

THE ATLAS UNDERWRITING CASE

INTRODUCTION

1. The 1991 High Court judgement in the Atlas Underwriting Case highlighted certain issues concerning duties that a broker may owe to parties other than his client.
2. In most cases a broker acts on behalf of its client, assured or reassured in negotiating and obtaining insurance cover. The broker is its client's agent. If the broker does not perform its duties as agent properly and with the necessary skill and care, then it will be liable to the client for any loss which it suffers as a result. The "Atlas" case established that a broker's duties may not be limited to duties owed to the client.

THE FACTS

3. Atlas was a United States underwriting agency which, with the help of a firm of Lloyd's brokers, obtained various binding authorities from Lloyd's underwriters and London market companies.
4. Unknown to the brokers, in April 1983, Atlas issued a financial guarantee policy in the United States to a company called Landbank. The policy enabled Landbank to sell loans to financial institutions with the benefit of insurance. The policy was outside the terms of the binding authorities, and financial guarantee business was also prohibited at Lloyd's.
5. In October 1983, an underwriter at the Excess Ins. Co., which subscribed to the relevant binding authority, obtained a copy of a policy which had been issued by Atlas and which appeared to be financial guarantee business. Excess took the matter up with the brokers, who contacted Atlas. Atlas said policy endorsements existed which brought the insurance within the terms of the binding authority. This information was passed back to Excess and the brokers said they would investigate the matter further on a visit to the US.
6. The Lloyd's leading underwriter knew nothing of these events, but found out independently that financial guarantee business may have been written by Atlas. He contacted the brokers and instructed them to cancel the policy if it was financial guarantee. He threatened termination of the binding authorities. The brokers informed him of Atlas' view that the policy was not financial guarantee and they added of their own volition that they would investigate and report back after visiting the US.
7. In the US the brokers were told by Atlas that the endorsements were not available for inspection but their effect was explained. The brokers understood that the effect was not to limit the policy in any way, but to extend it, and instructed Atlas to cancel the financial guarantee policy from inception.
8. Atlas later confirmed that the policy had only been cancelled as from 1 November 1983 but added an assurance that it was highly unlikely that any losses would ever be payable on the policy.

9. The brokers then told the Lloyd's leading underwriter that Atlas' view was that the policy was not financial guarantee, that it had been cancelled from 1 November 1983, and that there was no real risk of loss. The policy was not shown to Lloyd's and there was no mention of the alleged endorsements. The leading underwriter was left under the wrong impression that a policy had been written which perhaps should not have been written, but nonetheless it was within the strict terms of the binder. He thought that the risk had been cancelled as on 1 November 1983 and that there was no real cause for concern, either as to claims or as to Lloyd's regulations on financial guarantee business.
10. The policy had never been cancelled by Atlas, although the brokers were not blamed for not knowing this. Losses then came through which were substantial, and underwriters were put to great expense in compromising American law suits brought by their assureds. Underwriters succeeded in proceedings to recover damages from the brokers alleging that they had not reported the results of their findings as completely as they should have done.

THE DECISION

11. The Atlas judgement had the following practical ramifications for broking practice in the London market.
 - (i) The brokers, in volunteering to investigate and report to underwriters, had created for themselves a duty of care to underwriters. When they uncritically passed on Atlas' interpretation of the nature of the cover, which they knew to be wrong, underwriters were denied the chance of getting themselves off risk promptly.
 - (ii) The brokers had only dealt with the leading underwriter at Lloyd's who had not communicated his suspicions or doubts to the following market. Nevertheless, the brokers were also found liable in damages to the following market. The broker's failure to provide a complete and accurate report to the leading underwriter had financial consequences for the following market, which the brokers should have predicted. If there had been full disclosure to the leading underwriter, he probably would have informed the following market of the situation regarding the financial guarantee, and the whole market would have taken steps to get themselves off risk.
 - (iii) Binding authorities are contracts for insurance, not contracts of insurance, and so there is no duty under the Marine Insurance Act 1906 to disclose all material facts to the underwriter when the binder is placed. This case held that when a broker placing a binder on behalf of a coverholder owes a duty to the underwriter to disclose all material facts about the coverholder and the cover itself, which duty is very similar to the normal duty of disclosure in contracts of insurance. The broker could be liable in damages for failing to disclose all material facts that it knows to the underwriter.

THE RISK MANAGEMENT MESSAGE

12. Whilst you should consider assisting underwriters at all times, remember that your first duty is to your client. Inform your clients of all requests made by underwriters. More specifically;

- Do not volunteer your services to underwriters unless you are sure you can perform them properly and fully.
- Do not allow your eagerness to assist your client to interfere with your duty to act in good faith.
- Use disclaimers when giving advice, unless you can vouch for its accuracy.
- Do not act as a mere conduit of advice if you do not agree with it yourself.

This bulletin is for general information purposes only and does not provide a comprehensive or complete statement of the law relating to the issues discussed nor does it constitute legal advice. In addition, by its nature, this bulletin may be superseded by subsequent regulatory or legal developments. Professional advice should be sought where appropriate in relation to any particular circumstances.

All rights reserved. No part of this publication may be reproduced in any material form, whether by photocopying, scanning, downloading to computer or otherwise without the written permission of Griffin Managers except in accordance with the provisions of the Copyright, Designs and Patents Act 1988.

First Issued: 1991. This Issue 2012
© Tindall Riley Ltd

Managers: Griffin Managers
Regis House
45 King William Street
London EC4R 9AN
Telephone 020 7407 3588
Facsimile 020 7403 3942
Email griffin@triley.co.uk