

## 2013 DRAFTING REQUEST

### Bill

Received: 7/17/2013 Received By: pkahler  
Wanted: As time permits Same as LRB:  
For: John Nygren (608) 266-2343 By/Representing: Nels Rude  
May Contact: Drafter: pkahler  
Subject: Insurance - other insurance Addl. Drafters:  
Extra Copies:

Submit via email: YES  
Requester's email: Rep.Nygren@legis.wisconsin.gov  
Carbon copy (CC) to: Tamara.Dodge@legis.wisconsin.gov

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### Pre Topic:

No specific pre topic given

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### Topic:

Allow out-of-state risk retention groups to provide health care liability insurance

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### Instructions:

See attached

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### Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	pkahler 8/14/2013	jdye 8/15/2013	rschluet 8/15/2013	_____			
/P1	pkahler 2/10/2014			_____	sbasford 8/15/2013		State
/1		jdye 2/10/2014	jmurphy 2/10/2014	_____	mbarman 2/10/2014	mbarman 2/10/2014	State

FE Sent For:

*at intro*  
*2/20*

<END>

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/?	pkahler 8/14/2013	jdye 8/15/2013	rschluet 8/15/2013				
/P1		1 2/10 jld	jd	sbasford 8/15/2013			State

FE Sent For:

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See attached

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Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	pkahler	8/15 jld	9				

FE Sent For:

<END>

**Kahler, Pam**

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**From:** Rude, Nels  
**Sent:** Tuesday, July 16, 2013 7:42 AM  
**To:** Kahler, Pam  
**Subject:** Risk Retention Group Legislation

Hello Pam-

Rep. Nygren would like to draft legislation that would change Chapter 655 of the statutes in order to allow outstate Risk Retention Groups to sell medical liability coverage to Wisconsin physicians. The RRG policies would then qualify as "proof of insurance" required for physicians to participate in the Patients Compensation Fund. Below are two possible language changes. We would like to start with #2. However, if you feel there is cause to go with #1, or another version, please let me know.

1. 655.23(3)(a). Except as provided in par. (d), every health care provider either (i) shall insure and keep insured the health care provider's liability by a policy of health care liability insurance issued by an insurer authorized to do business in this state, **or by an insurer licensed as a risk retention group by any state or the District of Columbia and duly registered in this state**, or (ii) shall qualify as a self-insurer.
2. 655.23(3)(a). Except as provided in par. (d), every health care provider either (i) shall insure and keep insured the health care provider's liability by a policy of health care liability insurance issued by an insurer authorized to do business in this state, **or by an insurer licensed as a risk retention group by any state or the District of Columbia, approved by the commissioner for purposes of the injured patients and families compensation fund, and duly registered in this state**, or (ii) shall qualify as a self-insurer.

Thanks!

Nels

**Nels Rude**

Office of State Representative John Nygren  
Co-Chair, Joint Committee on Finance  
89<sup>th</sup> Assembly District  
309 East, State Capitol  
608.267.2371  
[nels.rude@legis.wi.gov](mailto:nels.rude@legis.wi.gov)

15 USC 390(a)(4)

duly registered = auth. to do  
bus?

## Kahler, Pam

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**From:** Rude, Nels  
**Sent:** Friday, July 26, 2013 11:01 AM  
**To:** Kahler, Pam  
**Subject:** FW: OCI Issue  
**Attachments:** Risk Retention Memo to OCI 3.5.13 .pdf; 2013-05-09 JAF ltr to Schwartzer.pdf; RRG Timeline.pdf

Hey Pam- As discussed on the phone, here is how it has been explained to me... In 1990, legislation passed which made a key change to 655.23(3)(a), it amended the section to require that to meet the Patient Compensation Funds' "proof of insurance" requirement a physician's private policy had to be sold by a Wisconsin licensed company. After that, OCI informed doctors who were receiving med mal from outstate companies that their policies were no longer sufficient as "proof of insurance" and they would need to purchase from a WI licensed carrier or be in violation of the PCF requirements. The Risk Retention Act of 1986 says that RRG's must be licensed by a single state, but that should be authorized to sell insurance in all states.

Attached are a few documents that will hopefully help to clarify this issue.

Thanks

Nels

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**From:** eric@jgr-llc.com [mailto:eric@jgr-llc.com]  
**Sent:** Wednesday, May 08, 2013 11:15 PM  
**To:** Rude, Nels  
**Cc:** Schoenfeldt, Jeff  
**Subject:** OCI Issue

Hey Nels.

Thanks to you and Jeff for facilitating the meeting with John today. Know you're busy with JFC tomorrow - just wanted to get you my email and get you a bit more of the history.

If you can send me the current OCI motion request you and John asked me about, I will look at it quickly to see if it has anything to do with this issue, but from what it sounds like it does not.

I represent Ophthalmic Mutual Insurance Co (OMIC - <http://www.omic.com/>) that sells only to ophthalmologists, and Preferred Physicians Medical (PPM - <http://ppmrrg.com/>) that sells only to anesthesiologists. They want to get into the WI market, but without dramatically changing their business model they cannot.

History of this issue dates to 1986 - Congress passed the Risk Retention Act. It allowed Risk Retention Groups to be set up and offer liability insurance, and specifically to do so by being licensed by a single state and authorizing sale of insurance in all states. One goal was to allow membership organizations (like medical societies, or trade associations) to create their own insurers to offer competitive insurance tailored specifically to their members professions and needs, and by doing that create more competition in a market sorely lacking.

OMIC began selling med mal policies to WI ophthalmologists shortly thereafter - per the RRAct, they were licensed in a different state but could sell in WI, and followed applicable WI regulations. (I believe they were the first med mal RRG to begin selling in WI.)



