Notify

Commonwealth of Massachusetts
County of Suffolk
The Superior Court

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CIVIL DOCKET# **SUCV2010-04663**

Certain Underwriters at LLoyds London,
Equitas Insurance Limited
vs
Sidley Austin LLP,
Liberty Mutual Insurance Company

JUDGMENT

This action came on before the Court, Christine M. Roach, Justice, presiding, and upon consideration thereof,

It is **ORDERED and ADJUDGED:**

On Count I, Plaintiffs' plea for declaratory judgment in their favor is **DENIED,** judgment to enter for Defendants; and

On Count II, Plaintiffs' plea for a preliminary and permanent injunction is **DENIED,** judgment to enter for Defendants.

Case to be **DISMISSED,** with prejudice, and without costs to either side, **SO ORDERED.**

Dated at Boston, Massachusetts this 5th day of March, 2012.

Notice Sent
3-6-12
WFC
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Michael Joseph Donovan,
Clerk of the Courts

By: Claire A. Walsh
Assistant Clerk

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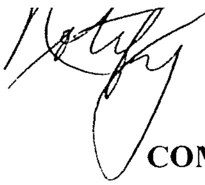
JUDGMENT ENTERED ON DOCKET 3-6 **20**12
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PRO
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS



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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 10-4663-BLS2

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON
and EQUITAS INSURANCE LIMITED

vs.

SIDLEY AUSTIN, LLP and LIBERTY MUTUAL INSURANCE COMPANY

MEMORANDUM AND ORDER OF FINDINGS AND RULINGS

This is an action to disqualify the defendant law firm from representing the defendant insurance company in an arbitration dispute over re-insurance charges assessed following judgment in an underlying asbestos case for personal injuries. The claim here is that Sidley Austin, LLP (Sidley) possesses an improper conflict of interest representing Liberty Mutual Insurance Company (Liberty Mutual) in the arbitration, against Resolute Management Services Ltd. f/k/a Equitas Ltd., while having simultaneously represented Certain Underwriters at Lloyd's London (Underwriters) on the appeal of an anti-anti-suit injunction in the Court of Appeals for the Ninth Circuit (the Teck litigation). Sidley's defense is that any potential conflict of interest was properly disclosed, and was waived by the Plaintiffs' informed consent.

Procedural Posture

The case was filed in this session April, 2011.[1] A Rule 16 Litigation Control Conference occurred April 11, 2011. The parties' position at that time was that the case needed to be tried or otherwise resolved immediately, given the pending and allegedly conflicting representations by Sidley. A series of discovery, as well as dispositive, motions quickly followed. Cross motions for summary judgment were denied in early June, 2011, following hearing in early May, 2011. The dispute was then tried to the bench without jury June 6-8, 2011.

As previously indicated on the docket, the matter was expedited ahead of many other cases awaiting trial and motion hearings in this session, in the hope that prompt attention would serve to narrow or eliminate the issues between the parties. That has not proven to be the case. Five lawyer witnesses testifying at trial hewed to their respective party lines, generally consistent with prior affidavit and deposition testimony. And, while the federal appeal in the Teck litigation has since been resolved,[2] I agree with Plaintiffs' position that the conflicts issue nonetheless remains alive.

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[1] It was originally filed in a Suffolk time standards session in November, 2010, and accepted into the BLS following a Joint Motion filed in February, 2011.

[2] The parties informed the court of this development by two letters in early August, 2011, nonetheless debating the impact of same.

The court also acknowledges the parties' communication by letter of January 19, 2012, that the arbitration at issue is "stayed" pending resolution of the representation issue. As discussed below, however, this is a case about highly sophisticated lawyers and their highly sophisticated clients, generating and maintaining a dispute exclusively out of their own self interests, and for their own strategic purposes. The matter has been held under advisement since trial for a simple reason: The court determined in its discretion that triage of the Commonwealth's increasingly scarce resources required three other, earlier bench trials from this Session, as well as numerous dispositive motions also heard earlier in the Session, to be resolved ahead of this case.[3]

FINDINGS OF FACT

All of the below-enumerated Findings of Fact represent findings by the court, including but not limited to determinations of the credibility, weight, and probative value of the evidence adduced at trial and reasonable inferences drawn from that evidence, as well as stipulations by the parties.[4]

The Parties

1. Sidley is a limited liability law firm partnership organized under the laws of Illinois. Sidley has a substantial and dedicated reinsurance practice. Sidley partner Susan Stone has litigated and arbitrated reinsurance disputes for over twenty years. Sidley partner William Sneed is also a litigator who practices in the insurance and reinsurance area. He has extensive experience in arbitrating and litigating international and domestic reinsurance disputes. Sneed has been averse to Plaintiff Underwriters or its putative successor Equitas in numerous reinsurance arbitrations over the past decade. Sneed testified he has never represented Underwriters; and that the disqualification at issue is the only time he has ever represented Equitas. Sneed Trial Testimony; Stone Trial Testimony.

2. Sidley's client Liberty Mutual is a mutual insurance company organized under the laws of this Commonwealth. Beginning in 1973, Liberty Mutual issued certain primary liability policies to Armstrong World Industries (Armstrong). In the early 1980's, Armstrong sought coverage from Liberty Mutual for asbestos exposure. Strong Trial Testimony.

