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**MEMORANDUM**

November 19, 2002

TO: Doug Barnes  
Executive Director  
National Risk Retention Association

FROM: Philip C. Olsson

RE: Risk Retention Coverage

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The New York Insurance Department has finally responded to my April 16, 2002, inquiry regarding the Department's refusal to allow risk retention coverage to serve as evidence of financial responsibility for service contracts in the State of New York. In my letter to Deputy Superintendent & General Counsel Audrey M. Samers, I pointed out that, "in concluding that insurance written by a an RRG does not constitute proof of financial responsibility... the Department relies on Section 5913 of the N.Y. Ins. Law," which categorically states that financial responsibility requirements "may not be satisfied by purchasing insurance from a risk retention group not chartered in this state," and I explained that such a categorical exclusion of risk retention group coverage is an intentional discrimination against risk retention groups of the type clearly prohibited by the Second Circuit Court of Appeals decision in *Preferred Physicians Mutual Risk Retention Group v. Pataki*, 85 Fed 3rd 913 (2d Cir. 1996). The October 30, 2002 response from Paul A. Zuckerman, Principal Attorney for the New York Department, avoids addressing the illegality of Section 5913 by simply not referencing that section of the New York Insurance Law or the portion of my letter that discusses it.

Another interesting features of the Zuckerman response is his disavowal that the original facts of the *Preferred Physicians* case involved financial responsibility at all. This point is undercut by Mr. Zuckerman's own admission that in *Preferred Physicians*, the N.Y. Department, "for the purposes of argument only," compared the statute at issue there "to a financial responsibility statute."

The bottom line is that the reply from New York evades the principal point which was raised in my letter. I will work with the officers and Board to determine an appropriate next step.