RISK RETENTION GROUP (E) TASK FORCE

Risk Retention Group (E) Task Force March 15, 2019, Conference Call Minutes
Letter Received from the National Risk Retention Association—NRRA) Regarding Non-Domiciliary State Registration Actions (Attachment One)

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Risk Retention Group (E) Task Force
Conference Call
March 14, 2019

The Risk Retention Group (E) Task Force met via conference call March 14, 2019. The following Task Force members participated: Michael S. Pieciak, Chair, represented by Sandra Bigglestone (VT); Stephen C. Taylor and Dana G. Sheppard (DC); Colin M. Hayashida represented by Tian Xiao (HI); Nancy G. Atkins represented by Sandy Batts (KY); James J. Donelon represented by Bill Werner (LA); Matthew Rosendale represented by Steve Matthews (MT); Barbara D. Richardson represented by Peter Rao (NV); Glen Mulready represented by Joel Sander (OK); and Raymond G. Farmer represented by Michael Shull and Jay Branum (SC). Also participating were: Janet Grace (CT); Kathleen Orth (MN); and John M. Talley (MO).

1. Discussed Letter Received from the NRRA Regarding Non-Domiciliary State Registration Actions

Robert H. Myers Jr. (National Risk Retention Association—NRRA) summarized the letter from the NRRA (Attachment One), stating that there are two issues. The first issue is fees charged by non-domiciliary states. While fees appear to be nominal on an individual state level, they add up for risk retention groups (RRGs) registered in multiple states and on aggregate amounts of more than $750,000 per year. The NRRA contends that these fees are not allowed by the federal Liability Risk Retention Act (LRRA), which specifically allows for taxes, but not fees. This assertion has been considered and upheld by various court cases. Mr. Myers stated that the second issue is the registration process in non-domiciliary states. The LRRA defines what needs to be provided to the non-domiciliary state, which is limited. It is common for RRGs to be asked for additional information, and the RRGs generally comply. However, it takes time and resources to provide this information, which the NRRA asserts goes beyond what is contemplated in the LRRA.

Mr. Talley stated that processing a registration takes time and resources, and he asked if it is reasonable to charge a fee to cover these costs. Mr. Myers responded that his understanding is that under general rules and case law, a fee cannot be charged for the time and resources to process a registration. Mr. Sheppard asked if the NRRA would object if fees were removed but taxes were increased. Mr. Myers responded that tax law is under the purview of each individual state.

Mr. Matthews commented that the states carefully consider a decision to charge fees and how to administer the registration process. If there are disagreements on these decisions between the non-domiciliary state and the RRG attempting to register that stem from interpretations of the LRRA, the appropriate avenue to resolve issues would be the court system.

Mr. Myers commented that he hopes there is a more amicable way to resolve the issues that would benefit both sides. He added that the LRRA states that once the required information is provided to the non-domiciliary state, the RRG is allowed to do business in that state. No approval or other steps are required by the LRRA.

Joe Deems (NRRA) added that there is also a function of fairness. RRGs consider the cost-benefit of taking a case to court and determine it is cheaper to pay the fees, but he does not believe paying the fees is the right answer.

Mr. Talley inquired about possible recourse by a non-domiciliary state once an RRG is registered but enters a hazardous financial condition or other significant issues are identified. Mr. Myers, Michael Schroeder (NRRA) and Jon Harkavy (NRRA) noted that a non-domiciliary state does have options, as laid out in the LRRA, which include: 1) getting an injunction from a court of competent jurisdiction; and 2) requiring an examination of the RRG if a request was first made to the domiciliary state to conduct an examination and that request was refused.

Ms. Bigglestone noted that domiciliary states must follow the NAIC Financial Regulation Standards and Accreditation Program guidelines for troubled companies, which include elements of communication with non-domiciliary states in situations of troubled or potentially troubled companies.

Ms. Batts raised the point that there is not always consensus on the action to take with an RRG that may be financially impaired, as there are many factors involved and each state insurance regulator needs to be able to serve and protect the policyholders in their respective state.

Mr. Shull provided his view on the registration process in South Carolina. South Carolina uses the registration form included in the *Risk Retention and Purchasing Group Handbook* for non-domiciliary RRGs, which is a simple process. He pointed out that the states with domestic RRGs are subject to the same Part B: Regulatory Practices and Procedures accreditation

requirements as traditional companies. This ensures that domiciliary states maintain a standard of regulation that can be relied on by other states.

Mr. Branum inquired about why an RRG would have to wait for approval from a non-domiciliary state to begin operating once the registration form is submitted, as long as the registration form includes all elements the LRRA requires.

Ms. Grace responded that, in her experience, registration forms are not always complete with the requested information. She added two additional concerns from a non-domiciliary perspective: 1) there have been instances when a registration form is received for an RRG that is insolvent or close to insolvent; and 2) signed registration forms have been received confirming compliance despite violations on the form.