3. Certain Underwriters at Lloyd's London consist of certain syndicates that

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[3] The court also determined that cases in the First Criminal session, and petitioners seeking to be discharged from "one-day-to-life" civil commitment as Sexually Dangerous Persons, were entitled to priority attention ahead of this matter.

[4] For purposes of background facts not elaborated at trial, the court relies in part on the parties' Rule 9A(b)(5)(i) Consolidated Statement of Material Facts, first submitted with the cross-motions for summary judgment in April, 2011, and then as Trial Exhibit 1. The document is unfortunately of limited use, in its failure to comply with the letter and spirit of our Rules. See Fabricant, J., "Just the Facts," 55 Boston Bar Journal No. 3 (Summer 2011).

are comprised of named people who underwrote the reinsurance of Liberty Mutual pursuant to certain reinsurance contracts. Underwriters subscribed to a series of reinsurance contracts called the General Excess Treaty, which Liberty Mutual claims reinsured Liberty Mutual for certain of the primary policies it issued to Armstrong. Stone Trial Testimony.

4. In April, 2001 Underwriters sought to invoke the cooperation clause under the General Excess Treaty, subject to a full reservation of rights, allowing Underwriters to be involved with Liberty Mutual's defense or settlement of the Armstrong losses. Stone Trial Testimony.

5. Equitas Insurance Limited (Equitas) is a limited liability company organized under the laws of the United Kingdom with its principal place of business in London, England. The parties dispute the precise legal relationship in the United States of Equitas to Underwriters. Bendig Trial Testimony; Ryan Trial Testimony; Sneed Trial Testimony.

6. A July, 2009 judgment by the English High Court of Justice, Chancery Division, sanctioned transfer to Equitas "of the 1992 and Prior Business carried on at Lloyd's," under Part VII of the Financial Services and Market Act 2000 (Part VII Transfer). The Part VII transfer became effective June 30, 2009. Defendants maintain the Part VII Transfer includes the General Excess Treaty covering Liberty Mutual, and that Equitas is the successor to Underwriters' liabilities for the business covered by the Part VII Transfer. Plaintiffs maintain that, because the Part VII transfer has yet to be recognized or enforced by a court within the United States, Equitas is not the transferee of these particular liabilities of Underwriters – at most it is "a limited transferee, limited by geography as yet." Stone Trial Testimony; Sneed Trial Testimony; Trial Exhibits 73-77, 99.

7. Resolute Management, Inc. – New England Division (Resolute New England) is a division of Resolute Management, Inc., a Delaware corporation based in Nebraska which is sometimes known as a third party administrator. Resolute Management provides claims handling, reinsurance collection, and financial support services. Resolute New England manages North American asbestos, pollution and health hazard direct insurance claims for Underwriters, on insurance contracts written prior to 1993. It is a separate legal entity from Resolute Management Services, Limited of London, f/k/a Equitas Management Services Limited, which manages business reinsured by Plaintiff Equitas, for Plaintiff Underwriters written prior to 1993. Bendig Trial Testimony; Ryan Trial Testimony; Trial Exhibits 12, 35, 46, 87, 98, 99.

8. Brian Bendig is Vice President and General Counsel of Resolute New England. Bendig had authority to execute engagement letters on behalf of Underwriters. Bendig did not need his boss, Thomas Ryan's, or anyone else's approval to do so. Bendig also had authority to provide legal advice to Equitas. Bendig describes the basis of his authority for Equitas as follows: I am the general counsel for an entity which is handling Lloyd's North American direct claims for which Equitas has at least potential,

providing certain legal predicates occur, responsibility." Bendig was the client contact primarily involved in retaining Sidley for the Teck litigation. Bendig Trial Testimony; Trial Exhibits 88, 99.

9. Elizabeth Sackett works for Bendig at Resolute New England. Sackett had day-to-day responsibility for the Teck litigation, and participated in certain of the communications with Sidley, both with respect to conflicts, and with respect to advice about "end game strategies" for the Teck litigation. Sackett echoes Bendig's testimony that, because Resolute New England handled only direct, not reinsurance for Underwriters, she had no reason to know about the Liberty Mutual Arbitration, and did not receive information from Sidley "sufficient for [her] to appreciate the significance" of Sidley's dual role. Trial Exhibit 90.

10. Thomas Ryan is President of Resolute New England. He and Sneed went to high school together. Until this dispute and Ryan's termination of Sneed from all Resolute matters, the two men liked and admired one another, and enjoyed doing business together. Ryan considered Sneed to be "one of our reliable, go-to reinsurance counsel." It was Ryan's decision to approach Sidley for assistance with the Teck litigation. Bendig similarly admired Sneed's work, and characterized Resolute New England's relationship with Sidley and Sneed as "very productive and successful." Ryan Trial Testimony; Sneed Trial Testimony; Trial Exhibit 98; Trial Exhibit 99.

Sidley's Allegedly Conflicting Representations

Liberty Mutual

11. In December, 2007, Liberty Mutual engaged Sidley to advise it concerning its rights and obligations under the General Excess Treaty, including Underwriters' invocation of the cooperation clause with respect to the Armstrong losses. At the time Liberty Mutual engaged Sidley, Liberty Mutual had not settled with Armstrong or billed Underwriters for its alleged share of the Armstrong losses. Trial Exhibit 86.

