Two Insurance Markets Separated by a Common Language?—Ten Things Every U.S. Coverage Lawyer Needs to Know About Lloyd's, the London Market, and Resolute Management

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Introduction—The London Market is Different[1]

Starting in the in the 1900s and running through the present day, Underwriters at Lloyd's, London and the various insurance companies doing business in the London Market (collectively, the "London Market") underwrote tremendous volumes of insurance in favor of U.S. businesses. This is particularly the case for large U.S. manufacturers, for which the London Market was, and remains, a critical source of insurance capacity. The London Market's presence was particularly strong in the aviation, maritime, rail, and heavy manufacturing sectors. For all these reasons, the London Market likewise has been hit heavily by the vast expansion of the long-tail liability exposure faced by those same U.S. industries, principally for asbestos and pollution. As a result, most U.S. coverage lawyers working in the long-tail arena will encounter pre-1993 Lloyd's and London Market coverage on a regular basis.

Many of those same practitioners, the authors have found, fail to appreciate the differences between London Market policies and those issued during the same era by Lloyd's U.S. counterparts. This presentation was prompted by the authors' observation, over decades of collective practice, that many U.S. coverage lawyers—particularly on the policyholder side—lack a ready means to learn about these differences and their practical effects, but instead are

[1] The views expressed herein are those of the authors, and should not be attributed to any of their firms or clients. Further, the authors—from both sides of the insured/insurer aisle—have jointly authored this paper and intend it to be a neutral statement of the material presented. However, in some instances a particular author may not agree with a particular assertion herein.

expected somehow to learn them by osmosis. That lack of understanding adds to the transaction and litigation costs for both the policyholder and the London Market insurers.

The authors have assembled the 10 aspects of the London Market that they believe every U.S. coverage lawyer should know. These differences can be pronounced with respect to the pre-1993 policies. As will be discussed in the presentation, many of these differences have diminished or disappeared in recent years. However, asbestos and environmental cleanup liability persist, and therefore these aspects of the London Market will be important for years to come.

<u>The Ten Things Every U.S. Coverage Lawyer Needs to Know About the London Market</u>

1. Lloyd's is not an insurance company; it is a marketplace of independent underwriters that has been in existence for more than 325 years.

To many Americans—at least those of a certain age—Lloyd's is an insurance company in London that insures exotic risks such as the Hindenburg, Betty Davis' waist, Betty Grable's legs, and Bruce Springsteen's voice, to name a few. It is true that Lloyd's has been and continues to be an important provider of specialty cover of that type. But from the standpoint of a U.S. insured or coverage lawyer, that common understanding is flawed in an important respect: Lloyd's is not an insurance company. It is not and has never been an entity, nor does Lloyd's itself insure anything. Instead, Lloyd's is a building, an administrative structure, and a marketplace, in which independent insurance underwriters bring capital for the purpose of insuring risks. It would be hard to improve on the following overview of Lloyd's provided by the U.S. Court of Appeals for the Eleventh Circuit:

> The Society of Lloyd's, London, is not an insurance company, but rather a British organization that provides infrastructure for the international insurance market. Originating in Edward Lloyd's coffee house in the late seventeenth century, where individuals gathered to discuss insurance, the modern market structure was formalized pursuant to the Lloyd's Acts of 1871 and 1982. Lloyd's Act, 1871, 34 Vict., c. 21, pmbl.; Lloyd's Act, 1911, 1 & 2 Geo. V, c. 62; Lloyd's Act, 1951, 14 & 15 Geo. VI, c. 8; Lloyd's Act, 1982, c. 14. Lloyd's itself does not insure any risk. Individual underwriters, known as "Names" or "members," assume the risk of the insurance loss. Names can be people or corporations; they sign up for certain percentages of various risks across several policies. Once admitted to the Society of Lloyd's, each Name is subject to a number of bylaws and regulations ensuring that he or she is solvent and "that at all times there are available sufficient funds" to pay all claims. *See, e.g.,* Lloyd's Act, 1982, c. 14 § 8. Critical to the

diversity jurisdiction question, Names are not only British citizens, but may be of many nationalities. Lloyd's Act, 1982, c.14, pmbl. (5).

Names underwrite insurance through administrative entities called syndicates, which cumulatively assume the risk of a particular policy. In this case, syndicates 861, 1209, and 588 subscribe to the Rockhills' policy. The syndicates are not incorporated, but are generally organized by Managing Agents, which may or may not be corporations. The Managing Agents determine the underwriting policy for the syndicate and accept risks on its behalf, retaining a fiduciary duty toward the underwriting Names. As mere administrative structures, the syndicates themselves bear no risk on the policies that they underwrite; the constituent Names assume individual percentages of underwriting risk. The Names are not liable for the risks that the other Names assume. Lloyd's Act, 1982, c. 14 § 8(1). Names purchase insurance through underwriting agents. Lloyd's Act, 1982, c. 14 § 8(2).