Physicians in WI must participate in the PCF. Physicians in WI must also carry private med mal coverage (\$1mil/\$3mil). In order to then participate in the PCF, physicians must provide OCI with "proof of insurance" - demonstrate they have the required private coverage. (We are not the only state with a mandatory PCF.)

In 1989, OCI requested a bill that included a provision that said that in order to qualify as "proof of insurance" for PCF participation, the private insurance must be sold by a "Wisconsin licensed insurer." OCI told OMIC in a letter at the time that the provision was specifically requested by the PCF Board.

OCI then informed all the ophthalmologists who had bought an OMIC policy that they'd need to find a policy from a WI licensed carrier in order to meet the "proof of insurance" requirement.

OMIC tried thereafter to work something out with OCI, but OCI refused. For better or worse, OMIC sued OCI in Federal Court in the early 90's arguing the requirement violated the Federal act. The 7th Circuit court said the WI law did not violate the Federal Act. The 9th Circuit has ruled the opposite on the same question. It's an issue that has not, and likely is not of sufficient national import to ever get to the US Supreme Court, so the 7th Circuit decision stands in WI.

We don't argue that WI has the power to do this - we do argue that it is not a good policy for WI to do it. Wisconsin is the only state with such a restriction on medical liability RRGs (OMIC sells to over 4000 ophthalmologists nationally in all 49 other states, PPM sells in 42).

There are dozens of other RRGs selling insurance in WI - including what amounts to med mal coverage to oral surgeons. Of course, none of those being insured have to participate in the PCF so don't have to meet this "proof of insurance" rule. This WI-licensing rule applies ONLY to RRGs selling medical liability coverage to physicians. Anything we seek would similarly apply ONLY to RRGs selling med mal coverage to physicians.

The med mal market in WI is (according to OCI's website) three-quarters controlled by just 4 companies. The auto insurance market, by contrast, is extremely diverse. I got into this at the request of the Wisc Acad of Ophthalmology (who I represent, who connected me with OMIC, and who urged OMIC to undertake this again) - WAO's members strongly support this effort. I also represent the Wisc Soc of Anesthesiologists, who are supportive as well. They would like the option of buying med mal insurance and services specifically tailored to their specialties -- including the specialty-specific risk management, patient safety and professional education courses they offer their insureds that ultimately help improve patient care.

What we'd like is a change the statute to allow RRGs to sell med mal coverage to WI physicians, according to the intent of the Federal act, and in line with how every other state treats med mal RRGs.

We met with Commissioner and Deputy in February, and at their request we provided a couple language ideas - in the letter I gave you. OCI sent us a memo several weeks later, written by an in-house attorney, that was a strong defense of the 1989 law and the 7th Circuit decision (showed you but did not share a copy). We were able to set a follow-up meeting with the Deputy and Counsel two weeks ago and flew in the CEO of OMIC and General Counsel from PPM -- that meeting ended on a more positive note. (We had set up to have them meet John and Alberta that day, but leadership called a meeting and we could not meet.) We have two additional language ideas we'll send to OCI this week that seek to address concerns they raised in that second meeting. (The longer memo I gave you gives a good background on RRGs, on my clients' financial situations, and responds to the memo we got from OCI in March.)

It is our strong preference to find a way to do this with OCI's support, and we're continuing to reach out to them to try to move with some haste.

That's the issue in a nutshell. As everything, there is more detail but this gives you the basic outline.

EJ

May 9, 2013

Daniel J. Schwartzer  
Deputy Commissioner  
Office of the Commissioner of Insurance  
125 S. Webster St.  
P.O. Box 7873  
Madison, WI 53707-7873

RE: Health Care Risk Retention Group Legislation

Dear Deputy Commissioner Schwartzer:

Thank you and your staff for taking the time to meet with me, Eric Jensen, and our clients, Steve Sanford and Tim Padovese, on April 25, 2013. We appreciate the opportunity to continue the dialogue about possible changes to the Patients Compensation Fund statutes that would permit health care risk retention groups to do business in Wisconsin. We listened closely to your concerns, as we know you did to ours, and we have attempted to draft statutory language that would accomplish our respective goals. As you know, by letter dated February 25, 2013, we provided the following two alternative draft amendments to the relevant provision in Wis. Stat. § 655.23(3)(a) from another letter:

1. 655.23(3)(a). Except as provided in par. (d), every health care provider either (i) shall insure and keep insured the health care provider's liability by a policy of health care liability insurance issued by an insurer authorized to do business in this state, or by an insurer licensed as a risk retention group by any state or the District of Columbia and duly registered in this state, or (ii) shall qualify as a self insurer....
2. 655.23(3)(a). Except as provided in par. (d), every health care provider either (i) shall insure and keep insured the health care provider's liability by a policy of health care liability insurance issued by an insurer authorized to do business in this state, or by an insurer licensed as a risk retention group by any state or the District of Columbia, approved by the commissioner for purposes of the injured patients and families compensation fund, and duly registered in this state, or (ii) shall qualify as a self insurer....

The following two new alternative drafts attempt to address the concerns you and your staff expressed on April 25.

