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 BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The story of the crisis at Lloyd's of London and the response thereto is a complicated one. But the issue before the Court at this stage of the proceedings is a narrow one. Are there material issues of fact as to whether the English judgments comport with Missouri standards of due process and fundamental public policy? The case before this Court is compelling and requires the Court's consideration of fundamental public policy issues affecting Missouri citizens.

The Society of Lloyd's has brought this action in an attempt to enforce and collect substantial sums in judgments it obtained in England from investors in Lloyd's (known as "Names"), including these Defendants in this case. The judgments arise out of the most catastrophic insurance loss in history and are a result of a well-documented, but as-yet unlitigated fraud scheme by Lloyd's, a scheme referred to in Time magazine as "the greatest swindle ever"

and "one of the greatest commercial and political crimes of the 20th Century."[1]

The Names herein were recruited as investors by agents of Lloyd's as part of a massive recruitment campaign in the 1970's and 1980's with assurances that Lloyd's was sound and conservative judgment.[2] Without their knowledge, Lloyd's had placed the Defendants Names in syndicates that had reinsured those liability policies which, in time, would face tens of thousands of claims due to asbestos contamination. By recruiting the Defendants Names and others in an effort to dilute liability for the asbestos losses, Lloyd's was able to stave off disaster for more than a decade, but when the losses exploded publicly in 1991, the Defendants Names were among those at the end of the chain of reinsurance contracts who faced complete personal financial ruin due to the unlimited liability set out in the myriad of documents signed by the Names.

Although the Defendant Names have a compelling fraud story to tell, they have never been able to tell it, in spite of the fact that judgments have been entered against them by English courts and Lloyd's now is seeking to collect on those judgments in this Court. Treating the Names' allegations that they were fraudulently induced into investing in Lloyd's syndicates as an

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[1] Time, February 21, 2002 ("Lloyd's of London 1688 - ? Its watchword is "Utmost Good Faith." (See Exhibit 1 to Defendants' Memorandum in Support of their Track 3 Designation)

[2] Affidavits of these Defendants are filed with Response, Evidentiary Objections and Counterstatements of Defendants Robert W. Fuerst, Hord Hardin II, Walter A. Klein, Meade M. McCain, Cynthia J. Todorovich and Michael B. Todorovich to Plaintiff's Statement of Undisputed Material Facts and are referred to collectively in this memorandum as "Defendants' Declarations." Additionally, a "Cease and Desist Order" issued by the Missouri Secretary of State is attached to Response, Evidentiary Objections and Counterstatements of Defendants Robert W. Fuerst, Hord Hardin II, Walter A. Klein, Meade M. McCain, Cynthia J. Todorovich and Michael B. Todorovich to Plaintiff's Statement of Undisputed Material Facts, both of which document the aforementioned misrepresentations. .

irrelevancy, English courts bound the Defendants Names to an unconscionable contract, precluded them from raising any affirmative defenses, and prevented them from discovering or presenting any evidence to challenge the existence or amount of their alleged liability. Remarkably, Lloyd's nonetheless brings this action claiming that "the Names had a full opportunity to present their defenses" in the English court.

Due to a series of procedural injustices that would make a mockery of the American Standards of Due Process and the Public Policy of the State of Missouri, consider the following actions that occurred as a result of Lloyd's special self-regulatory position in conjunction with English law:

But, given the opportunity to conduct discovery, what would have been proved to the Court, among other allegations, is the following as to the Equitas contract:

(1) After drawing down on the Missouri Names' letters of credit, Lloyd's, through its wholly-owned subsidiary, Equitas Reinsurance, Ltd., unilaterally issued mandatory cash calls obligating the Names to pay undocumented cash calls to cover insurance losses.

(2) When the Names refused to pay the cash calls or to enter into an agreement with Equitas requiring them to do so, Lloyd's unilaterally appointed a new agent for them without their knowledge or consent.

(3) At Lloyd's direction, the new agent then signed the Equitas contract on behalf of the Names, purporting to bind the Names to a contract they never saw, signed, or approved.

(4) The Equitas contract, to which the Names never agreed, bound the Names

to a "pay now, sue later" clause that prevented the Names from raising any affirmative defenses – such as fraud, breach of fiduciary duty, or setoff – before having a judgment entered against them.

(5) The Equitas contract, to which the Names never agreed, also bound the Names to a "conclusive evidence" clause that prevented the Names from conducting any discovery or raising any arguments to refute the basis of the liability the Names allegedly incurred, the amount of the liability, or the method of calculation.