Lead underwriters, or active underwriters, serve as the public faces for particular syndicates. In this case, the lead underwriter is Dornoch, Ltd. Second Amended Complaint at 2, ¶ 2, *Underwriters at Lloyd's, London v. Osting–Schwinn,* No. 8:05–CV–1460 (M.D.Fla. Nov. 18, 2005). This underwriter is usually the only Name disclosed on the policy, although the Lloyd's Policy Signing Office keeps records on the identity of each Name underwriting a policy. In the event of a suit over a Lloyd's policy, the lead underwriter is often named specifically in the suit. *See, e.g.,* *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.,* 160 F.3d 925 (2d Cir.1998) (naming Allan Peter Dennis Haycock, lead underwriter, in the suit); *Hilton Oil Transport v. Jonas,* 75 F.3d 627 (11th Cir.1996) (naming lead underwriter T.E. Jonas in a suit over marine insurance).

Crucially, each Name's liability is several and not joint. Thus, the Lloyd's Act of 1982 provides that an "underwriting member shall be a party to a contract of insurance underwritten at Lloyd's only if it is underwritten with several liability, each underwriting member for his own part and not one for another, and if the liability of each underwriting member is accepted solely for his own account." Lloyd's Act, 1982, c.14, § 8(1). *See also* Lloyd's Act, 1871, c. 14 § 40 ("Nothing in this Act shall confer limited liability on the members of the Society, or in any manner restrict the liability of any member thereof in respect of his individual undertakings, or make

> any member of the Society as such responsible in any manner for any of the undertakings, debts, or liabilities of any other member of the Society as such, or affect or interfere with or empower the Society or the Committee to interfere with any business whatever other than the business of insurance carried on by any member of the Society."). Through contractual agreement, the other Names that are members of the underwriting syndicates on the policy remain liable for their proportional share of any adverse judgments. As is typical, the Rockhills' contract has a provision explaining that "in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal." Thus, the legal relationship between the Names and the insured is a vertical one: it is the individual Names, not the syndicate, who are directly liable in the event of loss, as if each Name had a contract with the insured.

Underwriters at Lloyd's, London v. Osting-Schwinn, 613 F.3d 1079, 1081, 1083-85 (11th Cir. 2010).[2]

From the standpoint of the U.S. coverage practitioner, the following are the most important practical effects of Lloyd's nature as a marketplace of independent underwriters:

- On the Lloyd's side of the typical London Market policy (*see* Section 2, below), the underwriters—called "Names"— are individuals, who historically were wealthy investors. The Eleventh Circuit's description says that Names may be corporations; this is correct, but only on policies underwritten after 1993. For policies under which long-tail claims are likely to be lodged, all Names will be individuals. This has implications for, among other things, diversity jurisdiction, as addressed in Section 3, below.

- Each subscribing Name's responsibility under the insurance contract is several only, and not joint. In other words, each Name is liable only for his or her percentage share of the limit to which he or she subscribed; a particular name is never liable for the share of another. The existence of "all sums" allocation law in the U.S. often creates confusion on this score. Even in an "all sums" jurisdiction, that rule does not operate within the underwriters that have subscribed to a particular London Market policy.

[2] *See also Edinburgh Assurance Co. v. R.L. Burns Corp.*, 479 F. Supp. 138 (C.D. Calif. 1979) and *Allen v. Lloyd's of London*, 94 F. 3d (4th Cir. 1996) for excellent descriptions of how the historic London insurance market operated.

2. "Lloyd's" policies usually are "subscribed" (*i.e.,* underwritten) to by a combination of syndicates of Lloyd's names and London Market Companies in several shares "each for itself and not the other."

As described in the previous section, "Lloyd's" is a market-place of individual, flesh-and-blood insurance underwriters. However, most "Lloyd's" policies in fact are underwritten by both Lloyd's syndicates, made up of individual Names, and more traditional corporate insurance companies. A typical pre-1993 excess liability policy issued to a U.S. manufacturer might be underwritten 60 percent by Lloyd's syndicates and 40 percent by London Market Companies. The latter component, representing 40 percent of the policy limit, might be underwritten by six to eight companies doing business in the London Market, each taking a single-digit percentage of the total policy limit. Here again, the liability amongst the underwriters subscribing to a particular policy is several and not joint. Often, the companies would be subscribing to a separate policy that should, but not always, contain the identical terms and conditions as the Lloyd's coverage.

3. Under most pre-1993 Lloyd's policies, federal diversity of citizenship jurisdiction is unavailable and, as a result, most US coverage cases involving Lloyd's are venued in state court.

