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The Risk Retention Acts: Background and Issues

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Summary

Risk retention groups and risk purchasing groups are alternative insurance entities authorized by Congress to expand insurance supply through a simplification of insurance regulation. The McCarran-Ferguson Act of 1945 generally leaves the regulation of the business of insurance to the individual states. In 1981 and 1986, however, Congress crafted a narrow exception to the usual state insurance regulations for these groups, largely exempting them from multiple state oversight. Membership in risk retention and purchasing groups is limited to commercial enterprises and governmental bodies, and the risks insured by these groups are limited to liability risks.

Over the past two decades, interest — both in Congress and in the market — in these groups has varied largely with the vagaries of the regular insurance market. Since 2001, the insurance market has been in one of its periodic "hard" markets and regular insurance has become increasingly expensive and sometimes unavailable. During this time, the numbers of risk retention groups have risen dramatically and calls are being heard to expand the scope of insurance that they are allowed to offer. At the same time, some problems have occurred in individual risk retention groups and cautionary voices are also being heard.

The fundamental questions surrounding Risk Retention Act expansion are essentially the same as those addressed by Congress in prior consideration of the issue. Stripping away jargon, this question can be posed as an issue of availability vs. reliability. Those who would support expansion often focus on a failure of the current insurance market, and the current regulatory system, to make a sufficient supply of insurance available so that consumers who need insurance can find it at a reasonable price. The question they pose is essentially: "What happens to a community when a business, a school, or a doctor can not afford or find insurance?" Those who would oppose expansion often focus on the dangers in allowing insurance to be sold that is not subject to same regulatory standards as "normal" insurance. The question this group poses is essentially: "What happens to a community if the insurer from which this business, school, or doctor purchases insurance ends up bankrupt or if the policy does not cover what needs to be covered?"

This report outlines the current regulatory structures affecting risk retention and risk purchasing groups as well as the legislative and market history of these groups. It also discusses the current debate regarding possible expansion of these groups into areas beyond commercial liability insurance. This report will be updated as significant legislative events occur.

Contents

The Risk Retention Acts: Background and Issues

The insurance industry, particularly property/casualty insurance,[1] is known for alternating periods of "hard" and "soft" markets. Turns in this cycle are typically traced to unexpected changes in the investment climate, unexpected changes in insurance payouts, or both. During a typical hard market, the supply of insurance goes down, insurance prices go up, and underwriting standards become more stringent. This often leads to consumers encountering difficulty in finding and affording insurance. During a soft market, prices are typically flat, and insurers are more willing to underwrite greater risks, so consumers typically do not face such problems in obtaining insurance. Legislative attention tends to focus on insurance matters during hard markets as constituents relate complaints about finding or affording insurance to their legislators. Because regulation of the insurance market was left to the states in the McCarran-Ferguson Act of 1945,[2] however, the legislature in question is most often a state legislature. Among the solutions offered at the state level has been the creation of, or allowance for, "alternative" market entities to increase the amount of insurance available to consumers. The alternative market is made up of entities or arrangements that spread and finance risk like an insurance company, but that operate outside the normal regulations governing the world of "regular" insurance companies.[3]

Risk retention and purchasing groups are alternative market entities that have grown out of attempts at the federal level to expand insurance supply by simplifying insurance regulation. In 1981 and 1986, Congress crafted a narrow exception to the usual state insurance regulations for these groups, largely exempting them from multiple state oversight. Interest in risk retention and purchasing groups has increased over the past two years as prices for insurance have climbed. Some have suggested that Congress needs to expand the narrow exception that was made in the 1980s in order to expand the supply of insurance in areas outside of the liability coverage allowed under the current law. At the beginning of the 108th Congress, oversight of the Liability Risk Retention Act was included in the oversight plan of

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[1]The insurance industry is typically broken down into life/health and property/casualty insurance. Life/health is relatively straightforward, following its name, and includes annuity products. Property/casualty is a more diverse group, including auto, homeowners, professional liability, and many others. Property/casualty essentially refers to everything that is not life or health insurance.

[2]15 U.S.C. 1011 *et seq*.

