THE RHA REVIEW

ROUTE TO:

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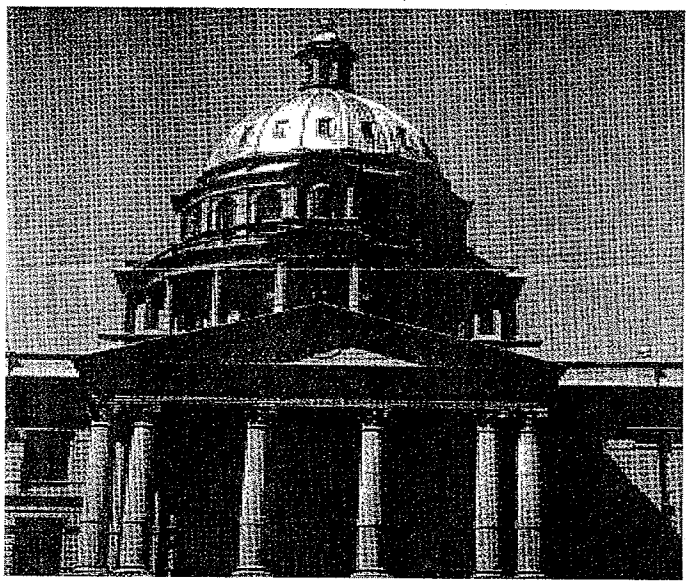
What's New in Who(m) to Sue?

By Robert N. Hughes, CPCU, ARM

What's new in who to sue? I know, I know . . . it should be "whom," but it sounds melodic the other way.

I daresay very few policyholders have purchased coverage with the thought that they will (or even might) have to sue the insurer to prove that coverage. Nevertheless, it does happen. Since 1993, I have been retained by both policyholders and insurers in more than 200 such cases. In almost every one of those cases there was an issue of forum, otherwise known as "choice of law" . . . where the lawsuit was to be tried and what law applied.

Often, one or both parties feel the case would be better served in a federal court. The U.S. Constitution Art. III, Par. 2, extends federal jurisdiction to cases where there is diversity of citizenship; i.e., the party on one side of a lawsuit is a citizen of one state, and the party on the other side is either the citizen of another state or an alien.



Often, one or both parties involved in an insurance litigation case feel the case would be better served in a federal court. Getting it tried there is not always a simple matter.

Further, there is a requisite jurisdictional amount that must be met, which is presently $75,000. Now that wouldn't seem to be a problem if you've got a $2,000,000 claim, and when you have, say, a citizen of Arizona suing a New York insurance company, it probably isn't. A problem has recently arisen, however, when you have a U.S. entity suing Lloyd's.

In order to completely understand this problem it is necessary that you understand a bit about Lloyd's. Regular readers will remember my tutelage that Lloyd's is not an "insurance company" but rather a place where buyers and sellers of insurance gather to transact business. It is a market composed of individual risk-takers known as "names" who band together in "syndicates" around "underwriters." All members of Lloyd's underwrite for their own accounts and their liability is several, not joint.

Okay, now, let's presume your $2,000,000 claim is against Lloyd's. The actual liability may well be divided among hundreds of individual names, each of whom has only a tiny piece of "the action." Assume for argument that the placement involves 20 syndicates, each of which has 150 names. That would be 3,000 persons. Assume further that each name has an equal share of the risk . . . $667 by my calculations.

Simple so far, but here's the rub. Recently the 2d U.S. Circuit Court of Appeals ruled in a case styled *E.R. Squibb & Sons Inc. vs Accident & Casualty Insurance Co., et. al.* (a case in which I testified as an expert, as it happens), that in order for a case against Lloyd's to meet the requirement for federal jurisdiction, it must be shown that each name resides outside the policyholder's own state (not too difficult) and is individually responsible for at least $75,000 in

(**Who(m) to Sue**, continued inside)

IN THIS ISSUE:

FROM NEAR AND FAR

In July the State of Nevada is opening up its workers' compensation market for the first time, and more than 200 insurance carriers are chomping at the bit to get a piece of the action. According to data from A.M. Best Co., Nevada produces around $450 million in premium each year.

More than $2.5 billion will be shared among 70,000 former coal miners in the United Kingdom. The miners, former employees of the British Coal Corporation, are suffering from lung diseases caused by the coal dust they inhaled while working in the pits. According to Stephen Byers, the Secretary of State for Trade & Industry, this was the largest industrial injuries case ever.

Cyclone Vance battered Western Australia in March, causing extensive damage. The storm, packing winds clocked at 165 miles per hour, was downgraded as it raced across the country from west to east. Damage estimates at this time are expected to exceed $100 million.

The earthquake that rumbled through Colombia in late January caused insured damages estimated at around $150 million. The total economic impact of the quake is expected to reach $2 billion. More than 900 people died as a result of the earthquake, which measured 6.0 on the Richter Scale.

(Who(m) to Sue, cont'd. from cover)

coverage (very difficult, if not impossible.) So does this mean, as some more cynical policyholder attorneys have suggested, that "you cannot sue Lloyd's, so don't buy insurance from them"? Not likely. What it does mean, however, is that some new precautions must be taken when seeking to sue Lloyd's.

