IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL J. QUILLING, Receiver for ABC VIATICALS, INC., and Related Entities, Plaintiff, v. ERWIN & JOHNSON, LLP and CHRISTOPHER R. ERWIN, Defendants Third-Party Plaintiffs, v. MILLS, POTOCZAK & COMPANY, DMHS STALLARD and CHRISTOPHER JOHN WILLIAM STENNING, Third-Party Defendants.	§	Case No.: 3:07-CV-1153-P-BF ECF

MEMORANDUM OF LAW IN SUPPORT OF DMHS STALLARD AND CHRISTOPHER JOHN WILLIAM STENNING'S MOTION TO DISMISS THIRD PARTY COMPLAINT

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Third Party Defendants, DMH Stallard and Christopher John William Stenning ("Stenning", and collectively "DMHS"), by and through their attorneys, Thomas P. McGarry and Richard B. Polony, and Richard N. Radford, move to dismiss[1] Erwin & Johnson, LLP and Christopher R. Erwin's (collectively "E&J") Third-Party Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and for their memorandum of law state as follows:

BACKGROUND

The Third-Party Complaint ("TP Complaint") alleges that DMHS conducted an investigation of certain Longevity Bonds issued by Albatross S.pA. ("Albatross"), an Italian company and guarantee letter issued by Unicredit Xelion Banaca S.p.A. ("Xelion"), an Italian financial institution. Third Party Defendants DMH Stallard, a law firm in England, and Stenning, an English solicitor were hired to advise ABC VIATICALS, INC. ("ABC") and issue an opinion letter with respect to a transaction based in England and Italy to which laws of England and Wales would apply. DMHS is now defending against a legal malpractice action in the United Kingdom's High Court of Justice because ABC has sued DMHS for its investigation and opinion of the Albatross bonds and the Xelion guarantee of those bonds.[2] The most relevant and salient fact of the UK suit is that ABC claims that it was the client of DMHS and that the legal advice provided by DMHS and Stenning was intended for the benefit of ABC. A copy of the UK suit is attached as Exhibit A.

[1] DMHS continues to assert their objection to jurisdiction as raised in its motion to dismiss, see Doc. #s 132 & 133.

[2] This Court recognized the potential for duplicative litigation in its Oct. 16, 2009 order, docket # 101: " It is true that there would be duplicitous litigation if Plaintiff pursued a lawsuit against Third-Party Defendants in the United Kingdom despite their being brought into this action." ABC has filed suit in the UK and this Court should take judicial notice of this fact in considering this motion to dismiss.

E&J seeks to recover money damages from DMHS based upon the legal advice DMHS provided to ABC. The TP Complaint seeks damages based on five claims: common law indemnity (Count I), legal malpractice (Count II), breach of fiduciary duty (Count III), negligent infliction of emotional distress (Count IV), and contribution (Count V).[3] DMHS now moves to dismiss the TP Complaint. In considering this motion, this Court will need to address whether the law of Texas, California or England applies to the transactions and claims described in the TP Complaint. Regardless of which law is applied, the TP Complaint should be dismissed.

LEGAL STANDARD

To withstand a Rule 12(b)(6) motion, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Borneo Energy Sendirian Berhad v. Sustainable Power Corp.*, 646 F.Supp.2d 860, 864 (S.D.Tex.,2009) See also *Ashcroft v. Iqbal,* 556 U.S. ----, 129 S.Ct. 1937, 1940, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S.Ct. at 1940 (citing *Twombly,* 550 U.S. at 556).

"[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of a cause of action, supported by mere conclusory statements do not suffice." *Iqbal,* 129 S.Ct. at 1940. Additionally, a complaint must describe the claim with sufficient detail as to "give the defendants fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). When the allegations in a complaint, however true, could not raise a claim

[3] E&J has exceeded the scope of this Court's order permitting a third party complaint as E&J has filed claims personal in nature and seeking personal damages, i.e., negligent infliction of emotional distress. The basis for allowing the third party complaint on an impleader basis was that E&J claimed DMHS was responsible for any harm resulting from E&J's own conduct. The scope of the order was for contribution-like claims and not personal tort claims.

of entitlement to relief, "this basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court." *Borneo*, 646 F.Supp.2d at 866.

CONFLICTS OF LAW ANALYSIS

"A court must make a conflicts-of-laws decision only when the case is connected with more than one state and the laws of the states in question differ on one or more points in issue." *Greenberg Taurig of New York, PC v. Moody*, 161 S.W.3d 56 (Tex.Civ.App. 2004). Texas uses the most significant relationship test as set forth in the Restatement (Second) of Conflicts of Laws. The restatement requires a separate conflicts analysis for each issue in the case. In general, when evaluating tort claims, the factors to be considered in the conflicts analysis are: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. *Id.* at 71.

E&J alleges that ABC instructed it to retain an English solicitor to investigate the Albatross bond and Xelion support letter. TP Comp. ¶ 10. E&J contacted Stenning in England and DMHS was retained to investigate "Xelion's support letter and relationship between Xelion and Albatross and to deliver an opinion."[4] TP Comp. ¶¶ 11, 13. Stenning traveled from England to Italy to conduct the investigation and prepared the opinion in England.[5] TP Comp. ¶ 13. E&J alleges that the opinion was addressed and delivered to ABC in Texas. TP Comp, ¶ 13. The retention of DMHS did not require the application of Texas or California law. Rather, the entire transaction was based in England and required the retention of an English solicitor.

According to E&J, the underfunding of the premium reserve account which is attributed to E&J was caused, in part, by the lack of a valid and enforceable Albatross bond and Xelion support

[4] Stenning is an English solicitor and DMHS Stallard is a firm of English solicitors. TP Comp. ¶ 2.

[5] Albatross and Xelion are both Italian corporations. TP Comp. ¶¶ 7, 9.

letter. TP. Comp. ¶ 16. E&J alleges that a valid and enforceable bond "would reduce the necessary premium reserve." *Id.* The ABC Receiver disagrees and has admitted that the damages of approximately $20 million it seeks from E&J are *exclusive* of damages which might have been incurred due to the lack of a valid and enforceable Albatross Bond. Am. Comp. Doc. #41 ¶ 16 and Doc. #108, pp.5-7. Significantly, pursuant to this Court's October 6, 2008 Order "the Receiver sold the portfolio of policies before any Albatross Bond even became due. ... Therefore, the Receiver incurred no additional premium obligations as a result of Albatross' fraud and DMHS Stallard's representations." Doc. #108, p. 7-8.

The theoretical damages to the premium reserve allegedly caused by DMHS Stallard never materialized. In fact, there are no facts alleged in the TP Complaint which fix the locale (or existence) of damages. The location where damages were incurred would therefore be neutral.

DMHS performed its investigation in Italy and drafted its opinion in England based on English law. Indeed, ABC specifically requested the opinion of an English solicitor, not a California or Texas lawyer. The second factor clearly favors the application of English law. *Greenberg Taurig of New York, PC,* 161 S.W.3d at 74-75. England has the strongest interest in applying its laws and rules of professional conduct which apply to English solicitors which are licensed under the laws of England. *Id.* (holding that "it is manifest that the law of New York, not Texas, should govern the Investors' fraud claims that are based on a fiduciary duty owed by New York lawyers to their clients.") That is the exact issue presented here and this rule applies with equal force directing the application of English law.

The third factor would appear to be neutral since ABC, E&J and DMHS Stallard are each located in different states or countries with no single common residence or place of incorporation. Although ABC and E&J are both U.S. Citizens, they hail from different states and the question is which state's or country's law to apply. This factor would appear to be neutral. The final factor is either neutral or favors the application of English law. The allegations in the Complaint do not fix

any location for the relationship between the parties other than the location for the performance of the work by DMHS. DMHS was retained in England to perform and investigation in Italy and prepare and opinion in England under English law. The only alleged connection to Texas was the opinion which was allegedly addressed to ABC in Texas. There is no connection to the state of California other than the residence of E&J. This final factor either supports a finding of neutrality or it supports the application of English law.

To the extent that the claims asserted by E&J in the TP Complaint are considered based upon the law of contracts, the choice of law analysis is much shorter. In Texas, if a contract is one "for the rendition of services, the Texas Supreme Court has particularly relied on section 196 of the Restatement." *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 461 (5th Cir.1991) (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 679 (Tex.1990)) abrogated on other grounds by *Floors Unlimited, Inc. v. Fieldcrest Can-non, Inc.*, 55 F.3d 181, 185-86 (5th Cir.1995). Under section 196 of the Restatement, the law to be applied in resolving a dispute relating to a contract for services is "the local law of the state where the contract requires that the services, or a major portion of the services, be rendered, unless, with respect to the particular issue, some other state has a more significant relationship." Restatement (Second) Conflicts § 196 (1971). Thus, "as a rule" in the absence of exceptional circumstances, the location of services to be rendered "alone is *conclusive* in determining what state's law is to apply." *DeSantis*, 793 S.W.2d at 679. (emphasis added)

In this case, DMHS was retained to provide legal services in the form of an opinion letter and investigation. Under Texas law, this would mean that the law of the location where the work was to be performed would be a conclusive indicator of what law should apply. DMHS is an English law firm, located in England, that was retained to perform an investigation and write an opinion letter in England. DMHS performed all of its legal services work outside of the United States. There are no exceptional circumstances in this matter to detract from the clear conclusion that because the services of DMHS were performed in England, English law should be applied.

