NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALLIED PROFESSIONALS INSURANCE COMPANY, A Risk Retention Group, Inc., an Arizona corporation, Plaintiff-Appellant, v. MICHAEL SCOTT ANGLESEY, M.D.; ELISEO GUTIERREZ; VERONICA GUTIERREZ, Defendants-Appellees.	No. 15-55231 D.C. No. 8:14-cv-00665-CBM-SH MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted February 7, 2017
Pasadena, California

Before: THOMAS, Chief Judge, NGUYEN, Circuit Judge, and AMON,** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Carol Bagley Amon, United States District Judge for the Eastern District of New York, sitting by designation.

Allied Professionals Insurance Company ("APIC") appeals the district court's dismissal for lack of standing of its complaint against Dr. Michael Anglesey, his patient, Eliseo Gutierrez, and the patient's wife, Veronica Gutierrez ("Defendants"). We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand. Because the parties are familiar with the history of this case, we need not recount it here.

The district court erred by dismissing the case for lack of standing. APIC's complaint sought: (1) declaratory relief as to the rights and duties it owed to each of the Defendants; (2) rescission of the 2012 and 2013 insurance policies; and (3) compulsory arbitration of "all claims that Defendants may have against APIC in any way arising out of or relating to the 2013 Policy or to Dr. Anglesey's alleged malpractice." At oral argument, APIC clarified that the claims it sought to compel were only for "rescission," a declaration of the "assignability of the contract," and "coverage." Therefore, we need not decide whether APIC lacked standing to bring any claims other than those three identified by APIC at oral argument.

For an insurer to have Article III standing to pursue a declaratory judgment that a policy was not in effect, the insurer need only "allege it was threatened with injury by virtue of being held to an invalid policy." *Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1222 n.2 (9th Cir. 1998) (en banc). In addition, an insurer has standing to seek declaratory relief in a coverage dispute with its insured. "Indeed, we have consistently held that a dispute between an insurer

and its insureds over the duties imposed by an insurance contract satisfies Article III's case and controversy requirement." *Id.* (first citing *American Nat'l Fire Ins. v. Hungerford*, 53 F.3d 1012, 1015–16 (9th Cir. 1995); then citing *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 144 (9th Cir. 1994)).

Here, Anglesey tendered defense of the malpractice action asserted against him to APIC, and it denied coverage. This denial created an actual dispute between APIC and Anglesey as to whether coverage existed under the policy. APIC therefore possessed Article III standing to pursue its declaratory judgment action.[1] For the same reason, APIC had standing to bring a claim against Anglesey for judicial rescission of the insurance contract. *See Sec. Life Ins. Co. of Am. v. Meyling*, 146 F.3d 1184, 1191 (9th Cir. 1998) (noting that federal courts have routinely identified a right to pursue insurance rescission).

Relatedly, because APIC had standing to bring claims for declaratory relief and rescission against Anglesey, APIC also had standing to seek to compel Anglesey to arbitrate those two claims. *See* 9 U.S.C. § 4 (authorizing a United States district court to entertain a petition to compel arbitration if the court would have jurisdiction, "save for [the arbitration] agreement," over "a suit arising out of the controversy between the

[1] Indeed, we note that the insured and the underlying plaintiffs have filed a declaratory relief action in Washington. It would certainly be an odd result to hold that the insurer lacked standing to pursue the very declaratory relief sought by the insured and underlying plaintiffs.

parties"); *Int'l Bhd. of Elec. Workers, AFL-CIO Local 1245 v. Citizens Telecomms. Co. of Cal.*, 549 F.3d 781, 788 (9th Cir. 2008) (explaining that refusal to arbitrate is "an invasion of a legally protected interest" for purposes of Article III).

However, our conclusion that APIC had standing to bring claims for declaratory relief and rescission against *Anglesey* does not end the inquiry, because we must also consider whether APIC had standing to bring those claims against the *Gutierrezes*, as Anglesey's putative assignees. Defendants argue that the risk APIC would be sued by the Gutierrezes as Anglesey's assignees was not sufficiently imminent to create an injury in fact at the time APIC filed this case because, in the underlying tort case between Anglesey and the Gutierrezes, the settlement assigning Anglesey's claims against APIC to the Gutierrezes had not yet been approved by the court. However, we conclude that the risk of a lawsuit from the Gutierrezes was sufficiently imminent to satisfy Article III because, according to APIC's complaint, APIC and Anglesey had entered into and sought court approval of a settlement assigning his claims to the Gutierrezes, and Anglesey's attorney had notified APIC that Defendants intended to execute a consent judgment whereby the Gutierrezes would agree to not execute the judgment against Anglesey, but instead seek to recover from APIC. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341, 189 L. Ed. 2d 246 (2014) ("An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk

that the harm will occur.' " (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 n.5 (2013)). Indeed, this risk of imminent harm came to fruition when Defendants' settlement was later reinstated and approved by the Washington court.

The parties assert other theories and highlight other issues involved in this case, as well as in the related litigation in Washington. However, we need not—and do not—reach any of those questions. The only question before us is whether the insurer had Article III standing, which it did.

REVERSED AND REMANDED.

RCWA 48.92.030

Requirements for chartering

(1) A risk retention group seeking to be chartered in this state must be chartered and licensed as a liability insurance company authorized by the insurance laws of this state and, except as provided elsewhere in this chapter, must comply with all of the laws, rules, regulations, and requirements applicable to the insurers chartered and licensed in this state and with RCW 48.92.040 to the extent the requirements are not a limitation on laws, rules, regulations, or requirements of this state.

(2) A risk retention group chartered in this state shall file with the department and the National Association of Insurance Commissioners an annual statement in a form prescribed by the National Association of Insurance Commissioners, and in electronic form if required by the commissioner, and completed in accordance with its instructions and the National Association of Insurance Commissioners accounting practices and procedures manual.

(3) Before it may offer insurance in any state, each domestic risk retention group shall also submit for approval to the insurance commissioner of this state a plan of operation or a feasibility study. The risk retention group shall submit an appropriate revision in the event of a subsequent material change in an item of the plan of operation or feasibility study, within ten days of the change. The group may not offer any additional kinds of liability insurance, in this state or in

any other state, until a revision of the plan or study is approved by the commissioner.

(4) At the time of filing its application for charter, the risk retention group shall provide to the commissioner in summary form the following information: The identity of the initial members of the group; the identify of those individuals who organized the group or who will provide administrative services or otherwise influence or control the activities of the group; the amount and nature of the initial capitalization; the coverages to be afforded; and the states in which the group intends to operate. Upon receipt of this information, the commissioner shall forward the information to the National Association of Insurance Commissioners. Providing notification to the National Association of Insurance Commissioners is in addition to and is not sufficient to satisfy the requirements of RCW 48.92.040 or this chapter.

48.92.040

Required acts – Prohibited practices

Risk retention groups chartered and licensed in states other than this state and seeking to do business as a risk retention group in this state shall comply with the laws of this state as follows:

(1) Before offering insurance in this state, a risk retention group shall submit to the commissioner on a form prescribed by the National Association of Insurance Commissioners:

(a) A statement identifying the state or states in which the risk retention group is chartered and licensed as a liability insurance company, date of chartering, its principal place of business, and any 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 RCW 48.92.020(11);

(b) A copy of its plan of operations or a feasibility study and revisions of the plan or study submitted to its state of domicile: PROVIDED, HOWEVER, That the provision relating to the submission of a plan of operation or a feasibility study shall not apply with respect to any line or classification of liability insurance which: (i) Was defined in the federal Product Liability Risk Retention Act of 1981 before October 27, 1986; and (ii) was offered before that date by any risk retention group which had been chartered and operating for not less than three years before that date;

(c) The risk retention group shall submit a copy of any revision to its plan of operation or feasibility study required under RCW 48.92.030(3) at the same time that the revision is submitted to the commissioner of its chartering state; and

(d) A statement of registration which designates the commissioner as its agent for the purpose of receiving service of legal documents or process.

