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Lloyd's & the London Insurance Market 1999: Capitalizing on Change

***227** SUING EQUITAS ON A LLOYD'S POLICY: LIFTING THE LONDON FOG

John M. Sylvester
Stephen M. Goldman



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***229** [Editor's Note: John M. Sylvester and Stephen M. Goldman were counsel to the policyholder in the case captioned Central Vermont Public Service Corp. v. Adriatic Insurance Co., No. 1:96 CV-252 (D.Vt. Feb. 11, 1998). Mr. Sylvester is a partner in the Pittsburgh office of Kirkpatrick & Lockhart LLP. Mr. Goldman is of counsel with the Washington D.C. office of McKenna & Cuneo LLP. The views expressed herein are those of the authors, and not necessarily of their respective firms or their clients. The authors wish to thank Kirkpatrick & Lockhart associates Paul Del Vecchio, Melissa Ferragonio, Michaël Fischer and Roberta Anderson for their valuable assistance in the preparation of this Article. Replies to this commentary are welcome. Copyright 1998 John M. Sylvester and Stephen M. Goldman.]

A new era of coverage litigation with Lloyd's of London has begun with the recent establishment of Equitas. Created under the impetus of the Lloyd's Reconstruction and Renewal Plan, Equitas was designed to provide a self-styled "firebreak" between Lloyd's substantial exposure for asbestos, pollution and health hazard ("APH") and other longtail claims on the one hand, and Lloyd's current, profitable insurance business on the other. [FN1] Equitas was created to assume, and has assumed, both coverage and claims-handling responsibility for all APH claims on policies written in all underwriting years before 1993. Specifically, under the Equitas Reinsurance and Runoff Contract ("RROC"), into which Names at Lloyd's entered as part of the Plan, coverage obligations and claims-handling responsibility for all APH claims made against all Lloyd's syndicates [FN2] for 1992-and-prior years of account were transferred to Equitas Reinsurance Limited which, in turn, transferred them to Equitas Limited. (This transaction is referred to herein as the "Equitas Transaction"). As a result of the Equitas Transaction, the Equitas entities [FN3] are now handling all policyholder coverage claims for APH liabilities, managing litigation with respect to such claims and paying policyholders directly for settlements or judgments arising out of those claims.

The implications of the Equitas Transaction for Lloyd's policyholders with APH claims are substantial. Quite apart from the very serious financial questions surrounding the sufficiency of the original capitalization of Equitas and, thus, its continued ability to meet claims obligations, [FN4] significant questions exist regarding Equitas's claims-handling practices and strategies. Given the potential deficit between Equitas's reserves and its coverage liabilities, Equitas may be suspected of delaying the payment of policyholder claims in order to compensate for its capital shortfall by the performance of its investment portfolio in world financial markets. The effect of such a strategy would be to ***230** delay and impede the claims-payment process, thereby reneging on Lloyd's historical promises to handle policyholder claims promptly and fairly. [FN5] As a result, many policyholders and their counsel have observed that Equitas has decided not to settle claims as promptly and fairly as had Lloyd's Underwriters in the pre-Equitas era and that Equitas now is constructing unreasonable roadblocks to coverage for APH claims under historical Lloyd's policies. [FN6]

As policyholders are forced to deal with new obstacles to claims settlement established by Equitas, increased coverage litigation is likely to result. In some of that litigation, circumstances may dictate that claims be prosecuted against Equitas directly, in addition to against Lloyd's Underwriters. For example, where a policyholder can prove the existence and material terms of coverage of an old Lloyd's policy, including the amount of coverage afforded by Lloyd's in the aggregate, but cannot identify the specific Lloyd's syndicates subscribing to that policy, Equitas will likely take the position that no coverage can be provided under the policy. This is a reflexive application of the pre-Equitas position maintained by Lloyd's Underwriters that it was necessary to know which particular underwriting syndicates subscribed to a policy so as to determine which Names were responsible for paying their several shares of the claim.

From the policyholders' perspective, however, the Equitas Transaction has rendered irrelevant the identification of particular syndicates on a Lloyd's policy. Indeed, as a result of the Equitas Transaction, Equitas has assumed direct coverage liability for APH claims under all 1992-and-prior Lloyd's policies, regardless which syndicates had subscribed to those policies. Moreover, unlike claims paid prior to the establishment of Equitas, such claims are now paid from undifferentiated Equitas funds. There is, therefore, no legitimate reason for Equitas to refuse to pay claims under a Lloyd's policy simply because the specific subscribing syndicates cannot be identified. [FN7] Accordingly, in such a circumstance of unidentified market subscription, a policyholder's direct suit against Equitas reflects the reality of ultimate responsibility for the claims, regardless of whether the policyholder is able to identify the specific Lloyd's underwriters that were the original obligors on the policy.

A second situation that may warrant the prosecution of a claim directly against Equitas is where the policyholder is able to allege bad-faith claims handling. Given that Equitas has now replaced Lloyd's Underwriters in handling all APH coverage claims under pre-1993 Lloyd's policies, if the policyholder is victimized by bad-faith claims-handling practices, the responsible wrongdoer is Equitas. Thus, the policyholder should be able to sue the entity that allegedly has engaged in such wrongdoing.

Moreover, suing Equitas, rather than Underwriters at Lloyd's, may avoid potential problems with federal diversity jurisdiction. Some courts, including recently the United States Court of Appeals for the Seventh Circuit, have held that the diversity-of-citizenship requirement of federal subject-matter jurisdiction is not satisfied if the residency of any one of the individual Underwriting Names participating in a Lloyd's policy at issue is the same as the residency of the policyholder. [FN8] For an American policyholder that wishes to initiate a coverage action on Lloyd's policies in federal court, a suit against the English corporation Equitas, instead of against Lloyd's Names themselves, will properly provide diversity jurisdiction where the citizenship of one or more Names may render such jurisdiction unavailable.

***231** Finally, the presence of Equitas as a party in coverage litigation makes it more easily subject to a policyholder's discovery than if Equitas is viewed only as a non-party residing in a foreign country. Specifically, if Equitas were a party, the policyholder need not satisfy the time-consuming and cumbersome procedures of The Hague Convention in order to obtain documents and witness testimony from Equitas. Given that Equitas controls and directs the handling of all long-tail coverage claims against Lloyd's, Equitas now has access to many of the relevant documents and employs many of the key witnesses that would be the likely subject of discovery in coverage litigation. A policyholder will probably be more successful in accessing Equitas's documents and witnesses if Equitas is subject to the civil procedural rules applicable to parties in litigation, rather than those applicable to non-parties.

In the few instances to date where policyholders have sought to name Equitas as a defendant in coverage litigation, both Equitas and Lloyd's Underwriters adamantly have asserted that Equitas may not be sued by a Lloyd's policyholder. The principal arguments advanced by Lloyd's and Equitas to support their position are that: (a) policyholders and Equitas are not in privity of contract because Equitas is merely a "reinsurer" of Lloyd's Underwriters and, as such, is not subject to a direct-action suit by the policyholder; and (b) the Equitas entities are English companies that do not do business in the United States and thus are not subject to the personal jurisdiction of United States courts and have not consented to such jurisdiction. Whatever their superficial appeal, these arguments are contrary to the facts. The very nature of the Equitas Transaction and the extensive involvement of Equitas in directly handling American policyholder claims and managing the litigation of those claims makes Equitas a proper party in coverage litigation. Indeed, these arguments were recently advanced in, and rejected by, the United States District Court for the District of Vermont in a case entitled Central Vermont Public Service Corp. v. Adriatic Insurance Co. [FN9] In Central Vermont, despite strenuous objection by Lloyd's Underwriters, the court permitted the policyholder to amend its complaint to add the Equitas entities as party-defendants. [FN10]

Drawing on the reasoning advanced by the policyholder in Central Vermont, this Article demonstrates that Lloyd's characterization of the RROC as an ordinary contract of indemnity "reinsurance" in an effort to prevent Equitas from being named as a defendant in policyholder suits is an attempt to shroud the Equitas Transaction in a fog so as to obscure the true nature of that transaction. This Article "lifts the fog" and exposes the real character of the Equitas Transaction, which is not true "reinsurance," but rather is what is known in the Lloyd's market as a "reinsurance-to-close" or an "RITC" transaction. Under an RITC transaction, the original obligors under the policies (in this case Lloyd's Underwriters) transfer their contractual coverage obligations under Lloyd's policies to Equitas, and Equitas assumes the direct responsibility to the policyholder to satisfy those obligations. Put differently, RITC is an insurance portfolio transfer, and not indemnity reinsurance. Under well-established insurance law principles, by virtue of this transfer to Equitas of coverage obligations, a policyholder may sue Equitas directly for non-performance of those obligations.

In addition, this Article examines and rebuts the position advanced by Equitas that it cannot be sued in American courts because it is not subject to the personal jurisdiction of such courts. Indeed, whether by virtue of its own substantial contacts with most forums in the United States or by virtue of its assumption of obligations under the typical ***232** Service of Suit clause in a Lloyd's policy, Equitas has subjected itself to the personal jurisdiction of United States courts.

