

National Risk Retention Association Stands Up For Its Members In Court

The National Risk Retention Association has taken a lead role as a participant in litigation that has defined and interpreted the Liability Risk Retention Act of 1986. Since 1992, NRRA has participated as either an *amicus curiae* or plaintiff in almost every important risk retention case. In *NRRA v. Brown*, NRRA successfully challenged a Louisiana statute that established minimum capitalization requirements for non-domiciliary risk retention groups in direct violation of § 3902 (a) of the Act. NRRA's *amicus* participation has always involved the interpretation of § 3905 (d) of the Act in cases where States have taken the position that risk retention coverage will not satisfy a State's financial responsibility requirements. The Act provides that:

Subject to the [Act's provisions] relating to discrimination, nothing in [the Act] shall be construed to preempt the authority of a state to specify acceptable means of demonstrating financial responsibility....

15 U.S.C. § 3905 (d). NRRA has consistently advocated that a state can only exclude a risk retention group from providing financial responsibility coverage on the basis of non-discriminatory criteria—for example, capital and surplus requirements—which apply on the same terms to both admitted carriers and risk retention groups.

***National Risk Retention Association v. Brown*, 927 F.Supp.195 (M.D. La. 1996), *aff'd*, 114 F.3d 1183 (5th Cir. 1997).**

In this litigation, NRRA was joined by three risk retention groups as co-plaintiffs: American Trial Lawyers Assurance, a Mutual Risk Retention Group, Non-Profits Mutual Risk Retention Group, Inc, and American Association of Orthodontists Insurance Company. The lawsuit challenged a Louisiana statute which required that non-domiciliary risk retention groups have \$5 million in capital and surplus, post funds or a bond of \$100, 000 with the commissioner of insurance, and submit the group's plan of operation to the commissioner annually with an examination fee of \$1,000 and submit a detailed “Application to Act As Risk Retention Group in the State of Louisiana,” which would have to be approved by the Department of Insurance prior to a non-domiciliary risk retention group being authorized operating in the state.

The District Court held that “as applied to risk retention groups chartered in another state, the requirements for minimum capitalization or for posting of a bond or funds specified by section 2704.1 of Louisiana's insurance code are preempted by the LRRRA. The requirement in section 2074.1, that a risk retention group submit its plan of operation annually with a fee of one thousand dollars to cover the cost of examination is [also] preempted...” 927 F.Supp. 195, 200. The court went on to find that, “the burden imposed by the application process for a nonresident risk retention group is broader than is allowed by the LRRRA.” *Id.*

Louisiana's Department of Insurance appealed the District Court decision to the Fifth Circuit, where oral argument was held on April 29, 1997. The Appeals Court issued a *per curiam* decision affirming the District Court on May 5, 1997.

NRRA v. Brown is the single case where the National Risk Retention Association has initiated litigation as a Plaintiff. In a large number of other cases, NRRA has appeared in the role of *amicus curiae*, supporting one or more of its member risk retention groups.

***Charter Risk Retention Group Insurance Company v. Rolka et al.*, 796 F. Supp. 154 (M.D. Pa. 1992)**

In *Charter*, Pennsylvania law provided that companies operating limousine service in that state must hold insurance from a company “authorized to do business within the Commonwealth.” The Pennsylvania Public Utility Commission issued orders to show cause to 60 limousine companies insured by Charter Risk, directing them to show clause why they should not obtain insurance coverage from a provider licensed in Pennsylvania. Charter filed an action for declaratory judgment asserting that Pennsylvania's exclusion of

risk retention groups was preempted by the Liability Risk Retention Act of 1986, 15 U.S.C. § 3901, et seq. (the Act).

In denying the Defendants' Motion to Dismiss, the Court concluded that the Defendants' action was preempted by the LRRRA. The court agreed with the Defendants that the LRRRA allows States to impose financial responsibility requirements which include or exclude particular forms of insurance, but endorsed the principal argument made by NRRA, stating:

However, the amicus argument is well taken that this provision means that should a particular risk retention group fail to meet conditions of financial responsibility they may be properly excluded. Any other reading of this provision (such as that states may exclude risk retention groups in general as a means of financial responsibility) would allow states to discriminate against all risk retention groups and their members in violation of the anti-discrimination provisions of the Act.

Charter, 796 F. Supp. 154 at n. 6. The Court went on to hold that Pennsylvania's exclusion of risk retention group coverage for limousine companies was preempted by the LRRRA.

As an *amicus* in *Charter*, NRRA played an important role in this first case to interpret the anti-discrimination limitation included in the LRRRA's financial responsibility language, 15 U.S.C. § 3905 (d).

