

Approved 2 - 12 - 87
Date

MINUTES OF THE House COMMITTEE ON Insurance

The meeting was called to order by Rep. Dale M. Sprague at
Chairperson

3:30 ^{xx} a.m./p.m. on February 9, 19⁸⁷ in room 521-S of the Capitol.

All members were present except:

Rep. Brady, excused
Rep. Littlejohn, excused

Committee staff present:

Chris Courtwright, Research Department
Bill Edds, Revisor's Office
Deanna Willard, Committee Secretary

Conferees appearing before the committee:

Dick Brock, Kansas Insurance Department

Hearing on: HB 2129 - concerning risk retention and purchasing groups

Staff said that this bill was requested by the Insurance Department. It is modeled after an act designed by the NAIC to establish appropriate state regulatory structure for risk retention and risk purchasing groups. This action is due to the federal Liability Risk Retention Act of 1986, which grants states power to regulate all areas except those which it lists.

A risk retention group is a limited liability association whose primary activity consists of assuming and spreading the liability exposure of its members. It must be licensed as a liability insurance company in one of the 50 states.

A risk purchasing group purchases liability insurance on a group basis. It may only be composed of members whose businesses are similar with regard to their liability exposure.

Mr. Dick Brock, Kansas Insurance Department, presented a memorandum from Robert H. Myers, Jr., of Heron, Burchette, Ruckert & Rothwell of Washington, D.C. on the Liability Risk Retention Act of 1986. (Att. 1.) He said the federal act was sponsored by provisional insurance buyers, such as the buyer of insurance for Hallmark Cards. It stems from the desire of Congress to address the affordability and availability issues. There are provisions in Chapter 44 which would allow school districts to form pools to purchase workman's comp insurance, but that act requires that each member must have a net worth of \$1 million, which is difficult to determine in this case. The act wouldn't give school districts additional authority; if they form risk retention groups, they would fall under this act. The 1981 federal act provides that groups could be chartered in Bermuda or the Cayman Islands. That provision is grandfathered, though the 1986 act requires that such groups be formed in the 50 states.

Risk retention groups are not members of the guaranty fund; members are not eligible for guaranty protection. Mr. Brock said that the main purpose behind these groups was to assure availability of liability insurance. Three risk retention groups have applied to operate in Kansas; without the bill, the Insurance Department doesn't have the authority to determine the type of

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Insurance,
room 521-S, Statehouse, at 3:30 XX a.m./p.m. on February 9, 1987

coverage they are providing. About 13 risk purchasing groups are operating in Kansas, though none are chartered here. He presented an explanatory memorandum for HB 2129. (Att. 2.)

Mr. Brock offered an amendment which would provide that risk retention groups pay premium tax at the same rate as insurance companies; it would also prevent an insurance company from calling itself a risk retention group so as to be exempt from the guaranty fund. (Att. 3.)

He said that without this bill, it would be difficult for the Insurance Department to regulate risk retention groups, especially in such areas as fraud or unfair claims practices. The bill conforms our law to the 1986 federal law as amended. It is stronger than the federal law in those areas where the federal law says it can be.

Mr. Brock will find out whether or not those risk retention groups who have applied to operate here are aware of the scope of this bill. He believes most states will soon have similar legislation, as state regulators will have more authority and will not be estopped from collecting taxes from risk retention groups.

A bill request was made by a Committee member; staff briefed the Committee on the act which would provide coverage for cancer deaths for those members of the Kansas police and firemen's retirement system who have been with the service for five years. (Att. 4.) Rep. King made a motion that such a bill be introduced as a Committee bill; Rep. Neufeld seconded the motion. The motion carried.

The meeting was adjourned at 4:35 p.m.

MEMORANDUM

TO: NAIC

FROM: Robert H. Myers, Jr. *RHM*

DATE: November 19, 1986

SUBJECT: Liability Risk Retention Act of 1986

The Risk Retention Amendments of 1986 (P.L. 99-563) were signed into law on October 27, 1986. The text of the final bill was attached to the 1986 Legislative Update - Report No. 10 (October 10, 1986).

The Government Printing Office has not yet produced the final, official version of P.L. 99-563. It may be several weeks before that document is available. Moreover, the text of the Risk Retention Amendments of 1986 reflects only amendments to prior law (the Product Liability Risk Retention Act of 1981, as amended). Therefore, reading the text of P.L. 99-563 makes little sense without reference to prior law.

The attached version of the Liability Risk Retention Act of 1986 prepared by this office consists of the Product Liability Risk Retention Act of 1981 as amended by the Risk Retention Amendments of 1986. The annotations to the text are intended to assist you in interpreting the Act.

If you have any questions concerning the Act, I would be pleased to try to answer them for you.

