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The Risk Retention Reporter

Leveling the Playing Field: Representing Risk Retention Groups in Coverage Disputes

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1. Developing the Differences Between RRGs and Traditional Carriers Early in Litigation and Through Trial

There is an automatic handicap for any traditional insurance carrier involved in a coverage dispute. It's no secret that many people have negative attitudes towards insurance companies. Maybe someone had a bad experience with a homeowners' claim; maybe they were involved in a car accident claim that did not go well for them; or maybe they are a small business owner or their job requires them to deal with insurance issues on a regular basis. It is important to account for such sentiments early on as they can be reflected in the attitudes of judges, jurors, or arbitrators. Judges also generally pressure carriers into settling cases to lighten their dockets. The traditional carrier is often treated like the visiting team in court or arbitration.

Contrary to well-developed perceptions about traditional insurance companies, most people do not have much, if any, experience with RRGs. This includes judges and arbitrators. The authors recently successfully defended a risk retention group in a federal jury trial coverage action where none of the prospective jurors had any experience with risk retention groups— but they had plenty of experience with insurance companies, mostly negative.

An RRG, while technically an insurer, is vastly different from a traditional insurance carrier. RRGs are regulated much differently than traditional insurance companies. Rather than being subject to heavy state insurance regulations, RRGs are regulated pursuant to federal law under the *1986 Federal Liability Risk Retention Act*, 15 U.S.C. § 3901 et seq. (the "*LRRA*"), but because most people do not know the difference, an RRG in litigation runs the risk of being treated, and referred to, as a traditional carrier. Establishing early on in a coverage dispute the differences between a traditional carrier and an RRG can be critical. Counsel for an RRG should consider developing these differences thematically, and often creatively, weaving them into the litigation through the pleadings, motion practice, discovery, and trial.

For example, one of the most unique aspects of an RRG is that it must be created and owned by the same type of professionals it offers to insure. In other words, instead of a David versus Goliath, unsophisticated insured versus evil-empire-carrier type dynamic, a coverage dispute with an RRG and one of its insureds can be accurately characterized as more of a dispute "within the family." More to the point, many RRGs are much smaller than traditional carriers in terms of the number of employees and total premium revenues. An RRG is more akin to a small business rather than a Fortune 500 company. RRGs are also usually managed differently due to their size. The underwriting and claims handling processes are more hands on and more tightly monitored by a smaller group of underwriters and claims managers. The above facts can be easily established in written discovery responses and depositions, which can then be used later as part of a summary judgment motion or trial theme.

At trial, judges usually give counsel considerable latitude on voir dire questioning, especially as it relates to the basic description of one of the parties. If the coverage case is to be presented to a jury, this presents an excellent opportunity to introduce and highlight the differences between RRGs and traditional insurers. The authors have yet to find a prospective juror who has heard of an RRG, setting up for the court to allow testimony concerning these seemingly innocuous (but important) background facts. Doing so allows counsel to highlight the differences between RRGs and traditional carriers during closing arguments, dispelling any negative perceptions as inapplicable.

Further, the *LRRA* greatly restricts the reach of the states in regulating RRGs, thereby also restricting some of the favorite tools relied upon by policyholder attorneys, as discussed further below.

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II. Using the LRRA in Your Defensive Scheme

The *LRRA* amended and expanded the *Product Liability Risk Retention Act of 198*1. The purpose of the *LRRA* is to increase the availability of commercial liability insurance, which became severely restricted in the market crisis of the mid-1980s. RRGs are risk-bearing entities that must be chartered and licensed as insurance companies in one state. The *LRRA* requires that the primary purpose of the group be to assume and spread the commercial liability risk of its members. Once the group has obtained a license in one state, it may operate in all states without needing to also obtain a license in each additional state in which it operates and is largely unregulated except by the domiciliary commissioner. The *LRRA* requires that the RRG be owned by its insureds and requires the insureds to have similar or related liability exposure. The only type of coverage RRGs are permitted to write is commercial liability insurance for their members.

With regard to preemption of state laws, with the exception of the domiciliary state, RRGs are exempt from all but specified state laws, rules, regulations, or orders that would make unlawful, or would regulate, directly or indirectly, the operation of an RRG. The domiciliary state regulates the formation and operation of the RRG. However, any other state may require an RRG to do certain specified things, including compliance with unfair claim settlement practices laws, payment of taxes, limited financial reporting, and registration requirements.

Policyholder attorneys often have playbooks and standard operating procedures, most of which are designed to attack traditional insurance carriers. By virtue of the unique regulatory framework of RRGs, it is often possible to create leverage points that most policyholder attorneys are not familiar with addressing. Some states, like Florida, identify the specific sections of the state insurance code that apply to RRGs. Conspicuously absent from the list of sections that do apply to RRGs transacting insurance in Florida are the attorney fee-shifting provision (Fla. Stat. § 627.428), claims administration statute (Fla. Stat. § 627.426), and the civil remedy statute/statutory bad faith claim (Fla. Stat. § 624.155). The applicability of these statutes to an RRG has not yet been tested in the courts. However, the potential of not being able to seek recovery of attorneys' fees and costs, or not being able to enforce non-compliance with the claims administration statute, can cause the policyholder attorney to reassess the coverage claim, thereby leveling the playing field and allowing for the parties (and the court) to properly assess the issues involved.

III. Conclusion

Fundamental differences exist between the traditional insurance company and RRGs. Coverage counsel for an RRG must understand and highlight these differences from the beginning of any coverage dispute involving an RRG. Policyholder attorneys will attempt to employ their standard playbook and procedures, relying upon their favorite insurance statutes and regulations, which often are preempted by the *LRRA*. Throughout discovery, motion practice, and trial (if it comes to that), counsel for an RRG must develop a theme during the course of litigation that demonstrates the differences between an RRG and a traditional carrier. Doing so can help judges, jurors, and arbitrators set aside any insurance industry bias and level the playing field in coverage disputes involving RRGs.

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