3. **655.23(3)(a).** Except as provided in par. (d), every health care provider either (i) shall insure and keep insured the health care provider's liability by a policy of health care liability insurance issued by an insurer authorized to do business in this state, or by an insurer licensed as a risk retention group by any state or the District of Columbia and (a) approved by the commissioner for purposes of the injured patients and families compensation fund, (b) duly registered in this state, and (c) in compliance with the state's unfair claim settlement practices laws, deceptive, false, or fraudulent acts laws, and the applicable state premium tax payment requirements or (ii) shall qualify as a self insurer.
4. **655.23(3)(a).** Except as provided in par. (d), every health care provider either (i) shall insure and keep insured the health care provider's liability by a policy of health care liability insurance issued by an insurer authorized to do business in this state, or by an insurer licensed as a risk retention group by any state or the District of Columbia and (a) approved by the commissioner for purposes of the injured patients and families compensation fund, (b) duly registered in this state, (c) in compliance with the state's unfair claim settlement practices laws, deceptive, false, or fraudulent acts laws, and the applicable state premium tax payment requirements, and (d) open to an examination by the state, for reasonable cause, to determine the risk retention group's financial condition or (ii) shall qualify as a self insurer.

We believe Option 3 fairly addresses your concerns. With some reservation, however, our clients are willing to accept Option 4, if we can secure your support.

We would like to move the legislative process along as quickly as possible. Please let us know your thoughts about our proposals at your earliest convenience.

If it would be helpful, we would be happy to meet with you and/or your staff at any convenient time. Thank you for your attention to this matter.

Sincerely,

GODFREY & KAHN, S.C.



James A. Friedman

JAF:jw

cc: Theodore K. Nickel  
Eric Jensen (via email)

9108181\_1

Daniel J. Schwartzer

May 9, 2013

Page 3

bcc: Paul Weber (via email)  
Steve Sanford (via email)  
Kim Wynkoop (via email)  
Jeff Johnson (via email)  
Tim Padovese (via email)

9445963.1

## **"Proof of Insurance" Requirement for PCF and RRGs - Timeline**

(1986) Congress passes LRRRA creating RRGs – specifically authorizes RRGs to organize and be licensed in a single state and to then sell liability insurance in all states without being licensed in all states – goal is to increase competition in liability insurance market.

(Pre-1989) PCF in Wisconsin requires that participants provide OCI with "Proof of Insurance" (showing they have private insurance that meets minimum coverage requirements).

(1986-1989) OMIC begins selling medical malpractice liability coverage to Ophthalmologists in WI. OMIC policies considered "Proof of Insurance."

(1989-90) OCI requests legislation – buried in it is change to PCF statutes (Ch. 655) that changes as follows:

In order to qualify as "Proof of Insurance" the policy must be purchased from an insurer holding a Wisconsin insurance license.

(1990) Legislation passes – ophthalmologists insured by OMIC informed their policies no longer qualify as "Proof of Insurance."

(1990) – OMIC approaches OCI about legislation to discuss accommodations. OCI will not budge. OCI writes in letter to OMIC that the legislation was specifically requested by the PCF Board.

(1990's) OMIC sues OCI in Federal Court arguing that the licensure requirement to qualify for "Proof of Insurance" violates the LRRRA.

- 7<sup>th</sup> Circuit Court of Appeals (WI, IL, IN) agrees (1998 decision) with Trial Court that WI can have such a requirement

- 9<sup>th</sup> Circuit Court of Appeals (WA, OR, CA, NV, AZ, ID, MT) has decided this question exactly opposite.

(2000's) OMIC reaches out to and meets with OCI on issue, but OCI refuses to move off position.

(2/18/13) OMIC and PPM meet with OCI to discuss, as requested, propose two alternatives by letter dated 2/25/13.

(3/21/13) OCI responds with internal memo dated 3/5/13.

(4/25/13) OMIC CEO and PPM Gen Counsel meet directly with OCI to discuss concerns.

(5/9/13) Receiving no followup from OCI, OMIC/PPM offer two more alternatives designed to address concerns raised by OCI at 4/25 meeting.

(2013) OCI statistics show Medical Malpractice insurance market – 4 companies sell 78%

(2013) Wisconsin is ONLY state with such a requirement – ONLY state where OMIC cannot sell medical malpractice liability coverage in accordance with Congressional intent of LRRRA.



# State of Wisconsin / OFFICE OF THE COMMISSIONER OF INSURANCE

Scott Walker, Governor  
Theodore K. Nickel, Commissioner  
[Wisconsin.gov](http://Wisconsin.gov)

Legal Unit  
125 South Webster Street • P.O. Box 7873  
Madison, Wisconsin 53707-7873  
Phone: (608) 267-9586 • Fax: (608) 264-6228  
Web Address: [oci.wi.gov](http://oci.wi.gov)

Date: March 5, 2013  
To: Dan Schwartzer  
Deputy Commissioner  
From: Julie E. Walsh  
Attorney  
Subject: Risk Retention Groups and Medical Malpractice Coverage

Thank you for the opportunity to provide you with the requested bullet points responsive to a potential amendment to s. 655.23, Wis. Stats., broadening the requirements to include risk retention groups ("RRGs"). In order to ensure you have sufficient information on this topic, I reviewed Wisconsin laws, regulations and case law responsive to the discussion. The following will provide you with bullet points on the issue and also very brief background information on each of the bullet points related to the potential statutory amendment.