[3]The alternative market has grown significantly in recent years, with some estimates placing its share of the insurance market as high as 50%. See Insurance Information Institute, "Captives and Other Risk-Financing Options," at [http://www.iii.org/media/hottopics/insurance/test3], visited Dec. 8, 2003.

the House Financial Services Committee, and the Chairman of that committee reportedly indicated a strong interest in examining the law governing risk retention groups. Expansion of the Risk Retention Act has been advocated for some time, but the recent failures of a small number of groups, particularly the National Warranty Insurance Risk Retention Group, may be a factor in any examination of the act.

Risk Retention and Purchasing Group Structure and Regulation

Risk retention groups are required by current federal law[4] to be state-chartered insurance companies; they are allowed to insure commercial liability risks, such as the risk that a physician will be found liable for medial malpractice, but not other property/casualty risks, such as the risk that a physician's office might burn down. These insurance companies also must be mutual companies; that is, they must be owned by the members of the group. All policies issued by a risk retention group must bear a federally mandated warning that the policy is not regulated nor guaranteed in the same way as other insurance. Group members are required to be businesses, including individual professionals such as physicians and attorneys, or government entities, such as public universities, school districts, and town or city administrations, who are engaged in a similar business or face similar risks. The exact corporate structure of a risk retention group can vary. Many are licensed as "captive" insurers,[5] which typically have lower capital requirements, but some are licensed as "regular" mutual insurers. Risk purchasing groups are likewise groups of entities in a similar business or facing similar risks. Instead of creating their own insurance company, these groups join together to purchase commercial insurance from established insurance companies.

If risk retention groups must be licensed as an insurer under the existing laws of an individual state, the obvious questions arise: What advantages do they possess? Why go to the trouble and expense of creating such a group? The answers are in the different regulatory treatment of these groups as they operate outside of the state where they are chartered (or "domiciled"). Under normal circumstances, an insurer who wishes to operate outside of its domiciliary state must receive a license and submit to regulation from every state in which it wishes to do business. This means complying with 51 different sets of state or district laws and regulations in order to do business across the country. The impact of this multiplicity of regulation is particularly high in insurance, as compared to other businesses, because both the prices and the content of insurance policies are highly regulated in most states. This

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[4]15 U.S.C. 3901 *et seq*.

[5]A captive insurer is "[a]n enterprise with all the authority to perform as an insurance company, but is organized by a parent company for the express purpose of providing the parent company's insurance." From National Underwriter Company, *Field Guide for Property & Casualty Agents and Practitioners*, glossary available at [http://www.imms.com/glossary/Cgloss.htm], visited Dec. 11, 2003. See also [http://www.captive.com]. Captives are typically licensed as insurers either in an individual state or offshore, often in Bermuda or the Cayman Islands.

perceived burden of multiple state regulatory systems is also the primary argument cited currently by some in the insurance industry for creating a federal charter to replace or supplement the current state system.[6]

Risk retention groups are exempted by federal law from the requirement to be licensed in all states in which they operate as well as from other state laws regulating the business of insurance. They must register and file documentation with a state's insurance regulator, but after this filing, they are essentially free to do business in that state. This exemption from state law extends to most laws on the business of insurance, but laws such as those on fraudulent trade practices, nondiscrimination, and unfair claim settlement practices still apply. They also must pay state premium taxes as regular insurers do. In addition, a non-domiciliary state's insurance regulator is empowered to monitor the financial solvency of a group, including requiring that a group submit to a financial condition examination if the chartering state regulator refuses to do such an exam, and seeking an injunction to force it to cease doing business if the group is in hazardous financial condition. This regulatory oversight is less than that accorded regular insurance companies, however, and some observers fear that this might lead to an increased danger of such groups becoming insolvent. In the case of a risk retention group insolvency, the policyholders have no recourse to a state guaranty fund because membership in these funds is specifically prohibited by the federal statute.

Risk purchasing groups are given a similar, but more limited, exemption from state law. Many states have laws, known as "fictitious grouping laws," that specifically prohibit or limit groups from purchasing insurance for the members of the group, particularly if the group exists solely for the purchase of insurance. State insurance regulators use these laws to protect consumers and ensure solvency. Risk purchasing groups are exempted from these laws and from countersignature laws, which are laws requiring a local broker's or agent's signature on an insurance contract. Otherwise, they are regulated by each state in which they operate. The insurance that such groups purchase on behalf of their members must meet the laws and regulations of the state that is designated as the domicile of that group.

