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## Domesticating the United States' Securities Laws: The Ninth Circuit Joins the Majority in Enforcing Forum Selection and Choice of Law Clauses Displacing U.S. Law in *Richards v. Lloyd's of London*

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# DOMESTICATING THE UNITED STATES' SECURITIES LAWS: THE NINTH CIRCUIT JOINS THE MAJORITY IN ENFORCING FORUM SELECTION AND CHOICE OF LAW CLAUSES DISPLACING U.S. LAW IN *RICHARDS V. LLOYD'S OF LONDON*

By Anthony Ragozino†

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"The available English remedies are not adequate substitutes for the firm shields and finely honed swords provided by American securities law."<sup>1</sup>

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<sup>1</sup> *Richards v. Lloyd's of London*, 107 F.3d 1422, 1430 (9th Cir. 1997) (No. 95-5574) [hereinafter *Richards II*].

## I. INTRODUCTION

On February 3, 1998, the United States Court of Appeals for the Ninth Circuit, after reconsideration en banc, joined the majority of circuit courts in holding that forum selection and choice of law clauses in Lloyd's of London<sup>2</sup> policies are enforceable despite anti-waiver provisions contained in the Securities Act of 1933<sup>3</sup> and the Securities Exchange Act of 1934,<sup>4</sup> which appear to prohibit enforcement of the choice clauses.<sup>5</sup> In so holding, the Ninth Circuit withdrew its original three-judge panel decision in which it held that these choice clauses were void under the federal securities laws.<sup>6</sup> In 1986, these clauses were contained in all new contracts, and inserted as an amendment to all pre-existing contracts, between Lloyd's and individuals Lloyd's recruited in the United States to invest in the Lloyd's underwriting system.<sup>7</sup> The clauses require that all dis-

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<sup>2</sup> Hereinafter referred to as "Lloyd's." The Corporation of Lloyd's (also referred to as the Society of Lloyd's and the Council of Lloyd's) was established by the Lloyd's Acts of 1871 to 1982. The Corporation of Lloyd's is the administrative entity that provides the physical facilities and regulatory staff of the insurance market, and also provides services such as accounting, preparation of policies, and supervision of brokers. The Council of Lloyd's is the governing body of the society and the corporation responsible for governance of the market. Appellees' Answering Brief at 10, *Richards v. Lloyd's of London*, 107 F.3d 1422 (9th Cir. 1997) (No. 95-5574). See also *Richards v. Lloyd's of London*, 1995 U.S. Dist. LEXIS 6888, at \*15; Fed. Sec. L. Rep. (CCH) ¶98,801 (S.D. Cal. 1995) [hereinafter, *Richards I*]. In *Richards I*, the plaintiffs sued the Corporation of Lloyd's and the unincorporated association of Lloyd's of London. See Plaintiffs/Appellants' Opening Brief at 3 (citing *Richards II*, 107 F.3d 1422).

<sup>3</sup> See Securities Act of 1933, 15 U.S.C. §§ 77a et seq. (1994) [hereinafter Securities Act]. The Securities Act regulates public offerings of securities. It contains the general requirement that all securities offered and sold to the public be registered with the Securities and Exchange Commission, as well as several exemptions from the registration requirement. See THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* 7 (2d ed. 1990).

<sup>4</sup> 15 U.S.C. §§ 78a et seq. (1994) [hereinafter Securities Exchange Act]. The Securities Exchange Act regulates the secondary market, or the market after an issuer's securities are first sold to the public. The Securities Exchange Act created the Commission and imposed upon it the responsibility of administering the Securities Act and the Securities Exchange Act. The Securities Exchange Act contains many varied provisions, including provisions against fraud in connection with the purchase or sale of securities. See HAZEN, *supra* note 3, at 7-8.

<sup>5</sup> See *Richards v. Lloyd's of London*, 1998 U.S. App. LEXIS 1414, 135 F.3d 1289 (9th Cir. 1998) (No. 95-56467) [hereinafter *Richards III*].

<sup>6</sup> See *Richards III*, at \*1.

<sup>7</sup> See *Richards II*, 107 F.3d. at 1423. See *infra* part II for a description of the Lloyd's system.

putes arising out of the contracts be litigated in English courts and pursuant to English Law.<sup>8</sup> These clauses were inserted after two significant events: (1) Lloyd's exposure to claims due to threatened litigation related to asbestos and other catastrophic losses;<sup>9</sup> and (2) Parliament's passage of the Lloyd's Act of 1982, which grants Lloyd's immunity from certain liability in suits filed by investors in the Lloyd's system.<sup>10</sup> The purposes of this article are to analyze the Ninth Circuit's reasoning in *Richards II*<sup>11</sup> and *Richards III*, discuss the present state of the law on this issue, and explain how and why the law should be changed. This article proposes that the law provide as follows: (1) the anti-waiver provision of the Securities Act applies to all cases in which a security is acquired in the United States; (2) the anti-waiver provision of the Securities Exchange Act applies to all cases in which a security is offered,<sup>12</sup> purchased,<sup>13</sup> or sold<sup>14</sup> in the United States, and (3) neither anti-waiver provision can be avoided by a choice of law clause, or by a forum selection clause

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<sup>8</sup> See *id.* at 1423.

<sup>9</sup> See *id.* See also *Richards I*, 1995 U.S. Dist. Lexis 6888, at \*20; *infra* note 37.

<sup>10</sup> Lloyd's Act, 1982, ch. 14., § 14 (Eng.).

Section 14 provides that Lloyd's shall not be liable for damages for negligence or other tort, breach of duty or otherwise, in respect of any exercise of or omission to exercise any power, duty or function conferred or imposed by Lloyd's Acts 1871 to 1982 . . . (a) in so far as the underwriting business of any member of the Society or the costs of his membership or the business of any person as a Lloyd's broker or underwriting agent may be affected unless the act or omission complained of (i) was done or omitted to be done in bad faith. *Id.*

<sup>11</sup> Compare *Richards II*, 107 F.3d at 1427 (striking down choice of law and forum selection clauses) with *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996) (upholding choice of law and forum selection clauses) [hereinafter *Allen II*]; *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353 (2d Cir.), *cert. denied*, 510 U.S. 945 (1993); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.), *cert. denied*, 506 U.S. 1021, 113 S. Ct. 658 (1992).

<sup>12</sup> See § 2(3) of the Securities Act, 15 USC § 77b (defining "offer to sell," "offer for sale," and "offer" to include "every attempt or offer to dispose of, or solicitation of an offer to buy, a security, for value").

<sup>13</sup> See § 3(a)(13) of the Securities Exchange Act, 15 USC § 78c (defining "buy" and "purchase" to include "any contract to buy, purchase, or otherwise acquire").

<sup>14</sup> See § 2(3) of the Securities Act, 15 USC § 77b (defining "sale" and "sell" to include "every contract of sale or disposition of a security or interest in a security, for value"); section 3(a)(14) of the Securities Exchange Act, 15 USC § 78c (defining "sale" and "sell" to include "any contract to sell or otherwise dispose of).

where the chosen forum would not apply United States securities law.

Part II of this article provides an introduction to the Lloyd's of London system and a brief explanation of the role of each participant. Part III traces the history of *Richards v. Lloyd's of London* and includes a discussion of the district court and Ninth Circuit opinions. Part IV provides a critical analysis of the Ninth Circuit's majority and dissenting opinions in *Richards II* and *Richards III*. Part V summarizes some recent cases that addressed this issue and one district court case which is set to be heard by the U.S. Court of Appeals for the Eleventh Circuit. Part VI contains a proposal for dealing with the issue of the anti-waiver provisions of the Securities Act and the Securities Exchange Act, as related to choice of law and forum selection clauses, in future cases.

## II. LLOYD'S OF LONDON AND THE UNITED STATES MARKET

Lloyd's, an English concern, operates a massive insurance market.<sup>15</sup> Although Lloyd's does not underwrite insurance, it manages the England based market in which agencies around the world underwrite insurance.<sup>16</sup> Having begun in 1680, insuring shipping risks out of a coffee house in London, the Lloyd's market now has more than three hundred agencies competing for underwriting business.<sup>17</sup> Each underwriting agency, or syndicate, is managed by a Managing Agent who is responsible for the syndicate.<sup>18</sup> In this capacity, the Managing Agent seeks un-

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<sup>15</sup> Lloyd's relationship to the insurance market it regulates has been analogized to the New York Stock Exchange's regulatory relationship to the stock market. See *Roby*, 996 F.2d at 1357. See also *Haynsworth v. Lloyd's of London*, 933 F. Supp. 1315, 1318 (S.D. Tex. 1996), *aff'd*, 121 F.3d 956 (5th Cir. 1997) [hereinafter *Haynsworth I*] (referring to Lloyd's as "an exchange — a place where people meet to do business" and noting that its duties are regulatory and that Lloyd's is managed by a board elected by its members) (citing ELIZABETH LUESSENHOP & MARTIN MAYER, *RISKY BUSINESS* (1995); ADAM RAPHAEL, *ULTIMATE RISK: THE INSIDE STORY OF THE LLOYD'S CATASTROPHE* (1994); LLOYD'S OF LONDON MEMBERSHIP GUIDE, A GUIDE TO CORPORATE MEMBERSHIP (Sept.1993); INTERNAL REPORT TO THE CHAIRMAN OF LLOYD'S, REPORT OF AN INQUIRY INTO SYNDICATE PARTICIPATIONS AND THE LMX SPIRAL (1992)).

<sup>16</sup> See *Richards I*, 1995 U.S. Dist. Lexis 6888, at \*15.

<sup>17</sup> See *Allen II*, 94 F.3d at 926; *Haynsworth I*, 933 F. Supp. at 1318; *Richards I*, 1995 U.S. Dist. Lexis 6888, at \*15. In 1871, Lloyd's was incorporated by an act of Parliament. See *id.*

<sup>18</sup> See *Richards I*, 1995 U.S. Dist. Lexis 6888, at \*15.

derwriting business from brokers and raises capital to insure the underwritten risks.<sup>19</sup> To obtain this capital, the Managing Agent solicits investors to become members, called "Names." The Names are represented in their dealings with the Managing Agent by the Members' Agent. The Names enter into a Members' Agent's Agreement with the Members' Agent, a Managing Agent's Agreement with the Managing Agent, and a General Undertaking with Lloyd's.<sup>20</sup>

The Names decide how much money to invest and in which syndicates to participate.<sup>21</sup> Names are either inside (or working) Names or outside (or external) Names.<sup>22</sup> Inside Names are active participants in the underwriting process; outside Names are passive investors.<sup>23</sup> The outside Names invest a certain amount of money in the syndicate. Usually this investment is in the form of a letter of credit for an amount equal to a percentage of the premium income they expect to receive in a given year from their underwriting syndicate.<sup>24</sup> Although the Names are responsible only for their own share of a syndicate's loss, they assume unlimited liability for that share.<sup>25</sup>

During the 1970's and 1980's, in an effort to expand its business, Lloyd's recruited people in the United States to become outside Names.<sup>26</sup> Americans who already were outside Names were encouraged to recruit more Names in the United States.<sup>27</sup> Lloyd's efforts were successful inasmuch as it raised

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<sup>19</sup> See *id.*

<sup>20</sup> See *id.* at \*17. The General Undertaking is the primary document establishing the Names' membership in the Lloyd's system. See Appellees' Answering Brief at 10.

<sup>21</sup> See *Richards I*, 1995 U.S. Dist. Lexis 6888, at \*19.

<sup>22</sup> See *Richards II*, 107 F.3d at 1424.

<sup>23</sup> See *id.* See also Appellants' Opening Brief at 9 (stating that Names are passive in that they do not issue policies or determine the amount of premiums charged, nor do they meet with policyholders); Plaintiffs/Appellants' Reply Brief at 12 (stating that "Names are completely prohibited by Lloyd's from any participation in the actual business of underwriting insurance") (citing *Richards II*, 107 F.3d at 1424).

<sup>24</sup> See *Richards II*, 107 F.3d at 1424; *Richards I*, 1995 U.S. Dist. Lexis 6888, at \*17.

<sup>25</sup> See *Richards I*, 1995 U.S. Dist. Lexis 6888, at \*19-20.

<sup>26</sup> See *Richards II*, 107 F.3d at 1424; *Richards I*, 1995 U.S. Dist. Lexis 6888, at \*20. See Appellants' Opening Brief at 5-6. (stating that this effort by Lloyd's to recruit United States residents to invest in Lloyd's was initiated soon after pollution and asbestos claims under Lloyd's policies had begun to mount).

<sup>27</sup> See *Richards II*, 107 F.3d at 1424.

more than \$600 million in letters of credit and deposits from over 3,000 Americans who signed contracts to become outside Names.<sup>28</sup> These outside names included Alan Richards and 573 other individuals.<sup>29</sup>

### III. RICHARDS V. LLOYD'S OF LONDON

#### A. *Background*

In 1986, all new and pre-existing Lloyd's Names were required to sign a Members' Agent's Agreement and a General Undertaking which contained two provisions previously absent from these agreements.<sup>30</sup> Paragraph 2.1 of the General Undertaking, the choice of law clause, states that: "[t]he rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking, shall be governed by and construed in accordance with the laws of England."<sup>31</sup> Paragraph 2.2 of the General Undertaking, the forum selection clause, states that: "[e]ach party irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at Lloyd's. . ."<sup>32</sup>

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<sup>28</sup> See *id.*

<sup>29</sup> Hereinafter referred to collectively as the "Plaintiffs." Although the district court opinion states that there were 574 Plaintiffs, the Plaintiffs state that there were 609 Plaintiffs, 603 of which were recruited in the United States, "using face-to-face meetings, telephone calls, correspondence and other means of solicitations." Appellants' Opening Brief at 8-10. The Appellants' Opening Brief also states that some of the Plaintiffs were parties in *Roby*, a case factually similar to *Richards II*, and that collateral estoppel bars them from asserting that the anti-waiver provisions of the federal securities laws, discussed below, preclude enforcement of the choice clauses. See *id.* at 25-26, n.26. However, the Plaintiffs urge that the issue of whether the clauses were procured by fraud was not decided in *Roby* and, therefore, none of the Plaintiffs are collaterally estopped from making that claim here. See *id.*

<sup>30</sup> See *Richards II*, 107 F.3d at 1425; *Richards I*, 1995 U.S. Dist. Lexis 6888, at \*17.

<sup>31</sup> *Richards I*, 1995 U.S. Dist. Lexis 6888, at \*18 n. 11.