Ms. Orth asked about the purpose of providing the registration form to a non-domiciliary state if that state cannot refuse the application. She noted that traditional insurance companies applying for a license in Minnesota are subject to seasoning requirements.

Mr. Schroeder noted that the registration form provides basic information that can help the non-domiciliary state when actions are necessary, such as contact information to pursue complaints.

Mr. Myers noted that the system is designed to place reliance on the domiciliary state, and there is recourse in the LRRA if the domiciliary state does not uphold certain responsibilities.

Ms. Bigglestone stated that the role of the domiciliary state, in the licensing process and ongoing regulation, is important and should be included in any proposed solution. She then summarized some current resources that can be reviewed for revisions or might offer guidance as the Task Force works through the concerns raised: 1) the NAIC Uniform Risk Retention Group Registration Form; 2) accreditation Part B1: Financial Analysis – Process-Oriented Guidelines B1(e)8; 3) accreditation Part D: Organization, Licensing and Change of Control of Domestic Insurers; 4) the *NAIC Risk Retention Purchasing Group Handbook*; and 5) the *Company Licensing Best Practices Handbook*.

Mr. Deems concluded by asking how a subjective delay in the registration process assists the non-domiciliary states in terms of what they already have a right to do.

Having no further business, the Risk Retention Group (E) Task Force adjourned.

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November 19, 2018

VIA EMAIL – David.Provost@vermont.gov

NAIC RRG Working Group
Attn: David Provost, Chairman
Vermont Department of Banking, Insurance
89 Main Street, Drawer 20
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Re: Request for RRG Working Group Input and Assistance With Respect to Non-Domiciliary State Registration Actions

Dear Chairman Provost:

This letter is being written on behalf of the National Risk Retention Association (NRRA) to inform the RRG Working Group (Working Group) regarding the imposition of LRRA-prohibited actions on RRGs and the abuse of the registration mechanism by non-domiciliary states. We are seeking the support and proactive attention of the NAIC to benefit the RRG industry as a whole and to achieve consistency in the ways in which our members are treated by all states.

The issues fall into two categories.

Fees

The imposition of state-mandated fees by non-domiciliary states is not permitted under the LRRA. [1] RRGs are now paying over **$770,000** per year in fees being charged by a little more than half of all states.

The increasing number of states imposing fees is frankly a matter of great concern for RRGs. The cost of challenging these fees by an individual RRG is prohibitive, which effectively means that the RRG has no effective recourse.

Registration

Section 3902(d) of the LRRA permits a non-domiciliary RRG to do business in a state immediately upon submitting to that state the information delineated in that section. The seminal federal court case on Risk Retention Groups, *Nat'l Risk Retention Ass'n v. Brown*, 927 F. Supp. 195 (M.D. La. 1996) confirms this position. There is no federal court decision to the contrary.

[1] Under § 3902(a)(1)(B), a non-domiciliary state is permitted to asses a "tax," but is not allowed to assess a "fee." *Attorneys' Liability Assur. Society v. Fitzgerald*, 174 F. Supp. 2d 619 (W.D. Mich. 2001).

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Consistent with the lead-state regulatory scheme of the LRRA, many states will promptly issue confirmation of an RRG's registration in the state upon their receipt of the requisite information mandated under the LRRA and evidence of the RRG's licensure by its domiciliary regulator. Unfortunately, more states are imposing a "review" process not unlike that imposed on traditional licensed insurers (and in some cases the exact same procedure) when it comes to the registration filing for foreign RRGs. Not only are more states initiating so-called "review" procedures for RRG registration filings, an increasing number of states are routinely taking substantially longer to "review" registration filings.

Beyond the initial registration of a foreign RRG, some states impose an *ongoing* annual "registration renewal" filing submission or process (*e.g.*, Alaska, California, Iowa, Massachusetts, Mississippi, North Carolina and North Dakota). California's RRG registration renewal form is five (5) pages long and is "reviewed" by the state insurance department for the RRG's continued registration.

All of the hurdles outlined above fall well outside the scope of permissible non-domiciliary state authority and run counter to the original premise of the LRRA for the operation of an RRG. Rather than accepting the lead-state regulatory scheme for conducting business in non-domiciliary jurisdictions, many states, in effect, are attempting to second-guess the RRG's domicile.

These problems represent a serious concern to the RRG community. To date the NAIC utilizes its "accreditation" standards to assess how well *domiciliary* states regulate their RRGs, but does not consider the unlawful actions undertaken by *non-domiciliary* states against RRGs.

We would appreciate the opportunity to address these issues in detail and to respond to your inquiries. We would appreciate your placing this letter on the agenda for the next meeting of the Working Group.

Thank you for your attention to this matter.

Very truly yours,

Joseph E. Deems
Executive Director
Chairman, Government Affairs
National Risk Retention Association (NRRA)

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