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Cover Page Footnote

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LLOYD'S OF LONDON AND THE PROBLEM WITH FEDERAL DIVERSITY JURISDICTION

BY HOWARD M. TOLLIN AND MARK DECKMAN*

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I. INTRODUCTION

When Lloyd's of London and the London Market ("Lloyd's") is a litigant, diversity jurisdiction is difficult to obtain because of the structure of Lloyd's. Lloyd's is considered an unincorporated association under British law, and is composed of many individual investors who may be liable for some portion of a loss. The issue of whether a United States federal court has jurisdiction based upon diversity of parties to hear a case where Lloyd's is a defendant has not been settled in the Circuits. Some federal courts have required that the citizenship of each investor be determined when considering whether diversity jurisdiction exists. In future litigations, the process of determining the citizenship of the hundreds or thousands of investors will be burdensome and often lead to the conclusion that subject matter jurisdiction is lacking. Moreover, subject matter jurisdiction may be lacking in actions currently pending in federal court in which Lloyd's is a party.

II. SUMMARY OF FEDERAL JURISDICTION

Federal courts are courts of limited jurisdiction. However, the United States Constitution grants the federal judiciary the authority and the power to hear "Controversies . . . between Citizens of different States."[1] Additionally, with the enactment of the Judiciary Act of 1789, federal courts became empowered to hear diversity jurisdiction disputes.[2] The two common forms of federal jurisdiction are: federal question jurisdiction and diversity of citizenship jurisdiction. Federal question jurisdiction has clear and distinct boundaries that federal courts cannot exceed. Federal question disputes are disputes arising under "the Constitution, laws, or treaties of the United States."[3]

On the other hand, federal diversity jurisdiction is not as specific. The diversity statute states that "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between citizens of different States [or is between]; citizens of a State and citizens . . . of a foreign state."[4] The Supreme Court firmly requires that complete

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1. U.S. CONST. art. III, § 2, cl.1.
2. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.
3. 28 U.S.C. § 1331 (1999).
4. 28 U.S.C. § 1332(a)(1-2) (1999); see also St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289 (1938) (noting that to establish the jurisdictional amount, the sum claimed by the plaintiff controls if the claim is made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal).

diversity between plaintiffs and all defendants exist for diversity jurisdiction to be proper.[5]

Significantly, when lack of subject matter jurisdiction is discovered, a federal court is required to dismiss that action.[6] Considerations of fairness or judicial economy cannot create federal diversity jurisdiction when complete diversity is lacking.[7] Federal Rule of Civil Procedure 12(h)(3) provides that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."[8] Accordingly, any current federal court action in which Lloyd's is a party has the potential of being dismissed regardless of its age or status.

III. THE LLOYD'S "NAMES"

The rules of "citizenship" within diversity jurisdiction are complex when applied to insurance issued through Lloyd's. To understand diversity jurisdiction and how it applies to Lloyd's, it is essential to possess a general understanding of Lloyd's structure.

Lloyd's is not an insurance company, nor does it underwrite insurance.[9] Lloyd's operates as a marketplace where investors buy and sell insurance risks.[10] Lloyd's provides the staff, services and offices to enable these investors and their underwriters to do business on a day-to-day basis.[11] Lloyd's consists of investors called, "Names," who form unincorporated groups referred to as syndicates.[12] These syndicates underwrite insurance coverage for an insured through agents, called lead underwriters, who act on behalf of the syndicate.[13]

For purposes of federal diversity jurisdiction, a question arises as to whose citizenship counts for the purpose of establishing diversity jurisdiction: the lead underwriters; the Names; or someone or something else?[14] Typically, a lead underwriter will manage the

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5. *See* Strawbridge v. Curtiss, 7 U.S. 267, 267 (3 Cranch 1806).

6. *See* Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 377 (1978); *see also* American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18 (1951).

7. *See* Owen Equipment, 437 U.S. at 377.

8. FED. R. CIV. P. 12(h)(3).

9. *See* Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co. 177 F.3d 210, 221 (3d Cir. 1999).

10. *See* Humm v. Lombard World Trade, Inc., 916 F. Supp. 291, 293 (S.D.N.Y. 1996).

11. *See* Chemical Leaman, 177 F.3d at 221.

12. *See id.*

13. *See* Certain Interested Underwriters at Lloyd's, London, England v. Layne, 26 F.3d 39, 39 (6th Cir. 1994).

