DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

CASE NO: 97-CV-6951, COURTROOM/DIVISION 8

BRIEF IN SUPPORT OF EQUITAS LIMITED'S MOTION TO QUASH SERVICE OF PROCESS, OR, IN THE ALTERNATIVE, TO DISMISS FOR LACK OF PERSONAL JURISDICTION

UNION PACIFIC RAILROAD COMPANY, as successor-in-interests to THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
Plaintiff,

v.

CENTURY INDEMNITY COMPANY f/k/a CALIFORNIA UNION INSURANCE COMPANY, et al.,

Defendant.

Equitas Limited[1] files this brief in support of its motion to quash the Plaintiff's improper service of process on Equitas Limited, or, in the alternative, to dismiss the Complaint for lack of personal jurisdiction over Equitas Limited. Equitas Limited makes this limited appearance for the sole purpose of contesting service and jurisdiction.

SUMMARY OF ARGUMENT

The Union Pacific Railroad Company filed this case as the successor in interest to The Denver & Rio Grande Western Railroad Company ("D&RGW") seeking insurance coverage from the insurers of the D&RGW for monies spent cleaning up polluted sites. Equitas Limited is an English reinsurer. It has no contractual relationship to the plaintiff. It did not insure D&RGW or the Plaintiff.

---

[1]The plaintiff incorrectly identified Equitas Limited as "Equitas, Ltd." in its Complaint.

On January 14, 1998, the Plaintiff incorrectly attempted to serve the law firm of Mendes & Mount on behalf of Equitas Limited. (Affidavit of Daniel M. Bianca, attached as Exhibit "B," ¶ 7). Equitas Limited has never authorized the law firm of Mendes & Mount to receive service for Equitas Limited. (Bianca Aff., ¶ 6).[2] This Court should, therefore, quash Plaintiff's attempted service on Mendes & Mount as inconsistent with the letter and spirit of the Constitution of the United States and Rule 4 of the Colorado Rules of Civil Procedure.

Even if Plaintiff's service were proper and satisfied the Constitution and Colorado law, Equitas Limited is not subject to personal jurisdiction in Colorado. Equitas Limited has engaged in no acts in Colorado and has no contacts with the State of Colorado. Equitas Limited has no contractual relationship with Plaintiff. Plaintiff's Complaint should be dismissed for lack of personal jurisdiction.

STATEMENT OF FACTS

Formation and Purpose of Equitas Limited.

In an effort to address the Names' liabilities in respect of 1992 and prior years' business and the litigation attendant thereto, Lloyd's developed a Reconstruction and Renewal Plan ("R&R"). Among other things, R&R proposed a mechanism for the individual Lloyd's members, or (Affidavit of Gisela Gledhill, attached as Exhibit "A," at ¶ 10) "Names," to reinsure their liabilities in respect of 1992 and prior business (other than

[2] The parties met and conferred by telephone regarding the issues presented in this Motion. Counsel for the Plaintiff contended that service through Mendes & Mount constiuted adequate service on Equitas Limited, in spite of the clear facts to the contrary.

the life insurance business). Id. Equitas Reinsurance Limited ("ERL") was one of the companies formed to facilitate this purpose: Equitas Limited is a wholly owned subsidiary of ERL. (Gledhill Aff. ¶¶ 5-6). ERL and Equitas Limited are subject to the laws of England and to the regulatory framework for insurance business in England as operated by the Treasury (previously the Department of Trade and Industry).

The Reinsurance Contract

On September 3, 1996, ERL entered into a "Reinsurance and Run-Off Contract" ("the Reinsurance Contract") with the Names to "reinsure and indemnify" them in respect of claims arising in connection with the 1992 and prior non-life insurance and reinsurance business underwritten by the Names, other than the business previously reinsured by Lioncover Insurance Company Limited.[3] A true and correct copy of the Reinsurance Contract is attached to the affidavit of Gisela Gledhill, which is Exhibit "A" to this brief. English law expressly governs the Reinsurance Contract, and the Names who are parties to the Reinsurance Contract submit to the exclusive jurisdiction of the High Court of England and Wales to resolve "any dispute . . . of whatsoever nature which may arise out of or in connection with this Agreement." Reinsurance Contract §25.1.