Heron, Burchette, Ruckert & Rothwell

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House Insurance Committee
February 9, 1987
Att. 1

PRODUCT LIABILITY RISK RETENTION
ACT OF 1981, AS AMENDED
BY THE RISK RETENTION AMENDMENTS
OF 1986 (P.L. 99-563)

SHORT TITLE

Sec.1. This Act may be cited as the "Liability Risk Retention Act of 1986".1/

DEFINITIONS

Sec. 2(a) As used in this Act --

(1) "insurance" means primary insurance, excess insurance, reinsurance, surplus lines insurance, and any other arrangement for shifting and distributing risk which is determined to be insurance under applicable state or federal law;

(2) "liability" --

(A) means legal liability for damages (including costs of defense, legal costs and fees, and other claims expenses) because of injuries to other persons, damage to their property, or other damage or loss to such other persons resulting from or arising out of --

1/ Hereinafter the "Product Liability Risk Retention Act of 1981" will be referred to as "Product Liability RRA 1981" and the "Risk Retention Amendments of 1986" will be referred to as "RRA 1986". The "Liability Risk Retention Act of 1986", which consists of the Product Liability Risk Retention Act of 1986 as amended by the Risk Retention Act of 1986, will be referred to as the "Act."

(i) any business (whether profit or nonprofit), trade, product, services (including professional services), premises, or operations; or

(ii) any activity of any state or local government, or any agency or political subdivision thereof; and

(B) does not include personal risk liability and an employer's liability with respect to its employees other than legal liability under the Federal Employers' Liability Act (45 U.S.C. 51 et seq.);

(3) "personal risk liability" means liability for damages because of injury to any person, damage to property, or other loss or damage resulting from any personal, familial, or household responsibilities or activities, rather than from responsibilities or activities referred to in paragraphs (2) (A) and (2) (B);

(4) "risk retention group"^{2/} means any corporation or other limited liability association --

^{2/} RRA 1986 changes the definition of "Risk Retention Group" from that offered by the Product Liability RRA 1981 by further restricting the permissible membership and its activities. A risk retention group must be chartered and licensed as a liability insurance company and authorized to engage in the business of insurance under the laws of one of the fifty states unless it qualifies under the "grandfather" provision of Subsection (C) (ii). In that event, it may only continue to provide product liability or completed operation coverage.

Each of the members of the group must have an "ownership interest" in the group. In addition, all owners must be provided insurance by the group. This is to prevent participation by third parties which may not be interested in the specific insurance problems of group members but are merely interested in making a profit. The single exception to this requirement is when the sole member and sole owner of the organization is an entity consisting of persons who are qualified to be members of the risk retention group "as secondary owners".

(A) whose primary activity consists of assuming and spreading all, or any portion, of liability exposure of its group members;

(B) which is organized for the primary purpose of conducting the activity described under subparagraph (A);

2/ CONTINUED

The members "who are also the owners" are required to be engaged in businesses or activities "similar or related with respect to the liability to which they are exposed by virtue of any related, similar, or common business, trade, product, services, premises or operation." This restriction is for the purpose of requiring substantial identity among the members (who are also the owners and insureds) in regard to the nature of the risks faced.

A risk retention group may not provide insurance other than liability insurance. Further, it can only provide reinsurance to another risk retention group if all of that group's members would qualify for membership in the risk retention group offering the reinsurance. This provision was designed to restrict a risk retention group to only reinsuring its own risks or the similar risks of similarly situated businesses. For example, a risk retention group whose membership consists of grocery store owners, could not reinsure a risk retention group whose membership consists of hazardous waste transporters.

The risk retention group must be chartered and licensed as a liability insurance company and authorized to engage in the business of insurance under the laws of one of the fifty states unless it qualifies under the "grandfather" provision of Subsection (C) (ii).

(C) which --

(i) is chartered and licensed as a liability insurance company and authorized to engage in the business of insurance under the laws of any state; or

(ii) before January 1, 1985, was chartered or licensed and authorized to engage in the business of insurance under the laws of Bermuda or the Cayman Islands and, before such date, had certified to the insurance commissioner of at least one state that it satisfied the capitalization requirements of such state, except that any such group shall be considered to be a risk retention group only if it has been engaged in business continuously since such date and only for the purpose of continuing to provide insurance to cover product liability or completed operations liability (as such terms were defined in this section before the date of the enactment of the Risk Retention Amendments of 1986);

(D) which does not exclude any person from membership in the group solely to provide for members of such a group a competitive advantage over such a person;

(E) which --

(i) has as its members only persons who have an ownership interest in the group and which has as its owners only persons who are members who are provided insurance by the risk retention group; or

(ii) has as its sole member and sole owner an organization which is owned by persons who are provided insurance by the risk retention group (hereinafter in this section referred to as 'secondary owners');