14. *See id.*

affairs of the syndicate and individual Names.[15] The Names simply invest money and assets as security for insurance risks which have already been accepted in the Lloyd's market.[16] To become a Name, "[a]n individual must pay a membership fee, keep certain deposits at Lloyd's, and meet several specific requirements, including possession of a certain degree of wealth."[17] After a Name has joined the market, that investor becomes severally liable to the extent of the percentage share of the risk that he or she has assumed.[18] While they are liable for the insured's liabilities, Names also profit from the premiums received based on their percentage of participation.[19] The insurance contract is actually between the policyholder and each individual Name, not the syndicate or lead underwriter.[20]

Each syndicate has an "active" or "appointed" lead underwriter who acts and manages the syndicate on behalf of the Names.[21] A particular syndicate may have a few hundred or many thousand Names.[22] The syndicates are neither corporations nor recognized as separate entities having their own citizenship under British law; they are considered unincorporated associations.[23]

The individual members of unincorporated associations become significant for subject matter jurisdiction, venue, service of process and enforceability of judgment purposes. Again, the Names are the members of Lloyd's, and many Names have citizenship in one of the United States.[24] If a Name is a citizen of the same state in which an opposing party is a citizen, there is no diversity jurisdiction.[25] Subject matter jurisdiction may further be lacking if the jurisdictional amount fails to exceed the sum of $75,000 as to each Name as required under 28 U.S.C. § 1332. Hence, the query of whether

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15. *See id.* at 43.

16. *See* Humm v. Lombard World Trade, Inc., 916 F. Supp. 291, 293 (S.D.N.Y. 1996).

17. Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co. 177 F.3d 210, 221 (3d Cir. 1999).

18. *See* Lowsley-Williams v. North River Ins. Co., 884 F. Supp 166, 168 (D.N.J. 1995). The court stated that "[s]ince Names assume unlimited liability, Names are liable to the full extent of their personal wealth for any risks undertaken. For any given contract, each Name is liable only for the percentage of the risk which that Name has agreed to underwrite and for no other portion of the risk assumed by any other Name." *Id.*

19. *See* International Ins. Co. v. Certain Underwriters at Lloyd's London, 1991 WL 693319, at *3 (N.D. Ill. Sept. 16, 1991)("Like Membership in a partnership, membership in a Lloyd's syndicate is personal and not transferable and terminates upon the death of the member.").

20. *See id.*

21. *See* Certain Interested Underwriters at Lloyd's, London, England v. Layne, 26 F.3d 39, 42 (6th Cir. 1994).

22. *See id.*

23. *See id.* at 41.

24. *See* Humm v. Lombard World Trade, Inc., 916 F. Supp. 291, 293 (S.D.N.Y. 1996).

25. *See* 28 U.S.C. § 1332(a)(1-2) (1999).

federal diversity jurisdiction exists with respect to Lloyd's is problematic if the individual citizenship of each Name must be considered to establish complete diversity.

IV. JURISDICTIONS WHERE ALL THE "NAMES" MUST BE CONSIDERED

The analysis for diversity jurisdiction typically begins with a "real party in interest" standard. Federal Rule of Civil Procedure 17(a) provides that "every action shall be prosecuted in the name of the real party in trust."[26] Thus, if a party in the caption of the action is merely a nominal party, its presence must be ignored when determining diversity jurisdiction.[27] Who are the real parties in interest when looking at the structure of Lloyd's?

The Fifth and Seventh Circuits and district courts in the First and Ninth Circuits have held that the citizenship of Names within Lloyd's must be considered for purposes of diversity jurisdiction.[28] Accordingly, these Circuits have held that the Names are the real parties in interest because it is their contract that binds them to the insured.

Furthermore, a federal district court in Maine held that the citizenship of all active and inactive Names within Lloyd's are the real parties in interest and must be considered for purposes of diversity jurisdiction.[29] The court stated that since each Name is potentially liable to the insured for any loss covered by the insurance policy, the citizenship of each Name must be considered for diversity purposes.[30]

In *Bath Iron Works*, plaintiff, a Maine corporation, originally brought the case in the Maine Superior Court for declaratory and monetary relief.[31] Defendant "Lloyd's" then filed a Notice of Removal to the District Court of Maine claiming that the state court lacked jurisdiction over the dispute.[32] Lloyd's argued that the only

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26. FED. R. CIV. P. 17(a); *see also* Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 461 (1980). The Court in *Navarro* held that federal courts must disregard nominal or formal parties and rest jurisdiction in a diversity case only upon the citizenship of real parties to the controversy. *See id.*

27. *See* Salem Trust Co. v. Mfrs.' Fin. Co., 264 U.S. 182, 190 (1924).

28. *See, e.g.*, Bath Iron Works Corp. v. Certain Member Cos. of the Inst. of London Underwriters, 870 F. Supp. 3 (D. Maine 1994); Royal Ins. Co. of America v. Quinn-L Capital Corp., 3 F.3d 877 (5th Cir. 1993); Indiana Gas v. Home Ins. Co., 141 F.3d 314 (7th Cir. 1998); Queen Victoria Corp. v. Ins. Specialists of Hawaii, Inc., 711 F. Supp. 553 (D. Haw. 1989).

29. *See* Bath Iron Works Corp. v. Certain Member Cos. of the Inst. of London Underwriters, 870 F. Supp. 3, 4 (D. Maine 1994).

30. *See id.* at 7.