In a U.S. lawsuit between an insured and Underwriters at Lloyd's, federal diversity of citizenship jurisdiction is unlikely to exist. In *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990), the U.S. Supreme Court held that: (a) the citizenship of each member of an unincorporated association must be considered in determining whether diversity exists; and (b) the jurisdictional amount at issue, currently $75,000, must be met as to each member of the unincorporated association. *Id*. at 195. A majority of courts that have considered the issue have held that Lloyd's syndicates, the administrative entities for the individual "names" subscribing to each policy, are unincorporated associations. Thus the *Carden* rule applies, and in order to establish federal diversity jurisdiction under 28 U.S.C. section 1332, diversity of citizenship and the minimum jurisdictional amount must be present with respect to each name. *Underwriters at Lloyd's, London v. Osting-Schwinn*, 613 F.3d 1079, 1081 (11th Cir. 2010*); Indiana Gas Co. v. Home Insurance Co*., 141 F.3d 314, 317 (7th Cir.1998); *NL Indus., Inc. v. OneBeacon Am. Ins. Co.*, 435 F. Supp. 2d 558, 564 (N.D. Tex. 2006); *Majestic Ins. Co. v. Allianz Int'l Ins. Co*., 133 F. Supp. 2d 1218, 1223 (N.D. Cal. 2001); *Chase Manhattan Bank v. Aldridge*, 906 F. Supp. 870 (S.D.N.Y.1996); *Humm v. Lombard World Trade*, 916 F.Supp. 291 (S.D.N.Y.1996); Lowsley-Williams v. North River Ins. Co., 884 F.Supp. 166 (D.N.J.1995); *Transamerica Corp. v. Reliance Ins. Co*., 884 F.Supp. 133 (D.Del.1995); *Bath Iron Works Corp. v. Certain Member Cos. of the Inst. of London Underwriters*, 870 F.Supp. 3, 7 (D.Me.1994); *Queen Victoria Corp. v. Insurance Specialists of Hawaii, Inc*., 711 F.Supp. 553 (D.Haw.1989). *See also E.R. Squib & Sons, Inc. v. Accident & Cas. Ins. Co*., 160 F.3d 925, 931-34 (2d Cir. 1998) (concluding that the lead underwriter suing in a representative capacity does not fall within an exception to the general rule that "federal courts must look to the individuals being represented rather than their collective representative" to determine diversity).

The only federal circuit to take a different approach has been the Sixth. In *Certain Underwriters at Lloyd's, London, England v. Layne*, 26 F.3d 39 (6th Cir.1994), the court applied a "real party in interest" analysis and relied on Tennessee agency law to hold that lead underwriters suing in a representative capacity could establish diversity jurisdiction based only on their own citizenship. 26 F.3d at 43-44.

If an underwriter is acting in its individual, not representative, capacity, the result may be different. The Fifth Circuit in *Corfield v. Dallas Glen Hills LP*, 355 F.3d 853 (5th Cir.2003), held that where the underwriter was seeking declaratory judgment in its individual capacity, only the underwriter's citizenship and potential liability were relevant for purposes of diversity jurisdiction. 355 F.3d at 864. Similarly, the Third Circuit has held that when only the named underwriter is listed in the complaint, only his citizenship and liability amount are relevant to the exercise of diversity jurisdiction. *Chemical Leaman Tank lines, Inc. v. Aetna Casualty & Surety Co.*, 177 F.3d 210, 223 (3d Cir.1999); *see also E.R. Squibb*, 160 F.3d at 938 (allowing possibility that if "a Name is properly sued solely in his individual capacity to establish his individual liability, it is the latter relationship that defines the case for jurisdictional purposes"); *Sikorsky Aircraft Corp. v. Lloyds TSB Gen. Leasing (No. 20) Ltd*., 774 F. Supp. 2d 431, 442 (D. Conn. 2011) (same).

The typical Lloyd's policy issued in the pre-1993 era was subscribed by a dozen or more syndicates, each consisting of scores of names—sometimes numbering up to one hundred or more in any given year. Many U.S. practitioners are surprised to learn that the names from that era included a substantial number of wealthy U.S. investors who reside in many different states. As a result of this counterintuitive phenomenon, in many situations a name (or his or her estate or heirs) will defeat diversity of jurisdiction because they are a resident of the same state as the coverholder and therefore, this eliminates the need to examine the issue of jurisdictional amount.

Even if complete diversity is present, the multiplicity of the names, combined with their several-only liability, means that the jurisdictional amount rarely will be met for each name. *See E.R. Squib*, 160 F.3d at 925 (plaintiff cannot aggregate claims against individual defendants to meet the jurisdictional requirement when defendants' liability is several and not joint). However, with the advent of corporate membership in Lloyd's, i.e., the ability of corporate entities to subscribe as names to Lloyd's policies, the likelihood of establishing federal jurisdiction will increase. *E.g., Certain Underwriters at Lloyd's of London Subscribing to Policy No. FINFR 1001771* v. Commonwealth Int'l, Inc., No. 2:12-CV-00824-ODW, 2012 WL 2328215, at *2 (C.D. Cal. June 19, 2012) (complete diversity existed between the seven corporate entities composing the four syndicates subscribing to the policy).