(2) Any risk retention group doing business in this state shall submit to the commissioner:

(a) 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;

(b) A copy of each examination of the risk retention group as certified by the commissioner or public official conducting the examination;

(c) Upon request by the commissioner, a copy of any information or document pertaining to an outside audit performed with respect to the risk retention group; and

(d) Any information as may be required to verify its continuing qualification as a risk retention group under RCW 48.92.020(11).

(3)(a) A risk retention group is liable for the payment of premium taxes and taxes on premiums of direct business for risks resident or located within this state, and shall report on or before March 1 st of each year to the commissioner the direct premiums written for risks resident or located within this state. The risk retention group is subject to taxation, and applicable fines and penalties related thereto, on the same basis as a foreign admitted insurer.

(b) To the extent insurance producers are utilized under RCW 48.92.120 or otherwise, they shall report to the commissioner the premiums for direct business for risks resident or located within this state that the licensees have placed with or on behalf of a risk retention group not chartered in this state.

(c) To the extent insurance producers are used under RCW 48.92.120 or otherwise, an insurance producer shall keep a complete and separate record of all policies procured from each risk retention group. The record is open to examination by the commissioner, as provided in chapter 48.03 RCW. These records must include, for each policy and each kind of insurance provided thereunder, the following:

(i) The limit of liability;

(ii) The time period covered;

(iii) The effective date;

(iv) The name of the risk retention group that issued the policy;

(v) The gross premium charged; and

(vi) The amount of return premiums, if any.

(4) Any risk retention group, its appointed insurance producers and representatives, shall be subject to any and all unfair claims settlement practices statutes and regulations specifically denominated by the commissioner as unfair claims settlement practices regulations.

(5) Any risk retention group, its appointed insurance producers and representatives, shall be subject to the provisions of chapter 48.30 RCW pertaining to deceptive, false, or fraudulent acts or practices. However, if the commissioner seeks an injunction regarding such conduct, the injunction must be obtained from a court of competent jurisdiction.

(6) 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 days after a request by the commissioner of this state. The examination shall be coordinated to avoid unjustified repetition and conducted in an expeditious manner and in accordance with the National Association of Insurance Commissioners' examiner handbook.

(7) Every application form for insurance from a risk retention group and every policy issued by a risk retention group shall contain in ten-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.

(8) The following acts by a risk retention group are hereby prohibited:

(a) The solicitation or sale of insurance by a risk retention group to any person who is not eligible for membership in that group; and

(b) 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.

(9) 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 the risk retention group, other than in the case of a risk retention group all of whose members are insurance companies.

(10) The terms of an insurance policy issued by a risk retention group may not provide, or be construed to provide, coverage prohibited generally by statute of this state or declared unlawful by the highest court of this state.

(11) A risk retention group not chartered in this state and doing business in this state shall 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 subsection (6) of this section.

Selected docket entries for case 18—56513

Generated: 10/07/2020 17:23:52

Filed	Document Description	Page	Docket Text
11/08/2018			Filed order (JACQUELINE H. NGUYEN and JOHN B. OWENS, Circuit Judges) in case no. 18–80092 on 11–8–2018: The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Within 14 days after the date of this order, petitioner shall perfect the appeal in accordance with Federal Rule of Appellate Procedure 5(d). [11083285] (RT)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALLIED PROFESSIONALS INSURANCE COMPANY, A Risk Retention Group, Inc., an Arizona corporation, Plaintiff-Appellant, v. MICHAEL SCOTT ANGLESEY; et al., Defendants-Appellees.	No. 18-80092 D.C. No. 8:14-cv-00665-CBM-SH Central District of California, Santa Ana ORDER (Filed Nov. 8, 2018)

Before: NGUYEN and OWENS, Circuit Judges.

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Within 14 days after the date of this order, petitioner shall perfect the appeal in accordance with Federal Rule of Appellate Procedure 5(d).

R.Appx. 16

CASE NOS.: 18-56513 & 18-56522

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALLIED PROFESSIONALS INSURANCE COMPANY, A RISK RETENTION GROUP.,
An Arizona Corporation,

Appellee – Cross-Appellant

v.

MICHAEL SCOTT ANGLESEY, M.D., et al.,

Appellants – Cross-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
D.C. No. 8:14-cv-00665-CBM-SH

NATIONAL RISK RETENTION ASSOCIATION'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLEE, APIC, REGARDING FEDERAL LAW PREEMPTON OF STATE STATUTE PROHIBITING ARBITRATION CLAUSE IN RISK RETENTION GROUP CONTRACT OF INSURANCE

(Filed Jul. 11, 2019)

Joseph E. Deems CA SBN 64012
DEEMS LAW OFFICES, APC
16133 Ventura Blvd., Suite 1055
Encino, CA 91436
(818) 995-3274
Joe.deems@gmail.com

Attorneys for *Amicus Curiae*
NATIONAL RISK RETENTION ASSOCIATION

Pursuant to Federal Rule of Appellate Procedure 29(b) and Ninth Circuit Rule 29-3, *Amicus Curiae*, the National Risk Retention Association ("NRRA") respectfully moves the Court to grant it leave to file the attached *amicus curiae* brief in support of Appellee Allied Professionals Insurance Company, RRG (APIC) in its' contentions that the federal Liability Risk Retention Act (LRRA) preempts Washington state law prohibiting an arbitration clause in RRG insurance contract. In support of this motion, NRRA states:

MOVANT'S INTEREST

NRRA is a §501(c)(6) non-profit and non-partisan trade association that is dedicated to the development, education and promotion of U.S.-domiciled alternatives to traditional liability insurance, and specifically risk retention groups and purchasing groups which are enabled pursuant to 15 U.S.C. §§3901 et seq., i.e., the "*Liability Risk Retention Act*" (LRRA) adopted by the congress in 1986.

NRRA represents risk retention groups ("RRGs") and advocates the interests of its members before legislative bodies, regulatory and executive agencies, and

the courts. There are 220-plus RRGs currently in operation and doing business in all 50 of the United States. Approximately 98 of those RRGs are offering liability insurance in the State of Washington with additional numbers of RRGs offering liability insurance in the other eight (8) states in the Ninth Circuit.

An RRG is a liability insurance company owned and operated by its members, and those members must be its insureds. RRGs offer commercial liability insurance for the mutual benefit of these owner-insureds, who must be exposed to similar risks and be members of the same industry. RRGs insure over 450,000 owner-members and produce approximately $3.25 billion in annual premiums nationwide.

NRRA has taken a lead role as a participant in litigation affecting its members' interests. The NRRA has appeared as either plaintiff or as *amicus curiae* in many important risk retention cases, including *Attorneys Liab. Protection Soc'y, Inc. v. Ingaldsen Fitzgerald, P.C.*, 838 F.3d 976 (9th Cir. 2016) (*amicus brief filed*); *Wadsworth v. Allied Professionals Ins. Co.*, 748 F.3d 100 (2d Cir. 2014) (*same*); *Alliance of Nonprofits for Ins., Risk Retention Grp. v. Kipper*, 712 F.3d 1316 (9th Cir. 2013) (*same*); *Auto Dealers Risk Retention Grp., Inc. v. Poizner*, No. 07-2660 (E.D. Cal. Mar. 7, 2008) (*same*); *Attorneys' Liab. Assurance Soc'y, Inc. v. Fitzgerald*, 174 F. Supp.2d 619 (W.D. Mich. 2001) (*same*); *National Risk Retention Ass'n v. Brown*, 927 F. Supp. 195 (M.D. La. 1996) (Plaintiff); *Courville v. Allied Professionals Ins. Co.*, 174 So.3d 659 (La. Ct. App. 2015), *writ denied*, 179 So.3d 615 (La. 2015) (*same*); *Speece v. Allied Professionals Ins. Co.*, 289 Neb. 75 (Neb. Sup Crt., 2014) (*same*);

Restoration Risk Retention Group, Inc. v. Gutierrez, 880 F. 3d, 339, 2018 U.S. App. LEXIS 868, 2018 WL 388070 (7th Cir. 2018) (same); and *Reis, et al v. OOIDA Risk Retention Group, Inc.*, 814 S.E. 2d 338 (GA Sup. Crt., 2018) (same).