(F) whose members or secondary owners are engaged in businesses or activities similar or related with respect to the liability to which such members or secondary owners are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations;

(G) whose activities do not include the provision of insurance other than --

(i) liability insurance for assuming and spreading all or any portion of the liability of its group members or secondary owners; and

(ii) reinsurance with respect to the liability of any other risk retention group (or any members or secondary owners of such other group) which is engaged in businesses or activities so that such group or member or secondary owner meets the requirement described in subparagraph (F) for membership in the risk retention group which provides such reinsurance; and

(H) the name of which includes the phrase "Risk Retention Group";

(5) "purchasing group"^{3/} means any group which --

(A) has as one of its purposes the purchase of liability insurance on a group basis;

^{3/} The Product Liability RRA 1981 contained a very loose definition of "purchasing group." RRA 1986 offers a more restrictive definition of those groups that can qualify as "purchasing groups." A purchasing group must only offer insurance to its group members, and the insurance must cover their similar or related liability exposure. Further, the group members must have businesses or activities that are similar or related with respect to the liability to which group members are exposed. Finally, the purchasing group must be domiciled in one of the states of the United States, i.e., it cannot be domiciled offshore.

(B) purchases such insurance only for its group members and only to cover their similar or related liability exposure, as described in subparagraph (C);

(C) is composed of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations; and

(D) is domiciled in any state;

(6) "State" means any State of the United States or the District of Columbia; and

(7) "hazardous financial condition"^{4/} means that, based on its present or reasonably anticipated financial condition, a risk retention group is unlikely to be able --

(A) to meet obligations to policyholders with respect to known claims and reasonably anticipated claims; or

(B) to pay other obligations in the normal course of business.

^{4/} The definition of "hazardous financial condition" stipulates that a regulator, in looking at the financial condition of a risk retention group, can base his conclusions on reasonable expectations of future performance. This definition enables the regulator to anticipate future financial problems and to take appropriate action under the authority contained in Sections 3(a)(1)(H), 3(e)(2), 3(f) of the Act or other relevant sections.

(b) Nothing in this Act shall be construed to affect either the tort law or the law governing the interpretation of insurance contracts of any state, and the definitions of liability, personal risk liability, and insurance under any state law shall not be applied for the purposes of this Act, including recognition or qualification of risk retention groups or purchasing groups.

RISK RETENTION GROUPS

Sec. 3(a) Except as provided in this section, a risk retention group is exempt from any state law, rule, regulation, or order to the extent that such law, rule, regulation, or order would --

(1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group except that the jurisdiction in which it is chartered may regulate the formation and operation of such a group and any state may require such a group to^{5/} --

^{5/} The chartering state may apply the full range of its insurance laws to a risk retention group which charters in that state, except that participation in the insolvency guaranty fund may not be required. The authority of non-domiciliary states is more limited. This principle was established by the Product Liability RRA 1981 in Section 3(a)(1), which was not amended by RRA 1986 as it relates to this issue.

The Act exempts a risk retention group from any state law regarding its operation in a state in which it is not domiciled except those laws specifically referred to in the Act. However, if a risk retention group fails to qualify under the definitional requirements of the Act, it will not benefit from this exemption from state law. The commissioner, therefore, would be authorized to apply any of the laws that may be preempted by the Act because the group will not qualify for the preemption.

(A) comply with the unfair claim settlement practices law of the state;6/

(B) pay, on a nondiscriminatory basis, applicable premium and other taxes which are levied on admitted insurers and surplus lines insurers, brokers, or policyholders under the laws of the state;7/

(C) participate, on a nondiscriminatory basis, in any mechanism established or authorized under the law of the state for the equitable apportionment among insurers of liability insurance losses and expenses incurred on policies written through such mechanism;8/

(D) register with and designate the state insurance commissioner as its agent solely for the purpose of receiving service of legal documents or process;9/

6/ The provisions regarding the liability of risk retention groups to state taxation, compliance with the unfair claims settlement practices law, participation in a mechanism to apportion losses among participants, and registration and designation of the commissioner as agent for purpose of service of process were included in the Product Liability RRA 1981.

7/ Id.

8/ Id.

9/ Id.

(E) submit to an examination^{10/} by the state insurance commissioner in any state in which the group is doing business to determine the group's financial condition, if --

(i) the commissioner of the jurisdiction in which the group is chartered has not begun or has refused to initiate an examination of the group; and

(ii) any such examination shall be coordinated to avoid unjustified duplication and unjustified repetition;

(F) comply with a lawful order^{11/} issued --

(i) in a delinquency proceeding commenced by the state insurance commissioner if there has been a finding of financial impairment under subparagraph (E); or

(ii) in a voluntary dissolution proceeding;

(G) comply with any state law regarding deceptive, false, or fraudulent acts or practices, except that if the state seeks an injunction regarding

^{10/} A provision regarding submission to examination by the non-domiciliary state was included in the Product Liability RRA 1981. However, it was modified by RRA 1986 to eliminate the requirement that the commissioner had "reason to believe" the risk retention group was in a financially impaired condition. This deletion gives the commissioner greater latitude in requiring the group to submit to an examination.