ARGUMENT

I. Failure To State A Claim for Common Law Indemnity (Count I)

Count I of the TP Complaint asserts a claim for "common law indemnity" among tortfeasors. E&J is alleged to have breached its duty to ABC; thus, E&J is an alleged tortfeasor vis-a-vis ABC. Accordingly, E&J's request for common law indemnification is brought as tortfeasor seeking indemnification from another alleged tortfeasor, DMHS. See ABC's Am. Comp. Docket #41.

English and Texas law are similar in that neither recognizes any claim for common law indemnity under the facts of this case. *Aviation Office of America, Inc. v. Alexander & Alexander of Texas, Inc.*, 751 S.W.2d 179, 180 (Tex. 1988) (common law indemnity among tortfeasors has been abolished); *Jones v. Manchester Corp.*, 2 Q.B. 852, 856, 869, 871 (C.A. 1952) (holding that joint tortfeasors have no right of indemnity at common law). "The Texas Supreme Court has held that the common law right of indemnity is no longer available among joint tortfeasors in negligence cases." *International Harvester Co. v. Zavala*, 623 S.W.2d 699, 702 (Tex.Civ.App. 1981) Accordingly, under Texas and English law, Count I should be dismissed.

E&J attempts to circumvent the application of Texas law and the consequences of its own wrongful conduct by alleging that DMHS was an agent of E&J; however, such conclusory allegations are to be given no weight by this Court. *Iqbal*, 129 S.Ct. at 1940. "Agency is a relationship which must be proved and cannot be presumed to exist. An essential element of proof of agency is that the alleged principal has both the right to assign the agent's task and to control the means and details of the process by which the agent will accomplish the task." *Johnson v. Owens*, 629 S.W.2d 873, 875 (Tex.Ct.App.1982); *Marriott Bros. v. Gage*, 717 F.Supp. 458, 460 (N.D.Tex.,1989) ("The alleged principal must have 'both the right to assign the agent's task and to control the means and details of the process by which the agent will accomplish the task.'"); *Cardinal Health Solutions, Inc. v. Valley Baptist Medical Center*, 643 F.Supp.2d 883, 888 (S.D.Tex. 2008) ("There must be such a retention of a right of supervision that the contractor is not entirely free

to do the work in his own way." quoting the Supreme Court of Texas)).

The flaw in Plaintiff's claim is that the relationship with DMHS alleged by E&J is antithetical to the law governing lawyers. R. Mallen and S. Smith, *Legal Malpractice* § 5:9, at 678-83 (2009) Since the relationship between an attorney and client is personal, E&J could only delegate a service to be performed by outside counsel with the consent of the client, ABC. *Id.* at 678 ("Except for delegation within the law firm, an attorney does not have the inherent authority to associate outside counsel or to refer the client's representation.") Typically, lawyers may only become vicariously liable for work performed within their own firm or for services performed by other counsel with whom they share fees or with which they form a joint venture. Mallen, § 5:9 at 680-81; Restatement (Third), The Law Governing Lawyers § 58 cmt. e., 1998 (A firm is not ordinarily liable for the acts or omissions of a lawyer outside the firm who is working with the firm's lawyers as co-counsel or in a similar arrangement. Such a lawyer is usually an independent agent of the client over whom the firm has no control. Such a lawyer is not a servant or independent contractor of the firm. This is especially true when the outside lawyer represents the client in another jurisdiction, [e.g., England] in which that lawyer, but not the firm's lawyers, is a member of the bar.)

E&J cannot allege the requisite agency relationship for a number of reasons. First, the work which was to be performed for ABC required the expertise of an English solicitor. E&J does not allege that it is licensed as a firm of solicitors and could ethically exert any direction or control over the services rendered by DMHS without engaging in the unauthorized practice of law. Second, there is no derivative or imputed liability for discrete professional services which are referred to independent counsel. Third, if, as E&J has alleged, the referral was at the request and with the consent of the client, the attorney-client relationship and attendant duties flow between the attorney, DMHS, and the client, ABC. E&J was the intermediary that followed ABC's instruction to contact DMHS. Accordingly, E&J's allegations are legally insufficient to create any cognizable claim for indemnity and Count I should be dismissed.

Under the conflicts of law analysis, it is clear that California law should not apply to this claim. However, if this Court were to apply California law, Count I should still be dismissed. In California, claims for common law indemnification are limited and generally permitted only on a comparative fault basis. *American Motorcycle Assn. v. Superior Court*, 20 Cal.3d 578, 607-08; 578 P.2d 899, 146 Cal.Rptr. 182 (Cal. 1979) The right to partial indemnification is subject to qualification and countervailing considerations may limit recovery. *Musser v. Provencher*, 28 Cal.4th 274, 280; 48 P.3d 408, 411; 121 Cal.Rptr.2d 373, 377 (Cal. 2002). Indemnification in California has been disfavored where such a claim would contravene public policy considerations such as 1) avoiding conflicts of interest between an attorney and a client; 2) protecting confidential attorney-client communications and 3) the rights of clients to freely choose their attorneys.[6] *Id.* Although the *Musser* case permits a claim of partial equitable indemnification between co-counsel, such a co-counsel relationship claim is not the basis of E&J's suit against DMHS. Indeed, E&J claims indemnification based upon "the common law of agency." See TP Comp. ¶ 20. Thus, as E&J does not allege to be in a co-counsel position with DMHS, no co-counsel indemnification is being claimed. E&J alleges that it retained DMHS, on behalf of ABC, and that E&J is thereby somehow entitled to some type of derivative agency or derivative attorney-client relationship with DMHS. See TP Comp. ¶8, 10, 18, 22, 27.

Essentially, E&J is suing DMHS because DMHS allegedly gave ABC questioned advice. E&J's involvement is that of a intermediary between ABC and DMHS because E&J was acting as ABC's agent when it followed ABC's request for an opinion from an English solicitor. *Id.* ¶ 8 & 10. The relationship between E&J and DMHS was not one of attorney-client, nor was it one of

[6] E&J seeks relief under this Court's powers of equity; however, the affirmative defense of unclean hands or *in pari delicto*, would prohibit E&J from obtaining any equitable relief. ABC claims that E&J failed to create separate premium escrow accounts, failed to preserve money to pay the premiums on each policy and allowed ABC to operate as a Ponzi scheme. E&J's misconduct would bar any equitable recovery from DMHS. Under U.S. jurisprudence the Court must leave E&J where it finds it and must not allow E&J to seek any recovery for its wrongful conduct in allowing the Ponzi scheme to continue.

co-counsel to ABC. E&J and DMHS had distinct and separate engagements to advise and serve ABC. DMHS opined on matters peculiar to English law. E&J was ABC's escrow agent responsible for keeping the premium money safe in segregated escrow accounts. DMHS was ABC's advisor on whether the Albatross bond and Xelion support letter were enforceable under English law. Indeed, ABC has explicitly stated that it does not allege that E&J is or may be liable for any of the acts of DMHS alleged in ABC's complaint against E&J. See ABC's Resp. brief, docket # 64, p. 5. The theory of liability that ABC has against E&J shows that those claims stand independent of any claims ABC may have against DMHS.

Because E&J fails to allege indemnification based upon a co-counsel representation of DMHS, under California law, E&J's claim for indemnification from DMHS fails as a matter of law.

II. Failure To State A Claim for Legal Malpractice (Count II)

In order to state a claim for legal malpractice, E&J must plead facts to support the existence of an attorney-client relationship, a duty owed by DMHS, breach of that duty and damages proximately caused by the breach. Count II alleges that ABC asked E&J to "retain" a UK firm to investigate the letter of credit issued by Xelion. The engagement of DMHS was to investigate the Albatross bond and Xelion support letter for the benefit of ABC, as it was ABC who wanted to know if the support letter was valid. See TP Comp. ¶¶ 9 & 10. E&J was ABC's escrow agent and acted upon ABC's direction to obtain an opinion for the benefit of ABC. See TP Compl. ¶¶ 8, 9 & 10. Hence, ABC, not E&J, was the client of DMHS. Accordingly, E&J has failed to plead sufficient facts to show an attorney-client relationship existed between E&J and DMHS.

E&J cannot sue for legal malpractice in the absence of an attorney-client relationship. *SMWNPF Holdings, Inc. v. Devore*, 165 F.3d 360, 364 (5ht Cir. 1999) ("There must be an attorney-client relationship"); see also *Ex P Hartop*, (1806) 12 Ves 349; *Montgomerie and Others v. United Kingdom Mutual Steamship Assoc., LTD,* [1891] 1 Q.B. 370 (Queen's Bench Division) (stating "There is no doubt whatever as to the general rule as regards an agent, that where a person contracts

as agent for a principal the contract is the contract of the principal, and not that of the agent; and, *prima facie*, at common law the only person who may sue is the principal, and the only person who can be sued is the principal."). At common law, an attorney owes a duty of care only to his or her client, not to third parties who may have been damaged by the attorney's negligent misrepresentation of the client. *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex.1996). It has long been settled in England and in Texas that persons outside the attorney-client relationship do not have a cause of action for injuries they might sustain from the attorney's failure to perform or his or her negligent performance of a duty owed to the client. *Stonewall Surplus Lines Ins. Co. v. Drabek*, 835 S.W.2d 708, 710 (Tex.Ct.App. 1992); *Dickey v. Jansen*, 731 S.W.2d 581, 582 (Tex.Ct.App. 1987); *Ex P Hartop*, 12 Ves 349 (1806) "In other words, the law does not recognize a cause of action for negligence against an attorney asserted by one not in privity with that attorney." *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 401 (Tex.Ct.App. 1997).

The same is true under California law, "[o]ne of the requisite elements of a legal malpractice claim is the existence of an attorney-client relationship..." *Jager v. County of Alameda*, 8 Cal.App.4th 294, 297, 10 Cal.Rptr.2d 293, 294 - 295 (Cal.Ct.App. 1992)

E&J fails to state sufficient facts to support any conclusion that an attorney-client relationship was formed between E&J and DMHS. E&J was not in privity with DMHS regarding the legal services DMHS was to provide to ABC. Indeed, paragraph 8 of the TP Complaint deceptively states that E&J retained DMHS to act on behalf of E&J to investigate the bonds. However, when read in the context of the other allegations of the complaint, in particular ¶ 10 & 11, it is clear that E&J followed ABC's directions to contact DMHS on behalf of ABC to request DMHS to provide a legal opinion to ABC about the Albatross bond and Xelion support letter. As E&J served only as an intermediary in establishing the relationships between ABC and DMHS, E&J fails to state sufficient facts to support the existence of an attorney-client relationship. Thus, a claim of legal malpractice such as Count II fails to state a claim and should be dismissed.

III. Failure To State A Claim For Breach of Fiduciary Duty (Count III)

In order to state a claim for breach of fiduciary duty, E&J must plead the existence of a fiduciary duty, breach of that duty and damages proximately caused by the breach. *Patterson v. McMickle*, 191 S.W.3d 819, 824 (Tex.Civ.App. 2006); See also *Lazy Acres Market, Inc. v. Tseng*, 152 Cal.App.4th 1431, 1435, 62 Cal.Rptr.3d 378, 381 (Cal.Ct.App. 2007). E&J has failed to plead sufficient facts to show that a fiduciary duty obligation was created between E&J and DMHS. E&J pleads no facts to warrant to conclusion that any special relationship existed between E&J and DMHS that would rise to the level of a fiduciary.

Count III suffers from the same threshold defect as Count II. Under the facts alleged, if any fiduciary duty-bound relationship was created, it existed only between ABC and DMHS because it was ABC who requested the involvement of a UK counsel and identified DMHS as the firm to provide that opinion about the bond and support letter. The TP Complaint lacks the factual allegations needed to create a reasonable plausibility that any fiduciary duty was owed to E&J. Indeed, the TP Complaint states only that E&J was acting on behalf of ABC to retain the services of DMHS. See TP Compl. ¶¶ 8, 9, 10 & 11. By these allegations, E&J was the agent of ABC and E&J fulfilled the request of its principal to contact and retain DMHS to provide a legal opinion to ABC. DMHS's special duties of trust, loyalty and confidence were owed to its client only. The allegations hardly support an inference of a fiduciary duty between DMHS and ABC. E&J's conclusory statement that E&J was owed a fiduciary duty is wrong, but equally insufficient under *Iqbal,* 129 S.Ct. at 1940, and as such, Count III should be dismissed for failure to state a claim.

Further, the premise of the breach of fiduciary duty claim is also insufficient. Distilled to its essence, in paragraph 28 of the TP Complaint E&J alleges that DMHS failed to disclose potential conflicts of interest arising out of a "relationship with the Searles[.]" There can be no

dispute that since DMHS is a firm of English solicitors licensed under the laws of England, the Court will need to look to English law to determine whether any conflict exists as alleged by E&J.

Conflicts of interest involving English solicitors are governed by the Solicitor's Code of Conduct 2007 ("Code of Conduct"). See www.sra.org.uk/solicitors/code-of-conduct/rule3.page (visited July 20, 2010). Rule 3 of the Code of Conduct governs conflicts of interest and provides, in pertinent part, that:

> (2) There is a conflict of interests if:
>
> (a) you owe, or your firm owes, separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict; or
>
> (b) your duty to act in the best interests of any client in relation to a matter conflicts, or there is a significant risk that it may conflict, with your own interests in relation to that or a related matter.

Id.

E&J does not allege that the Searles were clients of DMHS with respect to the professional services rendered on behalf of ABC with respect to the Albatross Bond and Xelion support letter. In fact, E&J does not even allege that the Searles were clients of DMHS with respect to any unrelated matter. A conflict may only exist if the Searles were firm clients for "the same or related matters" *and* "those duties conflict, or there is a significant risk that those duties may conflict[.]" E&J's conclusory allegations are insufficient under *Iqbal,* 129 S.Ct. at 1940, and Count III must be dismissed for failure to state any claim.

IV. Failure To State A Claim For Negligent Infliction of Emotional Distress (Count IV)

A. The Law of England, Texas and California Fail to Recognize a Claim for Negligent Infliction of Emotional Distress Arising Out of Attorney Negligence

Neither Texas, England nor California recognize a claim for negligent infliction of emotional distress or reputational injury arising out of attorney negligence. *Douglass v. Delp,*

987 S.W.2d 879, 885 (Tex. 1999) (holding no recovery for emotional distress where attorney's negligence causes economic harm); *Alcock v. Chief Constable of South Yorkshire Police*, (1992) 1 A.C. 310, 401 (House of Lords) (stating that even if the risk of psychiatric illness is reasonably foreseeable, the law gives no damages if the psychiatric injury was not caused by shock. The shock must be sustained through the medium of the eye or ear without direct contact. Shock in this context involves the 'sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind.); *Erlich v. Menezes*, 21 Cal.4th 543, 554, 981 P.2d, 978, 985, 21 Cal.Rptr.2d 886, 985 (Cal. 1999); *Mirenda v. Superior Court of Nevada*, 3 Cal.App.4td 1, 11, 4 Cal.Rptr.2d 87, 92-93 (Cal.Ct.App. 1992) (client could not recover damages for emotional distress in attorney negligence case), disapproved of on other grounds). Precedent runs against recovery for emotional distress in connection with actions alleging economic damage, such as attorney malpractice actions. *Macy's California, Inc. v. Superior Court*, 41 Cal.App.4th 744, 754, 48 Cal.Rptr.2d 496, 502 (Cal.Ct.App. 1995). The alleged legal malpractice of DMHS is the sole basis for E&J's claim for negligent infliction of emotional distress (grounded on "reputational injury"). TP Comp. ¶ 34. Accordingly, because neither Texas, English nor California law recognize this cause of action in this context, E&J fails to state a claim for relief in Count IV as a matter of law.

B. Plaintiff Fails to Plead a Claim for Negligent Infliction of Emotional Distress

In the alternative, if this Court were to examine whether E&J has plead sufficient facts to fulfill the elements of this tort, this Court will find that E&J fails to state a claim. The most glairing deficiencies of E&J's pleading is that it fails to plead facts for this Court to plausibly conclude that DMHS's conduct was "extreme and outrageous", linked to witnessing a "horrific event or that DMHS owed any duty to E&J to avoid causing emotional distress.

Under Texas and English law, E&J has failed to plead sufficient facts of extreme and outrageous conduct or a "horrific event" causing "psychiatric damage" to withstand a motion to dismiss. The alleged misconduct of DMHS is well below the extreme and outrageous or "horrific event" standard needed for this tort. The Texas elements of the tort of negligent or intentional infliction of emotional distress are that (1) the defendant acted intentionally or recklessly; (2) the conduct of the defendant was extreme and outrageous; (3) the actions of the defendant caused the plaintiff emotional distress; and (4) the emotional distress suffered by the plaintiff was severe. *Massey v. Massey*, 807 S.W.2d 391, 399 (Tex.Civ.App. 1991).

English law also requires allegations (and ultimately proof of) extreme and outrageous conduct. The tort exists under English law only where "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another...provided that bodily harm results from it." *Wainwright v. Home Office*, [2002] Q.B. 1334 (Court of Appeal), p. 1350 (quoting *Salmond & Heuston on Torts,* 21st ed (1996), p.215 (internal quotations omitted)); *see also Wilkinson v. Downton*, [1897] 2 Q.B. 57 (Queen's Bench Division). "Meritorious claims for intentional infliction of emotional distress are relatively rare precisely because most human conduct, even that which causes injury to others, cannot be fairly characterized as extreme and outrageous." *Kroger Texas Ltd. Partnership v. Suberu*, 216 S.W.3d 788, 796 (Tex. 2006).

Whether a defendant's conduct is "extreme and outrageous" is a question of law. *Brewerton v. Dalrymple,* 997 S.W.2d 212, 216 (Tex. 1999). The mere fact that a defendant's conduct is tortious or otherwise wrongful does not, standing alone, necessarily render it "extreme and outrageous." *See id.* Instead, to be "extreme and outrageous," conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Bradford v. Vento*, 48 S.W.3d 749, 758 (Tex. 2001). E&J fails to plead any conduct which even comes close to meeting this standard. See TP

Compl. ¶ 32 & 33. E&J's conclusory statement that an alleged breach of a duty and failure to disclose was "extreme and outrageous" is insufficient under *Iqbal,* 129 S.Ct. at 1940, and as such, Count IV should be dismissed for failure to state a claim.

Under California law, E&J has failed to plead sufficient facts to show that DMHS owed any duty of care to E&J to support a claim for emotional distress. In California, the "negligent causing of emotional distress is not an independent tort but the tort of negligence .... The traditional elements of duty, breach of duty, causation, and damages apply. Whether a defendant owes a duty of care is a question of law." *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.,* 48 Cal.3d 583, 588; 257 Cal.Rptr. 98, 770 P.2d 278 (Cal. 1989).

In this case, E&J pleads that the alleged duty of care owed to E&J arose out of the foreseeability of the emotional injury to E&J. See TP Compl. ¶ 32 ("this foreseeability created a duty of care.") Under California law, foreseeability is insufficient to establish the duty of care needed to state a claim for negligent infliction of emotional distress. The California Supreme Court stated:

> it is clear that foreseeability of the injury alone is not a useful "guideline" or a meaningful restriction on the scope of the NIED [negligent infliction of emotional distress] action. The *Dillon* experience confirms, as one commentator observed, that "[f]oreseeability proves too much.... Although it may set tolerable limits for most types of physical harm, it provides virtually no limit on liability for nonphysical harm." *Rabin,* supra, at p. 1526.) It is apparent that reliance on foreseeability of injury alone in finding a duty, and thus a right to recover, is not adequate when the damages sought are for an intangible injury. In order to avoid limitless liability out of all proportion to the degree of a defendant's negligence, and against which it is impossible to insure without imposing unacceptable costs on those among whom the risk is spread, the right to recover for negligently caused emotional distress must be limited.
>
> *Thing v. La Chusa,* 48 Cal.3d 644, 663, 771 P.2d 814, 826-827, 257 Cal.Rptr. 865, 877 - 878 (Cal. 1989).

E&J makes the conclusory allegation that it was foreseeable that any failure by DMHS in conducting its investigation and drafting its report would cause damage to Erwin's professional

reputation. See TP Compl. ¶ 32. E&J fails to plead any facts to support this conclusory allegation. Count IV should be dismissed because, E&J has made only a conclusory allegation, i.e., foreseeability of emotional distress, to establish that DMHS owed a duty of care to E&J.

The courts in California have rejected "foreseeability" in this context and clarified that the law in California imposes a duty to avoid causing emotional distress in two general instances. The first involves "bystander" situations "in which a plaintiff seeks to recover damages as a percipient witness to the injury of another." *Christensen v. Superior Court*, 54 Cal.3d 868, 884, 2 Cal.Rptr.2d 79, 820 P.2d 181 (Cal. 1991); *Burgess v. Superior Court,* 2 Cal.4th 1064, 1073, 9 Cal.Rptr.2d 615, 831 P.2d 1197 (Cal. 1992). The second source of duty is found where the plaintiff is a "direct victim," in that the emotional distress damages result from a duty owed the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two. *Id.; McMahon v. Craig*, 176 Cal.App.4th 1502, 1509-1510, 97 Cal.Rptr.3d 555, 560 - 561 (Cal.Ct.App. 2009).[7]

The essence of the California decisions regarding negligent inflection of emotional distress is that "unless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests." *Potter v. Firestone Tire & Rubber Co.* 6 Cal.4th 965, 985, 863 P.2d 795, 807-808, 25 Cal.Rptr.2d 550, 562 - 563 (Cal. 1993)

E&J has not stated that it would qualify either as a "bystander" or a "direct victim" to claim a duty of care from DMHS. Rather, E&J has insufficiently alleged that DMHS's duty of

[7] In 'direct victim' cases, the duty owed is a duty owed by the specific defendant to the specific plaintiff. *Robinson v. United States*, 175 F.Supp.2d 1215, 1225 (E.D.Cal.2001). Derivative duties are not sufficient.

care was created by the foreseeability of the emotional damage to Erwin. See TP Compl. ¶ 32. This Court cannot re-write E&J's Complaint to bring it into compliance with California law.

California courts have explained that an attorney's duty to his or her client in civil litigation ordinarily concerns the client's economic interests and does not extend to protection against emotional injury. *Ovando v. County of Los Angeles*, 159 Cal.App.4th 42, 73, 71 Cal.Rptr.3d 415, 439 (Cal.Ct.App. 2008).[8] If the representation concerns primarily economic interests, "the foreseeability of serious emotional harm to the client and the degree of certainty that the client suffered such injury by loss of an economic claim are tenuous." *Id.* Precedent runs against recovery for emotional distress in connection with actions alleging economic damage, such as attorney malpractice actions. *Macy's California, Inc. v. Superior Court*, 41 Cal.App.4th 744, 754, 48 Cal.Rptr.2d 496, 502 (Cal.Ct.App. 1995)

In this case, the sole basis for E&J's claim of emotional distress is the legal representation by DMHS of ABC's economic interests. Hence, under California law, the legal representation of ABC's economic interests in the bonds does not provide a legal basis for a claim for emotional damages by E&J. Moreover, even if California law would allow for the recovery of emotional damages in this case, E&J has failed to plead facts of any actual harm to Erwin's professional reputation. See Third Party Compl. ¶ 34. E&J's conclusory allegation that Erwin's professional reputation was damaged is insufficient under *Iqbal,* 129 S.Ct. at 1940, and as such, Count IV should be dismissed for failure to state a claim.

For all of the above stated reasons, E&J has failed to plead a claim of negligent infliction of emotional distress. Count IV should be dismissed.

V. Claim for Contribution (Count V) should be dismissed because E&J fails to state a

[8] Public policy reasons do not support a different result when the alleged malpractice is committed in a non-litigation context, such as tax advice context or, as in this case, a financial bond advise context. *Camenisch v. Superior Court*, 44 Cal.App.4th 1689, 1697, 52 Cal.Rptr.2d 450, 455 (Cal.Ct.App. 1996)

claim and because it is duplicative of ABC Viatical's litigation against DMHS in the United Kingdom.

As mentioned at the beginning of this brief, ABC filed suit in the U.K. against DMHS to seek damages related to the legal advice DMHS provided to ABC regarding the Albatross bond and the Xelion support letter. The receiver for ABC has selected to pursue remedies through the English court system. Thus, under the principles of comity and judicial economy, this Court should allow the receiver for ABC to act in the best interests of the receivership to pursue its claims against DMHS and Stenning through the English court system without being forced to duplicate litigation in the United States. The complexity of this case would be reduced if this Court would re-consider its October 2009 order granting E&J permission to file this TP Complaint. See court docket # 101.

The substance of the English claim against DMHS makes clear that E&J has failed to state a claim for contribution because ABC is suing E&J and DMHS on different bases. E&J is being sued because it violated its duties to ABC when 1) E&J did not create separate escrow accounts to keep money for premium payments and 2) E&J did not conserve enough money to make the policy premium payments. See ABC's Am. Compl., court docket #41. No part of ABC's claim against E&J relies upon the due diligence report that DMHS prepared for ABC. E&J is subject to liability because it mismanaged or allowed LaMonda to steal the money it was duty bound to preserve for ABC as the escrow agent.

E&J was required to establish a separate and distinct trust for each individual policy. ABC Am. Comp. Doc.#41 ¶ 13. The payment of a policy by an Albatross Bond did not mean that E&J was free to raid the amount paid into the individual policy trust account to pay out premiums for other unrelated policies. It seems rather obvious that if an escrow agent fails to set up or maintain separate and distinct trust accounts, that alleged misconduct falls squarely on the shoulders of the escrow agent. There is no set of facts upon which E&J could rely to allow this Court to reasonably

infer that E&J's failure to set up individual policy trust accounts was caused by the due diligence report issued by DMHS to ABC. Similarly, E&J's failure to properly fund and preserve each individual policy trust account with a premium reserve is separate and distinct from the alleged unenforceability of the Albatross Bond or Xelion support letter.

E&J's claim against DMHS is based on the incorrect premise that it could raid an individual policy trust account which had received the life insurance proceeds to make up its shortfall in separate unrelated individual policy trust accounts. If only E&J would be allowed to continue to operate the ABC individual policy trust accounts like a Ponzi scheme, it could have masked the fraud for a little longer. It is beyond belief that E&J would seek damages from DMHS claiming that it was unable to raid the individual policy trust accounts to fund premium reserve shortfalls attributed to separate and distinct premium reserve trust accounts. The alleged misconduct of E&J is separate and distinct from the alleged misconduct of DMHS. The absence of a plausible connection between E&J's failure to set up the individual policy trust accounts and DMHS's opinion letter on the Albatross Bonds and Xelion support letter, is a death knell to E&J's claim for contribution.

ABC has also weighed in on this issue and admitted that the damages it seeks from E&J are exclusive of damages which might have been incurred due to DMHS's opinion and the lack of a valid and enforceable Albatross Bond or Xelion support letter. Am. Comp. Doc. #41 ¶ 16 and Doc. #108, pp.5-7. As described above, the policies were sold before any Albatross Bond became due and the Receiver incurred no additional premium reserve obligation. Doc. #108, p. 7-8. The theoretical damages to the premium reserve allegedly caused by the lack of an enforceable Albatross Bond or Xelion support letter never materialized. Stated differently, the alleged $20 million shortfall in the premium reserve account existed before ABC was called on to pay one dime in premiums due to the failure of an Albatross Bond or Xelion support letter. Since E&J is not being called upon to answer for any alleged damages caused by the failure of an Albatross Bond or Xelion support letter, there can be no claim for contribution.

The concepts of contribution in English and Texas law and equitable indemnification in California law are premised upon the fundamental fact that the co-tortfeasors are responsible for the same injury or damages. Common liability of two or more parties for the same damages to another party is the hallmark of the principle of contribution. *Nationwide Building Society v. Dunlop Haywards Ltd*, 2009 WL 364291 [2009] EWHC 254 (Comm) (High Court of Justice 2009) (the term "same damage" in Section 1(1) of the Civil Liability (Contribution) Act 1978 means the damages suffered by the party seeking contribution must be the same damages caused by the defendant responding in contribution); *Birse Construction Ltd v. Haiste Ltd.*, [1996] 1 W.L.R. 675 (Court of Appeal), p.679; *Civil Liability (Contribution) Act 1978*, 1978 Chapter 47 (U.K. Statute Law Database); *H. M. R. Const. Co. v. Wolco of Houston, Inc.*, 422 S.W.2d 214, 217 (Tex.Civ.App. 1967). A defendant's claim of contribution for a particular injury is derivative of the plaintiff's right to recover for that same exact injury from the joint defendant against whom contribution is sought. Therefore, a joint tortfeasor has only a derivative right to seek contribution from the other who is responsible for the ***exact same injury***. See *City of San Antonio v. Johnson*, 103 S.W.3d 639, 642 (Tex.Civ.App. 2003). See also *American Motorcycle Assn. v. Superior Court*, 20 Cal.3d 578, 607-08; 578 P.2d 899, 146 Cal.Rptr. 182 (Cal. 1979).

In this case, although the alleged misconduct of E&J and DMHS relates to ABC's business, the particular facts regarding the conduct of E&J and DMHS do not intersect. ABC has acknowledged to this Court that it does not allege that E&J is or may be liable for any of the acts of DMHS alleged in ABC's complaint against E&J. See ABC's Resp. brief, docket # 64, p. 5. The absence of a causal connection between the conduct of DMHS and E&J in causing any respective harm to ABC means there is no right to contribution between E&J and DMHS. The damages are not the same. ABC seeks to recover from E&J the damages caused by its failure to maintain an adequate premium reserve trust account irrespective of the Albatross bonds or Xelion support letter.

CONCLUSION

The Defendants, DMH Stallard and Christopher John William Stenning, respectfully requests this Court enter an order dismissing Erwin & Johnson, LLP and Christopher R. Erwin's Third Party Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), with prejudice and for any other relief this Court deems just.

Date: July 20, 2010

Respectfully submitted,

By: /s/ Richard B. Polony
One of the Attorneys for Third Party Defendants, DMHS Stallard and Christopher John William Stenning

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the 20th day of July 2010 to all known counsel of record listed below by means of the Court's electronic filing system as required by the Federal Rules of Civil Procedure:

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Claim Form

In the High Court Of Justice

Chancery Division
Royal Courts of Justice

	for court use only
Claim No.	HC10C02105
Issue Date	23 JUN 2010

Claimant(s)
ABC VIATICALS INC (IN RECEIVERSHIP)
Whose address is at:
Quilling, Selander, Cummiskey & Lownds PC
Bryan Tower
2001 Bryan Street, Suite 1800
Dallas
Texas 75201
USA

Defendant(s)
DMH STALLARD (A FIRM)
6 New Street Square
New Fetter Lane
London EC4A 3BF

HIGH COURT OF JUSTICE ★ 23 JUN 2010 ★ CHANCERY CHAMBERS

SEAL

Brief details of claim
The Claimant claims damages by reason of the Defendant's breach of retainer and/or breach of the common law duty of care, together with interest thereon pursuant to Section 35A of the Senior Court Act 1981

Value
The Claimant expects to recover more than £25,000

Defendant's [illegible] address

DMH STALLARD (A FIRM)
6 NEW STREET SQUARE
NEW FETTER LANE
LONDON EC4A 3BF

Amount claimed	NOT LIMITED
Court fee	1,530.00
Solicitor's costs	TO BE ASSESSED
Total amount	TO BE ASSESSED

The court office at Strand, London, WC2A 2LL
is open between 10 am and 4 pm Monday to Friday. When corresponding with the court, please address forms or letters to the Court Manager and quote the claim number.

Exhibit A

Claim No.

Does, or will, your claim include any issues under the Human Rights Act 1998? ☐ Yes ☒ No

Particulars of Claim (attached) XXXXXXXX

Statement of Truth

XXXXXXXXX (The Claimant believes) that the facts stated in these particulars of claim are true.

* I am duly authorised by the claimant to sign this statement

Full name NICHOLAS JOHN ARNOLD

Name of claimant's solicitor's firm Blake Lapthorn

signed ______________________ position or office held PARTNER

XXXXXXXX XXXXXXXXXXX (Claimant's solicitor) (if signing on behalf of firm or company)

**delete as appropriate*

Blake Lapthorn

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+44 (0)844 620 3402
NJA/557295/1

Exhibit A

IN THE HIGH COURT OF JUSTICE **CLAIM NO_____**

CHANCERY DIVISION

BETWEEN:

ABC VIATICALS INC (IN RECEIVERSHIP)

Claimant

- and -

DMH STALLARD (A FIRM)

Defendant

PARTICULARS OF CLAIM

A. THE PARTIES; & SUMMARY OF CLAIM

1. The Claimant is a corporation formed under the laws of Texas. Prior to being placed into receivership in November 2006, the Claimant carried on business offering investments in "viatical" and "life settlement" products. The Claimant would purchase life insurance death benefit policies from insureds for less than the face value of the policies and would then sell fractionalized interests in those policies on to investors (who would collect their share of the policy benefits upon the death of the insured or under the terms of a bond).

2. By an Order dated 17 November 2006, the United States District Court for the Northern District of Texas (Dallas Division), appointed Michael Quilling as receiver over the business and assets of the Claimant. Mr Quilling was appointed receiver as a result of a fraud perpetrated on the Claimant and on its various investors by the company's officers, Keith and Jesse LaMonda, who removed from the Claimant significant monies belonging to the Claimant and/or its investors. At the date of the receivership, the Claimant had sold fractionalized shares in policies to around 4000 investors worldwide, and its assets comprised 55 insurance policies with a combined death benefit face value of around US$236 million.

Exhibit A

3. Since November 2006, Mr Quilling has been seeking to preserve and protect the assets of the Claimant, and also to recover monies from third parties responsible for its losses. It is anticipated that such assets and recoveries will be paid out to investors who have claims against the Claimant. The facts and matters pleaded below are based on information obtained during the course of Mr Quilling's receivership.

4. The Defendant is, and has been at all material times, a firm of English solicitors carrying on business from offices in London and in various other locations in England. Christopher Stenning ("Mr Stenning"), then a partner in the Defendant's corporate department, was the relevant individual in relation to the matters pleaded below. All references below to Mr Stenning are references to him acting in his capacity as a partner in the Defendant firm.

5. In summary, the claim herein is as follows:

   a. The Claimant purchased life settlement products (the "Products") from an English broker called Life Settlement Risk Management Ltd ("LSRM"), and sold on fractionalized interests in those products to various investors.

   b. The Products comprised bonds (providing cover for life insurance policies declared to those bonds) issued by an Italian company called Albatross Investment S.p.A ("Albatross"), and guarantees of those bonds provided by an Italian bank called Unicredit Xelion Banca S.p.A. ("Unicredit").

   c. The Claimant retained the Defendant (between November 2005 and March 2006) to conduct a due diligence investigation into the Products, Albatross, Unicredit and, in particular, the authority of one Dottore Tazza ("Tazza") to sign guarantees on behalf of Unicredit; and to provide an opinion as to the validity and enforceability of bonds and guarantees issued by Albatross and Unicredit respectively (which bonds and guarantees were and/or were to be governed by English law).

   d. The Defendant advised that the bonds and guarantees were valid and enforceable, and that Tazza had authority to issue guarantees on behalf of Unicredit. The Defendant expressed no concerns about Albatross, the bonds or guarantees.

   e. In fact, the bonds and guarantees were commercially worthless and/or invalid and unenforceable and/or were part of a fraudulent scheme. Albatross appears to have been (and to be) a sham company without any assets (its principal shareholder, a Mr Fiore, has a criminal background in Italy), and the bonds issued by it are commercially

Exhibit A

worthless and/or shams. Further, Tazza had no authority to issue guarantees on behalf of Unicredit, and the guarantees are commercially worthless, invalid and unenforceable.

f. The Claimant contends that the Defendant acted negligently in carrying out the retainer, and that the Claimant has consequently sustained losses of US$5,578,000.

B. FACTUAL BACKGROUND

(1) Life Settlement Business

6. A life settlement is an investment whereby the insured under a life insurance policy sells (for an immediate payment) the rights to receive the policy's death benefits for a discounted percentage of the policy's face value. Thereafter, the purchaser of those rights pays the premiums to maintain the policy in force until maturity. Upon the death of the insured, the proceeds of the policy are paid to the purchaser.

7. The principal risk for the purchaser is that the insured's life expectancy exceeds actuarial estimates, this risk being termed the "longevity risk", thereby delaying payment under the life insurance policy. To protect against this risk, some life settlement purchasers obtain bonds (in effect, insurance policies) and guarantees (of the bonds) from third party financial institutions, the effect of which is that payment is made to the purchaser under the bonds and/or guarantees of the full value of the life insurance policy in the event that the insured exceeds his or her life expectancy.

8. The Claimant, as a life settlement provider, would purchase life insurance policies in the way described above; would purchase protection against the "longevity risk" in relation to those policies; and would then sell to its investors a fractionalized share in the rights in relation to the policies. The payments made by the investors would be used by the Claimant for the purpose of paying the premiums under the policies, and for the purpose of purchasing the "longevity risk" protection. Part of those investor payments were misappropriated by the Claimant's officers, the LaMonda brothers.

(2) The LSRM "Longevity Risk" Protection Product

9. LSRM is a company which appeared to carry on business creating and structuring "longevity risk" protection product in relation to life insurance policies, and then selling those products to life settlement providers (such as the Claimant).

Exhibit A

10. In around 2005, LSRM appeared to have created and was marketing to life settlement providers (such as the Claimant) "longevity risk" protection products apparently backed by highly rated financial institutions that were designed to provide 100% cover of the face value of life insurance policies declared to the products.

11. The LSRM "longevity risk" protection product was structured as follows:

    a. A bond was issued by Albatross to the purchasing company (such as the Claimant) to indemnify the purchasing company in a sum equal to the face value of any life insurance policy declared to the bond up to but not exceeding a specified aggregated amount. Payment under the bond would be triggered if the insured lived past his or her life expectancy plus a deferral period of one year. If the insured died before that date, the bond would not be triggered and, instead, the Claimant would receive payment in full from the life insurer.

    b. A substantial and highly regarded bank provided a "letter of support" which was intended to be an enforceable guarantee of Albatross's obligations under the bond. As appears below, Banco di Roma was originally the bank providing the guarantee, but (after the discovery of a likely fraud in procuring this guarantee) was replaced by HSBC, which in turn was replaced (after the discovery of a likely further fraud affecting the HSBC guarantee) by Unicredit, a subsidiary of a substantial and highly regarded Italian bank, Unicredito Italiano S.p.A..

12. During the course of early 2005 (and possibly earlier), LSRM sought to market and sell to the Claimant this LSRM "longevity risk" protection product. By this time, LSRM had an established relationship with Mr Stenning (who had previously acted for LSRM).

(3) The 1st Albatross Bond

13. By May 2005, LSRM had sold to the Claimant a bond issued by Albatross dated 2 May 2005 (to which the Claimant subsequently declared 19 life insurance policies) with an aggregate limit of US$50 million ("the 1st Albatross Bond"), which was extended to US$70 million on 14 October 2005. The 1st Albatross Bond was, during that period (i.e. May to October 2005) purportedly guaranteed by Banca di Roma by a letter of support/guarantee dated 2 May 2005.

14. By a letter from Banca di Roma dated 21 November 2005 (and possibly earlier in November), the Claimant learned that the letter of support/guarantee purportedly provided by Banca di Roma was (according to Banca di Roma) "*abusive and false*" and a forgery; that no letter/guarantee had

Exhibit A

been issued by Banca di Roma in favour of the Claimant; that Albatross had never (contrary to the letter/guarantee) "*had any credit facility from Banca di Roma*"; that the Italian Judicial Authorities "*have already examined such "support agreement letters" because of forgery*"; and that the Claimant could not rely upon such letter/guarantee.

15. It appears that, from around that time (November 2005), LSRM sought to find a replacement bank to provide a letter/guarantee. At one point in late 2005, it appears that a draft letter/guarantee was purportedly provided by HSBC but that, again, it transpired that the letter/guarantee was a forgery.

16. By early December 2005, LSRM had raised with the Claimant the possibility of Unicredit providing a replacement letter/guarantee in respect of the 1st Albatross Bond. A replacement guarantee was purportedly issued by Unicredit to the Claimant dated 27 February 2006 ("the 1st Unicredit Guarantee") as pleaded more fully below.

(4) Genesis of 2nd Albatross Bond

17. By the beginning of November 2005, LSRM was seeking to sell to the Claimant a further bond to be issued by Albatross with an aggregate limit of around US$38 million, such bond also to be supported by a letter/guarantee.

18. This further bond was subsequently issued by Albatross to the Claimant dated 16 January 2006 ("the 2nd Albatross Bond"), and was supported by a guarantee purportedly issued by Unicredit to the Claimant dated 27 February 2006 ("the 2nd Unicredit Guarantee") as pleaded more fully below. No policies were ever declared by the Claimant to the 2nd Albatross Bond.

(5) Involvement of Mr Stenning: November 2005 to March 2006

19. By the beginning of November 2005, LSRM had introduced the Claimant to Mr Stenning. The purpose of the introduction was to enable the Claimant to instruct Mr Stenning to review the LSRM "longevity risk" protection product (i.e. the bond and guarantee) and to provide an opinion on the validity and enforceability thereof. Mr Stenning was familiar with LSRM's product, having been retained previously by LSRM and also (presumably on the introduction of LSRM) by several other life settlement providers which had purchased the product from LSRM.

20. By early December 2005, the Claimant was aware that Banca di Roma took the view that the letter/guarantee in relation to the 1st Albatross Bond was false, fraudulent and unenforceable.

Exhibit A

21. By an email dated 9 December 2005 from the Claimant's legal trustee to Mr Stenning, the trustee (acting on behalf of the Claimant) instructed Mr Stenning to conduct a due diligence investigation in the following terms:

> *Subject: Due Diligence...Generally we would like appropriate due diligence (in light of the current evidence) done both on the banks involved and more importantly Albatross. Here is the situation as I see it. There are several pieces of negative information circulating in the life settlement community as to the authenticity, financial strength and soundness of this bonding product. Several of these negative pieces of information have been independently confirmed. Most recently the bank "Banca di Roma" that has issued a support letter has written to my client the attached letter. This letter is quite clear and states that the support letter is false and a forgery and there is a criminal investigation in this matter.*
>
> *Now in the normal course of business I would expect to receive a written explanation from both the broker LSRM and Albatross as to the situation, to date I have received nothing, except that "we are working on a new bank". This further raises my suspicions into this financial product...*

22. The instructions then stated that Mr Stenning was, among other matters, (1) to obtain a detailed written response from Albatross to the Banca di Roma letter dated 21 November 2005 (referred to at paragraph 14 above), (2) to provide "*detailed financial reports as to Albatross financial condition (in particular their reserves to this market)*", and (3) to ensure that, as regards the new bank which was to provide a letter of support/guarantee, "*a properly authorized bank officer has bound the bank to their guaranty, and their relationship with Albatross*". As appears below, Mr Stenning failed in relation to each of these 3 matters.

23. The instructions then concluded as follows: "*This list of questions is not intended to be inclusive, what I really need is a rational businessman making an informed inquiry into this situation. I am not looking for a superficial meeting; I am looking for a tough detailed inquiry into this product...*" [emphasis added].

24. On 13 December 2005, Mr Stenning visited Italy for the purpose of the due diligence investigation. In fact, (as appears from his subsequent due diligence report) no substantive information was obtained from this visit.

25. On 16 January 2006:

    a. Albatross issued to the Claimant the 2nd Albatross Bond with an aggregate limit of US$38.8 million. It also issued a "*support agreement*" dated 16 January 2006 to the Claimant which stated that Unicredit had "*made available sufficient financial capacities*" to Albatross to enable it to make any payment due under the 2nd Albatross Bond.

Exhibit A

b. Unicredit issued to the Claimant a letter of support/guarantee signed by Tazza guaranteeing Albatross's obligations under the 2nd Albatross Bond ("the January Unicredit Guarantee"). This guarantee was subsequently replaced by the 2nd Unicredit Guarantee dated 27 February 2006.

26. Mr Stenning received the 2nd Albatross Bond and the January Unicredit Guarantee on or shortly after 16 January 2006. It is unclear how or why the 2nd Albatross Bond and the January Unicredit Guarantee came to be issued prior to such time as Mr Stenning had conducted his due diligence investigation, or issued his due diligence report and his opinion. Mr Stenning does not appear to have questioned this.

27. On 18 January 2006, Mr Stenning was provided by LSRM's consultants with (among other documents) the wording of a draft legal opinion which was to be signed off by an Italian lawyer. The draft opinion dealt (among other things) with the validity and enforceability of the 2nd Albatross Bond and the January Unicredit Guarantee as a matter of Italian law. The draft opinion was headed "*LETTERHEAD OF ISSUING LAW FIRM*". This reflected the fact that LSRM and Mr Stenning appeared to be themselves agreeing the wording of a draft opinion which would then be placed before an Italian lawyer for his approval and signature. Mr Stenning was thereafter involved in further drafting to this opinion before it was finally purportedly signed by one Avv. Coluccio in the circumstances explained below.

28. By an email dated 18 January 2006, Mr Stenning stated that "*...we really do need a copy of the written instruction given by each of Albatross and Unicredit*". This was an apparent reference to the instructions to the relevant Italian lawyer who was to approve and sign the draft opinion.

29. On 23 January 2006, the Claimant asked Mr Stenning, by an email of that date, when his due diligence report would be completed and emphasized the need to do "*heavy DD on Albatross/Banca di Roma*" (i.e. heavy due diligence). By an email dated 24 January, Mr Stenning sought confirmation that the Claimant meant Unicredit and not Banca di Roma, and confirmed that he would, on his forthcoming visit to Italy, "*ask all the questions which I think are appropriate*".

30. On 24 January 2006, Mr Stenning was sent by LSRM's consultants (among other things):

a. A letter dated 9 November 2005 from Unicredit to Tazza (with a manuscript English translation) which referred to Tazza being able to sell "*financial instruments*" on behalf of Unicredit. The letter dated 9 November 2005 made no reference to Tazza being permitted to bind Unicredit to contracts of guarantee.

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b. Unsigned drafts of the 2nd Albatross Bond and the January Unicredit Guarantee for his further comment even though the 2nd Albatross Bond and the January Unicredit Guarantee had already been issued by Albatross and Unicredit, respectively, on 16 January 2006.

31. On 27 January 2006, a legal opinion (in the form previously commented on by Mr Stenning) was purportedly signed by Avv. Coluccio. This opinion stated (among other things) that the 2nd Albatross Bond and the January Unicredit Guarantee were valid and enforceable as a matter of Italian law, and that the January Unicredit Guarantee was "*executed by duly authorized officers of Unicredit*" (even though it was, in fact, executed by Tazza alone).

32. On 31 January 2006, Mr Stenning visited Italy for the purpose of the due diligence investigation. It appears that, on this visit, Mr Stenning was accompanied by representatives of LSRM, and was apparently taken by them to offices of Albatross and Unicredit where he supposedly met with Mr Fiore of Albatross and Tazza.

