

"AN ACT TO PROVIDE FOR THE REGULATION OF THE FORMATION AND OPERATION OF RISK RETENTION GROUPS IN THE STATE OF ARKANSAS PURSUANT TO THE PROVISIONS OF THE FEDERAL LIABILITY RISK RETENTION ACT OF 1986; AND FOR OTHER PURPOSES."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. It is hereby determined by the General Assembly that the Federal Products Liability Risk Attention Act of 1981 has been amended by the Federal Liability Risk Retention Act of 1986. It is further determined that risk retention groups have been operating or will seek to operate in this State, and that there is a need to assure that such risk retention groups operate in this State in compliance with the Federal Liability Risk Retention Act of 1986. Therefore it is the purpose of this Act to authorize the Insurance Commissioner to regulate the formation and operation of risk retention groups and purchasing groups in this State in conformity with the provisions of the Federal Liability Risk Retention Act of 1986.

SECTION 2. As used in this Act, the term:

(1) "Commissioner" means the Insurance Commissioner of this State or the commissioner, director or superintendent of insurance in any other state;

(2) "completed operations liability" means liability arising out of the installation, maintenance, or repair of any product at a site which is not owned or controlled by:

(a) any person who perform that work; or by any person who hires an independent contractor to perform that work; but shall include liability for activities which are completed or abandoned before the date of the occurrence giving rise to the liability;

(3) "domicile", for purposes of determining the state in which a purchasing group is domiciled, means:

(a) for a corporation, the state in which the purchasing group is incorporated; and

(b) for an unincorporated entity, the state of its principal place of business;

(4) "hazardous financial condition" means that, based on its present or reasonably anticipated financial condition, a risk retention group, although not yet financially impaired or insolvent, is unlikely to be able:

(a) to meet obligations to policyholders with respect to known claims and reasonably anticipated claims; or

(b) to pay other obligations in the normal course of business;

(5) "insurance" means primary insurance, excess insurance, reinsurance, surplus lines insurance, and any other arrangement for shifting and distributing risk which is determined to be insurance under the laws of this State;

(6) "liability" means

(a) legal liability for damages (including costs of defense, legal costs and fees, and other claims expenses) because of injuries to other persons, damage to their property, or other damage or loss to such other persons resulting from or arising out of:

(i) any business (whether profit or nonprofit), trade, product, services (including professional services) premises, or operations; or

(ii) any activity or any state or local government, or any agency or political subdivision thereof; and

(b) does not include personal risk liability and an employer's

liability with respect to its employees other than legal liability under the Federal Employers' Liability Act, 45 U.S.C. 51, et seq.;

(7) "personal risk liability" means liability for damages because of injury to any person, damage to property, or other loss or damage resulting from any personal, familial, or household responsibilities or activities, rather than from responsibilities or activities referred to in subsection (6) of this Section;

(8) "product liability" means liability for damages because of any personal injury, death, emotional harm, consequential economic damage, or property damage (including damages resulting from the loss of use of property) arising out of the manufacture, design, importation, distribution, packaging, labeling, lease, or sale of a product, but does not include the liability of any person for those damages if the product involved was in the possession of such person when the incident giving rise to the claim occurred;

(9) "purchasing group" means any group which:

(a) has as one (1) of its purposes the purchase of liability insurance on a group basis; and

(b) purchases such insurance only for its group members and only to cover their similar or related liability exposure, as described in subparagraph (c) of subsection (10) of this Section; and

(c) is composed of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations; and

(d) is domiciled in any State;

(10) "risk retention group" means any corporation or other limited liability association formed under the laws of any state, Bermuda, or the Cayman Islands:

(a) whose primary activity consists of assuming and spreading all, or any portion, of the liability exposure of its group members; and

(b) which is organized for the primary purpose of conducting the activity described under subparagraph (a) of subsection (1) of this Section; and

(c) which (i) is chartered and licensed as a casualty insurance company and is authorized to engage in the business of insurance under the laws of any state; or

(ii) before January 1, 1985 was chartered or licensed and authorized to engage in the business of insurance under the laws of Bermuda or the Cayman Islands and, before such date, certified to the insurance commissioner of at least one (1) state that it satisfied the capitalization requirements of such state, except that any such group shall be considered to be a risk retention group only if it has been engaged in business continuously since such date and only for the purpose of continuing to provide insurance to cover product liability or completed operations liability, as such terms were defined in the Product Liability Risk Retention Act of 1981 before the date of the enactment of the Risk Retention Act of 1986; and

(d) which does not exclude any person from membership in the group solely to provide for members of such group a competitive advantage over such person; and

(e) which (i) has as its members only persons who have an ownership interest in the group and which has as its owners only persons who are members who are provided insurance by the risk retention group; or