<sup>32</sup> *Id.* The Members' Agent's Agreement contains similar provisions. See *id.* at \*17. When discussing both, the forum selection clause and the choice of law clause will be referred to as the "choice clauses" or the "clauses." The Plaintiffs claimed that the addition of the choice clauses was the only material change in these agreements from the agreements that were used prior to 1986. Appellants' Opening Brief at 13. Further, the Plaintiffs claimed that these agreements con-

These clauses were inserted into the Lloyd's agreements despite express statutory language contained in the U.S. securities laws which appears to prohibit enforcement of the clauses. Specifically, Section 14 of the Securities Act provides as follows: "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void."<sup>33</sup> Section 29(a) of the Securities Exchange Act provides a similar anti-waiver provision.<sup>34</sup> It reads: "[a]ny condition, stipulation or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder . . . shall be void."<sup>35</sup> Section 29(a) is broader than Section 14 in that its application is not limited to persons "acquiring" a security; presumably, it would also apply to persons selling a security as well as persons to whom a security is offered.

#### B. *The District Court*

On October 9, 1994, the Plaintiffs sued Lloyd's in federal court in the Southern District of California.<sup>36</sup> The Plaintiffs alleged that Lloyd's failed to disclose that their syndicates reinsured high-risk asbestos and toxic waste claims that arose before the Plaintiffs became Names.<sup>37</sup> The Plaintiffs claimed that Lloyd's violated the anti-fraud provisions of the federal securities laws by omitting this fact.<sup>38</sup> The Plaintiffs further al-

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taining the choice clauses were presented on a "take-it-or-leave-it basis," and that they were given no explanation of the clauses' legal effect, nor were they given an opportunity to negotiate on the agreements' terms. *See id.*

<sup>33</sup> 15 U.S.C. § 77n (1994).

<sup>34</sup> *See* 15 U.S.C. § 78cc(a) (1994).

<sup>35</sup> *Id.*

<sup>36</sup> *See Richards II*, 107 F.3d at 1425.

<sup>37</sup> *See Richards I*, 1995 U.S. Dist. Lexis 6888, at \*11-12. The Plaintiffs alleged that some of their losses were caused by the failure adequately to insure against the risk of the Piper Alpha disaster and the Exxon Valdez oil spill. *See id.* at \*10. Other unexpected losses incurred by Lloyd's Names during the 1980's and 1990's included Hurricane Hugo and the bombing of Pan Am Flight 103. *See Allen II*, 94 F.3d at 927.

<sup>38</sup> *See Richards I*, 1995 U.S. Dist. Lexis 6888, at \*20-21. *See also* § 12(2) of the Securities Act; § 10(b) of the Securities Exchange Act; Commission Rule 10b-5. Section 12(2) of the Securities Act provides, in pertinent, part as follows:

Any person who . . . (2) offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate

leged that Lloyd's violated the registration requirements of the Securities Act.<sup>39</sup> Finally, the Plaintiffs alleged that Lloyd's violated the Racketeer Influenced and Corrupt Organizations Act

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commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading . . . shall be liable . . . to the person purchasing such security from him . . .

15 U.S.C. § 77l(2) (1994).

Section 10(b) of the Securities Exchange Act provides, in pertinent part, as follows:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange. . . . (b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78b (1994).

Rule 10b-5, promulgated pursuant to the Commission's rule making authority granted by §10(b) of the Securities Exchange Act, provides, in pertinent part, as follows:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) to employ any device, scheme, or artifice to defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1984).

<sup>39</sup> See *Richards I*, 1995 U.S. Dist. Lexis 6888, at \*12. See also 18 U.S.C. § 1961 (1994). See also § 5 of the Securities Act of 1933; 15 U.S.C. § 77e (1994), which generally prohibits the offer or sale of securities not registered with the Commission, unless an exemption from registration applies. The purpose of the registration process is for investors to have enough information about an issuer make an informed decision about whether to purchase an issuer's securities. See HAZEN, *supra* note 3, at 7. Violations of § 5 are actionable by private parties under § 12(1) of the Securities Act, See also 15 U.S.C. § 77(1)(1994).

of 1970<sup>40</sup> and state Blue Sky laws;<sup>41</sup> the Plaintiffs also stated claims for breach of fiduciary duty and common law fraud.<sup>42</sup>

Relying on the forum selection clause, Lloyd's moved to dismiss the case based on improper venue<sup>43</sup> claiming that the suit could be brought only in England and pursuant to English law.<sup>44</sup> The district court agreed, holding that forum selection clauses are presumptively valid and should be voided only if they are unreasonable under the circumstances.<sup>45</sup> The court re-

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<sup>40</sup> See *Richards I*, 1995 U.S. Dist. Lexis 6888, at \*21; 18 U.S.C. § 1961 (1994) [hereinafter RICO]. Passed in 1973, RICO was designed to eradicate organized crime. See Pub. L. No. 91-452, 84 Stat. 922, 923 ("It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies . . ."). The statute, however, covers far more conduct than organized crime. See, e.g., 18 U.S.C. § 1961(1) (1994) (defining "Racketeering activity" as including, *inter alia*, acts or threats involving murder, kidnaping, arson, mail fraud, fraud in the sale of securities, and the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States).

<sup>41</sup> Blue Sky laws are the securities registration laws promulgated by each individual state. There are several explanations as to where the term "blue sky" originated. One explanation is that the first such law was passed in Kansas in 1911 to "protect the Kansas farmers against the industrialists' selling them a piece of the blue sky." HAZEN, *supra* note 3, at 6. Another explanation is that the purpose of these laws is to prevent "speculative schemes which have no more basis than so many feet of 'blue sky.'" *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 550 (1917).

<sup>42</sup> See *Richards I*, 1995 U.S. Dist. Lexis 6888, at \*21.

<sup>43</sup> See Fed. R. Civ. P. 12(b)(3).

<sup>44</sup> See *Richards I*, 1995 U.S. Dist. Lexis 6888, at \*21. Alternatively, Lloyd's sought dismissal based on forum non conveniens. Because it found the first ground dispositive, the district court did not address the forum non conveniens issue. See *id.* at \*21-22. Similarly, because the Plaintiffs did not argue forum non conveniens as a basis for not enforcing the forum selection clause, the court did not consider the issue in this respect either. See *id.* at \*26.

<sup>45</sup> See *id.* at \*24-25. Cf. *Ashenden v. Lloyd's of London*, No. 96 C 852, 1996 WL 717464, at \*2-3 (N.D. Ill. Dec. 9, 1996) (finding forum selection clause reasonable, therefore, enforceable) (citing *Bonny*, 3 F.3d 156). But see *Baker v. LeBoeuf, Lamb, Leiby & MacRae*, 105 F.3d 1102 (6th Cir. 1997) (holding that counsel for Lloyd's could not rely on forum selection clause in contracts between Names and Lloyd's syndicate in action against law firm for fraud, breach of fiduciary duty and negligent representation/legal malpractice in connection with Names' investments in Lloyd's); *In re Lloyd's American Trust Fund Litigation*, 954 F. Supp. 656, 669-70 (S.D.N.Y. 1997) (holding that trustee could not rely on forum selection clause in contracts between Names and Lloyd's in action against trustee of premium funds based on breach of contract and fiduciary duty because trustee was not "closely related" to Lloyd's) (citing *Frietsch v. Refco, Inc.*, 56 F.3d 825, 827 (7th Cir. 1995); *Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 209-10 (7th Cir. 1993)).

lied on *Roby v. Corporation of Lloyd's*,<sup>46</sup> where the United States Court of Appeals for the Second Circuit dismissed a similar complaint on the same grounds. In *Roby*, the Second Circuit prescribed a four-part test to determine the enforceability of the choice clauses. The clauses should not be enforced if any of the four following prongs are present:

"(1) if their incorporation into the agreement was the result of fraud or overreaching;<sup>47</sup> (2) if the complaining party 'will for all practical purposes be deprived of his day in court,' due to grave inconvenience or unfairness of the selected forum; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) if the clauses contravene a strong public policy of the forum state."<sup>48</sup>

The District court found none of the four prongs present and specifically concluded that there was no contravention of public policy. As the Second Circuit had already found, the Names were unable to show that the English remedies are inadequate to deter the challenged conduct.<sup>49</sup>

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<sup>46</sup> *Roby*, 996 F.2d 1353.

<sup>47</sup> Appellants' Opening Brief at 34-36 (arguing that Lloyd's procured the choice clauses by fraud). See also *Tufts v. Corporation of Lloyd's*, No. 95 Civ. 3480 (JFK), 1996 U.S. Dist. LEXIS 12606, at \*16 (S.D.N.Y. Sept. 18, 1996) (granting defendants' motion to dismiss based on plaintiffs' failure to provide sufficient evidence showing that the forum selection and choice of law clauses in its contracts with Lloyd's were procured through fraud) (citing *Richards I*, 1995 U.S. Dist. LEXIS 6888, at \*34 n.20; *Haynsworth I*, 1996 U.S. Dist. Lexis 9975, No. H-96-210, slip op. at 8 (S.D. Tex. July 17, 1996)).

<sup>48</sup> *Roby*, 996 F.2d at 1363.

<sup>49</sup> See Appellants' Opening Brief at 41-42. The court also acknowledged the Second Circuit's statement in *Roby* that the public policy argument is somewhat diluted by the fact that the Commission has never taken any public action against Lloyd's based on violations of the federal securities laws. See *Roby*, 996 F.2d at 1365-66. See Appellants' Opening Brief at 40. The Commission responded to this point in an *amicus curiae* brief it submitted to the Ninth Circuit on behalf of the Plaintiffs. See Brief for the Securities and Exchange Commission, *amicus curiae*, at 24-27; *Richards II*, 107 F.3d 1422 (9th Cir. 1997) (No. 95-5574) (stating that the Commission cannot pursue all allegations of wrongdoing, and that private actions serve as a necessary supplement to the Commission's enforcement program). See also Appellants' Opening Brief at 30 (citing *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 637 n. 19 (1985), where the Court gave no indication that a public policy argument should be weakened simply because neither the Federal Trade Commission nor the Department of Justice had taken enforcement action in a case involving the federal antitrust laws.)

### C. *The Court of Appeals in Richards II*

#### 1. *The Majority*

On appeal, the Ninth Circuit panel stated that it expressed no view on whether the Names' agreements with Lloyd's constitute securities within the meaning of the federal securities laws. Assuming the Plaintiffs' allegations on this point to be true, the court turned to the language of the anti-waiver provisions of the Securities Act and the Securities Exchange Act.<sup>50</sup> The court stated that "[t]he Choice Clauses [in the Lloyd's agreements] operate to effect such waivers [proscribed by the securities laws]. Accordingly, under the precise terms of these two statutes, the Choice Clauses are void."<sup>51</sup> Reversing the lower court's grant of Lloyds' motion to dismiss the claims based on the federal securities laws, the Ninth Circuit found the district court made an error of law in deciding that the Choice Clauses could be void only if unreasonable.<sup>52</sup> With striking deference to Congress and a tone of distaste for the district court's judicial activism, Circuit Judge Noonan exclaimed, "[i]t was not for a court to weigh . . . [the clauses'] reasonableness, [it was] not for a court to say whether . . . [the clauses] offended any policy of the United States. The policy decision [already] had been made by the legislature."<sup>53</sup>

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<sup>50</sup> See *Richards II*, 107 F.3d at 1426 (citing 15 U.S.C. §§ 77n, 78cc(a) (1994)).

<sup>51</sup> *Richards II*, 107 F.3d at 1426.

<sup>52</sup> See *id.* The Ninth Circuit affirmed the district court's grant of Lloyds' motion to dismiss the claims based on state Blue Sky laws, common law fraud, and breach of fiduciary duty. See *id.* at 1431. The Plaintiffs proffered no anti-waiver provision that would preserve these claims. See *id.* at 1430. Because the Ninth Circuit found that the anti-waiver provisions do not apply to RICO, the court remanded to the district court to determine whether the choice clauses are reasonable as they relate to the RICO scheme. See *id.*

<sup>53</sup> *Id.* at 1426. Although reversed on appeal, the Eastern District of Virginia maintained the same position on this issue. See *Allen v. Lloyd's of London*, No. 3:96cv522, 1996 U.S. Dist. LEXIS 12300, at \*64 (E.D. Va. Aug. 23, 1996) (in considering whether to engage in an analysis of the effect enforcement of choice clauses would have on the public policy embedded in the federal securities laws, the court stated, "it is neither permissible nor necessary for this court to substitute its own public policy determinations for those made by Congress") [hereinafter *Allen I*]. See also *Lloyd's Forum Selection and Choice of Law Clauses are Void Because They Violate U.S. Securities Laws*, *Journal of Insurance Regulation*, Fall 1997 (discussing *Richards II* and noting that Congress amended the Securities Act to cover international transactions and that the 9th Cir. therefore felt it would be inappropriate for a court to consider the reasonableness of applying U.S. securities law to international transactions).

The Ninth Circuit analyzed the case law put forth by the litigants. First, in *Scherk v. Alberto-Culver Co.*,<sup>54</sup> the Supreme Court held that in an international commercial transaction, a clause requiring arbitration in Paris, France, for any controversy or claim arising out of the agreement, should be upheld despite the plaintiffs' reliance on the federal securities laws.<sup>55</sup> The Ninth Circuit swiftly distinguished the facts of *Scherk* by conducting a "contacts" analysis. The transaction in *Scherk*, unlike those in *Richards II*, involved several contacts with at least three different countries and only "fragmentary contacts" with the United States.<sup>56</sup> In addition to the factual differences, the Ninth Circuit noted that in *Scherk* the Supreme Court was faced with two conflicting federal statutes, the Arbitration Act<sup>57</sup>

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<sup>54</sup> 417 U.S. 506 (1974). *Scherk* involved a dispute which arose from the sale, by a German citizen, of certain businesses to an American company. The American company, Alberto-Culver Co., manufactured and distributed toiletries and hair products; the German citizen, Scherk, owned three companies that manufactured and licensed trademarks for such products. Negotiations surrounding the transaction took place in England, Germany, and the United States, and the contract was signed in Austria and closed in Switzerland. *See id.* at 506. Alberto-Culver Co. claimed that Scherk had violated the Securities Exchange Act by making certain misrepresentations about encumbrances on trademarks which were transferred as part of the sale. *See id.* at 509.