12. Although the retention occurred in 2007, there is no evidence on this record that Sidley began actively representing Liberty Mutual on this matter until, at the earliest, late 2009.

13. In October, 2009 Liberty Mutual settled the claim made by Armstrong under the primary policies. Stone was informed about, but did not participate in, the settlement negotiations. By correspondence dated February 22, 2010, Liberty Mutual billed its reinsurers pursuant to the General Excess Treaty; Equitas as alleged successor to Underwriters was among them. Stone Trial Testimony.

14. Plaintiffs' alleged share of the settlement exceeds $60M. Plaintiffs declined to pay Liberty Mutual's bill, and on April 6, 2010 Liberty Mutual, through Stone, issued a Demand for Arbitration on Resolute Management Services Ltd., seeking

payment by "the London Reinsurers" (which by Liberty Mutual's definition included both Underwriters and Equitas), including a claim of bad faith settlement practices. Stone acknowledges that Sidley, on behalf of Liberty Mutual, became averse to Equitas shortly before this arbitration demand, when the reinsurer(s) stated "I'm not paying." Stone Trial Testimony; Trial Exhibit 33.

15. Equitas disputes its responsibility for any "share" of the settlement, because Equitas claims not to be the Part VII transferee as a matter of United States law. Thus Equitas claims the Part VII Transfer has been put at issue by Sidley in the Liberty Mutual Arbitration, because Liberty Mutual has taken the position that the arbitration panel has jurisdiction over Equitas. Bendig Trial Testimony; Trial Exhibit 99.

16. Liberty Mutual was consulted about, and consented to, Sidley's representation of Underwriters/Equitas in the Teck litigation. Trial Exhibits 12-14, 17-19.

Underwriters/Equitas

17. On or about January 15, 2010, Bendig sent an email to Sneed seeking consultation on a potential engagement. A telephone call occurred January 18, 2010, among Bendig, Sneed and Sackett, about the potential representation. Bendig and Sackett told Sneed that Underwriters and other London market insurers were defendants in Federal District Court in the state of Washington in which a Canadian mining company, Teck Cominco, had obtained an "anti-anti-suit injunction" against Underwriters with respect to a second matter pending in British Columbia, Canada (the Teck litigation). Sackett had become dissatisfied with current counsel. Bendig, on behalf of Underwriters, wanted Sneed and his colleagues (in particular, an experienced Sidley appellate lawyer admired by Ryan and Bendig named Phillips) to appear in conjunction with the Ninth Circuit appeal of the District Court's order, as well as to provide strategic advice for defending in two forums if the appeal failed. Bendig Trial Testimony; Ryan Trial Testimony; Sneed Trial Testimony; Trial Exhibit 2.

18. Although Bendig was speaking on behalf of Underwriters, Sneed believed Equitas to be a party in interest in the Teck litigation. At the time of this January 18, 2010 telephone conversation, Sneed was well aware of the Part VII Transfer and its history, which he and Sidley had reviewed as part of their regular practice in reinsurance matters involving the London market. It was Sneed's view based on his review of this issue – including prior information he had received from Ryan -- that Equitas was the true risk-bearing party for these types of claims. Sneed Trial Testimony; Stone Trial Testimony.

19. The parties disagree about the content of this first phone call. Bendig denies Sneed mentioned Sidley's "regular" involvement on behalf of clients averse to London market reinsurers, or that Sneed broached the topic of a conflicts waiver in any way. Sackett recalls Sneed said Sidley had been averse to other London market companies in reinsurance disputes, but that Sneed did not specifically discuss Lloyd's or

Equitas in this connection. Sneed maintains he explicitly told Bendig and Sackett that Sidley routinely represented American insurers against London market reinsurers, and that the proposed engagement would not be possible without a conflicts waiver with respect to present and future reinsurance disputes. Sneed also testified Bendig stated in general terms that he did not anticipate a waiver being a problem. Bendig Trial Testimony; Sackett Trial Testimony; Sneed Trial Testimony.

20. On January 29, 2010, Sneed sent Bendig an email indicating the ongoing need to "nail down exactly whom we will be representing (entities in addition to Lloyd's/Equitas?) and how we can ensure that this representation does not threaten Sidley's ability to be adverse to Lloyd's/Equitas and other London market companies in present and future reinsurance disputes." The email attached a draft engagement letter, which named Equitas as the client/Company to be represented; referred generally to other representations by Sidley "presently and regularly" in cases adverse to the Company and other London market reinsurers, in both arbitration and litigation," and named Liberty Mutual as one of Sidley's "clients in this regard." The draft also included general prospective waiver and estoppel language, with a carve out for "substantially related" matters. Trial Exhibit 15.

21. Bendig made no comment whatsoever on the draft engagement letter. In each following written communication, Sneed referred to Sidley's potential client for the Teck litigation engagement as either Lloyd's or Equitas. Trial Exhibits 20, 22, 43.

22. Meanwhile, time was of the essence with respect to Sidley's appearance in the Teck litigation. At the request of Bendig, Sidley filed its appearance on February 12, 2010; the revised engagement letter was not forwarded to Bendig until February 9, 2010. Trial Exhibits 8, 20, 22, 31.