4. The placement process and the resulting policy documentation are different than those in the U.S.

Given that long-tail claims can implicate policies issued more than 70 years ago, lost-policy disputes are commonplace. When embarking on an insurance archaeology effort, it is critical that U.S. insureds and their counsel understand the process by which London Market policies were underwritten, prepared, and issued. That process was quite different than that in place within most U.S. insurance markets, and it resulted in different types of documentation. This has created unique challenges for insureds seeking to reconstruct and prove up missing policies.

a. The London broker obtains subscriptions

When dealing with the London insurance market and brokers one must first understand this is a very traditional market by its nature. The market has for centuries worked on a subscription principle with brokers acting as the agents and main record holders. The following is a description of an open market placement.

The broker will have received a package of information from the US wholesale broker which for casualty would often contain:

- Outline of limits and cover required
- Loss record
- Details of underlying placements
- Background and details of client's business

The Lloyd's broker would from this information normally prepare two types of document:

- A slip
- An exhibit or exhibits concerning the client, loss record and other data for the underwriter to review

Once the placing clerk has prepared the slip and exhibit(s), the broker would take these into Lloyd's and seek out a respected underwriter for the relevant class of business. He would then present the slip and exhibit(s) for review and discuss the placement with the underwriter, who would normally ask various questions of the broker to better understand the risk before them.

The slip is itself a short-form policy and will contain the following information in what is called the body:

- Type of cover required– for example Excess Umbrella
- The proposed form of wording to be used (if known), for example LRD1960
- Insured name

- Period
- Limits including deductible(s)
- List of standard clauses in short form, such as NMA1685 – Seepage & pollution clause (from 1960 on)
- Space for lead underwriter to indicate their quote

Assuming the underwriter is persuaded by the broker, he or she would then write his quote and amend by hand any of the terms on the slip. If any of the terms state “as agreed L/U” or similar, the underwriter would initial them.

The broker would then return to the office and convey the quote and terms to the U.S. wholesale broker, or direct retail broker who would in turn present to the client.

If the client accepts the terms of the broker would then take the slip to other Lloyd’s syndicates and the London company market to fill the remaining unsubscribed portion of the slip until 100 percent of the cover has been placed. Each underwriter would place their line on the slip often using a stamp showing their syndicate number, or company name. The first underwriter to sign is known as the lead underwriter and the balance of the market are the followers.

During the broking the broker would often telex or cable the U.S. broker with details of the position stating what percentage had been completed.

As the London market developed after World War II, the concept of company leads also developed. In effect one would have a slip lead, which was normally a Lloyd’s syndicate, and a company lead who was deemed to head the company market. By the 1970s companies such as HS Weavers were actually leading slips.

Once the broker had a full slip he would advise the client and prepare a covernote, that confirmed the placement of the coverage and a general summary of the terms of the coverage.

Often a slip would be oversubscribed, in that the total lines would exceed 100%. In this case the lines would be signed down, unless an individual underwriter had instructed that his line was “to stand”. This means that slips may reflect “written lines” and “signed lines”. The “written line” is the percentage amount of the coverage the underwriter initially agreed to take. The “signed line” is the final agreed line the underwriter has committed to and is the percentage they will pay. If an underwriter was to become insolvent the other underwriters would not be responsible for the insolvent carrier’s line.

b. Contract and binding authorities

Especially for smaller and more routine risks, a Lloyd's broker in conjunction with a North American broker would help arrange a binding authority contract where a U.S. broker would be given the authority to commit to risks within the classes and conditions specified in the binding authority contract. In effect, the U.S. broker would be delegated to "have the pen" of the London underwriters to commit the underwriters to insure the risks of the insured. Once the terms of the binding authority contracts are agreed, the commitments to these in London are documented on pre agreed slips placed by a Lloyd's broker and typically where handled on bordereaux (often monthly).

c. Signing Offices and London policy documents

Once the covernote was issued and the client had received their invoice, the slip would be submitted to the various signing offices:

- London Policy Signing Office – LPSO – Lloyd's market
- ILU – Institute of London Underwriters – originally marine companies
- PSAC- Policy Signing and Accounting Office – non-marine
- LIRMA - London International Insurance and Reinsurance Market Association which was formed by the merger of ILU and PSAC (since 1998 is called IUA)

The only other type of London policy is known as a "company's collective." This was for companies who were not members of the ILU and PSAC/LIRMA. They would individually sign off under such a policy.

The role of these offices was to review the slip and handle premiums and claims. They would then issue a signing number, which would be accounted to the broker to pay the premium for transfer to the individual syndicates and companies.

For example a "6" prefixed LPSO signing relates to a US dollar signing and traditionally Lloyd's accept U.S. Dollars, Canadian Dollars and Pounds Sterling.

A typical Lloyd's U.S. dollar signing would be: 60000 – 30 5 1957 (30^{th} May 1957)

On some occasions, but not always, after the broker had issued the covernote, the broker would send a copy of the slip to the U.S. broker. This would be followed by the signed policy.

The various signing offices would review the wording and sign the policies, often after the leader had also reviewed.

If one had Lloyd's, ILU, PSAC and Companies Collective you would have four different policies for the one placement.

