No. 00-686

In The

Supreme Court of the United States

MARY NEIDIG, DIRECTOR,
DEPARTMENT OF CONSUMER AND
BUSINESS AFFAIRS OF THE
STATE OF OREGON,

Petitioner,

v.

NATIONAL WARRANTY INSURANCE COMPANY, RRG
(a Risk Retention Group),

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Ross S. Myers
Counsel of Record for Amicus Curiae
National Association of Insurance Commissioners
2301 McGee Street, Suite 800
Kansas City, Missouri 64108-2604
Phone (816) 842-3600
Fax (816) 783-8054

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The National Association of Insurance Commissioners (NAIC) respectfully moves this Court, pursuant to Rule 37.2(b), for leave to file a brief as an amicus curiae in this case in support of the Petition for a Writ of Certiorari and in support of its motion states:

1. Counsel of record for NAIC attempted to obtain consent of all parties to this matter to the filing of an amicus curiae brief by the NAIC by timely corresponding with the parties' counsel of record.

2. The Petitioner, Mary Neidig, Director, Department of Consumer and Business Services of the State of Oregon, has consented to the filing of the brief.

3. The Respondent, National Warranty Insurance Company (RRG), by counsel, has informed the undersigned that it does not consent to the filing of the brief.

4. The members of the NAIC have a strong interest in this case and believe that they can aid the Court as set out in the brief submitted with this motion.

WHEREFORE, the National Association of Insurance Commissioners (NAIC) respectfully moves that this Honorable Court grant its motion to file the following amicus curiae brief in support of the Petition for a Writ of Certiorari in this case.

Respectfully submitted,
ROSS S. MYERS
NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS
2301 McGee Street, Suite 800
Kansas City, MO 64108-2604
(816) 842-3600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTEREST OF THE NAIC[1]

As of March 1, 2000 the National Association of Insurance Commissioners (NAIC) converted to a non-profit corporation. Before then it has continuously been an unincorporated association which was established in 1871 and whose membership consisted of and continues to solely consist of the principal insurance regulatory officials of the fifty States, the District of Columbia, the territories and insular possessions of the United States. It is the nation's oldest association of state government officials. The members of the NAIC completely control the same.

In submitting this brief, the NAIC seeks to demonstrate its interest in this proceeding and to fulfill the mission of the NAIC, as set out in its Bylaws, to:

> . . . assist state insurance regulators, individually and collectively, in serving the public interest in achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost-effective manner, consistent with the wishes of its members:
>
> 1. Protect the public interest, promote competitive markets and facilitate the fair and equitable treatment of insurance consumers;

---

[1] Neither counsel for the parties to this matter authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation and submission of this brief.

2. Promote the reliability, solvency, and financial solidity of insurance institutions; and

3. Support and improve State regulation of insurance.

The interest of the NAIC in this matter arises out of the regulatory responsibility vested in each insurance regulator (commissioner, superintendent or director) to see that all laws respecting insurance companies and the types of policies offered for sale in his or her State are executed faithfully. The insurance commissioners, directors and superintendents of the various States are charged with the responsibility of regulating the business of insurance within their jurisdictions pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, and State insurance laws.

The members of the NAIC formed a Risk Retention Working Group in December, 1986 in response to the passage of the Liability Risk Retention Act of 1986, 15 U.S.C. §§ 3901-3906 (1981, as amended 1986). The group drafted and the NAIC adopted the Model Risk Retention Act (the Model Act). *NAIC Model Laws, Regulations and Guidelines*, Vol. IV, p. 705 (1991). Since then, every state in the country has enacted the Model Act or similar legislation. The Model Act sets out the specific state requirements risk retention groups must meet in chartering states and non-chartering states, as authorized by the Liability Risk Retention Act (LRRA). Uniform registration forms for risk retention groups and purchasing groups were developed by the NAIC and are presently used by more than thirty (30) states.

Since the passage of the LRRA in 1986, members of the NAIC have been concerned with regulation of risk retention groups. The NAIC submits that the Ninth Circuit Court of Appeals' decision in the case at bar is in conflict with all three of the NAIC's regulatory goals. The decision defeats the ability of individual states to defend the consumer as was so clearly intended by Congress. "Indeed, legislative history from the day the Senate passed the LRRA reveals that Congress specifically intended to preserve for states the right to exclude non-domestic RRGs on the basis of financial responsibility." *Ophthalmic Mutual Ins. Co. v. Musser,* 143 F.3d 1062, 1068 (7th Cir. 1998).