The Reinsurance Contract provides that ERL will conduct the "run-off" of these reinsured liabilities, i.e., the adjustment and settlement of all outstanding and future claims against the reinsured Names. Reinsurance Contract §9.1. The Reinsurance

[3] On December 8, 1997, under the similar terms of the Lioncover Reinsurance Contract, ERL reinsured the Lioncover Insurance Company Limited against all liabilities arising in respect of the syndicates that the Lioncover Insurance Company Limited had

Contract also delegates to ERL control in handling the run-off and grants ERL various enumerated powers, including the control of claims and payment of claims to the Names' policyholders. *Id.* at §9.2. However, the Reinsurance Contract makes it clear that ERL's powers to conduct the run-off ***do not supersede the legal contractual relationships between the Names and their policyholders*** (in this case, the Plaintiff). *Id.* at Preamble ¶J. Further, the Reinsurance Contract does not create any third-party beneficiary status in, or confer any third-party beneficiary rights upon, the Names' original policyholders. (*Id.* at § 3.7; Gledhill Aff. ¶ 18).

Claim Handling by Equitas Limited

As contemplated in Section 9.3 of the Reinsurance Contract, ERL ceded the business it reinsured to its wholly-owned subsidiary, Equitas Limited, pursuant to a separate Retrocession Agreement dated September 3, 1996. Equitas Limited, therefore, is the entity responsible for conducting the run-off of liabilities under the Names' original policies. Within Equitas Limited, the Equitas Claims Unit performs the necessary claims-handling functions. (Gledhill Aff. ¶¶10-13). This function has no effect on the liabilities of the Names and companies signatory to the policies against which claims are being made.

Equitas Limited Has No Contacts With the State of Colorado

Equitas Limited is organized and registered under the laws of England. It is not licensed to do business in Colorado or in any other state in the United States. It has never conducted business of any kind in Colorado, nor has it in any way availed itself of the benefits and protections of the laws of Colorado. Equitas Limited has not engaged in

---

reinsured. (Glendhill Aff. ¶ 11).

any acts or committed any torts in the state of Colorado. Equitas Limited has no contractual relationship with the Plaintiff and did not act as insurer of the Plaintiff. Equitas Limited does not own, use, or possess any real property in the state of Colorado, or in any state in the United States. (Gledhill Aff. ¶ 14).

ARGUMENT

I. Plaintiff Has Not Perfected Service of Process on Equitas Limited

On January 14, 1998, plaintiff incorrectly attempted to serve a summons on Equitas Limited at the offices of the law firm Mendes & Mount, in New York City. (Bianca Aff., ¶ 7). Although Mendes & Mount acts as an agent for service of process on certain of the parties to this lawsuit, it is not an agent for service on Equitas Limited. (Bianca Aff., ¶¶ 5-7). Equitas Limited has no agent for service of process in the United States. Mendes & Mount properly rejected the attempted service on Equitas Limited. (Bianca Aff. ¶ 7). The attempted service of Equitas Limited through Mendes & Mount should be quashed as improper and in violation of the requirements of due process. The improper service upon Equitas Limited ends the analysis, however, assuming for the sake of argument that service were proper, Equitas Limited must be dismissed for the lack of jurisdiction as further set forth below.

II. **Colorado's Long-Arm Statute Does Not Permit the Exercise of Personal Jurisdiction over Equitas Limited**

Under Colorado law, the question of personal jurisdiction over a nonresident defendant involves a two-part analysis. The court must first look to whether the exercise of jurisdiction meets the requirements of Colorado's long-arm statute (C.R.S. § 13-1-124 (1996 Supp.)), and the court must then determine whether the exercise of jurisdiction satisfies Constitutional Due Process. Fleet Leasing, Inc. v. District Court In and for the City and County of Denver, 649 P.2d 1074 (Colo. 1982); Doe v. National Medical Services, 748 F. Supp. 793 (D. Colo. 1990). Plaintiff cannot show that the exercise of jurisdiction over Equitas Limited passes muster under either of these analyses.

Colorado's long-arm statute permits its courts to exercise jurisdiction over nonresident defendants in lawsuits arising from the following:

> (a) The transaction of any business within this state;
>
> (b) The commission of a tortious act within this state;
>
> (c) The ownership, use, or possession of any real property situated within this state;
>
> (d) Contracting to insure any person, property, or risk residing or located within this state at the time of contracting . . .

