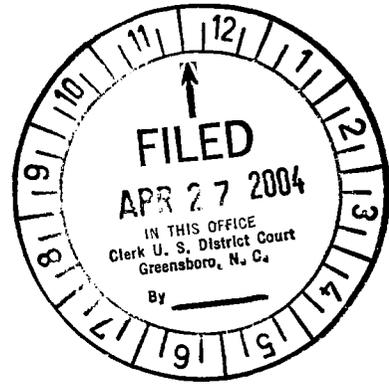


IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

AON RISK SERVICES, INC. of ILLINOIS )  
)  
Plaintiff, )  
v. )  
)  
CENTENNIAL INSURANCE COMPANY, )  
)  
Defendant . )  
\_\_\_\_\_ )

1:00CV180



MEMORANDUM OPINION

TILLEY, Chief Judge.

A bench trial was held in this matter from October 2 to October 5, 2001. Findings of fact were presented in open court, and written conclusions of law were to follow. For the reasons outlined below, Centennial Insurance Company shall reimburse Aon Risk Services, Inc. in the amount of \$410,000. Aon Risk Services will be allowed its costs pursuant to Federal Rule of Civil Procedure Rule 54(d)(1).

I.

On April 26, 1997, a tractor-trailer load of cigarettes belonging to Lorillard Tobacco Company ("Lorillard") was stolen from the terminal of the Perry & Turner trucking company in Greensboro, North Carolina. Perry & Turner submitted a claim to its insurance company, Centennial Insurance Company ("Centennial"),<sup>1</sup> for the \$762,276.60 loss. Centennial denied the claim in a letter dated November 17, 1997.

<sup>1</sup>Centennial was formerly known as Atlantic Mutual Insurance Company.

Lorillard sued Perry & Turner in the Superior Court of Guilford County, North Carolina to recover the value of the stolen load of cigarettes. In turn, Perry & Turner asserted third-party claims against Centennial. Perry & Turner also asserted alternative claims against its insurance broker, Aon Risk Services, Inc. ("Aon"), for failure to procure proper insurance coverage.

On July 12, 1999, the state court entered summary judgment in favor of Lorillard in the amount of \$762,267.60 plus interest. The remainder of the state court action was settled on January 5, 2000. Under the terms of the Mediated Settlement Agreement, Centennial and Aon agreed to satisfy Lorillard's judgment against Perry & Turner by each paying a total of 410,000. Aon and Centennial agreed to resolve their dispute over ultimate liability for the loss in this Court, with the prevailing party to be reimbursed \$410,000.

Aon filed this diversity action on February 23, 2000. This Court entered summary judgment in favor of Centennial on Aon's first claim for breach of the written insurance contract. Aon's remaining two claims, for breach of the parties' agreement to issue insurance with terminal coverage and for reformation of the written policy, were presented at a bench trial from October 2 to October 5, 2001.

I.

The Court finds the facts to be as follows:<sup>2</sup> Aon employee Roy “Buddy” Walls, a broker specializing in trucking insurance, first learned about Perry & Turner from one of his other clients. In January of 1997, Mr. Walls and co-worker Beth Hannan went to visit Perry & Turner for the purpose of getting acquainted with the potential client. During that visit, Mr. Walls and Ms. Hannan met with Perry & Turner employees Klee Wilson and Sherry McCulloh to discuss Perry & Turner’s insurance needs.

Mr. Wilson explained that Perry & Turner was seeking a new insurance provider who could issue coverage identical to the policy it already had in place with another insurance provider. Perry & Turner’s existing policy included coverage for trucks parked at its terminal. Because a truck load of Lorillard cigarettes previously had been stolen from the Perry & Turner terminal, Mr. Wilson took Mr. Walls and Ms. Hannan on a tour of the facility to show them the various security measures in place to prevent further losses on the premises.

On January 31, 1997, Mr. Walls faxed Centennial an application for insurance coverage on behalf of Perry & Turner at a rate of \$.30 per \$100 of revenue (\$.30/\$100). While not specifically requesting terminal coverage, Mr. Walls typed in the location of the company’s only terminal in the section entitled

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<sup>2</sup>The Court announced some of these findings of facts in open court at the conclusion of the trial. The rest of the facts have been found subsequently.

"Terminal Locations." It was typical in the trade for motor truck cargo policies to include coverage for the terminal. Listing the location of the terminal on the application was considered a sufficient request for terminal coverage.