31. *Id.*

32. *See id.* at 4.

real parties to the controversy were the active lead underwriters as representatives of all the Names because the lead underwriters are responsible for paying the claims and making litigation decisions.[33] The court, however, held that "'control' is not a dispositive issue in determining who, among parties, is the real party-in-interest."[34] The court further rejected the contention that, to determine the citizenship of an artificial entity, the court may consult the citizenship of less than all of the entity's members.[35]

The Fifth Circuit in *Royal Ins. Co. of America v. Quinn-L Capital Corp.*,[36] held that when looking at an unincorporated association (Lloyd's), the citizenship of all of its members, the Names, must be considered.[37] The citizenship of an agent or an attorney-in-fact should not be considered, because neither is a member of Lloyd's and are only acting as an agent for the syndicate.[38] Diversity jurisdiction depends on the citizenship of the Names who actually underwrite the insurance policies and are obligated to indemnify the policyholder for any covered loss, not the agent.[39]

In *Indiana Gas v. Home Ins. Co.*,[40] the Seventh Circuit similarly held that the citizenship of all the Names of Lloyd's must be considered when determining whether complete diversity exists because all the Names are financially responsible for the loss to the policyholder.[41] In *Indiana Gas*, the plaintiffs were incorporated in and had their principal place of business in Indiana.[42] Therefore, any defendant who was a resident of Indiana defeated diversity jurisdiction. The complaint named among the defendants "Certain Underwriters at Lloyd's, London" and "Certain London Market Insurance Companies."[43] In *Indiana Gas*, the district court judge did not require the plaintiff to be specific in its complaint as to the Names from which they were seeking coverage.[44] Accordingly, the Seventh Circuit considered whether to look at the individual Names, or the lead underwriter, when determining diversity jurisdiction.[45]

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33. *See id.*
34. *Id.* at 6.
35. *See id.*
36. 3 F.3d 877 (5th Cir. 1993).
37. *See id.* at 882-83.
38. *See id.* at 882.
39. *See id.*
40. 141 F.3d 314 (7th Cir. 1998).
41. *See id.* at 317.
42. *See id.*.
43. *Id.* at 316.
44. *See id.*
45. *See* Indiana Gas, 141 F.3d at 315.

This court stated that when a principal's interests are affected by the litigation, the principal's citizenship counts "even if the agent is the sole litigant."[46] Therefore, in order to determine whether diversity jurisdiction exists, federal courts should look to the individual Names, who are the principals whose interests are at stake, rather than to their collective representative, the lead underwriter.[47]

A Ninth Circuit district court also addressed diversity jurisdiction with respect to Lloyd's in *Queen Victoria Corp. v. Ins. Specialists of Hawaii, Inc.*[48] The court in *Queen Victoria* held that "[s]ince Lloyd's is an unincorporated group of underwriters, its citizenship is determined by the citizenship of all of its members [the Names]."[49] In *Queen Victoria,* the plaintiff sued an unincorporated group of insurance underwriters (including Lloyd's) in state court.[50] Those underwriters brought a third-party complaint against Marisco Ltd.[51] Marisco sought to remove the case to federal court and the plaintiff brought a motion to remand the case back to state court.[52] The court held that the third-party defendant, Marisco, failed to present information regarding the citizenship of all the Names.[53]

The decisions discussed above reflect a trend in federal courts to require a consideration of the citizenship of each Name for determining whether diversity of citizenship exists.

V. JURISDICTION WHERE THE "LEAD UNDERWRITER" IS CONSIDERED

The Sixth Circuit has allowed the citizenship of the lead underwriter to govern when establishing diversity jurisdiction. In *Certain Interested Underwriters at Lloyd's, London, England, v. Layne,*[54] the Sixth Circuit held that the citizenship of insurance underwriters, as agents for unincorporated syndicates, rather than the citizenship of all the Names, can suffice when determining diversity jurisdiction.[55] The court in *Layne* found that when a party elects to sue the lead underwriter, it elects to sue the agent.[56]

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46. *Id.* at 319.
47. *See id.* at 314; *see also* Northern Trust Co. v. Bunge Corp., 899 F.2d 591, 594 (7th Cir. 1990).
48. 711 F. Supp. 553 (D. Haw. 1989).
49. *Id.* at 554.
50. *Id.*
51. *See id.*
52. *See id.*
53. *Id.*
54. 26 F.3d 39 (6th Cir. 1994).
55. *See id* at 41.
56. *See id.* at 43.