23. The February 9, 2010 email accompanying the revised letter was clear as can be that: "This engagement letter identifies our client as Equitas Insurance Limited (successor to the Lloyd's Syndicates)." The letter defines the "Scope of Representation" as: (a) an appeal to the U.S. Court of Appeals for the Ninth Circuit of an injunction order first issued by the court in *Teck Cominco Metals, Ltd. v. Seaton Ins. Co. et al.*, No. 05-CV-0411-LRS (E.D. Wash.) on or about December 8, 2009, and then re-affirmed in an order dated on or about January 19, 2010; and (b) advice to the Company respecting strategic litigation alternatives in light of the prospect of competing, mirror-image coverage actions over the Teck Cominco environmental liabilities going forward in the United States and Canada." The letter provided that the engagement was effective as of February 1, 2010. Trial Exhibit 22.

24. Sneed revised the engagement letter to be clear "who was in, and who was out" of the representation, to "tighten it." He wanted to confirm Equitas was the party engaging Sidley. And he needed Resolute "to structurally agree to it," to be sure the "waterfront was covered." Without a general prospective waiver, Sneed considered the proposed engagement to be "a non-starter." Sneed Trial Testimony.

25. Plaintiffs have not alleged material difference between the draft and revised letters with respect to the claims and defenses presented in this case, and following careful review, I find none. The revised engagement letter incorporated all of the material language cited in Finding 20 above with respect to a general prospective waiver. No communication from Sidley to anyone at Resolute New England, including but not limited to the revised engagement letter, ever specifically identified the Liberty Mutual Arbitration, or any other particular matter against Equitas, either before or after the arbitration filing. In January, 2010, Stone advised Sneed not specifically to identify the Liberty Mutual matter to Resolute. Stone Trial Testimony; Trial Exhibit 14.

26. Neither Bendig nor anyone else representing the Plaintiffs requested changes to the engagement letter. Because of the importance of the reinsurance work to Sidley and Sneed, Sneed wanted a written waiver even though he believed he had Bendig's oral commitment. Despite repeated requests by Sneed, Bendig did not sign and return the letter until June 23, 2010. February 19, 2010, Bendig told Sneed by telephone that he had no issues with the letter. On March 16, 2010, Bendig told Sneed he would be returning the letter executed. On May 21, 2010, Sneed again asked for the counter-signed letter. Ultimately both Bendig and Sackett reviewed the letter before Bendig signed it, but not until sometime in June, 2010 just before it was signed. Sneed Trial Testimony; Sackett Trial Testimony; Bendig Trial Testimony; Trial Exhibits 43, 52.

27. Bendig testified after the fact (by summary judgment affidavit, deposition and at trial) that he was "uncomfortable" with the engagement letter, thought the letter was "very strange," and that he "had mixed feelings" about it, for a number of reasons. The reasons included what Bendig believed to be the (mis)identification of the client, and the "very substantial exception" to the waiver provision. Bendig did not communicate any of this discomfort to Sneed, nor did he seek guidance from any superior. Bendig testified at deposition he thought the language of the letter "would require a lot of questions and perhaps some difficult discussions" with Sneed. Bendig later testified at trial he signed the letter because he thought the waiver had no legal effect. Bendig Trial Testimony; Trial Exhibits 88 and 99.

28. Bendig has also testified that, at the time, he thought the language of the letter had "less to do with conflicts than the politics in Bill's practice group and somebody putting pressure on him to back off or get us to agree to back off the scope of the representation. That's what I mean by big firm bureaucracy." Trial Exhibit 99.

29. The bulk of Sidley's work on the Teck litigation took place between February and August, 2010. Oral argument occurred in February, 2011. Trial Exhibit 84.

30. It is undisputed Sidley's work on the Teck litigation included advice concerning strategic alternatives should the Teck appeal be unsuccessful. Although the Part VII Transfer was not an issue on appeal in the Teck litigation, the Teck litigation could ultimately involve questions of joint and several liability, and thus potential successor liability under the Part VII Transfer. Teck Metals, Ltd. v. London Market Ins.,

2010 WL 48138-7, at *10 (E.D. Wash. Aug. 25, 2010). Sneed testified at trial that Sidley's work for Sackett did not include an opinion "on whether it [the Part VII Transfer] would be recognized by U.S. courts – they kept that question away from us." Sackett testified the Part VII Transfer was referenced as part of an analysis of Lloyd's/Equitas' options, should there be two different Teck judgments in the United States and Canada. Sneed Trial Testimony; Sackett Trial Testimony; Trial Exhibit 90.

31. The parties nonetheless acknowledge the existence of a (privileged) memorandum from Sidley to Sackett dated April 16, 2010. Bendig never saw this memorandum, and was not privy to whatever advice it contained. Bendig does not know if any confidential information was communicated with that advice. Sackett characterized the memorandum from Sidley as "critical to our entire litigation strategy [in the Teck litigation]," and stated she believed information she provided to Sidley could be used against her clients. However, the record does not establish that the information provided by Resolute was confidential and unavailable from public sources. Sackett Trial Testimony; Trial Exhibits 97 and 99.

