

BINDERS: A REVIEW OF PROBLEM AREAS

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Topics

- A. General Observations
- B. Legal Principles
- C. Role of the placing broker
- D. Disclosure and Misrepresentation
- E. The Contract and Specific issues

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A. General Observations

- Binder = a commercial agreement
- Not a contract of insurance
- No industry standard
- Binders and other agreements must compliment/
be consistent
- Awareness of duties

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B. Legal principles – duties/obligations

- 1) Contractual obligations
- 2) Common law / agency
- 3) Lloyd's
- 4) FSA

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Legal principles – duties/obligations (2)

On the coverholder

- Contract
 - Express
 - Implied
- Tortious (concurrent liability with contract)
- Fiduciary (as agent)

On the underwriter

- Contract
 - Express
 - Implied

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Legal principles – duties/obligations (3)

Contractual obligations

- Coverholder ----- > ----- Insurer
- Coverholder ----- > ----- Broker (placing the binder)
- Coverholder ----- > ----- Client/ Policyholder

Accounting for premium

- Coverholder ----- > Broker > ----- Insurer

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Legal principles – duties/obligations (4)

Contractual terms

Binders generally include:

- Binding Authority limits
- Payment of premium and accounting
- Payment of commission
- Claims handling/payment of claims

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Legal principles – duties/obligations (5)

Contractual terms

- Auditing/performance review/inspecting records
- Termination of binder
- Jurisdiction and law

Beware:

- Inconsistencies between documents (binders, TOBAs etc)
- Changing practices over time

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Legal principles – duties/obligations (6)

Common law / agency

- Obligations on the cover holder
 - Implied duty to act with reasonable skill and care
 - Fiduciary duties

“A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary...”

Bristol & West Building Society V Mothew (1998)

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Legal principles – duties/obligations (7)

Common law / agency

In practice this means:

- Always acting in the best interests of the principal
- Not to make secret profits
- To act in good faith
- Not to have conflicts of interest
- To act within the terms of the authority given
- A duty to disclose and report material information to the principal

Note:

- Applies to individuals as well as companies

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Legal principles – duties/obligations (9)

Authority

- Actual authority
- Ostensible authority
- Delegation of authority
 - Dilution of authority/limits of authority
- Ratification

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Legal principles – duties/obligations (8)

Lloyd's

- Intermediaries Byelaw
- Lloyd's Code of Practice – Delegated Underwriting

FSA

- Authorisation
- False statements

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C. The Placing Broker

- Not a party to the contract
- Participates in operation of the binder
 - Premium remittances; communications
- Generally – no duty owed to the insurer

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The Placing Broker (2)

- Sub-agent of the insurer when binder effected
- A duty may be assumed
 - *Pryke v Gibbs Hartley Cooper (1991)*

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D. Disclosure

Disclosure

MIA 1906 ss17-19

Misrepresentation

Misrepresentation Act 1967

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D. Disclosure (2)

- Personal liability

*Sphere Drake Insurance v Euro International Underwriting
(2003)*

- Fraudulent misrepresentation
- Concealment

- Fraud unravels all

Markel/QBE v Surety Guarantee Consultants (2009)

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E. The Contract and Specific issues

Negotiation and terms

- A commercial contract: no industry standard
- Consistency between slip contract and binder
- Consistency between documents
- Supplement duties/obligations with express provision
- The general prohibition
-CIC Insurance Company Costa Rica

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The Contract and Specific issues (2)

Claims

- Binder and Claims Handling Agreement
- Claims settlement within delegated authority?
- Detailed framework and reporting structure
- Differentiate between underwriters

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The Contract and Specific issues (3)

Claims

- Potential loss of control
- Internet sites
 - Insurer control of content
 - Screen grabs
- Suitable Claims-Underwriting Feedback mechanism

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The Contract and Specific issues (4)

Terminating the Binder

- Breaches of authority - actionable breach
- Plan for termination
 - What can happen?
 - What do you want to happen?
 - How can it be done?
- Properly drafted notice
- Timing of notices

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The Contract and Specific issues (5)

Terminating the Binder

- Delivery up of insurance documents
- Handling the run-off

- *Temple Legal Protection Ltd v QBE Insurance (Europe) Ltd (2008)*

- *Europe Assistance Insurance Limited v Temple Legal Protection Ltd v (2007)*

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The Contract and Specific issues (6)

- Ownership
 - *Hiscox Underwriting v Dickson Manchester & Co Ltd (2004)*
- Exclusivity
 - Diverting business
 - Insurer has right of first refusal
- Proprietary Rights
 - Insurance Documentation
 - Marketing Material
- Non Solicit

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Money Issues

- Coverholder is agent of the underwriter
- Risk transfer
- Do the terms reflect the position?
 - Non-statutory trust or statutory trust
 - Express trust
 - IBA – no protection on insolvency

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Housekeeping points

1. Clarify aims; check no conflicting terms; the parties are authorised & the agreement binds.
2. Give sufficient/proper notice & have a plan.
3. Who has the right to conduct claims?
4. Exclusivity/protection of proprietary rights?
5. Are the accounts the right accounts?

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