<sup>55</sup> *See Richards II*, 107 F.3d at 1426, (citing *Scherk*, 417 U.S. 506). *See also* *Transit Casualty Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619 (8th Cir. 1997). In *Trans Casualty Co.*, the United States Court of Appeals, 8th Cir., dismissed, based on lack of subject matter jurisdiction, a case involving an arbitration clause in a contract to which underwriters from Lloyd's of London were parties. The case was originally filed in state court, then was removed to federal court. *See id.* at 620. The district court then remanded based on lack of subject matter jurisdiction. *See id.* at 623. It reached this conclusion in part based on a state statute which provides that arbitration agreements are enforceable except in insurance contracts. Because the contract at issue was an insurance contract, plaintiffs argued they were not bound by the arbitration clause. The district court, after concluding that the state statute was not preempted by federal law, held that plaintiffs were not bound by the arbitration clause in the contract. *See id.* at 623-24. As such, the federal statute, put forth by defendants as a means of removal to federal court, was inapplicable. Therefore, the case was not properly before the district court. The eighth circuit dismissed the appeal because, if the district court lacked subject matter jurisdiction, the appellate court lacked subject matter jurisdiction to review the remand order. As a result, no substantive issues were decided on appeal. *See id.* at 625.

<sup>56</sup> *See Richards II*, 107 F.3d at 1426-27.

<sup>57</sup> 9 U.S.C. § 1 (1994).

and the Securities Exchange Act.<sup>58</sup> The Ninth Circuit found it acceptable to disregard the anti-waiver provisions when there are two conflicting federal statutes. It disagreed, however, with the district court's decision to balance policy considerations with an act of Congress, when there is only one statute.<sup>59</sup> The court underscored the difference between refusing to enforce the anti-waiver provisions on policy grounds, and refusing to enforce the provisions based on another federal statute.<sup>60</sup> The former "represents judicial reasoning in the area where the federal statutes, if they are to the contrary, must rule."<sup>61</sup>

The Ninth Circuit panel then cited *Mitsubishi Motors v. Soler Chrysler-Plymouth*,<sup>62</sup> where the Supreme Court stated in dicta that when choice clauses operate in tandem as prospective waivers of a party's right to pursue statutory remedies for anti-trust violations, they are void as against public policy.<sup>63</sup> The Majority argued, by analogy, that the Supreme Court would invalidate the choice clauses in *Richards II* because they would operate in tandem as prospective waivers of the Plaintiffs'

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<sup>58</sup> 15 U.S.C. §§ 78a (1994). See *Richards II*, 107 F.3d at 1427 (citing *Scherk*, 417 U.S. at 517). The *Scherk* Court explained the conflicting policies of the Arbitration Act and the Securities Exchange Act:

On the one hand, the Arbitration Act stressed "the need for avoiding the delay and expense of litigation," and directed that such agreements be "valid, irrevocable, and enforceable" in federal courts. On the other hand, the Securities Act of 1933 was "designed to protect investors" and to require "issuers, underwriters, and dealers to make full and fair disclosure of the character of securities sold in interstate and foreign commerce and to prevent fraud in their sale," by creating "a special right to recover for misrepresentation . . . ."

*Scherk*, 417 U.S. at 512 (citing *Wilco v. Swan*, 346 U.S. 427 (1953) (citation and footnotes omitted)).

<sup>59</sup> See *Richards II*, 107 F.3d at 1427.

<sup>60</sup> See *id.*

<sup>61</sup> *Id.* See also *Allen I*, 1996 U.S. Dist. LEXIS 12300, at \*60 (stating that "where Congress has expressed a clear statement in a statute which is inconsistent with the enforcement of choice of forum and choice of law clauses, those clauses must not be enforced") (citing *Union Insurance Society v. Elikon*, 642 F.2d 721 (4th Cir. 1981)). See also *infra* note 81.

<sup>62</sup> 473 U.S. 614. *Mitsubishi Motors* involved an action brought by an automobile manufacturer against a dealer for certain claims based in contract. The dealer's counterclaims alleged violations of antitrust and unfair competition statutes. The Supreme Court held that the antitrust claims were subject to arbitration under the Arbitration Act. See *id.*

<sup>63</sup> See *Richards II*, 107 F.3d at 1427 (citing *Mitsubishi Motors*, 473 U.S. at 637 n.19).

rights to pursue remedies for federal securities law violations.<sup>64</sup> This is because enforcement of the forum selection clause would lead an English court interpreting the choice of law clause to preclude operation of the United States securities laws.<sup>65</sup> For example, the court points to Section 12(2) of the Securities Act,<sup>66</sup> which places on the seller of securities the burden of proving lack of scienter when a buyer alleges fraud.<sup>67</sup> Enforcing a choice of law clause calling for the application of English law would require the plaintiff to waive this substantive provision of the federal securities laws because English law places the burden on the Plaintiffs to prove Lloyd's (the seller) acted in bad faith. As a result, the choice of law clause, interpreted by an English court via the forum selection clause, must be void.<sup>68</sup>

Turning to the courts of other circuits that have decided cases involving Lloyd's Names, Lloyd's cited *Riley v. Kingsley Underwriting Agencies, Ltd.*<sup>69</sup> The Ninth Circuit panel stated simply that *Riley* did not discuss the anti-waiver provisions of the federal securities laws and that the case involved an arbitration clause not present here. Thus, the court concluded, *Riley* is inapposite.<sup>70</sup> The court cited cases from three other circuits with which, it acknowledged, it is now in conflict.<sup>71</sup> How-

<sup>64</sup> See *Richards II*, 107 F.3d at 1427. But see *Haynsworth I*, 933 F. Supp. at 1323 ("When a party chooses to go to England to become an underwriter in England, he probably chooses English laws and courts; this choice is not a waiver but a consequence of independent, substantial choices otherwise made.").

<sup>65</sup> See Commission Brief at 12 (citing Declaration of Kenneth Stuart Rokison in Opposition to Motion to Dismiss). Mr. Rokison asserts that "it is 'very unlikely' that English courts would find the English choice of law clause 'avoidable'; and that even if it were avoidable it seems 'highly likely' that English courts would nevertheless apply English law; and that in applying English law, the English courts will not apply United States legislation, i.e. the securities laws." See *id.*

<sup>66</sup> See 15 U.S.C. § 771(2) (1994).

<sup>67</sup> See *Richards II*, 107 F.3d at 1428 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)).

<sup>68</sup> See *Richards II*, 107 F.3d at 1428. See also Appellants' Opening Brief at 22. <sup>69</sup> 969 F.2d 953.

<sup>70</sup> See *Richards II*, 107 F.3d at 1428.

<sup>71</sup> See *id.* (citing *Allen II*, 94 F.3d 923; *Bonny*, 3 F.3d 156; *Roby*, 996 F.2d 1353). For a discussion of these cases, see Darrell Hall, *Note, No Way Out: An Argument Against Permitting Parties to Opt out of U.S. Securities Laws In International Transactions*, 97 COLUM. L. REV. 57 (1997). While the Ninth Circuit cites cases from the Second, Fourth and Seventh Circuits, three other circuits have enforced similar choice clauses in Lloyd's contracts. See, e.g., *Haynsworth v. The Corp.*, 1997 WL 534146 (5th Cir. 1997) [Hereinafter *Haynsworth II*], *Shell*, 55 F.3d 1227; *Riley*, 969 F.2d 953. Similarly, other district courts, including the Southern

ever, the panel steadfastly asserted that those decisions were decided wrongly, as those courts "improperly disregard[ed] the statutory anti-waiver provisions of the Securities Acts."<sup>72</sup>

The Ninth Circuit majority claimed that the Second, Fourth, and Seventh Circuits all analyzed their cases improperly based on Supreme Court precedent.<sup>73</sup> Specifically, the circuits relied on *The Bremen v. Zapata Off-Shore Co.*<sup>74</sup> and *Carnival Cruise Lines, Inc. v. Shute*,<sup>75</sup> which both held that a forum selection clause should be enforced unless enforcement would be unreasonable or unjust, or where the clause was procured by fraud or overreaching.<sup>76</sup> The circuits mentioned above, relying on *Bremen*, reasoned that enforcement of such a clause would be unreasonable if it would contravene a strong public policy of the forum in which suit is brought.<sup>77</sup> The circuits held that the choice clauses in the Lloyd's agreements did not contravene any public policy because the remedies available under English law are "adequate to effectuate the anti-fraud purposes of the American securities laws."<sup>78</sup>

Although it later engaged in a comparative analysis of the American and English laws, the Ninth Circuit panel stated simply that the anti-waiver provisions of the federal securities laws obviate the need to assess the reasonableness of enforcing the choice clauses.<sup>79</sup> The court highlighted the fact that in neither *Bremen* nor *Carnival Cruise Lines* was the Court presented with a statute that addressed the enforceability of an applicable

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District of California in *Richards I*, have relied on the circuit court cases cited above. See, e.g., *Grace v. Corporation of Lloyd's*, 1997 WL 607543 (S.D.N.Y. 1997), *McDade v. NationsBank of Texas*, Civ. No. H-94-3714, 1995 U.S. Dist. LEXIS 21095 (S.D. Tex. June 28, 1995); *Haynsworth*, 933 F.Supp 1315.

<sup>72</sup> *Richards II*, 107 F.3d at 1428.

<sup>73</sup> See *id.* at 1428-29. See also *Allen I*, 1996 U.S. Dist. LEXIS 12300, at \*53-58 (explaining why the Supreme Court precedent followed by other circuits in enforcing the choice clauses in Lloyd's contracts is not applicable to the plaintiffs (Names) because the combined effect of the choice clauses in this case is to waive substantive statutory rights) (citing *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 115 S. Ct. 2322, 2328-30 (1995)).

<sup>74</sup> 407 U.S. 1 (1972).

<sup>75</sup> 499 U.S. 585 (1991).

<sup>76</sup> See *Richards II*, 107 F.3d at 1428 (citing *Bremen*, 407 U.S. 1; *Carnival*, 499 U.S. 585).

<sup>77</sup> See *Richards II*, 107 F.3d at 1428 (citing *Allen II*, 94 F.3d at 928; *Bonny*, 3 F.3d at 160; *Roby*, 996 F.2d at 1363).

<sup>78</sup> See *Richards II*, 107 F.3d at 1428.

<sup>79</sup> See *id.* at 1428-29.

statute.<sup>80</sup> Unlike *Richards II*,<sup>81</sup> those cases provide a “reasonableness” test in the absence of a pre-determined Congressional mandate.

In finding that the laws of England are not as advantageous to the Plaintiffs as the United States securities laws, the Ninth Circuit panel was guided by the Commission, the agency principally responsible for the administration and enforcement of the federal securities laws.<sup>82</sup> In an *amicus curiae* brief submitted to the Ninth Circuit in *Richards II*, the Commission pointed out that English law does not provide a cause of action for the failure to register securities, as is provided by Sections 5

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<sup>80</sup> See *id.* at 1429.

<sup>81</sup> See *id.* See also *Allen I*, 1996 U.S. Dist. LEXIS 12300, at \*59 (“In neither *Bremen* nor any ensuing decision was the Supreme Court called upon to apply the *Bremen* rule where Congress has expressed so clearly a public policy that is inconsistent with the enforcement of forum choice and choice of law clauses.”). In *Allen I*, the district court, discussing the “public policy” prong, stated that there are two possibilities when a federal statute, such as the anti-waiver provision of the Securities Act, is contrary to the enforcement of choice clauses: (1) the anti-waiver provision may preclude the court from a public policy analysis altogether, or (2) the provision may simply be evidence of the importance of the public policies underlying the securities laws. See *id.* at \*63-65. The court then cited the SEC’s *amicus curiae* brief for the proposition “that the anti-waiver provisions are not simply an expression of public policy that favors United States securities laws unless other comparable laws are available. Rather, . . . the provisions are an express and unequivocal directive that the rights and obligations under the securities laws cannot be waived. Since this determination has been made by Congress, the courts are not free to substitute their own public policy determinations.” *Id.* at \*63. The court then concluded that the anti-waiver provision precluded the court from engaging in a public policy analysis. See *id.* at \*64. The court then cites *Scherk*, for its finding that the statute should be considered evidence in the public policy analysis. *Allen I*, 1996 U.S. Dist. LEXIS 12300, at \*65 n.6.

On appeal, the United States Court of Appeals for the Fourth Circuit reversed the district court in *Allen*, stating that enforcing the choice clauses will not subvert the federal securities laws’ policy of prohibiting fraud. *Allen*, 94 F.3d at 929. The Fourth Circuit went on to state that not only does English law also prohibit fraud, but it provides Names adequate remedies for such fraud. See *id.* (citing *Shell*, 55 F.3d at 1231; *Bonny*, 3 F.3d at 161; *Roby*, 996 F.2d at 1365; *Riley*, 969 F.2d at 958). However, the Fourth Circuit in *Allen II* also concluded that the Lloyd’s plan at issue was not a security within the meaning of the federal securities laws. See *id.* at 930-32. As such, the anti-waiver provisions would not apply. Thus, the court’s analysis of the enforceability of the choice clauses is no different than the Supreme Court’s analysis in *Bremen*; that is, in the absence of a Congressional statement, like the anti-waiver provisions, the courts must look to the “reasonableness” of enforcing the choice clauses.

<sup>82</sup> See *Richards II*, 107 F.3d at 107 F.3d at 1429-30. See also 15 U.S.C. § 771(2) (1994); 15 U.S.C. § 78 (b) (1994); 17 C.F.R. § 240.10b-5 (1984).

and 12(1) of the Securities Act.<sup>83</sup> Although Lloyd's contended that the registration requirements of the federal securities laws are merely administrative,<sup>84</sup> the Plaintiffs argued that "the affirmative disclosure duties that accompany registration lie 'at the heart' of the [Securities] Act's scheme of regulation for protecting investors."<sup>85</sup>

The Commission indicated that the remedies provided by Section 12(2) of the Securities Act, for false or misleading statements made in connection with the sale of securities, would be "severely compromised" if the plaintiffs were forced to rely on English law.<sup>86</sup> Under the Lloyd's Act of 1982, Lloyd's is immune from any claims under England's Misrepresentations Act of 1967,<sup>87</sup> absent a showing of bad faith.<sup>88</sup> The Plaintiffs point out that English courts refuse to hold Lloyd's liable for the failure to disclose certain information because they reason that Lloyd's owes no duty of disclosure to the Names.<sup>89</sup> Left to English law, the Plaintiffs would be unable to bring an action based on

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<sup>83</sup> See Commission Brief at 20.

<sup>84</sup> See Appellees' Answering Brief at 48. Cf. *Allen I*, 1996 U.S. Dist. LEXIS 12300 (stating that "[a]lthough American courts have on occasion applied United States securities laws' anti-fraud provisions to predominantly foreign transactions, the 'anti-fraud provisions of American securities laws have broader extraterritorial reach than American filing requirements.'" (quoting *Consolidated Gold Fields PLC v. Minorco S.A.*, 871 F.2d 252, 262 (2d Cir.1989)). The Fourth Circuit in *Allen II* then stated that "[t]his is because 'an interest in punishing fraudulent or manipulative conduct is entitled to greater weight than are routine administrative requirements.'" *Allen II*, 94 F.3d at 930 (quoting Restatement (Third) of the Foreign Relations Law of the United States § 416 cmt. a (1986)).