## Bullet Points:

1. Allowing RRGs to enter into the medical malpractice insurance market is contrary to the ruling in *Ophthalmic Mutual Insurance Company v. Musser et al.* (1998, US App Lexis 9017) ("Ophthalmic Mutual"). The Ophthalmic Mutual case is still good law throughout the US and set the precedent throughout the federal circuit courts on the issue of ability of states to regulate the insurance industry in accordance with federal RRGs law.<sup>1</sup> To date, I am unaware of providers having raised concerns regarding access or affordability of medical malpractice coverage – concerns that were the impetus behind the federal RRGs law. The legislative intent behind the creation of the Fund was to stabilize the market and enhance the affordability of medical malpractice coverage. The Fund and the medical malpractice insurance market are stable with little solvency risks and have competitive pricing for coverage. In addition, the Wisconsin Health Care Liability Insurance Plan, a medical malpractice insurer of last resort, ensures all providers are able to obtain coverage for medical malpractice in the state alleviating access issues.
2. In Wisconsin the medical malpractice market is robust with 24 authorized insurers and self-insurers conducting business. Since the amendment to s. 655.23, Wis. Stats., in 1990, the market for medical malpractice insurance has diversified with increasing competition. While three carriers hold 57% of the market, 21 carriers and self-insurers

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<sup>1</sup> The only exception was a case that criticized the Ophthalmic Mutual court and that is materially distinguishable from the Ophthalmic Mutual case.

compete for the remaining 43% of the market. Each of the carriers would be at a competitive disadvantage if RRGs directly compete without having to comply with Wisconsin regulations. Since no other state has a Fund, no other state's financial responsibility regulatory structure would include the requirements Wisconsin has for medical malpractice carriers. In addition, Wisconsin has market conduct requirements that are not parallel in any other state pertaining to the Fund, including but not limited to prior approval of policy forms with all endorsements and manuscripts; limitations on the use of deductibles, requirements for coverage by the insurer for legal fees and defense costs, prohibition of allowing the provider to decide whether to settle a claim. Permitting RRGs to write medical malpractice insurance without similar financial responsibility requirements will put the other 24 insurers at a disadvantage. Concerns were raised through the NAIC (and that were highlighted in the 2011 GAO report<sup>2</sup>), that some states are lowering financial standards such as lower minimum capitalization requirements, for RRGs as a means to attract RRGs to their states. This lowering of financial standards by domiciliary states renders the playing field for authorized insurers uneven.

? which?  
but there would apply if ch. 655 applies to them

3. Healthcare providers would be put at risk for \$1 million dollars plus defense and legal costs if an RRG were insolvent since the Wisconsin Insurance Security Fund does not apply to RRG coverage. This could also directly affect Wisconsin citizens who may not be able to receive appropriate compensation for harm rendered by a healthcare provider. Currently, the stability in the marketplace and ready access to affordable coverage in addition to the Fund are used as recruitment tools for entities such as Marshfield Clinic. When other states experienced a crisis in the medical malpractice arena in the mid-2000s, Wisconsin was one of five states that did not experience a crisis due in part to the Fund. The Fund aids in keeping medical malpractice coverage affordable for providers since it attaches at \$1 million and is unlimited. The Fund is precluded from dropping below the \$1 million attachment point by statute as the Fund is not triggered until at least one limit is paid.
4. In Wisconsin registered RRGs are not providing medical malpractice coverage for purposes of ch. 655, Wis. Stats. Surplus lines agents may only place coverage identified in s. Ins 6.75, Wis. Admin. Code (except for title, mortgage guaranty and workers compensation insurance). Medical malpractice is not included on the list of allowable coverage, although liability coverage is permitted. I could not confirm the assertion that several nondomestic RRGs, including American Association of Orthodontists Insurance Company (AZ domestic), Healthcare Industry Liability Reciprocal Company (DC domestic) and Mental Health RRG (Vermont domestic), are writing health care professional liability insurance. According to the Arizona Department of Insurance website, American Association of Orthodontists Ins. Co., is authorized to write "casualty without workers compensation and employer liability coverage." Arizona uses the term professional liability, which includes medical malpractice. If this company is issuing professional liability in Wisconsin or elsewhere it has not sought approval from its domiciliary state. This raises concern regarding regulatory oversight of RRGs that nondomiciliary states such as Wisconsin must rely.
5. Not all registered RRGs are currently compliant with Wisconsin requirements for reporting premium tax through the RRG's surplus lines agent or broker. Our Bureau of Financial Analysis and Examinations has identified that when tax forms are submitted

<sup>2</sup> Risk Retention Groups: Clarifications Could Facilitate States' Implementation of the Liability Risk Retention Act (GAO-12-16, December 8, 2011).

without identification of the licensed agent as required, there may be direct placement of coverage occurring. Filing in this manner is contrary to Wisconsin regulation. As proposed, an RRG could place medical malpractice coverage in this state without use of a licensed agent if the RRG's state of domicile permits direct placement.

#### Brief Legal Background:

The Products Liability Risk Retention Act ("PLRRA") was aimed at encouraging the creation of RRGs due to the lack of product liability insurance at affordable rates. The PLRRA permitted product manufacturers to purchase group insurance at more favorable rates or to self-insure through insurance cooperatives called RRGs. The PLRRA preempted certain state laws and regulations that put up roadblocks to nationwide distribution of this type of product. Congress broadened the PLRRA in 1986 with the Liability Risk Retention Act ("LRRRA") extending the multiple employer group insurance cooperatives to professional groups including health care providers. The LRRRA preempted state laws or regulations, other than the domiciliary state, that regulated the operation of RRGs or tended to discriminate against the RRGs.

As to Wisconsin law, in 1990 the Legislature amended the financial solvency provision of s. 655.23 (3) (a), Wis. Stats., to its current form requiring the insurers be authorized to do business in the state or self-insure. A suit was brought by Ophthalmic Mutual Insurance Company ("OMIC"), on behalf of the ophthalmologists within Wisconsin for whom OMIC had previously provided medical liability coverage. Based upon the interpretation of LRRRA, the court ruled that the Office's requirement fell within the federal law's exception under 15 U.S.C. s. 3905 (d). The section allows a state authority to specify acceptable means of demonstrating financial responsibility when financial responsibility is a condition for obtaining a license in order to conduct specific activities. The case was ultimately appealed to the US Court of Appeals for the Seventh Circuit and upheld and continues to be followed and referenced in cases throughout the US. Recently, in 2000 the 9<sup>th</sup> Circuit US Court of Appeals based in Oregon, disagreed with the 7<sup>th</sup> Circuits' analysis, however the laws and issues raised in the 9<sup>th</sup> Circuit case where different from the Ophthalmic Mutual matter in that the Oregon law in question directly prohibited RRGs from selling reimbursement insurance policies to automobile dealers.