Policies were issued in triplicate:

- Office copy for the Lloyd's broker
- Copy for the U.S. broker
- Copy for the client

Unfortunately, at times is appears that the U.S. broker never passed on the actual Lloyd's policy to the client, but instead sent a broker certificate or other documentation on the U.S. broker's own paper. While such broker paper may constitute some documentation of a Lloyd's policy in court, it is not viewed as definitive proof of the placement of a policy when presenting a claim to the London Market insurers. Instead, the presentation of the signed slip or the signed Lloyd's or company policy are of much great utility.

d. Slips and policies

In the UK it is traditionally accepted that if a signed slip differs in scope to the policy then the signed slip has the greater authority, as this is the document the underwriters scratched their lines on.

e. Insurance Archaeology and reconstruction of coverage histories

In order to present a legacy claim the insured and its representatives need to obtain copies of the available slips and policies. These need to be the London-issued documents and not U.S. broker covernotes or certificates.

When a coverage dispute has ensued, the best method to ensure full disclosure is for counsel acting for London and counsel for the insured to make a joint request to the relevant London broker or brokers. This request should include a request to provide:

- Slips
- Policies
- Correspondence files
- Claims files

Typically the parties normally agree for the purpose of conducting a privilege review that the documents received from the broker will be initially split as follows:

- Slips and policies to both parties
- Correspondence to insured's counsel
- Claims files to underwriters' counsel

This can of course be varied by agreement. The key advantages to this approach are that both parties receive a first generation set of documents and can confirm that these documents originated directly from the broker.

f. The value of an expert archaeologist

The authors are of the view that, when seeking to collect evidence of and reconstruct London Market policies, the assistance of a qualified London insurance archaeologists can be very helpful because they:

- Understand which historic U.S. brokers typically dealt with which historic London brokers.
- May recognise the policy number and determine the broker and/or Lloyd's broker number (like syndicates each Lloyd's broker has a three digit broker number).
- Understand the terms referenced in a short form slip.
- Knowledge if a broker has been taken over and who therefore holds the records.
- Have contacts in the London insurance market, such as the run-off companies, to obtain secondary evidence.
- Frequently have former brokers on their staffs who can therefore give a practitioner's insight

If one chooses an archaeology service provider linked to a London broker, they will have direct access to that broker's in-house archive and strong links with the market.

g. Possible sources of secondary evidence

The gold standard of London market evidence is of course the slip and/or policy, but if these are not available other sources of evidence can assist. These include:

- Broker correspondence files may contain partial unsigned slips (one that hasn't been through the LPSO), or copies of covernotes or certificates listing the companies market and the Lloyd's block percentage.
- London market broker covernotes.

- Accounting records, or details of historic claims, can provide an insight into historic brokers and insurance market.

- Many U.S. broker covernotes, or certificates will list the company market and often the Lloyd's block percentage. They may also state which London broker was used to the place the cover and you can therefore approach the London broker for the actual London slip.

- Many legacy London insurers do hold records and can be approached if you have a covernote to confirm cover.

- Lloyd's syndicates typically kept underwriting cards and if there is evidence of Lloyd's placements, these can be requested to prove at least a proportion of the Lloyd's market.

- If you have a Lloyd's signing number and date, the historic LPSO records should be able to confirm the syndicate breakdown.

- In the U.S. the federal government, especially the Department of Defense, can be a useful source of insurance records as contractors had to provide evidence of cover

In the UK some Lloyd's records (mainly marine) have been transferred to the Guildhall Library in the City of London. Also the Chartered Insurance Institute library can be a source of information on legacy insurance companies, albeit you will need to retain an advisor with membership of the CII.

5. The role of the brokers, London and U.S., are different than those under comparable U.S.-placed cover.

Insurance brokers play a key role in the London Insurance market, which is the last of the major financial industries in the City of London to retain its traditionally tight geographical clustering, with almost all London market insurers, brokers, and service providers being physically based within a short walk from Lloyd's of London, at One Lime Street.

The fundamental importance of the broker in the London market relates not only to placement of policies (as covered below), but also to payment of claims. Whereas brokers do not have the ability to compel insurers to pay claims (in England & Wales only solicitors are able to issue Court proceedings), London market brokers have considerably greater commercial influence with insurers than even the largest policyholders. The London brokers traditionally have served as the liaison between the U.S. insured, its surplus lines broker, the U.S. producing broker and the underwriter. They also acted as a liaison with the underwriters regarding the handling of claims. They traditionally provided services to the insured on the placing side and the underwriters on the claims handling side, including the transmission of attorneys reports. In effect, they served dual roles. Large insurance coverage disputes have called into question some of these traditional roles.

The close working relationship between London market brokers, and London market insurers, which is intensified by their physical proximity, creates an environment where the commercial "triangle" (between policyholder and broker, broker and insurer, and insurer and policyholder) is openly acknowledged and, when the London market works as it should, allows all participants to deal with each other on a reasonably level commercial playing field.