It is within this context that Missouri law permits this Court to not enforce the English judgments upon the following circumstances:

> First, Missouri Revised Statute §511.780.1 (1984) provides that a foreign country judgment is not conclusive if the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law; and
>
> Secondly, Missouri Revised Statute §511.780.2 (1984) states that a foreign country judgment need not be recognized if:
>
> (1) The judgment was obtained by fraud; or
>
> (2) The claim for relief on which the judgment is based is repugnant to the public policy of this state.

II. NEED FOR ADDITIONAL DISCOVERY

Discovery, if permitted by this Court, would have enabled Defendants to submit evidence to this Court which will allow Defendants to demonstrate the Lloyd's judgment was obtained by

fraud, and its enforcement would be repugnant to the public policy of the State of Missouri. Without the ability to present these issues to the Court, the Court is deprived of facts which would allow it to decide whether or not Missouri Public Policy would be circumvented and violated by the enforcement of this judgment.

III. STANDARDS REGARDING SUMMARY JUDGMENT

The Court is well acquainted with the standards and burdens placed upon the Plaintiff's Motion for Summary of Judgment. The moving party has the initial burden of demonstrating that it is entitled to summary judgment, that there is no material issue of fact, and that it is entitled to judgment as a matter of law. (See *Clark v. Coats and Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

IV. THE AFFIRMATIVE DEFENSES AND REMEDIES SOUGHT BY THE NAMES DO NOT CONSTITUTE A RELITIGATION OF THOSE ISSUES

Because these Defendants oppose Lloyd's attempt to enforce the English Judgments on the basis of violations of due process and public policy, Lloyd's erroneously contends that the Defendants seek to relitigate the substantiative merits of the English court's judgments. However, Defendants do not seek to relitigate the defenses that they have raised in this case. To the contrary, these Defendants are asking the Court not to enforce the English judgments precisely because they have not been permitted to litigate their defenses at all. The Defendants were not allowed to litigate Lloyd's fraudulent inducement which Lloyd's agents perpetrated on Missouri citizens in Missouri.

Since the filing of its initial Complaint, and with almost every pleading Lloyd's has filed, it makes a point of listing every case in which it has won a victory.

It is absolutely crucial to the evaluation of Defendants' claims herein that the Court understand that many of the previous victories were based on erroneous premises such as adequate remedies awaited the Names before English Courts.

For example, in the case of *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998) (*en banc*) the Court upheld the forum selection clause and forcing the Names to England for justice. In reaching its decision, the Court made a fatal presumption that the Names had adequate remedies in English Courts and that the policies underlying American Securities Laws could be vindicated in litigation in those Courts. It is now clear that this assumption was erroneous. The English Courts barred the defense of fraudulent inducement without allowing the Names any opportunity to present evidence.

Furthermore, the English Courts refused to permit the Names to have discovery on the basis on which Lloyd's calculated its damages. Accordingly, while the 9th Circuit assumed that the English Court would provide an effective forum in which the Names could raise their defense of fraud, the Names are now able to show that the available remedies were not adequate to protect their interests and to provide redress for their security claims.

Similarly, in the case of *Bonny v. The Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994). The Court in *Bonny* found "that the Plaintiffs could sue Lloyd's in England for fraud and for breach of contract; that they could sue Member's Agents for breach of fiduciary duty; that upon application of [an English] Secretary of State, they might obtain an injunction and remedial order; and that, upon a finding of criminal liability under the [English] Financial Services Act, they 'could' potentially receive some compensation for their injuries."

This pattern evident in the *Bonny* and *Richards* cases additionally shows up in the case of

The Society of Lloyd's v. Ashenden, 1999 WL 284775 (N.D.Ill. April 23, 1999). What is interesting about the *Ashenden* case is that the Court found that the Ashendens "had been denied a meaningful pre-deprivation hearing in the English court that entered summary judgments against them, due to the pay now, sue later, and the conclusive evidence clauses." The Court further went on to state that although they were not allowed to seriously challenge these claims, the Court opined that the Ashendens could bring "separate suits in England to contest the amount claimed and to present any other claims they felt they have against Lloyd's, such as their claim of fraud."

We now understand that the assumptions of these Courts. Surely, the Courts reasoned, claims of fraudulent concealment could be brought in England by the Names.

The threshold question that this Court must address is whether or not it could conceivably allow Lloyd's agents to fraudulently induce Missouri citizens to stake the entire breadth of their assets and retirement while those agents knew the Name's entire future financial health was as good as decimated. If the argument is that Missouri Public Policy does not stand in the way of such a result, one must seriously wonder what Missouri interest the courts would protect.

