

GENERAL ASSEMBLY OF NORTH CAROLINA
1987 SESSION

CHAPTER 310
SENATE BILL 310

AN ACT TO AMEND THE PRODUCT LIABILITY RISK RETENTION GROUP LAW BY REFLECTING THE FEDERAL RISK RETENTION AMENDMENTS OF 1986 IN ORDER TO CARRY OUT THE AUTHORITY GRANTED BY CONGRESS TO THE STATES.

The General Assembly of North Carolina enacts:

Section 1. Article 40, Chapter 58 of the General Statutes is rewritten to read:

"ARTICLE 40.

"Liability Risk Retention.

"§ 58-505. **Purpose.**—The purpose of this Article is to regulate the formation and operation of risk retention and purchasing groups in this State that are formed pursuant to the provisions of the Product Liability Risk Retention Act of 1981, as amended by the Risk Retention Amendments of 1986 (15 U.S.C. §3901 et seq.).

"§ 58-506. **Definitions.**—As used in this Article:

(1) 'Completed operations liability' means liability arising out of the installation, maintenance, or repair of any product at a site that is not owned or controlled by:

- a. any person who performs that work; or
- b. any person who hires an independent contractor to perform that work;

but includes liability for activities that are completed or abandoned before the date of the occurrence giving rise to the liability.

(2) 'Domicile', for purposes of determining the state in which a purchasing group is domiciled, means:

- a. for a corporation, the state in which the purchasing group is incorporated; and
- b. for an unincorporated entity, the state of its principal place of business.

(3) 'Hazardous financial condition' means that, based on its present or reasonably anticipated financial condition, a risk retention group, although not yet financially impaired or insolvent, is unlikely to be able:

- a. to meet obligations to policyholders with respect to known claims and reasonably anticipated claims; or
- b. to pay other obligations in the normal course of business.

(4) 'Insurance' means primary insurance, excess insurance, reinsurance, surplus lines insurance, and any other arrangement for shifting and distributing risk that is determined to be insurance under the laws of this State.

(5) 'Liability' means legal liability for damages, including costs of defense, legal costs and fees, and other claims expenses, because of injuries to other persons, damage to their property, or other damage or loss to such other persons resulting from or arising out of any profit or nonprofit business, trade, product, professional or other services, premises, or operations; or any activity of any state or local government, or any agency or political subdivision thereof. Liability does not include personal risk liability or an employer's liability with respect to its employees other than legal liability under the Federal Employers' Liability Act (45 U.S.C. §51 **et seq.**).

(6) 'Personal risk liability' means liability for damage because of injury to any person, damage to property, or other loss or damage resulting from any personal, familial, or household responsibilities or activities. Personal risk liability does not include liability as defined in subdivision (5) of this section.

(7) 'Plan of operation' or 'feasibility study' means an analysis that presents the expected activities and results of a risk retention group including, at a minimum:

- a. the coverages, deductibles, coverage limits, rates, and rating classification systems for each kind of insurance the group intends to offer;
- b. historical and expected loss experience of the proposed members and national experience of similar exposures;
- c. **pro forma** financial statements and projections;
- d. appropriate opinions by a qualified, independent casualty actuary, including a determination of minimum premium or participation levels required to commence operations and to prevent a hazardous financial condition;
- e. identification of management, underwriting procedures, managerial oversight methods, and investment policies; and
- f. such other matters as may be prescribed by the Commissioner for liability insurance companies authorized by this Chapter.

(8) 'Product liability' means liability for damages because of any personal injury, death, emotional harm, consequential economic damage, or property damage, including damages resulting from the loss of use of property, arising out of the manufacture, design, importation, distribution, packaging, labeling, lease, or sale of a product; but does not include the liability of any person for those damages if the product involved was in the possession of such person when the incident giving rise to the claim occurred.

- (9) 'Purchasing group' means any group that:
- a. has as one of its purposes the purchase of liability insurance on a group basis;
 - b. purchases such insurance only for its group members and only to cover their similar or related liability exposure, as described in subdivision c. of this subdivision;
 - c. is composed of members whose businesses or activities are similar or related with respect to the liability to which the members are exposed

by virtue of any related, similar, or common business, trade, product, services, premises, or operations; and

d. is domiciled in any state.

(10) 'Risk retention group' means any corporation or other limited liability association formed under the laws of any state, Bermuda, or the Cayman Islands:

a. whose primary activity consists of assuming and spreading all or any portion of the liability exposure of its group members;

b. that is organized for the primary purpose of conducting the activity described under sub-subdivision a. of this subdivision;

c. that

(i) is chartered and licensed as a liability insurance company and authorized to engage in the business of insurance under the laws of any state; or

(ii) before January 1, 1985, was chartered or licensed and authorized to engage in the business of insurance under the laws of Bermuda or the Cayman Islands and, before that date, had certified to the insurance regulator of at least one state that it satisfied the capitalization requirements of such state; except that any such group shall be considered to be a risk retention group only if it has been engaged in business continuously since that date and only for the purpose of continuing to provide insurance to cover product liability or completed operations liability, as such terms were defined in the Product Liability Risk Retention Act of 1981 before the effective date of the Risk Retention Act of 1986;

d. that does not exclude any person from membership in the group solely to provide for members of such a group a competitive advantage over such person;

e. that

(i) has as its members only persons who have an ownership interest in the group and that has as its owners only persons who are members who are provided insurance by the risk retention group; or

(ii) has as its sole member and sole owner an organization that is owned by persons who are provided insurance by the risk retention group;

f. whose members are engaged in businesses or activities similar or related with respect to the liability of which such members are exposed by virtue of any related, similar, or common business trade, product, services, premises, or operations;

g. whose activities do not include the provision of insurance other than:

(i) liability insurance for assuming and spreading all or any portion of the liability of its group members; and

- (ii) reinsurance with respect to the liability of any other risk retention group, or any members of such other group, that is engaged in businesses or activities so that such group or member meets the requirement described in sub-subdivision f. of this subdivision from membership in the risk retention group that provides such reinsurance; and

h. the name of which includes the phrase 'Risk Retention Group'.