<sup>85</sup> Appellants' Reply Brief at 28-29 (citing *Pinter v. Dahl*, 486 U.S. 622, 637-39 (1988)).

<sup>86</sup> See Commission Brief at 20.

<sup>87</sup> The Misrepresentations Act of 1967 provides remedies for certain types of misrepresentations, including negligent misrepresentations. Misrepresentations Act of 1967 (Eng.).

<sup>88</sup> See *id.* Section 14 of the Lloyd's Act, 1982, provides that Lloyd's shall not be liable for damages

[f]or negligence or other tort, breach of duty or otherwise, in respect of any exercise of or omission to exercise any power, duty or function conferred or imposed by Lloyd's Acts 1871 to 1982 . . . in so far as the underwriting business of any member of the Society or the costs of his membership or the business of any person as a Lloyd's broker or underwriting agent may be affected . . . unless the act or omission complained of - was done or omitted to be done in bad faith. Lloyd's Act, 1982, ch. 14, § 14 (Eng.).

<sup>89</sup> See Plaintiffs' Reply Brief at 30.

breach of the duty to disclose; however, under the Securities Act,<sup>90</sup> such an action may be brought.

## 2. *The Dissent*

Judge Goodwin, the sole dissenter among the Ninth Circuit panel, chastised the majority for assuming, based merely on the Plaintiffs' allegation, that the agreements entered into between the Names and Lloyd's constitute "securities" as that term is defined in the federal securities laws.<sup>91</sup> The anti-waiver provision of the Securities Act applies to any "person acquiring any security."<sup>92</sup> If the court relies on the Plaintiffs' allegations, Judge Goodwin argued, the protection of the federal securities laws would apply "to any one who loses his or her savings betting on chicken fights in Zamboanga."<sup>93</sup> The District court did not analyze the issue, but simply stated that it was not necessary for resolving the issue before the court.<sup>94</sup> Presumably, the

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<sup>90</sup> See *id.* at 30-32.

<sup>91</sup> See *Richards II*, 107 F.3d at 1431.

<sup>92</sup> *Id.* See also 15 U.S.C. 77n (1994).

<sup>93</sup> *Richards II*, 107 F.3d at 1431. Similarly, Lloyd's argued that the anti-waiver provisions of the federal securities laws should not enable a plaintiff to nullify choice clauses simply by asserting claims under those laws. See Appellees' Answering Brief at 23-24. Cf. *Hugel v. Corp. of Lloyd's*, 999 F.2d 206, 211 (7th Cir. 1993) (quoting with approval *Roby*, 996 F.2d at 1360, "[i]t defies reason to suggest that a plaintiff may circumvent forum selection . . . merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff simply would have to allege violations of his country's statutory law or his country's . . . property law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction.").

<sup>94</sup> See *Richards I*, 1995 U.S. Dist. Lexis 6888, at \*11. Similarly, the court refused to address Lloyd's argument that the Plaintiffs had mischaracterized the Lloyd's market as a common enterprise, a necessary element of an "investment contract," one of the terms used in the securities acts to define a "security." *Id.* See 15 U.S.C. § 77b(1) (1994) (defining "security"); 15 U.S.C. § 78c(10) (1994). See Appellants' Opening Brief at 6-7 (explaining how the Lloyd's system constitutes a "common enterprise"); Appellants' Reply Brief at 11 (stating the position of the California Department of Corporations, the agency which enforces the California state securities laws, that Lloyd's offered and sold securities (citing Letter pursuant to Ninth Circuit Rule 29-1 Advisory Committee Note (June 20, 1996))); *Allen I*, 1996 U.S. Dist. Lexis 12300, at \*140-69 (analyzing, in action for injunctive relief, whether it is reasonably likely that Names' investments in Lloyd's constitute securities, and concluding in the affirmative). But see *Allen II*, 94 F.3d at 930-32 (reversing district court's conclusion that the Lloyd's plan at issue involved securities); California Commissioner of Insurance, *Amicus Curiae* Brief at 15-22, *Richards II*, 107 F.3d 1422 (No. 95-55747) (arguing that Names' investments in the Lloyd's system do not constitute securities).

district court would enforce the choice clauses even if the jurisdictional issue of whether there is a “security” were undisputed; that is, it would allow the choice clauses to trump the anti-waiver provisions of the federal securities laws.<sup>95</sup>

Addressing the anti-waiver provisions, Judge Goodwin engaged in an “International v. Domestic” analysis; he concluded that the contract at issue, contrary to the majority’s conclusion, is an international transaction.<sup>96</sup> As such, the Supreme Court’s reasoning in *Bremen*,<sup>97</sup> that forum selection clauses in contracts that are fundamentally international in character are presumptively valid, should control.<sup>98</sup> Judge Goodwin stated that the choice clauses could be voided if English law does not provide adequate remedies to deter fraud upon American Names.<sup>99</sup> In stark contrast to the majority’s mandate, Judge Goodwin deemed the case appropriate for “judicial balancing.”<sup>100</sup> In the balance, Judge Goodwin weighed the remedies available in England against the public policy behind the American securities laws.<sup>101</sup> Judge Goodwin concluded, consistently with the other circuit courts that have addressed the issue,<sup>102</sup> that the laws of England provide adequate remedies for any fraud perpetrated upon American Names.<sup>103</sup>

Judge Goodwin noted that English law provides remedies, including rescission, for fraudulent, negligent, and even inno-

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<sup>95</sup> The essence of the majority’s opinion is that, where Congress has spoken (via the anti-waiver provisions) the courts should not supplant the policy decisions of Congress with its own. *See supra* part III.C.1. In order for the federal securities laws to apply, thus invoking the anti-waiver provisions, there must be a “security.” Regardless of whether the majority was correct in assuming the truth of the Plaintiffs’ allegation that Lloyd’s offered and sold “securities,” the court knew that this threshold must be crossed before analyzing whether the anti-waiver provisions could even apply. *See id.*

<sup>96</sup> *See Richards II*, 107 F.3d at 1432. *But see* Appellants’ Reply Brief at 16 (claiming that the transactions at issue are essentially domestic).

<sup>97</sup> *See generally* 407 U.S. 1.

<sup>98</sup> *See Richards II*, 107 F.3d at 1432. *But see* Appellants’ Reply Brief at 18-19 (citing *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984) (arguing that the anti-waiver provisions of the federal securities laws do not provide an exemption for “truly international” transactions and that deference should be given to the SEC’s interpretation of the issue)).

<sup>99</sup> *See Richards II*, 107 F.3d at 1433.

<sup>100</sup> *Id.*

<sup>101</sup> *See id.* at 1434-35.

<sup>102</sup> *See id.* at 1428. *See also supra* note 71.

<sup>103</sup> *Id.* *See also* Appellees’ Answering Brief at 37-43.

cent misrepresentation, and penalties for misleading statements made knowingly or recklessly.<sup>104</sup> Further, the exemption Lloyd's enjoys under the Lloyd's Act of 1982 does not apply to acts done in bad faith.<sup>105</sup> Since fraud requires bad faith, Judge Goodwin concluded Lloyd's remains liable in damages for fraud.<sup>106</sup> Similarly, English law imposes obligations on Members' Agents to provide the Names full information pertaining to the underwriting syndicates, with breach of contract remedies for failure to disclose.<sup>107</sup>

Because Lloyd's recruits Names in many different countries, Judge Goodwin argued that Lloyd's utilized the choice clauses to prevent it from being subject to the laws of every jurisdiction, and from being amenable to suit in all jurisdictions, in which it does business.<sup>108</sup> As a result of nullifying the choice clauses, Judge Goodwin posits, the majority's holding will "inject counterproductive uncertainty" into the Lloyd's marketplace.<sup>109</sup> Further, Judge Goodwin suggested that without the certainty of the choice clauses, Lloyd's may not engage in the kind of insurance market which it operates.<sup>110</sup> Judge Goodwin argued that notions of international comity and respect for the integrity and competence of foreign tribunals should lead the court to enforce the clauses.<sup>111</sup>

Judge Goodwin last addressed the majority's ruling to remand the RICO issue.<sup>112</sup> Judge Goodwin engaged in a balancing test here as well, and concluded that although the United States provides treble damages<sup>113</sup> (unlike England), the English remedies are adequate to prevent the conspiracy alleged by

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<sup>104</sup> See *Richards II*, 107 F.3d at 1435. See also English Financial Services Act, 1986, ch. 60, § 47 (Eng.). But see *supra* notes 86-90 and accompanying text.

<sup>105</sup> See *supra* note 88.

<sup>106</sup> See *Richards II*, 107 F.3d at 1435. See also Appellees' Answering Brief at 39. But see *supra* notes 89-90 and accompanying text.

<sup>107</sup> See *Richards II*, 107 F.3d at 1435. See also Appellees' Answering Brief at 39.

<sup>108</sup> See *Richard's II*, 107 F.3d at 1432-33.

<sup>109</sup> *Id.* at 1432.

<sup>110</sup> See *id.* at 1433.

<sup>111</sup> See *id.* But see Appellees' Answering Brief at 41 (quoting *Riley*, 969 F.2d at 958, "our courts have long recognized that the courts of England are fair and neutral forums").

<sup>112</sup> See *Richards II*, 107 F.3d at 1426. See also *supra* note 52.

<sup>113</sup> See 18 U.S.C.A. § 1964(c). "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any

the Plaintiffs.<sup>114</sup> As a result, Judge Goodwin concluded this issue should not have been remanded and argued further that it defies reason to suggest that a plaintiff can invalidate choice clauses in a contract simply by alleging a claim under RICO.<sup>115</sup>

#### D. *The Court of Appeals in Richards III*

##### 1. *The Majority*

From sole dissenter in *Richards II*, Judge Goodwin became the drafter of the majority opinion in *Richards III*. Judge Goodwin first summarized the Names' arguments as to why the court should not enforce the choice clauses: "[The Names contend] (1) that the antiwaiver provisions of the federal securities laws void [the choice] clauses; (2) that the choice clauses are invalid because they offend the strong public policy of preserving an investor's remedies under federal and state securities law and RICO; and (3) that the choice clauses were obtained by fraud."<sup>116</sup>

The court begins its analysis by stating that *Bremen* governs the validity of choice clauses in international agreements.<sup>117</sup> Relying on *Scherk* and *Haynsworth*, Judge Goodwin concludes that the transactions between Lloyd's and the Names were international.<sup>118</sup> The Names had argued that Lloyd's insistence that the Names go to England to sign their contracts is merely a ritual and does not render the transactions international. In rejecting this argument, Judge Goodwin asserts that Lloyd's does this so that the Names will understand that English law governs the transactions.<sup>119</sup> Judge Goodwin acknowledges the anti-waiver provisions of the federal securities laws,

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appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *Id.*

<sup>114</sup> See *Richards II*, 107 F.3d at 1435-36.

<sup>115</sup> See *id.* Judge Goodwin concurred in the part of the majority's opinion affirming the dismissal of the Blue Sky law, common law fraud, and breach of fiduciary duty claims, and agreed that the choice clauses were not procured by fraud. See *id.* at 1436.

<sup>116</sup> 1998 U.S. App. LEXIS 1414, at \*6-7.

<sup>117</sup> See *id.* at \*7 and n. 1.

<sup>118</sup> See *id.* at \*9-11.

<sup>119</sup> *Id.* at \*12.

but simply states that the Court in *Bremen* contemplated that a choice clause may conflict with certain statutes.<sup>120</sup>

Judge Goodwin states that the Ninth Circuit is following the other six circuits that have enforced similar choice clauses.<sup>121</sup> Applying *Bremen*, Judge Goodwin rejects the Names' argument that the choice clauses contravene a strong public policy of American securities law.<sup>122</sup> In rejecting this argument, Judge Goodwin quotes the Supreme Court's conclusion in *Scherk* that "[t]o require that 'American standards of fairness' must . . . govern the controversy demeans the standards of justice elsewhere in the world, and unnecessarily exalts the primacy of United States law over the laws of other countries."<sup>123</sup> Judge Goodwin notes the Court's dictum in *Mitsubishi Motors* that choice clauses should be voided as against public policy where they would operate in tandem as a prospective waiver of a party's rights.<sup>124</sup> However, he simply concludes that the *Scherk* Court's reasoning outweighs the dictum in *Mitsubishi Motors*.<sup>125</sup>

The majority then addresses the respective remedies provided by American and English law, concluding that English law is not so deficient as to deprive the Names of any reasonable recourse.<sup>126</sup> Judge Goodwin explains that the Names can pursue actions against the Members' Agents and Managing Agents for fraud, breach of fiduciary duty, or negligent misrepresentation.<sup>127</sup> As in his dissenting opinion in *Richards II*, Judge Goodwin notes that Lloyd's can still be sued for actions done in bad faith, including fraud.<sup>128</sup> Last, Judge Goodwin concluded that (1) the RICO claim does not alter the court's holding, and (2) the inclusion of the choice clauses in the Lloyd's contracts was not the product of fraud.<sup>129</sup>

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<sup>120</sup> See *id.* at \*8-9.

<sup>121</sup> See *id.* at \*14.

<sup>122</sup> See *Richards III*, 1998 U.S. App. LEXIS 1414 at \*13.

<sup>123</sup> *Id.* at \*16, quoting *Scherk*, 417 U.S. at 517 n.11.

<sup>124</sup> See *id.* at \*17.

<sup>125</sup> *Id.* 18.

<sup>126</sup> See *id.* at \*19.

<sup>127</sup> See *id.*

<sup>128</sup> *Richards III*, 1998 App. LEXIX 1414 at \*20, citing Lloyd's Act of 1982, Ch. 14(3)(e)(i).

<sup>129</sup> *Id.* at \*20-23.

## 2. *The Dissent*

Judge Sidney R. Thomas, joined by Judges Pregerson and Hawkins, dissented from the majority opinion in *Richards III*. The dissent articulates five main reasons for its position: (1) because Congress explicitly resolved the question at hand, the majority was wrong in applying the *Bremen* Court's policy analysis; (2) a holding contrary to the majority would not give American securities law boundless reach; (3) the case law relied upon by the majority is distinguishable and thus should not control; (4) the choice clauses are unenforceable because American securities law provides remedies far greater than those provided by English law; and (5) additional public policy reasons weigh in favor of enforcing the anti-waiver provisions of the federal securities laws.

