



RRG Attorneys: Nevada Ignoring Federal Law

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By **ROBERT H. MYERS JR., CINDY CHANG**

Currently pending in federal district court in Nevada is a case between a risk retention group, the Alliance of Nonprofits for Insurance (ANI), and the Nevada Division of Insurance (NDI).

As the court contemplates its ruling on each party's respective motion for summary judgment, the RRG industry awaits a decision that may reverberate nationwide.

ANI, which has issued policies in Nevada since 2001 and is rated "A-" by A.M. Best, is an RRG domiciled in Vermont and registered in nearly two-dozen states, including Nevada. ANI was formed to issue affordable commercial auto policies to nonprofit organizations—one of the intended beneficiaries of the federal Liability Risk Retention Act (LRRRA).

On Sept. 13, 2010, however, NDI issued a cease-and-desist order to ANI for writing "first-dollar" automobile liability policies.

Suddenly, ANI's nonprofit members were denied vehicle registrations at the Department of Motor Vehicles because ANI was not on an approved list of insurers. Despite the nearly 10 years since ANI's proper registration with the Division pursuant to the LRRRA, NDI now maintains that ANI may not provide first-dollar coverage because it does not hold a certificate of authority.

Non-domiciliary state regulators like Nevada force RRGs to make a choice that is contrary to a primary purpose of the LRRRA. Congress intended to encourage the provision of affordable commercial liability insurance by subjecting RRGs to a single state regulator. RRGs cannot efficiently operate if they must litigate to enforce their rights to issue policies pursuant to the LRRRA.

LRRA VIOLATION

Most states require all insurers with a certificate of authority to be members of the state guaranty fund. This is to safeguard policyholders in the event an insurer becomes insolvent.

The LRRA and many state statutes bar RRGs from being members of state guaranty funds. Thus, imposing a “certificate of authority” requirement for any type of coverage effectively bars all RRGs from providing that type of coverage.

In fact, requiring RRGs to obtain certificates of authority to provide coverage in the state undermines the fundamental regulatory structure established by the LRRA, which sought to promote the provision of affordable commercial liability insurance by broadly exempting RRGs from non-domiciliary regulations.

The statute and case law provide that states may exclude particular RRGs if they can show that they are financially unsound or otherwise dangerous. But they may not categorically exclude RRGs under the guise of promoting financial responsibility.

FAULTY REASONING

So why does the NDI believe it has a case? It has cited 15 U.S.C. § 3905(a) as the basis for its arguments because the provision’s heading reads: “No exemption from State motor vehicle no-fault and motor vehicle financial responsibility laws.”

But as well-established principles of statutory construction require, a statute’s heading cannot be interpreted to expand the plain meaning of the provision’s actual text.

In this case, § 3905(a) specifically and narrowly exempts policy form and coverage requirements of any state motor vehicle no-fault or financial responsibility law. This is consistent with the LRRA’s other provisions that exempt from preemption non-discriminatory laws that go toward ensuring financial responsibility.

In ANI's case, the RRG has complied with all of Nevada's policy form and coverage requirements, thus achieving the intended financial responsibility requirements of those provisions.

REGULATORS IGNORE BINDING COURT DECISION

Since enactment of the LRRRA, several RRGs have challenged various state statutes. Often at issue are the scope of the LRRRA's preemption of non-domiciliary state regulation and non-discriminatory provisions.

If the U.S. Circuit Courts of Appeal are split, it may be difficult for an RRG operating in multiple jurisdictions to know how those decisions may affect its business.

The ANI case illustrates that, even in jurisdictions where a binding decision has been entered, uncertainty exists as to whether state regulators will heed that decision.

The Division is bound by the Court of Appeals for the Ninth Circuit's decision in National Warranty Insurance Company RRG v. Greenfield, which unambiguously held that states may not discriminate against RRGs by requiring automobile dealers to obtain liability insurance from a member of the Oregon Insurance Guaranty Association.

But NDI has maintained its position against ANI in direct conflict with the National Warranty decision. As a consequence, ANI and other RRGs in similar positions must incur significant legal costs to seek enforcement of existing binding court decisions.

In sum, Nevada is seeking to undermine the LRRRA by ignoring the law in the Ninth Circuit and making it financially onerous for RRGs to do business. This is directly contrary to the clear intent of Congress in passing the LRRRA.

Nevada is inviting Congress to take action.



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