32. It is Plaintiffs' position in this litigation that enforcing judgments is "always an issue" because of the existence of the Part VII Transfer. Bendig Trial Testimony; Trial Exhibit 99.

The Challenge to Sidley

33. The first written challenge to Sidley's representation in the Liberty Mutual Arbitration came by letter of June 7, 2010, stating "[w]e are advised that Resolute is a long-standing, current client of Sidley." That initial challenge was rebuffed by Stone on June 17, 2010. Stone considered the challenge to be "tactical," and "dirty pool" on the part of Liberty Mutual. Sneed did not see Stone's letter of June 17, 2010 before it went out. Stone Trial Testimony; Sneed Trial Testimony; Trial Exhibits 46-51.

34. A subsequent letter dated September 13, 2010 gives four reasons for the disqualification challenge which is the subject matter of this case: Sidley's alleged representation of Certain Underwriters in the Teck litigation; a "current conflict with Equitas . . . which is named as Sidley's client in the Teck engagement letter and is named as a defendant in the Arbitration;" a lack of informed consent; and a substantial relationship between the Teck litigation and the Liberty Mutual Arbitration, due to the potential role of the Part VII Transfer. Trial Exhibits 46-49, 64.

35. It is Bendig's position that he first learned of the existence of the Liberty Mutual Arbitration "accidentally," or by "happenstance" in August, 2010, when he overheard a conversation about Sidley's conflicts challenge to Underwriters/Equitas' counsel in the Liberty Mutual Arbitration. Sometime after that, Bendig first showed the retention letter to Ryan. However, it is undisputed that Ryan knew about Sidley's role in the Liberty Mutual Arbitration no later than April 27, 2010. Trial Exhibit 99.

The Other Alleged Conflict of Interest

36. Approximately six months before Plaintiffs filed this action to challenge Sidley's representation of Liberty Mutual, but just a week before Ryan first learned of the Liberty Mutual Arbitration, Sidley challenged the representation being provided to these Plaintiffs in that Arbitration.

37. Specifically, Stone sent a letter dated April 20, 2010, raising an issue about a lawyer (Stephen Kennedy), who had recently transferred his practice to Clyde & Co. Stone alleged Kennedy had previously advised Liberty Mutual, with regard to Equitas/Lloyd's invocation of the cooperation clause under the General Excess Treaty, back in 2001. Trial Exhibit 36.

38. Following some back and forth between those parties not probative here, on May 19, 2010, Stone sent another letter on behalf of Liberty Mutual, stating Sidley's conclusion that Clyde & Co. had a conflict, and requesting that Clyde & Co. withdraw from its representation of Underwriters and Equitas in the arbitration. Trial Exhibit 42.

39. Sneed did not support Sidley's challenge to Clyde & Co. He "knew these things [conflicts challenges] were poisonous." Sneed Trial Testimony.

40. On July 13, 2010, Clyde & Co. withdrew from its representation in the Liberty Mutual arbitration. Trial Exhibit 56.

The Role of Thomas Ryan

41. Ryan called Sneed on the morning of April 27, 2010. Sneed had known Ryan for years and understood Ryan to be Bendig's boss. The parties dispute the substance of that initial conversation. Ryan maintains he communicated his displeasure with Sidley's conflicts challenge to Clyde & Co., and asked Sneed to "look into it," and attempt to persuade Sidley to drop its conflicts claim, and move on to the merits of the dispute. Ryan remembers one of his colleagues (Brian Snover) alerted him that Sidley itself was adverse to Underwriters in a matter, but nonetheless was challenging one of Underwriters' lawyers for conflicts purposes. Ryan does not recall discussing Sidley's alleged conflict in the Liberty Mutual Arbitration directly with Sneed, or asking Sidley to withdraw from the Arbitration. Sneed maintains Ryan told Sneed Ryan had just learned of Sidley's involvement in the Liberty Mutual Arbitration. Ryan Trial Testimony; Sneed Trial Testimony; Trial Exhibit 98.

42. Apparently unbeknownst to Stone, Sneed, Bendig or Ryan, Mr. Snover, General Counsel to Berkshire Hathaway Group of Insurance Companies, a Resolute parent company, and Michael Knoerzer, the lead Clyde & Co. counsel representing Underwriters/ Equitas in the Liberty Mutual Arbitration who Sidley was seeking to disqualify, were very close friends. According to Ryan and Bendig, Knoerzer complained to Snover, who then reported to Ryan, that despite Sidley itself being averse

to Underwriters in the Liberty Mutual Arbitration, Sidley was "making things tough for Mike." Thus, Ryan's April 27, 2010 telephone call to Sneed. Ryan Trial Testimony; Trial Exhibits 98 and 99.

43. The two sides agree there was no mention of the Teck litigation per se in this initial April 27, 2010 conversation between Ryan and Sneed. Ryan testified at trial that he did not see the Sidley engagement letter for the Teck litigation until sometime after August, 2010, and that Bendig had not consulted with him about it. Ryan maintained he had very limited knowledge about both the Teck litigation and the Liberty Mutual Arbitration at the time of the April 27, 2010 phone call, and that he "did not make a connection" between the two. However, Sneed experienced the April 27, 2010 telephone conversation as "the warning." Ryan Trial Testimony; Trial Exhibits 95, 98.