Legislative History

The 1981 Product Liability Risk Retention Act

The first "Product Liability Risk Retention Act" was introduced in 1979, and an amended version became P.L. 97-45 in 1981. Its origin can be traced to an interagency task force created by the White House in 1975[7] to examine difficulties in the availability of product liability insurance. Among the proposals discussed by

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[6]For more information on the optional federal chartering issue, see CRS Report RL31982, *Optional Federal Chartering for Insurers: History and Background of Insurance Regulation*, by Carolyn Cobb.

[7]Interagency Task Force on Product Liability. Its final report was published by the Department of Commerce in 1977 (NTIS PB-273-320).

the task force's report was the possible creation of alternatives to the traditional insurance market. The 1981 act was relatively narrow, limiting risk retention groups and risk purchasing groups to insurance covering product liability[8] as well as completed operations liability.[9] The 1981 act also limited members of these groups to "product manufacturers, wholesalers, distributors and retailers."[10] Risk retention groups had to be chartered, and thus regulated, as an insurer in one of the United States, including the District of Columbia, or in Bermuda or the Cayman Islands.[11] The act specifically exempted risk retention groups from most regulation by any state in which they operate, aside from the chartering state. This federal exemption, however, did not cover laws that were not specific to the business of insurance, such as fraud or deceptive practice laws. The act also preempted any state laws preventing risk purchasing groups from purchasing the same narrow range of insurance as that allowed to be offered by risk retention groups.

By the time the act became law in September 1981, the market difficulties that prompted so much attention had largely passed. With regular commercial insurance available and relatively inexpensive, there was little incentive for companies to undertake the expense of forming risk retention or purchasing groups, and only three of the former and four of the latter were formed in the first four years of the act's operation.

Despite the lack of market action, congressional interest in the issue continued. In 1983, a "Clarification of the Risk Retention Act" (S. 1046, eventually P.L. 98-193) was passed by voice votes of both the House and the Senate. This act was a response to a model state law suggested by the National Association of Insurance Commissioners (NAIC).[12] This suggested model law referenced the various state tort laws in its definition of "product liability" rather than following the definition passed by Congress in P.L. 97-45. The state tort laws tended to have a more narrow definition than that desired by Congress. P.L. 98-193 specified clearly that the

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[8]"Products liability refers to the liability of a manufacturer or seller for injury caused by his product to the person or property of a buyer or third party." See CRS Issue Brief 97056, *Products Liability: A Legal Overview*, by Henry Cohen, for additional discussion.

[9]Completed operations liability insurance generally covers claims arising after the completion of a project (for example, if a contractor finished a house, but a defect was found some time later).

[10]U.S. Congress, Senate Committee on Commerce, Science, and Transportation, *Product Liability Risk Retention Act of 1981*, report to accompany S. 1096, 97th Cong., 1st sess., S.Rept. 97-102 (Washington, GPO, 1981), p. 1; and U.S. Congress, House Committee on Energy and Commerce, *Product Liability Risk Retention Act of 1981*, report to accompany H.R. 2120, 97th Cong., 1st sess., H.Rept. 97-190 (Washington, GPO, 1981), p. 7.

[11]The authority to form risk retention groups outside of the United States was limited in time, expiring on Jan. 1, 1985.

[12]The NAIC is the national trade association of state insurance regulators, which, among other activities, publishes model laws to encourage harmonization of state insurance regulation.

definitions in the federal statute would be the controlling definitions for purposes of the Risk Retention Act.[13]

The 1986 Liability Risk Retention Act

In the mid-1980s, the insurance market began to harden again and Congress again heard of many problems faced by businesses and individuals in finding and affording insurance. One of the congressional responses was to reconsider the 1981 act. Numerous bills were introduced to expand the provisions so that more consumers might avail themselves of the additional insurance supply mechanism that Congress had created.