***Mears Transportation Group v. State of Florida*, 34 F.3d 1013 (11th Cir. 1994)**

In *Mears*, a Florida statute that required that for-hire passenger transportation companies prove their financial responsibility by maintaining insurance coverage purchased from “an insurance carrier which is a member of the Florida Insurance Guaranty Association.” The LRRRA expressly exempts risk retention groups from any state law that would “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.” 15 U.S.C. § 3902 (a) (2).

Several transportation businesses insured by a risk retention group sued the Director of the Florida Department of Highway Safety and Motor Vehicles, claiming that the requirement of membership in the Florida Insurance Guaranty Association (FIGA) constituted improper discrimination against RRGs, because RRGs cannot belong to FIGA. The State argued that the Act allows a State to specify the manner in which companies must demonstrate financial responsibility.

The United States District Court followed *Charter* in holding that any requirement that would exclude RRGs as a group—such as the FIGA requirement—would allow for discrimination against all RRGs and thus violate the anti-discrimination provision of the Act.

The Eleventh Circuit reversed the District Court's decision on appeal. In a split decision, the Appeals Court determined that the Florida law “specified an acceptable means for owners and operators of for-hire passenger transportation vehicles to demonstrate financial responsibility” and therefore fell “squarely within the language of § 3905 (d).” The court further stated that the law did not “single out” RRGs for exclusion, because many other types of insurers were similarly ineligible for membership in FIGA. Additionally, the court found an absence of discrimination because coverage in excess of \$30,000 could still be purchased from non-FIGA members such as RRGs.

Plaintiff/Appellant's petition for review by the U.S. Supreme Court was denied. NRRA submitted an amicus curiae brief to the Eleventh Circuit in support of the Plaintiff/Appellant.

***Preferred Physicians Mutual Risk Retention Group v. Pataki*, 865 F. Supp. 1057 (S.D.N.Y. 1994) vacated, 85 F.3d 913 (2d Cir. 1996)**

In *Preferred*, the State of New York's Excess Insurance Law (EIL) provided \$1 million free excess insurance coverage to doctors if their primary insurance coverage was written by a New York-licensed

insurance company. Preferred Physicians Mutual Risk Retention Group, a risk retention group chartered in Missouri, offered insurance to physicians in New York. However, the State refused to provide excess insurance coverage under the EIL to New York physicians who obtained primary coverage from Preferred, because the risk retention group was not licensed in New York. Physicians and dentists, who carried a minimum of \$1 million of coverage from a New York-licensed provider, were eligible for free excess coverage of \$1 million. With the free supplemental coverage from the State, each physician was covered to a limit of \$2 million per occurrence, with an aggregate limit of \$6 million.

Preferred brought an action in District Court, alleging that the EIL was preempted by the LRRRA, and the court granted summary judgment in favor of Preferred. The court also granted injunctive relief compelling New York to provide the benefits of the EIL to physicians covered by out-of-state RRGs. In its decision, the District Court cited with approval of the decision in *Charter Risk* and criticized the decision of the Eleventh Circuit in *Mears*.

The Court of Appeals for the Second Circuit vacated and remanded the decision of the District Court, holding that in deciding the case on the basis of motions for summary judgment, the lower court had allowed insufficient development of evidence either to show that the economic impact of the EIL “was sufficiently substantial to constitute—in essence—indirect regulation,” or that “the EIL effectively forecloses RRGs from competing in a substantial submarket of New York’s physicians, that might constitute indirect regulation of RRGs.” The Court of Appeals also vacated the District Court’s finding of discrimination, noting “the existence of a factual dispute material to the question of whether Preferred, presuming the applicability of disparate impact analysis, can prevail on such a claim.”

Upon remand, Preferred ultimately withdrew its lawsuit because of the high costs it would have incurred in proceeding with discovery and trial on the evidentiary issues identified by the Court of Appeals. NRRA supported Preferred as an *amicus curiae* at both the District Court and Court of Appeals levels in this litigation.

***Ophthalmic Mutual Insurance Company v. Musser*, 143 F.3d 1062 (7th Cir. 1998)**

Ophthalmic Mutual Insurance Company (OMIC), a Vermont chartered risk retention group, challenged a Wisconsin law that requires health-care providers (in this case ophthalmologists) to demonstrate proof of financial responsibility by carrying insurance obtained from an insurer licensed in Wisconsin. Because insurance from OMIC or any other non-domiciliary risk retention group could not satisfy Wisconsin’s financial responsibility requirement, OMIC’s member ophthalmologists in Wisconsin were forced to use other coverage.