REASONS FOR GRANTING LEAVE TO FILE *AMICUS* BRIEF

NRRA has a keen interest in preserving the integrity of the LRRA and the availability of affordable, quality insurance to its members' insureds. In the scheme of today's insurance world, RRGs tend to be very small entities which depend heavily on the "preemptive" effect of the LRRA in order to provide affordable liability insurance through the elimination of duplicative and often conflicting regulatory requirements of 50 different states. NRRA believes the attached brief will significantly assist this Court because the legal issues to be decided will have a 9th Circuit, not to mention, *national* industry-wide regulatory impact well beyond the one insurance policy and one state law directly involved in the instant litigation proceeding. Proper resolution of the preemption issue presented in this case is therefore of the utmost importance to NRRA and its members in preserving the integrity of the congressional intent behind the LRRA legislation.

CONSENT OF THE PARTIES

In accordance with Ninth Circuit Rule 29-3, NRRA sought the consent of the parties to file its *amicus*

curiae brief. Attorneys for Plaintiff/Appellee APIC consented to the filing and attorneys for Defendant Appellants Anglesey, et al, declined to consent.

CONCLUSION

Part of NRRA's role has been to educate courts, regulators and legislators as to the global effect that one incorrect decision can have upon an entire industry, not to mention the confusion it causes when the LRRA "preemption" is not consistently applied by courts.

WHEREFORE, NRRA respectfully moves this Court to grant it leave to file the proposed *amicus curiae* brief in support of Respondent APIC's Response that Washington state law is preempted by the LRRA.

DATED this 11th day of July, 2019.

Respectfully submitted by:

/s/ *Joseph E. Deems*
Joseph E. Deems
CA State Bar No. 64012
Executive Director, NRRA
Deems Law Offices, APC
Attorneys for National Risk Retention Association

[Certificate Of Service Omitted]

R.Appx. 21

CASE NOS.: 18-56513 & 18-56522

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALLIED PROFESSIONALS INSURANCE COMPANY,
A RISK RETENTION GROUP.,
An Arizona Corporation,

Appellee – Cross-Appellant

v.

MICHAEL SCOTT ANGLESEY, M.D., et al.,

Appellants – Cross-Appellees

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
D.C. No. 8:14-cv-00665-CBM-SH

[PROPOSED] *AMICUS CURIAE* BRIEF OF THE NATIONAL RISK RETENTION ASSOCIATION IN SUPPORT OF APPELLEE ALLIED PROFESSIONALS INSURANCE COMPANY, A RISK RETENTION GROUP

(Filed Jul. 11, 2019)

Joseph E. Deems
DEEMS LAW OFFICES, APC
16133 Ventura Blvd., Suite 1055
Encino, CA 91436
(818) 995-3274
Joe.deems@gmail.com

Attorneys for *Amicus Curiae*
NATIONAL RISK RETENTION ASSOCIATION

---

[i] CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), *Amicus Curiae* National Risk Retention Association ("NRRA") hereby provides the following disclosure statements:

1. NRRA is a 501(c)(6) non-profit trade association;
2. NRRA offers no stock and there are no parent corporations or publicly owned corporations that own 10 percent or more of its stock;
3. No party's counsel authored this brief, in whole or part;
4. No party's counsel contributed money that was intended to fund preparing or submitting this brief; and
5. No person other than a*micus curiae* or its counsel contributed money that was intended to fund preparing or submitting this brief.

[ii] **TABLE OF CONTENTS**

Page

[iv] **TABLE OF AUTHORITIES**

CASES

[vi] **STATUTES**

OTHER AUTHORITIES & SOURCES

[1] I. STATEMENT OF INTEREST

The National Risk Retention Association ("NRRA") provides this Brief to discuss the background, purpose and significance of the Liability Risk Retention Act of 1986 ("LRRA")[1] and its impact, relative to foreign risk retention groups, and the effect of statutory insurance laws in non-domiciliary states which attempt to regulate such risk retention groups.[2] NRRA, formed in 1987, is a 501(c)(6) non-profit and non-partisan trade association, dedicated to the development, education and promotion of U.S.-domiciled alternatives to traditional liability insurance. NRRA represents more than 220 risk retention groups ("RRGs") and purchasing groups before legislative bodies, executive agencies, and courts throughout the nation.

NRRA has taken a lead role as a participant in litigation affecting its members' interests. NRRA is uniquely qualified to address the LRRA and the LRRA preemption issues disputed by Appellants in their appeal from the Amended Order.[3] (EOR 405.) NRRA has appeared as either plaintiff or as *amicus curiae* in many important risk retention cases, including, but

---

[1] 15 U.S.C. §§ 3901 *et seq*.

[2] See e.g., Wash. Rev. Code § 48.18.200(1)(b).

[3] In the District Court's Amended Order, Judge Marshall held: "This order involves a controlling question of law – whether the Liability Risk Retention Act preempts Wash. Rev. Code § 48.18.200(1)(b) as applied to [foreign] risk retention groups – as to which there is substantial ground for difference of opinion, and an immediate appeal from this order may materially advance the ultimate termination of the litigation. See 28 U.S.C. § 1292(b)." (Dkt 127 at 21-22)

not limited to, *Speece v. Allied Professionals Insurance Company*;[4] *Courville v. Allied Professionals Insurance* [2] *Company*;[5] *Alliance of Nonprofits for Insurance, Risk Retention Group v. Kipper*;[6] *Wadsworth v. Allied Professionals Insurance Company*;[7] *National Risk Retention Association v. Brown*;[8] *Attorneys' Liability Assurance Society Inc v Fitzgerald*;[9] *Attorneys Liab. Prot. Soc'y Inc v Ingaldson Fitzgerald, P. C*;[10] *Restoration Risk Retention Grp., Inc. v. Gutierrez*;[11] and most recently, *Reis v. OOIDA Risk Retention Group, Inc.*[12]

II. SUMMARY OF ARGUMENT

Thirty-nine years ago, American businesses and professionals were suffering from wildly escalating

---

[4] *Speece v. Allied Professionals Insurance Company*, 289 Neb. 75 (2014).

[5] *Courville v. Allied Professionals Ins. Co., a Risk Retention Group Inc. et al*., 174 So. 3d 659 (2015).

[6] *Alliance of Nonprofits for Ins., Risk Retention Group v. Kipper*, 712 F.3d 1316 (9th Cir. 2013).

[7] *Wadsworth v. Allied Professionals Ins. Co.*, 748 F.3d 100 (2d Cir. 2014).

[8] *Nat'l Risk Retention Ass'n v Brown*, 927 F. Supp. 195 (M.D. La. 1996).

[9] *Attorneys' Liability Assurance Soc'y Inc v Fitzgerald*, 174 F. Supp.2d 619 (W.D. Mich. 2001).

