

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EMPLOYERS INSURANCE COMPANY OF WAUSAU
f/k/a EMPLOYERS INSURANCE OF WAUSAU A
MUTUAL COMPANY,

Plaintiff,

MEMORANDUM AND ORDER

v.

05-C-124-S

CERTAIN UNDERWRITERS AT LLOYD'S LONDON,
EQUITAS HOLDINGS LIMITED, EQUITAS REINSURANCE
LIMITED, EQUITAS LIMITED, AGF MARINE AVIATION
TRANSPORT f/k/a COMPAGNIE D'ASSURANCES MARITIMES
AERIENNES ET TERRESTRES, ALLIANZ INTERNATIONAL
INSURANCE COMPANY LIMITED, ANCON INSURANCE
COMPANY (U.K.) LIMITED, BRITTANY INSURANCE
COMPANY LIMITED, CNA REINSURANCE OF LONDON LIMITED,
COMPAGNIE EUROPEENNE D'ASSURANCES INDUSTRIELLES S.A.,
THE DOMINION INSURANCE COMPANY LIMITED, FOLKSAM
INTERNATIONAL INSURANCE COMPANY (U.K.) LIMITED,
GUARDIAN ROYAL EXCHANGE ASSURANCE PLC., HEDDINGTON
INSURANCE (U.K.) LIMITED, INTERNATIONAL INSURANCE
COMPANY, MUNICH REINSURANCE COMPANY, ST. KATHERINE
INSURANCE COMPANY PLC., STOREBRAND INSURANCE
COMPANY (U.K) LIMITED, TAISHO MARINE & FIRE INSURANCE
COMPANY LIMITED, THE TRAVELERS CORPORATION (U.K.)
LIMITED, UNIONAMERICA INSURANCE COMPANY LIMITED,
WINTERTHUR SWISS INSURANCE COMPANY and YASUDA FIRE
AND MARINE INSURANCE COMPANY (U.K.) LIMITED,

Defendants.

Plaintiff Employers Insurance Company of Wausau commenced this
action to recover reinsurance claims from the named defendants.
Defendants Equitas Holdings Limited, Equitas Reinsurance Limited,
and Equitas Limited (collectively "Equitas") move to dismiss the

claims against them for lack of personal jurisdiction and failure to state a claim for which relief can be granted. The remaining defendants move to dismiss for lack of subject matter jurisdiction. These defendants also contend that plaintiff has inappropriately joined claims based on three unrelated underlying insurance contracts and seek severance of the claims. The following facts are undisputed for purposes of the pending motions.

BACKGROUND

Plaintiff paid certain pollution loss related claims on three separate insurance policies to Phillips Petroleum, Sperry Corporation and Reynolds Metals. Plaintiff had entered into separate reinsurance agreements for each of the Phillips, Sperry and Reynolds policies. Plaintiff commenced this action to recover amounts allegedly owed it under the various reinsurance agreements. Plaintiff's claims against Equitas and "Certain Underwriters at Lloyd's, London" ("Lloyd's") with respect to the reinsurance agreement on the Phillips policy exceed \$75,000. All other claims against any other reinsurer defendant, whether considered separately or aggregated across the three underlying policies seek less than \$75,000.

Lloyd's is a collection of individuals organized into syndicates for the purpose of offering reinsurance. For historical reasons Equitas was formed in 1996 to indemnify Lloyds syndicates

against certain pre-1993 liabilities and entered into certain "Reinsurance and Run-Off Contracts" with syndicates for that purpose. As part of these contracts Equitas also assumed the right and obligation to settle and manage litigation relating to such claims against Lloyd's. Plaintiff alleges that Equitas is a successor in interest to the liabilities of Lloyd's.

MEMORANDUM

The Equitas defendants move to dismiss the claims against them arguing that their lack of contractual privity with plaintiff and their lack of presence in Wisconsin deprives the Court of personal jurisdiction. Alternatively, Equitas argues that the complaint fails to state a claim because they are merely a reinsurer of Lloyd's and have no direct liability to plaintiff. All defendants other than Equitas assert a lack of subject matter jurisdiction arguing that the jurisdictional amount in controversy is not satisfied as to them. The Court first addresses the scope of its jurisdiction.

Subject Matter Jurisdiction

For purposes of the present motion it is undisputed that the claim against Equitas exceeds \$75,000. It is also undisputed that all other claims, except the claim against Lloyd's, are for less than \$75,000. It is also undisputed that diversity of citizenship

exists between plaintiff and each defendant except Lloyd's. As to Lloyd's the amount of the claim is the subject of legal dispute and its citizenship has not been fully established.