First, you need to realize that the rules say that there must be at least $75,000 in controversy with every person cited as a defendant. When you examine the "service of suit" clause in Lloyd's policies (this is the provision that cites the rules for suing Lloyd's), you will note that most of these clauses contain a paragraph that states:

> It is further agreed that . . . in any suit instituted against any one of them upon this Policy, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

"The service of suit clause states that the other underwriters 'will abide by the final decision of such Court,' so does that preclude settlement with the 'non-sued but following' underwriters? No one really knows."

So if you are able to identify at least one "Underwriter" (meaning "name") who has $75,000 or more at risk, according to the service of suit clause, you can simply name that one underwriter as a defendant, and all the other participants must follow. As far as we can determine, however, this clause has never been tested. Even if it does work the way we think it does, it offers some interesting possibilities regarding settlement discussions. For instance, what if the named underwriter wishes to settle? The service of suit clause states that the other underwriters "will abide by the final decision of such Court," so does that preclude settlement with the "non-sued but following" underwriters? No one really knows.

Some prominent Lloyd's attorneys have suggested that all that will be necessary is to sue the lead underwriter as an individual. Then

(Who(m) to Sue, cont'd. opposite)

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s_ Jicate's own contracts establish "all for one and one for all," in which case all the other names will have to "pony up." Since that contract is made in London, however, it is unlikely that U.S. courts would have any jurisdiction. The efficacy of this suggested methodology is therefore yet to be determined.

"Lloyd's predilection for U.S. federal courts goes back a long way."

So, you say, we'll just sue them in state court. After all, the Lloyd's service of suit clause reads as follows:

> It is agreed that in the event of he failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Assured, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court. (emphasis added)

Good idea, and it certainly does happen. My understanding as a non-lawyer is that you must be able to establish that an alien insurer (such as Lloyd's) has had "minimum contacts" in the state in question. This can mean such things as transacting business, m taining bank accounts, committing torts, etc. Interestingly enough, neither Lloyd's nor large nationwide policyholders prefer this method. Lloyd's predilection for U. S. federal courts goes back a long way. In a memo dated May 15, 1939, the Non-Marine chairman of the Lloyd's Insurance Brokers' Association wrote to the U.S. secretary of the Lloyd's Non-Marine Association stating, inter alia:

> Incidentally, you can well appreciate the fact that it is not a simple matter to get cases such as these into Federal Court, although naturally whenever possible our Adjusters always attempt to do so.

"Certainly, having a case in federal court reduces the possibility that the same issues will have to be tried over and over again in various state courts, and this is advantageous to underwriters."

Certainly, having a case in federal court reduces the possibility that the same issues will have to be tried over and over again in various state courts, and this is advantageous to underwriters. Although the same motivation sometimes applies to large national policyholders, their motivation for selecting a federal court as their forum of choice is usually, in my experience, based upon their distaste for existing state law or their distrust of the courts in a particular state. There are many examples, particularly in Texas and California, in which lower-court decisions which were friendly to one side or the other have been reversed and radically amended at the appellate and Supreme Court levels.

So, considering the fact that both sides oppose the 2d Circuit's ruling, one might be curious as to what degree of cooperation, if any, might be forthcoming. It is inconceivable that Lloyd's attorneys, particularly if Equitas is involved, will enter into proactive discourse to assist policyholder plaintiffs in any way. What might happen, however, is that once litigation has begun and the issue of forum surfaces, Lloyd's could be more forthcoming regarding the drafting history of the service of suit clause and also could more readily disclose the values at risk for the lead underwriters in order to establish the $75,000 threshold. An even simpler solution would be for Lloyd's to ratify the "one for all, all for one" doctrine and certify the lead underwriter as the designated defendant.

"So, considering the fact that both sides oppose the 2d Circuit's ruling, one might be curious as to what degree of cooperation, if any, might be forthcoming."

So, as usual, life gets more complicated. This issue is something that must be considered when purchasing insurance from alien insurers providing coverage on a "several" rather than "joint and several" basis. But for most policyholders the question is not pertinent, as any suit against Lloyd's would, as a matter of course, be a state court matter. RHA

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Associates Abound

Robert Hughes Associates, Inc., has recently added three consultants to our group of associates. Joining us in the last few months are Michael T. Fitzgerald, Philip D. Kentfield and Ben Love. Below is a brief introduction of each of them and their qualifications.

■ **Mike Fitzgerald** is a wet marine underwriter with more than 24 years of insurance industry experience. He has a wide range of expertise, including, but not limited to, Ocean Cargo, Hull and Machinery and Protection and Indemnity (P&I). He has designed, marketed and serviced a broad range of wet marine products and also has extensive experience in handling large and/or difficult marine claims.

■ **Phil Kentfield** is an Atlanta, Georgia-based claim management consultant who has more than 27 years of experience. He has worked for Home Owners Warranty Corp., Sedgwick Payne Co., Alexander & Alexander and Tillinghast in positions ranging from regional claim supervisor to senior claim management consultant.

■ **Ben Love** is a former staff counsel with three insurance companies and also has been in private practice. His experience includes supervision of large loss groups and insurance coverage groups and serving on large loss committees. He has also conducted more than 100 jury trials and is qualified to act as an arbitrator and a mediator.

If you would like further information about any or all of the above associates, please contact John Oakley at 972-980-0088. RHA

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