> no change

#### Regulation of RRGs in Wisconsin:

In Wisconsin RRGs can register with the Office and conduct business as unauthorized surplus lines insurers. All entities identified in the list provided are registered in accordance with Wisconsin requirements. RRGs pay premium tax through a licensed surplus lines agent at the rate of 3% of gross premium, but are not subject to reciprocal and retaliatory taxes.<sup>3</sup> In 2011 Wisconsin collected approximately \$293,000 in premium taxes and the Bureau of Financial Analysis and Examinations collects and tracks premium taxes for all surplus lines agents and separately tracks premium taxes from RRGs. Each RRG must comply with domiciliary state financial requirements and provide the Office with annual NAIC statement filings, quarterly statutory filings, and annual audited financial report as filed with the state of domicile, as well as subsequent amendments to the plan of operation or feasibility studies as required by the Office.

\*

<sup>3</sup> The Office's website includes information on how to register and premium tax requirements. Many RRGs fail to comply with filing requirements by submitting the tax forms without identifying a licensed surplus lines agent.



✓  
Solvency is a concern for RRGs. As you are aware, the Insurance Security Fund under ch. 646, Wis. Stats, does not include coverage issued by RRGs. Unlike all current medical malpractice insurance carriers, if a RRG becomes insolvent there is no coverage for the health care provider for the first \$1 million dollars of a claim. RRGs need only file annual financial reports as filed with their domiciliary state which would not include Wisconsin's Compulsory and Security Surplus form – a form that provides a great deal of information regarding not only the reserves but also how the entity is managing its risks. The Office tracks an entity over time to determine if early intervention is needed so that the entity does not become insolvent. Under LRRA, Wisconsin relies solely upon the domiciliary state for monitoring the financial health of RRGs and Wisconsin is precluded from requiring additional solvency information. Additionally, unless the domiciliary state requires, Wisconsin cannot impose the duties for surplus lines agents and policies the requirements contained within ss. 618.41 (4), (7m), (8), (9) or (10), Wis. Stats.<sup>4</sup>

The types of products sold by RRGs are defined in s. Ins 6.75, Wis. Admin. Code, with exceptions contained in s. Ins 6.17 (2), Wis. Admin. Code. If a RRG was offering professional liability coverage in Wisconsin it is assumed that proper disclosure is being given that such coverage currently does not comply with ch. 655, Wis. Stats. Policy forms are not submitted by RRGs and may or may not be required by the RRGs domiciliary state, so Wisconsin cannot monitor that the products offer are compliant.

←

#### Competition in Medical Malpractice Market:

The Wisconsin market for professional liability medical malpractice insurance is growing. As of September 30, 2012, 24 insurers and self-insurers covered all Wisconsin health care providers subject to ch. 655, Wis. Stats. Market share ranged from 22.1% down to .01% covering 16,218 health care providers. Three insurers held approximately 57% of the market.

A 2011 Government Accountability Office Report on RRGs, (GAO-12-16, December 8, 2011), ("Report") reviewed the role of RRGs between 2004 and 2010. Growth in the medical

<sup>4</sup> The requirements for the paragraphs cited within s. 618.41 (12), Wis. Stats., are summarized as follows:

- (4) Requires insurer and any agent or broker to provide the policyholder with a statement informing the policyholder that the insurer is an unauthorized insurer and not regulated in this state.
- (7m) Requires risk purchasing groups to use licensed surplus lines agents to solicit liability insurance from an unauthorized insurer.
- (8) Contains three provisions, the first restricts an agent or broker from soliciting for an unauthorized insurer if the insurer is (a) financially unsound, engages in unfair practices or is otherwise substandard; (b) the agent or broker fails to give the applicant written notice of the insurer's deficiencies and (c) the agent or broker either knows of, or fails to adequately investigate, the insurer's financial condition and general reputation. The second subparagraph requires the agent or broker to keep a copy of the notice for at least 5 years. The final provision defines "financially sound" to mean that an insurer must be able to satisfy standards comparable to those applied under the laws of this state to authorized insurers, unless this state is the insured's home state, in which case s. 618.416, Stats., applies.
- (9) Contains two provisions; the first of which requires that the policy reflect the name of the agent or broker and include a notice that the insurer is an unauthorized insurer and that there is a 3% premium tax charged. The second provision requires a description of the subject of the insurance, the coverage type, conditions and terms, the premium charged and premium taxes to be collected from the policyholder, and the name and address of the policyholder and insurer.
- (10) Requires the agent or broker to deliver to the policyholder evidence of the insurance.

malpractice area was noted especially among states experiencing a medical malpractice crisis.<sup>5</sup> The Report noted that of all medical professional liability written in 2010, approximately \$10.6 billion, 13% was written by RRGs. Professional liability coverage to nursing homes is among the areas in which many RRGs are offering coverage. In Wisconsin very few nursing homes participate in the Fund, as only those whose operations are combined as a single entity with a hospital are considered eligible. (See, s. 655.002 (2) (j), Wis. Stats.) If growth were desired in the nursing home arena, the proposed amendment would not accomplish the desired outcome.