Layne involved an insured who bought fire insurance from Lloyd's for a tavern, which burned down two months later in suspicious circumstances.[57] Lloyd's obtained a jury verdict of no coverage on the grounds of arson.[58] On appeal, the insured sought to vacate the judgment for lack of subject matter jurisdiction.[59] The court of appeals found that the insured had technically waived its claims against all the absent Names and preserved the judgment of no liability.[60] The court held that the manner of filing suit against the agent waived liability of the absent Names.[61] The Names were no longer liable to the insured on the contract and, consequently, were not real parties in interest.[62] The court held that the lead underwriter's citizenship was controlling because the lead underwriter actually writes the insurance, processes the claim, and is authorized to sue on the policy.[63]

Citing *Navarro Sav. Ass'n v. Lee,* [64] the court in *Layne* further addressed the "real party to the controversy test" [65] under which the citizenship of nominal parties is disregarded. In *Navarro,* the Supreme Court held that trustees, not trust beneficiaries, were the real parties in the litigation because trustees were entitled to sue in their own right without trust beneficiaries for 150 years.[66] Thus, the Court required federal courts to "disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy."[67] Relying on the trustee analogy in *Navarro,* the court in *Layne* found that the lead underwriters are the real parties in interest and that they are liable on the contract.[68] The court in *Layne* further found that when an agent makes a contract in his own name, without disclosing the identity of the principal, the agent becomes personally liable, even though the person with whom the agent deals knows that he is acting as an agent.[69] Thus, in the Sixth Circuit it

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57. *Id.*
58. *See id.*
59. *See id.*
60. *See* Layne, 26 F.3d at 42.
61. *See id.*
62. *See id.*
63. *See id.*
64. 446 U.S. 458 (1980).
65. *See* Layne, 26 F.3d at 39. The court stated that "diversity must be complete between all of the plaintiffs and all of the defendants, but if one of the nondiverse parties is not real party in interest, and is purely formal or nominal party, that party's presence may be ignored in determining jurisdiction." *Id.*
66. Navarro, 446 U.S. at 461.
67. *Id.*
68. *See* Layne, 26 F.3d at 43.
69. *See id.*

appears that the citizenship of the lead underwriter determines diversity, rather than each Name, when the lead underwriter is sued as the agent for the Names.

Though the law in the Sixth Circuit suggests an alternative path to handle these types of cases, it may not be very convincing precedent. The fact that a judgment had already been entered in *Layne* may have influenced the court to sustain federal jurisdiction.[70] Moreover, most other courts which have considered Names for determining diversity do not find the trust beneficiary analogy compelling and, therefore, have criticized or distinguished *Navarro* and *Layne*.[71]

VI. JURISDICTIONS WHERE THE "LEAD UNDERWRITER" IS ALLOWED TO BE SUED IN ITS INDIVIDUAL CAPACITY

The Second and Third Circuits take a somewhat different approach. When the lead underwriter is sued as a representative of the syndicate, all Names within the syndicate must be taken into account when determining diversity jurisdiction.[72] However, when the lead underwriter is sued in its individual capacity, it is only his citizenship and jurisdictional amount that determines federal jurisdiction.[73] However, the lead underwriter must be able to meet the jurisdictional amount on his own to remain in federal court.[74] Aggregation between the lead underwriter and the Names within the syndicate is not allowed.

In *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*,[75] the plaintiff brought a declaratory action against its primary and excess insurers seeking indemnification for product liability claims.[76] Two years later, the plaintiff filed a new complaint against its insurers that included a host of new domestic and foreign defendants. Among those named in the complaint was defendant Haycock, a British subject, who was named "as a representative underwriter representing certain underwriters at Lloyd's [of] London, being all underwriters who subscribed the policies of insurance issued to the

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70. Layne, 26 F.3d at 43.

71. *See* Carden v. Arcoma Assoc., 494 U.S. 185, 195 (1990).

72. *See* E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 160 F.3d 925, 939 (2d Cir. 1998); *see also* Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co., 177 F.3d 210, 223 (3d Cir. 1999).

73. *See* E.R. Squibb & Sons, 160 F.3d at 939.

74. *See* Chemical Leaman, 177 F.3d at 223.

75. 160 F.3d 925 (2d Cir. 1998).

76. *See id.* at 928.

plaintiff."[77] The parties then stipulated that Haycock was "appearing in this action in his individual capacity, and . . . as a representative of all Lloyd's Underwriters [Names]."[78] The Second Circuit held that in the event that Lloyd's lead underwriters are sued in their representative capacity, but not in a class action, "each and every Name whom the lead underwriter represents must be completely diverse."[79] However, when Lloyd's Names, including the lead underwriter, are properly sued in their individual capacity, it is each individual "Name's characteristics, both as to citizenship and jurisdictional amount, that are determinative for jurisdictional purposes."[80]

The Third Circuit, in *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co.*,[81] similarly held that if the lead underwriter is sued in an individual capacity, only its citizenship is looked at when determining diversity jurisdiction.[82] In *Chemical Leaman*, the plaintiff, a Delaware corporation with its principle place of business in Pennsylvania, filed a suit against Aetna and "Certain Underwriters at Lloyd's, London subscribing to Insurance Policies [specifically enumerated]."[83] The complaint claimed that diversity jurisdiction was proper and alleged that "Certain Underwriters" were "various insurance companies organized and existing under the laws of the United Kingdom."[84] The Third Circuit found that the complaint was based solely on the policies, and the Names shared no common liability under those policies absent a class certification.[85] Accordingly, when a lead underwriter is sued in its individual capacity, it is only the lead underwriter's citizenship and jurisdictional amount that is at issue and of consequence.[86] Even a voluntary side agreement on liability between the lead underwriter and the Names does not deprive the court of jurisdiction.[87]

