

## **HISTORY OF RISK RETENTION GROUPS (RRG)**

In 1981, Congress passed the Products Liability Risk Retention Act to allow a type of insurance vehicle called Risk Retention Groups ("RRGs") to cover product liability exposures.

After several committee hearings in the 99th Congress in 1986, Congress expanded the 1981 Act to allow the RRGs to cover all casualty risks except workers compensation. This expansion occurred with the passage of the Liability Risk Retention Act of 1986, which permitted RRG's to write insurance in all 50 states without having to comply with many of the insurance laws and regulations of the states in which they operate.

Specifically, the day-to-day regulation of this new type of insurance carrier was to be controlled by the state in which the risk retention group chooses to be initially chartered ("Chartering State"). Most of the insurance laws and regulations of other states in which the risk retention group is operating ("Non-chartering States") are preempted by the Liability Risk Retention Act of 1986.

## **WHAT IS A RISK RETENTION GROUP?**

In summary, risk retention groups allow similar businesses to form groups to provide self-insurance.

A risk retention group is a corporation or other limited liability association, functioning as a captive insurance company and organized for the primary purpose of assuming and spreading the liability risk exposure(s) of its group members (member-owners). It must be chartered and licensed as a liability insurance company in one of the fifty states or the District of Columbia.

## **WHAT ARE THE NOTABLE DIFFERENCES OF A RRG?**

### **1. Less regulatory oversight – No forms or rates requiring approval**

With a RRG the non-chartering state regulators have no approval authority over rates, coverages, forms, insurance-related services, management, operation, investment activities, reinsurance or loss control and claims administration. The only oversight and compliance that an RRG may need to adhere to is the Unfair Claims Practices Act (depending on the state).

This can be a significant concern for a physician because if they purchase a policy from an RRG that is domiciled in another state, Obstetricians & Gynecologists Risk Retention Group of America (OGRRGA) domiciles in Montana, they will not have the protection afforded by the state in which they reside. This means that the department of insurance (or similar state agency) which monitors domestic insurance companies is not permitted to oversee that the proper rates are charged to doctors,

proper non-renewal or cancellation procedures are followed, or that audits and financial examinations are conducted periodically in a foreign RRG.

## **2. Risk Retention Act preempts states from requiring the RRG from participating in the insolvency guaranty funds which protects physician policyholders if the insurer goes insolvent.**

The preemption provisions prevent states from letting risk retention groups participate in insurance insolvency guaranty funds.

**This is probably the most significant difference from obtaining an insurance policy with an approved and authorized insurance carrier in New Jersey - because if the RRG is deemed insolvent there will be NO PROTECTION afforded by any state mechanism and physicians' personal assets will be EXPOSED from any claims that arise against them.**

Contrastingly, if a physician were to obtain a policy from an admitted and authorized insurance carrier in New Jersey each policyholder would be protected up to \$300,000 by the New Jersey Property Liability Insurance Guaranty Association (PLIGA) for a lawsuit filed against them while they were covered by the insurance carrier that is now insolvent. Remember, here a plaintiff attorney will directly recover their damages from the physician and his/her personal assets will be the only available assets.

### **REASONS FOR NO GUARANTY FUND PARTICIPATION?**

Congress provided two reasons for preventing risk retention groups from participating in insurance insolvency guaranty funds. First, risk retention groups are not full-fledged, multi-line insurance companies, but limited operations providing coverage only to member companies, and only for a narrow group of coverages. Apparently, Congress believed that because of the limited nature of risk retention groups, states do not have as great a need to protect their citizens from an insolvency of such an insurer. Clearly, this is NOT what is occurring here with OB/GYN physicians. There is a REAL risk that if they are sued, the losses may exceed the premiums collected. This is one of the primary reasons this Act may need modifications in the future.

The second reason declared by Congress for the prohibition was that by allowing this freedom there would be a strong incentive for risk retention groups to set adequate premiums and establish adequate reserves mainly because each member would know there is no other source of funds from which to pay claims. This is important because it means physicians could also be unaware that they are purchasing an assessable policy for which they may eventually become liable for losses of the insurer.

Specifically, many states have started requiring risk retention groups to put the following in notice on their insurance policies:

**"NOTICE"**

"This policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and regulations of your State. State insurance insolvency guaranty funds are not available for your risk retention group."

To date, at least 36 states have enacted laws requiring that such a notice be placed on a risk retention group application or policy.

## **CONCLUSION**

Risk Retention Groups were not initially seen as a substitute for typical insurance carriers when Congress first passed the Act in 1981. They viewed the 1981 Act as the ability for commercial companies to create self-insurance programs for products liability insurance. However, the Risk Retention Act of 1986 expanded many of these freedoms to apply to all lines of insurance, with some consequential scrutiny.

In August 2005, the General Accountability Office (GAO) issued a report (GAO-05-536) titled "Risk Retention Groups: Common Regulatory Standards and Greater Member Protections are Needed." The report stated that in order to strengthen the overall regulation of RRGs, it is GAO's recommendation that state insurance regulators adopt consistent regulatory standards for RRGs. According to the report, the GAO suggests that Congress should consider 1) granting LRA's regulatory preemption only to states that adopt the standards and 2) establishing minimum corporate governance standards for RRGs.

Unfortunately many of the recommendations in this report have not been implemented by New Jersey to date, and therefore physicians must educate themselves with the risks of purchasing a policy from an RRG.