Separately the Report also discussed financial solvency of RRGs on a national basis reflecting in part that RRGs were hit during the financial crisis, especially those RRGs that were capitalized by letters of credit from financial institutions. It was noted in the Report that assertions were made alleging that several states relaxed financial solvency requirements in an attempt to attract RRGs or permitted RRGs to be licensed as captives with less restrictive regulatory requirements, including permitting initial capitalization through letters of credit. Eighty percent (80%) of RRGs are domiciled in one of 5 states and the District of Columbia, as of 2010, yet wrote the majority of their business outside the state of domicile. Additionally, with no protection from the Insurance Security Fund, there is greater risk to Wisconsin providers and healthcare consumers if an RRG were to be rendered insolvent. Further, although states are permitted to regulate financial responsibility, relaxed solvency requirements may introduce volatility into Wisconsin's stable market at a time when health reform is also causing waves of uncertainty may be ill timed.

The proposed amendment permits RRGs licensed in any state and registered in Wisconsin to offer medical malpractice coverage. Unlike all other coverage offered by authorized insurers, the proposed amendment would leave RRG medical malpractice coverage outside Wisconsin specific laws and regulations since LRRA would fully apply. Since no other state has a Fund, no other state's regulatory structure would include the unique requirements Wisconsin has for medical malpractice carriers (i.e. prior approval of policy forms with all endorsements and manuscripts; limitations on the use of deductibles, requirements for coverage by the insurer for legal fees and defense costs, prohibition of allowing the provider to decide whether to settle a claim). With these types of discrepancies, permitting RRGs to write medical malpractice coverage will competitively disadvantage the current 24 insurers and self-insurers.

Under the proposed amendment if an RRG were rendered insolvent health care providers would be put at risk for \$1 million dollars plus defense and legal costs since the Wisconsin Insurance Security Fund does not apply to RRG coverage. This could also directly affect Wisconsin citizens who may not be able to receive appropriate compensation for harm. Currently the solvency of the Fund, the favorable jury verdicts and affordable medical malpractice coverage are recruitment tools for entities such as Marshfield Clinic. When other states experienced a crisis in the medical malpractice arena in the mid-2000s, Wisconsin was one of five states that did not experience a crisis in part due to the Fund. The Fund aids in keeping medical malpractice coverage affordable and accessible to providers since it attaches at \$1 million and is unlimited.

<sup>5</sup> Wisconsin was one of five states that did not experience a crisis in the medical malpractice market in large part due to the existence of the Wisconsin Injured Patients and Families Compensation Fund.

Summary:

The current amendment proposal should be scrutinized carefully in light of the potential regulatory challenges, competitive impact to the marketplace and domestic insurers, and potential negative financial exposure that an insolvency of a medical malpractice RRG would create for Wisconsin health care providers and consumers.

Please let me know if I may be of further assistance.

## Kahler, Pam

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**From:** Walsh, Julie E - OCI <Julie.Walsh@wisconsin.gov>  
**Sent:** Friday, August 02, 2013 6:18 AM  
**To:** Kahler, Pam  
**Subject:** Re: Risk retention groups

Pam,

You are correct on both fronts. We have presented them with licensing options and had not heard back since our last discussion in spring. Ophthalmic Mutual case is still good law on this issue.

Please let me know if I can be of further assistance!

Julie E. Walsh  
Senior Attorney  
Wisconsin Office of the Commissioner of Insurance  
[Julie.Walsh@wisconsin.gov](mailto:Julie.Walsh@wisconsin.gov)  
Ph: (608)264-8101  
Fax (608)264-6228  
Mobil (608)417-0281

\*\*\*\*CONFIDENTIAL\*\*\*\*\*

This communication is intended to be transmitted to or from the OCI legal unit and may contain information that is privileged, confidential and protected by the attorney-client, attorney work product or s. 601.465, Wis. Stat., privileges.

On Aug 1, 2013, at 4:20 PM, "Kahler, Pam" <[Pam.Kahler@legis.wisconsin.gov](mailto:Pam.Kahler@legis.wisconsin.gov)> wrote:

Hi, Julie:

I've been told I can talk to you about this issue. As you are probably aware, Nigren's office is interested in a bill that would allow out-of-state risk retention groups (RRGs) to provide health care liability coverage under ch. 655. I've been looking over the materials and have some idea of what is going on, but I have a very basic question at the outset that Nigren's office can't answer. Since a policy under ch. 655 must be "issued by an insurer authorized to do business in this state," why couldn't an out-of-state RRG (which is an "insurer" under s. 600.03 (27)) apply under s. 618.11 for a certificate of authority to do an insurance business in this state? Is it that the RRGs refuse to or believe they should not have to because federal law preempts that regulation by a state that is not the state in which the RRG is chartered? Just curious. Thanks!

Pam

*Pamela J. Kahler*  
*Legislative Attorney*  
*Legislative Reference Bureau*  
608-266-2682



State of Wisconsin  
2013 - 2014 LEGISLATURE



LRB-2708

PJK:

PI  
Jld  
✓ in not run

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

would like by 8-19

(in 8-12)  
D-note

LPS-run  
spellcheck

- ✓
- 1 **AN ACT** relating to: authorizing out-of-state risk retention groups to provide
- 2 health care liability insurance.

***Analysis by the Legislative Reference Bureau***

The health care liability provisions of the statutes require certain health care providers to carry health care liability (medical malpractice) insurance with liability limits of at least \$1,000,000 for each occurrence and at least \$3,000,000 for all occurrences in a policy year. Any portion of a medical malpractice claim that exceeds the policy limits is paid by the Injured Patients and Families Compensation Fund for health care providers that are subject to the health care liability provisions. Under current law, a health care provider may satisfy the requirement for liability coverage either by being covered under a policy issued by an insurer authorized to do business in this state or by qualifying as a self-insurer in accordance with conditions established by the commissioner of insurance (commissioner).