The NAIC also adopted the Service Contracts Model Act in 1995. *NAIC Model Laws, Regulations and Guidelines,* Vol. IV, p. 685 (1995). The law is essentially identical to the Oregon Service Contract Law. This model law, or similar or related legislation, has been adopted by approximately twenty-seven (27) states. Like the Oregon statute, this model requires that each provider of a service contract "[i]nsure all service contracts under a reimbursement insurance policy issued by an insurer authorized to transact insurance in this state . . . ." It also provides for exceptions to this requirement, including the option of maintaining a net worth of "$100 million." Like the Oregon statute, the Model Act requires that the reimbursement insurer be directly liable to the consumer upon default of the seller of the reimbursement policy. Or. Rev. Stat. § 742.390 (1995). Thus, the consumer is an insured of the reimbursement insurer.

The NAIC is concerned that, if the Ninth Circuit's decision is allowed to stand, various and sundry risk retention groups, either chartered in a state or in a foreign country, will be free to sell service contract policies directly to the public throughout the country with the dealer or seller of consumer goods as a mere strawman or *de facto* commissioned broker.[2]

The NAIC asks that this Honorable Court grant the Petition for Writ of Certiorari. The members of the NAIC believe that a review of the decision of the Ninth Circuit Court of Appeals will be in the best interest of insurance consumers, to whom all insurance commissioners, superintendents and directors (all of whom are members of and completely control the NAIC) are charged by both State and Federal law to protect.

SUMMARY OF ARGUMENT

The members of the National Association of Insurance Commissioners wish to ensure that consumers are not harmed by the entry of risk retention groups into insurance areas that the States, through the exercise of their duty to protect their citizens, have determined should be covered by financial responsibility laws. The NAIC believes the clear intent of Congress and the plain meaning of the statutory language dictate that States have the right to prohibit risk retention groups from

[2] Respondent, as it admitted in pleadings filed in the lower courts, pursuant to the reimbursement insurance policies it issues agrees to reimburse the obligor (i.e., dealer or seller) 100% of all sums the obligor would have to pay under any service agreement it manages to sell to a consumer.

issuing insurance policies for coverages required under financial responsibility laws.

The members of the NAIC further believe that states do not discriminate against risk retention groups when these consumer protection requirements are imposed and that the Ninth Circuit's ruling in this cause decided an important question of federal law that has not been, but should be, settled by the Supreme Court.

ARGUMENT

Background

Respondent National Warranty Insurance Company, RRG (NWIC), in the District Court and the Ninth Circuit Court of Appeals, devoted significant argument to the history, background and purpose of the Product Liability Risk Retention Act of 1981 (PLRRA) and the Liability Risk Retention Act of 1986 (LRRA) in its briefs. To the extent that such argument is used to justify Respondent's desire to sell a reimbursement insurance policy in satisfaction of a state financial responsibility requirement, the argument should be examined.

The legislative history is clear as to the purpose of the financial responsibility exception to the preemption of state regulation by the LRRA. "The 1986 Act was designed to meet both the need for a nationwide solution to the problems experienced by businesses seeking liability coverage and the need for meaningful consumer protection." H.R. Rep. No. 865, 99th Cong., 2d Sess. 7, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5303, 5304.

"[R]equirements of financial responsibility are usually the result of a State's concern about third parties who might be injured by the insured's activities . . . . Such laws would continue to be valid notwithstanding the fact that they might preclude participation in an out-of-State risk retention group for the purpose of meeting the requirement." 132 Cong. Rec. S15446-01 (*daily ed.* Oct. 6, 1986) (Statement of Sen. Gorton).

Congress' concern over the impact on the consumer was noted in a case interpreting the PLRRA relied on by Respondent in the lower courts. "The legislative history of the RRA indicates that one of the major underlying premises of the Act was that risk retention groups would be providing insurance only to its own members and not to members of the general public. This premise led Congress to conclude that it was safe to deprive non-chartering states of virtually all authority to supervise risk retention groups." *Home Warranty Corp. v. Elliott*, 572 F.Supp. 1059, 1066 (D. Del. 1983), *modified*, 585 F.Supp. 443 (D. Del. 1984).