Thus, the Second and Third Circuits appear to rely on the nature of the pleadings for determining whether those named are liable, rather then evaluating the persons or entities actually paying the

77. *Id.*
78. *Id.*
79. *Id.* at 939.
80. *Id.*
81. 177 F.3d 210 (3d Cir. 1999).
82. *See id.* at 223.
83. *Id.* at 215.
84. *Id.*
85. *See id.* at 222.
86. *See id.* at 223.
87. *See id.*

loss.[88] At some juncture, however, the Second and Third Circuit may recognize that Names are ultimately the real parties in interest who remain proportionately liable for a covered loss.

VII. ALTERNATIVES TO ESTABLISH DIVERSITY JURISDICTION

If each Name is completely diverse, and each meets the $75,000 jurisdictional requirement, then subject matter jurisdiction will not create any problem for removing a case to federal court. Otherwise, parties may pursue alternative arguments to have a case remain in federal court notwithstanding that the diversity jurisdiction standard has not been met under the strictest view.

Four alternatives are considered when attempting to satisfy diversity jurisdiction with respect to Lloyd's: (1) a Federal Rule of Civil Procedure 23 Class Action suit; (2) a dissolution of non-diverse Names; (3) a lawsuit against the lead underwriter in an individual capacity; and (4) an application of the trust analysis. Choosing an alternative to establish diversity may affect subject matter jurisdiction, venue, service of process and enforceability of the judgment.

A. A Rule 23 Class Action Suit

One alternative to seek diversity jurisdiction is to classify the suit as a Class Action under Federal Rule of Civil Procedure 23. This enables the class to use a representative for purposes of determining diversity of citizenship.[89] However, in order to sue or to be sued in a representative capacity, four prerequisites must be met: (1) the class must be so numerous that joinder of all members is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and (4) the representative parties must fairly and adequately protect the interests of the class.[90]

Lloyd's syndicates are considered unincorporated associations which are governed by Federal Rule of Civil Procedure 23.2.[91] Rule 23.2 provides that "an action brought by or against the members of an unincorporated association as a class by naming certain members

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88. *See* E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 160 F.3d 925, 939 (2d Cir. 1998); Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co., 177 F.3d 210, 223 (3d Cir. 1999).

89. *See* E.R. Squibb & Sons, 160 F.3d at 939.

90. FED. R. CIV. P. 23(a).

91. FED R. CIV. P. 23.2; *see* E.R. Squibb & Sons, Inc. v. Accident & Casualty Ins. Co., 1999 WL 350857, at *14 (S.D.N.Y. June 2, 1999).

as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members."[92] Hence, a question remains as to whether a lead underwriter or representative Names sufficiently protect the interests of all Names on the policies.

It is unclear whether a federal court would permit a class action to solve a jurisdiction defect. The court in *Indiana Gas Co. v. Home Ins. Co.*,[93] held that the Names within a syndicate cannot be sued in a Rule 23.2 class action suit.[94] Converting a suit against the Names into a Rule 23.2 class action would "undermine the substantive distinction . . . between Rule 23 classes and limited partnerships."[95] As the court in *Indiana Gas* and various scholars have pointed out, "the rule of *Carden*[96] . . . [can]not be evaded by reclassifying the suits against the Lloyd's syndicates as class actions."[97] A rule of procedure may not expand the subject-matter jurisdiction of the federal courts.[98]

Similarly, the court in *Phillsbury Co. v. Underwriters at Lloyd's*,[99] stated that the only thing that unites various Names within a syndicate is a lawsuit brought by an insured.[100] The Names on the policy do not share profits or losses. They are severally liable for only their portion and simply because Names on a policy share litigation expenses does not create an unincorporated association under Rule 23.2.[101]

However, in *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*,[102] the court held that a case involving various Names in a Lloyd's syndicate should proceed as a class action under Rule 23.[103] The

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92. FED. R. CIV. P. 23.2.

93. 141 F.3d 314 (7th Cir. 1998).

94. *See id.* at 322.

95. John M. Sylvester & Robert D. Anderson, *Litigating Against Lloyd's In Federal Court: Is It Still Possible?*, 789 PLI/COMM 183, 205 (1999); *see also* Carden v. Arcoma Associates, 494 U.S. 185 (1990).