^{11/} Subsection (ii) regarding a voluntary dissolution proceeding was added by RRA 1986.

the conduct described in this paragraph, such injunction must be obtained from a court of competent jurisdiction;^{12/}

(H) comply with an injunction issued by a court of competent jurisdiction, upon a petition by the state insurance commissioner alleging that the group is in hazardous financial condition or is financially impaired;^{13/} and

(I) provide the following notice,^{14/} in 10-point type, in any insurance policy issued by such group:

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.

^{12/} The provision regarding compliance with state laws regarding deceptive, false, or fraudulent practices was added by RRA 1986. However, RRA 1986 preempts the portions of the state unfair trade practices act that relate to unfair methods of competition or unfair acts or practices. Nonetheless, state antitrust and state unfair practice laws which apply to commerce generally are applicable and are not preempted by the federal law. In addition, the chartering state retains all of its authority to deal with an unfair trade practice under its insurance laws.

^{13/} Added by RRA 1986.

^{14/} The provision regarding the notice to purchasers concerning the limitation of regulatory oversight of risk retention groups and the lack of insolvency guaranty fund protection was added by RRA 1986. The purpose is to allow the states to require adequate disclosure to consumers.

(2) require or permit a risk retention group to participate in any insurance insolvency guaranty association to which an insurer licensed in the state is required to belong;

(3) require any insurance policy issued to a risk retention group or any member of the group to be countersigned by an insurance agent or broker residing in that state; or

(4) otherwise discriminate against a risk retention group or any of its members, except that nothing in this section shall be construed to affect the applicability of state laws generally applicable to persons or corporations.

(b) The exemptions specified in subsection (a) apply to laws governing the insurance business pertaining to^{15/} --

(1) liability insurance coverage provided by a risk retention group for --

(A) such group; or

(B) any person who is a member of such group;

(2) the sale of liability insurance coverage for a risk retention group; and

^{15/} This provision narrows the scope of the exemption offered by Section 3(a) by stating that the exemption from state law applies to laws governing the insurance business pertaining to liability insurance, the sale of liability insurance, and the provision of insurance related services, management, operations, and investment activities, or loss control and claims administration. Other activities would be subject to the full weight of state law.

(3) the provision of --

(A) insurance related services;

(B) management, operations, and investment activities; or

(C) loss control and claims administration (including loss control and claims administration services for uninsured risks retained by any member of such group);

for a risk retention group or any member of such group with respect to liability for which the group provides insurance.

(c) A state may require that a person acting, or offering to act, as an agent or broker for a risk retention group obtain a license from that state, except that a state may not impose any qualification or requirement which discriminates against a nonresident agent or broker.^{16/}

(d) Each risk retention group shall submit^{17/} --

(1) to the insurance commissioner of the state in which it is chartered --

(A) before it may offer insurance in any state, a plan of operation or a feasibility study which includes the coverages, deductibles, coverage limits, rates, and rating classification systems for each line of insurance the group intends to offer; and

^{16/} Included in the Product Liability RRA 1981.

^{17/} RRA 1986 also added the requirement that a risk retention group submit a notice of operations and financial condition. The purpose of this provision is to require a risk retention group to give the commissioner of any state in which it intends to operate adequate notice of its intended activity and financial condition so that the commissioner can take appropriate action if the possibility of a potential insolvency or commercial abuse exists.

(B) revisions of such plan or study if the group intends to offer any additional lines of liability insurance;

(2) to the insurance commissioner of each state in which it intends to do business, before it may offer insurance in such state --

(A) a copy of such plan or study (which shall include the name of the state in which it is chartered and its principal place of business); and

(B) a copy of any revision to such plan or study, as provided in paragraph (1)(B) (which shall include any change in the designation of the state in which it is chartered); and

(3) to the insurance commissioner of each state in which it is doing business, a copy of the group's annual financial statement submitted to the state in which the group is chartered as an insurance company, which statement shall be certified by an independent public accountant and contain a statement of opinion on loss and loss adjustment expense reserves made by --

(A) a member of the American Academy of Actuaries; or

(B) a qualified loss reserve specialist.

(e) Nothing in this section shall be construed to affect the authority of any federal or state court to enjoin^{18/} --

(1) the solicitation or sale of insurance by a risk retention group to any person who is not eligible for membership in such group; or

(2) the solicitation or sale of insurance by, or operation of, a risk retention group that is in hazardous financial condition or is financially impaired.