Claims against severally liable individual defendants cannot be aggregated for jurisdictional purposes. Northern Trust Co. v. Bunge Corp., 899 F.2d 591, 597 (7th Cir. 1990). Accordingly, the only possible basis for jurisdiction over the claims for less than \$75,000 is supplemental jurisdiction, 28 U.S.C. § 1367, which provides in relevant part:

(a) Except as provided in subsections (b) or (c) or as expressly provided otherwise by federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution....

(b) In any civil action of which the district courts have jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

The Supreme Court, resolving a circuit split in a manner consistent with the previous holding of the Seventh Circuit Court

of Appeals, has adopted a literal approach to applying the provisions. Exxon Mobil Corp. v. Allapattah Services, Inc., 2005 WL 1469477 (June 23, 2005); Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928 (7th Cir. 1996). Under Exxon Mobil and Stromberg, “§ 1367(a) confers supplemental jurisdiction over all claims including those that do not independently satisfy the amount-in-controversy requirement, if the claims are part of the same Article III case or controversy.” Exxon Mobil, 2005 WL 1469477 at *9. Accordingly, since at least the Equitas claim satisfies all § 1332 requirements, the remaining claims fall within 1367(a).

However, § 1367(b) excepts from supplemental jurisdiction claims against additional defendants made parties under Rule 20. Plaintiff does not dispute that the only basis for joining these defendants in the same action is Rule 20. Both Stromberg, 77 F.3d at 932 (“claims against persons made parties under Rule 20 are forbidden”), and Exxon Mobil, 2005 WL 1469477 at *10 (“§ 1367(b) explicitly excludes supplemental jurisdiction over claims against defendants joined under Rule 20”), expressly recognized that there is no jurisdiction over the claims against these defendants whose only basis for joinder in the action is Rule 20. Accordingly, § 1367(b) compels dismissal of all defendants except Equitas and Lloyds for lack of subject matter jurisdiction. Exxon Mobil, 2005 WL 1469477 at *11 (jurisdictional defects in a diversity case can be cured by dismissing offending parties).

In an effort to avoid this result plaintiff erroneously ignores the plain language of § 1367(b) and the fact that Stromberg, which dealt only with additional plaintiffs who failed to meet the jurisdiction amount, expressly noted that the result was opposite for additional defendants.

Whether the Court has jurisdiction over the claims against Lloyd's requires consideration of how Lloyd's is treated as a legal entity, a matter discussed in detail in Indiana Gas Co., Inc. v. Home Ins. Co., 141 F.3d 314 (7th Cir. 1998). Lloyd's consists of syndicates comprised of individual members ("Names") located throughout the world. Id. at 316. Any given reinsurance policy may be underwritten by several syndicates and any syndicate may have hundreds of members. Id. For jurisdictional purposes each syndicate (not the individual Names) is a party which is treated like a partnership for purposes of determining citizenship. Id. at 317-319. Like a partnership, a syndicate is a citizen of every state or country of which any Name is a citizen. Accordingly, two issues are critical to the jurisdictional determination: the amount of the claims against individual syndicates and the citizenship of each Name within the syndicates.

There is no evidence of the critical citizenship facts in the record before the Court. Defendant Lloyd's, who is likely the only party with access to information on the Names and their citizenship, unhelpfully notes that it has not "undertaken the time consuming task" of determining citizenship and therefore does not

dispute complete diversity. Defendant Lloyd's' support brief at footnote 4. Of course, the fact that the parties wish to concede subject matter jurisdiction and have failed to provide adequate jurisdictional facts does not absolve this Court of its obligation to assure itself of its subject matter jurisdiction and merely increases the likelihood that time and money is being wasted. Hart v. Terminex Intern., 336 F.3d 541, 543 (7th Cir. 2003).

As it concerns the amount in controversy plaintiff is apparently in a position to determine the amount of claims against the separate syndicates and has simply chosen not to present that information. Indeed, although defendants expressly asserted in their opening brief at page 4 that no syndicate faces a claim of \$75,000 or more plaintiff chose not to reply to the statement, relying instead on the fact that the aggregated claims against all syndicates exceed the jurisdictional amount. In light of the relatively modest aggregate claim of \$132,000, the only possible inference is that plaintiff cannot establish a claim that meets the jurisdictional amount in controversy requirement against any Lloyd's syndicate. Because plaintiff bears the burden to prove the amount in controversy "to a reasonable probability," Target Market Publishing, Inc. v. ADVO, Inc., 136 F.3d 1139, 1142 (7th Cir. 1998), and has clearly failed to satisfy its burden, the claims against Lloyd's must also be dismissed for lack of subject matter jurisdiction.