Centennial underwriter Greg Horun called Aon on February 6th, 1997 and said that he was not interested in quoting a price on an insurance policy for Perry & Turner. The entire focus of the conversation related to Mr. Horun's concerns about potential losses and the security measures that were at that time in place at the terminal. For example, Beth Hannan described a fence around the terminal, locks and an alarm on the terminal itself, security lighting and various safety procedures used by employees. After that conversation, Mr. Horun said he felt better about the security at the terminal and wanted to think about it further. There was no discussion about a policy that did not include terminal coverage.

After the phone conversation, Mr. Horun spoke with his superior<sup>3</sup> and then faxed Aon an insurance quote later that same day. The quote did not specifically mention terminal coverage. However, the quote was consistent with one of the two quotes that Aon had received from Centennial in the recent past, and would not reasonably have alerted Aon employees that terminal coverage would not be included, especially in light of the conversation with Mr. Horun earlier that day.

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<sup>3</sup>Because Mr. Huron was relatively new to writing motor truck cargo policies, he was required to have a supervisor approve his insurance quotes.

Mr. Horun never informed Aon, either orally or in writing, that he was not quoting terminal coverage. Because the concern over terminal coverage was the primary reason that Mr. Horun originally was going to decline the quote, and because he provided a quote the same day he had been assured about the safety at Perry & Turner's facilities, the only reasonable interpretation of the quote was that it included coverage for the terminal. A further indication that Mr. Huron intended to include terminal coverage is that Mr. Horun offered insurance coverage at a higher rate than the rate Mr. Walls had requested, \$.32/\$100 as opposed to \$.30/\$100.

On February 27, 1997, Aon faxed Mr. Horun an acceptance of the February 6, 1997 proposal.<sup>4</sup> The acceptance was in the form of a request for Centennial to bind coverage<sup>5</sup> for Perry & Turner with coverage to become effective March 1, 1997. Mr. Horun completed a policy request form on or about March 27, 1997. In doing so, he mistakenly omitted any mention of coverage at the terminal. He wrote down "nil" next to the blank on the form indicating terminal coverage.

The request form was sent to another Centennial office for processing. The policy, in final form, showed zero coverage for terminals. Centennial sent the

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<sup>4</sup>The fax also included an additional term the parties had orally agreed upon, providing a higher amount of coverage for two of Perry & Turner's bigger customers. One of these customers was Lorillard.

<sup>5</sup>A binder is an oral or written contract between the insurance company and the insured that covers the insured from the time insurance is agreed upon until the written policy is formally issued.

policy to Aon, where it was received on Friday, April 18th. Ms. Mize, an office employee, reviewed the policy first. Upon noticing the zero terminal coverage, she looked for another policy from Centennial for comparison purposes. Ms. Mize found a policy written for another customer which showed specific limitations for coverage at the terminal. Concluding that there was a discrepancy between the policies, Ms. Mize contacted Mr. Walls who was out of the office that day. Mr. Walls advised Ms. Mize that she should notify Centennial if she thought there was any discrepancy between their request for coverage and the final policy. Ms. Mize sent a fax to Centennial noting her concern about the discrepancy and delayed sending the final policy to Perry & Turner until Mr. Walls could review it.

When Mr. Walls returned to the office on Monday, April 21st, he examined the Perry & Turner policy. Despite the plain language of the policy, Mr. Walls relied upon his earlier conversation with Mr. Horun and continued to believe that terminal coverage would be provided. Mr. Walls informed Ms. Mize that there was no problem with the policy. Accordingly, Ms. Mize never followed up on her fax to Centennial.

Other than Ms. Mize's fax, Aon made no further contact with Centennial prior to the Lorillard loss on April 26, 1997. Aon forwarded the policy to Perry & Turner along with a note saying that the policy appeared to be in order. The note also asked Perry & Turner to review the policy and contact Aon if they had any questions. Perry & Turner did not receive the policy until after the Lorillard loss.

Centennial did not contact anyone at Aon or Perry & Turner prior to the loss, the last communication from Aon being Ms. Mize's fax noting a discrepancy.

II.