Congress ultimately passed S. 2129 (eventually P.L. 99-563), which renamed the 1981 act the "Liability Risk Retention Act" and brought the law to its present form. P.L. 99-563 expanded the scope of the insurance to include most types of commercial liability insurance and expanded the organizations that could form such groups to include any business as well as state or local governments or governmental entities as long as all the members of a single group were engaged in similar business activities or were exposed to similar risks. This expansion, however, did not retroactively include the small number of foreign-based risk retention groups. These groups, formed under the temporary authority described above, were allowed to continue in the area of product liability insurance but were not permitted to expand into other kinds of commercial liability insurance. It also included changes designed to allow some increased oversight of risk retention and purchasing groups, including the requirement to file documentation in non-chartering states, and the right of non-chartering commissioners to conduct examinations if the chartering state fails to do so and to seek injunctions against groups in a hazardous financial situation. In general, however, the clear intent of Congress remained to allow these groups to operate throughout the country while being regulated largely, if not solely, by a single state regulator, rather than facing 51 jurisdictions with very different laws and regulatory styles.

Market Reaction Since 1986

Growth in the Risk Retention Market

Market reaction to the expansion of the law was relatively swift. By 1988, 54 risk retention groups had been created with more than 43,000 insured and a total premium amount of $250 million. The number climbed to 79 by 1990 and then plateaued for the next 10 years, actually declining to 69 by 2001. The number of insured and total premium amount, however, continued to increase, reaching over 174,000 insured and $944 million in 2001. Purchasing group numbers followed a more steady course, growing from 358 in 1988 to 756 in 2001, with premium amount

[13]For more discussion, see U.S. Congress, Senate Committee on Commerce, Science, and Technology, *Clarification of the Risk Retention Act*, report to accompany S. 1046, 98th Cong., 1st sess., S.Rept. 98-172 (Washington, GPO, 1983).

growing from $575 million to an estimated $3 billion.[14] Within the aggregate statistics, there has been significant churning, as individual groups are formed and retired based on the business decisions made by those seeking insurance. In the period from 1987 to 2001, a total of 142 risk retention groups were formed and 73 retired. Reasons for a group retirement vary greatly. Some became insolvent, some changed status to become a regular insurer or were absorbed by a regular insurer, and some simply ceased operation when insurance on the regular market became more affordable.[15]

The relative calm in the marketplace that prevailed through the 1990s and into the new century ended quickly with the hardening of the insurance market in 2001. This current hard market has been ascribed to the downturn in both interest rates and the stock market as well as to unexpected claims, particularly the estimated $40 billion in insured losses due to the terrorist attacks on September 11, 2001. Making many of the price increases even more dramatic has been the fact that the soft market of the 1990s lasted for so many years, leading to some complacency on the part of both insurers and insureds.

Interest in risk retention groups has increased along with the prices of insurance. According to the most recent study,[16] completed in September 2003, a total of 37 new groups were formed in the previous year, and only five retired, leaving a total of 122 groups operating. Estimated risk retention group premium for the 2003 calendar year is $1.725 billion, up over 36% in 2003 alone. The projected number of insured in calendar year 2003 is nearly 154,000, a decrease since 2001. This implies that the retirements in 2002 and 2003 have come from relatively high-volume, low-premium areas of business.

While growth has occurred in a variety of different sectors, the survey reports the largest number of new groups, 31, in health care. This growth seems largely due to widely reported difficulties that health-care providers are encountering in obtaining medical malpractice insurance. In Pennsylvania, one of the states that has been identified by some as being in a medical malpractice "crisis,"[17] 16 health-care risk retention groups were operating in mid-2003.[18] While many of these groups have been formed very recently, none of them are domiciled in Pennsylvania, although some serve members exclusively in Pennsylvania. In one interesting reported case,

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[14]Statistics from 1988 to 2001 available from the Risk Retention Reporter website at [http://www.rrr.com/education/growth.cfm], visited Dec. 9, 2003.

[15]See "Soft Market Fueled Risk Retention Group Retirements During 1990s," *Risk Retention Reporter*, vol. 16, no. 2, Feb. 2002, pp 1-3.

[16]"2003 Risk Retention Reporter Survey of Risk Retention," *Risk Retention Reporter*, vol. 17, no. 10; also reported at "RRG '03 Premium Projected to Swell to More Than $1.7 Billion," *National Underwriter, Property & Casualty/Risk & Benefits Management Edition*, Oct. 13, 2003.

