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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

THE SOCIETY OF LLOYD'S,)
)
Plaintiff,)
)
v.)No. 4:03-CV-01113 HEA
)
ROBERT W. FUERST, et al.,)
)
Defendants.)

MOTION HEARING

BEFORE THE HONORABLE HENRY E. AUTREY
UNITED STATES DISTRICT JUDGE

OCTOBER 20, 2004

APPEARANCES:

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1 (PROCEEDINGS STARTED AT 11:20 A.M.)

2 THE COURT: Good morning.

3 MR. PRESSMAN: Good morning, Your Honor.

4 MR. HANNAFAN: Good morning, Your Honor.

5 THE COURT: This is the matter of The Society of
6 Lloyd's versus Robert Fuerst, Hord Hardin, II, Harold Ilg,
7 Walter Klein, Meade McCain, John Shillington, Cynthia
8 Todorovich, and Michael Todorovich in case number
9 4:03-CV-01113 HEA. The matter is specifically before the
10 Court in relation to Society of Lloyd's versus John J.
11 Shillington. Plaintiffs are present in open court represented
12 by counsel; defendants are present through counsel. This
13 matter arises as a result of some attempts at discovery, and
14 for the record, the Court was contacted by the parties
15 yesterday I believe during the course of depositions --
16 deposition, singular, of Mr. Shillington requesting the
17 Court's intervention to resolve issues with regard to
18 Mr. Shillington's failure to answer certain questions put to
19 him during the course of the deposition. As I understand it,
20 Mr. Pressman represents Mr. Shillington --

21 MR. PRESSMAN: That is correct, Your Honor.

22 THE COURT: -- and has asserted that the defendant,
23 Mr. Shillington, is not or should not be required to answer
24 certain questions on assertion of his Fifth Amendment claim of
25 protection. I think that's the bottom line reason for why we

1 are here; is that correct?

2 MR. PRESSMAN: And the Missouri similar provision,
3 Your Honor.

4 THE COURT: Yes. Okay. Let's have at it.

5 MR. PRESSMAN: I assume that you want them to go
6 first?

7 THE COURT: Yes.

8 MR. BUCKLEY: Your Honor, before we begin, let me
9 apologize to the Court for being so late. We had a problem
10 with finishing up a witness, and I misunderstood the timing on
11 who was coming over, so it is really my fault. I apologize to
12 the Court.

13 THE COURT: Okay. I will call Marshal Henderson and
14 have him send you forthwith to our version of the Gulag, which
15 would be either Miami or someplace up in the northeast,
16 Connecticut or Maine or one of those places, but not the
17 women's facility because Bureau of Prisons would have a
18 problem with that.

19 MR. HANNAFAN: Good morning, Your Honor, Blake
20 Hannafan on behalf of Lloyd's.

21 THE COURT: Yes.

22 MR. HANNAFAN: I understand that Mr. Buckley provided
23 the Court with a brief memorandum; is that correct? Do you
24 have that, Your Honor?

25 THE COURT: I believe I do.

1 MR. HANNAFAN: Also, if Your Honor would like, I
2 brought over a few cases that we had cited, if I can hand
3 those up to you if you would like them.

4 THE COURT: Certainly.

5 MR. HANNAFAN: I apologize, I was not able to -- I
6 was hoping to highlight certain portions for you, but
7 unfortunately I got tied up.

8 THE COURT: No problem.

9 MR. HANNAFAN: But those are sort of the key cases,
10 Your Honor.

11 MR. PRESSMAN: Excuse me, I have a copy of one of the
12 cases but not -- do you have a copy for me?

13 MR. HANNAFAN: No, I'm sorry, I do not. Your Honor,
14 as Your Honor knows, all eight defendants in this case
15 including Mr. Shillington had summary judgment granted against
16 them and in Lloyd's favor, and a judgment was entered by the
17 Court in July, I believe it was July 12, 2004. Each
18 defendant, Your Honor, in this case including Mr. Shillington
19 submitted -- well, they filed answers. They vigorously
20 defended this case. They opposed our motion for summary
21 judgment, and seven of the eight defendants including
22 Mr. Shillington, everyone but Mr. Ilg, submitted a sworn
23 affidavit in opposition to our motion for summary judgment.
24 They made several statements in that, which I think waives any
25 alleged privilege here, but I will address that in a moment.

1 Mr. Ilg, who is the other, the eighth defendant, Your Honor,
2 had submitted an affidavit as well regarding his motion to
3 dismiss. He did not respond to our motion for summary
4 judgment.