This bill authorizes a health care provider to satisfy the liability coverage requirement by being covered under a policy issued by an insurer that is a risk retention group that is domiciled in another state. Although not authorized to do business in this state, the risk retention group must be registered with the commissioner and approved by the commissioner to provide health care liability insurance coverage to health care providers under the health care liability provisions of the statutes. Under the bill, any such risk retention group would be subject to all the requirements under the health care liability provisions of the statutes that apply to other insurers that provide health care liability insurance coverage to health care providers under the health care liability provisions of the statutes, including policy

is

approval by the commissioner, assessments for the peer review council, mandated payment of specified costs in the settlement or defense of claims, and reporting requirements related to claims paid. Current law defines a risk retention group with the meaning given under federal law, which is, generally, a corporation or limited liability company whose primary activity is assuming and spreading the liability exposure of its group members; that is chartered or licensed as a liability insurance company under the laws of a state; that has as its owners only persons who comprise the membership of the group and who are provided insurance by the group, or that has as its sole owner an organization that has as its members only persons who comprise the membership of the group and as its owners only persons who comprise the membership of the group and who are provided insurance by the group; and 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, services, or operations.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

SECTION 1. 618.43 (1) (a) 2. of the statutes is amended to read:

618.43 (1) (a) 2. The insurance is transacted by an unauthorized insurer which that is a risk retention group, including a foreign risk retention group authorized to provide health care liability insurance under s. 655.23 (3) (am) that has not been issued a certificate of authority under s. 618.12.

History: 1971 c. 260; 1975 c. 371 s. 50; 1979 c. 102 ss. 148, 237; 1987 a. 247; 2001 a. 65; 2011 a. 224.

\*\*\*\*NOTE: I believe this retains the status quo but eliminates any confusion over whether the out-of-state risk retention group is unauthorized or not.

SECTION 2. 655.001 (8c) of the statutes is created to read:

655.001 (8c) "Insurer" includes a foreign insurer that is a risk retention group that issues health care liability insurance under this chapter.

\*\*\*\*NOTE: This provision makes all of the provisions in ch. 655 that apply to insurers apply to out-of-state risk retention groups.

SECTION 3. 655.23 (3) (am) of the statutes is created to read:

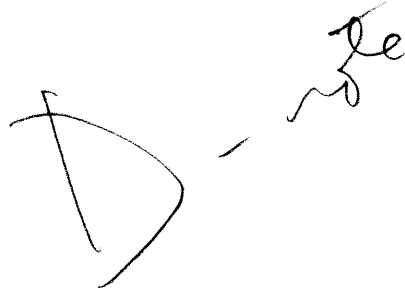
655.23 (3) (am) For purposes of par. (a), <sup>only</sup> a foreign insurer that is a risk retention group <sup>and</sup> that has not been issued a certificate of authority under s. 618.12 is authorized

1 to do business in this state if the risk retention group is registered with the  
2 commissioner and approved by the commissioner to provide health care liability  
3 insurance coverage under this chapter.✓

\*\*\*\*NOTE: If an out-of-state risk retention group✓ satisfies these requirements, a  
health care provider satisfies the financial responsibility requirements with a policy sold  
by the out-of-state risk retention group.

4

(END)



**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-2708/dn

PJK:.....

PI  
r m not needed

date

Although I have treated one of the following sections in the draft, please review the following sections to determine whether any more changes are needed due to a conflict or simply as a result of the authorization under this bill for foreign risk retention groups to provide health care liability insurance coverage under ch. 655: s. 601.41 (6)✓ and the sections referenced in that section, i.e., ss. 601.72, 618.41, 618.415, 618.43, 628.02, 628.03, and (especially) 628.48.✓

I have made risk retention groups that provide health care liability insurance under ch. 655 subject to the requirements under ch. 655 that other insurers are subject to. Is this your intention?

Pamela J. Kahler  
Senior Legislative Attorney  
Phone: (608) 266-2682  
E-mail: pam.kahler@legis.wisconsin.gov



**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2708/P1dn  
PJK:jld:rs

August 15, 2013

Although I have treated one of the following sections in the draft, please review the following sections to determine whether any more changes are needed due to a conflict or simply as a result of the authorization under this bill for foreign risk retention groups to provide health care liability insurance coverage under ch. 655: s. 601.41 (6) and the sections referenced in that section, i.e., ss. 601.72, 618.41, 618.415, 618.43, 628.02, 628.03, and (especially) 628.48.

I have made risk retention groups that provide health care liability insurance under ch. 655 subject to the requirements under ch. 655 that other insurers are subject to. Is this your intention?

Pamela J. Kahler  
Senior Legislative Attorney  
Phone: (608) 266-2682  
E-mail: [pam.kahler@legis.wisconsin.gov](mailto:pam.kahler@legis.wisconsin.gov)

**Kahler, Pam**

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**From:** Rude, Nels  
**Sent:** Monday, February 10, 2014 1:20 PM  
**To:** Kahler, Pam  
**Cc:** Evenson, Andrew  
**Subject:** FW: Draft review: LRB -2708/P1 Topic: Allow out-of-state risk retention groups to provide health care liability insurance  
**Attachments:** 13-2708/P1.pdf; DraftersNote1.pdf

Pam- Please jacket this for introduction. Senator Darling plans to author the companion bill.