There are currently 235 brokers registered as Lloyd's brokers, and only those are able to place business at Lloyd's. As a result, there is often more than one broker involved in a London market placement: the producing broker (typically not a Lloyd's broker), and the placing broker (typically a registered Lloyd's broker). The producing broker may be a UK based non-Lloyd's broker, or a broker based outside the UK.

The Lloyd's brokers with a particularly significant presence in the London market include:

- Aon
- Marsh
- Willis
- AJ Gallagher
- JLT
- Miller
- Lockton
- Howden
- Cooper Gay
- Integro

6. The claims handling procedures and process are different than in the U.S.

When a broker received a claim they would prepare a claims file. The file would include the following papers:

- Notice of claims and correspondence
- Slip(s)
- LCCF (Lloyd's Claims Collection Form).
- Endorsement to the slip for the claim amount.

The claim once presented to the underwriters would also be presented to the relevant signing offices using the LCCF. If the claim was agreed the LPSO and other claims offices would place signing numbers and dates on the endorsement/LCCF and the funds would be transferred to the broker for payment to the U.S. Traditionally, the broker would serve as the intermediary involving communications between a U.S. based attorney and underwriters reporting on a claim.

7. Only London Market Companies can be insolvent—and many are—and the estates of insolvent companies are marshaled and paid under "schemes" pursuant to U.K. law.

U.S. insurance coverage lawyers are familiar with dealing with insolvent domestic insurers. Policyholders likewise must deal with insolvent underwriters that subscribe to London Market policies, but there are two important differences between the London Market and the U.S. treatment of insolvents. First, it is important to note that, with rare exceptions, Lloyd's syndicates under pre-1993 policies will not become insolvent. This is because the Lloyd's names were individuals with unlimited personal liability, combined with the availability of reinsurance and other financial protections specific to the Lloyd's component of London Market policies. As a result, it is rare for a U.S. policyholder's claim under a pre-1993 policy to be reduced on account of insolvencies within Lloyd's.

This is very much not the case with respect to companies that subscribed to London Market policies during that era. Those London Market Companies have been hit particularly hard by the explosion of long-tail liability in the U.S. and other factors. Dozens of London Market Companies have become insolvent in the past 25 years, with more insolvencies likely to take place in the future. A U.S. policyholder with a typical asbestos or environmental claim under a pre-1993 London Market policy generally can expect to absorb an uninsured share of between 10 and 30 percent of the company side of the policy due to these insolvencies.

The second important difference between U.S. and London Market insolvency practice is the legal regime and process for running off and liquidating insolvent insurers. The process under U.K. law is known as a "scheme of arrangement." Such schemes can be applied both to insolvent and, under some circumstances, solvent insurers. Panelist David Pryce addresses schemes in his paper, "A Primer on Solvent and Insolvent Schemes of Arrangement," attached as **Tab** A to this paper.

For reference below we list the main insolvent legacy UK companies, all of whom have now completed payments under their respective schemes, other than Orion/London & Oversees:

INSURER	Percentage paid
Kingscroft per HSW	86.41
Walbrook per HSW	102.28
El Paso per HSW	100.61
Lime Street per HSW	90.25

INSURER	Percentage paid
Mutual Re per HSW	76.42
Bermuda Fire per HSW/BLUA	95.3
Bryanston per HSW	60.61
Andrew Weir	49.65
North Atlantic (British National)	27.118
Orion	58
London & Overseas	58
English & American	49.6
Anglo American	90
Mentor UK	33
Sovereign	97
Trinity / Trident	76.75
United Standard	64.94
Southern American per HSW	90

8. Insurance archaeology and lost-policy disputes are more challenging under London Market policies.

a. The documents that comprise most pre-1993 Lloyd's "policies" are different than those of U.S. commercial liability policies during the same era.

Panelist Ian Pelham has prepared a detailed presentation of the documents that comprise a pre-1993 Lloyd's policy, and the meaning of the sometimes obscure notations in such documents. That presentation is attached at **Tab B** to this paper.

b. There was a greater tendency in the London insurance market to specifically manuscript policies to fit the needs of the insured rather than to rely on a policy form.

The London insurance market has earned the reputation of being able to insure unique and innovative risks. This may be attributable to a tradition that rewarded entrepreneurialism and creativity. While specific policy forms were developed and utilized throughout the London insurance market, other underwriters or brokers developed their own specific (and sometimes "one off") wordings designed to accommodate the needs of the insured. In some situations, there may have been specifically crafted manuscript wordings for particular North American insureds that placed insurance in the London market over the course of decades. This creates some special challenges in trying to reconstruct a missing policy as the pre-approved TP form may only be one of a number of available sources for that language used in that particular policy.

Traditionally lead by underwriters such as Cuthbert Heath and Sturge the London market has for major risks issued what is a known as a manuscript policy. These where bespoke to the individual risk, albeit normally what we would regard as a "cut and paste" production.

The slip, as previously mentioned, would contain a list of clauses and the type of risk being covered. The lead underwriter may have also hand amended the slip to alter the cover to be underwritten.