Judge Thomas claims that the anti-waiver provisions do not simply declare "a strong public policy" against the waiver of compliance with American securities laws.<sup>130</sup> Rather, these provisions unconditionally prohibit such a waiver.<sup>131</sup> Judge Thomas claims that, via the anti-waiver provisions, Congress adopted "a per se rule that American laws cannot be ignored in this context. Courts should not employ amorphous public policy to emasculate plain statutory language."<sup>132</sup> Judge Thomas contends that disregarding the anti-waiver provisions "to assess whether enforcement of the choice clauses contravenes the underlying policy against waiver is akin to overlooking the plain language of a statute to consider its legislative history."<sup>133</sup>

Judge Thomas then argues that enforcing the anti-waiver provisions will not result in "boundless" reach of the American securities laws. First, he notes that any plaintiff seeking to rely on the federal securities laws would still have to meet the basic jurisdictional elements of those laws, for instance, by establishing that the transactions at issue involve "securities" within the meaning of the Securities Act and the Securities Exchange Act.<sup>134</sup> Further, Judge Thomas points out that the transactions

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<sup>130</sup> See *id.* at \*24.

<sup>131</sup> See *id.*

<sup>132</sup> *Id.* at \*25.

<sup>133</sup> *Richards III*, 1998 U.S. App. LEXIS 1414 at \*26, citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146 (1992).

<sup>134</sup> *Id.* at \*27.

at issue involve substantial U.S. connections, thereby justifying application of American securities law.<sup>135</sup> Moreover, Congress intended the Securities Acts to have international application.<sup>136</sup> Accordingly, the Names should be afforded the protection of American law, and Lloyd's should not be surprised by its application.

Next, Judge Thomas discussed the case law. First, he notes distinctions between *Scherk* and *Richards*. *Scherk* involved a forum selection clause calling for arbitration in Paris, France, but a choice of law clause calling for application of the law of Illinois, U.S.A.<sup>137</sup> In *Richards*, both the forum selection and choice of law clauses favored England and English law, respectively.<sup>138</sup> Because of this distinction, Judge Thomas argued, *Scherk* is not binding, and any implicit approval by the *Scherk* Court of a "hypothetical choice-of-law clause" calling for foreign law is merely dicta.<sup>139</sup> In addition, and related to the previous argument, Judge Thomas pointed out that *Scherk* involved many more connections with foreign countries, unlike *Richards*, which involved mostly contacts with the U.S.<sup>140</sup>

The dissent responded to the majority's treatment of *Mitsubishi Motors* and *Vimar*. Although the majority noted that the pertinent language in *Mitsubishi Motors* was merely dicta, the Court reiterated the same position in *Vimar*, a case involving a very different set of facts.<sup>141</sup> As such, the majority improperly construed these cases too narrowly. Further, to the extent that the *Scherk* Court's reasoning cited by the majority was dicta, it should be entitled to no greater weight than the Court's reasoning in *Mitsubishi Motors*.

Judge Thomas next claimed that the choice clauses should be voided because they are unreasonable under the circumstances, in that English law provides far less protection to American investors than does American law.<sup>142</sup> Relying on *Mitsubishi Motors* and *Vimar*, both rejected by the majority, Judge

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<sup>135</sup> See *id.*

<sup>136</sup> See *id.* \*35-36.

<sup>137</sup> See *id.* at \*28.

<sup>138</sup> *Id.* at \*28-29.

<sup>139</sup> *Richards III*, 1998 U.S. App. LEXIX 1414 at \*29.

<sup>140</sup> *Id.* at \*29-30.

<sup>141</sup> *Id.* at \*33-34.

<sup>142</sup> See *id.* at \*30-31.

Thomas states that these cases “militate[] against enforcing the choice clauses.”<sup>143</sup> Judge Thomas noted examples of differences between American and English law: (1) English law provides no remedy for failing to register securities, unlike Section 12(1) of the Securities Act; (2) English law provides no remedy against Lloyd’s for negligent misrepresentation, unlike Section 12(2) of the Securities Act; and (3) English law provides no cause of action for control person liability, unlike Section 15 of the Securities Act and Section 20(a) of the Securities Exchange Act.<sup>144</sup> Last, although the majority noted that it is simply unfortunate for the Names that the Members’ Agents and Managing Agents may be insolvent, the dissent pointed out that this is more evidence that English law is inadequate to address the Names’ grievances.<sup>145</sup>

The dissent set forth additional policy reasons for refusing to enforce the choice clauses. First, “[e]nforcing the choice clauses gravely disadvantages American businesses, because foreign businesses, like Lloyd’s, can recruit investors without expending the time and money involved in fulfilling the requirements of the [American securities] Acts — a burden that American businesses cannot legally evade.”<sup>146</sup> The dissent notes that the federal securities laws were designed in part to prevent a recurrence of the “dire national distress” that ensued in the aftermath of the 1929 market crash; many American investors had lost millions of dollars as a result of incomplete and false representations.<sup>147</sup> The dissent urges that this legislative history “drives home the necessity for invalidating the choice clauses.”<sup>148</sup> Judge Thomas concludes that “[i]ncreasing access to international capital markets is a laudable goal, but one need not trample on United States securities laws to achieve it. . . . Indeed, the facts alleged in this case make a powerful argument for vigorous application of American securities laws. A company, whether foreign or domestic, should not be able to mislead American investors with impunity.”<sup>149</sup>

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<sup>143</sup> *Id.*

<sup>144</sup> *See id.* at \*32.

<sup>145</sup> *See Richards III*, 1998 U.S. App. LEXIS 1414 at \*32 n. 1.

<sup>146</sup> *Id.* at \*33.

<sup>147</sup> *See id.* at \*35, *citing* S. Rep. No. 47, at 2 (1933).

<sup>148</sup> *Id.* at \*36.

<sup>149</sup> *Id.*

#### IV. CRITIQUE OF THE NINTH CIRCUIT'S HOLDING IN *RICHARDS V. LLOYDS OF LONDON*

The purpose of this section is to analyze the Ninth Circuit's reasoning in *Richards II* and *Richards III*. The first issue involves the court's treatment of the case law. The second issue deals with the court's interpretation of Congress' intent in drafting the anti-waiver provisions. The third issue involves the court's finding that English law, compared to American law, adequately protects American investors. Finally, the last issue covers several policy factors discussed in the various opinions.

In *Richards III*, Judge Goodwin echoed his dissent from *Richards II* in holding that the *Bremen* Court's reasonableness test should be used to decide whether to enforce the choice clauses. The majority in *Richards II* had rejected this test based on its position that the anti-waiver provisions of the federal securities laws obviated the need to assess the reasonableness of enforcing the choice clauses.<sup>150</sup> Holding true to his original view, Judge Goodwin concluded that the transactions at issue were international and, therefore, *Bremen* should control.

Although the majority in *Richards II* simply argued that *Bremen* did not apply because of the express language of the anti-waiver provisions, the dissent in *Richards III* expanded on this view by emphasizing the American connections as justification for distinguishing this case from *Bremen*. Further, in its discussion of *Scherk*, the majority in *Richards II* was careful to distinguish those facts from the facts in *Richards*.<sup>151</sup> The main distinctions were that the transaction in *Scherk* was primarily international in character, based on the contacts with foreign countries, unlike the transactions in *Richards II*.<sup>152</sup> Adding to these distinctions, the dissent in *Richards III* noted that although the forum selection clause in *Scherk* called for a for-

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<sup>150</sup> See *Richards II*, 107 F.3d at 1428-29; *Allen I*, 1996 U.S. Dist. LEXIS 12300, at \*59. See also *supra* note 81

<sup>151</sup> See generally *Scherk*, 417 U.S. 506. See also *supra* notes 54-61 and accompanying text.

<sup>152</sup> *Richards II*, 107 F.3d at 1426 (citing *Scherk*, 417 U.S. 506.) See also *supra* notes 54-58 and accompanying text.

eign forum, the choice of law clause called for application of domestic law.<sup>153</sup>

The Ninth Circuit's original opinion noted that the *Bremen* Court was acting without guidance from Congress.<sup>154</sup> As such, the *Bremen* Court was free to reason its way to what it believed was a just result. Had there been an applicable statute, such as the Securities Act's anti-waiver provision, the *Bremen* Court, via the Ninth Circuit panel's reasoning, would have been less able to craft its own formula for resolving the issue. Similarly, had the *Scherk* Court been faced with only one statute, rather than two conflicting statutes, it too, would have had less flexibility in reaching its outcome. The dissent in *Richards III* echoed its view that *Bremen* was inapplicable because of the presence of the anti-waiver provisions and that *Scherk* was inapplicable because it was factually distinguishable from *Richards*.<sup>155</sup>

The Ninth Circuit panel in *Richards II* took an interesting approach to *Riley v. Kingsley Underwriting Agencies, Ltd.*,<sup>156</sup> a Tenth Circuit case cited by Lloyd's. Dismissing the case summarily as inapposite, the majority stated simply that *Riley* involved an arbitration clause not present in *Richards II*, and the *Riley* court did not discuss the anti-waiver provisions of the federal securities laws.<sup>157</sup> However, the majority took the time to carefully distinguish *Richards II* from *Scherk*, a case which, like *Riley*, also involved an arbitration clause and which barely mentioned the anti-waiver provisions of the federal securities laws.<sup>158</sup> Perhaps the panel was merely being more deferential to the Supreme Court, as it must, but its limited treatment of *Riley* undermines its reasoning for not following *Scherk*. Interestingly, although the majority in *Richards III* noted the Tenth Circuit's position in *Riley*,<sup>159</sup> it did not expressly rely on any portion of the *Riley* opinion.

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<sup>153</sup> *Richards III*, at \*25-30.

<sup>154</sup> See *Richards II*, 107 F.3d 1428-29. See also *supra* notes 73-81 and accompanying text.

<sup>155</sup> *Richards III*, 1998 U.S. App. LEXIS 1414 at 25-30.

<sup>156</sup> *Riley*, 969 F.2d 953.

<sup>157</sup> See *Richards II*, 107 F.3d 1428.

<sup>158</sup> See *id.* at 1427.

<sup>159</sup> *Richards III*, at \*13-14.

Relying on *Mitsubishi Motors*, the majority in *Richards II* found that the choice clauses would operate in tandem as a prospective waiver of a party's right to pursue statutory remedies under the federal securities laws.<sup>160</sup> In some cases, one could argue that either alone, rather than both clauses "operating in tandem," would operate as such a prospective waiver of a party's right. For example, if there is only a forum selection clause, and the chosen forum would apply U.S. securities law, respecting the U.S. anti-waiver provisions, the forum selection clause would not pose a problem. If, however, the chosen forum would not apply U.S. securities law, even in the absence of a choice of law clause, as is likely the case with English courts,<sup>161</sup> the anti-waiver provisions would render the forum selection clause void. As examples of this reasoning, the majority in *Richards II* cited Supreme Court cases holding that arbitration clauses were enforceable because the arbitrators applied the substantive securities laws of the U.S. where applicable.<sup>162</sup> Similarly, if there is only a choice of law clause, opting for law as favorable to the plaintiffs as U.S. securities law, then the choice of law clause would be enforced. If, however, the chosen law is less favorable than U.S. securities law, the anti-waiver provisions would render the choice of law clause void, as it would operate as a prospective waiver of a party's right. In any event, while noting the struggle in grappling with *Mitsubishi Motors*, the majority in *Richards III* espoused the controlling view in the Ninth Circuit that the language in *Mitsubishi Motors* was mere dicta.<sup>163</sup>

The majority in *Richards II* paid great deference to Congress in holding that the anti-waiver provisions must control. The panel believed it was not the court's place to conduct a policy analysis because Congress conducted that analysis when it passed the anti-waiver provisions as part of the Securities Act and the Securities Exchange Act. The court emphasized that cases like *Bremen* and *Carnival Cruise Lines* provide a "reasonableness" test in the absence of a pre-determined Congressional

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<sup>160</sup> *Id.*

<sup>161</sup> See *supra* notes 65 and 221.

<sup>162</sup> See *Richards II*, 107 F.3d at 1427 (citing *Rodriguez de Quijas*; *Shearson/American Express v. McMahon*, 482 U.S. 220, 232, *reh'g den.* (1987)).

<sup>163</sup> *Richards III*, at \*17-18.

mandate. Similarly, the dissent in *Richards III* argued forcefully that through the anti-waiver provisions, Congress adopted a “per se” rule that agreements such as the choice clauses are unenforceable.

In spite of the statutory language contained in the anti-waiver provisions, the Ninth Circuit enforced the choice clauses. However, the Court did not provide a clear standard for courts confronted with this issue in the future. The court’s only guidance as to when choice clauses might not be enforced is its statement that, “were English law so deficient that the Names would be deprived of *any reasonable recourse*, we would have to subject the choice clauses to another level of scrutiny.”<sup>164</sup> Problems can arise when a court, as the Ninth Circuit here, draws its own boundaries to laws whose boundaries already have been drawn by Congress. Nowhere in its opinion does the court define “any reasonable recourse,” whereas the anti-waiver provisions enunciate a precise mandate obviating the need for judicial line-drawing. Nor does the court suggest exactly what “another level of scrutiny” would involve.

The problem with the Ninth Circuit’s holding becomes apparent when taken to its logical extension. As per *Richards III*, if an American investor signs a contract containing choice clauses with a foreign party in that party’s country, the transaction is international. If the transaction is international, *Bremen* controls the issue of whether or not to enforce choice clauses. Under *Bremen*, the American courts will enforce the clauses unless it would be unreasonable to do so. Enforcing a choice clause would be unreasonable if doing so would contravene a strong public policy of the forum in which suit is brought. According to the Ninth Circuit, a strong public policy of the United States courts is that American investors have “any reasonable recourse” when they have been wronged. Thus, under *Richards III*, if a foreign company solicits investors in the U.S. and takes them back to corporate headquarters to sign the contracts, the transaction is international, and *Bremen* controls. If the contracts contain choice clauses calling for application of foreign law, the clauses will be enforced as long as the chosen law provides “any reasonable recourse” to the investors.

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<sup>164</sup> *Richards III*, at \*19 (emphasis added).

Aside from the likely confusion in discerning whether investors will have "any reasonable recourse," there are a few dangerous results likely to emanate from the court's reasoning. First, foreign companies will take advantage of this holding. When soliciting American investors, they will be sure to establish some contact between the investors and the foreign country in order to qualify the transactions as international. Such companies will make sure they include choice clauses in their contracts favoring law less investor-protective than U.S. law. These steps will enable foreign companies to avoid the effort and expense of complying with U.S. securities laws, to the detriment of American investors. Second, American enterprises may seek to incorporate overseas in order to solicit American investors without having to comply with U.S. securities laws. Similar abuses already have occurred, for example, with Regulation S under the Securities Act.<sup>165</sup> American companies have offered securities ostensibly to foreign investors; the "foreign" investors, often Americans who establish off-shore accounts to effect the purchases of "Reg-S" stock, then sell the securities back into the U.S. market after a prescribed waiting period. This type of abuse allows the company to offer its securities to American investors while circumventing the rigorous registration and disclosure requirements of the U.S. securities laws.