At the conclusion of the trial, the court made findings of fact on the record and informed the parties that the conclusions of law would be based on one of two theories: 1) that the written policy was in the form of a counter-offer that had not yet been accepted by the broker or the insured and thus the binder remained in effect, or 2) that the written policy was in effect because it had been accepted on behalf of Perry & Turner by Mr. Walls. For the reasons set forth below, this Court finds that the binder was in effect, and that the loss was covered under the binder.

A.

Oral contracts of insurance, or written binders issued by insurers to memorialize oral contracts, are valid under North Carolina law. See Sloan v. Wells, 251 S.E.2d 449, 451, 296 N.C. 570, 573 (1979). This temporary insurance is in effect from the time the binder is issued until it is superseded by the written policy and the insurer is liable for any loss occurring in the interim. Id.

The evidence presented at trial shows that both Centennial and Aon believed an oral binder was in effect from March 1, 1997 until the written policy was issued on April 8, 1997.<sup>6</sup> However, the parties dispute whether the terms of the binder or

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<sup>6</sup> This Court has found that Centennial orally agreed to bind coverage for Perry & Turner beginning on March 1, 1997. Both the certificate of insurance issued by Aon to the insured and the Centennial policy were back-dated to March 1, 1997

of the written policy were in effect at the time of the Lorillard loss on April 26, 1997.

The written policy was received at Aon's office on Friday, April 18, 1997. Mr. Walls testified that he received the policy on Monday, April 21, 1997. At that time he reviewed the policy and forwarded it to Mr. Wilson, Vice President at Perry & Turner, along with a letter giving instructions for Mr. Wilson to review the policy and to notify Mr. Walls if there were any problems. Although the policy was mailed on April 21, 2001, Perry & Turner did not receive it until after April 26, 1997, the date of the Lorillard loss. Based on these events leading up to the loss and the law on insurance contracts discussed below, it is clear that the terms of the binder, which reflected the oral agreement between the parties, were in effect on the day of the loss.

If a written policy includes terms which differ from the application sent to the insurance company, the written policy is considered a counter-offer which must be accepted by the insured before its terms are effective. 1 Couch on Insurance §§ 11:7, 16:1 (3d ed. 1996 & Supp. 2000). The insured must have a reasonable time to ratify or waive any inconsistent provisions in order to make a valid contract on the basis of a policy that does not conform to the application for insurance. Id. Therefore, until the insured accepts or rejects the counter-offer within a reasonable time, the terms of the oral binder remain in effect. State Distrib. Corp. v. Travelers

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despite being issued March 6 and April 8, 1997, respectively.

Indem. Co., 30 S.E.2d 377, 379, 224 N.C. 370, 373 (1944) (stating that insured must accept new terms of policy to make it binding; once accepted all terms merge); 1 Couch on Insurance §§ 13:9,17:9; 44 C.J.S. Insurance § 267 (1993) (“until a policy is issued, the provisions of an application, binder, and accompanying endorsement constitute the terms of a contract”)<sup>7</sup>.

The evidence presented at trial shows that the written policy differed from the oral agreement reached by the parties regarding the scope of coverage at Perry & Turner’s terminal. At the close of trial, this Court found by clear and convincing evidence that the oral binder included coverage for trucks parked in the terminal. The written policy, by its terms, clearly excludes coverage for trucks parked in the terminal. Therefore, the written policy differed from the oral agreement and should be construed as a counter-offer from Centennial that had to be accepted by the insured in order to become a binding contract.

1.

Centennial contends that Mr. Walls had the authority not only to procure insurance for the insured, but also to accept or reject the written policy on behalf of Perry & Turner. Further, Centennial contends that Mr. Walls did in fact accept

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<sup>7</sup>The essential terms of oral binders “may be supplied by implication, but the terms must be readily inferable from the prior course of dealing between the parties or from established insurance business standards.” 44 C.J.S. Insurance § 267. Here, testimony from Mr. Walls and Ms. Hannon shows that the binder included terminal coverage. Further, the Plaintiff’s expert, Mr. Bernard Brooks, testified that motor truck cargo insurance excluding terminal coverage was rare. In light of the facts presented at trial, it is clear that the oral binder included terminal coverage.

the policy on Perry & Turner's behalf. However, the evidence at trial and the law do not support these contentions.

A broker's authority to procure insurance is not a general authority to act for the principal and does not automatically include authority to accept a policy. 3 Couch on Insurance § 46:1. Authority to accept the terms of a policy on behalf of the insured either must be explicit or apparent based on custom or some other evidence. Id. Accordingly, persons dealing with the agent who fail to determine the scope of the agent's authority "deal with him or her at their peril." Id.

