

LEGISLATIVE BILL 514

Approved by the Governor May 5, 1987

Introduced by Landis, 46; Warner, 25

AN ACT relating to insurance; to adopt the Risk Retention Act; to provide severability; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. This act shall be known and may be cited as the Risk Retention Act.

Sec. 2. The purpose of the Risk Retention Act is to regulate the formation and operation of risk retention groups in this state formed under the federal Liability Risk Retention Act of 1986 and to regulate the operation of purchasing groups in this state formed under the federal Liability Risk Retention Act of 1986.

Sec. 3. As used in the Risk Retention Act, unless the context otherwise requires:

(1) Commissioner shall mean the commissioner, director, or superintendent of insurance in any other state;

(2) Completed operations liability shall mean liability arising out of the installation, maintenance, or repair of any product at a site which is not owned or controlled by (a) any person who performs the work or (b) any person who hires an independent contractor to perform the work. The term shall include liability for activities completed or abandoned before the date of the occurrence giving rise to the liability;

(3) Department shall mean the Department of Insurance;

(4) Director shall mean the Director of Insurance;

(5) Domicile, for purposes of determining the state in which a purchasing group is domiciled, shall mean (a) for a corporation, the state in which the purchasing group is incorporated and (b) for an unincorporated entity, the state of its principal place of business;

(6) Hazardous financial condition shall mean that, based on its present or reasonably anticipated financial condition, a risk retention group, although not yet financially impaired or insolvent, is unlikely to be able to (a) meet obligations to policyholders with respect to known claims and reasonably anticipated

claims or (b) pay other obligations in the normal course of business;

(7) Insurance shall mean primary insurance, excess insurance, reinsurance, surplus lines insurance, and any other arrangement for shifting and distributing risk which is determined to be insurance under the laws of this state;

(8) Liability shall mean legal liability for damages, including the cost of defense, legal costs and fees, and other claim expenses, for injuries to other persons, damage to their property, or other damage or loss to such other persons resulting from or arising out of (a) any profit or nonprofit business, trade, product, services, including professional services, premises, or operations or (b) any activity of any state or local government or any agency or political subdivision thereof. The term shall not include personal risk liability, workers' compensation, 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.;

(9) Personal risk liability shall mean liability for damages for 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 subdivision (8) of this section;

(10) Plan of operation or a feasibility study shall mean an analysis which presents the expected activities and results of a risk retention group including at a minimum:

(a) The coverages, deductibles, coverage limits, rates, and rating classification systems for each line of insurance the group intends to offer;

(b) Historical and expected loss experience of the proposed members and national experience of similar exposures to the extent that such experience is reasonably available;

(c) Pro forma financial statements and projections;

(d) Appropriate opinions by a qualified, independent casualty actuary, including a determination of minimum premium or participation levels required to commence operations and to prevent a hazardous financial condition;

(e) Identification of management, underwriting procedures, managerial oversight methods, and investment policies; and

(f) Such other matters as may be prescribed by the director for liability insurance companies authorized by the insurance laws of the state in which the risk retention group is chartered;

(11) Product liability shall mean liability for damages for any personal injury, death, emotional harm, consequential economic damage, or property damage, including damages resulting from loss of use of property, arising out of the manufacture, design, importation, distribution, packaging, labeling, lease, or sale of a product but shall not include the liability of any person for such damages if the product involved was in the possession of the person when the incident giving rise to the claim occurred;

(12) Purchasing group shall mean any group which:

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

(b) Purchases such insurance only for its members and only to cover their similar or related liability exposure, as described in subdivision (c) of this subdivision;

(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; and

(13) Risk retention group shall mean a corporation or other limited liability association formed under the laws of any state, Bermuda, or the Cayman Islands:

(a) Whose primary activity consists of assuming and spreading all or part of the liability exposure of its members;

(b) That is organized for the primary purpose of conducting the activity described under subdivision (a) of this subdivision;

(c) That (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 the federal Product Liability Risk Retention Act of 1981 before the date of the enactment of the Risk Retention Act of 1986;

(d) That does not exclude any person from membership in a group solely to provide members of such group a competitive advantage over such person;

(e) That (i) has as its owners only persons who comprise the membership of the risk retention group and who are provided insurance by such group or (ii) has as its sole owner an organization which has as (A) its members only persons who comprise the membership of the risk retention group and (B) its owners only persons who comprise the membership of the risk retention group and who are provided insurance by such group;

(f) Whose members are engaged in businesses or activities similar or related with respect to the liability of which such members 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 and (ii) reinsurance with respect to the liability of any other risk retention group or any members of such other group that is engaged in businesses or activities so that such group or member meets the requirement described in subdivision (f) of this subdivision from membership in the risk retention group which provides such reinsurance; and

(h) The name of which includes the phrase Risk Retention Group.