Based on the slip the brokers policy technician would then prepare the manuscript policy for review and sign off by the lead underwriter and policy offices.

c. The London brokers—and not Lloyd's or the Companies--were the main repository of pre-1993 policy records.

First on the list of an insurance archeologist's sources in typically the insurer itself. However, this is usually not the case in the case of London Market policies. As a matter of historical law and practice, neither Lloyd's itself nor (to a lesser extent) the London Market Companies were the repository of pre-1993 policies and related records. This practice originated in part from the fact that the "box" where the Lloyd's syndicates conducted business were small and cramped quarters that did not allow the room for the storage of documents. Rather, for this and other reasons, the London broker was the keeper of such records. Accordingly, with rare exceptions, insurance archeology and discovery is better directed to the London brokers and, in some cases, the lead underwriters and managing agents, rather than the myriad of other subscribing Lloyd's syndicates.

d. Even where the evidence establishes the issuance and wording of a London Market policy, the insured (arguably) cannot recover unless they can prove the identity and participations of the subscribing underwriters.

Once an insured successfully reconstructs the terms and conditions of a Lloyd's policy, the insured may still lack the identities of the specific Lloyd's syndicates that subscribed to that policy. In other words, an insured may have irrefutable evidence that Lloyd's syndicates insured a specific percentage of the risk on a policy, but be unable to prove the identities of the syndicates or each syndicate's percentage participation. The same may be true on the London Companies side of a policy—the insured may locate documentation establishing some, but not all, of the subscribing companies or what appears to be all of the subscribing company, but not their percentage participations.

In this situation, Lloyd's has historically contended—successfully—that no recovery may be had on the policy unless the insured proves the specific Lloyd's syndicates that issued that policy. Lloyd's contends that this is the straightforward application of basic contract law: the proponent of the contract bears the burden of proving the material terms and conditions of the coverage grant, with the identity of the contracting party being such a material term. Lloyd's has been successful in this regard, and U.S. policyholders must understand that this is a significant obstacle in lost-policy cases that ordinarily is not present in the context of a domestic insurer. That is, when an insured successfully reconstructs a policy issued by a known U.S. insurer, there typically is no further question of identifying subscribing underwriters or their percentages. This aspect of London Market policies raises the bar with respect to archeology and actually locating historical documentation of the subscriptions.

Some U.S. policyholders have argued that a development discussed in Section 9 below, the Part VII Transfer, has changed the requirement that the insured prove the identity and participations of the subscribing Lloyd's syndicates.

9. The 2009 Berkshire Hathaway/Equitas Insurance Limited transaction and Part VII transfer changed the identity of the parties who ultimately are financially responsible for Lloyd's former interest under pre-1993 coverage.

a. The Berkshire/EIL Retroactive Reinsurance Transaction

In 1993 the Lloyds market was in effect split into two under the reconstruction and renewal plan. The issue Lloyd's faced was that US long tail claims were in danger of bringing down the market. Under the plan approved by then UK regulators all open years were reinsured to close into a new insurer called Equitas Insurance Ltd. The net effect was that all liabilities were transferred to Equitas and the market was able to proceed unencumbered by its legacy. The benefit for policyholders of Equitas's takeover of the open years was the establishment of a one stop shop for Lloyds claims.

Equitas was then in effect sold to Berkshire Hathaway in 2006/7. The company's own website sets out the transaction details as follows:

> The Company was transformed when it entered into an agreement in November 2006 under which National Indemnity Company, a member of the Berkshire Hathaway group of companies, reinsured its liabilities and another member of the Berkshire Hathaway group, Resolute Management Services Limited ("RMSL"), took over responsibility for the run-off. This first phase of this transaction was completed in March 2007.
>
> The second phase of the transaction was completed when the High Court made an order on 25 June 2009 approving the transfer under Part VII of the Financial Services & Markets Act 2000 of the 1992 and prior non-life business of members and former members of Lloyd's to Equitas Insurance Limited. The transfer covers all the business reinsured by Equitas at the time of Reconstruction and Renewal in 1996, and includes the PCW syndicates' business

> reinsured by Lioncover Insurance Company Limited and the Warrilow syndicates' business reinsured by Centrewrite Limited. The transfer took effect on 30 June 2009, and means that Names are no longer liable for their 1992 and prior years' underwriting liabilities at Lloyd's as a matter of UK law.

These developments substantially changed the players on the insurer side of long-tail claims under pre-1993 Lloyd's policies (and only the Lloyd's side of such policies—the solvent London Market Companies were not part of these events). The first was the above-described 2009 transaction between Lloyd's and U.S. conglomerate Berkshire Hathaway. This transaction is an example of what is known as a "Loss Portfolio Transfer" ("LPT"). The principal elements of that transaction, much simplified for present purposes, were as follows:

- ***Analysis, Valuation, and Setting of Premium***. Berkshire (via its insurance subsidiaries) undertook a detailed actuarial study of Lloyd's outstanding liabilities on its legacy policies. These projections were used to establish the amount and timing of the future financial outlay on those policies. Berkshire used that information to establish a premium to be charged in exchange for assuming the liabilities under the legacy policies.