5 Now Your Honor, Mr. Pressman yesterday instructed his
6 client, Mr. Shillington, not to answer any questions other
7 than his name. It was not -- I am not trying to correct Your
8 Honor, but Your Honor had mentioned earlier that he refused to
9 answer certain questions. He refused to answer anything
10 except for his name. Mr. Pressman has stated that the
11 Missouri Constitution and the Fifth Amendment under the U.S.
12 Constitution allow them to assert the privilege against
13 self-incrimination as a blanket for anything and that the
14 burden is passed to us to show that it can incriminate.
15 Unfortunately, to take that to its logical conclusion, Your
16 Honor, no one would ever have to answer any questions in any
17 case other than their name. It could be a personal injury
18 case. He is claiming under Missouri law if you bring -- even
19 if you bring a claim as a plaintiff including perhaps as a
20 verified complaint in state court or in federal court, then
21 you can sit there at your deposition and say I don't have to
22 answer any of those questions because it may incriminate me,
23 including your address, were you in the car, did you file this
24 complaint. Mr. Shillington wouldn't even answer my question
25 of if he saw that there was a signature on his affidavit.

1 Mr. Pressman is correct that when I asked him if he
2 ate breakfast yesterday, he invoked the Fifth Amendment and
3 the Missouri Constitution. Your Honor, the reason I asked
4 that question, I know he cited it in his brief, was to show
5 the absurdity of this and that they are completely refusing to
6 do anything, and this is a continued longstanding tradition of
7 many of the Lloyd's Names, and in particular these defendants,
8 to delay and frustrate Lloyd's in its collection of valid
9 judgments which were valid and enforceable in England and
10 which Your Honor found here.

11 With regards, Your Honor, to the privilege against
12 self-incrimination, unlike what Mr. Pressman has argued, it is
13 not a blanket right, and in fact, the U.S. Supreme Court in
14 the Hoffman case, which is cited, has stated that the witness
15 is not exonerated from answering merely because he declares
16 that in doing so he would incriminate himself. His say-so
17 does not of itself establish the hazard of incrimination. The
18 Court went on and said instead it is for the Court to say
19 whether silence is justified, and that the trial court in
20 appraising the claim must be governed as much by his personal
21 perception of the peculiarities of the case as by the facts
22 actually in evidence. Now I know Your Honor did not have a
23 chance to see Mr. Shillington yesterday deposed and has not
24 had a chance to read the transcript, but certainly Your Honor
25 is able to take into account what has occurred in this case

1 and before.

2 In addition and more importantly I think, Your Honor,
3 is the fact that the Eighth Circuit in several cases, which
4 are cited and which I gave Your Honor copies, including
5 Capitol Products Corporation v. Herson, 457 F.2d 541, that was
6 a case almost identical to this where it was a judgment debtor
7 who was refusing to answer anything, and the questions that
8 had been put to him as are discussed in here briefly and are
9 in the case were things such as his wife and children and
10 their whereabouts, his assets, his bank accounts, documents
11 that had been requested, his employment, income, things of
12 that nature. The Eighth Circuit said, Your Honor, that -- and
13 I am quoting this -- with the Fifth Amendment privilege,
14 quote, The Court must determine whether the claimant is
15 confronted by substantial and real and not merely trifling or
16 imaginary hazards of incrimination. The Ueckert Court follows
17 essentially the same thing saying that it only applies where
18 the danger of self-incrimination is real and appreciable, not
19 remote and speculative. In Re: Grand Jury Proceedings says
20 the same, protects against real dangers and that the claimant
21 must be confronted by substantial and real, not trifling or
22 imaginary. The United States Supreme Court in Hoffman says
23 the privilege must be confined to instances where the witness
24 has reasonable cause to apprehend danger from a direct answer.

25 Now again, Your Honor, Mr. Pressman is trying to say

1 that the burden is on us. These cases show that, you know,
2 real and appreciable and reasonable cause and that it is
3 not -- they are not the sole arbiter. They can't just say,
4 Well, I am taking the Fifth and that is the end of the
5 inquiry.

6 The last one I want to point out, Your Honor, again
7 the Capitol Products says there is no blanket Fifth Amendment
8 right to refuse questions in non-criminal proceedings. This
9 is not a criminal proceeding. It is not a Grand Jury. As far
10 as I know, Your Honor, none of these defendants -- and Your
11 Honor, just for the record, the only people that have taken --
12 that are taking the Fifth Amendment and asserting these
13 privileges are those defendants represented by Mr. Pressman.
14 Mr. Ilg yesterday asserted some, and Mr. Todorovich is pro se
15 as well, but Mr. McCain has not done that, I deposed him this
16 morning, as well as Mr. Hardin.

17 But with regards to the burden, Your Honor, the Court
18 in the Eighth Circuit again says that in Ueckert, and this is
19 a 1983 or '85 case -- I'm sorry, it is '83 -- quote, Unless
20 the danger of self-incrimination is readily apparent, the
21 burden of showing such danger exists rests with the claim and
22 to the privilege. That means they've got to come forward with
23 it unless it is clearly obvious. I am not a U.S. Attorney. I
24 am not with the FBI. This is a non-criminal proceeding.
25 Again, like I said, as far as I know, none of these gentlemen

1 are being investigated by the FBI, the IRS, the U.S. Attorney,
2 anything, and those are questions, Your Honor, that they
3 should have to answer which I asked Mr. Shillington yesterday
4 because if they can't show that there is a real and
5 appreciable danger, then they are not allowed to just assert
6 that willy-nilly, especially in a case like this where they
7 are trying to frustrate a collection of assets. The Capitol
8 Products case, like I said, is very similar to this.