Plaintiff has often cited that these judgments of English descent are not those to be confused with judgments from Iran, Iraq or North Korea. Such chauvinism is another way to divert this Court's judgment and focus on the true issue before this Court.

Thieves and charlatans come in all sorts of cloaks and robes. The fact that these flim-flam men spoke with English accents and wore the finest threads hardly indicates that they should be allowed to use utterly foreign concept, namely not recognizing fraudulent concealment, to steal the very livelihood of Missouri citizens.

V. ENFORCEMENT OF LLOYD'S ENGLISH JUDGMENTS VIOLATE MISSOURI'S PUBLIC POLICY

When foreign judgments are not barred by federal pre-emption, each state remains free to apply its own rules respecting recognition and enforcement of foreign judgments. The states are allowed to deny enforcement of the foreign judgment on due process grounds if the jurisdiction is unreasonable or procedures are flawed in the sense of a lack of due process. It is established that, in sharp contrast to the Full Faith and Credit clause's on the enforcement of a sister-state judgments, American Courts have the discretion not to recognize foreign judgments that violate the enforcing forum's public policy. See *Sompartex, Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 443 (3rd Cir. 1971), *cert. denied* 405 U.S. 1017 (1972); *Overseas Inns S.A.P.A. v. United States*, 911 F.2d 1146 (5th Cir. 1990). The Court in *Laker Airlines, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 931 (D.C. Cir. 1984) stated that a court "is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interest."

To quote Alan Reed in his article regarding the enforcement of foreign judgments:

> "The defenses of fraud, breach of material or substantial justice, and public policy operate as 'safety valves' against 'judgments which we simply cannot accept.'[3]

Missouri law holds that a foreign judgment of a sister state is subject to attack if the judgment was obtained by fraud in the procurement or concoction of the judgment. See *Gibson*

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[3] A New Model of Jurisdictional Propriety for Anglo-American Foreign Judgement Recognition and Enforcement: Something Old, Something Borrowed, Something New?, Alan Reed, Liola of Los Angeles, International and Comparative Studies, Vol. 25, p. 243, at 251.

v. Epps, 352 S.W.2d 45, 48 (Mo.App. 1961); *Mekelburg v. Whitman*, 545 S.W.2d 89, 90-91 (Mo.App. 1976) It would simply be inconceivable that the State of Missouri would allow an inquiry regarding fraud for a sister state judgment but not be allowed to make an inquiry as to a foreign state's judgment. Nor can it be assumed, as Plaintiff seems to take for granted, that decisions as to other states' public policies would, indeed, be the same as Missouri's public policy.

Nor is fraud limited, in Defendants' view, to whether or not fraud was intrinsic or extrinsic. The most recent trend has been to expand the fraud exception cited in this type of statute. The Restatement (Second) of Judgments expressly rejects the intrinsic/extrinsic distinction. See the Statement (Second) of Judgment Section 68 and Section 70 cmt. c (1982).

The English judgments were based on the Equitas contracts, which these Defendants never saw or signed. These Defendants became bound, according to Plaintiff, to those Equitas contracts because their agent – who was appointed unilaterally by Lloyd's – acted against their expressed desires and interests. The judgments further were based on proceedings that prevented these Defendants from asserting any affirmative defenses such as fraud, breach of fiduciary duty, or offset. The judgments also were rendered against these Defendants without their having the opportunity to discover or attempt to refute the basis for liability, the amounts that were being assessed, or the method of calculation for such amounts.

Under these circumstances, Lloyd's cannot reasonably contend that these Defendants should not have an opportunity to prove a fraud was perpetrated upon these Defendants.

VI. NEITHER THE ENGLISH COURTS NOR THE AMERICAN COURTS HAVE ENFORCED EACH OTHER'S JUDGMENTS WITHOUT JUDICIAL SCRUTINY

While it may be true that American courts have enforced some English judgments, there is no blanket rule that all English judgments are enforceable in the United States. To the contrary, American courts have refused to enforce English judgments where due process is lacking or public policy is violated. For example, in *Bachchan v. India Abroad Publications Inc.*, 585 N.Y.S.2d 661 (1992), the New York Supreme Court refused to enforce an English judgment for libel because the cause of action in England carried a different burden of proof and the judgment contravened First Amendment protections and public policy.