Nowhere in the Act or in its legislative history was there any mention of a nationwide crisis in the optional warranty insurance and service contract market. These are not the product liability, negligence and other tort liabilities that Congress intended to assist businesses in addressing when it passed the Liability Risk Retention Act. Service contract reimbursement policies are clearly for contractual liability, as defined by the court in *Home Warranty*. *Home Warranty Corp.*, 585 F.Supp. at 446 (footnote 6).

To the extent that Respondent may use the tort liability insurance crisis of the 1980s to justify the selling of a contractual liability product in 1999 and the new millenium, it is the NAIC's belief that Respondent is wrong.

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S INTERPRETATION OF 15 U.S.C. 3905 (d) NEGATES THE INTENT OF CONGRESS TO PROTECT CONSUMERS FROM RISK RETENTION GROUPS, IT RESULTS IN CONSUMERS BECOMING INSUREDS OF RISK RETENTION GROUPS WITHOUT BEING MEMBERS OF THE SAME OR RECEIVING THE CONGRESSIONALLY MANDATED WARNING REQUIRED UNDER 15 U.S.C. 3902(a)(1)(i) AND THUS IS AN ISSUE OF NATIONAL IMPORTANCE.

There are many situations where a state, in the exercise of its police power, imposes a financial responsibility requirement in order to protect its citizens from financial harm. Congress, in passing the Liability Risk Retention Act of 1986, clearly understood this, recognized this very important duty of the states, and made full allowance for this duty by including 15 U.S.C. § 3905(d) in the Act.

Financial responsibility requirements are imposed on entities that engage in particular activities to make absolutely certain that there is a pool of funds that others can look to should they be injured as a result of those activities. These requirements serve the public interest by preventing or mitigating financial injury to a state's citizens. To allow risk retention groups to sell insurance policies in fulfillment of such requirements defeats the very purpose of these requirements. Risk retention groups are not ordinarily subject to non-chartering state insurance department examinations, audits, and restrictions on asset transfers, they are not required to meet more than one state's minimum capitalization and reserve requirements, they are not subject to non-chartering states' market conduct examinations, policy form or premium rate approvals, they are not subject to certain restrictions on investment of reserve and surplus funds, their management varies in experience and competency and they do not belong to insolvency guaranty associations.[3] Their policies may have widely varying coverages, exclusions, conditions, technical clauses and other differences in policy language that do not meet a non-chartering state's minimum requirements. It was because of this that "Congress specifically excepted from the Act's preemption provisions those state laws aimed at assuring the financial responsibility of entities subject to state, county, and city licensure laws. By so doing, Congress evidenced its intent to preserve for the states the authority to utilize financial responsibility laws to protect the public." *Mears Transp. Group v. Florida*, 34 F.3d 1013, 1018 (11th Cir. 1994), *cert. den.*, 115 S.Ct. 1960 (1995). *Accord*, *Ophthalmic* at 1068.

Oregon's Service Contract Law was enacted in recognition of the fact that optional service contracts and warranties being sold to consumers were simply not being

---

[3] It is likely that licensed insurance companies belonging to guaranty associations would strongly oppose such membership since they are assessed in case of any insolvency. Regardless, it appears that a state is absolutely prohibited from allowing a RRG to join a guaranty association even if a RRG wished to do so. 15 U.S.C. §§ 3902(a)(1)(I) & 3902(a)(2).

honored because the sellers were going out of business or outright breaching them. It is clearly a consumer protection law. It is ironic then that Respondent in the lower courts stated "[i]n addition, if NWIC becomes insolvent, its members, who are automobile dealers, are the ones at risk . . . ." Oregon passed the statute not to protect the dealers (who make substantial commissions from the sale of these contracts), but the consumers who in that past have been consistently victimized in the service contract area and are the ones at risk. The funds represented by the insurance policies are supposed to benefit the consumers, not the dealers. The risk to consumers is even more apparent when it is recognized that, if a risk retention group is allowed to sell its policy in fulfillment of this financial responsibility requirement, only the dealer and not the consumer sees this federally mandated warning:

> 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.

15 U.S.C. § 3902(a)(1)(I).

Many consumers may decide not to purchase a service contract if this risk retention group insurance policy notice were placed in their service contract or optional warranty in the "10 point type" required by law.