## **I. The Equitas Transaction Creates The Right Of Policyholders To Sue Equitas** Directly For Non-Performance Of Coverage Obligations Under Lloyd's Policies

### **A. Equitas Is The Reinsurer-To-Close Of Lloyd's Underwriters' Pre-1993** Liabilities

Lloyd's historically has operated as an insurance market in which individual investors, known as "Names" or "Underwriters," act as insurers and, in so doing, pledge the entirety of their personal wealth to satisfy policyholder claims. Unincorporated groups of Names operate as Lloyd's "syndicates." These syndicates hire professional underwriters and claims examiners to carry on the insurance business of the Names in that syndicate. A typical Lloyd's insurance policy is subscribed to by many Lloyd's syndicates, each responsible for a specified percentage of the risk. If a claim is made on a Lloyd's policy, each syndicate participating in the policy -- and hence each Name in each participating syndicate -- must pay its respective share of the claim. [FN11]

The insurance business of Lloyd's proved quite profitable for individual Names for decades leading up to the late 1980's. Beginning in the late 1980's and continuing into the mid-1990's, Lloyd's experienced a series of shocks: internal scandals, suits by Names against their member agencies and against the managing agencies of various syndicates. Moreover, Lloyd's incurred enormous liabilities for asbestos, pollution and toxic tort claims that were covered under historical policies issued to American policyholders.

In 1996, as part of an effort to "reconstruct" and "renew" Lloyd's as a viable player in the worldwide insurance market, and particularly in the lucrative American insurance market, Lloyd's devised the Equitas Transaction as a method to circumscribe these significant problems so that they did not destroy Lloyd's ongoing insurance business. Lloyd's understood that its major exposure was borne by syndicates with open years of account for 1992-and-prior operating years, which were experiencing huge losses. These losses included both those that were pending, many of which were in litigation, as well as losses that were incurred but not yet reported. Lloyd's created Equitas in an attempt to solve the problems arising from these pre-1993 liabilities, and, in so doing, to stop the need for further cash calls to beleagured Names. Lloyd's hoped that its promises of "finality" to Names as a result of the Equitas Transaction would also bring to an end the vexatious litigation being pursued by the Names against Lloyd's and a host of market insiders.

Though Equitas was created as a new entity, the mechanism used to transfer liabilities was one universally employed by Lloyd's for decades. The mechanism is what for many years has been known at Lloyd's as "reinsurance-to-close" or "RITC." By means of a document known as the Reinsurance and Run-Off Contract, Lloyd's Names transferred and delegated to Equitas their contractual obligations on all non-life insurance policies written in 1992-or-prior years. Yet, notwithstanding its name, the RROC is nothing like an ordinary indemnity reinsurance agreement, and Equitas is nothing like an indemnity reinsurer. Instead, the Equitas Transaction is Reinsurance-To-Close. The distinction is crucial because, in at least in the cases of which the authors are aware, Lloyd's has taken the position that Equitas is simply an indemnity reinsurer of Lloyd's Underwriters. ***233** Lloyd's has advanced this position in an attempt to invoke a general rule that a policyholder may not directly sue a reinsurer. [FN12] This assertion is undercut, however, by the terms and conditions of the RROC itself.

So different is reinsurance-to-close from ordinary indemnity reinsurance that only the use of the word "reinsurance" in RITC could allow any confusion between the two. As a brief survey of the characteristics of the two types of transaction demonstrates, RITC is vastly different from typical reinsurance purchased by insurers in markets around the world. Ordinary reinsurance helps to accomplish the fundamental economic purpose of insurance of spreading the risk of loss as widely as possible. It accomplishes this purpose by allowing an original insurer to reinsure (or cede) all or part of a risk or a line of business it has originally insured. As such, reinsurance spreads the risk of contingent loss, i.e., the risk that specified kinds of possible losses will occur at some future date. The reinsurer has only a single duty -- namely, to indemnify its cedent-insurer in the event that the cedent-insurer pays money to its insured. The ordinary reinsurer's duty to indemnify typically arises on a "follow the fortunes" basis, which means that, absent bad faith, it must pay reinsurance for a claim in the manner that its cedent has paid the policyholder, including relying upon the cedent's decision as to whether and how to settle or compromise a claim. [FN13] Therefore, the indemnity reinsurer neither assumes direct liability to, nor has contact with, the policyholder. [FN14]

By contrast, the Equitas Transaction, as acknowledged by Equitas itself, is a reinsurance-to-close transaction. [FN15] Thus, it is a completely different type of transaction than an indemnity reinsurance agreement. The hallmark of RITC is that the reinsurer-to-close replaces the original insurer as the entity primarily liable to the policyholder and assumes all direct contact with the policyholder. The original insuring Names retain liability on their policies, but only on a secondary basis -- namely, if the reinsurer to close fails to satisfy the policies' obligations, the original Names could be held liable.

Reinsurance-to-close is a practice long employed by Lloyd's because of particular characteristics of its structure and operations. Historically, so that Names' capital could be accessed by prospective purchasers of insurance in the marketplace to support the underwriting of risks, Names were combined together in Syndicates, which were annual business ventures. To enable these annual ventures to close their accounting books relatively quickly so that Names could receive their final distribution of profits or allocation of their losses, and to allow Names to enter and exit participation in syndicates freely, Lloyd's needed a mechanism to ensure that someone would be available, after the date of final distribution, to pay coverage liabilities that arose subsequent to the date a syndicate's books for a given operating year were closed. RITC was devised to accomplish this purpose. [FN16]

Under RITC, at a point three years after the inception of a given operating year, that operating year is "closed," and the obligations to policyholders of Names in that syndicate-year are transferred and delegated to Names in the next syndicate-year, along with all other aspects of those Names' insurance business in the closed year, including claims-handling authority and liability for punitive damages. Thus, unlike the ordinary reinsurer, the reinsurer-to-close does not have a duty to "indemnify" the syndicate that has been reinsured to close (the "closed syndicate"). Rather, the closed syndicate ceases to operate, and the syndicate providing the reinsurance-to-close takes over its business, making claim decisions and paying policyholders directly. RITC thus lacks the central, ***234** defining characteristic of ordinary reinsurance -- namely, that the reinsurer owes the single duty to indemnify its cedent on a follow- the-fortunes basis. [FN17] For the reinsurer-to-close, unlike an ordinary reinsurer, there are no "fortunes" of a ceding insurer to follow.

In short, therefore, Equitas, like the traditional Lloyd's reinsurer-to- close, is not, so far as the policyholder is concerned, a behind-the-scenes indemnitor following the fortunes of its cedent. In fact, it is not the indemnitor of reinsured Names at all. Instead, Equitas has assumed the role reinsurers-to-close have always assumed in the Lloyd's market: primary claims- handling responsibility and primary responsibility to pay claims. [FN18] The Equitas Transaction, therefore, was a market-wide reinsurance-to-close.

**B. Under The Historical Practices Of Lloyd's, Names In Reinsuring-To-Close** Syndicates Have Sued And Have Been Sued Instead Of The Original Names On Lloyd's Policies

Under Lloyd's historical (pre-Equitas) practices, reinsuring-to-close syndicates not only have handled and paid policyholder claims in the place of the syndicates originally subscribing to Lloyd's policies, but they have also prosecuted and defended litigation surrounding those claims. Indeed, given that the central purpose of RITC is to allow Names participating in a particular operating year of a syndicate to close that year's operations and realize either their profits or losses, no other result would be possible. Thus, in a case where the Lloyd's insurance policies in litigation were issued more than three years prior to the inception of the litigation, and the original syndicates subscribing to those policies have reinsured-to-close the relevant operating years for those policies, in accordance with ordinary Lloyd's practices, the reinsuring-to-close syndicates that have assumed coverage responsibility for those policies will prosecute or defend the litigation with respect to those policies. [FN19] Moreover, if the Lloyd's policies at issue in the litigation are found to be liable to the policyholder for coverage, it is the reinsuring-to-close syndicates, and not the original subscribing syndicates on the policies, that will pay the judgment amount.

Indeed, none other than the **Society** of **Lloyd's** itself has acknowledged the propriety of suing reinsuring-to-close Names for coverage under Lloyd's policies, rather than the Names originally subscribing to those policies. In the Society's Reconstruction and Renewal Settlement offer to Lloyd's Underwriters, dated July 1996, the Society represented to Underwriters:

[I]n addition, policyholders in the United States would probably be able to bring their claims directly against current members on the syndicates which have provide indemnity cover through RITC. [FN20]

The fact that litigation with Lloyd's is prosecuted and defended by reinsuring- to-close Names and not by the original subscribing Names may be most clearly evident in a case wherein coverage is disputed under Lloyd's policies issued decades prior to the lawsuit. In such a case, many of the original subscribing Names on the policies are probably deceased (and their probate estates closed) and thus, they cannot possibly be defending such litigation.

***235** In sum, by virtue of the Equitas Transaction, Equitas has assumed all the rights and duties with respect to Lloyd's policies issued by reinsured-to- close syndicates that reinsuring-to-close syndicates have always assumed. Thus, Equitas is a reinsurer-to-close. As such, Lloyd's policyholders should be able to sue Equitas in exactly the same way that policyholders have always sued Names in reinsuring-to-close syndicates for claims on Lloyd's policies issued by predecessor syndicates. Not only is such a result consistent with the historical practices of Lloyd's, it is also firmly rooted in well-established legal doctrine.