In the case of *Matusevitch v. Telnikoff*, 877 F.Supp. 1 (D.D.C. 1995), the Court refused to enforce under the Uniform Foreign Money-Judgments Recognition Act a British libel judgment on the grounds that to enforce it would result in a deprivation of the defendant's First and Fourteenth Amendment Rights. However, the ruling was based, *inter alia*, on the fact that the United Kingdom, unlike the United States, the defendant bears the burden of proving the truth of the allegedly defamatory statements and the plaintiff is not required to prove malice. Quoting *Hilton v. Guyot*, 159 U.S. 113 (1895), the court reasoned that comity "does not require, but rather forbids [recognition] where such a recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our citizens." *Id.* at 3, *quoting Hilton*, 159 U.S. at 164.

In *Bachchan*, for example, the judgment creditor asserted, as Lloyd's asserts here, that the "court should not reexamine the claim for which the judgment was awarded to determine whether

it would be culpable under United States precedents." 585 N.Y.S. 2d at 662. Despite this assertion, the court nonetheless evaluated whether the libel claim on which the English judgment was based would have been successful it had been brought under American law and public policy. *Id.* ("the libel law applied by the High Court of Justice in London in granting judgment to plaintiff will be reviewed to ascertain whether its provisions meet the safeguards . . . enunciated by the courts of this country").

In other words, the only way an American court can determine whether foreign judgments were rendered in accordance with our standards of due process and public policy is to evaluate the judgments in light of those standards. Just as the *Bachchan* and *Matusevitch* courts had to examine whether the libel claims could stand under American constitutional and public policy standards, so this Court must examine the Equitas contract can be binding on the Defendants under due process and public policy standards against unconscionable contract and in favor of discovery and the right to present defenses and challenge liability before a deprivation of property. That this Court may disagree with the decisions of the English court is precisely the point of the comity analysis. Indeed, any time a foreign judgment is not enforced under principles of comity, the American court necessarily will contradict a decision of the foreign court. Doing so does not constitute impermissible relitigation.

The English case of *Adams and Others v. Cape Industries Plc. and Another* [1984 A. No. 2597] [Court of Appeal] [1990] demonstrates the lack of blind adherence to a foreign country's judgment without meaningful review. In this case, the English Court reviewed a default judgment given in a Texas Court against English Companies entered by Judge Steger, a Federal District Judge sitting in Texas. The issues before the English Court included "**that the method**

by which the [United States] court came to a decision as to the amount of the default judgment was contrary to the requirements of substantial justice contained in English law." (Emphasis supplied)

The English Court additionally states the English law as follows: **It is well settled also that a foreign judgment given by a court of competent jurisdiction will not be enforced in this country if the judgment can be shown to have been obtained by fraud or if its enforcement would offend natural justice or public policy**. (Emphasis supplied) *Id*. at 6.

This English decision of eighty-seven pages is, in essence, a detailed and intricate review of a United States federal court judgment. The English Court reviewed the documents entered into evidence, the procedures undertaken by the federal judge, the authority of the federal court to grant the default judgment and a discussion regarding the Federal Rules of Civil Procedure. The conclusion reached by the "trial judge" and sustained by the Appellate Court was as follows:

> **In the result, while we have some doubts as to whether the [English trial] judge reached the right conclusion on the country issue, we are satisfied that he reached the right conclusions on the presence issue and the natural justice issue. He was accordingly right, in our judgment, to dismiss the plaintiffs' claims and this appeal likewise must be dismissed.** (Emphasis supplied) *Id*. at 90-91.

Hence, it is difficult to understand Plaintiff's argument which states this Court should ignore the judicial procedures of the English Courts without at least a preliminary examination of what occurred in the English Courts.

VII. CONCLUSION

Defendant Names have argued to this Court that in reviewing the Affidavit of Michael David Freeman and the Time article whether or not the Court would take the position that this was a wrong that needed further examination.

It bears repeating that what occurred in this case, and what Defendants would prove with discovery, would be that English representatives came on to Missouri soil and duped Missouri citizens into entering contracts which would place **all** of their personal assets and futures on the line. These English flim-flam men knew that the asbestos losses made it entirely impossible for any conclusion to occur than what has already been seen, that is, total and complete financial devastation. And while these "gentlemen" were not from North Korea or Iran, they also knew that they faced total immunity from consequence in the English Courts and that the mere simple due process considerations we experience and are blessed with in Missouri, the idea that one can sue for fraudulent concealment or the simple process of being able to challenge the calculations of what is owed was not available in England.

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CERTIFICATE OF SERVICE

I certify that on the 15th day of April, 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.

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