Although the majority panel in *Richards II* relied heavily on the judgement of the Commission in holding that English law is not as favorable as American law for remedying the Plaintiffs' injuries,<sup>166</sup> the majority in *Richards III* did not even acknowledge the Commission's position. The following table represents a comparison of the Plaintiffs' possible bases for pursuing legal action against Lloyd's and the respective remedies available under English and American law:

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<sup>166</sup> See *id.* at 1429-30. See also *supra* notes 82-90, and accompanying text.

TYPE OF CONDUCT	ENGLISH REMEDY	AMERICAN REMEDY
Failure to Register Securities	None Available.	§ 5 of Securities Act, via §12 (a)(1) of Securities Act. Plaintiff can seek damages <sup>167</sup> or rescission.
Negligent Misrepresentation	Common Law and Misrepresentations Act of 1967; Lloyd's immune under § 14 of Lloyd's Act of 1982. Plaintiff can sue Members' and Managing Agents; Burden on buyer/plaintiff to prove negligence.	§12(a) (2) of Securities Act. Plaintiff can seek damages or rescission. <sup>168</sup> Burden on seller/defendant to prove exercise of reasonable care, and/or absence of loss causation.
Intentional Misrepresentation	Common Law and Misrepresentations Act of 1967; plaintiff must prove bad faith.	§12 (a)(2) of Securities Act; <sup>169</sup> §10(b) and 18(a) of Securities Exchange Act and Rule 10b-5; for §10(b) and Rule 10b-5, plaintiff can seek damages or rescission and/or injunction and must prove scienter. <sup>170</sup>
General Fraud	Financial Services Act of 1986; Lloyd's immune under § 42.	§10(b) of Securities Exchange Act and Rule 10b-5. <sup>171</sup>
Control Person Liability	None Available.	§ 15 of Securities Act; § 20 of Securities Exchange Act. Both hold control persons liable for the violations of the persons subject to their control. <sup>172</sup>

As the table illustrates, American law provides more remedies for plaintiffs seeking recovery against Lloyd's in the context

<sup>167</sup> The amount of damages recoverable under § 12(a)(1) depends on whether the plaintiff still owns the securities. If so, then the plaintiff is entitled to recover the purchase price with interest, less any income received thereon, upon tender of the securities. If not, plaintiff may recover the difference between the purchase price and the resale price. See §§ 12(a)(1), (a)(2); HAZEN, *supra* note 3 at § 7.2, p. 276-77.

<sup>168</sup> Damages in an action for violation of § 12(1) are calculated in the same manner as in an action for violation of § 12(1). See *id.* § 7.5, at p. 300-01.

<sup>169</sup> In an action alleging intentional misrepresentation in violation of § 12(a)(2), plaintiffs' remedies are generally the same as in an action for negligent misrepresentation as described above. See *supra* (previous two notes).

<sup>170</sup> See § 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder; See generally, HAZEN, *supra* note 3, at ch. 13. Damages in actions alleging violations of § 10(b) and Rule 10b-5 are calculated in any number of different ways, depending on the factual circumstances and the particular court. The following are examples of methods courts have used: out-of-pocket; benefit of the bargain; rescissory damages; and disgorgement of ill-gotten gains. See *Id.* at §13.7, p. 714-15.

<sup>171</sup> The remedies available under these provisions are the same as provided in note 170 *supra*. Additionally, § 9 of the Securities Exchange Act prohibits certain conduct designed to manipulate security prices. Affected persons may sue persons who violate § 9(e).

<sup>172</sup> See § 15 of the Securities Act; § 20 of the Securities Exchange Act; HAZEN, *supra* note 3, at § 7.7, p. 309.

of cases like *Richards*. Although there is some overlap in the protection provided by both sets of laws, certain remedies, such as failing to register securities and control person liability, simply are not recognized in English law. Further, for certain causes of action under English law, such as negligent misrepresentation, Lloyd's is immune from liability. Thus, although a plaintiff might be entitled to more protection in a suit against another defendant, acts of English Parliament render the Lloyd's cases unique since the full panoply of English remedies is unavailable.

In *Richards III*, Judge Goodwin did not repeat his argument that the choice clauses must be enforced, lest Lloyd's be subject to suit in all jurisdictions in which it does business.<sup>173</sup> In *Richards II*, the majority noted that "Lloyd's voluntarily accepted the burdens of United States litigation — no matter how disruptive — by soliciting investments from thousands of investors in the United States."<sup>174</sup> Further, in his argument, Judge Goodwin, cognizant of the Plaintiffs' allegations, did not discuss the fact that Lloyd's inserted the choice clauses in all Names contracts in 1986, after the passage of legislation which immunized Lloyd's from certain liability and after Lloyd's learned of the potential losses from asbestos and other toxic injury claims.<sup>175</sup> The Plaintiffs asserted, as did the plaintiffs in the other pertinent cases against Lloyd's (and its affiliated entities), that the fraud perpetrated by Lloyd's consisted, in part, of inserting these clauses in contracts for Names who were put unknowingly in syndicates fraught with potential losses based on high exposure disaster claims.<sup>176</sup> Therefore, Lloyd's was aware of the potential for litigation in the United States and chose to

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<sup>173</sup> See *Richards II*, 107 F.3d 1432.

<sup>174</sup> Appellants' Reply Brief at 35.

<sup>175</sup> See Appellants' Opening Brief at 11-14 (Plaintiffs argue that Lloyd's was trying to prevent the Plaintiffs from learning about the potential exposure to these losses at least until it succeeded in getting Parliament to enact the Lloyd's Act of 1982.). See also *Leslie v. Lloyd's*, 1995 U.S. Dist. LEXIS 15380, at \*87-88 (stating that the insertion of the forum selection clause in the Lloyd's contracts coincides with Lloyds' efforts to seek passage of the Lloyd's Act of 1982, and the clause was mandated "just as reports started to surface that American Names planned to sue Lloyd's, and shortly before it became impossible for Lloyd's to continue concealing the extent of its problems") *rev'd*, *Haynsworth II*, 121 F.3d 956.

<sup>176</sup> See *Richards I*, 1995 U.S. Dist. Lexis 6888, at \*10, 20. See also *supra* note 37 and accompanying text.

continue doing business there anyway. It would be far from unfair to subject Lloyd's to litigation in such places under these circumstances.

Similarly absent from *Richards III* is Judge Goodwin's argument that if Lloyd's cannot rely on the choice clauses, it may not continue its business the way it has.<sup>177</sup> This argument overlooks the fact that Lloyd's had been operating successfully world-wide for more than 300 years prior to the insertion of the choice clauses in its Names contracts.<sup>178</sup> As the majority in *Richards II* pointed out, even if the choice clauses are voided, "Lloyd's will go on writing insurance as long as the business is profitable;"<sup>179</sup> Lloyd's will just be more careful when directing its business toward United States investors.<sup>180</sup> Such a result would only foster the policy objectives of the federal securities laws.<sup>181</sup>

In both *Richards II* and *Richards III*, Judge Goodwin expressed his view that the court should be careful to avoid insulting foreign courts and legislatures. In *Richards II* he stated that the court should enforce the choice clauses out of respect for the integrity and competence of foreign tribunals.<sup>182</sup> In *Richards III* he argued that "[t]o require that 'American standards of fairness' must . . . govern the controversy demeans the standards of justice elsewhere in the world, and unnecessarily

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<sup>177</sup> See *Richards II*, 107 F.3d at 1433.

<sup>178</sup> See *In re Lloyd's American Trust Fund Litigation*, 954 F. Supp. 656, 661 (S.D.N.Y. 1997) (stating that Lloyd's has been operating for more than 300 years and that in 1995 more than 15,000 Names from over 50 countries were actively underwriting at Lloyd's); Appellees' Answering Brief at 6-7 n. 6 (citing *Roby*, 796 F. Supp. at 104); Appellees' Answering Brief at 11 (stating that Lloyd's Names reside in more than 80 countries).

<sup>179</sup> *Richards II*, 107 F.3d at 1429.

<sup>180</sup> See *id.* But see Appellees' Answering Brief at 10 (stating that Lloyd's does not share in the profits or losses made by the syndicates).

<sup>181</sup> See *Commission v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186-87 (1963) (noting, as purposes of the federal securities laws, to implement a policy of full disclosure of relevant information, to replace the doctrine of caveat emptor, and to play a critical role in sustaining honest and efficient markets); *Allen I*, 1996 U.S. Dist. LEXIS 12300, at \*68 (stating that "the securities laws are aimed at prospectively protecting American investors from injury by demanding 'full and fair disclosure' from issuers" (quoting *Roby*, 996 F.2d at 1364)). See also *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (stating that the federal securities laws should be construed broadly to effectuate their purposes).

<sup>182</sup> See *Richards II*, 107 F.3d at 1433. See also *supra* note 111 and accompanying text.

exalts the primacy of United States law over the laws of other countries." This argument is slightly misguided. The majority in *Richards II* and the dissent in *Richards III* simply contended that the courts of England were not equipped with the "firm shields and finely honed swords provided by American securities law"<sup>183</sup> and as a result, English courts could not adequately protect the Plaintiffs.<sup>184</sup> This is neither an attack upon the integrity or competence of foreign tribunals nor does it "demean the standards of justice" in England. It simply acknowledges that U.S. securities law is more protective of investors than English law.

In *Richards II*, the majority and the dissent agreed that the anti-waiver provisions of the U.S. securities laws cannot act as a bar to the RICO claims.<sup>185</sup> They differed, however, on how to handle these claims. The majority found insufficient evidence in the record to evaluate the English remedies available for the conduct underlying the RICO claim, while the dissent felt the record was sufficient to determine that the English remedies were adequate and, thus, the clauses were reasonable.<sup>186</sup> Interestingly, the majority was comfortable enough about the information in the record to conclude that English law does not provide adequate remedies for the alleged securities law violations.<sup>187</sup> Because the alleged securities law violations provide the basis for the Plaintiffs' RICO claims, it would seem the record contained sufficient evidence to evaluate the reasonableness of the choice clauses as they affect the RICO claims. The majority in *Richards III* did not reach a different conclusion and the dissent did not address this issue.<sup>188</sup>

## V. RECENT RELEVANT DECISIONS

A recent case from the Southern District of New York lends some support to the proposal discussed in the following section and to the dissent in *Richards III*. *Stamm v. Corporation of Lloyd's*<sup>189</sup> was decided after *Richards II* but before *Richards III*.

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<sup>183</sup> *Richards II*, 107 F.3d at 1430.

<sup>184</sup> See *id.* See also *supra* part III.C.1.

<sup>185</sup> See *Richards II*, 107 F.3d at 1436.

<sup>186</sup> See *id.*

<sup>187</sup> See *id.* See also *supra* notes 82-90 and accompanying text.

<sup>188</sup> *Richards III*, at \*20-21.

<sup>189</sup> No. 96 CIV. 5158 (SAS), 1997 WL 438773 (S.D.N.Y. Aug. 4, 1997).

In *Stamm*, the plaintiffs were investors in the Lloyd's system; their contracts, like the contracts in *Richards I*, contained the choice clauses. After the plaintiffs filed their action in state court based on common law fraud and alleged violations of the New York General Business Law, the defendant, Corporation of Lloyd's, removed the action to federal district court.<sup>190</sup> The plaintiffs moved to remand the case back to state court because they did not want to allege violations of the federal securities laws.<sup>191</sup> The plaintiffs knew that if they sought the protection of the anti-waiver provisions of the federal securities laws to preclude enforcement of the choice clauses, the Southern District would be bound by the Second Circuit's decision in *Roby*.<sup>192</sup> As a result, the court would dismiss the plaintiff's claim based on the *Roby* court's reasoning that the choice clauses do not violate the public policy of the United States because English law provides adequate remedies for American investors.<sup>193</sup>

The Southern District, however, acknowledged the SEC's recently expressed position as amicus in *Richard II* that the choice clauses violate the anti-waiver provisions of the federal securities laws.<sup>194</sup> The *Stamm* court noted that the *Roby* court relied, in part, on the fact that the Commission had been silent on the issue.<sup>195</sup> As a result, the court questioned "whether *Roby* continues to squarely preclude the instant plaintiffs from arguing that the . . . [choice] clauses in the . . . [Lloyd's contracts] are unreasonable because they violate United States public policy by depriving American investors of adequate remedies."<sup>196</sup> The Southern District then granted the defendants' motion to dismiss and granted plaintiffs leave to amend in accordance with its opinion.<sup>197</sup> The plaintiffs responded to the court's invitation

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<sup>190</sup> See *id.* at \*1.

<sup>191</sup> See *id.*

<sup>192</sup> See *id.*

<sup>193</sup> See *id.* See also *supra* notes 46-48 and accompanying text.

<sup>194</sup> See *Stamm*, 1997 WL 438773, at \*3.

<sup>195</sup> See *id.* at \*2-3. See also *supra* note 49.

<sup>196</sup> *Id.* at \*1.

<sup>197</sup> See *id.* at \*1-2. In the plaintiffs' initial complaint, they alleged that the forum selection and choice of law clauses should not be enforced because the clauses (1) were induced by fraud, and (2) are unconscionable. The plaintiffs claimed two bases in support of its argument that the choice clauses were induced by fraud: (a) Lloyd's never informed them about English law, and (b) the plaintiffs would never have signed the contracts to become Names had they been fully aware

by filing an amended complaint alleging claims under state law and federal securities law.<sup>198</sup>

The Southern District went on to state that the Ninth Circuit's reasoning in *Richards II* is "highly persuasive."<sup>199</sup> The court suggests that *Roby* may be "unwise or outdated," and "may well . . . [have been] wrongly decided."<sup>200</sup> The court cites, approvingly, the Commission's *amicus curiae* brief from *Richards II*.<sup>201</sup> The Southern District then indicates that "the cogent reasoning of the *Richards II* decision, combined with the SEC's forcefully-advocated position and Hall's exhaustive scholarship, combine to form a convincing attack on the citadel of *Roby* by undermining the policy bases and analysis of Supreme Court precedent on which that decision rests."<sup>202</sup> However, the court reaches two conclusions: (1) that it is bound by the precedent of the circuit in which it sits and, therefore, must follow *Roby*;<sup>203</sup>

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of their potential liability. In support of their claim that the choice clauses are unconscionable, the plaintiffs urged that it would have been too costly for them to withdraw from the Lloyd's system. The court rejected these arguments. *See Stamm v. Barclays Bank of New York*, 960 F.Supp. 724, 730-33 (S.D.N.Y. 1997). First, the court noted that the legal relationship between the plaintiffs and Lloyd's was not a fiduciary one, but rather a contractual relationship between businessmen. Consequently, Lloyd's was under no obligation to inform the plaintiffs about the differences between American and English law and, thus, the potential impact of the choice clauses. Secondly, the court reasoned, while the plaintiffs may not have signed the agreements had they known of the potential liability, this does not support a claim that Lloyd's incorporated the choice clauses as a result of fraud. *See id.* at 732 (citing *Prima Paint Corp.*, 388 U.S. 395, 403-404, 87 S. Ct. 1801, 1805-06 (1967)).