### C. A Lloyd's Policyholder May Sue Equitas Directly Under Well-Established Insurance Law

As a consequence of the Equitas Transaction, Lloyd's policyholders may sue Equitas directly. Specifically, as a reinsurance-to-close agreement, the RROC was not traditional indemnity reinsurance, but rather was an insurance-portfolio transfer from Lloyd's syndicates to Equitas whereby the syndicates transferred their assets to Equitas and Equitas assumed direct liability for policyholder claims. A policyholder may sue Equitas under the RROC because, even though the policyholder is not a party to that agreement, given the nature of the RROC, the law implies the privity required for such an action.

Typically, "reinsurance" contracts are contracts of indemnity and are not enforceable by the policyholder of a ceding insurer because of the policyholder's lack of privity-of-contract with the reinsurer. [FN21] Accordingly, if the Equitas Transaction had created mere indemnity reinsurance, policyholders under Lloyd's policies could not proceed directly against Equitas because of the absence of privity. However, courts have generally recognized that a reinsurance agreement may be written in such a manner so as to create liability on the part of the reinsurer directly to the policyholder. [FN22] Such agreement is referred to as an "assumption" reinsurance agreement. It is a well-established principle that, in any case where a contract of reinsurance is more than a mere contract of indemnity, and where, by such contract, the reinsurer assumes the direct liability of the ceding insurer to the policyholder on its policies, the liability of the reinsurer may be directly enforced by the policyholder." [FN23] The policyholder may maintain an action against a reinsurer in such a case because the law implies privity. [FN24]

In the case of the Equitas Transaction, the RROC is not an ordinary indemnity reinsurance agreement; rather, it is reinsurance-to-close, which is an assumption agreement, i.e., the transfer of all direct coverage responsibilities from one insurer to another. Thus, Equitas has no obligation to indemnify the original insuring syndicates against actual loss suffered. Rather, under the RROC Equitas has assumed liability for the Lloyd's policies under the RROC from the Names in the original subscribing syndicates. Accordingly, the law supplies the privity necessary to allow the policyholders to sue Equitas directly on the RROC. [FN25]

The right of a policyholder to sue a reinsurer that has assumed direct liability to the policyholder has been described succinctly by Couch:

In the case of a transfer of the original insurer's business to, and its consolidation with, another company, the reinsurer becomes directly liable, as it does where it assumes all risks and liabilities of the original insurer, and in either ***236** case the original insured may sue the reinsurer, and this is true even though the contract between the two insurance companies expressly provides that it shall only be effective as between the companies, and shall not give the policyholders the right to sue the reinsurer.... [FN26]

The emphasized language of Couch quoted above is particularly significant because, in an effort to avoid being sued, Equitas has pointed to the provision in the RROC stating that the parties to that contract do not intend to confer any third-party beneficiary rights upon insurance creditors or other persons under the contract. [FN27] Lloyd's and Equitas argue that Lloyd's policyholders may not be deemed third-party beneficiaries of the RROC by virtue of this contract provision and thus cannot sue Equitas under a third-party beneficiary theory. Regardless of the merits of that argument, [FN28] as explained by Couch, a Lloyd's policyholder may bring a coverage suit against Equitas notwithstanding the presence of language in the RROC purporting to prevent third-party beneficiary status. Indeed, the right to bring such a suit is not dependent upon the Lloyd's policyholder being deemed a third-party beneficiary of the RROC. Rather, it is the nature of the RROC as an assumption of Lloyd's syndicates' direct liabilities to policyholders that confers such a right.

This basic tenet of insurance law was enunciated long ago by the Supreme Court of North Carolina in Shoaf v. Palatine. [FN29] The reinsurance contract at issue in Shoaf effected a complete transfer of a ceding insurer's coverage obligations under certain insurance policies, but it also contained a provision stating that the contract was "only ... effective as between the parties thereto" and that "no holder of a policy of the [ceding insurer] [was] entitled to enforce this contract against the [reinsurer]." [FN30] This contract was entered into by the ceding insurer and the reinsurer, and the policyholders were not parties. [FN31] At issue was whether policyholders could maintain an action for coverage directly against the reinsurer. The court in Shoaf rejected the reinsurer's argument that the policyholders lacked privity to maintain the action. Indeed, the court noted that a policyholder could maintain an action against a reinsurer under ordinary contract principles where the reinsurer assumed liability under the contract:

The principle sanctioned by several respectable authorities is this: If A., on receipt of good and sufficient consideration, agrees with B. to assume and pay a debt of the latter to C., then C. may maintain an action directly on such contract against A., although C. is not privy to the consideration received by A. [FN32]

The court then correctly held that the reinsurer and original insurer could not between themselves defeat this right:

It is the implied right, arising out of the express agreement of the [ [ [reinsurer] that enables the [plaintiffs-policyholders] to maintain the action. The [reinsurer] relies on the provision in ... its contract as a protection against any action by the plaintiffs against that company. If the plaintiffs have a right to sue the [reinsurer], as we think they have, the two com***237** panies cannot, by any agreement between themselves, to which plaintiffs are not a party, defeat that right. [FN33]

Accordingly, the RROC clause purporting to limit the rights of Lloyd's policyholders and others to enforce the RROC is not effective to prevent policyholders from suing Equitas for non-performance of coverage obligations under Lloyd's policies. [FN34]

The question whether a Lloyd's policyholder may sue Equitas directly was recently litigated in an environmental coverage action captioned Central Vermont Public Service Corp. v. Adriatic Insurance Co. [FN35] In that case, the policyholder, Central Vermont Public Service Corporation, had originally sued Underwriters at Lloyd's, London for coverage under Lloyd's policies. Central Vermont faced a problem, however, in that it did not possess copies of several early Lloyd's excess liability policies that it knew, from secondary evidence, had been issued to it. As a result, Lloyd's took the position that Central Vermont's proof of the issuance of Lloyd's policies, as well as the material terms and conditions of those policies, was not sufficient to establish coverage. Rather, Lloyd's contended -- as it typically does -- that Central Vermont must prove the identity of the specific subscribing Lloyd's syndicates participating on the policies as a pre-requisite to coverage.

Central Vermont responded, however, that it was unnecessary to prove the identities of the subscribing Lloyd's syndicates to establish coverage under Lloyd's policies given the implementation of the Equitas Transaction. Central Vermont reasoned that, because Equitas had reinsured-to-close all of the Lloyd's syndicates that had participated on all of the Lloyd's policies at issue, Equitas had assumed direct, primary responsibility to pay Central Vermont's coverage claims on those policies. Consequently, the identification of the original subscribing syndicates was irrelevant, because Equitas would pay any claims from its funds, regardless of which syndicates had originally subscribed to the policies. Lloyd's would not accept Central Vermont's position that identification of the original subscribing syndicates was unnecessary to establish coverage, and thus Central Vermont moved to amend its complaint to add Equitas as a defendant. Central Vermont sought to sue Equitas directly based on the fact that Equitas had assumed primary responsibility on those policies.

Lloyd's vigorously opposed Central Vermont's Motion For Leave To Amend on two principal grounds.[FN36] First, Lloyd's argued that the RROC was a traditional indemnity reinsurance agreement and, as such, Central Vermont had no right or ability to sue Equitas, the reinsurer. Second, Lloyd's argued that Equitas was an English corporation that transacted no business in the United States -- and particularly Vermont -- and thus the court could not exercise personal jurisdiction over Equitas. In replying to Lloyd's opposition papers, Central Vermont presented to the court many of the arguments and authorities set forth in this Article to establish that Central Vermont had a direct cause of action against Equitas and that Equitas was subject to the personal jurisdiction of the court. The court accepted Central Vermont's arguments by granting the Motion For Leave To Amend and thereby allowing Equitas to be added as a party-defendant in the lawsuit.

The other two court decisions of which the authors are aware addressing the question whether Lloyd's policyholders have a direct cause of action against Equitas are the cases captioned First State Insurance Co. v. Minnesota Mining & Mfg. Co. [FN37] and USX Corporation ***238** v. Adriatic Insurance Company. [FN38] In those decisions, the courts ruled that the policyholders could not maintain a cause of action against Equitas. Significantly, though, in both cases, the courts acknowledged the legal principle that reinsurers assuming direct obligations to policyholders may be sued by those policyholders. [FN39] Nonetheless, in both cases, the courts misconstrued the RROC as a mere contract of indemnity reinsurance rather than an assumption reinsurance agreement and thus concluded that the policyholder had no right to sue Equitas. Both court decisions were clearly erroneous because they failed to appreciate the full extent of the Equitas Transaction as reinsurance-to-close, which effected an insurance-portfolio transfer of assets and coverage obligations from Lloyd's syndicates to Equitas.