[17]See the American Medical Association map on their website at [http://www.ama-assn.org/ama1/pub/upload/mm/-1/med_liab_19stat.pdf] , visited Dec. 9, 2003.

[18]Jennifer Nejman, "Pennsylvania Doctors Form Group to Deal with Malpractice," *York Daily Record*, June 27, 2003.

a Pennsylvania Department of Public Welfare grant provided the initial $5 million in capital for a Vermont-domiciled risk retention group with the purpose of insuring nursing homes solely in Pennsylvania.[19] Apparently this occurred because the chartering laws on the creation of smaller or captive insurers in Vermont are more favorable than those in Pennsylvania.

Individual Difficulties Have Come Along with Growth

The growth of risk retention groups has not been without some problems. As was noted above, the number of insured declined from 2001 to 2003. This was largely due to the liquidation of three Tennessee-domiciled groups[20] that insured physicians, lawyers, and other professionals for professional liability. The liquidation was forced by the insolvency of a regular Virginia-based insurer who had provided reinsurance for these risk retention groups. Individual policyholders of regular insurance are normally eligible for protection in the case of insolvency under the various states' guaranty funds; this, however, would typically apply only to those directly insured by the Virginia company, not to policyholders of companies that are reinsured by this company. These policyholders are considered creditors of the company, not insureds, and thus have a lower priority claim on the assets of the failed company. Further complicating the legal situation is the statutory prohibition on risk retention group participation in state guaranty funds. Class action lawsuits[21] have been filed by insureds seeking guaranty fund protection for the insured along with damages for other malfeasance.[22]

Another risk retention group failure that has attracted considerable attention is the insolvency of the National Warranty Insurance Risk Retention Group (hereafter "National Warranty"). Although physically headquartered in Lincoln, Nebraska, National Warranty was incorporated in the Cayman Islands. It was one of the handful of companies that were incorporated outside of the United States before 1985 and was thus grandfathered out of regulation by any of the individual states. Prior to its being declared insolvent in August 2003, it acted as an insurer of the obligations taken on by its members, mainly marketing companies and auto dealerships, who sold vehicle service contracts. Although the actual group was made up of only approximately 580 members, the potential effect of the insolvency is more

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[19]Andrew Sargeant, USA Risk Group of Vermont, as quoted in "Sources of Capital for Risk Retention Groups," *Risk Retention Reporter*, June, 2003, vol. 17, no. 6.

[20]These groups were the American National Lawyers Insurance Reciprocal, Doctors Insurance Reciprocal Risk Retention Group, and The Reciprocal Alliance.

[21]*Fullen v. General Reinsurance Corp., et al.* (VLW 003-12-03), *Herrick v. General Reinsurance Corp., et al.* (VLW 003-12-01), and *Crenshaw Community Hospital v. General Reinsurance Corp., et al.* (VLW 003-12-02). See "Class-Action Suits Filed Against Reciprocal Companies," *Virginia Lawyers Weekly*, Apr. 3, 2003, available at [http://www.valawyersweekly.com/anlir14.cfm], visited Dec. 9, 2003.

[22]For a more complete reporting, see "Policyholders of Reinsurance Group Reciprocal to Get Partial Payment," *Richmond Times-Dispatch*, Oct. 20, 2003, and "Move to Liquidate ROA Will Impact RRG Insureds and Others," *Risk Retention Reporter*, May 2003, vol. 17, no. 5, as well as the previously cited article in *Virginia Lawyers Weekly*.

widespread ,as these members sold contracts to or through more than 5,000 auto dealerships in 49 states.[23]

The text of the Risk Retention Act requires insureds to be members and part owners of a risk retention group; however, this line was apparently somewhat blurred in the National Warranty case. National Warranty acted both as an administrator, adjusting claims on behalf of its members, and as the insurer of these members.[24] This dual role apparently gave the impression that the final consumers were purchasing service contracts directly from National Warranty rather than from the individual group members. The insolvency has then resulted in confusion about to whom the consumers should be making claims when they need repairs on their cars that should be covered under the terms of the contracts. Class action lawsuits have been filed by some of these consumers. Accountants with KPMG, acting as "Joint Official Liquidators" in the Cayman Islands insolvency proceedings, have indicated that any consumer claims should be directed at the individual group members and that National Warranty is not directly obligated to the consumers.[25]

