IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

THE SOCIETY OF LLOYD'S,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 4:03CV1113 HEA**
	)	
ROBERT W. FUERST, HORD HARDIN, HAROLD F. ILG, WALTER A. KLEIN, MEADE M. McCAIN, JOHN J. SHILLINGTON, CYNTHIA J. TODOROVICH and MICHAEL B. TODOROVICH	)	**(Judge Autrey)**
	)	
Defendants.	)	
	)	

PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiff The Society of Lloyd's, pursuant to Local Rule 7-4.01(E), submits this Statement of Undisputed Material Facts in support of its Motion for Summary Judgment.

The Parties

1. Plaintiff The Society of Lloyd's ("Lloyd's") is not an insurer and does not insure risks. (Declaration of Nicholas P. Demery attached (hereinafter "Demery Dec."), ¶ 2).

2. Lloyd's is the regulator of an English insurance market located in London, England. (Id.). The United Kingdom Parliament, through a succession of Parliamentary Acts known as the *Lloyd's Acts* 1871-1982, created Lloyd's and charged it with the duty and authority to regulate those who conduct insurance business in the Lloyd's market. (Id.).

3. Lloyd's regulatory responsibilities are currently vested in, and must be carried out by, the Council of Lloyd's. (Demery Dec., ¶ 3); s*ee also Lloyd's Act* 1982 § 6(1).

4. Among its regulatory responsibilities, Lloyd's promulgates and enforces regulations in accordance with its powers and obligations under the *Lloyd's Acts*, and exercises disciplinary

authority over persons in the Lloyd's market. (Demery Dec., ¶ 3). One of Lloyd's fundamental objectives is to ensure that policyholders are paid on valid claims. (Id.).

5. The only insurers in the Lloyd's market are underwriting members of Lloyd's, who are known as "Names." (Demery Dec., ¶ 4). The United Kingdom *Financial Services & Markets Acts* 2000 (formerly *Insurance Companies Act* 1982) permits Names to lawfully conduct insurance business only as long as they become, and remain, subject to Lloyd's regulatory jurisdiction. (Id.). This membership in Lloyd's and compliance with Lloyd's regulations and requirements is a license to lawfully conduct insurance business in the United Kingdom. (Id.).

6. Defendants are all Names in the Lloyd's market. (Demery Dec., ¶ 5).

Defendants Executed General Undertakings

7. As a condition of membership in Lloyd's and to obtain the privilege of underwriting at Lloyd's, Defendants signed certain agreements governing the terms of their membership in Lloyd's. (Id.).

8. One of the agreements that each Defendant signed was the "General Undertaking". (Id.). In the General Undertaking, defendants agreed, among other things, that: (a) they would comply with the provisions of the *Lloyd's Acts* 1871-1982 and any bye-laws and regulations duly promulgated regarding their membership at Lloyd's; (b) any dispute arising out of or relating to their membership of or underwriting of insurance business at Lloyd's would be resolved in English courts pursuant to English law; and (c) any judgment in any Proceeding brought in the English courts is conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction. (Id.); *see also* General Undertaking §§ 1, 2.1 – 2.3.[1]

9. Pursuant to the *Lloyd's Acts*, Names only could participate in the Lloyd's market through

[1] True and accurate copies of the General Undertaking for each Defendant are attached to the Complaint as Exhibits 1-8.

an underwriting agent, who would contractually assume management responsibilities over Names' underwriting activities. (Demery Dec., ¶ 6). The agreements between agents and Names contained choice of forum, arbitration and choice of law clauses, all requiring disputes to be resolved in England under English law. (Id.).

10. Names (each having several liability, but not joint liability, for their individual risks assumed) provide insurance through groups of Names called "syndicates." (Demery Dec., ¶ 7). Each Defendant incurred liabilities with respect to insurance commitments he or she undertook by assuming a portion of a syndicate's risk in the Lloyd's market. (Id.).

11. In order to close the syndicate at the end of each underwriting year of account, reinsurance is purchased to cover any outstanding liabilities as well as liabilities that have been incurred but not reported at that time. (Id.).

The Reconstruction & Renewal Plan

12. Although underwriting in the Lloyd's market was historically a profitable venture, in the late 1980s and early 1990s, Names in the Lloyd's market incurred aggregate underwriting losses of over $12 billion. (Demery Dec., ¶ 8). As a result of these losses, Names underwriting in those years found themselves unable to purchase affordable reinsurance for their outstanding liabilities and thus faced open-ended exposure. (Id.).