The First State decision does not even mention the fact that the Equitas Transaction was a reinsurance-to-close transaction, much less analyze the substantial similarity between reinsurance-to-close and a traditional assumption reinsurance agreement. Morevoer, although the court in USX acknowledges the practice of reinsurance-to-close at Lloyd's, it miscontrues RITC as mere indemnity reinsurance. [FN40] The court also seemingly fails to appreciate that the Equitas Transaction was a reinsurance-to-close transaction. Consequently, the USX court's decision concludes that Equitas merely indemnifies originally subscribing Names for coverage obligations under Lloyd's policies, without reconciling that conclusion with the fact that many of those originally subscribing Names may be deceased and thus could not be the recipients of indemnity. The USX court also relies too heavily on the presence of the word "reinsurance" in the RROC in determining that the RROC is an indemnity reinsurance contract, rather than an assumption reinsurance contract -- and thus fails to realize that the word "reinsurance" can just as readily refer to assumption reinsurance as it can refer to indemnity reinsurance.

In short, a recognition of the RROC as a reinsurance-to-close contract, along with a better understanding that reinsurance-to-close constitutes a transfer of primary liability under a Lloyd's policy, should have led both the First State court and the USX court to conclude that Equitas was directly liable to Lloyd's policyholders. Instead, the courts' superficial review of the wording of the RROC, without analyzing the actual effect of that contract, led both courts to conclude erroneously that Equitas was a mere indemnity reinsurer that could not be sued by Lloyd's policyholders.

**II. Courts Of The United States May Maintain Personal Jurisdiction Over Equitas**

In opposing efforts by American policyholders to bring suit directly against Equitas, Lloyd's Underwriters also assert that courts in the United States lack personal jurisdiction over Equitas because the requisite minimum contacts are lacking. [FN41] This assertion may be defeated on either one of two independent grounds. First, Equitas's own substantial activities in the United States, as well as those of its agents, are sufficient to establish minimum contacts in the various states throughout the country. Second, Lloyd's insurance policies typically contain a Service of Suit clause requiring Lloyd's Underwriters to submit to the jurisdiction of any United States court. Just as the coverage obligations of those Lloyd's policies have been delegated to Equitas by virtue of the Equitas Transaction, so too are the obligations of the Service of Suit clause binding upon Equitas. Under either or both of these grounds, a United States court should conclude that it may exercise personal jurisdiction over Equitas.

***239 A. Equitas's Activities In The United States Give Rise To Personal** Jurisdiction

**1. Equitas's Own Activities**

Typically a state's long-arm statute [FN42] will permit its courts to assume personal jurisdiction over non-resident defendants to the full extent permitted by the Due Process Clause of the Constitution. [FN43] In International Shoe Co. v. Washington, [FN44] the Supreme Court of the United States enunciated the due-process requirement for personal jurisdiction by holding that a court has in personam jurisdiction over a defendant that has purposefully established minimum contacts with the forum, so long as the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

A defendant's contacts with a forum can give rise to either general jurisdiction or specific jurisdiction. General jurisdiction is present when a defendant's contacts with the forum are continuous and systematic, permitting the forum to exercise personal jurisdiction over the defendant even if the cause of action did not arise from or relate to activities conducted within the forum state. [FN45] General jurisdiction involves a more demanding minimum-contacts analysis than does specific jurisdiction, because it requires that the defendant have conducted substantial activities within the forum.

A court may exercise specific jurisdiction, on the other hand, where the defendant's alleged liability arises from or is related to an activity conducted within the forum, even where the defendant's contacts with the forum are neither continuous nor systematic. [FN46] In the case of specific jurisdiction, the minimum contacts requirement is satisfied so long as the contacts resulted from the defendant's purposeful conduct and not the unilateral activities of the plaintiff, and so long as the defendant's conduct and connection with the forum state are such that it should reasonably anticipate being haled into court there. [FN47] Additionally, the assertion of specific jurisdiction over a defendant must comport with traditional notions of fair play and substantial justice. [FN48]

The most important consideration in determining if a defendant's activities satisfy the minimum contacts test is whether the defendant's conduct and connection with the forum state are such that the defendant should reasonably anticipate being haled into court there. [FN49] The minimum-contacts requirement is satisfied if there has been intentional and affirmative action on the part of the non-resident defendant in pursuit of its corporate purposes within the forum state. [FN50] Similarly, any act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws" is sufficient to satisfy the minimum contacts test. [FN51]

Although Equitas's systematic contacts with many states are sufficient to support general jurisdiction over Equitas in the courts of those states, specific jurisdiction over Equitas may be obtained in other states where Equitas's activities with respect to a particular policyholder's claim make it amenable to coverage litigation there. Whether the analysis is one of general jurisdiction or specific jurisdiction, Equitas's activities must be considered on a forum-specific basis. Nonetheless, Equitas typically has more than sufficient contacts with a given forum in the United States to confer personal jurisdiction upon that state's courts. Indeed, Equitas is responsible for handling all APH claims ***240** throughout the United States. Equitas has assumed broad-sweeping powers under the RROC to handle such claims and manage the defense of litigation with policyholders over such claims. These powers include the power to settle and pay policyholder claims without the consent of Lloyd's Underwriters and the power to retain and direct American lawyers representing Lloyd's Underwriters in coverage litigation. [FN52] Such litigation is occurring virtually in every state throughout the country.

In advancing their position that United States courts do not have personal jurisdiction over Equitas, Lloyd's Underwriters and Equitas maintain that Equitas personnel are engaged in their claims-handling and litigation management activities only in England and thus the absence of their physical presence in the United States prevents personal jurisdiction from attaching. This position, even assuming arguendo it were true as a factual matter, [FN53] is unavailing as a matter of law. Due process does not require a defendant's physical presence in the forum before personal jurisdiction is exercised. [FN54] As the Supreme Court of the United States has pronounced, "[we] have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction." [FN55]

Much of Equitas' claims-management activities are conducted by telephone and mail correspondence with agents in the United States. Such communications with persons in the forum state can constitute sufficient minimum contacts with the forum. [FN56] In addition, the conduct of litigation in a forum state by a non-resident may subject the nonresident to the jurisdiction of courts of that state. [FN57] There is simply no question that Equitas now directs and controls the defense of all litigation against Lloyd's Underwriters on all APH claims in courts across the country. These activities include hiring American lawyers to defend coverage suits, making litigation strategy decisions, answering interrogatories on behalf of Lloyd's Underwriters, appearing in Rule 30(b)(6) depositions on behalf of Lloyd's Underwriters, attending settlement conferences and making settlement decisions.

Equitas engages in all of the foregoing activities in furtherance of one of its major activities -- handling and resolving APH claims of American policyholders. When an entity engages in any activity to further its business strategy in a given state, personal jurisdiction may be established -- even in the absence of the entity's physical presence in that state. [FN58] Indeed, the burden on foreign defendants having to litigate in the United States has been ameliorated by modern methods of transportation and communication. [FN59] An exercise of jurisdiction over a foreign defendant will only be improper if the defendant can show that it is onerous in a special, unusual, or other constitutionally significant way. [FN60] Given its substantial activities in the United States, including the control of the defense of litigation in courts throughout the country, Equitas cannot make such a showing.

Finally, it is clear that the claims decisions being made by Equitas with respect to the APH claims of American policyholders have had, and will continue to have, a direct effect within the United States. Such decisions involve the transfer of millions of dollars to policyholders in the United States. [FN61] When a non-resident entity engages in activities that have a direct effect within a forum-state, such activities may give rise to personal jurisdiction over the non-resident. [FN62]

***241 2. The Activities Of Equitas's Agents**

Another avenue of analysis of the jurisdictional contacts of Equitas in the United States is an analysis of the activities of the agents of Equitas. Indeed, while Equitas officials may not typically travel to the United States in furtherance of their APH claims-handling activity, numerous agents of Equitas are physically present in the United States and acting on its behalf. For example, Equitas will frequently appoint American law firms or claims-adjusting firms in the United States to investigate policyholder claims prior to coverage litigation. Such firms are often located in the forum state and communicate with the policyholder in an effort to obtain information and, if they are not located there, they may travel to the forum state to inspect environmental sites or other locations where losses have occurred. Moreover, if and when coverage litigation ensues, Equitas, in the course of its management of the litigation, retains and directs the actions of American lawyers to conduct a defense of the litigation in the forum state. All of the actions of the agents of Equitas in the forum state may be imputed to Equitas for jurisdictional purposes. [FN63]

**B. Equitas Has Assumed The Obligations Of Lloyd's Underwriters To Submit To The** Personal Jurisdiction Of The United States Courts

n addition to all of its own contacts that are sufficient to subject Equitas to the personal jurisdiction of the court, by virtue of the Equitas Transaction, Equitas has assumed all of the contractual obligations of the Lloyd's syndicates that originally underwrote the Lloyd's policies at issue. [FN64] Thus, Equitas may be deemed to have consented contractually to suit in an American court to precisely the same extent that Underwriting Names had consented in the insurance contracts they sold.

One of the key provisions of every Lloyd's policy -- which was a prerequisite for Lloyd's sale of insurance to American policyholders -- is the so-called "Service of Suit" clause wherein Lloyd's Underwriters agreed to submit to the jurisdiction of any court in the United States in which a policyholder brought suit on the policy.