The District Court found that the Wisconsin statute was neither discriminatory nor preempted by the LRRRA. The trial court noted that the LRRRA specifically allows a state to exclude insurance from several types of non-licensed carriers from serving as evidence of financial responsibility, subject to the anti-discrimination provisions of the Act. The court then determined that OMIC had failed to prove discrimination stating that:

OMIC has not offered any evidence that § 655.23 (3) (a) has a disparate impact upon non-domiciliary risk retention groups as opposed to other non-domiciliary insurers.

Ophthalmic Mutual Insurance Company v. Musser, No. 96-C-638-S, slip op. at 10 (W.D. Wis, Jan. 16, 1997). In its decision, the District Court followed the reasoning—used by the Eleventh Circuit in *Mears*—that the discrimination prohibited by the LRRRA would have to have a disparate impact upon the risk retention group as compared to other non-domiciliary insurers, rather than a disparate impact upon the risk retention group as compared to licensed carriers in the State. The District Court granted summary judgment for the defendants, concluding that the Wisconsin statute fit within the exception provided by § 3905(d) of the Act.

On appeal the Seventh Circuit noted that: “While at the lower level OMIC contended that § 655.23 discriminates against RRGs, OMIC has not appealed the District Court’s determination that § 655.23 does

not discriminate against RRGs.” 143 F.3d 1062, 1070 (7th Cir. 1998). The Seventh Circuit went on to find that OMIC's argument that the District Court opinion would cause “the exception contained in § 3905 (d) to obliterate the preemptive effect of the LRRRA altogether...” was “without merit,” and proceeded to affirm the decision of the lower court.

NRRA did not participate as an *amicus curiae* at either the District Court or Appeals Court level of the OMIC litigation.

***National Warranty Insurance Company v. Greenfield*, 214 F. 3d 1073 (2000)**

National Warranty Insurance Company (NWIC), provides reimbursement insurance policies covering the liability of automobile dealers under service contracts. Oregon's Service Contract Act required that reimbursement insurance policies be obtained from an “authorized” insurer, which was interpreted by the State to mean an insurance carrier licensed in the State of Oregon, thereby excluding non-domiciliary risk retention groups. NWIC filed suit against Oregon's Director of Consumer and Business Affairs, challenging the state's Service Contract Act as preempted by the LRRRA.

In a carefully reasoned opinion, the District Court found that the net effect of Oregon's interpretation of its Service Contract Act was that RRGs “are prohibited from writing reimbursement insurance policies for service contract obligors in Oregon.” 24 F.Supp.2d 1096, 1100. The District Court went on to say:

[A] state may not exclude all RRGs for a class of insurance, but only may exclude a particular RRG. In other words, states may set objective and neutral criteria of financial responsibility for licensees which are the same for domestic insurers and RRGs but which may result in the exclusion of a particular RRG.

Id. at 1104. The District Court proceeded to address and distinguish the opposite result reached by the Eleventh Circuit in *Mears*, concluding that the disparate impact of the Oregon statute on NWIC—as compared to an Oregon-licensed carrier—constituted the “discrimination” prohibited by the LRRRA, and that there was no need to find the intent to discriminate relied on by the *Mears* majority. Ultimately, the District Court reached the conclusion that “the Director's interpretation of the language of the ‘financial responsibility’ provision of the LRRRA. 15 U.S.C. § 3905 (d), would eviscerate the intended effect of the preemption provision.” *Id.* at 1109. The court declared that to the extent the Director's interpretation of the Oregon law barred foreign RRGs from issuing reimbursement insurance policies to service contract obligors, the Director was in violation of the LRRRA.

Oregon proceeded to appeal the District Court decision to the Ninth Circuit, where a unanimous three-judge panel affirmed the District Court. The Court of Appeals specifically asked, “whether the right of the state to ‘exclude insurance coverage obtained from... a risk retention group’ under this section is the right to exclude coverage from particular RRGs or whether it is the right to exclude coverage from all RRGs” and concluded that “we believe that its most natural reading permits the state to exclude coverage only from particular RRGs.” 214 F.3d 1073, 1078 (2000). In its analysis, the Ninth Circuit panel specifically disagreed with and distinguished the opinions of the Eleventh Circuit in *Mears* and the 7th Circuit in *OMIC*. Finally, the panel concluded:

We believe that in passing the LRRRA, Congress decided that RRGs, as a group, were sufficiently trustworthy providers of insurance that they should be allowed to provide insurance free of state regulation, subject only to specifically granted and fairly narrow exceptions.

Id. at 1082. Oregon has now filed a Petition for a Writ of Certiorari seeking review from the United States Supreme Court.

NRRA participated in the NWIC litigation as an *amicus curiae* at both the District Court and Appeals Court levels.