(f) (1) Subject to the provisions of subsection (a) (1) (G) (relating to injunctions) and paragraph (2), nothing in this Act shall be construed to affect the authority of any state to make use of any of its powers to enforce the laws of such state with respect to which a risk retention group is not exempt under this Act.^{19/}

(2) If a state seeks an injunction regarding the conduct described in paragraphs (1) and (2) of subsection (e), such injunction must be obtained from a federal or state court of competent jurisdiction.

(g) Nothing in this Act shall affect the authority of any state to bring an action in any federal or state court.

(h) Nothing in this Act shall be construed to affect the authority of any state to regulate or prohibit the ownership interest in a risk retention group by an

^{19/} This provision regarding the administrative and procedural authority retained by the states is designed to permit a commissioner to investigate for potential hazardous financial condition or market conduct abuses and to take appropriate action where necessary. It clarifies that no federal preemption takes place regarding the procedural and administrative authority of the commissioner. However, RRA 1986 requires that any injunction sought by the commissioner must be obtained from a court of competent jurisdiction. These authorities would include, but not be limited to, the commissioner's administrative authority to investigate, issue subpoenas, conduct depositions and hearings, issue orders, and impose penalties instead of or in addition to injunctions and other orders. With regard to any investigation, administrative proceeding, or litigation, the commissioner can rely on the procedural law and regulations of the state.

insurance company in that state, other than in the case of ownership interest in a risk retention group whose members are insurance companies.^{20/}

PURCHASING GROUPS

Sec. 4(a) Except as provided in this section and section 6, a purchasing group is exempt from any state law, rule, regulation, or order to the extent that such law, rule, regulation, or order would^{21/} --

(1) prohibit the establishment of a purchasing group;

(2) make it unlawful for an insurer to provide or offer to provide insurance on a basis providing, to a purchasing group or its members, advantages, based on their loss and expense experience, not afforded to other persons with respect to rates, policy forms, coverages, or other matters;

^{20/} The prohibition on ownership by an insurance company of a risk retention group was added by RRA 1986 for the purpose of limiting the involvement of fully regulated insurance companies in risk retention groups. The Congress believed that this was a method to avoid the possibility that fully regulated companies would choose the Risk Retention Act as a vehicle to avoid full regulation.

^{21/} RRA 1986 establishes that the scope of the exemption from state law for risk retention groups is greater than that for purchasing groups. The Act in Section 3(a) states that a risk retention group is exempt from the laws of non-chartering states and then specifies those authorities which are retained by those states. In regard to purchasing groups, however, Section 4 specifically lists those laws from which a purchasing group is exempt. In general, those laws relate to the formation of such groups. Therefore, a state can apply all of its laws to purchasing groups and persons dealing with purchasing groups (except the laws specifically listed), although federal law will not permit discrimination against purchasing groups. As noted in regard to risk retention groups, if a purchasing group does not meet the criteria specified to define it as a purchasing group, it does not benefit from any federal preemption of state law and all state laws apply.

(3) prohibit a purchasing group or its members from purchasing insurance on the group basis described in paragraph (2) of this subsection;

(4) prohibit a purchasing group from obtaining insurance on a group basis because the group has not been in existence for a minimum period of time or because any member has not belonged to the group for a minimum period of time;

(5) require that a purchasing group must have a minimum number of members, common ownership or affiliation, or a certain legal form;

(6) require that a certain percentage of a purchasing group must obtain insurance on a group basis;

(7) require that any insurance policy issued to a purchasing group or any members of the group be countersigned by an insurance agent or broker residing in that state; or

(8) otherwise discriminate against a purchasing group or any of its members.

(b) The exemptions specified in subsection (a) apply to --

(1) liability insurance provided to --

(A) a purchasing group; or

(B) any person who is a member of a purchasing group; and

(2) the provision of --

(A) liability coverage;

(B) insurance related services; or

(C) management services;

to a purchasing group or member of the group.

(c) A State may require that a person acting, or offering to act, as an agent or broker for a purchasing group obtain a license from that state, except that a state may not impose any qualification or requirement which discriminates against a nonresident agent or broker.22/

(d) (1) A purchasing group which intends to do business in any state shall furnish notice of such intention to the insurance commissioner of such state.23/ Such notice --

(A) shall identify the state in which such group is domiciled;

(B) shall specify the lines and classifications of liability insurance which the purchasing group intends to purchase;

(C) shall identify the insurance company from which the group intends to purchase insurance and the domicile of such company; and

(C) shall identify the principal place of business of the group.

(2) Such purchasing group shall notify the commissioner of any such state as to any subsequent changes in any of the items provided in such notice.

22/ Included in the Product Liability RRA 1981.

