

D. Prevention – Monitoring the binder

The Underwriter

- Inform Lloyd's
 - the insolvency of the coverholder;
 - criminal or fraudulent activity by the coverholder;
 - risks written outside the terms of the binder and authority;
 - failure to pass on funds;
 - behaviour that risks damaging Lloyd's licences, Central Fund or reputation;
 - systems that may not be 'fit for purpose'.

D. Prevention – Monitoring the binder

Audits

- Assessment of the coverholder against its obligations
- An audit policy
 - frequency of audit;
 - scope for review, structures of reports and lay-out;
 - terms of reference for the auditors;
 - the agreement, implementation and tracking of recommendations resulting from the audits.
- Relevant audit experience - risk type and territory.
- Review by appropriate personnel at the underwriter.

E. Cure – Options when things go wrong

When it becomes contentious

- Process/checklist on the termination of a binder
- The ability and personnel to recover all documentation
- Inform all relevant parties
- Termination notice – form and process
- Consistent contract terms – jurisdiction and law
 - *Trust Risk Group SpA v AmTrust Europe Limited*

E. Cure – Options when things go wrong

When it becomes contentious

The Underwriter

- Previous reports and expectations
- FCA's view - disproportionate reliance on audits
- Clear time periods for compliance
- Undertakings and injunction
- Revoke authority and contact all sub-delegates
- Handling of business bound
- An action list for termination and a management team
 - *ARB International Ltd v Baillie [2013]*

E. Cure – Options when things go wrong

When it becomes contentious

The coverholder

- Notify E&O insurers?
 - *Maccaferri Ltd v Zurich Insurance Limited*
- Consider waiver by estoppel
- Convey relevant information to underwriter – knowledge?

E. Cure – Options when things go wrong

Professional indemnity insurance

- The levels of cover
- Notification and confirmation
- Frame the claim
- Careful drafting

F. Conclusions / Takeaway Points

For insurers

- Quick, decisive action
- Prompt notification of your position.
- Take great care not to ratify the breach or waive rights
- Clear/Prompt correspondence
- Act consistently with position

Coverholders

- Provide information
- Careful correspondence
- Consider waiver and ratification
- E&O insurance



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