96. *See* C.T. Carden v. Arcoma Assocs., 494 U.S. 185, 185 (1990). Citizenship of limited partners must be taken into account to determine diversity of citizenship among the parties, in an action brought by a limited partnership; a limited partnership is not in its own right a "citizen" of the state that created it, and the diversity determination could not be based upon the citizenship of the general partners, but rather, would have to be based upon the citizenship of all partners. *See id.*

97. Sylvester & Anderson, *supra* note 95, at 322.

98. *See* Indiana Gas Co., 141 F.3d at 321.

99. 705 F. Supp. 1396 (D. Minn. 1989).

100. *See id.* at 1398.

101. *See id.*

102. 1999 WL 350857 (S.D.N.Y. June 2, 1999).

103. *See id.* at *14.

court stated that "it is hard to conceive of a case that is more appropriate for defendant class action status."[104]

Under the Lloyd's insurance contracts, a plaintiff could require all of the Names to appear individually in a lawsuit.[105] However, this would prove to be inefficient and burdensome to all parties. In a class action, only the citizenship of the class representative would be considered when determining diversity.[106] However, all the Names must satisfy the jurisdictional amount. If there are some Names who do not meet the required amount, "a class action may [still] be maintained against those who do" meet the amount.[107]

B. Dismissing Non-Diverse Names

The power to sever non-diverse parties in a suit is granted to the federal courts by Federal Rule of Civil Procedure 21.[108] However, an indispensable party may not be severed from the action. An indispensable party is defined in Federal Rule of Civil Procedure 19 which states a party must be joined if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.[109]

Accordingly, since the insurance policies between the plaintiff and the Names are essentially direct contracts, courts are likely to conclude that the Names constitute the necessary and indispensable

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104. *Id.*

105. *See id.*

106. *See id.* at *15.

107. *Id.* (citing Zahn v. Int'l Paper Co., 414 U.S. 291, 301 (1973)("Each plaintiff in a 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case.")).

108. FED. R. CIV. P. 21. "Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately." *Id.*

109. FED. R. CIV. P. 19(a)(1-2).

parties to the action, and not merely the lead underwriters.[110] Because the Names' liability is only several, and not joint, the plaintiff may be denied a full recovery unless the plaintiff receives compensation for the non-diverse Names' percentage of liability.[111] Courts have not yet addressed the issue of whether certain Names can be intentionally left out or dismissed in order to establish diversity jurisdiction.

The Supreme Court in *Zahn v. International Paper Co.*,[112] held that "multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement for [diversity suits]."[113] Severally liable parties may not aggregate their demands in order to satisfy the jurisdictional amount requirement.[114] Thus, even upon dismissal of non-diverse Names, courts are likely to find that each remaining Name must meet the $75,000 requirement to stay in federal court.

C. Suing the Lead Underwriter in an Individual Capacity

A recent district court decision in New York held that, under British law, an individual Name may be sued in its individual capacity to enforce the obligations of a policy to which it subscribed.[115] Furthermore, the court held that each plaintiff must satisfy the jurisdictional amount; and any plaintiff who does not must be dismissed from the case.[116]

The Second Circuit court in *Squibb* held that when a lead underwriter or an individual Name is sued only in their individual capacity, such lead underwriter or individual Name's citizenship determines diversity jurisdiction.[117] Federal Rule of Civil Procedure 21 specifically states that "parties may be dropped or added by order

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110. Sylvester & Anderson, *supra* note 95, at 210.

111. *See id.* at 211.

112. 414 U.S. 291 (1973).

113. *Id.* at 294.

114. *See* Niagara Fire Ins. Co. v. Dyess Furniture Co., Inc., 292 F.2d 232, 233 (5th Cir. 1961).

115. *See* E.R. Squibb & Sons, Inc. v. Accident & Casualty Ins. Co., 1999 WL 350857, at *4 (S.D.N.Y. June 2, 1999).

116. *See id.* at *7.

117. *See* E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 160 F.3d 925, 939 (2d Cir. 1998). The Court of Appeals, Calabresi, Circuit Judge, held that:

(1)when Lloyd's of London lead underwriter is sued in representative capacity, but not in class action, each and every Name whom lead underwriter represents must be completely diverse, but (2) when Lloyd's Name, including lead underwriter, is properly sued only in individual capacity, it is that Name's characteristics, both as to citizenship and jurisdictional amount, that are determinative for jurisdictional purposes.

Id.

of the court on motion of any party or of its own initiative at any stage of (an) action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."[118] However, a court must determine whether "in equity and good conscience" an action should be dismissed because the absent person might be an indispensable party to the action.[119]

It is clear that an individual Name can be sued in his or her individual capacity. The contracts that are signed by each individual Name provide:

> We the Underwriters, members of the Syndicate(s), ... hereby bind Ourselves, each for his own part ... to pay or make good to the Assured ... or to indemnify him ... against all such loss, damage or liability as herein provided ...[120]

Accordingly, it would be that Name's citizenship, along with the jurisdictional amount requirement, that would be at issue in determining subject matter jurisdiction in federal court. It is unclear, however, whether the citizenship of the lead underwriter, or other entity, should be considered when the lead underwriter or entity is sued in its individual capacity.