The typical Service of Suit clause in a Lloyd's policy issued to an American policyholder provides, in relevant part, as follows:

It is agreed that in the event of the failure of Insurers hereon to pay any amount claimed to be due hereunder, Insurers hereon, at the request of the insured (or reinsured), will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court. [FN65]

By this clause, the Underwriters who originally underwrote Lloyd's policies issued to American policyholders agreed to submit to the personal jurisdiction of any United States court in which they may be sued by an American policyholder on a coverage dispute arising from the policy. [FN66] Such a provision was necessary to make Lloyd's policies marketable ***242** in the United States. Moreover, the successor Lloyd's syndicates that had succeeded to the liabilities of the original Underwriters through the reinsurance-to-close process have acknowledged the contractual obligation of the Service of Suit clause that has been delegated to them, and they have regularly appeared as defendants in American APH coverage litigation over the past 10-15 years without contesting personal jurisdiction, even though they were not the original contracting parties agreeing to the Service of Suit clause. [FN67]

For the same reason that the reinsuring-to-close syndicates before them were bound to honor the Service of Suit clause, so too is Equitas -- as a reinsurer- to-close -- obligated to appear in any United States court to defend a lawsuit brought on a Lloyd's policy. The obligations of the Service of Suit clause are just like the coverage obligations of the basic insuring agreement of the Lloyd's policies that Equitas has assumed as part of the Equitas Transaction. As such, Equitas must honor these obligations as it must honor all other policy obligations it has assumed by virtue of the reinsurance-to-close process. [FN68]

### C. Recent Decisions Involving Personal Jurisdiction Over Equitas

The issue whether Equitas is bound by the Service of Suit clause was considered by the United States District Court for the Western District of Wisconsin in a case captioned Employers Insurance of Wausau v. Certain London Market Companies. [FN69] The Wausau case involved an attempt by the plaintiff-insurer to sue directly certain Equitas entities to recover under certain reinsurance treaties that had been issued to the plaintiff by Underwriters at Lloyd's. The reinsurance treaties contained a Service of Suit provision providing that the underwriting Names "will submit to the jurisdiction of any court of competent jurisdiction within the United States." [FN70]

Equitas opposed efforts to be a defendant in the Wausau case, stating that the Equitas Transaction was merely a "reinsurance agreement" by which Equitas indemnified the Underwriting Names and did not assume all of their policy obligations. Moreover, Equitas argued that the RROC itself specified that it did not provide any third-party beneficiary rights to ceding insurers, such as plaintiff, and that all disputes arising under the contract should be governed by English law.

In ruling against Equitas and denying its motion to dismiss, the Wausau court applied the test of Hugel v. Corporation of Lloyd's, [FN71] by which a non-party to a forum-selection clause may nevertheless be bound by that clause. Specifically, as the Hugel court stated, a non-party is so bound when it is "so closely related to the dispute such that it becomes foreseeable that it will be bound." [FN72]

The Wausau court stated:

Applying the Hugel analysis, I agree with plaintiff's basic contention that Equitas is so closely related to its dispute with defendant Names that Equitas should be bound to the forum selection clauses that bind defendant Names. Equitas was formed to represent the interests of the Names and to provide the Names with finality in pre-

1993 matters. It must be closely related to defendant Names and the claims against the Names. How could a party not closely related be capable ***243** of providing the Names with finality? Adding support for this finding is that the fact that Equitas has agreed to indemnify Names for losses arising from disputes, such as those between plaintiff and defendant Names. Last, and most significant to the existence of a close relationship between defendant Names and Equitas, Equitas has assumed control over all litigation relating to disputes over defendant Names' pre-1993 policies. Such a broad grant of authority makes Equitas closely related to the dispute.

Regarding the foreseeability phase of the Hugel analysis, I find that when Equitas took control of the Name's pre-1993 obligations and assumed the power to litigate disputes arising out of those obligations, it should have realized it would be bound to these forum selection clauses. Such clauses were an important part of all treaties underwritten at Lloyd's. Equitas should have anticipated that the clauses might affect their efforts to settle matters for the Names.... [FN73]

Although the Wausau court did not conclude that the Service of Suit clause obligations had been contractually transferred to Equitas -- as is the contention of the authors of this Article -- the court did find significant the fact that Equitas had assumed control of all of the litigation regarding Lloyd's pre-1993 policies. The court also acknowledged that the Service of Suit clause had been an important part of the reinsurance treaty at issue. Accordingly, the Wausau court concluded that Equitas should have foreseen that it would be bound by such clauses once it took responsibility for handling the litigation arising out of all the insurance and reinsurance policies in which those clauses were contained. Such a result certainly was not unfair to Equitas in the Wausau case, nor is it unfair in any other case where it has assumed claims-handling and litigation-management responsibility for the relevant Lloyd's policies.

A recent decision by a Colorado trial court, Union Pacific Railroad Co. v. Century Indemnity Company,[FN74] rejected the reasoning of Wausau and held that the court did not have personal jurisdiction over Equitas. The Union Pacific court based its decision on a determination that the "foreseeability" test of Hugel was unconstitutional. Specifically, the court found that the fact of Equitas having forseen the possibility of litigating in Colorado, by itself, was not sufficient contact with Colorado to form the basis of constitutional jurisdiction. [FN75] The Union Pacific holding was wrongly decided because, regardless whether "foreseeability" alone could justify the minimum contacts test, there were other, more significant contacts between Equitas and Colorado that the court failed to appreciate. Indeed, Equitas not only had foreseen the possibility of being involved in litigation in Colorado, but it was actively directing and controlling the action of agents -- namely, American lawyers -- in conducting the defense of litigation against Lloyd's in Colorado so as to further Equitas' primary business purpose of handling and resolving American APH claims. The Union Pacific court tried to analogize Equitas' appointment of American litigation counsel to the appointment of an agent for service of process and, in so doing, reasoned that the mere presence of either is insufficient to establish personal jurisdiction. Yet, one can hardly equate the actions of a passive agent for service of process with those of an active litigation counsel that is traveling to the forum state to appear in court and regularly communicating with others in the state.

***244** Moreover, the Union Pacific court completely missed the fact that, by virtue of the RROC, Equitas had assumed the duties of the Lloyd's policies at issue. As such, Equitas was obligated to comply with the Service of Suit provision of those policies which bound Equitas -- as it had originally bound the Underwriting Names -- to consent to the personal jurisdiction of any American court in which it was sued. The Union Pacific court's finding that the Underwriting Names were still liable under the Lloyd's policies, [FN76] while correct, fails to recognize that, by virtue of the RROC, Equitas had also become directly liable to the policyholder for all of the obligations under the policies. [FN77]

In short, the Union Pacific court failed to appreciate the full consequences of Equitas having reinsured-to-close the Lloyd's policies at issue in that case. As a consequence of the RROC, Equitas not only had assumed the obligations of Names to submit to the jurisdiction of the Colorado court, but also Equitas was actively engaged in litigation activities in Colorado, either directly or through its agents, which activities were more than sufficient to satisfy due process requirements for personal jurisdiction.

## III. Conclusion

The circumstances that led to the creation of the Equitas entities were unprecedented in Lloyd's. Consistent with the Lloyd's tradition of building upon its historical practices, Lloyd's has endeavored to solve the problems associated with the pre-1993 long-tail APH claim liabilities by the use of its time-honored mechanism of reinsurance-to-close. Yet, in an effort to immunize Equitas against suit by American policyholders, Lloyd's and Equitas now attempt to mischaracterize the Equitas Transaction as an ordinary indemnity reinsurance contract rather than a reinsurance-to-close. Courts that carefully scrutinize the position of Lloyd's and Equitas, however, should squarely reject it. From the point of view of well-established insurance law, the reinsurance-to-close effected by the RROC constituted an assumption by Equitas of policy obligations, the result of which is to provide Lloyd's policyholders the right to sue Equitas directly for failure to satisfy those obligations.

In addition, from the point of view of personal jurisdiction, the argument that Equitas is a foreign corporation, and thus not amenable to suit in American courts, is utterly without merit. Whether analyzed under long-arm jurisdiction doctrine dating back to International Shoe, or under the view that the transfer of policy obligations to Equitas included the duty to respond to policyholder suits because of the obligations imposed by the Service of Suit clause, Equitas cannot successfully complain that it is not subject to the personal jurisdiction of American courts when it is sued under Lloyd's policies whose obligations it has assumed.

In conclusion, Equitas is not immune from suit in the United States by Lloyd's policyholders that do not receive the benefit of the coverage they purchased under Lloyd's policies. Accordingly, Equitas should recognize that its actions in responding to policyholder claims and in conducting the defense of American policyholders' coverage litigation regarding Lloyd's policies may result in Equitas properly being named as a party-defendant in coverage litigation. As such, Equitas would be subject to the same discovery obligations of any insurer-party in the litigation and to the same rules of liability regarding bad-faith claims handling to which the Lloyd's Underwriters historically have been subject. This exposure to policyholder suits in American courts should have a salutary effect on Equitas's claims-handling conduct in the years ahead.