(ii) has as its sole member and sole owner an organization which is owned by persons who are provided insurance by the risk retention group; and

(f) whose members are engaged in businesses or activities similar or related with respect to the liability to which such members are exposed by

virtue of any related, similar, or common business trade, product, services, premises, or operations; and

(g) whose activities do not include the provision of insurance other than (i) liability insurance for assuming and spreading all or any portion of the liability of its group members; and

(ii) reinsurance with respect to the liability of any other risk retention group or any members of such other group which is engaged in businesses or activities so that such group or member meets the requirement described in subparagraph (f) of subsection (11) of this Section from membership in the risk retention group which provides such reinsurance; and

(h) the name of which includes the phrase "Risk Retention Group"; and

(11) "State" means any State of the United States or the District of Columbia.

SECTION 3. No risk retention group formed under the laws of any State shall transact business in this State unless so authorized by a subsisting certificate of registration issued by the Insurance Commissioner. A risk retention group organized or formed under the laws of this State and seeking to operate in this State must be licensed as a casualty insurance company pursuant to the insurance laws of this State and, except as provided elsewhere in this Act, must comply with all of the laws, rules, regulations and requirements applicable to such insurers licensed in this State. Before it may offer insurance in any State, each such risk retention group shall submit for approval to the Insurance Commissioner a plan of operation and revisions of such plan if the group intends to offer any additional lines of liability insurance pursuant to the provisions of this Act.

The plan of operation shall analyze the expected activities and results of the risk retention group including, but not limited to, the following:

(a) the coverages, deductibles, coverage limits, rates, and rating classification systems for each line of insurance the group intends to offer;

(b) historical and expected loss experience of the proposed members and national experience of similar exposures;

(c) pro forma financial statements and projections;

(d) appropriate opinions by a qualified, independent casualty actuary, including a determination of minimum premium or participation levels required to commence operations and to prevent a hazardous financial condition;

(e) identification of management, underwriting procedures, managerial oversight methods, investment policies; and

(f) such other matters as may be prescribed by the Commissioner for casualty insurance companies authorized by the insurance laws of this State.

The Commissioner shall issue a certificate of registration to such risk retention group organized or formed under the laws of this State when the Commissioner is satisfied that such applicant group has fully complied with the provisions of this Act.

SECTION 4. (A) Risk retention groups organized and formed under the laws of states other than this State and seeking to do business as a risk retention group in this State must submit to the Commissioner before offering insurance in this State:

(1) a statement identifying the state or states in which the risk retention group is chartered and licensed as a casualty insurance company, date of chartering, its principal place of business, and such other information, including information on its membership, as the Commissioner of this State may require to verify that the risk retention group is qualified under Section 2 (11) of this Act; and

(2) a copy of its plan of operations and revisions of such plan sub-

mitted to its state of domicile; provided, however that the provision relating to the submission of a plan of operation shall not apply with respect to any line or classification of liability insurance which

(a) was defined in the Product Liability Risk Retention Act of 1981 before October 27, 1986; and

(b) was offered before such date by any risk retention group which had been chartered and operating for not less than three (3) years before such date; and

(3) an appointment of the Commissioner and his successors in office, on a form furnished by the Commissioner, as its agent to receive service of legal process insued against it in this State; the appointment shall be irrevocable, shall bind the risk retention group and any successor in interest, and shall remain in effect as long as there is outstanding in Arkansas any obligation or liability of the risk retention group resulting from its transactions therein; further the risk retention group shall file with the Commissioner designation of the name and address of the person to whom process against it served upon the Commissioner is to be forwarded, and any subsequent amendments to such name and address.

(B) The Commissioner shall issue a certificate of registration to risk retention groups organized and formed under the laws of other states when the Commissioner is satisfied that such applicant groups have fully complied with the provisions of this Act.

SECTION 5. Each authorized risk retention group and any risk retention group doing business in this State shall annually on or before March 1, or within any extension of time therefor which the Commissioner for good cause may have granted, file with the Commissioner:

(1) a copy of the group's financial statement submitted to its state of domicile, which shall be certified by an independent public accountant and contain a statement of opinion on loss and loss adjustment expense reserves made by a member of the American Academy of Actuaries or a qualified loss reserve specialist under criteria established by the National Association of Insurance Commissioners; and

(2) a copy of each examination of the risk retention group as certified by the commissioner or public official conducting the examination; and

(3) upon request by the Commissioner, a copy of any audit performed with respect to the risk retention group; and

(4) such information as may be required to verify its continuing qualification as a risk retention group under Section 2 (11).

SECTION 6. (A) Each authorized risk retention group shall on or before the first day of March of each year file with the Commissioner on forms prescribed by the Commissioner a statement for the preceding calendar year showing all premiums paid to such risk retention group for risks insured within this State.