13. Consequently, many Names defaulted on their underwriting obligations as they came due, placing policyholders at risk of non-payment of claims. (Id.). Simultaneously, a significant amount of litigation began to embroil the Lloyd's market. (Id.).

14. To address these loss issues, which threatened the viability of the Lloyd's market, Lloyd's implemented the Reconstruction and Renewal Plan (the "Plan") in 1996. (Demery Dec., ¶ 9). The Plan had two separate components: (a) the provision of reinsurance otherwise

unavailable to each Name for his underwriting obligations on 1992 and prior underwriting years of account from a newly formed company, Equitas Reinsurance Ltd. ("Equitas"); and (b) an offer of settlement (the "Settlement Offer") was made to each Name with liabilities in 1992 and prior underwriting years to end any litigation and to assist the Names in meeting their underwriting obligations. (Id.).

15. The cost of reinsuring each Name's outstanding 1992 and prior liabilities was individually calculated and charged to the Name (the "Equitas Premium"). (Id.). Names who wished to resign their membership of Lloyd's would be able to do so upon payment of their Equitas Premium and other outstanding obligations. (Id.).

16. A Name was not required to accept the Settlement Offer. (Demery Dec., ¶ 9). Absent acceptance, a Name would not receive credits to offset his Equitas Premium but could continue to litigate against Lloyd's or other persons who did business in the Lloyd's market. (Id.). If the Settlement Offer was not accepted, a Name still was required to pay the full amount of his underwriting obligations, including the Equitas Premium. (Id.). The closing date for accepting the Settlement Offer was September 11, 1996. (Id. at ¶ 12).

The "Pay Now, Sue Later" And "Conclusive Evidence" Clauses of the Plan

17. In implementing the Reconstruction and Renewal Plan, Lloyd's required that each Name become a party to the Equitas reinsurance contract through the appointment of a substitute agent, who signed the contract on behalf of the Name. (Demery Dec., ¶ 10).

18. Paragraph 5.5 of the Equitas reinsurance contract, which is often referred to as the "pay now, sue later" clause, prohibits the Names, in an action for the Equitas Premium – such as the English actions which resulted in the entry of the Judgments against Defendants – from asserting claims that they may have against Lloyd's or others as a set-off or counterclaim. (Id.).

Nevertheless, Names were not prohibited by the "pay now, sue later" clause from pursuing those claims in a separate lawsuit against Lloyd's. (Id.).

19. The Equitas reinsurance contract also contains a "conclusive evidence" clause, set forth in Paragraph 5.10, which provides that Lloyd's determination of a Name's Equitas Premium is conclusive "in the absence of manifest error." (Demery Dec., ¶ 11).

20. English courts, both before and after the Plan went into effect, held that the implementation of the Plan – including that aspect of the Plan that made a Name's purchase of reinsurance from Equitas mandatory -- was within Lloyd's Parliament sanctioned regulatory authority. (Id.). *See also R. v. The Council of the Society of Lloyd's ex parte Susan Rachel Johnson,* (16 Aug. 1996); *Society of Lloyd's v. Lyon, Leighs & Wilkinson* (Court of Appeal 31 July 1997).

21. Less than five percent of all Names did not accept the Settlement Offer, and a still smaller number, Defendants included, refused to pay the Equitas Premium. (Demery Dec., ¶ 12).

22. The Plan became effective on September 4, 1996, and the full amount of the Equitas Premium became due and payable on September 30, 1996. (Id.). Even though none of the present Defendants accepted their Settlement Offers, they nonetheless were required to pay the full amount of the Equitas Premium. (Id.).

23. Each of the Defendants here failed to make such payment. (Demery Dec., ¶ 12). On October 2, 1996, for reasons of regulatory prudence and to ensure immediate funding for Equitas to meet regulatory requirements imposed by the United Kingdom government, Equitas validly assigned to Lloyd's its right to collect the Equitas Premium from Names, including the right for Lloyd's to sue on its own behalf to recover any unpaid Equitas Premiums. (Demery Dec., ¶ 13).

Lloyd's Files Collection Actions In England

24. On various dates beginning in late 1996, Lloyd's commenced separate actions in the High Court of Justice, Queen's Bench Division in London, England (the "English Court"), against each of the Defendants here and other Names who had not paid their Equitas premium in full (the "English Actions"). (Demery Dec., ¶ 14).