- ***Berkshire (EIL) Contractually Assumes Liability on the Legacy Policies***. Lloyd's having paid that premium, Berkshire subsidiary Equitas Insurance Limited indemnified Lloyd's against all future liabilities under the specified policies. The assumption of risk is accomplished by EIL writing a reinsurance policy. This is known as "retroactive reinsurance," in that the reinsurer is retroactively taking on the risk of liability for events that have already occurred under insurance policies that were long-since issued.

- ***EIL Assumes Control of the Reserves and Premium***. EIL assumed ownership and control of all funds transferred from the counterparty. Such funds consist of the reserves previously held by the counterparty under the legacy insurance policies, as well as the premium paid by Lloyd's.

- ***EIL, Via Resolution Management, Assumes All Claim-Handling Functions***. Having assumed responsibility for the legacy insurance policies, EIL has a strong interest in controlling how and when proceeds under those policies are paid out. EIL delegates all claim-handling functions, both as to the monitoring, defense, and payment of underlying claims and the management of disputed coverage claims, to another Berkshire subsidiary, Resolute Management, Inc.

The Berkshire-Lloyd's transaction was large but not, in most respects, unique. As of this writing, Berkshire has closed at least 37 LPTs, of which 22 were with non-U.S. insurers (including Lloyd's). NICO's 2013 Annual Statement discloses that Berkshire collected over

22.2 billion dollars in premiums for retroactive reinsurance associated with these deals.[3] NICO's counterparties include some of the biggest names in U.S. property/casualty insurance:

- Lloyd's of London—all pre-1993 policies.
- The CNA companies: CNA, Continental Ins. Co., Continental Casualty, etc.
- All Liberty Mutual companies, including all former Safeco companies.
- Asbestos liabilities of all AIG subsidiaries, including National Union Fire Insurance Company of Pittsburgh, PA., Lexington Insurance Company, and Granite State Insurance Company.
- Stonewall Insurance Company.
- Swiss Re.
- Westchester Fire Insurance Company.
- Century Indemnity Company.

b. The Part VII Transfer

The Berkshire-Lloyd's LPT is unique among the other major transactions on one respect. In all but the Lloyd's transaction, the legacy insurer remains contractually obligated to the insured. That is, under a Liberty Mutual policy, regardless of the fact that a Berkshire subsidiary has reinsured Liberty Mutual and contractually assumed its liabilities under that policy, Berkshire is still merely an assignee and Liberty Mutual remains liable on the insurance contract.

This is not the case in the Lloyd's transaction. In that case, the subject pre-1993 Lloyd's liability insurance contracts were novated, such that the Underwriters at Lloyd's—thousands of syndicates comprised of personally liable individual investors—are no longer contractually responsible to the U.S. insureds. Instead, the policies were novated, with EIL becoming the contractually liable party. This novation was accomplished under U.K. law, Part VII of the Financial Services and Markets Act of 2000. In a proceeding under that statute, in 2009 the U.K. courts approved the novation. This novation has not been approved in the United States.

U.S. policyholders have argued that the Part VII Transfer alters the necessary proof in lost-policy and "missing market" disputes under Lloyd's policies. The argument is that because the Part VII Transfer eliminated the individual syndicates and Names as contracting parties, substituting a single, unitary entity, EIL, Lloyd's and EIL should have to take the bitter with the

[3] Available at www.naic.org.

sweet. That is, the Names achieved closure and got out from under a potentially ruinous financial obligation, but they should have to live with the natural legal consequence of the novation: no proof of those historical syndicates should be necessary.

EIL strongly disagrees with that argument. EIL's arguments include: (1) the Part VII Transfer, and thus the novation to EIL, has not been recognized by the U.S. courts; and (2) EIL needs the syndicate participation information in order to collect on historical reinsurance.

10. The performance of Resolute Management, Inc. in the administration of pre-1993 Lloyd's interests has been controversial among insureds.

The Berkshire-Lloyd's transaction has generated some controversy, at least among some U.S. policyholders. Some such clients of the policyholder-side authors have reported negative experiences along the following lines:

- ***Decreased Responsiveness.*** When a policyholder's legacy insurer completes an LPT with Berkshire, the claims representative usually changes, with a Resolute employee substituting for the legacy representative (in a minority of cases, the legacy claims representative becomes a Resolute employee and stays on the file). Anecdotal reports have raised concerns that Resolute adjusters are spread too thin, which affects their responsiveness and knowledge of the files.

- ***"New Sheriff in Town" Mentality.*** Some policyholders have reported a change in the claims representatives' attitude and approach once Resolute has assumed the reins. Resolute has proven itself to be aggressive in claims handling, both in the coverage claim and underlying-claim context, and more litigious both as against its insureds and underlying asbestos claimants.