Policy Issues and Considerations

For approximately two years, interest groups have made a concerted effort, including the formation of a Council for Expanding the Risk Retention Act, to advocate expanding the provisions of the Risk Retention Act to include commercial property and casualty insurance, except for workers' compensation insurance. While no bills embodying this expansion have been introduced, Members of Congress have reportedly expressed interest in such legislation. In 2002, the National Conference of Insurance Legislators approved a resolution[26] supporting such an expansion, and a major consumer group, the Consumer Federation of America, has written in support of the idea as well.[27] Some insurance regulators, for example, District of Columbia Commissioner Lawrence Mirel and the Vermont Director of Captive Insurance Leonard Crouse, have also expressed their support for expansion of the Risk Retention Act.[28]

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[23]Figures from John Taylor, "Irate Consumers File Class-Action Suit against Lincoln, Neb., Firm," *Omaha World-Herald*, Sept. 23, 2003.

[24]Caroline McDonald, "Lessons from National Warranty," *National Underwriter, Property & Casualty/Risk & Benefits Management Edition*, Oct. 24, 2003.

[25]See the "Circular to Group Members" from KMPG Chartered Accountants, Grand Cayman, Cayman Islands, posted on National Warranty website at [http://www.nwig.com/circular%20to%20members.PDF], visited Dec. 9, 2003.

[26]See National Conference of Insurance Legislators, *Resolution in Support of the Expansion of the Liability Risk Retention Act to Cover All Commercial Lines of Insurance*, at [http://www.ncoil.org/other/RiskResolution.doc], visted Dec. 12, 2003.

[27]See Consumer Federation of America, *Creating Insurance Alternatives to Bring Down Rates*, at [http://www.consumerfed.org/risk_retention_act-expansion.PDF], visited Dec. 12, 2003.

[28]Lawrence Mirel, letter To Whom It May Concern, Sept. 16, 2002, and Leonard Crouse,
(continued...)

Doubts about such an expansion, however, have recently been raised in NAIC meetings, in particular by Nebraska's insurance commissioner, who has been at the forefront of dealing with the National Warranty insolvency. At the September 2003 meeting, the NAIC was encouraged to adopt a draft resolution that would put the group on record as opposing the expansion of risk retention groups.[29] Among the reasons cited in the resolution was the danger to consumers from a limitation on states' regulatory authority, the example of the National Warranty failure, and the absence of an availability problem in property insurance that has not been addressed by state-based solutions. No resolution has been adopted, but a working group to examine issues surrounding risk retention groups was created and it met at the December 2003 NAIC meeting.

The fundamental questions surrounding Risk Retention Act expansion are essentially the same as those addressed by Congress when the first act was passed in 1981, and when it was expanded in 1986. Stripping away jargon, this question can be phrased as an issue of availability vs. reliability. Those who would support expansion often focus on a failure of the current insurance market, and the current regulatory system, to make a sufficient supply of insurance available so that consumers who need insurance can find it at a reasonable price. The question they pose is essentially: "What happens to a community when a business, a school, or a doctor cannot find or afford insurance?" Those who would oppose expansion often focus on the dangers in allowing insurance to be sold that is not subject to same regulatory standards as "normal" insurance. The question this group poses is essentially: "What happens to a community if the insurer from which this business, school, or doctor purchases insurance ends up bankrupt or if the policy does not cover what needs to be covered?" The underlying basis for this question with regard to risk retention groups seems to be the assumption that the single domiciliary state regulator will do an insufficient job in protecting the consumers who live in other states.

Secondary arguments are, of course, also made. Proponents point out that because the insured are the owners of a risk retention group, they can see to it themselves that the insurance provided is reliable. It is also argued that the rates of failure of regular insurers and risk retention groups are nearly the same, and that the recent failure of National Warranty is a unique situation since it was an offshore group that was unaccountable to any state regulator. Doubters may counter by questioning what sort of impact risk retention groups might have when, even with their recent growth, they still occupy a fraction of a percent of the property/casualty market. In addition, even if the failure rates are similar, the impact of a state-regulated insurer failure is likely to be mitigated by its participation in state guaranty funds, which are specifically unavailable to insurers operating under the Risk Retention Act.

