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Audrey M. Samers, Esq.
Deputy Superintendent & General Counsel
State of New York Insurance Department
25 Beaver Street
New York, New York 10004

Re: Sections 7903(c)(1) and 5913 of the N.Y. Insurance Law and Risk Retention Groups

Dear Ms. Samers:

The National Risk Retention Association ("NRRA") has recently become aware of several informal opinions issued by the Office of General Counsel for the New York State Insurance Department ("Department"), regarding Article 79 of the N.Y. Insurance Law governing the issuance of service contracts. NRRA has reviewed those opinions and is concerned that the Department's position illegally impairs the ability of risk retention groups ("RRG"), and their members to do business in the State of New York, pursuant to the provisions of the Liability Risk Retention Act of 1986, 15 U.S.C. §§ 3901-3906 ("LRRA").

Article 79 requires that service contract providers, as a condition to becoming registered to sell service contracts in the State of New York, must demonstrate their financial responsibility through any one of three methods. One of the acceptable methods of demonstrating financial responsibility prescribed in Article 79 is a reimbursement insurance policy "issued by an insurer authorized to issue service contract reimbursement insurance in this state." N.Y. Ins. Law § 7903(c)(1).

In opinions issued October 30, 2000 and July 6, 2001, the Department's Office of General Counsel has taken the position that "a policy issued by a risk retention group will not satisfy the financial security obligations under Section 7903 (c)" and it has expressly refused to follow the decision of the United States Court of Appeals for the Ninth Circuit in *National Warranty Insurance Company, RRG v. Greenfield,* 214 F.3d 1073 (9th Cir. 2000), which affirmed a District Court decision concluding that Oregon was preempted by the LRRA from excluding insurance policies issued by an RRG as demonstration of financial responsibility for service contract coverage. To justify this position the July 6, 2001 opinion notes that "two other courts have concluded differently and upheld the state financial security laws that did not recognize risk retention group policies." *See*

Ophthalmic Mut. Ins. Co. v. Musser, 143 F.3d 1062 (7th Cir. 1998); *Mears Transp. Group v. Florida,* 34 F.3d 1013 (11th Cir. 1994), *cert. denied*, 514 U.S. 1109 (1995).[1] Unfortunately, neither opinion letter even references the decision of the controlling Second Circuit in *Preferred Physicians Mut. Risk Retention Group v. Pataki*, 85 F.3d 913 (2d Cir. 1996). By reference to the *Preferred Physicians* decision, it becomes clear that Section 7903(c)(1) clearly is preempted.

In concluding that insurance written by an RRG does not constitute proof of financial responsibility under Section 7903(c)(1), the Department relies on Section 5913 of the N.Y. Ins. Law, which provides:

> Wherever pursuant to the laws of this state or any political subdivision of this state a demonstration of financial responsibility is required as a condition for obtaining a license or permit to undertake specified activities, if any such requirement may not be satisfied by obtaining insurance coverage from an insurer not authorized to do business in this state, *such requirement may not be satisfied by purchasing insurance from a risk retention group not chartered in this state.*

(Emphasis added.) The line of reasoning expressed in these two opinions of the Office of General counsel is only saved from preemption under Section 6(d) of the LRRA (15 U.S.C. § 3905(d)) if it does not discriminate against RRGs and their members. NRRA believes that the Department's position is directly contradicted by *Preferred Physicians*, which the Department does not cite in its informal opinions.

In *Preferred Physicians*, an RRG challenged the New York Excess Insurance Law ("EIL"), which provided a free layer of excess insurance coverage to those physicians who purchased their primary coverage from a New York-licensed insurer. The plaintiff (an RRG) claimed that the EIL constituted a law that "discriminates" against RRGs and their members and, therefore, was preempted under the LRRA, specifically 15 U.S.C. § 3902(a)(4). On appeal, without deciding the issue of what constitutes a state law that "discriminates" against an RRG and its members, the Second Circuit noted that the concept of discrimination, "[i]n its *narrowest meaning* . . . requires a showing that the contested act was done with the intent to discriminate against the protected class." *Id.* at 918 (emphasis added). Citing, but not adopting, the split-panel decision of the United States Court of Appeals for the Eleventh Circuit in *Mears*, the Second Circuit observed that if the plaintiff (appellee) "were to demonstrate that the EIL was enacted with discriminatory intent, that would *no doubt suffice to make out a claim of discrimination under the LRRA*." *Id.* (emphasis added). The Second Circuit then remanded the case for a factual determination whether a program to supplement in-state medical malpractice coverage discriminated against RRGs. With automobile service

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[1] We urge the Department should defer to the Ninth Circuit's decision in *National Warranty*, because it is the most recent and best reasoned of the three circuit court decisions. In *Ophthalmic* the Sixth Circuit panel expressly pointed out that it had not dealt with key issue of discrimination because that had not been raised by the appellant for reasons that are as perplexing to the court as they are to NRRA. *Mears* is a less than lucid split decision from the 11th Circuit.

contracts the factual conclusion is clear; as interpreted in the two recent Office of General Counsel opinions, Section 7903(c)(1) constitutes *per se* discrimination against RRGs.

In *Preferred Physicians* the Second Circuit held that, at a minimum, any state law enacted with a discriminatory intent would be preempted under the LRRA. Article 79, when read together with Section 5913, is just such a law. Indeed, the Department has confirmed this discrimination by interpreting these statutes to require that only policies issued by New York-licensed insurers serve as proof of financial responsibility for service contracts and, consequently, that RRGs not be allowed to provide this coverage. Although NRRA believes, as the Ninth Circuit concluded in *National Warranty*, that the word "discriminates" in the LRRA preempts state action which has a discriminatory effect, regardless of whether there is intentional discrimination, the Department's current application of Section 7903(c)(1) and Section 5913 constitutes intentional discrimination which is expressly preempted by the Second Circuit's decision in *Preferred Physicians*.

NRRA, therefore, respectfully requests that the Department reconsider its position with respect to Article 79 and its enforcement in light of *Preferred Physicians.* This is a matter of great importance to NRRA and its members. I would welcome the opportunity to meet with you to discuss this matter further at your convenience. I would want to include counsel for one or more affected risk retention groups in any such meeting. If you believe that such a meeting would be helpful, please contact me. In the meantime, thank you for your consideration.

Very truly yours,

Philip C. Olsson
General Counsel to the
National Risk Retention Association

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