Accordingly, since no claim against any defendant except Equitas reaches the jurisdictional minimum and supplemental jurisdiction is not available all motions to dismiss for lack of subject matter jurisdiction must be granted. Because claims against any defendant do not satisfy the jurisdictional amount even if they are aggregated across the three distinct underlying insurance claims, there is no need to reach defendants' motion to sever.

Equitas Motions to Dismiss

The Equitas claims satisfy both the citizenship and amount in controversy requirements of § 1332. Equitas challenges the Court's power to exercise personal jurisdiction over it and, if personal jurisdiction is available, moves to dismiss for failure to state a claim. Plaintiff contends that personal jurisdiction is available and further that the defense is barred by the doctrines of res judicata and collateral estoppel.

Plaintiff bases its personal jurisdiction argument primarily on a prior decision of this district, Employers Ins. of Wausau v. Certain London Marketing Companies, 1997 WL 1134980 (W.D. Wis. Oct. 27, 1997), wherein judge Crabb, applying Wisconsin law, ruled that Equitas was subject to personal jurisdiction. Plaintiff argues not only that the analysis of the case was correct but that the doctrines of collateral estoppel and res judicata bind Equitas to

the decision. Because the Court finds the analysis of the case persuasive it does not reach the estoppel issues.

Employers Insurance is important both for what it holds and for what it does not. It holds that although Equitas was not a party to the reinsurance treaty between Lloyds and plaintiff, Equitas was nevertheless bound by the forum selection clause contained in the Lloyd's contract because the close relationship between Equitas and Lloyd's, particularly Equitas' obligation to manage and control all litigation involving the contracts, should have led Equitas to anticipate being bound to the forum selection clauses for claims against it arising from the contracts. Id. at *8 (citing Hugel v. Corporation of Lloyd's, 999 F.2d 206, 209 (7th Cir. 1993)). This reasoning is sound. Equitas surely knew that it would be defending and managing litigation in the forum prescribed by the forum selection clauses contained in the Lloyd's reinsurance agreements. To the extent that a direct claim arose against it on the basis of those agreements it could surely foresee that it would be bound to litigate that claim in the same forum. Accordingly, this Court adopts the Employers Insurance analysis and finds that it has personal jurisdiction over Equitas to consider the claim that Equitas has become the successor in interest to Lloyd's obligation under Lloyd's reinsurance contract with plaintiff.

Employers Insurance did not consider a motion under Rule 12(b)(6) and offers no holding concerning the merits of the claim against Equitas. It does not hold that Equitas is bound to any

provision in the Lloyd's reinsurance contracts except the forum selection clause. Id. at *9. It certainly did not hold, as plaintiff incorrectly represents, "that Equitas is bound by the reinsurance treaties with Wausau." The Court in Employers Insurance was not asked and did not address any issue other than applicability of the forum selection clause as a basis for its authority to assert personal jurisdiction over Equitas.

Equitas' 12(b)(6) motion seeks a determination that the Reinsurance and Run-Off Agreement did not have the legal effect of exposing it to a direct cause of action by Wausau for breach of plaintiff's reinsurance contract with Lloyd's. Typically, the Court may only consider the allegations of the complaint, including those documents which are an exhibit to the complaint, in connection with a 12(b)(6) motion. Rosenblum v. Travelbyus.com Ltd., 299 F.3d 657, 661 (7th Cir. 2002); Rule 10(c) Fed. R. Civ. P. Under seventh circuit precedent contracts attached to the motion to dismiss may be considered if they are referred to in the complaint and are central to plaintiff's claim. Id. (citing Wright v. Assoc. Ins. Cos., Inc., 29 F.3d 1244, 1248 (7th Cir. 1994)). The complaint contains no allegation or reference to the Reinsurance and Run-Off Agreement. Its sole allegation concerning Equitas is that Equitas is "the successor-in-interest to the liabilities of [Lloyd's]." While the allegation might be treated as an implied reference to the contract there is some doubt whether a 12(b)(6) motion is the proper vehicle to resolve the issue given the

particular allegations of this complaint. Alternatively, the Court might consider the agreement and treat the matter as a summary judgment motion pursuant to the final sentence of Rule 12(b).

Neither procedure is appropriate here, however, because the agreement attached to the motion includes only the odd numbered pages so that it is impossible for the Court to conduct an appropriately thorough review of the document. Accordingly, although it appears likely that the issue could be resolved as a matter of law if presented properly, the motion in its current form must be denied.

ORDER

IT IS ORDERED plaintiff's claims against all defendants except the Equitas defendants are dismissed for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED that the Equitas defendants motion to dismiss is DENIED.

Entered this 30th day of June, 2005.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge