Testimony of

Mr. Jeffrey Robinson

January 11, 2005

STATEMENT OF
JEFFREY D. ROBINSON, ESQUIRE
ON BEHALF OF
EQUITAS REINSURANCE LIMITED AND EQUITAS LIMITED
BEFORE
THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ASBESTOS LITIGATION REFORM
"FAIR" ACT OF 2005
JANUARY 11, 2005

Mr. Chairman, Senator Leahy, Members of the Committee, my name is Jeffrey Robinson and I am with the law firm Baach Robinson & Lewis. I am here today on behalf of Equitas Reinsurance Limited and Equitas Limited, English companies, which together reinsure all (non-life) direct and reinsurance liabilities of pre-1993 Lloyd's Names, including liabilities on claims for asbestos-related injuries.

I wish to begin by expressing our appreciation to the Chairman, Senator Leahy, former Chairman Hatch, and the other members of the Committee who have worked so hard during the past two Congresses to address the issue of asbestos litigation reform. Without that difficult and intense work, we would not be here today with the opportunity to enact historic legislation that could resolve one of the most significant problems ever to face our national court system. I would also like to thank Judge Becker for his work during the last two years to help the stakeholders forge agreements that may lead to effective legislation.

Mr. Chairman, as you know, we have been active participants in Judge Becker's meetings. Without his skill, experience and commitment to bringing about fair and effective legislation, I do not believe we would be as close to a solution as we are. While there is additional work required to achieve legislation that is truly fair and effective, my remarks are in no manner intended to denigrate Judge Becker's unprecedented efforts. Rather, my comments are meant to highlight a number of serious, but correctable, flaws that keep the legislation as proposed from being either fair or effective.

Many years ago Equitas recognized that the tremendous growth in claims from unimpaired individuals threatened to overwhelm the ability of the existing tort system to compensate those who were truly injured by exposure to asbestos.

This flood of claims also threatened the financial viability of numerous defendant companies and their insurers. Equitas has done what it can as a single company to resist claims from the

unimpaired and has had some success in this regard. It has become obvious, however, that no single company, or group of companies, can solve this problem through their own actions. A legislative solution isrequired.

Equitas actively supports efforts to obtain a comprehensive legislative reform of the asbestos litigation system. We have not been wedded to a particular approach and do not insist upon particular provisions in legislation. What we have always asked is that any legislation be effective in addressing the abuses in the current system and fair to all the participants - claimants, defendants and insurers. Unfortunately, various provisions in the current discussion draft render it ineffective and unfair.

My comments today are focused on Title II, Subtitle B - Asbestos Insurers Commission. Insurers are expected to provide upwards of $46 Billion in funding for the proposed trust fund. It should be noted that the $46 Billion figure was reached almost two years ago. Equitas, like others in the insurance industry, has spent considerable amounts resolving claims during that period significantly reducing our future liabilities for asbestos claims. Despite repeated promises to do so, insurers have not presented a formula specifying how contributions would be calculated that could be set forth in the statute. As a result, the Asbestos Insurers Commission will be charged with the critical task of ensuring that the insurers' contribution is collected and allocated amongst the various insurers and reinsurers who will be participants. As you might imagine, Equitas is keenly aware of the importance of this process, since some of the allocations prepared before the significant expenditures during the last two years showed Equitas making one of, if not the, largest contributions to the fund. Despite its critical function, the current discussion draft handcuffs the Commission, severely limiting its ability to obtain the required amounts through a fair process.

Independent and Impartial Commission First and foremost, the discussion draft does not ensure that the membersof the Commission will be free of actual or perceived conflicts of interest when they perform their sensitive task of allocating contributions amongst insurer participants. As currently designed, an officer or employee of an insurer participant could leave his or her job one day and the next be in charge of allocating billions of dollars among his/her former employer and its competitors.

While it may be acceptable in some circumstances for a former employee of a party to sit in judgment on matters of interest to that party, where the matter involves an allocation of enormous financial liabilities amongst the former employee's principal and its competitors, it is patently unacceptable, with or without disclosure.

The Commission members should be subject to no less of a test than are judges who would clearly be required to recuse themselves from deciding a case of this magnitude involving their former employer. The appearance of impropriety would compel it. Imagine the consternation and mistrust you would feel if you learned that your company had been assessed a billion dollars more than you anticipated by a commission led by the former CEO of your major competitor. No one would accept such a result from a court, and it should not be
accepted here.

Such a restriction would not place an undue burden on the President's ability to secure highly qualified Commission members. There are numerous candidates with backgrounds as actuaries, accountants, auditors, insurance regulators, and academics with the appropriate skills who would be impartial.

There is simply no need to select members from the ranks of former employees whose natural allegiance will be, or will be seen to be, with specific insurers.

Voluntary Agreements Depriving the Commission of Jurisdiction The discussion draft contains a provision allowing groups of insurers and reinsurers to circumvent the work of the Commission and shield themselves from the Commission's review by concluding private agreements regarding allocation.

Remarkably, the provision provides that all of the authority of the Commission terminates with respect to insurers who are parties to such an agreement. This provision should be rejected on multiple grounds.

The provision undermines the entire role of the Commission. If an independent commission applying a fair and transparent methodology to determining insurer shares is an appropriate and important exercise, it is appropriate for all participants. Agreements among groups of insurers as to how shares should be subdivided must be scrutinized under the same criteria applicable to all. In setting overall shares, private agreements among groups of insurers are calculated to keep the Commission from examining carefully the individual reserves and future exposures of those included in the agreement. If some insurers can reach an agreement amongst themselves regarding allocation, they should present it to the Commission and argue its merits. The Commission should be free to reach an independent judgment on the merits of the agreement and not be bound to rubber stamp it and terminate all its authority over the participants.

Second, this provision is discriminatory because it permits domestic and foreign insurers and reinsurers to form alliances to enter into such agreements but inexplicably precludes run off entities, such as Equitas, from participating.

Blatant Discrimination Against Equitas Equitas is particularly concerned about a provision targeted only at it, that would deny the Commission the ability to grant Equitas meaningful financial hardship or exceptional circumstances adjustments, adjustments that could be granted to all other insurers and reinsurers. Under the terms of the bill, insurers and reinsurers can obtain an adjustment that reduces their payment obligation to the Fund if payment without such adjustment would threaten their solvency, be exceptionally inequitable, or fail to account for other payments the insurer was required to make. To keep the Fund whole in the event of such an adjustment, the amount of the adjustment must be paid into the Fund by the remaining insurer contributors based on their proportionate shares of payment to the Fund.

Although the bill allows Equitas to receive an adjustment, it then discriminates against Equitas by applying to it (and to no other insurer participant) a provision that would nullify any such adjustment. The provision requires the parties reinsured by Equitas to make payment to the Fund in the amount of any adjustment granted to Equitas.

This provision could lead to the following absurd situation. The Commission determines that the formula it has adopted substantially overcharges Equitas because Equitas would face fewer liabilities in the existing tort system because of actions it has taken to reduce its future liabilities. The Commission then grants an adjustment to Equitas, but the parties who Equitas reinsures are required to pay to the Fund the adjusted amounts even though it has been determined to be inequitable.

Similarly, this provision leaves Equitas as the only contributor to the fund, defendant company or insurer, that could not obtain meaningful relief from an assessment that created a risk to its solvency. It makes no sense to prohibit the Commission from acting to meaningfully address a legislatively created solvency risk when (1) a major reason for enacting legislation is to address insolvencies caused by the existing system and (2) the insolvency of a major contributor couldthreaten the viability of the trust fund.

It is simply wrong to treat one identified participant different from all others. Wrongness contributed to by the fact that this provision appears to be the result of an attempt by some insurers and reinsurers to use this legislation to achieve a competitive advantage. It is also foolhardy, since such discriminatory provisions may make it impossible for Equitas to make its substantial contribution to the fund.

I would add that such a provision also might be contrary to the obligations of the United States under the General Agreement on Trade in Services ("GATS"). Specifically, GATS requires member countries in the World Trade Organization ("WTO") to provide "national treatment" to service suppliers of other member countries no less favorable than that afforded their own service suppliers. Treatment is considered less favorable if it modifies the conditions of competition in favor of service suppliers of a WTO member country compared to service suppliers of any other member country. The United States and the United Kingdom are WTO member countries. By protecting the solvency of all U.S. insurers and reinsurers while denying such protection to a British reinsurer, this provision in the draft bill would appear to violate the national treatment requirement of GATS.

In conclusion, Mr. Chairman, we applaud you for taking up the critical but difficult issue of asbestos litigation reform. The discussion draft presented represents an important next step in this process, but it is a step hindered by correctable error. Truly meaningful reform requires legislation that is both effective and fair. Absent steps to address these identified failings in the Asbestos Insurers Commission, this legislation will be neither effective nor fair. Taking these steps will go a long way towards creating legislation that can resolve the asbestos litigation crisis facing the nation.

On behalf of Equitas, we pledge our continued cooperation with the Committee in formulating an effective and fair reform of the asbestos litigation crises.

Thank you for inviting me to speak here today.