33. On or around 31 January 2006, Mr Stenning received a letter (written in Italian) headed "*Albatross Invest S.p.A.*" purportedly to Avv. Severino Coluccio. It stated (in Italian): "*Ref: Legal opinion: We are instructing you to provide your legal opinion on the Support Letters issued by Unicredit Xelion Banca and Albatross Invest SpA dated 16/01/2006*". It purported to be "*reviewed*" and signed by Tazza as "*Financial Adviser Person*" in his own capacity (i.e. not apparently on behalf of any company), and signed by Mr Fiore on behalf of Albatross.

34. On 1 February 2006, Mr Stenning wrote to the legal and administrative department at Unicredit in Milan. He attached Unicredit's letter to Tazza dated 9 November 2005 (referred to in paragraph 30 a above), and asked for a "*formal translation*" thereof; and also asked for confirmation of the name of the official at Unicredit who signed the letter. Mr Stenning never received a reply from Unicredit. Mr Stenning did not inquire of Unicredit at this time (or at any other time) whether Tazza was authorized to enter into guarantees on behalf of Unicredit.

35. By a letter dated 2 February 2006 purportedly to Avv. Coluccio (attaching the opinion dated 27 January 2006 referred to in paragraph 31 above), Mr Stenning sought confirmation from Avv. Coluccio that "*you did indeed issue the opinion on instructions from Dott Fiore of Albatross...and Dott Tazza of Unicredit...*". On 6 February 2006, a reply was received purportedly from and signed by Avv. Coluccio stating (somewhat cryptically) "*confirmation legal opinion*".

36. By an email dated 6 February 2006, Mr Stenning sent to the Claimant and LSRM (among others) copies of his draft opinion of that date and his due diligence report.

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a. The draft opinion stated that the following documents "*will constitute the legally valid and binding obligations respectively, of Albatross and of [Unicredit] under the laws of England and Wales*", namely (1) the 2nd Albatross Bond, (2) the Albatross "*support agreement*" dated 16 January 2006, (3) the January Unicredit Guarantee, and (4) the opinion from Avv. Coluccio. The draft opinion stated that the Claimant would be able to sue on those documents. The draft opinion further stated that "*we have seen evidence that...Dott, Tazza of [Unicredit], who purported to execute [the January Unicredit Guarantee] had authority to do so*" and that "*Avv. Coluccio was instructed by [Unicredit] and/or Albatross to write his opinion*". As explained below, Tazza did not have such authority; and Avv. Coluccio was not instructed by either Unicredit or Albatross, and did not sign the opinion.

b. The due diligence report stated that it was "*IN RELATION TO ALBATROSS INVEST SpA AND UNICREDIT XELION BANCA SpA AND THE ISSUE OF A BOND AND SUPPORT LETTERS*". The report (which set out the details of Mr Stenning's visit to Italy on 31 January 2006) expressed the following conclusion: "*...it appears to be the case that all the documents were properly executed by the corporations and people who said they had executed them and perhaps more importantly that they had the ostensible authority to do so*".

37. By an email dated 6 February 2006, Mr Stenning (responding to various questions raised by the Claimant in an email that day) stated that "*I have no hard evidence that the [Banca di Roma] documents were fraudulent and certainly BdR have not rushed to tell me so*". This statement was made despite the clear assertions made by Banca di Roma in its letter dated 21 November 2005. It is unclear what (if any) inquiries Mr Stenning had made of Banca di Roma by this time.

38. By an email to Mr Stenning dated 9 February 2006, the Claimant's trustee stated: "*We need your opinion what really happened with both the banca di roma situation and the HSBC fraud claim. This needs to be in detail and you need to document your understanding of these situations and how they affect the validity and credibility of all parties in this transaction....Further I believe it appropriate to contact senior management at Unicredit to further confirm your findings in your trip to Italy. Additionally your draft opinion on the Unicredit arrangement seems somewhat lacking in detail and substance, especially for the number of hours you have spent on the project*" [emphasis added]. It appears that Mr Stenning did not subsequently ascertain what happened in relation to the Banca di Roma or HSBC guarantees of the 1st Albatross Bond, and did not contact senior management at Unicredit.

39. By an email dated 10 February 2006, Mr Stenning responded by saying that he would investigate the position in relation to Banca di Roma and HSBC. He appears not to have done so.

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40. By an email to the Claimant dated 22 February 2006, Mr Stenning inquired whether "*the draft opinion and due diligence report are adequate*". He then stated that he could add two items, namely that "*on the instructions of LSRM I wrote to BdR and to its lawyer asking some leading questions and that I have had no reply...[and] I have a fax from the Italian lawyer which purports to confirm that he did issue the Italian opinion obtained on 27th January 2006*".

41. On 27 February 2006, Unicredit issued to the Claimant the 1st and 2nd Unicredit Guarantees (the 2nd Unicredit Guarantee replacing the January Unicredit Guarantee). The guarantees also confirmed that Albatross "*has the technical ability in accordance with the Law of Italy and adequate financial capacities to meet its obligations under the [Bond] in a full, proper and timely manner*".

42. On 28 February 2006, two opinions were signed, purportedly by Avv. Coluccio. One opinion related (among other things) to the validity and enforceability as a matter of Italian law of the 1st Albatross Bond and the 1st Unicredit Guarantee; and the other opinion related (among other things) to the 2nd Albatross Bond and the 2nd Unicredit Guarantee.

43. On 2 March 2006, Mr Stenning issued his opinion of that date. This opinion stated that "*we have seen evidence that...Dott, Tazza of [Unicredit], who purported to execute the Xelion Support Letter had authority to do so*". It also stated (in the same wording as in his draft opinion dated 6 February 2006) that the obligations of Albatross and Unicredit were valid and enforceable, although it wrongly referred to the January Unicredit Guarantee (dated 16 January 2006) and not the 2nd Unicredit Guarantee (dated 27 February 2006).

(6) Albatross & Unicredit Bonds & Guarantees: Invalid, Unenforceable and/or Fraudulent

44. The Claimant will be unable to obtain any payments from Albatross under either the 1st or 2nd Albatross Bonds. Albatross was a sham company and/or was a company which could and/or would never have paid out the sums purportedly indemnified under those bonds. The Claimant relies on the following:

    a. By an Order and Judgment dated 6 October 2008, the United States District Court for the Northern District of Texas (Dallas Division) has held as follows: "*...Albatross...appears to only exist on a website. The Italian attorney who allegedly wrote a legal opinion regarding the legitimacy of the company claims the letter is a forgery. The alleged owner of the company has 14 prior convictions in Italy.*" The "*alleged owner*" was a reference to Mr Fiore.

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b. There is no evidence that Albatross ever had the funds to make payment in the aggregate sums identified in the 1st and 2nd Albatross Bonds, and indeed there is no evidence that Albatross had any or any significant assets at the time of issuing the Bonds. Albatross does not appear to have filed company accounts since 2004.

45. The Claimant will be unable to obtain any payments from Unicredit under the 1st and/or 2nd Unicredit Guarantees. By a letter dated 11 February 2008 to the Claimant's solicitors, Unicredit has stated that (1) the 1st and 2nd Unicredit Guarantees were not valid and enforceable documents; (2) those guarantees were not issued by Unicredit; and (3) Tazza did not have authority on behalf of Unicredit to issue the guarantees, and had no power to represent or act on behalf of Unicredit. Further, Avv. Coluccio denies ever having written the two opinions dated 28 February 2006.

46. The Claimant, accordingly, has no remedies against either Albatross or Unicredit.

47. In the premises, it appears that the products purchased by the Claimant from LSRM (i.e. the 1st and 2nd Albatross Bonds and the 1st and 2nd Unicredit Guarantees) were part of a fraudulent scheme. The Claimant does not, however, know which person was the driving mind behind such fraudulent scheme or the identities of the other participants.

C. CAUSE OF ACTION AGAINST THE DEFENDANT

(1) The Scope of the Retainer

48. Between November 2005 and March 2006, the Claimant retained the Defendant (acting by Mr Stenning):

a. To carry out a due diligence investigation in relation to Albatross and Unicredit, the bonds and guarantees issued by those companies, and the authority of Tazza to issue a guarantee on behalf of Unicredit.

b. To produce an opinion as to the validity and enforceability of the bonds and guarantees issued by those companies.

49. The Defendant (by Mr Stenning) was aware from at least early December 2005, that the due diligence investigation needed to be particularly rigorous in the light of the apparent fraud relating to the Banca di Roma and HSBC guarantees of the 1st Albatross Bond. There was no reason for Mr Stenning to believe that the apparent unidentified fraudster had ceased to be involved in relation to the procuring of guarantees for Albatross bonds.

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50. It was an implied term of the retainer that the Defendant would perform its obligations thereunder with reasonable skill, care and diligence. Further or alternatively, the Defendant owed to the Claimant a like duty of care at common law.