44. Sneed immediately relayed Ryan's concerns to the appropriate people at Sidley. Sneed Trial Testimony; Trial Exhibits 40-41.

45. Sneed and Ryan spoke several times in the following months about the Liberty Mutual challenge to Clyde & Co.; Sneed informed Ryan there "was nothing he could do about it," and that the issue was "not resolvable." By the time of their dinner conversation in late summer 2010, Ryan had "connected the dots" with respect to the Liberty Mutual Arbitration and the Teck litigation. Ryan also understood from Sneed that Stone was "unwilling to move" on the Clyde & Co. challenge. Ryan Trial Testimony; Sneed Trial Testimony; Trial Exhibit 98. Trial Exhibit 41.

46. Sneed thought the dinner meeting with Ryan in late August or early September, 2010 was going to be purely social. However, at that meeting, Ryan communicated his decision to Sneed that Resolute would no longer be hiring Sneed for any Resolute work. Ryan said he thought the conflicts challenge to Clyde & Co. was "petty," and that the challenge had antagonized Snover. Ryan also informed Sneed that "the rules are changing," and that Liberty Mutual and Equitas had "an acrimonious history." Ryan explained that, when Sneed had represented entities averse to Underwriters in the past, Resolute was not representing Underwriters. Finally, Ryan told Sneed he would hire Sneed if Sneed left Sidley and worked at another law firm. Ryan Trial Testimony; Trial Exhibit 98.

LEGAL STANDARDS

1. In deciding whether a disqualification of counsel is warranted, a court must reconcile the right of a party to counsel of its choice on the one hand, and the obligation of maintaining the highest standards of professional conduct and the scrupulous administration of justice on the other. Slade v. Ormsby, 69 Mass.App.Ct. 542, 545 (2007), citing Mailer v. Mailer, 390 Mass. 371, 373 (1983). Charges of conflict of interest . . . warrant searching review before a disqualification order can be sustained. Adoption of Erica, 420 Mass. 55, 61 (1997).

2. Massachusetts Rule of Professional Conduct 1.7(a) provides that "[a]

lawyer shall not represent a client if the representation of that client will be directly averse to another client unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation." Rule 1.10(c), which applies to disqualifications imputed to lawyers associated in a firm, in turn incorporates the conditions of Rule 1.7(a).

3. An attorney who faces a conflict has an affirmative duty to disclose it, and to obtain the client's consent. In re Eisenhauer, 426 Mass. 448 (1998). Counsel bears the burden of proof that it obtained an informed consensual waiver. Celgene Corp. v. KV Pharm. Co. 2008 U.S. Dist. LEXIS 58735, *16-18 (D.N.J. July 28, 2008).

4. A certain level of detail is essential to informed consent. Centera, Inc. v. Estrin, 639 F.Supp.2d 790, 809-810 (E.D.Mich. 2009); Celgene Corp., at *19-20; Image Tech. Servs. Inc. v. Eastman Kodak Co., 820 F. Supp. 1212, 1217 (N.D. Cal. 1993).

5. Motions to disqualify are by their nature intensely fact specific. Erica, 426 Mass. at 63-64. Whether the relationship between representations (be they concurrent or sequential) is "substantial" is question of fact for the trial court. Slade v. Ormsby, 69 Mass.App.Ct. 542, 547 & n.11. (2007). Our Supreme Judicial Court has not yet determined whether the substantiality of the relationship should be analyzed based on the subject or factual contexts of the two matters, or on the alleged similarity or identity of issues involved. Erica, 426 Mass. at 62; Dee v. Conference Holdings, Inc., 1998 WL 1247926 (Mass. Super. 1998)(Sosman, J.)

6. However, helpful analysis may also be gleaned from cases addressed to Rule 1.9, which prevents sequential representation of different, adverse clients in "substantially related matter[s]." Erica, 426 Mass. 55, 61-62 and note 7 ("We interpret the scope of both DR 4-101 (B) and rule 1.9 to encompass the adverse effect on the interest of a former and the present client.")(1997); National Medical Care, Inc. v. Home Medical of America, Inc., 2002 WL 31068413 (Mass. Super. 2002)(Gants, J.); Dee.

7. Prospective waiver of conflicts of interest by agreement is not uncommon among sophisticated parties. Max-Planck-Gesellschaft Zur Forerun Der Swissenchaften E. V. v. Whitehead Inst. For Biomedical Research, 2011 WL 487828, at *6 (D. Mass. Feb. 7, 2011). Other jurisdictions have permitted advance waivers of potential future conflicts, even without specific disclosure of the exact nature of the future conflict. Visa U.S.A. Inc. v. First Data Corp., 241 F. Supp. 2d 1100, 1105 (N.D. Cal. 2003).

8. "The general rule in disqualification cases has been that, upon proof of a former attorney-client relationship concerning substantially related matters, disclosure of confidences is presumed. . . . [However] equity demands, and the pragmatics of emerging specialization inherent in contemporary legal practice dictates, that this presumption be rebuttable." City of Cleveland v. Cleveland Electric Illuminating Co., 440 F.Supp. 193, 209 (1977), citing T.C. Theatres Corp. v. Warner Bros. Pictures, Inc., 113 F.Supp. 265, 268 (S.D.N.Y. 1953). See also, Employers Ins. Co. of Wausau v. Munich Reinsurance Am., Inc., 2011 WL 1873123 (S.D. N.Y. May 16, 2011).