Under Oregon law, NWIC is bound directly to the consumer since the seller of the service contract (the dealer and obligor) is the reimbursement insurer's agent in dealing with the consumer. "(1) An obligor is considered to be the agent of the insurer that issued the reimbursement insurance policy . . . ." Or. Rev. Stat. § 646.273 (1995). The consumer would in fact be insured by a risk retention group without having any way of knowing this or receiving the federally mandated warning.

Magistrate Judge Stewart, in the initial U.S. District Court decision, recognized the unique nature of service contracts and their similarity to insurance when she stated:

> [D]espite these statutory provisions differentiating service contracts from insurance, the fact remains that service contracts are nothing more than a form of insurance against a specific type of loss. . . . The obligor promises to indemnify the consumer for this loss. . . . In contrast, an obligor of a service contract is analogous to a seller of insurance, while a reimbursement insurer, such as NWIC, is analogous to a reinsurer. . . . From that perspective, any attempt by a state to prevent RRGs as a class from engaging in that liability insurance business is preempted by the LRRA.

National Warranty Ins. Co., RRG v. Greenfield, 24 F.Supp.2d 1096, 1108-1109 (D. Or. 1998). This analogy recognizes that consumers are being insured by risk retention groups in this situation. Respondent, as it admitted in pleadings filed in the lower courts, pursuant to the reimbursement insurance policies it issues agrees to reimburse the obligor (i.e., dealer or seller) 100% of all sums the obligor would have to pay under any service agreement it manages to sell to a consumer. This again only makes too clear the consumer risk that is created if Oregon is not allowed to restrict reimbursement insurance policies to authorized insurers.

Only authorized (i.e., licensed) insurers are obligated to become members of insurance guaranty funds and only authorized insurers are obligated to file policy forms and endorsements for approval by the insurance departments for the states they operate in to ensure that the language of the policies (which can be very technical) comply with state law, have no improper limitations or exceptions and actually provide the coverages that consumers reasonably expect when they purchase the policies.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE OREGON'S REQUIREMENT THAT ANY REIMBURSEMENT INSURANCE POLICY BE ISSUED BY AN AUTHORIZED INSURER DOES NOT DISCRIMINATE AGAINST RISK RETENTION GROUPS IN THAT THE REQUIREMENT IS NOT DIRECTED TO RISK RETENTION GROUPS OR LIMITED TO RISK RETENTION GROUPS AND BECAUSE THE NINTH CIRCUIT HAS ACKNOWLEDGED THAT ITS DECISION TO THE CONTRARY IS AT WAR WITH OTHER CIRCUIT COURT DECISIONS.

Risk retention groups are completely legal and operate freely in Oregon. They can and do offer their members in the State of Oregon insurance for the entire field of liability as authorized by the LRRA. NWIC can certainly sell the broad range of other products it offers in the State of Oregon. It offers many types of liability insurance to automobile dealers which do not involve service contracts sold to Oregon's consumers. NWIC is equally free to obtain a certificate of authority and become an authorized insurer in accordance with Or. Rev. Stat. § 731.066 (1967). Oregon's requirement that only an authorized insurer sell service contract reimbursement policies does not focus on or even mention risk retention groups. The Act also prohibits insurance companies that may be licensed in other states but not Oregon from selling such policies (and who are not risk retention groups) and it restricts companies with a net worth of less than $100 million from selling service contracts without reimbursement insurance.

The District Court opinion suggested that the State of Oregon could avoid an accusation of discrimination by setting up a state-run facility similar to a state-run workers' compensation program. *National Warranty Ins. Co., RRG*, 24 F.Supp.2d at 1105. This would of course entail the creation of a new state agency, devotion of significant state funding and mandatory participation by all businesses wishing to sell service contracts. The very narrow need filled by service contracts surely does not seem to justify such an extraordinary remedy.

In its opinion the Ninth Circuit stated "[t]his is a close case, and we know that, in deciding it as we do, we disagree with the Seventh and Eleventh Circuits." *National Warranty Ins. Co. v. Greenfield*, 214 F.3d 1073, 1082 (9th Cir. 2000). In deciding this case the Circuit Court stated it agreed with the opinion of the District Court. *Id.* at 1075. In her District Court opinion Magistrate Judge Stewart suggested, and the respondent urged, that the State of Oregon create "a neutral standard for qualifying insurers participating in a financial responsibility program, such as one relating to minimum net worth . . . ." *National Warranty Ins. Co., RRG*, 24 F.Supp.2d at 1108. The inherent fault in such a proposal is its creation of two systems for licensing or approving insurance companies. It is respectfully submitted that a "neutral standard" for qualifying insurers, the state statutory licensing procedure, already exists in the State of Oregon and the fact is that the Respondent as it stands now does not meet that standard. Minimum net worth, as suggested by Judge Stewart, standing alone, is of no value in determining the solvency or stability of any insurance company. The process for measuring and determining the quality of assets, liabilities, reserves, surplus, reinsurance recoverables, management abilities, restrictions on asset transfers, compliance with reporting requirements and restrictions on entering new markets is not appropriate to abbreviate or short circuit solely to accommodate a risk retention group's desire to sell service contract reimbursement insurance.