9 Finally, Your Honor, as I mentioned, I think they
10 have waived it. The Fifth Amendment right against
11 self-incrimination can be waived. That is established by
12 Garner v. United States, 424 U.S. 648. As I said, Your Honor,
13 they opposed the claims. They filed answers. They made
14 several admissions in both their answers and their amended
15 answers. They made admissions and additional factual
16 statements in response to Lloyd's motion for summary judgment,
17 and most importantly, Your Honor, they submitted sworn
18 affidavits laying out their names, a number of them what their
19 jobs are, meeting with Lloyd's, letters of credits. They make
20 arguments by counsel, which are -- which were presented to the
21 Court about how they got a bum deal by Lloyd's and that there
22 was all this fraud and the compelling story that Mr. Frapolli
23 wanted to tell.

24 Once they open that door, Your Honor, they can't go
25 back to it. This was not anything that was inadvertent. If

1 they were concerned about that, certainly they could have not
2 filed affidavits and not made the admissions if they were so
3 concerned about it. However, once they lose, Your Honor, and
4 Lloyd's is coming after them to get this money which they have
5 owed for now going on almost ten years and interest, now they
6 don't want to say anything, and certainly I think if there is
7 a privilege that they are allowed to assert, Your Honor, I
8 think the case law from the United States Supreme Court and
9 the Eighth Circuit shows that it has to be real and
10 appreciable danger unless it is clearly apparent, which I
11 don't think it is. They have the burden of showing that, not
12 Lloyd's, because otherwise, Your Honor, it is absurd to say
13 that they can take it on anything and everything, and then I
14 as the questioner have to prove that there is no possible way
15 that any answer could do that, in particular, Your Honor, when
16 they are not even answering certain questions such as whether
17 they are being investigated.

18 A number of these questions, Your Honor, to
19 Mr. Shillington, for example, whether he filed an answer with
20 the Court, he took the Fifth Amendment. Clearly, there is
21 judicial notice. There is clear waiver on that. He filed it.
22 Whether he was represented by counsel by Mr. Alan Kohn --
23 Mr. Kohn had conversations with me. Mr. Kohn appeared in
24 front of Court several times and stated that he was
25 representing Mr. Shillington, yet Mr. Pressman instructs him

1 not to answer. That just goes to show our point that they
2 can't have this blanket, and if Your Honor finds that it
3 exists, I think it is waived; otherwise, I think they need to
4 establish what this real, appreciable, and substantial fear of
5 incrimination is, Your Honor. Nothing further right now.

6 THE COURT: Very well. Mr. Pressman.

7 MR. PRESSMAN: May it please the Court, Your Honor,
8 what distinguishes this case from any other case you might
9 hear involving the invocation of the Fifth Amendment of the
10 Missouri protection is the specific nature of a judgment
11 debtor collection action in Missouri. The deposition
12 notice -- and I filed a memorandum electronically yesterday,
13 and I also supplemented it this morning. The deposition
14 notice correctly, Your Honor, says the deposition is being
15 called pursuant to the Missouri rules, and that is right. At
16 first, when you look at it, you say, Oh, somebody must have
17 made a mistake. No, that is right. Under Federal Rule of
18 Civil Procedure 69, one uses the Missouri rules. The
19 deposition was served according to Missouri rules, and the
20 defendants have the right to invoke the Fifth Amendment
21 privilege.

22 The leading case on this subject is Shapiro versus
23 Cloyd. That is a case decided by the Missouri Supreme Court
24 En Banc cited in the brief in 1981. This case makes it clear
25 that in a judgment debtor examination, someone can take the

1 Fifth. Subsequent cases cited in the supplemental brief,
2 specifically the Askren case, which cites Cantor versus
3 Saitz -- these are all cited, I won't repeat the cites -- make
4 it clear that a judgment debtor cannot be compelled to answer
5 a question which may tend to incriminate himself, and
6 furthermore, it is also clear that he doesn't have to give the
7 reason why it would do it because that would destroy the
8 privilege. Now my distinguished colleague is from Chicago.
9 He has done a fine job on this case getting the judgments, but
10 in fact, what I am stating to Your Honor is the law in the
11 Missouri state courts. I know this is a federal court, Your
12 Honor, but I believe you are bound by the ruling in the
13 Missouri courts on this subject. We don't have to make a
14 showing of why this couldn't possibly incriminate ourselves.
15 They have to make that showing.