23/ The notice provisions regarding purchasing groups are designed to require that purchasing groups provide adequate information to the commissioner so that an evaluation can be made as to whether a purchasing group is (a) bona fide and (b) is likely to operate in a manner, and to purchase insurance coverage, that is consistent with the laws of the state.

(e) A purchasing group shall register with and designate the state insurance commissioner of each state in which it does business as its agent solely for the purpose of receiving service of legal documents or process, except that such requirement shall not apply in the case of a purchasing group^{24/} --

(1) which --

(A) was domiciled before April 1, 1986; and

(B) is domiciled on and after the date of the enactment of this Act,

in any State of the United States;

(2) which --

(A) before the date of the enactment of this Act, purchased insurance from an insurance carrier licensed in any state, and

(B) since such date of enactment, purchases its insurance from an insurance carrier licensed in any state;

(3) which was a purchasing group under the requirements of this Act before the date of the enactment of the Risk Retention Amendments of 1986; and

(4) as long as such group does not purchase insurance that was not authorized for purposes of an exemption under this Act as in effect before the date of the enactment of the Risk Retention Amendments of 1986.

^{24/} The provision regarding registering with and designating the commissioner as legal agent is designed to allow the commissioner to take prompt legal action against the purchasing group without the problem of locating the groups to effect proper legal service of process. The purchasing groups "grandfathered" out of this registration requirement are only those that were prior to April 1986 (and continue to be) domiciled in one of the United States, that purchase insurance only from U.S. carriers, that qualified as a purchasing group under the Product Liability RRA of 1981, and that do not currently purchase insurance other than that authorized under the Product Liability RRA 1981.

(f) A purchasing group may not purchase insurance from a risk retention group that is not chartered in a state or from an insurer not admitted in the state in which the purchasing group is located, unless the purchase is effected through a licensed agent or broker acting pursuant to the surplus lines laws and regulations of such state.^{25/}

(g) Nothing in this Act shall be construed to affect the authority of any state to make use of any of its powers to enforce the laws of such state with respect to which a purchasing group is not exempt under this Act.^{26/}

(h) Nothing in this Act shall affect the authority of any state to bring an action in any federal or state court.

APPLICABILITY OF SECURITIES LAWS^{27/}

Sec. 5(a) The ownership interests of members in a risk retention group shall be --

(1) considered to be exempted securities for the purposes of section 5 of the Securities Act of 1933 and for purposes of section 12 of the Securities Exchange Act of 1934; and

(2) considered to be securities for purposes of the provisions of section 17 of the Securities Act of 1933 and the provisions of section 10 of the Securities Exchange Act of 1934.

^{25/} The purpose of this restriction on insurance purchased by purchasing groups is to prohibit them from purchasing from insurers chartered and regulated outside of the United States, unless the purchase is lawfully effected through a licensed agent or broker acting pursuant to the surplus lines laws of the state.

^{26/} This "savings clause" preserves to the states all the authority that is not preempted by federal law. See FN 19.

^{27/} Included in the Product Liability RRA 1981.

(b) A risk retention group shall not be considered to be an investment company for purposes of the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.).

(c) The ownership interests of members in a risk retention group shall not be considered securities for purposes of any state blue sky law.

CLARIFICATION CONCERNING PERMISSIBLE STATE AUTHORITY

Sec. 6(a) Nothing in this Act shall be construed to exempt a risk retention group or purchasing group authorized under this Act from the policy form or coverage requirements of any state motor vehicle no-fault or financial responsibility insurance law.

(b) The exemptions provided under this Act shall apply only to the provision of liability insurance by a risk retention group or the purchase of liability insurance by a purchasing group, and nothing in this Act shall be construed to permit the provision or purchase of any other line of insurance by any such group.^{28/}

(c) The terms of any insurance policy provided by a risk retention group or purchased by a purchasing group shall not provide or be construed to provide insurance policy coverage prohibited generally by state statute or declared unlawful by the highest court of the state whose law applies to such policy.^{29/}

^{28/} This is intended to limit risk retention groups to the provision of, and purchasing groups to the purchase of, liability insurance.

^{29/} The provision regarding prohibited coverages was added by RRA 1986 for the purpose of enabling a state to regulate the coverages that could be offered within its borders. The Congress believed that this was a matter of public policy to be determined by each state.