Respondent also argued, and the Ninth Circuit in its opinion stated, that it is simply wrong to discriminate against unlicensed insurers in favor of licensed insurers. Setting aside the fact that Congress expressly gave permission to the States to "exclude insurance coverage obtained from . . . a risk retention group . . . ." (15 U.S.C. § 3905(d)), *amicus curiae* suggests this position is analogous to arguing that it is wrong to prohibit unlicensed medical doctors as a group from practicing medicine while allowing licensed medical doctors to do so. Some unlicensed doctors conceivably will have better skills and practice better medicine that some licensed doctors. However, common sense dictates that the public will be harmed if unlicensed doctors can practice medicine as freely as licensed doctors can. This position would call for a separate procedure to be set up to allow unlicensed doctors to practice medicine. This defeats the very purpose of licensing procedures, which in both cases is to protect the general public.

As the Eleventh Circuit noted in *Mears*, unless the discrimination is directed to or aimed at RRGs, it should not be considered discrimination against RRGs. To read the statute otherwise is to read it out of existence. In discussing *Mears*, the U.S. District Court for the Eastern District of Kentucky stated:

> The Eleventh Circuit, reversing the district court, determined that the Florida statute was precisely the type of state law Congress expressly exempted from the preemption provisions of the Liability Risk Retention Act. Further, the court found no evidence of discrimination. The undersigned likewise finds that like the Kentucky regulation, KAR 30:010, § 1, is precisely the type of financial responsibility law that Congress expressly exempted from preemption in 15 U.S.C. § 3905(d); additionally, there is no evidence of discrimination against Garage Service or any other purchasing group.

Garage Services and Equip. Dealers Liability Ass'n of Am., Inc. v. Homes, 867 F.Supp. 1301, 1307 (E.D. Ky. 1994). *Accord*, *National Risk Retention Ass'n v. Brown*, 927 F.Supp. 195, 200 (M.D. La. 1996) ("Section 3905(d) is properly applied in that situation to limit the reach of the LRRA to prohibit the state from discriminating against the prospective licensee if it offers insurance coverage from a risk-retention group as its proof of financial responsibility.").

In the lower courts Respondent cited *Charter Risk Retention Group Ins. Co. v. Rolka*, 796 F.Supp. 154 (M.D. Pa. 1992) despite that group's subsequent history. The risk retention group in question was put into receivership less than two weeks after that district court handed down its opinion in that cause. The insureds and claimants of that risk retention group were not protected by a state guaranty association. *Nebraska v. Charter Risk Retention Group*, Docket 489, Page 245, slip op. (D.Ct. Neb., Lancaster Cty. Nov. 25, 1992). Oregon's consumers, and consumers nationwide, deserve better.

CONCLUSION

In construing the meaning and purpose of the various provisions of the Liability Risk Retention Act of 1986, the members of the National Association of Insurance Commissioners, the nation's oldest association of state government officials, believe that the Congressional intent to protect the general public should guide this Honorable Court. Thus, on behalf of its members, the NAIC asks that this Honorable Court issue its Order granting Petitioner's Petition for Writ of Certiorari, and upon hearing this case on the merits, reverse the decision of the United States Ninth Circuit Court of Appeals and rule that the State of Oregon is permitted to require that service contract reimbursement policies only be issued by licensed insurance companies. This would be consistent with statutory and common law and is in the best interest of insurance consumers, whom the members of the NAIC are charged by both State and Federal law to protect.

Respectfully submitted,

Ross S. Myers
National Association of Insurance Commissioners
2301 McGee Street, Suite 800
Kansas City, Missouri 64108-2604
Phone (816) 842-3600
Fax (816) 783-8054

Counsel of Record for Amicus Curiae