25. In the English Actions, Lloyd's sought payment of each Defendant's respective Equitas Premium, plus unpaid interest and costs. (Id.). The English Actions were commenced by filing a Writ of Summons, which is equivalent to a complaint in American practice. (Id.).

26. Lloyd's notified each of the Defendants here of the commencement of the English Action against him or her by serving each Defendant, through their agent, Additional Underwriting Agents (No. 9) Limited ("AUA9"), duly appointed to accept service on their behalf, with a Writ of Summons. (Demery Dec., ¶ 15). In response to receipt of the summons, each of the Defendants, except Mr. Shillington, filed an Acknowledgement of Service of Writ of Summons ("Acknowledgment") through their solicitors of record, the firm of Epstein Grower & Michael Freeman. (Id.).[2] Lloyd's documents kept in the ordinary course of business indicate that all of the Defendants were living in Missouri at the time Lloyd's commenced the English Action and when the Judgments were entered against them. (Id.).

Defendants Contested The English Collection Actions

27. Defendants filed their Acknowledgements on or about May 20, 1997. (Demery Dec., ¶ 15). By filing the Acknowledgment, each Defendant, except Mr. Shillington, appeared in the English Actions, confirmed that the firm of Epstein Grower and Michael Freeman was instructed to act as solicitors on his or her behalf and notified Lloyd's that he or she intended to contest the claim. (Id.).

[2] Copies of the Acknowledgements are attached as Group Exhibit 1 to N. Demery's Declaration.

28. Lloyd's sought a final judgment against each of the Defendants, pursuant to Order 14 of the English Rules of the Supreme Court in all cases except Mr. Shillington and Mrs. Todorovich. (Demery Dec., ¶ 16).

29. Mr. Shillington's and Ms. Todorovich's duly appointed agent, AUA9, sent both of them notice of the English Actions, including copies of the Writs of Summons, against them. (Demery Dec., ¶ 17). On June 24, 1997, and May 14, 1999, default judgments, attached to the Complaint as Exhibits 14 and 15, were entered against Mr. Shillington and Mrs. Todorovich, respectively, because they failed to acknowledge service and/or to defend against Lloyd's claims. (Id.). In the absence of any application to set them aside, these default judgments became final, conclusive and fully enforceable on the day that they were entered. (Id.).

30. On March 11, 1998, the English Court issued judgments, attached to the Complaint as Exhibits 9-13 and 16, against Defendants Fuerst, Hardin, Klein, Ilg, McCain and Michael Todorovich and in favor of Lloyd's (the "Judgments"). (Demery Dec., ¶ 18).

31. Defendants had a full opportunity to present their defenses to payment of the Equitas Premium in the English Court. (Demery Dec., ¶ 19).

32. Specifically, before the Judgments were entered on March 11, 1998, there were hearings that lasted 32 days in the trial and appellate courts in England. (Id.). Defendants, except Mr. Shillington and Ms. Todorovich, through their appointed solicitors, raised a host of defenses to payment of their Equitas Premium. (Id.). The following defenses, including fraud, were considered and ultimately rejected by the English Courts (Id.):

a. That Lloyd's lacked the regulatory authority under the *Lloyd's Acts* 1871-1982 to mandate that all Names purchase reinsurance coverage from Equitas. *See Society of Lloyd's v. Dennis Hugh Fitzgerald Leighs & Others* (High Court of Justice 20 Feb. 1997), *aff'd*,

Society of Lloyd's v. Lyon, Leighs & Wilkinson (Court of Appeal 31 July 1997).

b. That Lloyd's lacked the regulatory authority under the *Lloyd's Acts* 1871-1982 to appoint substitute agents to bind Names to the reinsurance contract with Equitas. *See Society of Lloyd's v. Dennis Hugh Fitzgerald Leighs & Others* (High Court of Justice 20 Feb. 1997), *aff'd*, *Society of Lloyd's v. Lyon, Leighs & Wilkinson* (Court of Appeal 31 July 1997).

c. That Names were entitled to rescind their membership of Lloyd's as a result of alleged fraud in the inducement of their membership of, or underwriting at, Lloyd's. *See Society of Lloyd's v. Wilkinson* (High Court of Justice 23 Apr. 1997), *aff'd*, *Society of Lloyd's v. Lyon, Leighs & Wilkinson* (Court of Appeal 31 July 1997).