[10] *Attorneys Liab. Prot Soc'y Inc. v. Ingaldson Fitzgerald, P.C*., 838 F.3d 976 (9th Cir. 2016)

[11] *Restoration Risk Retention Grp., Inc. v. Gutierrez*, 880 F.3d 339, 2018 U.S. App. LEXIS 868, 2018 WL 388070 (2018).

[12] *Reis, et al v. OOIDA Risk Retention Group, Inc*., 814 S.E. 2d 338 (May 2018).

liability insurance premiums. Congress responded first by enacting the Products Liability Risk Retention Act ("PLRRA") in 1981, and then by expanding the PLRRA's reach to all forms of liability insurance with the 1986 Liability Risk Retention Act ("LRRA").[13]

Congress designed the PLRRA and the LRRA to encourage the formation and growth of risk retention groups ("RRGs"), a unique type of insurance carrier that differs from "traditional" carriers in that they are only allowed to sell insurance to group members, and not to the general public. Rather than create a federal regulatory scheme for RRGs, Congress decided that once an RRG is [3] chartered in one state—its home or "domiciliary" state—the RRG is allowed to operate nationwide exempt from nearly all other insurance laws of the other 49 states.

In this context, Appellants' contentions regarding the effect of Wash. Rev. Code § 48.18.200(1)(b) are actually highly misplaced. (footnote 2.) As will be demonstrated below, unless expressly exempted, any insurance regulations or statutes that are used to regulate the business or operations of a RRG are categorically preempted by the federal LRRA.

Appellee Allied Professionals Insurance Co., a Risk Retention Group, Inc. (APIC) is permitted, as a "foreign" RRG, to insure its members within Washington, exempt from nearly all Washington state laws regulating the business of insurance. There are

---

[13] 15 U.S.C. §§ 3901 et seq.

approximately **ninety-eight (98) risk retention groups offering liability insurance in Washington** (either domiciled in or registered as foreign RRGs).[14] This number does not necessarily include RRGs registered in Washington's surrounding states or, importantly, the *other* states within the 9th Circuit, which could or would be adversely affected by an erroneous decision.[15] Part of NRRA's role has been to educate courts, regulators and legislators as to the global effect that one incorrect decision can have upon an entire industry, not to mention the confusion it causes when the LRRA preemption is not consistently applied by courts.

Not all state laws *affecting* an LRRA insurer are tantamount to *regulating its operations*. Many state laws "affect" a foreign RRG—everything from laws requiring drivers' licenses to minimum wage statutes—but they do not "regulate" [4] the RRG's business or operations *as an insurer*. Laws of general applicability are not preempted, while those regulating the "business of insurance" are.[16]

To adopt Appellants' position would be to open the floodgates of *non-domiciliary* state control over foreign RRGs, including the use of state laws directly or

---

[14] See, Washington Office of the Insurance Commissioner at: https://fortress.wa.gov/oic/consumertoolkit/Search.aspx

[15] Alaska – 49; Arizona – 113; California – 107 (estimated); Hawaii – 110; Idaho – 68; Montana – 70; Nevada – 87(estimated); Oregon – 94; Washington – 98. Links to these other 9th Circuit states are set forth in Appendix "A."

[16] *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982)

indirectly to change or nullify the terms and conditions set forth in the RRGs' contract(s) of insurance, thereby defeating Congress' stated purpose in passing the LRRA. That purpose was to reduce the cost and increase the availability of commercial liability insurance, and enable "the efficient operation of risk retention groups." The recent ALPS decision from this Circuit is a case in point.[17] [18]

[5] **III. AS TO FOREIGN RRGS, THE LRRA PREEMPTS STATE LAWS REGULATING THE "BUSINESS OF INSURANCE," INCLUDING WASHINGTON'S "ANTI-ARBITRATION" STATUTE.**

Except as specifically enumerated, the LRRA preempts all state laws that "regulate the business of insurance" as applied to foreign RRGs.[19] This broad, preemptive sweep is clearly established by the text of the LRRA, its legislative history, and numerous cases from state and federal courts around the country.

First, Section 3902(a) of the LRRA provides that a foreign RRG is exempt from any state law that would

---

[17] *National Warranty Ins. Co. RRG v. Greenfield*, 214 F.3d 1073, 1075 (9th Cir. 2000) (quoting H.R. Rep. No. 190, 97th Cong., 1st Sess. 12 (1981), reprinted in 1981 U.S.C.C.A.N. 1432, 1441 [the "1981 House Report"]).

[18] *Attorneys Liab Prot Soc'y Inc v Ingaldson Fitzgerald, P.C.*, 838 F.3d 976, 980 (9th Cir. 2016) (*ALPS*)

[19] As discussed below, there are nine specific, enumerated exceptions in the LRRA to this preemptive sweep. None of them remotely relate to the issues presented by plaintiff in this case.

"regulate, **directly or indirectly**, the **operation** of a risk retention group. . . ."[20] Section 3902(b) then clarifies that "[t]he exemptions specified in subsection (a) of this section [i.e., the LRRA's preemption provision] apply to laws **governing the insurance business . . .** [including with respect to] the provision of . . . **loss control and claims administration**. . . ."[21] (Emphasis added.)

Second, the legislative history of the LRRA is equally clear. It is well-settled law that "[w]here a state statute conflicts with, or frustrates, federal law, the former must give way."[22] As with any preemption analysis, the ultimate touchstone is Congressional intent.[23] Congress intended a comprehensive preemption of state insurance laws with respect to foreign RRGs:

> [6] [T]he exemptions specified in [the LRRA] apply to laws governing **the insurance business** pertaining to liability insurance coverage, the sale of liability insurance, and the provision of insurance related services, management, **operations**, and investment

---

[20] 15 U.S.C. § 3902(a) (emphasis added).

[21] 15 U.S.C. § 3902(b).

[22] *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993) (citing U.S. Const., Art. VI, cl. 2); *see also Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, federal preemption occurs).

[23] *Levine v. First Nat. Bank of Commerce*, 948 So.2d 1051, 1059 (La. 2006).

> activities, **or loss control and claims administration**.[24]

Congress stated that it pre-empted state laws in a wide-ranging fashion in order to "eliminate the need for compliance with numerous non-chartering state statutes that, in the aggregate, would thwart the interstate operation [of] risk retention groups."[25]

Third, the case law under the LRRA overwhelmingly recognizes this preemption of state laws "regulating the business of insurance" with respect to out- of-state RRGs.

In a decision on point with the instant case, the Ninth Circuit in 2016 determined that Alaska Statute §21.96.100(d)'s prohibition on reimbursements of fees and costs incurred by an insurer defending a non-covered claim was preempted by the Liability Risk Retention Act of 1986. 15 U.S.C. §§3901-3906. The panel determined that the Alaska statute placed a restriction on Alaska insurance contracts and therefore the statute could not be applied to a Montana RRG.[26]

Other examples follow. The Nebraska Supreme Court in 2014 reasoned that *because* Nebraska's statute prohibiting arbitration clauses in insurance contracts "regulates the business of insurance," it *therefore*

---

[24] H.R. Rep. No. 99-865 (1986), reprinted in 1986 U.S.C.C.A.N. 5303, 5304 (the "1986 House Report"), at p. 6.

[25] 1981 House Report, at p. 12. (FN 17 supra)

[26] *Attorneys Liab. Prot. Soc'y, Inc. v. Ingaldson Fitzgerald, P. C.*, 838 F.3d 976, 980 (9th Cir. 2016) (*ALPS*). (Also referenced in FN 15 above.)