The evidence does not support a finding that Perry & Turner had specifically outlined the scope of Mr. Walls's authority to include the power to accept a policy of insurance. Mr. Walls's letter forwarding the proposed policy to Perry & Turner and asking Perry & Turner employees to review it strongly indicates no such authority had been given. Centennial did not present evidence that an industry custom existed that would have implied that Mr. Walls had such authority.

2.

Even if Mr. Walls had been given the authority to accept the policy on behalf of Perry & Turner, there is no evidence that Mr. Walls did, in fact, accept the policy. There is also no evidence that the insured accepted the policy. Because the written insurance policy differed from the parties' oral agreement, the insured was required to either affirmatively accept the written policy or keep the policy beyond a reasonable period without protest. State Distrib. Corp., 30 S.E.2d at

379, 244 N.C. at 373; 1 Couch on Insurance § 16:1 (“opportunity to ratify or waive any inconsistent provisions, or to accept the form of policy delivered, as well as actual acceptance of the altered contract, is essential to the making of a valid contract on the basis of the nonconforming policy”).

Centennial argues that Mr. Walls accepted the policy when he forwarded it to Perry & Turner without notifying Centennial or the insured of any problems with the coverage. This argument implies that no affirmative rejection of the policy was given. However, Glenda Mize sent notice to Centennial by fax that there was a problem with the terminal coverage. Therefore, Centennial, without knowing Mr. Walls’s personal thoughts about the policy’s coverage, would have to have concluded based on the fax that Mr. Walls intended to reject Centennial’s counter-offer. Even if Ms. Mize had not sent the fax and Mr. Walls had remained silent, Mr. Walls did not keep the policy for a sufficient period to have constituted acceptance.<sup>8</sup> Viewing the circumstances based on Aon’s objective behavior and not on Mr. Walls’s subjective thought, which could not have been known at the time, no affirmative assent to the terms took place.

Mr. Walls’s communications to the insured also do not indicate that acceptance of the terms had taken place. His April 21, 1997 letter to Mr. Wilson

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<sup>8</sup>While the North Carolina Supreme Court has not defined a “reasonable” amount of time, it has found over five months to be unreasonable. See State Distrib. Corp., 30 S.E.2d at 380, 224 N.C. at 375. It is sufficient in this case to say that holding a policy over the weekend so that Mr. Walls could review it before forwarding it to the insured is not unreasonable.

at Perry & Turner advised Mr. Wilson to inform him of any additions or corrections that needed to be made to the policy. In closing, Mr. Walls stated, "I trust you will find everything in order, but should you have any questions, please feel free to give us a call." Such language does not indicate that Mr. Walls had already accepted the policy on Perry & Turner's behalf, or that he intended to accept it. In fact, Mr. Walls testified that it was standard policy to notify the insurance company if there was a problem with the policy. Perry & Turner simply did not have time, before the loss, to notify Aon or Centennial of its assent to the terms of the counter-offer.

Centennial argues alternatively that the insured was required to read and accept or reject the written policy within a reasonable time, and its failure to do so even after the loss indicates an acceptance of the written terms. However, this Court finds that Perry and Turner's failure to read and reject the policy as written after the cigarette loss is irrelevant. The relevant inquiry is whether the insured had time in which to review the policy before the loss. Because the policy had not yet arrived when the loss occurred, Perry & Turner did not have adequate time to review the policy and did not accept it prior to the loss.

B.

Aon's reformation claim need not be discussed at length in light of the above findings. In order to consider reformation, this court would have to find that the written policy, rather than the binder, was in effect at the time of the loss. The facts in this case support a finding that the binder was still in effect.

IV.

In conclusion, this Court finds in favor of Aon Risk Services because Centennial's binder with the insured was in effect on the date of the loss. That binder incorporated the terms of the oral agreement, which provided terminal coverage for the Greensboro terminal. Therefore, Centennial was required to pay for the loss under that policy, and Aon should be reimbursed for its payment of \$410,000 to Perry & Turner. Aon also will be awarded costs pursuant to Rule 54(d)(1) of the Federal Rules of Civil Procedure.

This the <sup>27<sup>th</sup></sup>   day of April, 2004.

  
United States District Judge