In *Newman-Green, Inc. v. Alfonzo-Larrain,*[121] the Supreme Court held that the Court of Appeals may grant a motion to dismiss a dispensable non-diverse party pursuant to Rule 21 in order to salvage jurisdiction.[122] In *Caterpillar Inc. v. Lewis,*[123] the Supreme Court held that once a diversity case has been tried in federal court, "considerations of finality, efficiency, and economy become overwhelming."[124] In *Caterpillar,* judgment had been entered, years of litigation had passed and large accrued costs had been expended.[125] These considerations strongly contributed to the Court's reluctance to dismiss the case on diversity grounds.[126]

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118. FED. R. CIV. P. 21.
119. FED. R. CIV. P. 19(b).
120. E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 1999 WL 350857, at *5 (S.D.N.Y. June 2, 1999).
121. 490 U.S. 826 (1989).
122. *See id.* at 833.
123. 519 U.S. 61 (1996).
124. *Id.* at 75.
125. 519 U.S. at 62.
126. *See id.*

For tactical reasons, a suit against only a lead underwriter may go unchallenged until a judgment is entered. However, at that juncture, there is a greater likelihood that alternatives to cure citizenship will be allowed. Nevertheless, it is well-settled that a case must be dismissed any time before final judgment if the court lacks subject matter jurisdiction.[127] Again, considerations of fairness or judicial economy cannot create federal diversity jurisdiction where complete diversity is lacking.[128] For these reasons, parties should seek an Order regarding the dispensability of non-diverse Names, and propriety of suing the lead underwriter as early as possible in the litigation.

D. Applying the Trust Analysis

The Supreme Court, as early as 1808, stated that trustees of an express trust are entitled to bring diversity actions in their own names and upon the basis of their own citizenship.[129] Furthermore, in 1937, Federal Rule of Civil Procedure 17(a), which states that the real party in interest could be a trustee of an express trust, was adopted.[130] Trustees are "principals owning and managing a defined pool of assets."[131] Ultimately, the trustee has legal title. They manage the assets and they control the litigation.[132]

The lead underwriters at Lloyd's, however, are treated like agents of the syndicates, not trustees.[133] The lead underwriters do not own the corpus, they simply have the power to manage the assets and underwrite insurance risks on behalf of the syndicate.[134] It is the ownership of the corpus that is determinative.[135] If these agents were treated as trustees, then any unincorporated association could avoid a jurisdictional problem by naming an agent or an attorney to act on behalf of the association.[136] It would then be that agent or attorney's citizenship that would determine diversity jurisdiction. This cannot be the case. The lead underwriter does not own the corpus and is not part of the express trust upon which the

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127. *See* Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 377 (1978).
128. *See id.*; *see also* American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 (1951).
129. *See* Chappedelaine v. Dechenaux, 8 U.S. 306 (1808).
130. FED. R. CIV. P. 17(a).
131. Indiana Gas Co. v. Home Ins. Co., 141 F.3d 314, 318 (7th Cir. 1998).
132. *See* Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 465 (1980).
133. Sylvester & Anderson, *supra*, note 95, at 215-16.
134. *See id.*
135. *See id.*
136. Sylvester & Anderson, *supra*, note 95, at 217.

decision in *Navarro* rests.[137] For the foregoing reasons, the trust analysis is not likely to succeed. For similar reasons, suing Equitas, as trustee of Lloyd's, will not be allowed to satisfy federal diversity jurisdiction.[138]

VIII. EQUITAS AS A DEFENDANT

Equitas is primarily an arrangement formed with Lloyd's of London that is governed by English Law.[139] Equitas was formed by Lloyd's in 1996 to reinsure pre-1993 policies issued by the Names within a syndicate.[140] The pre-1993 policies were reinsured because the Names were incurring large losses. This arrangement was that: Equitas would indemnify the Names/Syndicate for any amount they had to pay out on the policies they had issued before 1993. . . . However, to be entitled to the indemnification, the Names had to enter a reinsurance contract with Equitas which provided that Equitas would have the exclusive authority to handle, litigate, defend and settle any claim arising against the Names.[141]

Moreover, the contract signed by the Names made it clear that Equitas did not have any "effect on the liability of any Name" individually.[142]

The contract between Equitas and the Names is signed by each Name individually and includes certain provisions.[143] One provision expressly provides that "Equitas has not assumed the liabilities of the Names in the underlying policies of insurance and that the Names through the Syndicates remain severally liable on the insured policies."[144] Because each Name remains severally liable on contracts with the insured, the citizenship of Equitas is not relevant for purposes of diversity.

In *Boeing Co. v. Equitas Ltd.*,[145] the plaintiff sued Lloyd's of London in King County Superior Court, seeking coverage for environmental losses under various policies that were issued by

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137. *See* Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 462 (1980).