(d) Subject to the provisions of section 3(a)(4) relating to discrimination, nothing in this Act shall be construed to preempt the authority of a state to specify acceptable means of demonstrating financial responsibility where the state has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specified activities. Such means may include or exclude insurance coverage obtained from an admitted insurance company, an excess lines company, a risk retention group, or any other source regardless of whether coverage is obtained directly from an insurance company or through a broker, agent, purchasing group, or any other person.^{30/}

INJUNCTIVE ORDERS ISSUED BY UNITED STATES DISTRICT COURTS

Sec. 7 Any district court of the United States may issue an order enjoining a risk retention group from soliciting or selling insurance, or operating, in any State (or in all States) or in any territory or possession of the United States upon a finding of such court that such group is in hazardous financial condition. Such order shall be binding on such group, its officers, agents, and employees, and on any other person acting in active concert with any such officer, agent, or employee, if such other person has actual notice of such order.^{31/}

^{30/} This provision clarifies that the authority of the state to establish criteria demonstrating financial responsibility is not preempted. For example, a state may require as part of its licensing procedure that pesticide applicators or hazardous waste transporters demonstrate financial responsibility by showing evidence of minimum financial capability and insurance coverage. Under this provision, a state will not be prohibited from setting criteria that may have the effect of preventing a risk retention group (or fully regulated insurance company) from providing the coverage required by law.

^{31/} This provision was added to allow a United States District Court to issue an injunction which would have nationwide effect and which would prohibit the operation of a risk retention group in a hazardous financial condition. The injunction would affect not only the group but its officers, agents, and employees.

Explanatory Memorandum for
House Bill No. 2129
(Legislative Proposal No. 6)

The Federal Product Liability Risk Retention Act of 1981 was amended by the 99th Congress as a part of federal efforts to improve insurance capacity through utilization of group self-insurance and group purchasing arrangements. One of the most fundamental changes in the federal law is an expansion of the kinds of insurance to which the act applies. As its title notes, the 1981 law was designed to accommodate products liability and completed operations exposures. The 1986 amendments extend its provisions to commercial liability insurance generally and can be described as a Congressional response to the availability/affordability crisis. The resulting Liability Risk Retention Act of 1986, like its predecessor, preempts application of state laws except those state laws specifically referenced in the law. One of the most significant preemptions is the law or regulation in a state which would otherwise prohibit providing or purchasing liability insurance on a group basis. However, what is not preempted includes a continuation of a state's right to assess taxes on business written by a risk retention group; application of the unfair claims settlement practices law; participation in a mechanism to apportion losses among participants; designation of the commissioner for service of process; the right to conduct an examination, etc. In addition, a risk retention group is subject to virtually all of the laws of the state in which it is chartered. The most notable exception is participation in a state guaranty fund. Thus, even though the federal law contains a significant preemption of state law, it, at the same time, leaves significant responsibilities in the hands of state insurance regulators. House Bill No. 2129 is essentially a model act developed and adopted by the National Association of Insurance Commissioners to establish the permissible state regulatory structure appropriate for risk retention groups and purchasing groups under the revised federal act.

The federal law and this proposal relate to two types of operations. The first is a risk retention group and the second is a purchasing group.

A risk retention group is any corporation or other limited liability association whose primary activity consists of assuming and spreading all, or any portion of the liability exposure of its group members. A risk retention group must be chartered and licensed as a liability insurance company in one of the 50 states.

A risk purchasing group is any group which has as one of its purposes the purchase of liability insurance on a group basis. A risk purchasing group acquires a master insurance policy and then issues certificates of insurance off the master policy to its group members. A risk purchasing group may only be composed of members whose businesses or activities are similar or related with respect to their liability exposure. A risk

purchasing group may only acquire insurance to cover its members similar or related liability exposure.

The 1986 federal act provides a state with more control over risk retention and risk purchasing groups than the original 1981 act. The original federal act specified the control a state had over risk retention and purchasing groups. If the act did not specifically grant the state authority in an area, the group was exempt from state control. The 1986 act reverses the above by specifying the areas in which a state cannot control a risk retention or risk purchasing group. Under the new act, if an area is not specifically exempt from state control, state law will govern.

This bill will allow the Kansas Insurance Commissioner the authority to regulate risk retention and risk purchasing groups to the fullest extent permissible under the 1986 federal law.

Section by Section Summary of House Bill No. 2129

Section 1. Amends previous law and defines the terms contained in this proposal. The two fundamental definitions as to what constitutes a risk retention and risk purchasing group are also contained in this section.

Section 2. Sets forth the requirements for risk retention groups seeking to be chartered in Kansas.

Section 3. Enumerates the requirements for risk retention groups chartered in a state other than Kansas, but seeking to do business as a risk retention group in this state.

Section 4. Prohibits risk retention groups from participating in any insurance insolvency guaranty fund, or similar mechanism.

Section 5. Self-explanatory.

Section 6. Lists the specific exemptions from state law that a risk purchasing group and its insurer may claim. If it is not specifically exempt under this section, Kansas law will apply.

Section 7. Describes the required notice a purchasing group, intending to do business in Kansas, must provide the commissioner.

Section 8. Restricts where a purchasing group may obtain insurance. A purchasing group may obtain insurance from a risk retention group chartered in one of the 50 states. It may also obtain insurance from an insurance company admitted in the state where the purchasing group is located (located meaning any state in which the purchasing group has a liability exposure), or from an insurance company acting pursuant to Kansas excess lines law.