16 Now Your Honor, I'm not interested in wasting the
17 Court's time. I understand that some of the questions which
18 were objected to, they might be able to meet their burden of
19 proof on. Why did the defendant take the Fifth on all of
20 them? Because of the very reason that they are claiming
21 waiver. If he wants to ask the irrelevant question of where
22 they had breakfast, and there is a stipulation or ruling by
23 the Court that I am not going to get sued for waiving the
24 client's provision, I have no objection to asking that, and
25 what I proposed in my brief was that we get the transcript, we

1 sit down according to the local rules and agree on which
2 questions we don't have a disagreement on. But I don't want
3 to be sandbagged on this issue. The problem with Lloyd's
4 position is that under Missouri law, this privilege against
5 self-incrimination, which I understand it might be surprising
6 to someone who doesn't normally practice in debtor creditor
7 work here, is that examinations of judgment debtors are
8 basically useless in Missouri. There is a specific case,
9 which I cite in the brief today, in which the specific
10 question "where are you employed," the Missouri Court of
11 Appeals I believe it was Western Division held that is a
12 proper invocation.

13 Now it is difficult for me to respond to some of the
14 cases -- well, two of the cases I was given yesterday, and
15 I've dealt with them in the brief. They are easily
16 distinguishable because they don't involve Missouri Rules of
17 Discovery and Federal Rule 69. They involve tax cases totally
18 irrelevant to this. The Capitol-Hernon case I just got handed
19 to a minute ago, I can't tell if it's a Missouri case. It
20 might be. I see some of the lawyers are from Missouri, but it
21 predates the Cloyd versus Shapiro case, which anyone can see
22 is the father of all these cases in Missouri, so I don't think
23 the Eighth Circuit in that case was taking a part of that.

24 I'm happy to come down -- I was happy to come down
25 here and argue this motion with the Court today, but I think

1 we are really premature. I'd offered -- and I didn't surprise
2 Mr. Hannafan or Mr. Buckley by saying my clients were going to
3 invoke their Fifth Amendment privileges. I indicated to them
4 that I would do that, and I offered, I said in the brief, I
5 offered if you want to lay out the questions, then we can do a
6 stipulation on this stuff. I think the situation here is such
7 that we have invoked the privilege. I don't want to waive it.
8 I think they need to make a showing on each of the questions.
9 And yes, I agree, I could stipulate on some of them, but let's
10 get the transcript. I'm not trying to -- this thing has been
11 going on for six years. I agreed to let the depositions -- I
12 didn't try to delay the depositions.

13 On the issue of overall waiver, because they defended
14 the lawsuit, they have waived their Fifth Amendment
15 privileges, I knew there would be a question of waiver, and
16 that is why I didn't want them to answer anything yesterday.
17 That is a very big question, which I think needs some
18 substantial research on. I know your law clerk will do it. I
19 tried to look at it last night. There is authority to the
20 effect that a waiver has to be knowing, has to be specific,
21 and I don't believe that the subjects that were raised in the
22 lawsuit -- I don't really know what they were. I mean, I
23 assume the subject of the lawsuit was there is a judgment in
24 England, it was unfair, we got it here, and you ruled, and
25 they didn't appeal, I have to enforce it. So I don't see how

1 they testified -- maybe I am wrong, I don't know. I don't
2 think any of them testified at depositions. I saw
3 Mr. Shillington's affidavit, the one with his signature. You
4 know, I have no reason to believe that it is not his
5 signature. Counsel produced it. It was filed. I don't see
6 how that is in the bottom line going to be deemed to waive a
7 right under the Missouri Constitution.

8 I want to make this clear, when we started this
9 morning, you said the Fifth Amendment -- the Court said the
10 Fifth Amendment. It is also the Missouri right, and it is
11 very similar. I think the wording is identical in both, but I
12 believe the Court is bound by Missouri law under 59. I am
13 starting to repeat myself, so unless Your Honor has any
14 questions, I'll retire.

15 THE COURT: Yes, I do, Mr. Pressman. With regard to
16 this affidavit that was previously filed by Mr. Shillington,
17 would you not agree/concede that at the very least as it
18 relates to the issue here, those things that are referenced in
19 the affidavit, any claim of protection or privilege had been
20 waived? It is under oath. It is his signature.

21 MR. PRESSMAN: Your Honor, I haven't thought --

22 THE COURT: I am not talking about a general waiver.
23 I am just talking about that specific document and its
24 contents, and so it would, therefore, be the subject of
25 inquiry at the very least to ask didn't you sign an affidavit

1 in this matter on such and such a date.

2 MR. PRESSMAN: I believe -- yes, Your Honor, I
3 believe that a question would be proper "did you sign the
4 affidavit" so long as if the Court rules and I consent to the
5 ruling that you're going to have to answer that, I don't want
6 to have my opponent say, Well, you have opened the door now.
7 There are cases on the subject of opening the door. I don't
8 have the affidavit in front of me. I honestly only saw it
9 yesterday. I mean, if there were a question in there which --
10 the reason why I am not giving you a straight answer, Your
11 Honor, and I am not giving a straight answer, is if there were
12 a question there -- answer saying I was broke when I signed
13 this -- when I went into Lloyd's and I didn't know what I was
14 doing, does that open the door for all these questions about
15 other things? I don't know the answer to that, so I am not
16 giving you a straight answer to that. I will just admit it,
17 Your Honor, but that is an issue.

