

Legal Q/A

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Q: *Malpractice insurance offered by risk retention groups is often cheaper than traditional liability insurance, but does it have any disadvantages?*

A: Congress passed the Liability Risk Retention Act of 1986 to allow risk retention groups (RRG) to cover practically every kind of liability exposure, except workers' compensation. An RRG must be chartered in one state, but then it can write insurance in the other 49 states without having to comply with many of the insurance laws and regulations of those states. The non-chartering states have no approval authority over rates, forms, insurance-related services, management, operation, investment, activities, reinsurance or loss control and claims administration. The only oversight and compliance that an RRG may need to adhere to is the Unfair Claims Practices Act (depending on the state).

An RRG is similar to a mutual insurance company in that the insureds (physicians) are the owners of the RRG. The liability coverage can be written on an occurrence basis, claims-made basis, or paid claim basis. The paid claims basis of underwriting

is unique to RRGs and means that the RRG will pay on a liability claim only if the coverage was in force at the time of the malpractice and continued in force when the claim is asserted **and** when it is finally paid.

One of the most significant features of a RRG is that the federal statute preempts states from requiring a RRG to participate in the insolvency guaranty funds which protects physician policyholders if the insurer becomes insolvent. Recently, the State Insurance Department issued an opinion addressing the consequences of an RRG insolvency.

The Insurance Department opinion involved an Arizona chartered RRG, registered as a risk retention group in New York State (the RRG provided coverage for companies in the trucking business). It went into receivership in Arizona and was therefore unable to pay the claims of one of its insureds in full. The Insurance Department was asked whether there is any fund available to guaranty payment of the claims of the insured. The answer was "no".

The Department stated that the RRG is not an "authorized insurer" under New York Insurance Law because it is neither licensed as an insurer in New York State nor does it have a corporate

charter granted pursuant to the laws of New York State granting it authority to transact an insurance business in this State. However, insofar as it is registered as a risk retention group in New York State, the RRG's registration enables it to write liability insurance covering the business risks of its members.

New York's Property/Casualty Insurance Security Fund would not be available to pay any claims against the RRG because the security fund only covers allowed claims that are unpaid by reason of insolvency of an **authorized insurer** to meet its obligations under certain policies, and an RRG is not an authorized insurer. Moreover, the Department noted that a risk retention group does not (indeed cannot) participate in an insurance insolvency guaranty association to which an insurer

licensed in the state is required to belong. And, of course, the Insurance Department made it very clear that it isn't a guarantor of any obligations that the RRG may have incurred in doing its liability business in the State of New York.

Physicians who are investigating malpractice coverage through a risk retention group need to be aware that there is no guaranty fund backing up the RRG's obligations. It is critically important to check out the financial strength and stability of the RRG because that is the only source for satisfying future liability claims.

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