RULINGS

1. I credit Sneed's version of the circumstances and communications surrounding the engagement for the Teck litigation, for multiple reasons: 1) Sneed's version is more consistent with the documentary evidence; 2) it is more consistent with the parties' respective positions otherwise expressed about the market in which they worked; 3) it is more consistent with common sense; and 4) I found Sneed's testimony at trial to be more internally consistent, more precise, more attentive to detail, and generally more credible, than that of Bendig. To take but a few examples:

2. Sneed consistently, in all of his written materials, identified the client company as Equitas. This was in keeping with Sneed (and Sidley's) concerted view that Equitas was, or would be, the successor to Underwriters' liabilities for matters such as Teck, and thus should be treated as the real party in interest. While I appreciate Bendig held a contrary view, there is no credible evidence before me that Bendig expressed his views to Sneed on the proper client identification for this engagement at any material time.

3. Sneed had indisputably been averse to Underwriters' interests for years. He (and Sidley) had every reason and incentive to seek to preserve those ongoing relationships, and that experience. No reason has been presented on this record why Sneed would be motivated to put at risk the potential of conflict with Sidley's many other insurance clients, simply to acquire this one piece of business on the Teck litigation. This is all the more true because Resolute was not a new client for Sneed; Resolute had already sent Sneed work in the past. Sneed's specifically seeking an explicit waiver from Liberty Mutual through Stone speaks to Sneed's awareness of his ethical duties, as well as to his business priorities.

4. Bendig, in contrast, offers no explanation – other than expediency – for his actions surrounding the Teck engagement letter. Bendig ignored what he maintains was the fundamentally erroneous naming of the client, despite Resolute's supposedly staunch position on the (non) liability of Equitas. Bendig ignored what he characterized as the "broad exception" carved from the waiver clause for "substantially related" matters, purportedly because of his view that the Part VII Transfer issue would render any insurance or reinsurance action brought against Equitas "substantially related" to any other. And, Bendig asks the court to believe he ultimately signed the engagement letter, either: 1) to spare himself and Sneed uncomfortable conversation about what Bendig presumed was internal Sidley politics; or 2) because Bendig didn't believe the engagement letter was valid.

5. Bendig also asks the court to believe that, although he possessed "authority to provide legal advice to Equitas," he did not have authority in speaking with Sneed or any other potential counsel to bind Equitas to engagements or to conflict waivers. This last position in particular – whether it derives from someone else in the Equitas/Resolute hierarchy or from Bendig personally – cannot be credited by the court. And none of these positions by Bendig makes any sense coming from a professional of

his credentials and experience. I can only conclude that for reasons not before me, Bendig failed to exercise due care and appropriate precision in securing this engagement.

5. In so ruling I do not suggest Bendig has sought intentionally to mislead the court, and I expressly reject Defendants' claims of "rascality" on Bendig's part. Nor do I impugn Sackett's testimony, to the extent it supports Bendig. Rather, I find Bendig's demeanor at trial to be consistent with a lackadaisical or cavalier approach to these issues, which I also find to have been evidenced in his dealings with Sneed on the engagement. Alternatively, the evidence supports a calculated business strategy on the part of Underwriters/Equitas to obtain Sidley's expertise for the short term – a strategy which is every client's prerogative. Resolute wanted Sidley; Resolute wanted Sidley in a hurry; and Bendig thought he knew the reinsurance market well enough to know who was who, and that he need not heed "law firm bureaucracy." Bendig was mistaken.

6. Bendig was nonetheless correct that some internal law firm politics were at work. It was Stone's preference that the language of the waiver remain general, and not identify the (then, potential only) Liberty Mutual reinsurance dispute. Stone and Sneed disagreed about the wisdom of a conflicts challenge to Clyde & Co; Stone also won that battle. And, when the Resolute challenge surfaced, Stone did not support Sneed's efforts to seek a compromise. I do not presume to assess the ultimate value to Liberty Mutual's interests of the Clyde & Co. challenge. However, with respect to the snapshot in time before me (spring/ summer of 2010) of Sidley's ongoing business relationships, Sneed was correct when he predicted "poisonous" results would follow.

8. Given these predicate findings, the court must analyze the conflicts claim and consensual waiver defense as a matter of Massachusetts law.

9. First, I find and rule from the record before me that, as of no later than April, 2010, Sidley's concurrent representations of Liberty Mutual in a reinsurance claim against the London market insurers including Equitas, and of Underwriters/Equitas in the Teck litigation, created a professional conflict of interest. This would be true regardless of whether the Teck client were Underwriters or Equitas. Second, I find and rule that Sidley, through Stone and Sneed, affirmatively disclosed the potential future conflict to Liberty Mutual in January, 2010, and obtained Liberty Mutual's consensual waiver of that conflict.