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[28](...continued)
letter To Whom It May Concern, May 15, 2002.

[29]Meg Fletcher, "NAIC May Seek to Block RRG Expansion," *BI Daily News*, Sept. 18, 2003, at [http://www.businessinsurance.com/cgi-bin/news.pl?newsId=2894], visited Dec. 12, 2003.

Assessing the arguments on either side will be a challenge for Congress. The broad question posed here as "availability vs. reliability" is in some sense a basic philosophical question about the degree of regulation needed by insurance markets and may not have an absolute empirical answer. Some see insurance philosophically as a public good, akin to a basic utility, and one that must be highly regulated in price and content to protect consumers. Others do not share this philosophy and feel insurance should be lightly regulated, with the market dictating prices and content. In general, the states, who have faced such basic insurance regulatory questions for many years, have attempted to suit the amount of regulation to the perceived sophistication of the consumer. Thus, the market for commercial insurance is usually left relatively less regulated on the theory that the businesses purchasing in the commercial market have the knowledge and experience to discern the intricacies of insurance policies and companies, or at least hire professionals to make these "reliability" judgments for them. Individual consumers are presumed to be less able to accurately make these judgments; thus, the market for such insurance, particularly homeowners and auto, tends to be much more highly regulated. Internationally, the insurance markets in general have tended to be less regulated, particularly with regard to the direct price and content controls found in some of the United States.[30]

The differential regulatory approach based on the sophistication of the consumer can be seen, for example, in the operation of state guaranty funds. These funds are intended to step in and pay claims arising from insolvent insurers, but they typically have a relatively low cap on the amount that can be paid to each policyholder. Keeping this amount low implies that consumers with relatively low claims, presumably most individuals, will be nearly fully protected against loss, while consumers with relatively high claims, presumably larger businesses, will be only partially protected. This cap on guaranty fund claims also affects the direct arguments surrounding risk retention groups. Because most risk retention group members, as businesses, face potentially large claims, the value of guaranty fund protection will be less to them than to individuals with presumably lower claims.

In assessing some of the more factual arguments, it is certainly true that risk retention and purchasing groups occupy a very small part of the insurance market. For comparison with the risk retention group totals, the total premium written in the property/casualty market in 2001 was approximately $323 billion.[31] Economic theory suggests, however, that it is not necessary for a competitor to have a large market share in order to have an impact on prices or availability. Anecdotal cases, particularly ones such as the Pennsylvania nursing home risk retention group mentioned above, also suggest that the act is expanding the availability of insurance, especially in local situations with severe supply difficulties. The Department of Commerce came to the conclusion in 1989[32] that the 1986 act had been successful in

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[30]For a more in-depth discussion of insurance regulation, see CRS Report RL32138, *Revising Insurance Regulation: Policy Considerations*, by Carolyn Cobb.

[31] See the Insurance Information Institute website at [http://financialservicefacts.org/financial2/insurance/pc/pby], visited Dec. 9, 2003.

[32]See U.S. Department of Commerce, *Liability Risk Retention Act of 1986: Operations Report 1989*, NTIS PB 90-123134.

addressing supply problems, and the general market experience since 1989 does not seem to have contradicted this conclusion.

An assessment of risk retention and purchasing groups also may offer insight into wider questions involving the federal role in insurance regulation. Particularly since the passage of the Gramm-Leach-Bliley Act, some have advocated for an increased federal role in insurance regulation, up to complete federalization of regulation for all interstate insurers. Others have suggested some lesser federal role to address specific problems they see caused by the multiplicity of state regulators, such as slow approval times for products and overly burdensome rate or form regulation. The Risk Retention Acts are an example of one way previous Congresses have tried to solve supply problems arising from, or exacerbated by, the insurance regulatory system. The answer provided by these acts was essentially a system of enforced mutual state recognition without broad federal regulation of insurance. As such an example, these acts might provide some insight into how the current Congress considers addressing problems in the insurance regulatory system today.