d. That Names were entitled to litigate claims of fraud in the inducement of their membership of, or underwriting at, Lloyd's as a defence or set-off to their obligation to pay the Equitas premium. *See Society of Lloyd's v. Wilkinson* (High Court of Justice 23 Apr. 1997), *aff'd*, *Society of Lloyd's v. Lyon, Leighs & Wilkinson* (Court of Appeal 31 July 1997).

e. That Names were not bound by certain provisions of the Equitas reinsurance contract (*i.e.*, the "conclusive evidence" clause and the "pay now, sue later" clause). *See Society of Lloyd's v. Fraser & Others* (High Court of Justice 3 Dec. 1997, 22 Jan. 1998, and 4 Mar. 1998). Leave to appeal was denied on July 31, 1998 after argument was heard from June 15-19, 1998. *See Society of Lloyd's v. Fraser & Others* (Court of Appeal 31 July 1998).

f. That American securities laws provided a defence to payment of the Equitas Premium. *See Society of Lloyd's v. Daly* (High Court of Justice 27 Jan. 1998); *Society of Lloyd's v. Frasers & Others* (Court of Appeal 31 July 1998).

The Defendants Have Exhausted All Appeals And The Judgments Are Final, Conclusive And Fully Enforceable In England

33. From June 15 to June 19, 1998, a three-judge panel of the United Kingdom Court of Appeal heard argument on the Names', including Defendants Fuerst, Hardin, Klein, Ilg, McCain and Michael Todorovich, application for leave to appeal from the entry of the Judgments entered on March 11, 1998. (Demery Dec., ¶ 20).

34. Leave to appeal was subsequently denied on July 31, 1998, although the English Court went on to discuss the merits of some defenses and found them lacking. (Demery Dec., ¶21); *see Society of Lloyd's v, Fraser & Others* at 17, 26-28 (Court of Appeal 31 July 1998). All appeals from the entry of the Judgments have now been exhausted. (Id.).

35. Following denial of leave to appeal, the Judgments of March 11, 1998, became final, conclusive and fully enforceable in England. (Id., ¶ 22).

36. Following the affirmance of the "pay now, sue later" clause, hundreds of Names brought fraud claims in England identical to those alleged by Defendants in this case. (Demery Dec., ¶23). All Names, including Defendants, were able to join in this action, but Defendants decided not to join. (Id.).

37. The fraud claims were resolved against the Names following a trial that lasted several months. (Id.); *See Society of Lloyd's v. Jaffray* (High Court of Justice 3 Nov. 2000). On July 26, 2002, the Court of Appeal affirmed the trial court's rejection of the fraud claims against Lloyd's in a 300-plus page opinion. (Id.); *See Society of Lloyds' v. Jaffray* (Court of Appeal 26 July 2002). Defendants' time has expired in which to file the fraud claims alleged in their Answers against Lloyd's. (Id.).

38. The Judgments are final, conclusive and fully enforceable in England. (Demery Dec., ¶ 24). No appeal is pending therefrom, and no stay has been issued preventing enforcement of the

Judgments. (Id.).

39. The Judgments have been accruing post-judgment interest at a rate of eight percent (8%) per annum since the following dates of their entries: June 24, 1997, for Mr. Shillington; March 11, 1998, for Messrs. Fuerst, Hardin, Klein, Ilg, McCain and Michael Todorovich; and May 14, 1999, for Mrs. Todorovich. (Id.).

40. None of the defendants has satisfied his or her judgment debt. (Demery Dec., ¶ 25).

Respectfully submitted,

/s/ Blake T. Hannafan
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Dated: January 22, 2004

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CERTIFICATE OF SERVICE

I certify that on the 22nd day of January, 2004, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following: Ted F. Frapolli, Esq., 275 North Lindbergh, Suite F, St. Louis, MO 63141, Attorney for Certain Defendants; Alan C. Kohn, Esq., One US Bank Plaza, Suite 2410, St. Louis MO 63101, Attorney for Defendant Shillington and Harold F. Ilg, 100 L'Ambiance Circle, Unit 202, Naples, FL 34108 and 16401 Ranchester Drive, Chesterfield, MO 63005.

/s/ Blake T. Hannafan
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