Sec. 4. A risk retention group seeking to be chartered in this state shall be chartered and licensed as a liability insurance company under Chapter 44 and, except as provided elsewhere in the Risk Retention Act, shall comply with all of the laws, rules, and regulations applicable to such insurers chartered and licensed in this state and with sections 5 to 13 of this act to the extent such requirements are not a limitation on laws, rules, or regulations of this state. Before a risk retention group may offer insurance in any state, it shall submit for approval to the director a plan of operation and revisions of such plan if the group intends to offer any additional lines of liability insurance.

Sec. 5. Risk retention groups chartered in states other than this state and seeking to do business as a risk retention group in this state shall observe and abide by the laws of this state as follows:

(1) Before offering insurance in this state, a risk retention group shall submit to the director:

(a) A statement identifying the state or states in which the risk retention group is chartered and licensed as a liability insurance company, the date of chartering, its principal place of business, and such other information, including information on its membership, as the director may require to verify that the risk retention group is qualified under subdivision (13) of section 3 of this act. The identity and location of specific group members shall not be considered public record but may be disclosed to other insurance departments and the National Association of Insurance Commissioners;

(b) A copy of its plan of operations or a feasibility study and revisions of such plan or study submitted to its state of domicile, except that the provision relating to the submission of a plan of operation or a feasibility study shall not apply with respect to any line or classification of liability insurance which (i) was defined in the federal Product Liability Risk Retention Act of 1981 before October 27, 1986, and (ii) was offered before such date by any risk retention group which had been chartered and operating for not less than three years before such date; and

(c) A statement of registration which designates the director as its agent for the purpose of receiving service of legal documents or process; and

(2) Any risk retention group doing business in this state shall submit to the director:

(a) A copy of the group's financial statement submitted to its state of domicile which shall be certified by an independent public accountant and contain a statement of opinion on loss and loss adjustment expense reserves made by a member of the American Academy of Actuaries or a qualified loss reserve specialist under criteria established by the National Association of Insurance Commissioners;

(b) A copy of each examination of the risk retention group as certified by the commissioner or public official conducting the examination;

(c) Upon request by the director, a copy of any audit performed with respect to the risk retention group; and

(d) Such information as may be required to

verify its continuing qualification as a risk retention group under subdivision (13) of section 3 of this act.

Sec. 6. All premiums paid for coverage within this state to risk retention groups shall be subject to taxation at the same rate and subject to the same interest, fines, and penalties for nonpayment as that applicable to foreign admitted insurers, and it shall be the responsibility of each risk retention group to report and pay such taxes whether or not the group is licensed as an insurance company in this state and whether or not agents or brokers are utilized.

Sec. 7. Any risk retention group shall comply with and be subject to sections 44-1522 to 44-1535 regarding deceptive, false, or fraudulent acts or practices and any rule or regulation adopted and promulgated under such sections. If the director seeks an injunction regarding such conduct, the injunction shall be obtained from a court of competent jurisdiction.

Sec. 8. Any risk retention group shall submit to an examination by the director to determine its financial condition if the commissioner of the jurisdiction in which the group is chartered has not initiated an examination or does not initiate an examination within sixty days after a request by the director. Any such examination shall be coordinated to avoid unjustified repetition and conducted in an expeditious manner and in accordance with the National Association of Insurance Commissioner's Examiner Handbook.

Sec. 9. Any policy issued by a risk retention group shall contain, in ten-point type on the front page and the declaration page, the following notice:

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.

Sec. 10. A risk retention group shall not:

- (1) Solicit or sell insurance to any person who is not eligible for membership in such group; or
- (2) Solicit or sell insurance or operate in a hazardous financial condition or financially impaired condition.

Sec. 11. A risk retention group shall not do business in this state if an insurance company is directly or indirectly a member or owner of such group, other than in the case of a risk retention group all of

whose members are insurance companies.