C.R.S. § 13-1-124 (1996 Supp.).

Equitas Limited never conducted business in the state of Colorado. Equitas Limited maintained no offices, agents, employees, bank accounts, other assets, or real

property within the state of Colorado. (Gledhill Aff. ¶ 15). This is an action for breach of contract and does not, therefore, arise out of any alleged tortious acts, but Equitas Limited has nevertheless committed no tortious acts in the state of Colorado. Finally, as will be discussed in greater detail below, Equitas Limited has not contracted to insure D&RGW, or any property or risk of D&RGW, in Colorado or anywhere else. Equitas Limited, therefore, is not subject to personal jurisdiction under the Colorado long-arm statute, and Plaintiff's Complaint against Equitas Limited should be dismissed.

A. The Reinsurance Contract is Neither An Assumption nor an Accession Agreement and Cannot Create Jurisdiction Over Equitas

In paragraph 8 of the complaint, the Plaintiff makes the unfounded assertion that Equitas Limited has somehow assumed the Lloyd's syndicates' contractual relationship with D&RGW. It is alleged that:

> Equitas, Ltd. purports to be a successor in interest to the syndicates referenced in paragraphs 5 and 6 and purports to have acceded to and assumed the liabilities of those syndicates for claims made against the Policies issued by those Certain Underwriters at Lloyd's, London, as described in paragraph 5.

This allegation is false. Equitas Limited has never "purported" to be the successor in interest to the referenced syndicates or to have assumed or acceded to the liabilities of those syndicates. The Reinsurance Contract does not supersede or extinguish the underlying contracts between the Names and their policyholders. (Gledhill Aff. ¶ 17).

The Reinsurance Contract does not insulate the Names from liability. The Names' contractual obligations to Plaintiffs under the policies remain in force. Thus, the Reinsurance Contract cannot be said to be an assumption or accession agreement, and Equitas Limited clearly is not the successor in interest to the Names' liabilities.

B. **The Reinsurance Contract Expressly Leaves in Place the Names' Liabilities to Their Policyholders**

Several critical provisions of the Reinsurance Contract make clear that it leaves in place the Names' liabilities to their policyholders. These provisions include the following:

"This Agreement is to take effect as a contract of reinsurance and shall have no effect on the liability of any Name or Closed Year Name under any original contract of insurance entered into by such Name or Closed Year Name. The liability of the relevant Names or Closed Year Names under all contracts of insurance underwritten by them shall be several and not joint." (Preamble ¶J).

Equitas is obligated to "reinsure and indemnify" the Names in respect of their policy obligations under certain 1992 and prior non-life insurance and reinsurance policies. (§3.1).

Under certain circumstances, the Names may be entitled to receive a return of their reinsurance premium under the Reinsurance Contract. (§8 and Schedule

The Reinsurance Contract "is not intended to and does not create any third party beneficiary status in, or confer third party beneficiary rights upon, Insurance

Creditors or any other persons with respect to this Agreement." (§3.7).

The Reinsurance Contract provides that in the event certain circumstances arise, including a determination by Equitas that its available assets are less than the liabilities to the Names' original policyholders, ERL may invoke "proportionate cover" mechanisms by which Equitas may reduce or suspend payment of its "Reinsurance Obligation to the Names." (§3.5 and Schedule 3). Thus, the ultimate obligation toward the original policyholders remains with the Names.

By its clear and explicit terms, the Reinsurance Contract is just that, a contract of reinsurance, in which D&RGW has no interest. The Reinsurance Contract is not a contract to insure D&RGW or any other of the Names' original policyholders, and it cannot create jurisdiction over Equitas Limited in Colorado. Plaintiff's Complaint should be dismissed as to Equitas Limited.

C. Jurisdiction Is Improper Because D&RGW Has No Contractual Relationship with Equitas Limited

A contract of reinsurance is a contract by which an insurer procures a third person (the reinsurer) to insure him against loss or liability by reason of such original insurance. The purpose of reinsurance is (1) to diversify the risk of loss to spread the risk associated with covering an insured's catastrophic loss, and (2) to allow an insurer to reduce required capital reserves, thus allowing it to use the freed-up capital to insure more risks. Bluewater Ins. Ltd. v. Balzano, 823 P.2d 1365, 1367 (Colo. 1992); see also Unigard Sec.