[FN1]. In May of 1998, Lloyd's of London reported profits of $1.93 billion for the 1995 underwriting year. See Lloyd's Clouds Its Results, BUSINESS INSURANCE, May 11, 1998, at 1. Previously, Lloyd's had reported profits of $1.88 billion for the 1994 underwriting year, up from the $349 million profit reported on the 1993 underwriting year. By contrast, for the five prior underwriting years 1988-1992, whose liabilities have been delegated to Equitas, Lloyd's reported combined losses of over $12 billion. See Lloyd's Profit, R&R Plan End Market's Dark Days, BUSINESS INSURANCE, Dec. 22, 1997, at 16.

[FN2]. When it was originally created, Equitas did not have responsibility to pay the claims of the former Peter Cameron Webb Syndicates. In the wake of the scandal that led to these syndicates ceasing to underwrite in the mid-1980's, payment obligations had previously been transferred to Lioncover Insurance Company, Ltd. Recently, the transfer of Lioncover's obligations into Equitas, on the same basis as obligations of the other pre-1993 Lloyd's syndicates, was completed. See Lloyd's Wins Agreement for Reinsurance of Equitas, BUSINESS INSURANCE, Dec. 22, 1997, at 1.

[FN3]. Equitas Reinsurance Limited has contracted with Equitas Claims Management Limited to handle all APH claims for which Equitas Reinsurance Limited has coverage responsibilities. In this article, Equitas Reinsurance Limited, Equitas Limited and Equitas Claims Management Limited will be referred to individually and collectively as "Equitas."

[FN4]. See Return from the Dead (Financial Woes Return for Lloyd's of London), 31 INSTITUTIONAL INVESTOR No. 6 (June 1, 1997); Audit Questions Validity of Equitas' First Financials, BUSINESS INSURANCE, April 14, 1997, at 1; Can Equitas Abide Runoff of 40 Years?, NATIONAL UNDERWRITER PROPERTY & CASUALTY-RISK BENEFIT MANAGEMENTTT at 3, Oct. 14, 1996.

[FN5]. One of the principal stated motivations in the creation of Equitas was to send a signal to the insurance-buying public, particularly in the United States, not only that Lloyd's wished to be recognized as an insurer that would honor its obligations, but that funds to pay APH claims were cordoned off from funds to pay claims on new policies. Nevertheless, as a runoff company with no ongoing insurance underwriting business, Equitas itself has no marketing incentive to handle policyholder claims quickly and fairly.

[FN6]. Dating back to its prompt payment of losses after the San Francisco earthquake of 1906, Lloyd's built its reputation, in part, by avoiding such disreputable practices.

[FN7]. One reason frequently advanced by Equitas in support of its purported need to know the specific syndicates subscribing to a Lloyd's policy is that such information enables Equitas to collect outward reinsurance for the policyholders' claims that had been purchased by each subscribing syndicate. Yet, the availability of reinsurance for a coverage claim cannot be a good- faith factor for Equitas to consider in deciding whether to accept or deny a claim. To the knowledge of these authors, the collectibility of reinsurance has never been a condition for payment of a claim under a Lloyd's policy.

[FN8]. See Indiana Gas, Inc. v. Home Insurance Co., 141 F.3d 314 (7th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3149 (U.S. Aug. 11, 1998) (No. 98-271).

[FN9]. No. 1:96 CV-252 (D.Vt. Feb. 11, 1998).

[FN10]. See Vermont Insured Granted Leave to Amend Complaint to Sue Equitas Entities, 12 No. 16 MEALEY'S LITIG. REP.: INS. 12 (Feb. 24, 1998).

[FN11]. See generally Richards v. Lloyd's of London, 135 F.3d 1289, 1291- 92 (9th Cir. 1998).

[FN12]. See First State Ins. Co. v. Minnesota Mining & Mfg. Co., No. C3- 94-12780 (D. Minn. May 1, 1997), 11 No. 34 MEALEY'S LITIG. REP.: INS. 13 (July 8, 1997). This was also the principal argument Lloyd's advanced in Central Vermont.

[FN13]. In support of its Motion For Leave To Amend Complaint in the Central Vermont case, Plaintiff Central Vermont submitted the Affidavit of its expert on Lloyd's and the London Market, Ronald Hendy. In his Affidavit, Mr. Hendy identified twenty separate characteristics of ordinary reinsurance, only one of which was shared by RITC and the Equitas Transaction. With respect to the other nineteen characteristics, Mr. Hendy explained that ordinary reinsurance is different from RITC and the Equitas Transaction. See Benchmark Analysis To Compare Reinsurance, RITC and Equitas Duties, attached as Exhibit "B" to the Affidavit of Ronald Hendy In Support of Plaintiff Central Vermont's Motion For Leave To Amend Complaint, dated January 26, 1998.

[FN14]. One significant exception to this general rule arises where the insurance contract establishes, or the law implies, a "cut-through," wherein the reinsurer is directly liable to the policyholder. See Stephen M. Goldman & Michael G. Zanic, Reinsurance Cut-Through Clauses and the Insolvency Nightmare, 9 No. 19 MEALEY'S LITIG. REP.: INS. (March 21, 1995).

[FN15]. See RROC, Whereas Clause (F) ("The Council has resolved that a reinsurance contract with ERL in the terms of this Agreement ... will constitute reinsurance to close as at the Inception Date"); see RROC, at ß 6.11; see also Equitas Report & Accounts dated Sept. 4, 1996, at 43 ("The Reinsurance and Runoff Contract provided for a reinsurance to close, by way of an indemnity in respect of the 1992 and prior years' liabilities of each syndicate, after deduction of the amounts recoverable and actually recovered under the syndicate's outward reinsurances and various other amounts which reduce claims ...").

[FN16]. See, e.g., Tomey v. Eagle Star Ins. Co., 1 Lloyd's Rep. 516 (Court of Appeal, Civil Division Jan. 26, 1994) ("The mechanism by which these [[[outstanding] liabilities are transferred is called 'reinsurance to close' and the sum being paid as a consideration for such transfer is called the 'premium to close'"); **Society** of **Lloyd's** v. Clementson, Q.B.D. (Commercial Court May 7, 1996) reprinted in THE LONDON TIMES, May 14, 1996 (defining RITC as the receipt of premium by a year of account "from the preceding year of account in return for assuming the liabilities of the previous year"); Orion Ins. Co. v. Sphere Drake Ins. PLC, 1 Lloyd's Rep. 239 (Court of Appeal, Civil Division Aug. 6, 1991) (an RITC is where "in accordance with the rules or practice of Lloyd's and in consideration of the payment of a premium, one underwriter agrees to meet the liabilities arising from the latter's business for an underwriting year so that the accounts of the business for that year may be closed").

[FN17]. Because Equitas' obligations under the RROC are those of a reinsurer-to-close, the use of the word "indemnify" in the description of Equitas' obligations under the RROC is highly misleading.

[FN18]. Under reinsurance-to-close, the reinsured-to-close Names are not relieved of their obligations under the Lloyd's policies; rather, they become secondarily liable under the policies, acting as a surety for the performance of the reinsuring-to-close Names.

[FN19]. See, e.g., Amoco Chemical Co. v. Certain Underwriters at Lloyd's of London, No. B083904, 1996 WL 407855 (Cal. Ct. App. June 4, 1996) (policyholder files insurance coverage action against Lloyd's in 1991 regarding products liability coverage under Lloyd's policies issued between 1973 and 1986); Babcock & Wilcox Company v. Arkwright-Boston Mfg. Mutual Ins. Co., 53 F.3d 762 (6th Cir. 1995) (policyholder filed coverage action against Lloyd's in 1993 regarding insurance policy subscribed to by Lloyd's Underwriters in 1979).

[FN20]. See Lloyd's of London, Reconstruction and Renewal: Settlement Offer, July 1996, at 138. The Society made the representation that the reinsuring-to- close syndicates could be sued directly by Lloyd's policyholders in an effort to rebut the contention of some Names that reinsuring-to-close syndicates could avoid responsibility for American long-tail APH claims by defaulting on those claims and forcing American policyholders to sue the original Underwriting Names, some of whom were likely deceased -- the so-called "Dead Man's Stop" alternative. In attempting to persuade Names to agree to the Reconstruction and Renewal Plan, the **Society** of **Lloyd's** emphasized that Names in existing, open syndicates that had reinsured-to-close earlier syndicates subscribing to policies against which APH claims were being made could not avoid the obligations they had assumed because American policyholders could sue them directly.

[FN21]. See, e.g., Fontentot v. Marquette Cas. Co., 247 So.2d 572, 576- 79 (La. 1971). Courts have reasoned that, because a policyholder does not participate in the formation of a reinsurance contract, he has no interest in the contract. Courts have labeled the policyholder's insufficient relationship to the reinsurance contract "lack of privity." See David P. Schack, Comment, Reinsurance and Insurer Insolvency: The Problem of Direct Recovery by the Original Insured or Injured Claimant, 26 UCLA L. REV. 872, 877 n.27 (1982). Other courts have held that reinsurance is a contract of indemnity between the reinsurer and the reinsured, to which the policyholder has no claim. See also cases cited in Fontentot, 247 So.2d at 576-79. See generally J. APPLEMAN, INSURANCE LAW AND PRACTICE ß 7694, at 528-29 (1976); Annotation, Who May Enforce the Liability of a Reinsurer?, 35 A.L.R. 1348 (1925); Annotation, Who May Enforce Liability of Reinsurer?, 103 A.L.R. 1485 (1936); 46 C.J.S. Insurance ß 1232 (1946).