(B) Coincident with the filing of such report, each authorized risk retention group shall remit to the State Treasurer through the Commissioner as a tax imposed for the privilege of transacting business as a risk retention group in this State, a tax of four percent (4%) on all premiums paid for coverages within this State to such risk retention group within the preceding calendar year as shown by the annual statement filed with the Commissioner.

(C) Agents or brokers shall report in an annual statement and pay the four percent (4%) tax on or before the first day of March of each year for the premiums for risks which they have placed within the preceding calendar year pith or on behalf of a risk retention group not authorized to do business in this State by a subsisting certificate of registration issued by the Commissioner.

(D) Any risk retention group, agent or broker who fails to file the annual statement, or fails to remit the tax as provided by law on the first day of March when the tax is due shall be liable for a fine of one hundred dollars (\$100) for each day of delinquency commencing with the first day of March; except, that for good cause shown, the Commissioner may grant after a written request a reasonable extension of time within which such statement may be filed and the tax paid. The tax may be collected by distraint, or the tax and fine may be recovered by an action instituted by the Commissioner in any court of competent jurisdiction. The Commissioner shall pay to the State Treasurer any fine so collected.

SECTION 7. Any domestic risk retention group, its agents and representatives shall comply with the provisions of the Trade Practices Act in the Insurance Code, Sections 209-221 of Act 148 of 1959, as amended, and other pertinent provisions of the Insurance Code. Any risk retention group organized or formed under the laws of other states, its agents and representatives shall comply with the provisions on claims settlement practices in the Insurance Code, Section 212 (9) and (10) of Act 148 of 1959, as amended, and other pertinent provisions of the Insurance Code.

SECTION 8. Any risk retention group shall comply with the provisions of Arkansas law regarding deceptive, false or fraudulent acts or practices.

SECTION 9. Examination Regarding Financial Condition. Any risk retention group must submit to an examination by the Commissioner to determine its financial condition if the commissioner of the jurisdiction in which the group is chartered has not initiated an examination or does not initiate an examination within sixty (60) days after a request by the Commissioner of this State. Any such examination shall be coordinated to avoid unjustified repetition and conducted in an expeditious manner and in accordance with the NAIC's Examiner Handbook. Each risk retention group being examined in this State shall pay the reasonable cost of the examination to the Commissioner, not to exceed the amounts for compensation and expenses of examiners as adopted by the NAIC or its successor organization.

SECTION 10. Notice to Purchasers. Any policy issued by a risk retention group shall contain in 10 point type on the front page and the declaration page, the following notice:

"NOTICE

This policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and regulations of your state. State insurance insolvency guaranty funds are not available for your risk retention group."

SECTION 11. Prohibited Acts Regarding Solicitation or Sale. The following acts by a risk retention group are hereby prohibited:

- (1) The solicitation or sale of insurance by a risk retention group to any person who is not eligible for membership in such group; and
- (2) The solicitation or sale of insurance by, or operation of, a risk retention group that is in a hazardous financial condition or is financially impaired.

SECTION 12. Prohibition on Ownership by an Insurance Company. No risk retention group shall be allowed to do business in this State if an insurance company is directly or indirectly a member or owner of such risk retention group, other than in the case of a risk retention group whose members are all insurance companies.

SECTION 13. No risk retention group may offer insurance policy coverage prohibited by provisions of the Insurance Code, as amended, or declared unlawful by the Arkansas Supreme Court or Arkansas Court of Appeals, or other court of competent jurisdiction.

SECTION 14. Delinquency Proceedings. A risk retention group holding a certificate of registration in this State must comply with a lawful order issued in a voluntary dissolution proceeding or in a delinquency proceeding commenced by a state insurance commissioner if there has been a finding of financial impairment after an examination under Section 9 of this Act.

SECTION 15. Compulsory Associations.

(A) No risk retention group shall be permitted to join or contribute financially to any insurance insolvency guaranty fund or similar mechanism in this State, nor shall any risk retention group or its insureds receive any benefit from any such fund for claims arising out of the operations of such risk retention group.

(B) A risk retention group shall participate in this State's joint underwriting associations and mandatory liability pools under provisions of the Insurance Code, as amended, and other applicable provisions of State law.

SECTION 16. Countersignatures Not Required. A policy of insurance issued by or to a risk retention group or to any member of that group shall not be required to be countersigned as provided in Sections 63-66 of Act 148 of 1959, as amended.

SECTION 17. Purchasing Groups. Any purchasing group meeting the criteria established under the provisions of the Federal Liability Risk Retention Act of 1986 shall be exempt from any law of this State relating to the creation of groups for the purchase of insurance, prohibition of group purchasing, or any law that would discriminate against a purchasing group or its members. In addition, an insurer shall be exempt from any law of this State which prohibits providing, or offering to provide, to a purchasing group or its members advantages based on their loss and expense experience not afforded to other persons with respect to rates, policy forms, coverages or other matters. A purchasing group shall be subject to all other applicable laws of this State.