Ins. Co. v. North River Ins. Co., 4 F.3d 1049, 1053 (2d Cir. 1993). It is well established that a reinsurance contract is a distinct agreement between the reinsurer and the reinsured, and that the original insured has no interest in it. Travelers Indem. Co. v. Gillespie, 50 Cal. 3d 82, 95 (1990); American Re-insurance v. Insurance Comm'n, 527 F. Supp. 444, 453 (C.D. Cal. 1981).

Reinsurance is a contract separate and distinct from the underlying insurance policy and there is no privity of contract between the reinsurer and the insured under the underlying policy. D&RGW is not a party to any reinsuring agreement between the London Insurers and their reinsurers, and D&RGW has no interest in the terms of such agreements or in the risks spread by them. This principle is concisely stated in Appleman on Insurance:

> The original insured is not notified of the reinsurance, has no contract with the reinsuring company, and is generally not party to the contract and has no legal interest therein.

13 Appleman, Insurance Law and Practice § 7681, at p. 480 (1976).

The Reinsurance Contract between ERL and the Names is entirely separate from the Names' insurance contracts with D&RGW, and the Plaintiff has no rights under the Reinsurance Contract. (Gledhill Aff. ¶¶ 17-18). Thus, there is no contractual basis for jurisdiction and D&RGW's complaint against Equitas Limited must be dismissed.

III. Because Equitas Limited Has No Contacts with Colorado, Exercising Jurisdiction Over It Would Offend Due Process

Plaintiff's attempt to compel Equitas Limited to defend a lawsuit in Colorado raises a Constitutional Due Process question that has been described by the United States Supreme Court as follows:

> The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he established no meaningful "contacts, ties, or relations." *International Shoe Co. v. Washington*, 326 U.S. at 319, 66 S.Ct. at 160. By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," *Shaffer v. Heitner*, 433 U.S. 186, 218, 97 S.Ct. 2569, 2587, 53 L.Ed.2d 683 (1977) (STEVENS, J., concurring in judgment), the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not subject them to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980).
>
> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed. 2d 790 (1984), and the litigation results from alleged injuries that "arise out of or relate to" those activities, *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984).

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985). Thus, the defendant's activities in the forum must relate to the injury or damage alleged in the litigation. The Plaintiff has not, and cannot, satisfy the threshold showing that Equitas Limited has engaged in any activity of any kind in Colorado that could give rise to the Plaintiff's

purported causes of action.

Colorado courts apply a three-prong test to determine whether a nonresident defendant has the minimum contacts the Due Process Clause requires for the exercise of jurisdiction: First, the Plaintiff must show that the defendant purposely availed itself of the privilege of acting in Colorado; second, the claim for relief must arise from the consequences in Colorado of the defendant's activities; and third, the consequences of the defendant's activities must have a substantial enough connection with Colorado to make the exercise of jurisdiction reasonable. Fleet Leasing, Inc. v. District Court in and for the City and County of Denver, 649 P.2d 1074, 1078-79 (Colo. 1982); Doe v. National Medical Services, 748 F. Supp. 793, 795 (D. Colo. 1990). D&RGW's attempt to force Equitas Limited to defend a lawsuit in Colorado cannot satisfy any of the elements of this analysis.

First, Equitas Limited has never availed itself of the privilege of acting in Colorado. Equitas Limited was formed and licensed in England, under English law. The Reinsurance Contract was drafted and executed in England and, by its express terms, is subject to the laws of England. Equitas Limited is not licensed to do business in Colorado, and it has never done business in Colorado. Equitas Limited has not conducted any activities in Colorado and has not invoked the benefits and protections of the laws of the state. See, e.g., Fleet Leasing, Inc. v. District Court in and for the City and County of Denver, 649 P.2d 1074, 1079 (Colo. 1982); Day v. Snowmass Stables, Inc., 810 F. Supp. 289 (D. Colo. 1993).