18 THE COURT: And the other question I have is with
19 reference to the types of questions that were put to
20 Mr. Shillington yesterday, not inclusive of questions that
21 were asked to demonstrate, as counsel indicated, to
22 demonstrate his belief of the absurdity of the claim of the
23 privilege and not the mundane questions of, you know, how long
24 have you been working at such and such a place, I don't know
25 if that is really that significant to tell you a whole lot

1 such that you can glean information that would allow you to
2 execute on a judgment, which I assume the deposition was all
3 about in an attempt to find assets or get some information
4 about where assets might be that might be executable, what
5 types of questions might those have been that were asked that
6 the privilege was claimed on before you all called me
7 yesterday?

8 MR. PRESSMAN: I want to make it clear, Your Honor,
9 Counsel's correct, I claimed privilege on virtually every
10 question. I think the questions -- and again, I'd prefer to
11 have the transcript, but I think the questions ranged from the
12 silly just to make a point that he was going to answer the
13 Fifth Amendment on anything, which I concede -- I mean, I'm
14 not going to lie to you -- to matters which are on the other
15 spectrum, like are you under investigation, have you filed tax
16 returns to things which might be a little bit great, are you
17 married, and I'm in a little bit difficult position here
18 because the Missouri law says I don't have to give a basis for
19 doing that. But let me give you a hypothetical basis.
20 Someone could be married more than once -- and I know this
21 sounds silly, Your Honor, but --

22 THE COURT: At the same time you mean?

23 MR. PRESSMAN: Yes, yes, yes, at the same time.

24 THE COURT: It ain't that uncommon anymore for people
25 to be married more than once, but it is sort of rare for

1 people to be married more than once at the same time.

2 MR. PRESSMAN: And you know what, Your Honor --

3 THE COURT: At least in America.

4 MR. PRESSMAN: In America, right. For instance, you
5 mentioned just now how long have you been working. There are
6 two real reasons that in general I think that is not a proper
7 question. One is --

8 THE COURT: Well, and I understand what you are
9 saying about that because you could be working legitimately;
10 you may also be working, but not working legitimately, and the
11 fact that you might be doing work or working in a not
12 legitimate fashion could be incriminatory. I understand.

13 MR. PRESSMAN: So as I say, I don't wish to waste the
14 Court's time on some of the questions, which I say, you know,
15 some of them, as long as I am not being held to opening the
16 door on something. And there are also cases which say if
17 someone doesn't raise their privilege on question A, and then
18 they go to question A1, they have opened the door on that.
19 Just like you have raised the issue, Your Honor, on the waiver
20 thing. That is why I think we're -- I'm happy to have done
21 the memorandum. I have known some of these cases. I have
22 never really put them down in writing, but I think we ought to
23 make a record. There also ought to be perhaps a motion before
24 the Court.

25 I'd also like to raise one more issue. I mean, this

1 is a judgment debtor examination, and I wasn't really kidding
2 about the judgment being denominated in U.S. pounds. There is
3 a footnote in my brief which says judgments in American
4 courts -- this is from the restatement -- have to be in
5 dollars, and I'm not sure that any of these questions were
6 relevant except as they looked to find whether defendant had
7 pounds, had pounds. And I have checked some other cases that
8 Lloyd's have had around the country. They have had a motion
9 prejudgment to convert them. There was no demand in this
10 complaint.

11 So I guess what I am saying is, Your Honor, I got
12 this memorandum just as we sat down here. I did a memorandum
13 which was okay. We have some depositions of the other people,
14 which I will stipulate to the Court that, you know, we will be
15 bound by the same things. If they want to come out and ask
16 the same things and make the same record, that is fine, but I
17 think we need a transcript. I think we need to try to get a
18 record before the Court, see what we can agree on, have the
19 Court rule on stuff and make certain rules, make certain rules
20 on what is going to be answered, what is not going to be
21 answered frankly to protect me from waiving anything, and then
22 either, you know, have a special master to do these
23 depositions which shouldn't take so long.

24 Again, I am repeating myself, so unless you have any
25 questions, I will sit down.

1 THE COURT: I got nothing else.

2 MR. PRESSMAN: Thank you, Your Honor.

3 THE COURT: Any response?

4 MR. HANNAFAN: Yes, Your Honor. A couple points.

5 With regards to Mr. Pressman's statements on Rule 69, Federal
6 Rule 69, I think he's misinterpreting it, which part of it
7 says that "in aid of the judgment or execution, the judgment
8 creditor or successor in interest when that interest appears
9 in the record may obtain discovery from any person including
10 the judgment debtor in the manner provided in these rules,"
11 meaning the federal rules, "or in the manner provided by the
12 practice of the state in which the district court is held."
13 He is right that our notice for deposition cites the Missouri
14 rules. That doesn't prohibit us from doing it under the
15 federal, and if Mr. Pressman would prefer that we give him
16 notices of depositions under the federal rules, I would be
17 more than happy to do that.