"regulates the 'operation of a risk retention group'" and is preempted by the LRRA.[27] As discussed below, the [7] Second Circuit Court of Appeals and the Louisiana First Circuit Court of Appeals have both determined that state "direct action" statutes "regulate the business of insurance" and are thereby preempted by the LRRA as to foreign RRGs.[28] In 2018, addressing Georgia's "direct action" statute, the Georgia Supreme Court unanimously held that, "while this type of regulating may be permissible with respect to traditional insurance carriers, it is not allowed in the case of a foreign risk retention group by the express act of Congress in the LRRA. 15 USC § 3902(a)(1). And, we cannot disregard Congress's command."[29] Also in 2018, in another case in New York citing to *Wadsworth*, a New York appellate court upheld a decision by the trial court that the subject RRG had not violated a state insurance law mandating a timely notice of disclaimer of coverage, on the specific grounds that the statute would have the effect of *regulating* the business of (that) foreign risk retention group.[30]

---

[27] *Speece*, 289 Neb. at 87; s*ee also Wadsworth*, 748 F.3d at 108 (New York's direct action statute preempted by the LRRA, in part, because application of the statute would "make it difficult for a foreign risk retention group to maintain uniform underwriting, administration, claims handling, and dispute resolution processes"), and *Greenfield*, 214 F.3d at 1075.

[28] *Wadsworth*, 748 F.3d at 108; *Courville*, 2015 WL 3536119, at *11.

[29] *Reis v. OOIDA* 814 S.E. 2d 338 at 343 (2018)

[30] *Nadkos, Inc. v. Preferred Contractors Insurance Company, RRG (PCIC)* 2018 N.Y. Slip Op. 03242

In support of their claim that Washington State law, RCW 48.18.200(1)(b), should be applied to prohibit a risk retention group from including an arbitration clause in its insurance contract with Washington resident insureds, Appellants seemingly become completely lost on the precedentially well-established notion that insurance statutes like the present one unequivocally attempt to "regulate" the business of APIC. Moreover, the quagmire of Appellants' arguments demonstrate that they do not understand the depth or breadth of federal and state law in their appeal where they literally seek to dictate the terms of the APIC Policy and "regulate its business of insurance" using a veritable litany of arguments: [8] disputing APIC's choices of headquarters location, sale of insurance in multiple states, (APIC's) ignorance of "local" laws, choice of laws and venue, "defacto *prevailing*" (whatever that means) when an "insured" cannot "afford" to "fight," etc., and, best of all, their claim that a state, meaning evidently Washington, should have a right to keep "insurance companies from improperly denying coverage. . . ."[31] These arguments seek to effectively insert certain provisions into the APIC contract of insurance that were not previously agreed upon, and nullify other provisions that were agreed upon.[32] These

---

[31] App Brief – IV. Statement of Issues Presented for Review, at pp 4-5.

[32] c.f. *Quinlan v. Liberty Bank & Trust Co.*, 575 So.2d 336, 352 (La. 1991) (where the Direct Action Statute is "read into and becomes part of a policy").

contentions are decidedly at odds with the text, legislative intent, and general understanding of the LRRA.

A. Background: In Passing The LRRA And Its Predecessor the PLRRA Congress Intended To Make Liability Insurance More Affordable By Exempting Foreign RRGs From The Vast Majority Of State Insurance Laws.

The PLRRA created RRGs, a new type of self-insurance system.[33] The PLRRA "allow[ed] businesses to purchase insurance at more favorable rates either by forming self-insurance pools called risk retention groups or by forming purchasing groups, which purchase group insurance from an existing insurer."[34] "RRGs are different from normal insurance companies. A risk retention group is a liability insurance company owned and operated by its members, and those members are its insureds. Risk retention groups . . . do not sell insurance to the general public; they only sell insurance to members of the RRG who are exposed to similar risks and are members of the same industry."[35] "Rather than creating a [9] federal regulatory scheme for risk retention groups, the [PLRRA] provided that a risk retention group which had been approved by the

---

[33] *Nat'l Risk Retention Ass'n v Brown*, 927 F.Supp. 195, 197 (M.D. La. 1996); *Swanco Ins. Co.-Ariz. v. Hager*, 879 F.2d 353, 354 (8th Cir. 1989).

[34] *Id*.

[35] *Courville*, 174 So. 3d 659, 670 (2015).

insurance authority of any state could act as a risk retention group nationwide."[36]

A "foreign" RRG is one that is chartered outside of the regulating state, but conducts business within that state.[37] "Under the PLRRA, an RRG is permitted to provide product liability insurance in all states, free of insurance regulation by those states, if it complies with the insurance laws of the state it chooses as its 'chartering jurisdiction.' "[38]

As the Louisiana First Circuit Court of Appeal put it: "Primary regulatory authority and enforcement power over risk retention groups is left to domiciliary, or chartering, states. Only the chartering jurisdiction may directly regulate the formation and everyday operations of a risk retention group."[39]

By drastically reducing the total number of state regulations an RRG has to comply with in order to operate on a national basis, RRGs are able to reduce their expenses and ultimately the cost of insurance to the group's members.[40] According to the House Report accompanying the PLRRA,

> Essentially, the objective of the [PLRRA] is accomplished by facilitating the formation of

---

[36] *Id.*

[37] *Wadsworth*, at 102-04.

[38] *Greenfield*, 214 F.3d at 1075 (citing 15 U.S.C. § 3901 (4)(C)(i)).

[39] *Shear v. Champagne*, 22 So.3d 942, 944-45 (La. App. 2009).

[40] *Greenfield*, 214 F.3d at 1075.

> an insurance entity able to provide coverage to members in any state. Under existing laws and regulations in the several states, it is extremely difficult to create a small specialized insurance carrier that can operate on a multistate basis. These [state] laws and regulations, which may be appropriate for commercial insurers dealing with the general public, create an almost insurmountable burden to an insurer seeking to provide specialized coverage to a limited number of risks.[41]

[10] The PLRRA was designed precisely to preempt these state laws and regulations as to foreign RRGs. As the 1981 House Report stated, the PLRRA's preemption of regulation by non-chartering states enables "the efficient operation of risk retention groups by eliminating the need for compliance with numerous non-chartering state statutes that, in the aggregate, would thwart the interstate operation [of] . . . risk retention groups."[42]

In 1986, Congress amended the PLRRA by enacting the LRRA "to expand the scope of coverage which could be provided by risk retention groups to include all types of liability coverage."[43] The reasons why Congress broadened the scope of the act were clearly stated:

---

[41] H.R. Rep. 97-190 at p. 4.

[42] *Greenfield*, 214 F.3d at 1075 (quoting H.R. Rep. No. 190, 97th Cong., 1st Sess. 12 (1981), reprinted in 1981 U.S.C.C.A.N. 1432, 1441).

[43] *Brown*, 927 F.Supp. at 197.

BACKGROUND AND NEED FOR THE LEGISLATION

During the 99th Congress, the Country has been shaken by a crisis in the availability and affordability of commercial liability insurance. Congress has been besieged with complaints regarding huge rate increases, mass cancellations of coverage, and entire lines of insurance virtually unavailable at any price. Crucial activities and services have been hard hit. Such activities include, among others, those of municipalities, universities, child daycare centers, health care providers, corporate directors and officers, hazardous waste disposal firms, small businesses generally, and many others.

. . .

Since a risk retention group is simply a group of businesses or others who join together to set up their own insurance company only to issue insurance policies to themselves, it was believed that by encouraging such groups, the subjective element in underwriting could be reduced. The risk retention group would know its own loss experience and could adhere closely to it in setting rates.

. . .

The Committee's hearings indicate the existence of a multi-billion dollar insurance capacity shortage, and the Committee believes that creation of self-insurance groups can provide much-needed new capacity.

. . .

> [11] **It is necessary to exempt risk retention and purchasing groups from State law, in the respects specified in the Risk Retention Act, in order to achieve the beneficial effects of such groups referred to above**.[44] (Emphasis added.)