Second, Plaintiff's claims for relief arise out of the alleged breach of insurance contracts it has entered into with the defendant insurers. Equitas Limited is not a party to those contracts and is not in privity of contract with Plaintiff. Therefore, the Plaintiff's claims for relief cannot arise out of Equitas Limited's actions, much less out of any actions in Colorado. Plaintiff's Complaint fails to satisfy the second prong of the minimum contacts analysis.

Third, because Equitas Limited has never acted in Colorado and because all of its contractual relationships and its corporate identities arose in, and are subject to the laws of, England, Plaintiff's Complaint fails to satisfy the third prong of the minimum contacts analysis. Plaintiff cannot show that Equitas Limited has engaged in any activities that have a substantial connection to Colorado or will result in consequences with a substantial connection to Colorado. Furthermore, because Plaintiff has no contractual relationship with Equitas Limited, Plaintiff cannot claim that its suit has arisen out of Equitas Limited's activities in any jurisdiction, including Colorado.

THEREFORE, for the reasons discussed above and in the accompanying motion, Plaintiff's attempted service of process on Equitas Limited should be quashed. In the alternative, Plaintiff's Complaint should be dismissed for lack of in personam jurisdiction over Equitas Limited.

Dated: This 13 day of February, 1998.

LONG & JAUDON, P.C.

Dennis W. Brown, #11163
Steven P. Hopkins, #12322
1600 Ogden Street
Denver, Colorado 80218-1414
(303) 832-1122

ATTORNEYS FOR EQUITAS LIMITED

Terry R. Howell
Steven R. Daniels
LORD, BISSELL & BROOK
One Atlantic Center
1201 West Peachtree Street, Suite 3700
Atlanta, Georgia 30309
(404) 870-4600

CERTIFICATE OF HAND DELIVERY

I hereby certify that I served the foregoing **BRIEF IN SUPPORT OF EQUITAS LIMITED'S MOTION TO QUASH SERVICE OF PROCESS, OR, IN THE ALTERNATIVE, TO DISMISS FOR LACK OF PERSONAL JURISDICTION** by having a copy hand delivered to the following this 13th day of February, 1998.

Steven E. Napper
Union Pacific Railroad Company
1860 Lincoln Street, Suite 200
Denver, Colorado 80295

Laura L. Davis

CERTIFICATE OF MAILING

I hereby certify that I will serve the foregoing **BRIEF IN SUPPORT OF EQUITAS LIMITED'S MOTION TO QUASH SERVICE OF PROCESS, OR, IN THE ALTERNATIVE, TO DISMISS FOR LACK OF PERSONAL JURISDICTION** by depositing a true copy thereof in the United States mail, postage prepaid, addressed to the following on the 13th day of February, 1998.

Lee W. Farrow
C N A Insurance Company
Environmental and Mass Tort Claims
1100 Cornwall Road, 3rd Floor
Monmouth Junction, NJ 08852-0906

James Brown
Cozen & O'Connor
1900 Market St.
The Atrium, Third Floor
Philadelphia, PA 19103

Kevin O'Brien
HALL & EVANS
1200 17th Street, Suite 1700
Denver, CO 80202-5800

Hugh Q. Gottschalk
Nancy L. Lipson
Otten, Johnson, Robinson, Neff & Ragonetti, P.C.
950 17th St., Suite 1600
Denver, CO 80202

Terry R. Howell, Esq.
Lord, Bissell & Brook
One Atlantic Center
1201 West Peachtree Street, Suite 3700
Atlanta, Georgia 30309

Timothy J. Clarke
Kelley, Casey & Clarke, P.C.
19251 Mack Avenue, Suite 550
Grosse Pointe Woods, MI 48236

James K. Green
Thomas Napp
Markusson, Green, Jarvis
1050 17th Street, Suite 2300
Denver, CO 80265

Christine L. Davis
Michael D. Gallagher
Thomas M. Going
German, Gallagher & Murtagh
200 South Broad Street, Suite 500
Philadelphia, PA 19102

Bruce Menk
Hall & Evans, L.L.C.
1200 17th St., Suite 1700
Denver, CO 80202-5800

Frederick W. Klann, Esq.
White & Steele
28th Floor
1225 Seventeenth St.
Denver, CO 80202-5528

James P. Gatlin
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179

Christine E. Kessler, Esq.
Jenner & Block
One IBM Plaza, Suite 4200
Chicago, IL 60611