18 Your Honor, there is another case that Mr. Buckley I
19 guess got when we were leaving, and I apologize, I just saw it
20 and it was not cited in our brief because it was found this
21 morning, it is U.S. v. Gwinn, G-W-I-N-N, Middle District of
22 Florida, 2003, and it's a -- I don't have the cite on here.
23 It is a computerized one. But, Your Honor, it discusses the
24 waiver issue, and it says once the witness voluntarily opens
25 the door, the Court may open it completely and scrutinize

1 every exposed matter. Your Honor, it also discussed waiver
2 and says the Fifth Amendment privilege is waived for matters
3 to which the witness testifies, and it cites Mitchell v.
4 United States, 526 U.S. 314, 1999. "A witness may waive his
5 Fifth Amendment privilege as to any matters addressed by the
6 witness in an affidavit to the Court." It cites a case for
7 that as well, Nutramax Labs v. Twin Labs, and it talks about
8 waiver from testimonial admissions, and it also applies to
9 documentary admissions on the same subject. And finally, Your
10 Honor, it says "where a witness provides statements as to his
11 finances in papers submitted to the Court, he is deemed to
12 have waived his Fifth Amendment privilege on the same subject
13 matter."

14 As Your Honor may recall, Mr. Frapolli and Mr. Kohn
15 in their papers, in their answers, in their affirmative
16 defenses, in their memos in opposition to various motions,
17 discovery motions, summary judgment, answers and admissions to
18 statement of facts, additional facts, we heard a lot about how
19 these people had letters of credit and that they had already
20 paid what they thought they owed to Lloyd's and that, you
21 know, they draw down on their letter of credit. That's
22 opening the door. I mean, if that is not opening the door in
23 submitting sworn signed affidavits in support of those papers,
24 Your Honor, I respectfully suggest that the door can't be
25 anymore open on waiver on that. They wanted to put that in.

1 It was admitted to the Court. Their attorneys made those
2 statements on their behalf, and the horse is out of the barn,
3 and once they open it a little bit as this case states and
4 others, you can go about anything.

5 Your Honor, I don't think Mr. Pressman's suggestion
6 of getting the transcript and going through it one by one and
7 his statement -- he keeps stressing this point that he asked
8 me to write out my questions. Well, I didn't know what all my
9 questions were going to be because I didn't know if they were
10 going to answer some of them. He had told us about the
11 Shapiro case, and I read it, and I certainly disagreed with it
12 and had other authority, which we told Mr. Pressman about, so
13 did I think Mr. Pressman was going to have him take the Fifth
14 on every single question I could ask. I mean, I'm entitled as
15 the counsel for Lloyd's to have each of these defendants come
16 in and answer these questions. I want to have that record. I
17 want them sworn because I think that is how it has to be done.
18 I appreciate his offer, and I understand that he was trying to
19 save some time there, but that is beside the point, and I
20 don't think that that really comes into play here.

21 Finally, Your Honor, again with the Missouri law
22 cases on this, the Eighth Circuit has decided this. Now
23 Mr. Pressman doesn't like some of the cases we cited, and
24 unfortunately that is just too bad. I don't think the Fifth
25 Amendment is changed up differently on these matters, but if

1 it is, certainly you need to have I think a more -- if that is
2 the case, there should be in a non-criminal proceeding such as
3 this, certainly they should show that they have a real and
4 appreciable fear of incrimination. The questions about
5 whether they are investigated or whether they are a defendant
6 in a criminal proceeding, if they are a defendant in a
7 criminal proceeding, that is probably in the public record
8 anyway, so that is waived. The things about where they work,
9 tax returns, those are filed, they have sent those out. To
10 not produce them and not respond to those, those are out in
11 the open.

12 Finally, Your Honor, last two things, with regards to
13 the judgment being in pounds, under the Uniform Foreign Claims
14 Action, there is a conversion process for that. It can be
15 converted to dollars. It has been done elsewhere. Maybe
16 Mr. Pressman isn't familiar with that. So I am not that
17 concerned about that. We can address that. I don't think
18 this is the time to do that, Your Honor, but I would note that
19 for you.