SECTION 18. Notice and Registration Requirements of Purchasing Groups.

(A) A purchasing group which intends to do business in this State shall furnish notice to the Commissioner which shall:

- (1) identify the state in which the group is domiciled; and
- (2) specify the lines and classifications of liability insurance which the purchasing group intends to purchase; and
- (3) identify the insurance company from which the group intends to purchase its insurance and the domicile of such company; and
- (4) identify the principal place of business of the group; and
- (5) provide such other information as may be required by the Commissioner to verify that the purchasing group is qualified under Section 2 (10) of this Act.

(B) The purchasing group shall register with and designate the Commissioner as its agent solely for the purpose of receiving service of legal documents or process, and shall comply with the provisions of Section 4 (3) of this Act; except that such requirements shall not apply in the case of a purchasing group:

- (1) which (a) was domiciled before April 2, 1986; and

(b) is domiciled on and after October 27, 1986 in any state of the United States; and

(2) which (a) before October 27, 1986 purchased insurance from an insurance carrier licensed in any state; and

(b) since October 27, 1986, purchased its insurance from an insurance carrier licensed in any state; and

(3) which was a purchasing group under the requirements of the Product Liability Risk Retention Act of 1981 before October 27, 1986; and

(4) which does not purchase insurance that was not authorized for purposes of an exemption under that Act, as in effect before October 27, 1986.

SECTION 19. Restrictions on Insurance Purchased by Purchasing Groups. A purchasing group may not purchase insurance from a risk retention group which does not hold a certificate of registration in this State or from an insurer not admitted in this State unless the purchase is effected through a licensed agent or broker acting pursuant to the surplus line laws and regulations of this State.

SECTION 20. Administrative and Procedural Authority Regarding Risk Retention Groups and Purchasing Groups. The Commissioner is authorized to make use of any of the powers established under the Insurance Code of this State to enforce the laws of this State so long as those powers are not specifically preempted by the Federal Product Liability Risk Retention Act of 1981, as amended by the Risk Retention Amendments of 1986. This includes, but is not limited to, the Commissioner's administrative authority to investigate, issue subpoenas, conduct depositions and hearings, issue orders, and impose penalties. With regard to any investigation, administrative proceedings, or litigation, the Commissioner can rely on the procedural law and regulations of this State. The injunctive authority of the Commissioner with regard to risk retention groups is restricted by the requirement that any injunction be issued by a court of competent jurisdiction.

SECTION 21. A risk retention group which violates any provision of this Act shall be subject to fines and penalties applicable to licensed insurers generally, including revocation of its certificate of authority or certificate of registration.

SECTION 22. Duty of Agents or Brokers to Obtain License. Any person acting, or offering to act, as an agent or broker for a risk retention group or purchasing group which solicits members, sells insurance coverage, purchases coverage for its members located within the State, or otherwise does business in this State shall, before commencing any such activity, obtain a resident or nonresident risk retention group agent or broker license from the Commissioner upon completion of the licensing provisions as to resident and nonresident agents or brokers under Sections 144-180 of Act 148 of 1959, as amended, except as they conflict with the provisions of the Federal Liability Risk Retention Act of 1986.

SECTION 23. The provisions as to fees for obtaining and continuing licenses for insurers, agents, and brokers under Section 68 of Act 148 of 1959, as amended, shall be applicable to risk retention groups, purchasing groups, and risk retention group agents or brokers under the provisions of this Act, except as they conflict with the provisions of the Federal Liability Risk Retention Act of 1986.

SECTION 24. A risk retention or purchasing group agent or broker who violates any provision of this Act shall be subject to fines and penalties

applicable to licensed resident and nonresident agents or brokers generally, including revocation of the resident and nonresident risk retention or purchasing group agent's or broker's license.

SECTION 25. Binding Effect of Orders Issued in U. S. District Court. An order issued by any district court of the United States enjoining a risk retention group from soliciting or selling insurance, or operating in any state, or in all states or in any territory or possession of the United States, upon a finding that such a group is in a hazardous financial condition shall be enforceable in the courts of this State.

SECTION 26. Rules and Regulations. The Commissioner may establish and amend such rules relating to risk retention groups as may be necessary or desirable to carry out the provisions of this Act.

SECTION 27. All laws and parts of laws in conflict with this Act are hereby repealed.

SECTION 28. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

SECTION 29. It is hereby found and determined by the General Assembly that the laws of this State as to risk retention groups and purchasing groups are inadequate. Therefore an emergency is hereby declared to exist, and this Act being necessary for the public peace, health and safety, shall be in full force and effect from and after its passage and approval.

APPROVED: 3/25/87
