Insurance/
Reinsurance

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INSURANCE BULLETIN





In this week's Insurance Bulletin:

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1. Regulation and legislation

UK: Brokers' PII under the microscope

The FCA recently released the results of its thematic review of general insurance intermediaries' professional indemnity insurance which can be found here.

General insurance (GI) intermediaries are regulated pursuant to section 3 of the Prudential sourcebook for Mortgage and Home Finance Firms, and Insurance Intermediaries (MIPRU), which requires GI intermediaries to purchase professional indemnity insurance on minimum terms and with minimum limits for their own protection and that of their clients.

The FCA undertook this thematic review of 200 sample GI intermediaries to assess the extent to which they met the requirements of MIPRU 3. The findings of the review were as follows:

1. Cover is generally available for GI intermediaries – there are nearly 60 market participants providing such cover, and cover is mostly available for the range of GI business.
2. High limits are available within the market. A number of firms bought insurance far beyond the minimum limits of indemnity. A small number of firms did not have the minimum level of cover required or had a policy excess higher than the maximum allowed. However, these firms appear to have addressed the deficiency during the course of the review.
3. A number of policies contained exclusions which concerned the FCA, specifically those related to the insurers from whom the GI intermediary was obtaining cover: (i) suitability of insurers, (ii) unrated insurers, (iii) non-admitted insurers, and (iv) insurer insolvency. Firms and their insurers were recommended to consider carefully whether the exclusions in their policies complied with the minimum terms required.
4. The review also looked at cover for appointed representatives. Some of the firms surveyed had ARs on the FCA register but their insurance cover did not specifically cover such activity. Such cover did not meet the requirements of MIPRU.
5. The majority of policies contained explicit cover for financial ombudsman awards, but in some cases the sub-limit fell below the maximum award of £150,000. Other policies did not explicitly mention FOS awards, which is potential a breach of MIPRU.
6. Some policies were inaccurate and needed updating – some included exclusions which, as drafted, excluded GI mediation.

The FCA has provided feedback to and engaged with the firms surveyed to ensure they are compliant with MIPRU. Other firms are expected to be proactive and review their own cover or risk censure.

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2. Court cases and arbitration

Australia: Double down on double insurance: *Lambert Leasing Inc. v QBE Insurance (Australia) Ltd*

In the case of *Lambert Leasing Inc. v QBE Insurance (Australia) Ltd*[1], the New South Wales Court of Appeal considered a number issues arising from double insurance and the applicability of "other insurance" clauses, following an air disaster.

The decision confirms that an insured cannot generally recover from an insurer payment for losses where another insurer has already paid in respect of the same loss, notwithstanding the characterisation of the insurance payment as a loan to be repaid by the proceeds of other insurance.

Background

The appellants, Lambert, sold an aircraft to a partnership which leased it to a third party. The aircraft crashed, killing all on board. The victims' relatives commenced proceedings in the United States, against the appellants. The appellants claimed under an insurance policy with the first insurer in relation to the US proceedings. The first insurer agreed to indemnify the appellants as subsidiaries of the named insured.

The appellants and the first insurer later discovered a policy of insurance with the second insurer which the partnership had been required to obtain as part of the aircraft purchase agreement. The agreement also contained an indemnity in favour

1 [2016] NSWCA 254

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PHIL KUSIAK, SENIOR ASSOCIATE

of the appellants arising from the partnership's "use and operation" of the aircraft.

The two policies each contained "other insurance" clauses which sought to limit the insurers' liability by reason of the insured having entered into another policy of insurance.

The appellants claimed indemnity from the first insurer, which declined indemnity pending resolution of a dispute over access to reports which the appellants refused to provide due to privilege.

The appellants commenced proceedings against the second insurer and the partnership in the Supreme Court of New South Wales seeking a declaration of indemnity. The proceedings were dismissed as being premature.

Subsequently, the US proceedings settled and the first insurer paid the settlement and the appellants' defence Costs. The first insurer also entered into a deed with the appellants (Deed) which characterised past and future payments as a loan to be repaid with insurance proceeds received from the second insurer.

The Appellants appealed the decision of the primary judge, having settled the US proceedings.

Appeal

The appeal considered whether s45 of the *Insurance Contracts Act 1984* (Cth) (ICA) rendered the second insurer's "other insurance" clause void and, if not, whether the two "other insurance" clauses cancelled each other out. The court held that, for s45 of the ICA to apply, the appellants must have "entered into" both contracts of insurance. Although the appellants were either 'named insureds' or 'additional insureds' under the policies, they did not negotiate terms or pay premiums and therefore failed to establish they had "entered into" the policies. As s45 of the ICA did not apply, the "other insurance" clauses cancelled each other out.

Were the appellants entitled to indemnity from the Partnership under the Agreement?

The Court of Appeal unanimously held that the appellants had been indemnified by the first insurer and were precluded from being indemnified twice. The first insurer was liable to (and did) indemnify the appellants and re-characterising the payment as a "loan" did not change this position. Therefore, the appellant's claim against the second insurer failed.

The decision confirms that an insured cannot recover from an insurer payment for losses where another insurer has already paid in respect of the same loss. The characterisation of the insurance payment as a loan to be repaid by proceeds of other insurance did not alter this.

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3. HFW publications and events

HFW attend celebration of 100 years of the British Chamber of Commerce and Industry in Brazil

On Thursday 8 December, Geoffrey Conlin, a Partner in HFW's Sao Paulo office, attended a lunch to celebrate 100 years of the British Chamber of Commerce and Industry in Brazil. The lunch was attended by Liam Fox MP, the Secretary of State for International Trade and President of the Board of Trade, the British Ambassador to Brazil, Alex Ellis, and various leading figures in Brazilian business.

HFW attend Airmic annual dinner

On Tuesday 13 December, HFW Partners Jonathan Bruce, James Clibbon, Graham Denny, Nick Hughes, Nigel Wick, Senior Associates Alison Proctor and Mark Waters, and Associate Lucinda Rutter attended the Airmic annual dinner.

First director disqualification for a breach of competition law obtained in the UK

HFW have published a briefing[1] on the first competition disqualification obtained by the Competition and Markets Authority (CMA) in the UK. The action highlights the importance of company directors understanding competition law principles. The briefing contains further details of the CMA's action and the implications for company directors.

For more information, please contact Anthony Woolich, Partner, London, on +44 (0)20 7264 8033, or anthony.woolich@hfw.com, or Jeremy Kelly, Associate, London/Brussels, on +44 (0)20 7264 8798/+32 2 643 3400, or jeremy.kelly@hfw.com, or your usual contact at HFW.

1 http://www.hfw.com/First-director-disqualification-for-a-breach-of-competition-law-obtained-in-the-UK-December-2016

Season's Greetings

We're taking a short break for Christmas and our next bulletin will be published in January.

HFW extends Season's Greetings to all of our readers with our best wishes for 2017.

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