20 THE COURT: Okay.

21 MR. HANNAFAN: Finally, Mr. Pressman did cite in his
22 case another Eighth Circuit case on the privilege, Aviation
23 Supply Corporation v. R.S.B.I. Aerospace, Inc. The cite, Your
24 Honor, is 999 F.2d 314. It is a 1993 case. And again, this
25 was a judgment debtor case similar to this. It was in

1 Missouri, and in here, in this case, Your Honor, they
2 appointed a receiver to take in the judgment debtor, and they
3 said that they did not have a Fifth Amendment right to refuse
4 to give documents and disclose assets to the receiver, which
5 was appointed by the Court. Now, Your Honor, I don't know
6 what exactly we're going to do, but I think again this goes --
7 this is not directly on point in this case, but it discusses
8 the Fifth Amendment case and it is a more recent Missouri
9 case. It doesn't let them give a Fifth Amendment to a
10 receiver, a blanket statement. They had to disclose that.
11 And Your Honor, if there is a privilege and depending on how
12 the Court rules and this all shakes out, then Lloyd's is most
13 likely going to come in and have to ask for the appointment of
14 a receiver because things that are considered doing that, Your
15 Honor, are again the tactics taken by the defendants, how long
16 they refuse to pay, what they have done. They have been sued
17 in England. They had appealed. They kept going. This has
18 been going on for a long time, and a number of these
19 defendants, in particular the ones being represented by
20 Mr. Pressman, are doing anything and everything they can to
21 delay this and to frustrate Lloyd's, Your Honor. And unless
22 Your Honor has any questions for me, I don't have anything
23 further.

24 THE COURT: Nope. Thank you.

25 MR. HANNAFAN: Thank you, Judge.

1 MR. PRESSMAN: Could I have one minute?

2 THE COURT: Go ahead.

3 MR. PRESSMAN: Mr. Hannafan has misrepresented the
4 case I cited. On page 6 of the brief, I quote the only part
5 that is important. "In the district court, Barber
6 successfully argued that in a diversity case, state law
7 governs assertions of the privilege, and under Missouri law,
8 his mere assertion of the privilege created a presumption of
9 self-incrimination that ASC could not overcome." They cite
10 Realty Consultants versus Dowd but say the matter is not
11 before us.

12 With respect to what Mr. Hannafan is saying about my
13 clients and the clients represented by Pressman, yes, I am
14 going to represent them vigorously. They didn't have their
15 day in court in this matter because the Court ruled and I
16 think probably correctly that their day in court was in
17 London, and I don't apologize for trying to assert their
18 rights, just like Mr. Hannafan didn't apologize for trying to
19 deny them their rights to have a free and fair trial. So with
20 that, I ask the Court to rule on whatever motion is before it,
21 which I don't know really what it is. Thank you.

22 MR. HANNAFAN: Your Honor, may I just -- one last
23 thing if I may, Your Honor.

24 THE COURT: Is this a biggie?

25 MR. HANNAFAN: I'm sorry?

1 THE COURT: Is it a biggie?

2 MR. HANNAFAN: No. Just, Your Honor, the footnote
3 that he cited with the Eighth Circuit, the Aviation Supply,
4 they said the issues are not before them and they expressed no
5 view on it. And finally, Your Honor, I did not -- I was not
6 counsel in England, and I certainly dispute that Mr. Pressman
7 thought that I had anything to do with -- or his implication
8 that I prevented them from getting a fair day in court. That
9 is ludicrous.

10 THE COURT: All right.

11 MR. HANNAFAN: That is it, Your Honor. Thank you.

12 THE COURT: Here is what I think, fellows. I think
13 that those matters that were referenced in pleadings or
14 affidavits or exhibits attached and made part of or were part
15 of the filings with the Court in the matter of Society of
16 Lloyd's versus the defendants, the Names if you will, those
17 matters which may be the subject of deposition inquiry at this
18 point, I think the privilege is waived. It is out there.
19 There are other matters though that might be more specific
20 than those matters already part of the Court file by way of
21 pleading, affidavit, or other document that may be a little
22 questionable. I do think, gentlemen, that related to matters
23 that may not already be out there in some fashion as it were,
24 it might be good for the parties to get together and just put
25 together what kind of information we're seeking by way of

1 inquiry, and who knows, it may be the kind of thing that may
2 be acquired without the necessity of deposition. On those
3 things that are on the bubble, I would suggest that you put
4 those things together, provide it to the Court, and I will
5 rule on whether you can ask it or actually whether they should
6 be required to answer it. But I do think though that most
7 things are probably already out there. There may be some
8 detail oriented aspects of those things that are out there
9 that may be objectionable or inquiry can be made in a less
10 offending way, not saying that you are offensive,
11 Mr. Hannafan, but from the defendant's perspective.

12 MR. HANNAFAN: I understand, Your Honor.

13 THE COURT: That would allow the answer to be given.
14 So I guess that is what the ruling boils down to. In short,
15 the stuff that is already out there, I think your guy is going
16 to have to answer any inquiries to or about. Other things,
17 I'm going to require you guys to get together and go over a
18 list -- you can call it a list, you can call it a method, mode
19 of inquiry, call it whatever you want to call it -- of things
20 that would be the subject of a deposition beyond what is
21 already out there. And if there are things from that list, if
22 you will, Mr. Pressman, that you find objectionable to which
23 the privilege does attach, make/comprise a secondary list and
24 provide it to me, and I will review it and make a
25 determination as to whether your guy should have to answer or

1 provide the information by way of answer to the plaintiffs,
2 okay?