In the words of the Nebraska Supreme Court: "A major benefit . . . is the ability to operate on a nationwide basis according to the requirements of the law of a single state, without being compelled to tailor their policies to the specific requirements of every state in which they do business."[45] Other courts concur. "The very purpose of the LRRA was to allow risk retention groups to operate nationwide under the regulation of one jurisdiction, rather than fifty- one jurisdictions."[46]

B. The LRRA's Preemption Provision

Section 3902 of the LRRA provides, in pertinent part:

> (a) Exemptions from State laws, rules, regulations, or orders. Except as provided in this section, a risk retention group is exempt from any State law, rule,

---

[44] H.R. Rep. No. 99-865 (1986), reprinted in 1986 U.S.C.C.A.N. 5303, 5304, at pp. 1 – 2 (the "1986 House Report").

[45] *Speece*, 289 Neb. at 87 (quoting *Wadsworth*, 748 F.3d at 108).

[46] *Soyoola v. Oceanus Ins. Co.*, 986 F.Supp.2d 695, 703 (S.D. W.Va. 2013).

> regulation, or order to the extent that such law, rule, regulation, or order would –
>
> (1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group except that the jurisdiction in which it is chartered may regulate the formation and operation of such a group. . . .[47] (Emphases added.)

The nine enumerated exceptions to this sweeping preemption provision—referenced in the language "[e]xcept as provided in this section"—are discussed below, in Part III. C. Non-chartering states, like Washington, may only regulate the [12] operations of foreign RRGs in the nine highly specific ways enumerated by Congress, none of which even arguably apply here.

The LRRA does not expressly define the term "operation" as used in §3902(a). However, §3902(b) then explains that "[t]he exemptions specified in subsection (a) of this section [i.e., the LRRA's preemption provision] apply to laws **governing the insurance business . . .** [including with respect to] the provision of . . . **loss control and claims administration**. . . ."[48] (The "exemptions" referred to above are a foreign RRG's exemptions from state insurance laws.)

The 1986 House Report elaborated further. "An important issue in construing the [LRRA], however, is

---

[47] 15 U.S.C. § 3902(a).

[48] 15 U.S.C. § 3902(b) (emphasis added).

from what laws of the nonchartering State a risk retention group is exempt. Because this raises sensitive issues of Federalism, the Committee wished to be as clear as possible. Accordingly, the bill adds to Section 3(b) of the Act the statement clarifying that the exemption from nonchartering State laws is from those 'governing the insurance business.' "[49] Although the LRRA ultimately used the word "operation," the 1986 House Report used the term "business." The terms are essentially interchangeable and help to define each other.

The Second, Third, Eighth, Ninth, and Eleventh Circuits have examined the LRRA's preemptive effect, and repeatedly characterized it as "broad," "expansive," and "sweeping."[50] As the Eleventh Circuit put it, the LRRA's [13] "sweeping preemption language" provides for "broad preemption of a non-domiciliary state's licensing and regulatory laws."[51]

---

[49] 1986 House Report, at p. 6.

[50] *Wadsworth*, 748 F.3d at 102-03; *see also*, *Ins. Co. of State of Pa. v. Corcoran*, 850 F.2d 88, 89 (2d Cir. 1988) (LRRA preemption is "sweeping"); *Am. Millennium Ins. Co. v. First Keystone Risk Retention Group, Inc.*, 332 Fed.Appx. 787, 788 (3d Cir. 2009) ("The LRRA protects the existence of RRGs by largely preempting state regulation of such entities."); *Swanco Ins. Co. Ariz. v. Hager*, 879 F.2d 353, 356-58 (8th Cir. 1989) (other than the nine exceptions at 15 U.S.C. § 3902 (a)(1)(A)-(I), the LRRA prohibits states from regulating the "operation" of a foreign RRG); *Alliance of Nonprofits for Ins., Risk Retention Group v. Kipper*, 712 F.3d 1316, 1318-19 (9th Cir. 2013) (LRRA "broadly preempts" non-domiciliary state laws).

[51] *State of Fla., Dept. of Ins. v. Nat'l Amusement Purchasing Group, Inc.*, 905 F.2d 361-63 (11th Cir. 1990).

C. With Nine Specific, Enumerated Exceptions, The LRRA Expressly Exempts Foreign RRGs From All Other State Insurance Laws. None of The Nine Exceptions Apply Here.

The LRRA contains nine (9) distinct exceptions to its sweeping preemption provision. The Eighth Circuit Court of Appeals unequivocally held that except for these limited powers reserved to nonchartering states, the LRRA prohibits those states from regulating foreign RRGs.[52]

Other federal circuits agree. "In short, as compared to the near plenary authority it reserves to the chartering state, the Act sharply limits the secondary regulatory authority of nondomiciliary states over risk retention groups to specified, if significant, spheres."[53] "[T]he Act authorizes nonchartering states to require risk retention groups to comply only with certain (very) basic registration, capitalization, and taxing requirements, as well as various claim settlement and fraudulent practice laws."[54] As all the federal circuits to examine this issue have concluded, these nine exceptions provide the *only* ways for a state to regulate the operations or "business of insurance" of a foreign RRG.[55]

---

[52] *Swanco*, 879 F.2d at 356-58.

[53] *Wadsworth*, 748 F.3d at 104.

[54] *Id.* at 106.

[55] *E.g.*, *Swanco*, 879 F.2d at 356-58; *Wadsworth*, 748 F.3d at 104-06.

[14] Non-chartering states, like Washington in this case, are limited to the nine exceptions listed in 15 U.S.C. § 3902 (a)(1)(A)-(I)[56] which allow a non-chartering state to require a foreign RRG to:

> (A) comply with the unfair claim settlement practices law of the State;
>
> (B) pay, on a nondiscriminatory basis, applicable premium and other taxes which are levied on admitted insurers and surplus lines insurers, brokers, or policyholders under the laws of the State;
>
> (C) participate, on a nondiscriminatory basis, in any mechanism established or authorized under the law of the State for the equitable apportionment among insurers of liability insurance losses and expenses incurred on policies written through such mechanism;
>
> (D) register with and designate the State insurance commissioner as its agent solely for the purpose of receiving service of legal documents or process;
>
> (E) submit to an examination by the State insurance commissioners in any State in which the group is doing business to determine the group's financial condition [under certain circumstances];

---

[56] *Wadsworth*, 748 F.3d at 106.

(F) comply with a lawful order issued—

(i) in a delinquency proceeding commenced by the State insurance commissioner if there has been a finding of financial impairment under subparagraph (E); or

(ii) in a voluntary dissolution proceeding;

(G) comply with any State law regarding deceptive, false, or fraudulent acts or practices, except that if the State seeks an injunction regarding the conduct described in this subparagraph, such injunction must be obtained from a court of competent jurisdiction;

(H) comply with an injunction issued by a court of competent jurisdiction, upon a petition by the State insurance commissioner alleging that the group is in hazardous financial condition or is financially impaired; and

(I) provide the following notice, in 10-point type, in any insurance policy issued by such group: '**NOTICE**' This policy is issued by your risk retention group. Your risk retention group may not [15] 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."[57]

---

[57] 15 U.S.C. § 3902 (a)(1)(A)-(I).

Washington's Risk Retention Group Statute (RCW 48.92.010 et seq.) follows the LRRA.[58] None of exceptions above, under the LRRA or under Washington law, have anything to do with regulating the terms of insurance policies offered by the risk retention groups.[59] In the instant case, APIC was chartered in Arizona, so Washington is a non-chartering state. Because the Appellants' arguments do not fit within any of the nine LRRA exceptions—or within Washington's laws regulating foreign RRGs—they cannot be imposed on APIC.