Section 9. Authorizes the commissioner to utilize state laws not specifically exempt by the Liability Risk Retention Act of 1986.

Section 10. Self-explanatory.

Section 11. Requires a license for agents and brokers working for either a risk retention or risk purchasing group in Kansas.

Section 12. Allows Kansas state courts to enforce U.S. District Court findings that a risk retention group is in hazardous financial condition.

Section 13. Self-explanatory.

Section 14. Self-explanatory.

Amendment to House Bill No. 2129

On line 270 immediately following the word "groups", add the phrase "chartered outside this state".

On line 273 immediately following the period, add the sentence "Risk retention groups chartered or licensed in this state shall be taxed in accordance with K.S.A. 40-252.".

HOUSE BILL NO. _____

AN ACT concerning the Kansas police and firemen's retirement system; relating to service-connected death and disability; amending K.S.A. 74-4952 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 74-4952 is hereby amended to read as follows: 74-4952. As used in K.S.A. 74-4951 to through 74-4969 and any amendments thereto, ~~both sections inclusive, the following words and phrases have the following meanings respectively ascribed to each of them, unless a different meaning is plainly required by the context:~~

(1) "Accumulated contributions," means the sum of all contributions by a member to the system which shall be credited to the member's account with interest allowed thereon after June 30, 1982;

(2) "disability," means the total inability to perform permanently the duties of the position of a policeman or fireman;

(3) "eligible employer," means any city, county, township or other political subdivision of the state employing one or more employees as firemen or policemen;

(4) "employee," means any policeman or fireman employed by a participating employer whose employment for police or fireman purposes is not seasonal or temporary and requires at least 1,000 hours of work per year;

(5) "entry date," means the date as of which an eligible employer joins the system; the first entry date pursuant to this act is January 1, 1967;

(6) "final average salary," means the average highest annual compensation paid to a member for any three of the last five years of participating service immediately preceding

retirement or termination of employment, or if participating service is less than three years, then the average annual compensation paid to the member during the full period of participating service, or if a member has less than one calendar year of participating service, then the member's final average salary shall be computed by multiplying the member's highest monthly salary received in that year by 12;

(7) "retirement benefit," means a monthly income or the actuarial equivalent thereof paid in such manner as specified by the member as provided under the system or as otherwise allowed to be paid at the discretion of the board, with benefits accruing from the first day of the month coinciding with or following retirement and ending on the first day of the month in which death occurs, unless the retirant is survived by the retirant's spouse, in which case the surviving spouse shall be paid the retirement benefit which would have been payable had the retirant lived until the end of the month, and upon proper identification such surviving spouse may negotiate the warrant issued in the name of the retirant, but if there is no surviving spouse no benefit will be payable for the month in which the death of the retirant occurred;

(8) "normal retirement date," means the date on or after which a member may retire with eligibility for retirement benefits for age and service as provided in subsections (1) and (3) of K.S.A. 74-4957 and amendments thereto;

(9) "retirement system" or "system," means the Kansas police and firemen's retirement system as established by this act and as it may be hereafter amended;

(10) "service-connected," means, with regard to a death or any physical or mental disability, means any such death or disability resulting from external force, violence or disease occasioned by an act of duty as a policeman or fireman and, for any member after five years of credited service, includes any death or disability resulting from a heart disease or disease of the lung or respiratory tract or cancer, except that in the event

that the member ceases to be a contributing member except by reason of a service-connected disability for a period of six months or more and then again becomes a contributing member, the provision relating to death or disability resulting from a heart disease or disease of the lung or respiratory tract or cancer shall not apply until such member has again become a contributing member for a period of not less than two years or unless clear and precise evidence is presented that the heart disease or disease of the lung or respiratory tract or cancer was in fact occasioned by an act of duty as a policeman or fireman;

(11) "fireman" or "firemen;" means an employee assigned to the fire department and engaged in the fighting and extinguishment of fires and the protection of life and property therefrom or in support thereof and who is specifically designated, appointed, commissioned or styled as such by the governing body or city manager of the participating employer and certified to the retirement system as such;

(12) "police," "policeman" or "policemen;" means an employee assigned to the police department and engaged in the enforcement of law and maintenance of order within the state and its political subdivisions, including sheriffs and sheriffs' deputies, or in support thereof and who is specifically designated, appointed, commissioned or styled as such by the governing body or city manager of the participating employer and certified to the retirement system as such; and

(13) except as otherwise defined in this act, words and phrases used ~~herein~~ in this act shall have the same meanings ascribed to them as are defined in K.S.A. 74-4902 and amendments thereto.

Sec. 2. K.S.A. 74-4952 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.