

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

The Society of Lloyd's,)
)
Plaintiff,)
) Case No: 4:03CV1113 HEA
vs.)
)
Robert W. Fuerst, Hord Hardin II, Harold F.)
Ilg, Walter A. Klein, Meade M. McCain,)
John J. Shillington, Cynthia J. Todorovich)
and Michael B. Todorovich,)
)
Defendants.)

**DEFENDANTS' ROBERT W. FUERST, HORD HARDIN II, WALTER A. KLEIN
MEADE M. McCAIN, CYNTHIA J. TODOROVICH
AND MICHAEL B. TODOROVICH'S MOTION
TO COMPEL DISCOVERY DIRECTED TO PLAINTIFF**

COME NOW Defendants, Robert W. Fuerst, Walter A. Klein, Hord Hardin II, Meade M. McCain, Cynthia J. Todorovich and Michael B. Todorovich ("Defendants") by their counsel Ted F. Frapolli, and pursuant to Fed.R.Civ.P. 37(a) states as follows:

COMMON ALLEGATIONS

1. Plaintiff The Society of Lloyd's ("Lloyds") filed its Complaint alleging that the High Court of Justice, Queen's Bench Division, Commercial Court, in London, England, entered money judgments in favor of Lloyd's against Defendants for premiums due and owing on contracts of reinsurance between Defendants and Equitas Reinsurance Ltd., an English reinsurance Company. Equitas has assigned Lloyd's all rights to recover those premiums. By Plaintiff's complaint, Plaintiff seeks an order recognizing and enforcing the English Judgments and entering judgment against each Defendant.

2. In response to Plaintiff's Complaint, Defendants have filed, in part, the following affirmative defenses (all Defendants have filed the type of affirmative defenses as set out in Meade M. McCain's Answer which was used as an illustration of Defendants' affirmative defenses):

SECOND AFFIRMATIVE DEFENSE

At the time of the General Undertaking and other transactions between McCain and Lloyd's, Lloyd's represented to the Names including McCain that participating in the syndicates would be a profitable venture, while knowingly concealing and/or misrepresenting the significant potential liability and risks which the Names would incur through participation in the Lloyd's syndicates, particularly due to the enormous liability then being faced in the Lloyd's insurance market due to asbestos claims. Accordingly, Plaintiff's claim is barred since the General Undertaking and other contracts between Lloyd's and McCain, as well as participation in the reinsurance program, were procured by misrepresentation, fraud, fraud in the inducement, knowing concealment and/or non-disclosure, and/or negligent misrepresentation.

THIRD AFFIRMATIVE DEFENSE

As a consequence of all of the foregoing, Plaintiff's claim is barred in whole or in part by the doctrines of fraud, illegality, duress and/or estoppel.

FIFTH AFFIRMATIVE DEFENSE

The judgment obtained by Lloyd's against McCain should not be recognized and/or enforced by this Court since Lloyd's has not provided an accounting of how said judgment amount was calculated, has not traced its alleged damages to any particular undertaking or risk, and has not provided any evidence of how the amount allegedly due and owing was arrived at.

SIXTH AFFIRMATIVE DEFENSE

The judgment obtained by Lloyd's against McCain should not be recognized and/or enforced by this Court since McCain never consented to participation in the reinsurance program and payment of the Equitas premiums.

SEVENTH AFFIRMATIVE DEFENSE

The judgment obtained by Lloyd's against McCain should not be recognized and/or enforced by this Court since the contracts at issue, including participation in the reinsurance program, constituted a contract of adhesion and were not the product of arms-length transaction, and were the product of a breach of fiduciary duty and loyalty of agents appointed by Lloyd's.

EIGHTH AFFIRMATIVE DEFENSE

McCain has already incurred significant losses due to participation in the Lloyd's syndicates and his forced participation in the reinsurance program, including significant losses due to Plaintiff's fraud; accordingly, Plaintiff's judgment, to the extent any valid judgment exists, is subject to the defenses of offset and/or recoupment.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part by its breach of the duty of good faith and fair dealing, breach of its fiduciary duty and breach of its duty of loyalty.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in that the actions of the so-called "agent" of this Defendant exceeded his authority and acted in violation of Missouri law.

SIXTEENTH AFFIRMATIVE DEFENSE

Enforcement of the Lloyd's judgment from the "English Courts" is against Missouri Public Policy in that Lloyd and its agents committed a fraud upon this Defendant and the general undertaking was the product and result of a fraudulent misrepresentation, reasonably relied upon by this Defendant, and resulted in damage and harm to this party.