D. Under Controlling Case Law, Non-Domiciliary State Laws, Including "Anti-Arbitration" Provisions in State Insurance Statutes, Cannot Be Applied To Foreign RRGs.

The U.S. Supreme Court has specified what it means to "regulate the business of insurance."[60] Courts addressing the scope of LRRA preemption draw directly upon this Supreme Court case law to understand which state laws regulate "the business of insurance." For example, the Nebraska Supreme Court reasoned that because a state law "regulates the business of insurance" as defined by the Supreme Court, it *therefore* "regulates the operation of a risk retention group" and is preempted by the LRRA.[61]

---

[58] Rev. Code of Washington 48.92.010 et seq.

[59] See *ALPS* discussion above.)

[60] *Pireno*, 458 U.S. at 119.

[61] *Speece*, 289 Neb. at 87.

In *Pireno*, the U.S. Supreme Court identified three criteria relevant to determining whether a particular practice is part of the "business of insurance":

> *[F]irst*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and [16] *third*, whether the practice is limited to entities within the insurance industry. None of these criteria is necessarily determinative in itself. . . .[62]

This three-part *Pireno* test remains the standard analysis defining the "business of insurance."[63]

Sturgeon, which is cited by the Appellants, is distinguishable as it erroneously focused on the "anti-discrimination" provisions of the LRRA, rather than the "regulation" preemption.[64] The case does not provide any compelling basis to reverse all the contrary authorities pertaining to LRRA preemption. *Sturgeon* and another case called *King* have been decisively rejected based upon their erroneous reasoning as

---

[62] *Pireno*, 458 U.S. at 129.

[63] *E.g.*, *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 501-03 (1993); *Mut. Reins. Bureau v. Great Plains Mut. Ins. Co., Inc.*, 969 F.2d 931, 933 (10th Cir. 1992).

[64] *Sturgeon v. Allied SUPP Prof'ls Ins. Co.*, 344 S.W.3d 205 (Mo. App. 2011).

articulated by the Second Circuit Court of Appeals and the Nebraska Supreme Court.[65] [66]

The Nebraska Supreme Court also pinpointed the flaws in the reasoning of *Sturgeon*, and the way that *Sturgeon* ignored the key prohibition from § 3902(a) on "regulat[ing]" the "operations" of a foreign RRG.

> The Missouri court basically reasoned that the purpose of the LRRA was to prevent states from discriminating against risk retention groups vis-a-vis other types of insurance companies. . . . We disagree with the reasoning of the court in *Sturgeon* and its interpretation of the LRRA. Such reasoning focuses on the portion of § 3902 exempting risk retention groups from state laws making their operations unlawful without recognizing or giving adequate emphasis to the additional exemption from laws that regulate their operation. Instead, we agree with the reasoning and interpretation of the Second Circuit Court of Appeals in *Wadsworth*. . . .[67] (Emphasis added)

[17] The LRRA is far more than an anti-discrimination statute, as *Sturgeon* would have it. On the contrary, the basic thrust of the LRRA is to ***discriminate*** or ***treat differently*** foreign RRGs on the one hand,

---

[65] *Wadsworth*, 748 F.3d at 109; *Speece*, 289 Neb. at 85.

[66] The other case distinguished by the *Wadsworth* and *Speece* courts based on the same reasoning was *National Home Ins. Co. v. King*, 291 F.Supp.2d 518 (E.D. Ky. 2003) (King).

[67] *Speece*, 289 Neb. at 84-85.

and domestic RRGs and traditional insurance companies on the other hand.[68]

All federal circuits that have addressed this issue, as well as the Washington and Nebraska Supreme Courts, agree that state laws banning or regulating arbitration provisions in contracts of insurance regulate "the business of insurance."[69] See, *State, Dep't of Transp. v. James River Ins. Co.*, 176 Wash. 2d 390, 402 (2013) (specifically holding that Washington's Anti-Arbitration Statute RCW 48.18.200 regulates the business of insurance.) The Eastern District of Louisiana determined that Louisiana's statute banning arbitration provisions in insurance contracts was preempted by the LRRA as to out-of-state RRGs.[70] The Nebraska Supreme Court also concluded that because such a law regulates the "business of insurance," it was preempted by the LRRA. Thus, these authorities consistently support the proposition that state laws which "regulate the business of insurance," are therefore preempted as to foreign RRGs. Accordingly, the use of any statutory insurance language to nullify the terms

---

[68] 15 U.S.C. § 3902(a); *Wadsworth*, 748 F.3d at 102-09; *Speece*, 289 Neb. at 84-85.

[69] *Mut. Reins. Bureau v. Great Plains Mut. Ins. Co., Inc.*, 969 F.2d 931, 933 (10th Cir. 1992); *Standard Sec. Life Ins. Co. of NY v. West*, 267 F.3d 821, 823 (8th Cir. 2001); *McKnight v. Chicago Title Ins. Co., Inc.*, 358 F.3d 854, 858 (11th Cir. 2004); *State, Dept. of Transp. v. James River Ins. Co.*, 176 Wash.2d 390, 402 (2013); *Speece*, 289 Neb. at 88.

[70] *Central Claims Serv., Inc. v. Claim Prof'ls Liability Ins. Co.*, 2011 WL 3898047, at *4 (E.D. La., Sept. 2, 2011).

and conditions of an "arbitration clause" in the policy of a foreign RRG, as urged in this case, is clearly preempted.[71]

[18] There is no reasonable debate about whether the Appellants' efforts to persuade this Court to invalidate APIC's "arbitration" policy provisions regulate "the business of insurance." The Appellants seek to have this Court revise and rewrite the APIC Policy.[72] "To expressly invalidate an agreement contained in the insurance contract touches the core of the 'business of insurance'. . . ."[73]

---

[71] Appellants may attempt to cite to another inapposite case, virtually overwhelmed by the reasoning in *Courville*, called *Ziegler*. (*Ziegler v. Housing Auth. Of New Orleans*, 192 So. 3d 175 [La. App. 2016]). *Ziegler* is simply bad law. After spending *one-half* of its 9-page decision justifying its conversion of the matter from that of an appellate review to that of a "discretionary supervisory" opinion, the Fourth Circuit panel ignored the case law cited herein, and rendered the same misplaced analysis seen in *Sturgeon* and *King, both of* which had been distinguished as clearly erroneous in the comprehensive analyses of *Wadsworth* and *Speece*. The *Ziegler* panel also rendered its opinion in knowing conflict with its sibling First Circuit Panel in *Courville, id*. Thereafter, during the pending subsequent *Writ of Certiorari* filed before the Louisiana Supreme Court hoping to settle the conflict, wherein NRRA was again *amicus curiae*, sadly the case "settled" before the Supreme Court could rule on the Writ and clarify the issue in Louisiana.

[72] *Quinlan*, 575 So.2d at 352.

[73] *Mutual Reinsurance*, 969 F.2d at 933 (emphasis added).

E. Not All State Laws Affecting A Foreign RRG Are Preempted.

The LRRA's "savings clause" reads as follows:

> (f) State powers to enforce State laws
>
> (1) Subject to the provisions of subsection (a)(1)(G) of this section (relating to injunctions) and paragraph (2) [also relating to injunctions], ***nothing in this chapter shall be construed to affect the authority of any State to make use of any of its powers to enforce the laws of such State with respect to which a risk retention group is not exempt under this chapter***.[74] (Emphasis added)

Put another way, the "savings clause" simply states that if a state law does not regulate, directly or indirectly, the "operation" or "business of insurance" of a foreign RRG, it is not preempted by the LRRA.

[19] Unless the state law fits within one of the nine exceptions to LRRA preemption discussed above, all state laws that *specifically* regulate the business or operations of a foreign RRG *as an insurer*—are preempted.