Addressing the plaintiffs' claim of unconscionability, the court stated that there was no "gross inequality in bargaining power between plaintiffs and defendants," such that the plaintiffs had no choice but to sign the agreement. As for the hardship to be borne by the plaintiffs via costs of withdrawing from Lloyd's, the court stated that "these allegations could not overcome the reasonable assumption that plaintiffs signed the New Undertaking because they believed their continued participation in the Lloyd's underwriting business would be profitable. Contracts that result from unwise business decisions are not, without more, unconscionable." *Id.* at 732-33.

<sup>198</sup> *See Stamm*, 1997 WL 438773, at \*2.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *See id.* at \*3-4. In its earlier opinion granting the plaintiffs leave to amend, the district court noted that the Commission's *amicus* brief points out the deficiencies in English securities law, and quoted Judge Noonan's summary of some of the major deficiencies. *See Stamm*, 960 F. Supp. at 733.

<sup>202</sup> *Stamm*, 1997 WL 438773, at \*3.

<sup>203</sup> *See Grace v. Corp. of Lloyd's*, 1997 WL 607543 (S.D.N.Y.) (Unrep.Op.) (noting the Ninth Circuit's holding in *Richard's II*, but declining to elaborate since that

and (2) even if there was a way around *Roby*, which it indicates there may be,<sup>204</sup> it is unable to resolve the issue in this case because the plaintiffs federal securities law claims are time-barred.<sup>205</sup>

The *Stamm* decision is noteworthy in several respects. First, it comes from the Southern District of New York, perhaps the district most familiar with complex cases involving the federal securities laws. Second, it severely undermines the credibility of *Roby*, a case decided by the circuit in which the *Stamm* court sits. Third, it highlights the validity of the Ninth Circuit's reasoning in *Richards II*, and the dissenting opinion in *Richards III*.<sup>206</sup> Finally, it acknowledges that the Commission has taken an affirmative position on this issue, and that no longer can the Commission's inaction be used by Lloyd's to defeat plaintiffs' claims. Each of these factors suggests the potential for a circuit conflict when the next court of appeals addresses this issue. That court may decide to adopt the reasoning of the majority in *Richards II*, the dissent in *Richards III*, and *Stamm* to conclude that more deference should be given to the anti-waiver provisions, which Congress deliberately wrote into the federal securities laws for the protection of American investors.<sup>207</sup>

In another recent case decided between *Richards II* and *Richards III*, the Ninth Circuit followed its reasoning in *Richards II*. In *Govett American Endeavor Fund Ltd. v. Trueger*,<sup>208</sup>

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decision is the subject of a rehearing en banc and, in any event, S.D.N.Y. is bound by *Roby*).

<sup>204</sup> See *Stamm*, 1997 WL438773 at \*3. The Southern District suggests that because the *Roby* court relied, in part, on the SEC's inaction, *Roby* may no longer be "iron-clad precedent" in light of the SEC's recent expression of its position on the issue of the choice clauses in the Lloyd's contracts with American investors. See *id.* See also *supra* note 49.

<sup>205</sup> See *Stamm* 1997 WL 438773, at \*3.

<sup>206</sup> See *Mayeux's A/C & Heating, Inc. v. The Famous Construction Corp.*, 1997 WL 567955 (E.D.La. 1997) (Unrep.Op.) (invalidating choice clauses in contract between contractor and subcontractor based, in part, on *Richards II* court's reasoning that where a statute addresses the validity of choice clauses, courts should defer to that legislative policy determination and not weigh the reasonableness of the choice clauses). Interestingly, *Mayeux's* was decided after the Fifth Circuit's decision in *Haynsworth II* and the Ninth Circuit's decision to rehear *Richards II* en banc.

<sup>207</sup> See *Richards II*, 107 F.3d at 1433.

<sup>208</sup> 112 F.3d 1017 (9th Cir. 1997).

the plaintiff, American Endeavor, was an investment fund organized under the laws of Jersey, Channel Islands. Arthur Trueger, an American citizen, was one of American Endeavor's directors.<sup>209</sup> When American Endeavor was formed several agreements were executed: (1) American Endeavor entered into an agreement with Berkeley Govett International Limited (hereinafter "BGIL"), a Channel Islands company that is a wholly-owned subsidiary of Govett & Co. Ltd. (hereinafter "Govett"), also a Channel Islands company, for BGIL to manage the American Endeavors fund's assets; (2) Berkeley International Capital Corp. (hereinafter "Berkeley"), a California company, entered into an agreement to provide investment advice to BGIL; (3) Govett entered into an agreement with American Endeavor to ensure that BGIL and Berkeley discharged all of their obligations.<sup>210</sup> All three agreements contained forum selection and choice of law clauses favoring Jersey, Channel Islands.<sup>211</sup>

American Endeavor filed suit in federal district court in California.<sup>212</sup> American Endeavor, claiming violations of RICO, alleged that Trueger orchestrated a scheme whereby American Endeavor would invest in American companies that would pay undisclosed kickbacks to Trueger, Berkeley, and BGIL, and that Trueger, Berkeley, and BGIL misappropriated American Endeavor's assets for their own personal gain.<sup>213</sup> The district court granted the defendants' motion to dismiss for lack of subject matter jurisdiction.<sup>214</sup> The court reasoned that the choice clauses in the above agreements called for Jersey law; Jersey law does not recognize RICO (or have a statute like RICO); therefore, the court lacks subject matter jurisdiction.<sup>215</sup> The court relied, in part, on the Second Circuit's approval of public policy in favor of forum selection and arbitration clauses, as expressed in *Roby*.<sup>216</sup>

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<sup>209</sup> See *id.* at 1018-19.

<sup>210</sup> See *id.* at 1019.

<sup>211</sup> See *id.* at 1019-20.

<sup>212</sup> See *id.* at 1021.

<sup>213</sup> See *Govett*, 112 F.3d at 1020.

<sup>214</sup> See *id.* at 1021.

<sup>215</sup> See *id.*

<sup>216</sup> See *id.* (citing *Roby*, 996 F.2d 1353).

On appeal, the Ninth Circuit reversed and remanded relying, in part, on its decision in *Richards II*.<sup>217</sup> The court noted that:

RICO represents a fundamental choice by Congress to employ the heavy artillery of federal law against a variety of organized criminal endeavors involving security fraud, wire fraud, and bribery. To permit this fundamental choice of public policy to be frustrated by private choice would be to exalt autonomy in contract over the laws of the United States; to do so would be contrary to the universal consensus on the appropriate limits to autonomy.<sup>218</sup>

Acknowledging that part of the plaintiffs' RICO claims were based on alleged violations of the federal securities laws, the court stated that the anti-waiver provisions of those laws must be observed.<sup>219</sup> As such, the court noted that the district court's reliance on *Roby* and *Bonny* is unfounded.<sup>220</sup> Thus, the court held that the RICO claim was permissible "as it incorporates a pattern of violations of the Securities Acts."<sup>221</sup>

Not surprisingly, Judge Goodwin dissented again in *Govett*, and would have affirmed the district court's finding that it lacked subject matter jurisdiction.<sup>222</sup> Judge Goodwin first cited the Restatement (Second) of Conflict of Laws, and its mandate that the law chosen by the parties shall govern unless that would be contrary to a fundamental policy of a state having an interest materially greater than that of the chosen state.<sup>223</sup> He then suggested that Jersey's interest in providing a remedy for its citizens is just as strong as the United States' interest in preventing fraudulent activity by its citizens.<sup>224</sup> As a result,

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<sup>217</sup> See *id.* at 1022.

<sup>218</sup> *Govett*, 112 F.3d at 1021-22 (citing Hessel E. Yntema, 'Autonomy' in *Choice of Law*, 1 Am. J. Comp. L. 341, 353 (1952)).

<sup>219</sup> See *id.* at 1021-22.

<sup>220</sup> See *id.* at 1022.

<sup>221</sup> *Id.* In discussing the defendants' argument that the RICO claim should be dismissed because of the choice of law clause, the Ninth Circuit states that "[a] contract specifying the law of a foreign jurisdiction as the law controlling contractual duties cannot be used as a defense to claims of torts committed in violation of federal criminal statutes." *Id.* at 1021.

<sup>222</sup> See *id.* at 1022.

<sup>223</sup> See *Govett*, 112 F.3d at 1023.

<sup>224</sup> See *id.* at 1023-24.

Judge Goodwin concluded the law chosen by the parties should be left undisturbed.<sup>225</sup>

Although the Ninth Circuit in *Govett* appeared to rely on its decision in *Richards II*, which is no longer controlling law, its analysis of the RICO claim was quite different in each case. In *Govett*, the court suggested that the RICO claim was permissible partly because it was premised upon alleged violations of the securities acts. Since the anti-waiver provisions prohibit waiver of rights under the securities acts, a claim based upon conduct constituting violations of these acts should not be "waivable" via a choice of law clause.<sup>226</sup> However, in *Richards II*, the court stated that the anti-waiver provisions of the securities laws do not prohibit waiver of rights under RICO, even where the RICO claim is premised upon alleged violations of the securities laws.<sup>227</sup> There, the court remanded the RICO claim to examine the remedies available in England for the conduct upon which the RICO claim was based.<sup>228</sup> In *Richards III*, the court simply stated that the loss of RICO claims would not prevent the court from granting a motion to dismiss for forum non conveniens.<sup>229</sup>

The court in *Govett* could have found that because Jersey does not have a statute comparable to RICO, Jersey's remedies are not adequate to effectuate the purposes of RICO. Consequently, the court could have upheld the RICO claim by finding that the choice of law clause contravened a strong public policy of the forum in which suit was brought, and not because the RICO claim was premised upon alleged violations of the securities laws.<sup>230</sup> Separate remedies sought by the plaintiffs under the securities laws, rather than RICO, could have been preserved by the anti-waiver provisions. Such a finding would

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<sup>225</sup> See *id.* at 1023.

<sup>226</sup> Interestingly, the reform Act of 1995 amended RICO to eliminate securities law violations as a predicate act under RICO. See Richard M. Phillips and Gilbert C. Miller, *The Private Securities Reform Act of 1995: Rebalancing Risks and Rewards for Class Action Plaintiffs, Defendants and Lawyers*, 51 BUSINESS LAWYER 1009, 1061 n. 314 citing 18 U.S.C. § 1964(c) (1994 & West Supp. 1996).

<sup>227</sup> See *Richards II*, 107 F.3d at 1430.

<sup>228</sup> See *id.* See also *supra* note 152.

<sup>229</sup> *Richards III*, at \*20-21.

<sup>230</sup> See *supra* note 226.

have been more consistent with the Ninth Circuit's holding in *Richards II*.

Although in *Govett* the Ninth Circuit applied the anti-waiver provisions to invalidate choice clauses, as it did in *Richards II*, the impact of *Govett* is not likely to be as significant as *Stamm*, which did not follow *Richards II*. This is so for two reasons. First, in *Stamm* the Southern District of New York expressed severe misgivings about the Second Circuit's stance on the enforceability of the choice clauses in the Lloyd's contracts. Second, as discussed above, the Ninth Circuit's position is somewhat unclear regarding the anti-waiver provisions' applicability to RICO claims premised upon alleged violations of the securities laws. Nevertheless, in the wake of *Stamm* and *Govett*, other courts may find it appropriate to give more deference to the anti-waiver provisions of the federal securities laws.

In *Haynsworth II*,<sup>231</sup> the Fifth Circuit joined the majority in upholding choice clauses in Names' contracts with Lloyd's. There, the Fifth Circuit consolidated two cases on appeal from the Southern District of Texas. Both cases involved claims brought by American Names against Lloyd's and/or its affiliated entities premised, in part, on alleged violations of the federal securities laws.<sup>232</sup> In each case, the defendant moved to dismiss based on the choice clauses, among other things.<sup>233</sup> In *Haynsworth I*, the district court granted the motion, finding that the parties were bound by the choice clauses.<sup>234</sup> In *Leslie*, the district court denied the motion, finding that the choice clauses were unenforceable because they were procured through fraud.<sup>235</sup>

On appeal, the Fifth Circuit affirmed *Haynsworth I* and reversed *Leslie*.<sup>236</sup> The Fifth Circuit rejected the plaintiffs' claim that the choice clauses were procured through fraud.<sup>237</sup> The court noted the difference between avoiding the choice clauses

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<sup>231</sup> *Haynsworth II*, 121 F.3d at 958.

<sup>232</sup> *See id.* at 961.

<sup>233</sup> *See id.*

<sup>234</sup> *See id.*

<sup>235</sup> *See id.*

<sup>236</sup> *See Haynsworth II*, 121 F.3d at 970. *But see, Lloyd's Scores Victory over U.S. Names in Fraud Battle*, *The Lawyer*, Sept. 9, 1997 (stating that the Haynsworth and Leslie Names are likely to seek leave to appeal to the Supreme Court).

<sup>237</sup> *See Haynsworth II*, 121 F.3d at 963-65.

when the underlying claim was based on alleged fraud and alleging that inclusion of the specific clauses in the contracts was a product of fraud.<sup>238</sup> Although the former may support the plaintiffs' underlying claim, only the latter provides an adequate basis for avoiding the choice clauses.<sup>239</sup> The court rejected the plaintiffs' argument that they were fraudulently induced to sign the General Undertaking, which included the choice clauses, because Lloyd's never mentioned the addition of the choice clauses when these contracts were executed.<sup>240</sup> The court found two bases to attack this argument: (1) this argument concerns the general undertaking as a whole, not the specific inclusion of the choice clauses; and (2) the plaintiffs, as sophisticated parties, had the responsibility to read the contract before signing it.<sup>241</sup>

The Fifth Circuit then discussed the "reasonableness" of the choice clauses in light of the public policy embodied in the anti-waiver provisions of the federal securities laws.<sup>242</sup> Starting with the presumption of enforceability of choice clauses, established by the Supreme Court in *Bremen* and *Scherk*, the Fifth Circuit stated that "we must tread cautiously before expanding the operation of U.S. securities law in the international arena. The regulatory regime Congress has constructed is 'designed to protect American investors and markets,' not to stamp out 'any fraud that somehow touches the United States.'"<sup>243</sup> The court then concluded that "[t]o insist on the application of American securities law where the laws of the parties' agreed upon forum meet this concern would be the very height of the parochialism that *Bremen* condemned."<sup>244</sup> The court did not, however, fully analyze how English law "meet[s] this concern" for protecting American investors. Although it acknowledged that the federal securities laws "may be the broadest, most comprehensive of all," the Fifth Circuit held that this alone cannot render inferior

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<sup>238</sup> See *id.* at 963 (quoting *Scherk*, 417 U.S. at 519 n.14).