EIGHTEENTH AFFIRMATIVE DEFENSE

As an affirmative defense, this Defendant states that the enforcement of the general undertaking is unconscionable and therefore unenforceable in that there is an undue harshness in its terms due to the facts stated herein.

TWENTIETH AFFIRMATIVE DEFENSE

As an additional affirmative defense, Defendant alternatively pleads that as to the forum selection clause:

- (a) Plaintiff misrepresented the Undertaking signed by this Defendant as to the extent and existence of the forum selection clause; or
- (b) Plaintiff materially misled Defendant by failing to advise Defendant of the nature, purpose, oppressive and intentionally fraudulent intent behind said forum selection clause.

3. Defendants propounded interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure to Plaintiff on or about October 22, 2003 to Plaintiff. A copy of said interrogatories are attached hereto, marked as Exhibit A and incorporated by reference as if fully set out herein.

4. Defendants submitted their Request to Produce Documents pursuant to Rule 34 of the Federal Rules of Civil Procedure, to Plaintiff on or about October 22, 2003. Said Request to Produce Documents is attached hereto marked as Exhibit B and incorporated herein by this reference as if fully set out herein..

5. Plaintiff served its Objections to said Interrogatories and Request to Produce documents on or about November 24, 2003, copies of which are attached hereto, marked as Exhibits C and D, and incorporated herein by this reference as if fully set out herein.

6. Plaintiff has purportedly answered Interrogatory No. 2, with objection, but Plaintiff's answers/objection to said Interrogatory is so evasive as to not constitute an answer.

7. Plaintiff has objected to Interrogatory No. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 as being overly broad, burdensome and irrelevant, nor is it reasonably calculated to lead to the discovery of relevant or admissible when indeed the questions are very relevant and material to the cause at hand and, in particular, to Defendants' affirmative defenses.

8. Plaintiff has objected to Document Request No. 1, 2, 4, 5, 6, 7, 9, 10, 13, 14, 17

and 18 as being overly broad, burdensome and as seeking irrelevant information and it is not reasonably calculated to lead to the discovery of relevant or admissible evidence.

9. Plaintiff has objected to Document Request No. 8, 10 and 12. Plaintiff's objections to these requests to produce documents are improper and Plaintiff should be compelled to answer.

10. With respect to Defendants' Request to Produce Documents, Plaintiff has objected to Request No. 3 on the basis for asking for privileged information.

11. Plaintiff's counsel has offered to provide Defendants with their Rule 26 initial disclosures before they are due, evidently on the condition that Defendants not contest the objections to Interrogatories and Request to Produce Documents.

12. The theory of the objections are primarily based in claims of *res judicata* and collateral estoppel (see Plaintiff's Petitions, paragraph number 16).

13. As to the claims of *res judicata* and collateral estoppel, no Court has ruled that said judgment is enforceable under Missouri law. Specifically, Missouri Revised Statute § 511.780.2.(2)(3), which states as follows:

A foreign judgment need not be recognized when:

- (2) The judgment was obtained by fraud;
- (3) The claim for relief on which the judgment is based is repugnant to the public policy of this state;

14. That said Interrogatories and Request to Produce Documents mentioned above are proper under the Federal Rules of Civil Procedure and are relevant and necessary to the proper preparation for trial by Defendants.

15. Timely responses to Interrogatories and Request to Produce Documents is necessary for the proper preparation for and trial of this cause.

16. Movants' attorney has conferred, via telephone on December 5, 2003 with opposing counsel, Blake T. Hannafan and Michael T. Hannafan, in good faith, but that after sincere efforts to resolve the dispute, counsel are unable to reach an accord.

WHEREFORE, Defendants request this Court Order Plaintiff to answer fully Interrogatories Numbered 2 through 13 and provide documents requested in Requests Numbered 1 through 18; and for such other and further Orders that this Court deems just and proper.

LAW OFFICES OF TED F. FRAPOLLI

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Attorney for Defendants Robert W. Fuerst,
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Cynthia J. Todorovich, Michael B. Todorovich and
Hord Hardin II

CERTIFICATE OF SERVICE

I certify that on the 23rd 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: Martin J. Buckley, Attorney for Plaintiff, 1139 Olive Street, Suite 800, St. Louis, Missouri 63101; Alan C. Kohn, Esq., Attorney for Defendant Shillington, One US Bank Plaza, Suite 2410, St. Louis, Missouri 63101; Blake T. Hannafan, Esq., Michael T. Hannafan & Associates, Ltd., One East Wacker Drive, Suite 1208, Chicago, IL 60601; and Harold F. Ilg, 100 L' Ambiance Circle, Unit 202, Naples, Florida 34108.

 /s/ Ted F. Frapolli