---

[74] 15 U.S.C. § 3902(f).

F. Under Washington's Own Risk Retention Group Statute, this Court Should Not Dictate the Terms of the APIC Policy

Aside from the LRRA itself, there is an entirely separate and independent reason why the Appellant's arguments fail. Washington's Risk Retention Group Statute segregates domestic and foreign RRGs and sets forth the insurance laws applicable to each. Washington state law regulates foreign RRGs, in a number of highly specific areas—none of which has anything to do with approving policy language.[75] Indeed, the Washington statute almost mirrors the LRRA.

The Washington Legislature carefully crafted the Risk Retention Group Statute such that foreign RRGs would be subject only to a discrete handful of state insurance laws, i.e., those that the LRRA allows a state to impose on foreign RRGs.

G. Risk Retention Groups Are For The Most Part Very Small Companies and Allowing States To Impose Their Own Laws In Areas That Are Preempted Would Have A Profound Impact On The RRG Industry

If each state were permitted to pick and choose which of their own laws they could impose on foreign RRGs, it would not only thwart the entire legislative purpose of the LRRA, but would also greatly harm the

---

[75] RCW 48.92.010, 040 et seq.

viability of the RRG marketplace. As stated in a report by the Congressional Research Service, "[u]nder normal circumstances, an insurer who wishes to operate outside of its domiciliary state must receive a license and submit to regulation from every state in which it wishes to do business. This means complying with 51 different sets of state or [20] district laws and regulations in order to do business across the country. The impact of this multiplicity of regulation is particularly high in insurance. . . ."[76]

A detailed report from the Government Accountability Office shows the clear growth trend: "In 2005, we reported that RRGs wrote about $1.8 billion of commercial liability coverage, which constituted about 1.17 percent of the overall market in 2003. According to NAIC [National Association of Insurance Commissioners] data, in 2010 RRGs wrote about $2.5 billion in premium(s), which was about 3 percent of the total $92 billion of commercial liability insurance coverage written industry wide."[77] By 2017, Gross Written Premium (GWP) of risk retention groups had grown to over $3.24 billion dollars and capital surplus had grown to $5.10 billion.[78] Everything is relative. Taking into account

---

[76] Baird Webel, Cong. Research Serv., RL 32176, The Risk Retention Acts: Background and Issues 1 (2003).

[77] U.S. Gov't Accountability Office, GAO-12-16, Risk Retention Groups: Clarifications Could Facilitate States' Implementation of the Liability Risk Retention Act 20 (2011) (hereafter the "GAO Report"), at p. 8.

[78] Risk Retention Reporter, 2018 Risk Retention Group Directory and Guide, pp 27-29. The Risk Retention Reporter is the

the 220 RRGs in existence, however, 120 of them wrote a total of only $202 million dollars in the aggregate in 2017 – an average of only $1.69 million in annual gross written premium per company. (Footnote 78)

In conclusion, the GAO Report stated: "While constituting a small portion of the total liability insurance market, the amount of premiums written by RRGs increased from 2004 to 2010 and the financial condition of the RRG industry generally has remained profitable during this same period. Based on our analysis, RRGs appear to have maintained a relatively consistent presence in the market, primarily providing coverage in niche markets such as medical professional [21] liability insurance and other health care-related insurance lines."[79] At the present time, NAIC statistics based upon publicly available reporting will confirm the foregoing including highly safe levels of capital surplus.

Putting the numbers in perspective, the 220-plus RRGs in business today are each domiciled in one (1) state and virtually all of them are "registered" as a "foreign" RRG in anywhere from 1 to 49 other states. With 98 RRGs doing business in Washington alone,[80] it is estimated that risk retention groups nationwide provide liability protection for about a half million insured professionals, businesses, public entities and health care

---

key *independent* publication for the industry, not owned or operated by NRRA herein.

[79] *Id.* at p. 43.

[80] https://fortress.wa.gov/oic/consumertoolkit/Search.aspx

providers. If foreign (non-domiciled) RRGs were required to comply with each state's public policy, laws and complex regulations imposed upon their domestic insurers, they would be met with severe financial and operational burdens. The RRGs would have to fundamentally change the way they do business. At present, they are able to provide nationwide insurance at very low rates because they are exempt from the complex restrictions imposed by each state. Without LRRA preemption, RRGs would no longer be able to develop uniform and streamlined policies, including cost-savings measures such as arbitration provisions agreed-to by their members. Ultimately, RRGs would not be able to afford to do business and bear the risk and expense of litigation in each of the 50 states. The result would be catastrophic to RRG members, as nearly a half-million insureds could lose their ability to obtain affordable liability coverage.

The benefit of the RRG is that the RRG is allowed to create the structure and nature of its operations, including the form of its policy, the rates charged, the underwriting process, the claims administration process, and the method and means for dispute resolution regarding policies issued with members and third [22] parties. The RRG can then operate in the other 49 states with limited regulation. This allows the RRG to develop its own unique manuscripted policy, frequently incorporating provisions designed to simplify and accommodate the homogenous business interests of the members (normally all of the same trade, profession or business). Homogeneity is a primary feature that

distinguishes RRGs from other traditional carriers. This structure also includes other less obvious benefits which save the members significant premium costs. For example, reinsurance treaties are much easier and more favorably priced to negotiate when policies, actuarial data on projected losses, claims reporting, risk management and insurable interests are similar. Most companies have sophisticated risk management procedures, standardized claim reporting and inexpensive alternative dispute resolution procedures, all of which save the members money.

Without these benefits, RRGs would be met with severe financial and operational burdens, forcing them to fundamentally change the way they do business. RRGs are currently able to provide nationwide insurance at very low rates specifically because they are exempt from the complex restrictions imposed by each of the states. Congress clearly intended it this way. The RRG industry has grown and met a profound need, and helped rescue the insurance industry from a crisis of unavailability.

IV. CONCLUSION

Imposing state "anti-arbitration" restrictions based upon statutory insurance laws on *foreign* RRGs like APIC would improperly regulate their business operations, in violation of the LRRA. The harmful economic impact on APIC, as well as on the 97 other RRGs doing business in Washington, and numerous other similarly situated carriers in the 9th Circuit, would undermine

the intent of the LRRA by threatening the existence of affordable liability insurance coverage. [23] Importantly, the foregoing cases and authority do absolutely nothing to change Washington law relative to traditional insurance carriers or RRGs chartered in Washington state.

DATED this 11th day of July, 2019.

Respectfully submitted by:

/s/ Joseph E. Deems
Joseph E. Deems
CA State Bar No. 64012
Executive Director, NRRA
Deems Law Offices, APC
Attorneys for National Risk Retention Association

Deems Law Offices, APC
16133 Ventura Blvd., Suite 1055
Encino, CA 91436

---

[24] APPENDIX "A"

*S*TATE – Registration Verification Location *Links*

ALASKA:

https://sbs-ak.naic.org/Lion-Web/jsp/sbsreports/CompanySearchLookup.jsp

ARIZONA:

https://sbs.naic.org/solar-external-lookup/

CALIFORNIA:

https://interactive.web.insurance.ca.gov/webuser/ncdwalphacoline$.startup

HAWAII:

https://insurance.ehawaii.gov/hils/

IDAHO:

https://doi.idaho.gov/licensing/search

MONTANA:

https://sbs.naic.org/solar-external-lookup/

NEVADA:

http://di.nv.gov/ins/f?p=licensing:search

OREGON:

https://sbs.naic.org/solar-external-lookup/

WASHINGTON

https://fortress.wa.gov/oic/consumertoolkit/Search.aspx

[25] [Certificate Of Compliance Omitted]

[26] [Certificate Of Service Omitted]