<sup>239</sup> See *id.* at 963.

<sup>240</sup> See *id.* at 964.

<sup>241</sup> See *Haynsworth*, 121 F.3d at 964-65.

<sup>242</sup> See *id.* at 965-66.

<sup>243</sup> *Id.* at 966-67 (quoting *Robinson v. TCI/US West Communications, Inc.*, 117 F.3d 900, 906 (5th Cir. 1997)).

<sup>244</sup> *Id.* at 967.

the laws of other countries.<sup>245</sup> The court wrote merely three sentences before it concluded that the English remedies were adequate to protect the policies behind the federal securities laws.<sup>246</sup>

The most recent case, presently pending before the Eleventh Circuit, involves the same choice clauses as those in *Richards I*.<sup>247</sup> *Lipcon* involves another group of Names who sued Lloyd's for violations of the federal securities laws arising out of their investments in the Lloyd's system. The district court dismissed the action based on the choice clauses. Following the *Bremen* Court's reasoning, the court held that the clauses are presumptively valid, and that this presumption could be overcome by a showing that the clauses are unreasonable under the circumstances. First, the court found that the clauses were not procured through fraud. Second, relying on other courts of appeals, the court found that enforcing the choice clauses would not deny the plaintiffs a remedy, be fundamentally unfair, or contravene public policy. As a result, the court dismissed the plaintiffs' complaint. The plaintiffs have appealed the district court's decision to the Eleventh Circuit.

In anticipation of the Eleventh Circuit's consideration of the *Lipcon* appeal, the Commission filed an *amicus curiae* brief with the court.<sup>248</sup> In its brief, the Commission states four major bases for reversing the district court: (1) the choice clauses are void because their effect is to preclude relief under the federal securities laws, in violation of the anti-waiver provisions; (2) the district court relied on the wrong case law; (3) even absent the anti-waiver provisions, enforcing the choice clauses would contravene public policy; and (4) English law does not provide

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<sup>245</sup> *Id.* at 969.

<sup>246</sup> See *Haynsworth II*, 121 F.3d at 969-70. The court found fault in the Ninth Circuit's reasoning in *Richards I* that in *Scherk* the Supreme Court focused on the forum selection clause, not a choice of law clause and, thus, it is distinguishable. The court noted that even without a choice of law clause, enforcing a foreign forum selection clause would often result in the displacement of American law for that of the chosen forum. See *id.* at 967. As a result, even if *Scherk* were factually distinguishable, such a distinction is inconsequential to the Court's reasoning. See *id.*

<sup>247</sup> *Irmgard Lipcon, et al. v. Underwriters at Lloyd's London, et al.*,

<sup>248</sup> See Brief of the Securities and Exchange Commission, *Amicus Curiae*, *Irmgard Lipcon, et al. v. Underwriters at Lloyd's London*, USCA 11<sup>th</sup> Cir., No. 97-5411 (Jan. 1998).

rights and remedies equivalent to those provided by American law.

First, the Commission argues that the fact that the plaintiffs agreed to the choice clauses is irrelevant because "the very objective of the antiwaiver provisions is to invalidate such agreements."<sup>249</sup> The forum selection clause leads to the application of English choice of law rules. Those rules lead to the application of English law where the parties have chosen for that law to apply. Thus, the choice clauses together lead to the application of English law. The anti-waiver provisions prohibit this result. Therefore, the choice clauses are void based on the clear language of the American statutes.

Next, the Commission addresses the case law relied upon by the district court. It argues that courts have mistakenly read *Bremen* to require them to determine whether the choice clauses would contravene a public policy of the forum. As a result, courts have analyzed the antiwaiver provisions in a way that enables courts to treat these provisions as mere expressions of public policy. The Commission notes, however, that the antiwaiver provisions represent an "express and unequivocal directive that the rights and obligations under the securities laws cannot be waived." As such, courts are not free to "substitute their own public policy determinations" for those already made by Congress.<sup>250</sup>

The Commission then addressed *Scherk* and *Roby*. Reiterating the argument it made as *amicus* in *Richards II*, the Commission noted that *Scherk* did not involve a case where the foreign forum sought to apply its own law; rather, there, the contract had a choice of law provision calling for application of Illinois law. Thus, the district court is not bound by *Scherk*. Further, *Roby* and its progeny, rather than determining whether American law would be available, focused on whether English law would be adequate to protect the plaintiffs. As noted earlier by the Commission, this reasoning is misguided because Congress's clear directive is that the clauses should be void if they would displace American securities law.<sup>251</sup>

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<sup>249</sup> *Id.* p.11.

<sup>250</sup> *Id.* p. 14.

<sup>251</sup> *Id.* pp.16-17.

The Commission then states its position that, even absent the antiwaiver provisions, enforcement of the choice clauses would contravene public policy. This argument is based on the premise underlying cases such as *Mitsubishi Motors* and *Vimar*, that it is against public policy to prospectively waive statutory rights. The Commission asserts that the Supreme Court cases relied upon by the district court involved forum selection and not choice of law clauses. The courts all held as they did with the assumption that American statutory remedies would be available to the plaintiffs. It is precisely because of this assumption that the reasoning of those cases is not binding in this context.<sup>252</sup> The Commission concluded by reiterating its argument contained in its *amicus curiae* brief submitted to the Ninth Circuit in *Richards II*, that English law is not as protective of the plaintiffs as American law.<sup>253</sup>

The Eleventh Circuit heard oral arguments May 21, 1998, but, to date, no decision has been rendered.<sup>254</sup>

## VI. A PROPOSED HOLDING FOR FUTURE CASES

The foregoing discussion illustrates the difficulty courts have had dealing with the choice clauses in the Lloyd's contracts.<sup>255</sup> The next court confronted with this issue should hold as follows: (1) the anti-waiver provision of the Securities Act applies to all cases in which a security is acquired<sup>256</sup> in the United States; (2) the anti-waiver provision of the Securities Exchange Act applies to all cases in which a security is offered, purchased, or sold in the United States;<sup>257</sup> and (3) neither anti-waiver provision can be avoided by a choice of law clause, or by a forum selection clause where the chosen forum would not apply United States securities law. The difference in the treatment of the two

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<sup>252</sup> *Id.* pp.18-19.

<sup>253</sup> *Id.* p.22, citing Section 42 of the Financial Services Act of 1986.

<sup>254</sup> The publication date of this article was November 15, 1998.

<sup>255</sup> *See supra* note 10.

<sup>256</sup> Since the word "acquired" is not expressly defined in the Securities Act, it should be given its ordinary meaning of securing beneficial ownership. The Random House Dictionary of the English Language 18 (1987).

<sup>257</sup> *See supra* note 12-14.

anti-waiver provisions is due to the broader language contained in the Securities Exchange Act's anti-waiver provision.<sup>258</sup>

This holding would be consistent with the language of the anti-waiver provisions of the federal securities laws by which U.S. courts are bound, assuming the jurisdictional elements for a claim based on the securities laws are met.<sup>259</sup> The requirement that a security be offered, acquired, or sold in the United States would avoid at least some potential criticism that the American approach to international transactions is one of "parochialism."<sup>260</sup> In most cases, if this requirement is satisfied, courts can feel justified that, by enforcing the anti-waiver provisions, they will be protecting persons whom the federal securities laws were designed to protect.<sup>261</sup>

Also, the proposed holding would support Congress's policy determination that the protection the federal securities laws provide American investors outweighs the benefits of affording investors complete contractual autonomy to waive substantive statutory rights.<sup>262</sup> Congress enacted the anti-waiver provisions

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<sup>258</sup> See 15 U.S.C. §§ 77n, 78cc (1994). See *supra* notes 33-35 and accompanying text. The difference in the language between the two anti-waiver provisions relates to the purposes behind the Securities Act and the Securities Exchange Act. The Securities Act focuses on protecting investors in purchasing securities offered by issuers; as a result, that Act's anti-waiver provision covers any person "acquiring" any security. See *supra* note 3. The Securities Exchange Act, however, was intended to have more broad application, covering all secondary market transactions and all persons involved directly or indirectly in such transactions; thus, that Act's anti-waiver provision prohibits any person from waiving compliance with the Securities Exchange Act. See *supra* note 4.

<sup>259</sup> See 15 U.S.C. §§ 77n, 78cc (1994). See also *supra* notes 32-34 and accompanying text.

<sup>260</sup> See, e.g., *Bremen*, 407 U.S. at 9. See also *Baker*, 105 F.3d at 1105 n.5 (defendant, counsel for Lloyd's, accusing district court of engaging in "parochial solicitude" for refusing to allow law firm to avail itself of the forum selection clause in plaintiffs'/Names' contracts with Lloyd's where dispute was between Names and law firm, not Lloyd's). See *id.*

<sup>261</sup> See *Richards II*, 107 F.3d at 1433.

<sup>262</sup> See Hall, *supra* note 70, at 86 (acknowledging that academic commentators have advocated parties' freedom to use choice of law provisions (citing Patrick J. Borchers, *The Internationalization of Contractual Conflicts Law*, 28 VAND. J. TRANSNAT'L L. 421, 435, 438 (1995); James T. Gilbert, *Choice of Forum Clauses In International And Interstate Contracts*, 65 KY. L. J. 1, 3 (1976))). See also *Haynsworth I*, 933 F. Supp. at 1323 ("Whatever policy may be embodied in a consumer protection act, public policy strongly supports private law. Party autonomy allows parties to a contract to specify which laws will govern the contract. Contractually selecting a forum for future litigation is not an impermissible waiver of rights and does not violate public policy, especially when the contracting parties are knowl-

to help investors by precluding them from contracting away the protection contained in the federal securities laws.<sup>263</sup> Neither individual investors, nor the courts, should be able to supplant the policy decision already made by Congress.<sup>264</sup> Further, the Supreme Court has stated its view that it is irrelevant that parties voluntarily enter into an agreement containing choice clauses; if a contractual provision waives compliance with a statutory duty, it is void under Section 29(a) of the Exchange Act.<sup>265</sup>

Finally, this proposal would provide predictability for American investors and for foreign venturers seeking capital in the U.S., and would obviate the need for courts to compare the remedies of the respective nations' laws. This proposal may require analysis of jurisdictions' choice of law rules in order to determine whether a "chosen forum" would apply U.S. securities law. Choice of law issues in these types of cases are often quite complex.<sup>266</sup> Nevertheless, the author submits that parties can, more often than not, better anticipate the outcome of the choice of law analysis than they could a comparative analysis of the remedies available, and policies underlying such remedies, in the respective jurisdictions.

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edgeable." (citing *Hoffman v. Burroughs Corp.*, 571 F. Supp. 545, 550 (N.D.Tex. 1982); *Wydel Assoc. v. Thermasol, Ltd.*, 452 F. Supp. 739, 742 (W.D.Tex.1978); *Accelerated Christian Education, Inc. v. Oracle Corp.*, 925 S.W.2d 66 (Tex.App.—Dallas 1996); Christian B. Miller, *Note, M/V Sky Reefer: Clear Sailing for Foreign Arbitration Clauses under COGSA*, 18 Hous. J. INT'L L. 935 (1996))).

<sup>263</sup> See Hall, *supra* note 70, at 59. In addition, it has been argued in an analogous context that requiring American plaintiffs to assert their claims against common carriers only in distant courts would lessen substantially the liability of such carriers. See *Underwriters at Lloyd's of London*, 773 F. Supp. at 525.

<sup>264</sup> See *Richards II*, 107 F.3d at 1426. See also *supra* note 53 and accompanying text.

<sup>265</sup> See *Shearson/American Express*, 482 U.S. 220, 230 (quoted in Appellants' Opening Brief at 22-23).

<sup>266</sup> See, e.g., *International Insurance Co. v. Certain Underwriters at Lloyd's of London*, No. 88 C 9838, 1991 WL 349907, at \*8-12, 15-16 (N.D. Ill. Sept. 16, 1991) (engaging in choice of law analysis between Illinois and English law in dispute between, among others, insurer and reinsurer). See also *Chuidian v. Philippine National Bank*, 976 F.2d 561, 564 (9th Cir. 1992) (stating that in federal question cases, federal common law governs the choice of law determination).

## VII. CONCLUSION

The effect of the anti-waiver provisions of the federal securities laws addressed in the *Richards* trilogy, and other similar cases,<sup>267</sup> is an important issue that needs to be resolved consistently.<sup>268</sup> Its potential impact reaches far beyond the Lloyd's of London system and into the ever-expanding global marketplace. Should one of these cases find itself on the steps of the Supreme Court, or a court in which this issue would be one of first impression, the proposal discussed in Part VI, above, would enable the court to reach a conclusion consistent with Congress's intentions. The proposal also would enable future participants in the global marketplace to proceed with a reasonable degree of certainty about the effect of the anti-waiver provisions of the federal securities laws.

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<sup>267</sup> See *Haynsworth II*, 121 F.3d at 969-70. Five circuit courts of appeals have ruled on cases between Names and Lloyd's and/or its affiliated entities. See, e.g., *Richards II*; *Bonny*, 3 F.3d 156; *Roby*, 996 F.2d 1353; *Riley*, 969 F.2d 953; *Hirsch v. Oakeley Vaughan Underwriting, Ltd.*, No. 89-2563, (5th Cir. May 31, 1989) (unpub. slip op.), cert. denied, 498 U.S. 981 (1990). Similarly, several district courts have addressed this issue as well. See *Richards I*, 1995 U.S. Dist. LEXIS 6888, at \*13-14 (citing *Leslie*, 1995 U.S. Dist. LEXIS 15380; *Beauzay v. Corporation of Lloyd's*, No. C-94-20859-JW, 1995 WL 419736 (N.D. Cal. July 10, 1995)).

<sup>268</sup> See Appellants' Opening Brief at p. 14-15 (citing *Leslie*, 1995 U.S. Dist. LEXIS 15380; *Feigin v. Lloyd's*, No. 95 CV 5541 (Colo. Dist. Ct., Denver Dec. 27, 1995)); *Grace*, 1997 WL 607543 (S.D.N.Y.) (Unrep. Op.).