10. Third, I find and rule that both through Sneed's oral and email communications with Bendig, as well as through the February 9, 2010 engagement letter itself, Sidley adequately and affirmatively disclosed to Underwriters/Equitas the potential conflict(s), for the following reasons:

a. Sidley identified Equitas Insurance Limited as the client Company for purposes of the engagement;

b. Sidley disclosed that the "firm's reinsurance dispute work presently and regularly includes cases adverse to the Company and/or other London market companies in both arbitration and litigation;"

c. Sidley identified Liberty Mutual as a client for whom it was "presently and regularly" working;

d. Sidley clearly and expressly stated that if it could not obtain the waiver to "continue to represent clients adverse to the Company and other London market companies on matters unrelated to the Teck Cominco coverage/forum dispute, we could not undertake the Representation;" and

e. I expressly find and rule that this level of detail is sufficient to obtain informed consent for a general prospective waiver of conflicts from these client parties involved in this sophisticated market.

10. Fourth, Sidley reasonably believed its ongoing "reinsurance dispute work" "in both arbitration and litigation" would not adversely affect its relationship with Equitas in the Tech litigation. Sidley's belief was reasonable because the Teck litigation was not "substantially related" to Sidley's reinsurance dispute work. I find this to be true regardless of whether the "facts" or the "issues" test is applied. The subject matters of various primary and reinsurance coverage disputes (in this example, coverage for Canadian mining losses versus coverage for asbestos contamination) may be (and in this case were) entirely unrelated. The only conceivable or alleged commonality between the Liberty Mutual Arbitration and the Tech litigation is the "end game" issue of whether Equitas will ultimately be held liable for any judgment in favor, or settlement of, the Underwriters parties' reinsurance liabilities to the respective "ceding" parties.

11. As the late Supreme Judicial Court Justice Sosman explained when she was a trial judge of this court, the public policy purpose behind both tests is to preserve client confidences, that is to insure against the risk that counsel will be tempted to disclose some useful information gleaned from one engagement to an averse client in another engagement. Dee, at *2. Here the record fails to demonstrate or even persuasively suggest the existence of any useful client confidences that could potentially give rise to such a temptation. I find it to be a matter of public record that: 1) Equitas intends to challenge any and all attempted applications of Part VII Transfer in the United States; and 2) Equitas will also continue to challenge particular allegations of successor liability on a case-by-case basis. Similarly, lawyers representing "ceding" companies seeking reinsurance coverage can be expected to make arguments supporting successor liability, relying at least in part on the Part VII Transfer. There is nothing confidential or surprising about any of this.

12. By the explicit language of the engagement letter, Sneed promised on behalf of Sidley "that during the course of our Representation we will not be provided with confidential information from the Company or any other entity respecting any subject other than the Teck Cominco coverage/forum dispute." There is no evidence

before me that Sidley has breached its promise. The only evidence is that Sackett sought and received general advice from Sidley about ultimate enforcement of the two potential Teck judgments. It is reasonable to infer, and I do infer, from that evidence that the privileged Sidley memoranda include general arguments and strategies, both for and against successor liability, based on the specific facts of the Teck insurance history. It is not reasonable to infer from this record, and I therefore decline to infer or to find, that any exchanges between Sackett and Sidley on the Part VII Transfer issue implicated confidential information from Equitas that was not, and is not, readily available from public or other industry sources. I find that any presumption that disqualifying confidences were exchanged has been rebutted on this record. National Medical Care (claim of disclosure not credible; information contained in public record).

13. I cannot and do not accept Plaintiffs' position that the mere existence of the Part VII Transfer alone means that an issue of successor liability is dispositive for disqualification purposes in any reinsurance engagement. The potentially crippling effects of such a ruling on the market for reinsurance legal services flies in the face of our cautious disqualification jurisprudence, and is entirely unwarranted on this record.

14. Pursuant to the engagement letter, Bendig agreed on behalf of Equitas that Sidley could represent Liberty Mutual, "the other client," under these circumstances, and that "the Company waive[d] any conflict arising from such representation, and the Company agrees that it will be estopped form seeking and will not seek to disqualify or otherwise seek to prevent [Sidley] from representing such other client." I find Bendig was an authorized, disclosed agent of both Underwriters and Equitas for these purposes. I find Bendig knowingly agreed to the general prospective waiver, in consideration of obtaining the immediate, expert representation by Sidley in the Teck litigation which Resolute sought on behalf of Equitas. I rule Underwriters/Equitas is therefore estopped, pursuant to the terms of Bendig's knowing, informed and consensual waiver, from disqualifying Sidley from the Liberty Mutual Arbitration. The waiver is valid, binding, and effective.

Conclusion

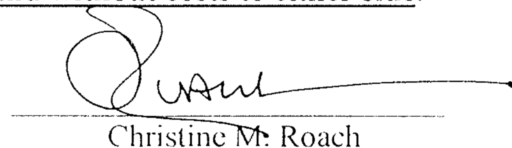
For all of the reasons stated, the court orders as follows:

- **On Count I, Plaintiffs' plea for declaratory judgment in their favor is DENIED, judgment to enter for Defendants; and**

- **On Count II, Plaintiffs' plea for a preliminary and permanent injunction is DENIED, judgment to enter for Defendants.**

Case to be DISMISSED, with prejudice, and without costs to either side.
SO ORDERED.

Dated: March 5, 2012



Christine M. Roach