(2) Breach of the Retainer

51. The Defendant acted in breach of the implied term of the retainer and/or the common law duty of care in that (through Mr Stenning) it failed to exercise reasonable skill, care and diligence in the conduct of the due diligence investigation and/or in the preparation of the due diligence report and the opinion dated 2 March 2006. In particular:

    a. Mr Stenning, in conducting the due diligence investigation, failed to carry out any or any adequate investigation into Albatross as a company and, in particular, the ability of Albatross to pay out substantial or any monies under the 1st and/or 2nd Albatross Bonds; and he failed to establish that Albatross was a sham company and/or a company without any or any significant assets and/or that bonds issued by Albatross were potentially part of a fraudulent scheme. In particular:

        i. Mr Stenning failed to seek or obtain any information as to Albatross's financial situation, its realizable assets and its ability to pay any part of the US$108.8 million indemnified by the 1st and 2nd Albatross Bonds. The 1st and 2nd Unicredit Guarantees referred to the fact that Albatross had "*adequate financial capacities to meet its obligations*" under 1st and 2nd Albatross Bonds; and the "*support agreement*" dated 16 January 2006 issued by Albatross to the Claimant stated that Unicredit had "*made available sufficient financial capacities*" to Albatross to enable it to make payment under the 2nd Albatross Bond. However, Mr Stenning made no inquiries (whether of Albatross, Unicredit or otherwise such as by requests to Albatross's bankers) as to what "*financial capacities*" were available to Albatross and/or what funds were held by Unicredit on behalf of Albatross. If Mr Stenning had sought such information and made such inquiries, he would have ascertained that Albatross had no such sufficient assets.

        ii. Mr Stenning failed to carry out any company search in relation to Albatross, its alleged parent company, Societe Civile Immobiliere U.P.M. (which was referred to in the 1st and 2nd Unicredit Guarantees), and he failed to carry out any investigation in relation to the officers, employees or shareholders of Albatross. He thereby failed to ascertain that Albatross was not a bona fide company, with

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reputable directors, officers and employees. If Mr Stenning had carried out such a search and investigation, he would have ascertained that Albatross was a sham company whose principal officer had a criminal background.

iii. Mr Stenning (according to his due diligence report), during his visit to Italy on 31 January 2006, was apparently shown "*the constitutive documents of Albatross and its holding company authenticated with the original signature and stamp by the authorized public officer on 31 January 2006. They were in either Italian and/or French*". He did not take copies of these documents, and obtained no English translation.

iv. Mr Stenning failed to bring to the Claimant's attention the above deficiencies in his due diligence relating to Albatross.

b. Mr Stenning, in conducting the due diligence investigation, failed to carry out any or any adequate investigation into the authority of Tazza to enter into the 1st and 2nd Unicredit Guarantees, and thereby failed to ascertain (or to alert the Claimant to the possibility) that those guarantees were issued without authority and were accordingly commercially worthless to the Claimant and/or were potentially part of a fraudulent scheme. By those guarantees, Unicredit was guaranteeing Albatross's obligations under the 1st and 2nd Albatross Bonds in a total sum of US$108.8 million. In those circumstances (and particularly given the allegations of fraud by Banca di Roma and HSBC), a thorough investigation of Tazza's alleged authority was obviously required and indeed was expressly requested by the Claimant. However:

i. Mr Stenning failed to make a written inquiry of any director, senior officer or employee at Unicredit as to whether Tazza had authority to bind Unicredit to guarantees and, in particular, whether he had authority to bind Unicredit to guarantees in excess of US$100 million.

ii. Mr Stenning failed to make any oral inquiry of any director, senior officer or employee at Unicredit as to whether Tazza had authority to bind Unicredit to guarantees and, in particular, whether he had authority to bind Unicredit to guarantees in excess of US$100 million.

iii. Although Mr Stenning wrote on 1 February 2006 to the legal and administrative department at Unicredit in Milan (attaching the letter dated 9 November 2005 from Unicredit to Tazza, and asking for a "*formal translation*" and confirmation of

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the name of the official who signed the letter), he never received a reply to this letter or to his questions.

iv. Mr Stenning (despite the matters referred to above) expressed the view in his opinion that "*we have seen evidence that...Dott, Tazza of [Unicredit], who purported to execute the [the January Unicredit Guarantee] had authority to do so*". He failed to alert the Claimant to the fact that the "*evidence*" was thoroughly unsatisfactory particularly given that (1) the guarantees were for a combined sum in excess of US$100 million, and (2) the previous guarantees might have been procured fraudulently.

v. The "*evidence*" relied upon by Mr Stenning in concluding that Tazza had authority on behalf Unicredit appears from the due diligence report to have included the following factors arising from his visit to Italy on 31 January 2006: (1) Tazza's business card, handed to Mr Stenning by Tazza himself during the visit; (2) Tazza's explanation as to his "*position at Unicredit*"; and (3) the fact that Tazza appeared on 31 January 2006 to be "*well known in this branch [i.e. of Unicredit] especially to Luciano Sirignano who appeared to be a member of the management of this branch*". These factors did not establish the actual or ostensible authority of Tazza (either as a matter of English law or, more appropriately, as a matter of Italian law).

vi. Mr Stenning also appears to have relied on a copy of the letter from Unicredit to Tazza dated 9 November 2005 confirming that Tazza was able to sell "*financial instruments*" on behalf of Unicredit. However, this letter (1) did not establish that Tazza had authority to enter into guarantees on behalf of Unicredit, still less guarantees in excess of US$100 million; and (2) was the subject of Mr Stenning's unanswered inquiries to Unicredit of 1 February 2006. Accordingly, the Unicredit letter dated 9 November 2005 did not establish the actual or ostensible authority of Tazza; and Mr Stenning was wrong to have relied on the letter (without at least significant qualification).

vii. Mr Stenning also appears to have relied on the statements contained in the purported opinions of Avv. Coluccio dated 28 February 2006, such reliance being unreasonable in all the circumstances. In particular:

1. Those opinions were not actually drafted by the signatory of the opinions, but were drafted by others including Mr Stenning himself and then appear to have been presented for approval and signature by an Italian

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lawyer. Mr Stenning appears to have done nothing to ascertain how or by whom Avv. Coluccio was selected as the appropriate lawyer.

2. It follows that Mr Stenning was or ought to have been aware of the possibility that whoever approved and signed those opinions did not carry out any independent analysis in relation to the content thereof.

3. Mr Stenning did not inquire of Avv. Coluccio as to what investigation he had made for the purpose of satisfying himself as to the content of the opinions and, in particular, the conclusion that the 1st and 2nd Unicredit Guarantees were signed by a duly authorized signatory.

4. Mr Stenning did not inquire of Avv. Coluccio whether he had considered the Unicredit letter dated 9 November 2005 in approving the conclusions set out in the opinions.

5. Mr Stenning never saw any written instructions from Unicredit to Avv. Coluccio seeking those opinions despite Mr Stenning having made it clear that it was important to do so (by the email dated 18 January 2006 pleaded in paragraph 26 above). Mr Stenning only ever saw purported instructions from Tazza and Albatross which simply requested Avv. Coluccio *"to provide your legal opinion on the Support Letters"*.

6. Mr Stenning failed to ascertain that, in fact, those opinions were not signed by Avv. Coluccio, and were fraudulent documents.

viii. Mr Stenning had no proper basis for concluding (without significant caveats being attached to such conclusion) that Tazza had authority (whether actual or ostensible) to enter into guarantees on behalf of Unicredit.

c. The Defendant, in conducting the due diligence investigation, failed to carry out any or any adequate investigation into the apparent fraud relating to the Banca di Roma and HSBC guarantees of the 1st Albatross Bond. Mr Stenning was repeatedly asked to conduct such an investigation, and failed to do so. Nor did he, in his opinion dated 2 March 2006 (or in the earlier draft) raise any concerns about the Claimant acquiring further bonds and guarantees from Albatross and Unicredit respectively against a background of this possible fraud.

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(3) Causation, loss and damage

52. The Claimant relied upon the Defendant's opinion and due diligence investigation and report as confirmation and/or reassurance that the 1st and 2nd Albatross Bonds and the 1st and 2nd Unicredit Guarantees were valid, binding and enforceable and/or were not part of a fraudulent scheme. Consequently, the Claimant acted as follows (actions which it would not have taken but for the Defendant's breach of retainer and/or negligence):

    a. The Claimant paid for the 2nd Albatross Bond dated 16 January 2006 with an aggregate limit of US$38.8 million purportedly supported by the 2nd Unicredit Guarantee dated 27 February 2006. Payment was made in early March 2006. The total fee paid by the Claimant was US$2,278,000.

    b. The Claimant entered into an extension to the 1st Albatross Bond on 19 April 2006 (extending the aggregate limit to US$100 million), and paid US$1,800,000 for that extension in May 2006; and entered into a further extension on 4 August 2006 for which the Claimant paid US$1,500,000 in August 2006.

53. By reason of the matters aforesaid, the Claimant has suffered loss and damage as follows:

    a. US$2,278,000, being the fees paid for the 2nd Albatross Bond and the 2nd Unicredit Guarantee.

    b. US$3,300,000, being the fees paid for the April and August 2006 extensions to the 1st Albatross Bond.

54. Further, the Claimant is entitled to and claim interest pursuant to section 35A of the Senior Court Act 1981 on all sums found to be due to the Claimant at such rate and for such period as the Court thinks fit, such interest to be paid on a compound alternatively a simple basis.

AND THE CLAIMANT CLAIMS:

1. Damages as aforesaid.

2. Interest pursuant to section 35A of the Senior Court Act 1981 as aforesaid.

ANDREW GREEN Q.C.

Exhibit A

STATEMENT OF TRUTH

The Claimant believes that the facts stated in these Particulars of Claim are true.

I am duly authorised by the Claimant to sign these Particulars of Claim.

Name: NICHOLAS JOHN ARNOLD

Position: PARTNER IN THE CLAIMANT'S SOLICITORS FIRM, BLAKE LAPTHORN

Signed:

Date: 23 June 2010

Exhibit A

IN THE HIGH COURT OF JUSTICE

CLAIM NO:

CHANCERY DIVISION

B E T W E E N :

ABC VIATICALS INC (IN RECEIVERSHIP)
Claimant

- and -

DMH STALLARD (A FIRM)
Defendant

PARTICULARS OF CLAIM

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Solicitors for the Claimant

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