[FN22]. See, e.g., Colonial American Life Ins. Co. v. Commissioner, 491 U.S. 244, 246-47 (1989); Epland v. Meade Ins. Agency Assocs., Inc., 564 NW2d 203, 205 (Minn. 1997); cert. denied, 18 S.Ct. 181; People ex rel. Kane v. National Sur. Co., 188 P. 653 (Colo. 1920); BARRY R. OSTRAGER & MARY KAY VYSKOCIL, MODERN

REINSURANCE LAW AND PRACTICE ß 1.04[a], at 1-14 (1996) (discussing the difference between assumption reinsurance and indemnity reinsurance and recognizing that "the assuming reinsurer steps into the insurer's shoes and becomes directly liable to the policyholders"); GRAYDON S. STARING, LAW OF REINSURANCE ß 1.5, at 8 (1993 & Supp. 1998) (same).

[FN23]. See, e.g., E.D. Baird & Son v. Kaskaskia Live Stock Ins. Co., 200 N.W. 575, 575-76 (Iowa 1924) (a policyholder can maintain an action directly against a reinsurer where the reinsurer takes over and assumes the obligations of the original insurer); Kane, 188 P. at 655 (where the reinsurer assumed liability as to "all obligations ... and for losses [under the original insurance agreement] ... the [policyholder] may sue the reinsurer directly, and his right of action against the reinsured is merely cumulative"); Barnes v. Heckla Fire Ins. Co., 57 N.W. 314, 314-15 (Minn. 1917) (where the contract of reinsurance includes agreement to assume and pay policyholders' losses, policyholders may bring actions directly against the reinsurer); Meyer v. National Sur. Co., 100 A. 164, 165 (N.J. 1917) ("When a company reinsures all the risks and agrees that all losses ensuing under the policies shall be borne, paid and satisfied by the reinsuring company, it has been held, that a policyholder in the first company might maintain an action against the reinsuring company to recover a loss on property covered by a policy of the first company"); Shoaf v. Palatine, 37 S.E. 451, 457 (N.C. 1900) (allowing policyholder to maintain action directly against reinsurer notwithstanding contractual provision purporting to limit reinsurer's liability to policyholder); Whitney v. Americans Ins. Co., 59 P. 897, 900 (Cal. 1900) (where reinsurer assumed all outstanding policies of the original insurer, the policyholders could maintain action directly against the reinsurer because "[t] he law creates the privity necessary for the maintenance of the action"); see also Security Benefit Ins. Co. v. Federal Deposit Ins. Corp., 804 F. Supp. 217, 226 (D. Kan. 1992) (recognizing that "when the [reinsurer] assumes direct liability to the original insured, the insurance risk or obligation is simply transferred to the [reinsurer], which is substituted for the original insurer" and that "[s]uch a transaction is more accurately characterized as ... an 'assumption agreement'") (emphasis added); In re Estate of Osborne v. Gerling Global Life Ins. Co., 529 So.2d 169, 171 (Miss. 1988) ("In any case where the contract of reinsurance is more than a contract of indemnity, and is made for the benefit of the policyholders of the reinsured, and by it the reinsurer assumes the liability of the latter on its policies, the liability of the reinsurer may be directly enforced by the insured or, or by his privies") (quoting First Nat'l Bank of Kansas City v. Higgins, 357 S.W.2d 139, 143 (Mo. 1962)); American Benefit Life Ins. Co. v. Ussery, 373 So.2d 824, 829 (Ala. 1979) ("The fact that the [reinsured] might also have retained some liability does not negate the liability assumed by [the reinsurer]. The reinsurance agreement shows that [the reinsurer] assumed liability ... instead of merely agreeing to indemnify [the original insurer]. Thus, [the reinsurer] became the principle obligor") (emphasis added). Cf. Vetter v. Security Continental Ins. Co., 567 N.W.2d 516, 521 n.7 (Minn. 1997) ("In the absence of clear proof of novation, a third person's assumption of [an] obligation ... makes the third person an additional obligor"); Arrow Trucking Co. v. Continental Ins. Co., 465 So.2d 691, 695 (La. 1958) ("It is well recognized that if the reinsurance contract reflects the reinsurer's intent to become directly obligated to the original insured (as is often the case with a reinsurer taking over the policies and assets of an insolvent insurer) then the original insured may pursue his action directly against the reinsurer"); Hunt v. New Hampshire Fire Underwriters Ass'n, 38 A. 145, 147 (N.H. 1895) (allowing policyholder to recover directly from reinsurer in equity).

[FN24]. See O'Hare v. Pursell, 329 S.W.2d 614, 622 (Mo. 1959); see also Sawyer v. Sunset Mut. Life Ins. Co., 66 P.2d 641, 643 (Cal. 1937) (where reinsurer assumed all outstanding policies of the original insurer, the policyholders could maintain action directly against the reinsurer because "the law created the privity necessary for maintenance of such an action"); Whitney, 59 P. at 900 (same).

[FN25]. Id.

[FN26]. couch, Cyclopedia of Insurance Law, Vol. 19, at ß 80.70 and n.7 (2nd ed. 1983) (emphasis added).

[FN27]. See RROC, at ß 3.7.

[FN28]. The entirety of the RROC belies the notion asserted in Section 3.7 that the RROC was not intended to benefit Lloyd's policyholders. Indeed, the primary reason for the Equitas Transaction was to implement a plan to enable Lloyd's policyholders to be paid on their substantial long-trial APH claims.

[FN29]. 37 S.E. 451 (N.C. 1900).

[FN30]. Shoaf, 37 S.E. at 452.

[FN31]. Id.

[FN32]. Id.; see also Johannas v. Phoenix Ins. Co., 27 N.W. 414, 417- 18 (Wis. 1886) (same).

[FN33]. Shoaf, 37 S.E. at 452 (emphasis added).

[FN34]. Recently, the United States Court of Appeals for the Sixth Circuit, in Nationwide Mutual Ins. Co. v. Home Ins. Co., 150 F.3d 545 (6th Cir. 1998), held that an original ceding insurer (Nationwide) may not directly sue an entity (CIGNA) that had assumed the reinsurance obligations of Nationwide's original reinsurer (Home). The Nationwide decision, which had reversed the ruling of the district court that such a suit was proper, was wrongly decided because it failed to consider the well-established body of insurance case law that upheld the right to sue in this context. Rather, the Sixth Circuit relied on general contract-law cases outside of the insurance context in holding that Nationwide could not sue CIGNA for failure to satisfy the reinsurance obligations that it had assumed from Home. In particular, the court failed to recognize and apply the case law holding that disclaimer provisions in an insurance assumption agreement should not be given effect if they purport to defeat the privity rights implied in the law that arise out of such assumption agreements.

[FN35]. No. 1:96 CV-252 (D.Vt. Feb. 11, 1998).

[FN36]. Equitas did not enter a special appearance in the District Court to oppose Central Vermont's Motion For Leave To Amend. Thus, only Underwriters at Lloyd's opposed the Motion. The Court did not decide whether Lloyd's had standing to contend, as it did, that the Court lacked personal jurisdiction over Equitas.

[FN37]. No. C3-94-12780 (D. Minn. May 1, 1997), 11 No. 34 MEALEY'S LITIG. REP.: INS. 13 (July 8, 1997).

[FN38]. No. 95-866 (W.D.Pa. September 30, 1998), 12 No. 45 MEALEY'S LITIG. REP.: INS. 15 (Oct. 6, 1998).

[FN39]. See First State Ins. Co., No. C3-94-12780, at 4; USX Corporation, No. 95-866, at 15-16.

[FN40]. USX Corporation, No. 95-866, at 4.

[FN41]. The London Market Insurers asserted this lack-of-personal jurisdiction argument in Central Vermont and also in the case captioned Employers Insurance of Wausau v. Certain London Market Companies, et al., No. 97-C-0409-C (W.D. Wis. Oct. 27, 1997).

[FN42]. The determination of whether a foreign corporation is amenable to suit in a federal court in a diversity action is resolved in accordance with the law of the state in which the court sits, so long as the court's assertion of jurisdiction comports with the constitutional requirements of due process. Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996); Swaim v. Moltan Co., 73 F.3d 711, 719 (7th Cir. 1996); Budde v. Ling-Temco-Vought, Inc., 511 F.2d 1033, 1036 (10th Cir. 1975).