3 MR. PRESSMAN: The only suggestion I'd have, Your
4 Honor, is there are other depositions, and we have just
5 adjourned Mr. Shillington's deposition. I haven't frankly had
6 an opportunity to review any of the underlying claims. I
7 would ask that the Court suggest -- I don't think this will
8 take a month -- a couple weeks. I would like the affidavits
9 of my clients filed from opposing counsel. He had them
10 yesterday. Let's just re-adjourn all these depositions in a
11 week or two or three weeks so we can do that. I think that is
12 a reasonable request.

13 MR. HANNAFAN: Your Honor, I'm sorry, I don't mean to
14 cut Mr. Pressman off. I think I know where he is going, and I
15 think I can short-cut it. We do have some depositions
16 scheduled this afternoon. I am willing to postpone those
17 because obviously I would like to look at the pleadings as
18 well as long as Mr. Pressman and I can have an agreement at
19 least on the record that, you know, we are going to try to get
20 these scheduled in the next, you know, month, three weeks,
21 something like that. I know he's got a busy schedule, I do,
22 Mr. Buckley does. I just don't want to have this dragged out
23 and then -- you know, obviously I can't tell Mr. Pressman what
24 he is going to do, but I don't know if he is going to come
25 running back in. We have also requested documents, so I would

1 like to get that, and that goes to this as well. So I agree
2 that postponing them would be fine, Your Honor.

3 THE COURT: As nearly as anyone could come, I think
4 it is safe to say that this case requires some degree of
5 closure --

6 MR. HANNAFAN: Thank you, Your Honor.

7 THE COURT: -- for all parties concerned. There's
8 got to be an end to it at some point.

9 MR. HANNAFAN: Your Honor, just so the record is
10 clear, does your ruling apply to all defendants because
11 Mr. Todorovich I know is pro se. Mr. Ilg is pro se. Mr. Ilg
12 took some Fifth Amendment yesterday, and I know Mr. Todorovich
13 did in his response --

14 THE COURT: Yeah, Mr. Ilg is pro se, and he is not
15 here today, so I think clearly it doesn't apply to him. He is
16 representing himself. He hasn't had the benefit of engaging
17 in our little repertoire this afternoon so...

18 MR. HANNAFAN: Your Honor, I just wanted to make sure
19 that your ruling on the waiver issue applies to all of them
20 who had submitted the answers.

21 THE COURT: Are you representing --

22 MR. PRESSMAN: I am representing three other
23 defendants.

24 THE COURT: Okay.

25 MR. PRESSMAN: Cynthia Todorovich, Walter Klein, and

1 Robert Fuerst, and I have stated in my brief that although
2 this matter doesn't apply to them, I concede that whatever
3 Your Honor rules here will apply to everybody.

4 THE COURT: What he said.

5 MR. HANNAFAN: Okay. Yeah, because Mr. Hardin and
6 Mr. McCain have not raised this.

7 THE COURT: Right. Whatever happens when and if you
8 do theirs is whatever happens at the time. We'll go from
9 there.

10 MR. HANNAFAN: Thank you, Your Honor. I appreciate
11 it.

12 THE COURT: They may view the situation -- or their
13 lawyers may view the circumstances differently or the same as
14 Mr. Pressman, who knows. I don't know.

15 MR. HANNAFAN: Okay.

16 MR. PRESSMAN: Thank you, Your Honor.

17 MR. HANNAFAN: Your Honor, thank you very much for
18 getting us in today. I appreciate it.

19 THE COURT: Thank you, gentlemen. Enjoy the weather.
20 Wish it was sunnier outside and less damp.

21 (PROCEEDINGS CONCLUDED AT 12:05 P.M.)

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CERTIFICATE

1
2
3 I, Angela K. Daley, Registered Merit Reporter and
4 Certified Realtime Reporter, hereby certify that I am a duly
5 appointed Official Court Reporter of the United States
6 District Court for the Eastern District of Missouri.

7 I further certify that the foregoing is a true and
8 accurate transcript of the proceedings held in the
9 above-entitled case and that said transcript is a true and
10 correct transcription of my stenographic notes.

11 I further certify that this transcript contains
12 pages 1 through 30 inclusive and that this reporter takes no
13 responsibility for missing or damaged pages of this transcript
14 when same transcript is copied by any party other than this
15 reporter.

16 Dated at St. Louis, Missouri, this 29th day of November,
17 2004.

18
19
20 _____
21 /S/Angela K. Daley
22 Angela K. Daley, CSR, RMR, FCRR, CRR
23 Official Court Reporter
24
25