Thank you

Nels

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**From:** LRB.Legal  
**Sent:** Thursday, August 15, 2013 8:34 AM  
**To:** Rep.Nygren  
**Subject:** Draft review: LRB -2708/P1 Topic: Allow out-of-state risk retention groups to provide health care liability insurance

**Following is the PDF version of draft LRB -2708/P1 and drafter's note.**



State of Wisconsin  
2013 - 2014 LEGISLATURE



LRB-2708/E  
PJK:jld:ps

ymr

~~PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION~~

203 Bio

SOON  
(in 2-10)  
up changes  
(except moving embedded notes)

Regen

- 1 AN ACT *to amend* 618.43 (1) (a) 2.; and *to create* 655.001 (8c) and 655.23 (3) (am)
- 2 of the statutes; **relating to:** authorizing out-of-state risk retention groups to
- 3 provide health care liability insurance.

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***Analysis by the Legislative Reference Bureau***

The health care liability provisions of the statutes require certain health care providers to carry health care liability (medical malpractice) insurance with liability limits of at least \$1,000,000 for each occurrence and at least \$3,000,000 for all occurrences in a policy year. Any portion of a medical malpractice claim that exceeds the policy limits is paid by the Injured Patients and Families Compensation Fund for health care providers that are subject to the health care liability provisions. Under current law, a health care provider may satisfy the requirement for liability coverage either by being covered under a policy issued by an insurer authorized to do business in this state or by qualifying as a self-insurer in accordance with conditions established by the commissioner of insurance (commissioner).

This bill authorizes a health care provider to satisfy the liability coverage requirement by being covered under a policy issued by an insurer that is a risk retention group that is domiciled in another state. Although not authorized to do business in this state, the risk retention group must be registered with the commissioner and approved by the commissioner to provide health care liability insurance coverage to health care providers under the health care liability provisions of the statutes. Under the bill, any such risk retention group is subject to all the requirements under the health care liability provisions of the statutes that apply to other insurers that provide health care liability insurance coverage under the health

care liability provisions of the statutes, including policy approval by the commissioner, assessments for the peer review council, mandated payment of specified costs in the settlement or defense of claims, and reporting requirements related to claims paid. Current law defines a risk retention group with the meaning given under federal law, which is, generally, a corporation or limited liability company whose primary activity is assuming and spreading the liability exposure of its group members; that is chartered or licensed as a liability insurance company under the laws of a state; that has as its owners only persons who comprise the membership of the group and who are provided insurance by the group, or that has as its sole owner an organization that has as its members only persons who comprise the membership of the group and as its owners only persons who comprise the membership of the group and who are provided insurance by the group; and 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, services, or operations.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

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*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1       **SECTION 1.** 618.43 (1) (a) 2. of the statutes is amended to read:

2       618.43 (1) (a) 2. The insurance is transacted by an unauthorized insurer ~~which~~  
3       that is a risk retention group, including a foreign risk retention group authorized to  
4       provide health care liability insurance under s. 655.23 (3) (am) that has not been  
5       issued a certificate of authority under s. 618.12.

\*\*\*NOTE: I believe this retains the status quo but eliminates any confusion over whether the out-of-state risk retention group is unauthorized or not.

6       **SECTION 2.** 655.001 (8c) of the statutes is created to read:

7       655.001 (8c) "Insurer" includes a foreign insurer that is a risk retention group  
8       that issues health care liability insurance under this chapter.

\*\*\*NOTE: This provision makes all of the provisions in ch. 655 that apply to insurers apply to out-of-state risk retention groups.

9       **SECTION 3.** 655.23 (3) (am) of the statutes is created to read:

10       655.23 (3) (am) For purposes of par. (a) only, a foreign insurer that is a risk  
11       retention group and that has not been issued a certificate of authority under s. 618.12

1 is authorized to do business in this state if the risk retention group is registered with  
2 the commissioner and approved by the commissioner to provide health care liability  
3 insurance coverage under this chapter.

\*\*\*\*NOTE: If an out-of-state risk retention group satisfies these requirements, a  
health care provider satisfies the financial responsibility requirements with a policy sold  
by the out-of-state risk retention group.

4 (END)

**Barman, Mike**

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**From:** LRB.Legal  
**To:** Rep.Nygren  
**Subject:** Draft review: LRB -2708/1 Topic: Allow out-of-state risk retention groups to provide health care liability insurance  
**Attachments:** 13-2708/1

**State of Wisconsin - Legislative Reference Bureau**  
**One East Main Street - Suite 200 - Madison**

**The attached draft was prepared at your request. Please review it carefully to ensure that it satisfies your intent.** If you have any questions concerning the draft or would like to have it redrafted, please contact Pamela J. Kahler, Senior Attorney, at (608) 266-2682, at [pam.kahler@legis.wisconsin.gov](mailto:pam.kahler@legis.wisconsin.gov), or at One East Main Street, Suite 200.

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**Per instructions from the drafting attorney ... we will jacket this draft for the Assembly and send it (by page) to your office this afternoon.**

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If the last paragraph of the analysis states that a fiscal estimate will be prepared, the LRB will submit a request to DOA when the draft is introduced. You may obtain a fiscal estimate on the draft prior to introduction by contacting our program assistants at [LRB.Legal@legis.wisconsin.gov](mailto:LRB.Legal@legis.wisconsin.gov) or at (608) 266-3561. If you requested a fiscal estimate on an earlier version of this draft and would like to obtain a fiscal estimate on the current version before it is introduced, you will need to request a revised fiscal estimate from our program assistants.

**Please call our program assistants at (608) 266-3561 if you have any questions regarding this email.**