[FN43]. See, e.g., Porter v. Porter, 684 A.2d 259, 261 (R.I. 1996) (interpreting R.I. Gen. Laws. 9-5-33(a)); CSR Ltd. v. Link, 925 S.W.2d 591, 594 (Tx. 1996) (interpreting Tex. Civ. Prac. & Rem. Code ß 17.042); Dall v. Kaylor, 658 A.2d 78, 79 (Vt. 1995) (interpreting Vt. Stat. Ann. tit. 12, ß 913(b)); Aspen Products, Inc. v. Global Distributors, Inc., 947 P.2d 49, 51 (Kan. Ct. App. 1997) (interpreting Kan. Stat. Ann. ß 60- 308(b)(5)); Boaz v. Boyle & Co., Inc., 46 Cal.Rptr.2d 888, 897 (Cal. Ct. App. 1995) (interpreting Cal. Civil Prac. Code ß 410.10).

[FN44]. 326 U.S. 310, 316 (1945).

[FN45]. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984).

[FN46]. Helicopteros, 466 U.S. at 414.

[FN47]. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980).

[FN48]. International Shoe Co., 326 U.S. at 316.

[FN49]. United States Sec. & Exch. Comm. v. Carrillo, 115 F.3d 1540, 1542 (11th Cir. 1997); Dayhoff, Inc. v. H. J. Heinz Co., 86 F.3d 1287, 1302 (3d Cir. 1996); Van Steenwyk v. Interamerican Management Consulting Corp., 834 F. Supp. 336, 340 (E.D. Wash. 1993).

[FN50]. Huey v. Bates, 375 A.2d 987, 989 (Vt. 1977); Cox v. Hozelock, Ltd., 411 S.E.2d 640, 644 (N.C. Ct. App. 1992); Prentice v. Demaq Material Handling Ltd., 437 N.Y.S.2d 173, 175 (N.Y. App. Div. 1981).

[FN51]. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 482 (1985); Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[FN52]. See RROC, at 21-23.

[FN53]. Equitas officials have, on occasion, been known to travel to the United States to conduct business in claims-handling and settlement. Thus, Equitas personnel have been physically present in at least some states.

[FN54]. See Burger King, 471 U.S. at 476; Grand Entertainment Group Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 482 (3d Cir. 1993) (defendant's physical presence in the forum not required before due process is exercised); Noorian v. Pie Mut. Ins. Co., 978 F. Supp. 690, 692 (S.D. Tx. 1997) ("It is well settled that specific jurisdiction may arise without the non-resident defendant's ever stepping foot upon the forum state's soil") (quoting Bullion v. Gillespie, 895 F.2d 213, 216 (5th Cir. 1990)); Ben & Jerry's Homemade, Inc. v. Coronet Priscilla Ice Cream Corp., 921 F. Supp. 1206, 1210 (D.Vt. 1996) (mere absence of physical presence in the state cannot defeat jurisdiction).

[FN55]. Burger King, 471 U.S. at 476.

[FN56]. Cole v. Mileti, No. 96-4214, 1998 WL 3319, at *2 (6th Cir. Jan. 8, 1998) (negotiating and executing a surety agreement via telephone calls and letters to the forum state constitutes minimum contacts); U.S. Securities and Exchange Com., 115 F.3d at 1544 (direct mailings of airline advertisement and solicitation materials to the forum may provide a basis for personal jurisdiction); Grand Entertainment Group Ltd., 988 F.2d at 482 (mail and telephone communications sent by the defendant into the forum to negotiate an agreement to acquire certain film rights may count toward the minimum contacts that support jurisdiction); Ben & Jerry's Homemade, Inc., 921 F. Supp. at 1210 (mail, telephone and facsimile communications to establish the terms of a distributor agreement are sufficient to establish minimum contacts).

Equitas manages certain former Lloyd's Trust Accounts in one or more states in the United States. The maintenance of bank accounts in a forum can give rise to personal jurisdiction. See Rounds v. Rea, 947 F. Supp. 78 (W.D.N.Y. 1996) (foreign corporation had minimum contacts within the state, including the existence of bank accounts, employees, ownership of leases on real property, public relations and publicity work, and sales within the state); United States Sec. and Exch. Comm., 115 F.3d at 1546 (maintaining bank accounts in the forum for purposes of carrying out the subject transactions constitutes purposeful availment and invocation of the benefits of the forum's laws).

[FN57]. See Rounds, 947 F. Supp. at 84 (factors such as advertising within the state, conducting litigation, planning and executing business tactics and strategy, and obtaining commercial credit arrangements may, when taken together with other relevant contacts and activities, provide a basis for establishing personal jurisdiction).

[FN58]. See id. at 78 (executing business tactics and strategy is a factor that may provide a basis for establishing personal jurisdiction). It should also be noted that Lloyd's Underwriting Names reside in many states in the United States. In furtherance of its business strategy of reinsuring-to- close the syndicates in which those Names participate, Equitas solicited and received payments from the Names in consideration of its agreement to provide RITC. This activity also gives rise to personal jurisdiction in Courts of the states in which the Names were solicited.

[FN59]. United States Sec. & Exch. Comm., 115 F.3d at 1547.

[FN60]. Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 718 (1st Cir. 1996) (cost and inconvenience of defending action in a foreign country is not enough for Hong Kong defendant to be immune from suit in Massachusetts).

[FN61]. As an example, in resolving the liability coverage dispute between Exxon Corporation and the London Market, Equitas agreed to participate in the settlement of the Exxon Valdez claim which resulted in a payment of $480 million to Exxon in Texas. See Exxon Settles for $480 Million; Some London Underwriters Disappointed With Agreement, BUSINESS INSURANCE, Nov. 1996, at 1. Such settlement payments have a substantial effect upon the policyholder as well as the forum in which they are made because of the impact that this significant amount of money will have after it is transferred from England to Texas.

[FN62]. Haisten v. Grass Valley Med. Reimbursement Fund, Ltd., 784 F.2d 1392, 1398 (9th Cir. 1986) (insurance contract executed in and governed by the laws of the Cayman Islands concerning the indemnification of California physicians against liability solely under California malpractice law would clearly have foreseeable effect in California); United States v. International Brotherhood of Teamsters, 945 F. Supp. 609, 620 (S.D.N.Y. 1996) (Canadian defendant's refusal to permit campaign access to its premises in Canada caused an effect in the United States and subjected defendant to personal jurisdiction because it compromised the free, fair and democratic character of the 1996 Intl. Brotherhood of Teamsters election); Advideo, Inc. v. Kimel Broad. Group, Inc., 727 F. Supp. 1337, 1340 (N.D. Cal. 1989) (California court had personal jurisdiction over Vermont corporation that negotiated and signed a contract with a California corporation through the mail, since the Vermont corporation was aware that its conduct would cause an effect in California).

[FN63]. International Shoe Co., 326 U.S. at 316 (authorized acts of agent, because of their nature and quality, can be sufficient to justify the fiction that the corporation consented to service and suit); In re The Mediators, Inc. v. Manney, 105 F.3d 822, 827 (2d Cir. 1997) (the acts and knowledge of an agent acting within the scope of employment are imputed to the principal); Kuenzle v. HTM Sport-Und Freizeitgerate AG, 102 F.3d 453, 458 (10th Cir. 1996) (a non-resident corporate defendant creates contacts for personal jurisdiction purposes through its authorized representatives: its employees, directors, officers and agents); Grand Entertainment Group Ltd., 988 F.2d at 483 (activities of a party's agent may count toward the minimum contacts necessary to support jurisdiction). Additionally, some long arm statutes expressly recognize that the contacts of others may be imputed to a party for jurisdictional analysis. See VT. STAT. ANN. Tit. 12 ß 913(b).

[FN64]. See supra Section I, C.

[FN65]. See McDermott Int'l, Inc. v. Lloyd's Underwriters of London, 944 F.2d 1199, 1200 (5th Cir. 1991); Travelers Ins. Co. v. Keeling, No. 91-CIV- 7753, 1993 WL 18909, at *1 (S.D.N.Y. Jan. 19, 1993).

[FN66]. See McDermott Int'l, Inc., 944 F.2d at 1206; Travelers Insurance Co., 1993 WL 18909, at *4.

[FN67]. See supra Section I, B.

[FN68]. Thus, under this analysis, a Lloyd's policyholder on a pre-1993 non- life policy may choose to sue only Equitas if it desires to enforce the obligations of the policy.

[FN69]. No. 97-C-0409-C (W.D. Wis. Oct. 27, 1997) (Opinion and Order).

[FN70]. See Wausau, No. 97-C-0409-C, at 8-9.

[FN71]. 999 F.2d 206 (7th Cir. 1993).

[FN72]. Hugel, 999 F.2d at 209.

[FN73]. Wausau, No. 97-C-0409-C, at 18-19.

[FN74]. No. 97-CV-6591 (Col. Dist. Ct. May 12, 1998).

[FN75]. Union Pacific Railroad Co., No. 97-CV-6591, at 5. The Union Pacific court did not address the question whether, if personal jurisdiction existed, the policyholder could maintain a direct cause of action against Equitas because of the nature of the Equitas Transaction.

[FN76]. Id. at 3.

[FN77]. The Union Pacific court's finding that the policyholder was not a "third-party beneficiary" of the RROC (see slip op. at 3) was not particularly relevant to the issue of personal jurisdiction. Indeed, policyholders need not sue Equitas on a third-party beneficiary theory because, as a result of the RROC, Equitas is now directly liable to the policyholder and, as such, could be sued on the Lloyd's policies themselves.

END OF DOCUMENT