138. *See infra* notes 121-26 and accompanying text.

139. *See* Idaho Power Co. v. Underwriters at Lloyd's, London, No. 97-0203 (E.D. Idaho Mar. 31, 1999).

140. *See* Millennium Petrochemicals, Inc. v. C.G. Jadgo, 50 F. Supp. 2d 654, 656 (W.D. Ky. 1999).

141. *Id.*

142. *Id.*

143. *See* USX Corp. v. Adriatic Ins. Co., 64 F. Supp. 2d 469, 479 (W.D. Penn. 1998).

144. *Id.*

145. No. 99-03873-8 SEA (Wash. Super., King Co. Dec. 16, 1999).

Lloyd's of London.[146] Boeing later amended the complaint and added Equitas Ltd. as a defendant, claiming that Equitas is liable for the losses pursuant to the reinsurance and run-off contract ("RROC").[147] The court held that a "RROC" does not bind Equitas to a "Service of Suit" clause in the insurance policy and that personal jurisdiction cannot rest on Equitas' consent.[148] The "Service of Suit" clause is contained in the Lloyd's Underwriters' policies. It states that the Names will consent to submit to any court of competent jurisdiction, within the United States and upon the request of the insured and will comply with all requirements necessary to give such Court jurisdiction.[149] The Names are bound by this Service of Suit clause.[150] That issue is not in contention. In the context of personal jurisdiction, courts have held that the reinsurance contracts with Equitas have no effect on the liability of any of the Names under the insurance contracts.[151] Equitas, however, is not bound by the Service of Suit clause.[152] Equitas has not assumed the Names' obligations under the contracts of insurance nor does the reinsurance contract signed by Equitas constitute a purchase of all the assets and liabilities of the Names.[153] In *Boeing*, the court held that personal jurisdiction could not be established over Equitas because "[a]lthough by virtue of their contract with Lloyd's Names the Equitas companies are directly involved in the Washington litigation concerning the Names, the fact does not constitute affirmatively doing business as contemplated by the long-arm statute."[154]

One court, in *Unisys Corp. v. Ins. Co. of North America*,[155] has found that by entering into a reinsurance contract with the Names, Equitas has sufficient minimum contacts with the forum state to be subject to personal jurisdiction.[156] The court stated that it would be extremely unfair and inequitable for state courts not to have personal jurisdiction over Equitas when Equitas is merely a vehicle created to

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146. *See id.*
147. *See id.*
148. *See id.*
149. *See id.*
150. *See id.*
151. *See* USX Corp. v. Adriatic Ins. Co., 64 F. Supp. 2d 469, 479 (W.D. Penn. 1998); Archdiocese of Milwaukee v. Certain Underwriters at Lloyd's London, No. 96-CV-006626 (Wis. Cir. Ct. Milwaukee Cty., July 12, 1999) ("Equitas never substituted itself for Underwriters as a party to the insurance policies.").
152. *See* Boeing Co., No. 9003873-8 SEA.
153. *See id.*
154. *Id.*
155. No. L-1434-94S (N.J. Super., Middlesex Co., Dec. 17, 1999).
156. *See id.* (noting that Equitas Limited and Equitas Reinsurance Limited has filed an appeal with the Superior Court of New Jersey, Appellate Division on January 19, 2000).

continue the claim settling obligation of the Names.[157] The court noted "Equitas subjected itself to personal jurisdiction by voluntarily injecting itself into the litigation by managing claims, conducting litigation and directly paying any judgment that policyholders might obtain."[158]

Notwithstanding the inclusion of Equitas in some actions, the Names should be considered the real parties in interest for purposes of satisfying diversity jurisdiction. Equitas is a reinsurer, and not the liable party under the policies issued to the insured. Thus, while some courts may allow Equitas to be brought in as a defendant, simply naming Equitas as representative for the Names will not achieve diversity jurisdiction.

IX. CONCLUSION

The structure of Lloyd's is not within the ordinary confines of United States corporations. Federal courts are now faced with the jurisdictional dilemma of requiring a determination of the citizenship of each Name, comprising the association known as Lloyd's, which is severally liable for losses. As the courts continue to evaluate the nature of Lloyd's, there will be a continued trend to consider the citizenship of the Names individually when establishing diversity jurisdiction. Determining the citizenship of hundreds or thousands of Names will be complex and burdensome. And, in many federal court actions involving Lloyd's, subject matter jurisdiction will be found to be lacking.

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157. *See id.*

158. *Id.*

> Equitas directly controls the defense of this litigation. It manages the defense, it handles the payment and settlement of all claims. If settlement is reached Equitas must approve and pay the settlement amount . . . Equitas also has sufficient minimum contacts to be subject to specific jurisdiction. By entering into the agreement . . . , Equitas, purposely and for its own benefit sought the advantage of setting claims in the United States with regard to environmental coverage. It certainly expected to be hailed into court here.

Id.