Sec. 12. A risk retention group may not offer insurance coverage prohibited by Chapter 44 or declared unlawful by the Supreme Court.

Sec. 13. A risk retention group which is not chartered in this state and which is doing business in this state shall comply with a lawful order issued in a voluntary dissolution proceeding or in a delinquency proceeding commenced by the director or the commissioner of any other state if there has been a finding of financial impairment after an examination under section 8 of this act.

Sec. 14. A risk retention group shall not join or contribute financially to any insurance insolvency guaranty fund or similar mechanism in this state nor shall any risk retention group or its insureds receive any benefit from any such fund for claims arising out of operations of such risk retention group.

Sec. 15. A policy of insurance issued to a risk retention group or any member of such group shall not be required to be countersigned as otherwise provided in Chapter 44.

Sec. 16. Any purchasing group meeting the criteria established under the federal Liability Risk Retention Act of 1986 shall be exempt from any law of this state relating to the creation of groups for the purchase of insurance or to the prohibition of group purchasing or any law that would discriminate against a purchasing group or its members. In addition, an insurer shall be exempt from any law of this state which prohibits providing or offering to provide 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. A purchasing group shall be subject to all other applicable laws of this state.

Sec. 17. (1) A purchasing group which intends to do business in this state shall furnish notice to the director which shall:

(a) Identify the state in which the purchasing group is domiciled;

(b) Specify the lines and classifications of liability insurance which the purchasing group intends to purchase;

(c) Identify the insurance company from which the group intends to purchase its insurance and the domicile of such company;

(d) Identify the principal place of business of the group; and

(e) Provide such other information as may be required by the director to verify that the purchasing group is qualified under subdivision (12) of section 3 of this act.

(2) A purchasing group shall register with and designate the director 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 that:

(a) Was domiciled before April 1, 1986, and is domiciled on and after October 27, 1986, in any state of the United States;

(b) Before October 27, 1986, purchased insurance from an insurance carrier licensed in any state;

(c) Since October 27, 1986, purchased its insurance from an insurance carrier licensed in any state;

(d) Was a purchasing group under the requirements of the federal Product Liability Risk Retention Act of 1981 before October 27, 1986; and

(e) Does not purchase insurance that was not authorized for purposes of an exemption under the federal Product Liability Risk Retention Act of 1981 as in effect before October 27, 1986.

Sec. 18. A purchasing group shall 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, rules, and regulations of such state, except that such licensed agent or broker need not be a resident of this state. A purchasing group shall be considered located in Nebraska if (1) there is a member of the purchasing group in Nebraska, (2) there is a covered risk or exposure in Nebraska, or (3) the purchasing group is doing business in Nebraska.

Sec. 19. The director may make use of any of the powers established under Chapter 44 to enforce the laws of this state if those powers are not specifically preempted by the federal Product Liability Risk Retention Act of 1981 as amended by the Risk Retention Amendments of 1986. Such powers shall include, but not be limited to, administrative authority to investigate, issue subpoenas, conduct depositions and hearings, issue orders, and impose penalties. With regard to any investigation, administrative proceedings, or litigation, the director may rely on the procedural law,

rules, and regulations of this state. The injunctive authority of the director in regard to risk retention groups shall be restricted by the requirement that any injunction be issued by a court of competent jurisdiction.

Sec. 20. A risk retention group which violates any provision of the Risk Retention Act shall be subject to fines and penalties applicable to licensed insurers generally, including revocation of its license to do business in this state.

Sec. 21. Any person other than a licensed surplus lines agent or broker acting or offering to act as an agent or broker for a risk retention group or purchasing group which solicits members, sells insurance coverage, purchases coverage for its members located within this state, or otherwise does business in this state shall, before commencing any such activity, obtain a license from the director pursuant to the Insurance Producers Licensing Act.

Sec. 22. An order issued by any district court of the United States enjoining a risk retention group from soliciting or selling insurance or operating in any state, in all states, or in any territory or possession of the United States upon a finding that such group is in a hazardous financial condition shall be enforceable in the courts of this state.

Sec. 23. The director shall adopt and promulgate rules and regulations relating to risk retention groups necessary to carry out the Risk Retention Act.

Sec. 24. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof.

Sec. 25. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.