"§ 58-507. Risk retention groups chartered in this State.—A risk retention group seeking to be chartered in this State must be chartered and licensed as a liability insurance company authorized by this Chapter and, except as provided elsewhere in this Article, must comply with all of the laws and rules applicable to such insurers chartered and licensed in this State and with G.S. 58-508 to the extent such requirements are not a limitation on laws, administrative rules, or requirements of this State. Before it may offer insurance in any State, each risk retention group shall also submit to the Commissioner, for his approval, a plan of operation or a feasibility study and revisions of such plan or study if the group intends to offer any additional lines of liability insurance.

"§ 58-508. Risk retention groups not chartered in this State.—Risk retention groups that have been chartered in states other than this State and that seek to do business as risk retention groups in this State must observe and abide by the laws of this State as follows:

(1) Notice of operations and designation of Commissioner as agent. Before offering insurance in this State, a risk retention group shall submit to the Commissioner:

- 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 such other information including information on its membership, as the Commissioner may require to verify that the risk retention group is qualified under G.S. 58-506(10);
- b. a copy of its plan of operations or a feasibility study and revisions of such 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 that (i) was defined in the Product Liability Risk Retention Act of 1981 before October 27, 1986, and (ii) was offered before that date by any risk retention group that had been chartered and operating for not less than three years before that date;
- c. a statement of registration that designates the Commissioner as its agent for the purpose of receiving service of legal process.

(2) Financial Condition. A risk retention group doing business in this State shall file with 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 NAIC or by the Commissioner;
- b. a copy of each examination of the risk retention group as certified by the State insurance regulator or public official conducting the examination;
- c. upon request by the Commissioner, a copy of any audit performed with respect to the risk retention group; and
- d. such information as may be required to verify its continuing qualification as a risk retention group under G.S. 58-506(10).

(3) Taxation. (Reserved)

(4) Compliance With Unfair Claims Settlement Practices Law. A risk retention group and its agents and representatives shall comply with G.S. 58-39(5) and G.S. 58-54.4(11).

(5) Deceptive, False, or Fraudulent Practices. A risk retention group shall comply with the provisions of Article 3A of this Chapter and Chapter 75 of the General Statutes regarding deceptive, false, or fraudulent acts or practices.

(6) Examination Regarding Financial Condition. A risk retention group must submit to an examination by the Commissioner to determine its financial condition if the insurance regulator of the jurisdiction in which the group is chartered has not initiated an examination or does not initiate an examination within 60 days after a request by the Commissioner. This examination shall be coordinated to avoid unjustified repetition and conducted in an expeditious manner and in accordance with the Examiner Handbook of the NAIC.

(7) Notice to Purchasers. Any policy issued by a risk retention group shall contain in 10 point type and contrasting color 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 or guaranty funds are not available for your risk retention group.'

(8) Prohibited Acts Regarding Solicitation or Sale. The following acts by a risk retention group are prohibited:

- a. the solicitation or sale of insurance by a risk retention group to any person who is not eligible for membership in such 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) Prohibition of Ownership By An Insurance Company. 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 such risk retention group, other than in the case of a risk retention group all of whose members are insurance companies.

(10) **Prohibited Coverage.** No risk retention group may offer insurance policy coverage prohibited or not authorized by this Chapter or declared unlawful by the appellate courts of this State.

(11) **Delinquency Proceedings.** A risk retention group not chartered in this State and doing business in this State must 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 G.S. 58-508.

"§ 58-509. Compulsory association.—(a) No risk retention group is required to join or contribute financially to any insurance insolvency or guaranty fund or similar mechanism in this State; nor shall any risk retention group or its insureds receive any benefit from any such fund for claims arising out of the operations of such risk retention group.

(b) A risk retention group may be required to participate in residual market mechanisms under Articles 25A and 37 of this Chapter.

"§ 58-510. Countersignature not required.—A policy of insurance issued to a risk retention group or any member of that group is not required to be countersigned as otherwise provided in this Chapter.

"§ 58-511. Purchasing groups; exemption from certain laws relating to the group purchase of insurance.—Any purchasing group meeting the criteria established under the provisions of 15 U.S.C. § 3901 et seq. is exempt from any law of this State relating to the creation of groups for the purchase of insurance, prohibition of group purchasing, or any law that discriminates against a purchasing group or its members. In addition, an insurer is exempt from any law of this State that prohibits providing, or offering to provide, to a purchasing group or its members, advantages based on their loss and expense experience not afforded to other persons with respect to rates, policy forms, coverages, or other matters. A purchasing group is subject to all other applicable laws of this State.

"§ 58-512. Notice and registration requirements of purchasing groups.—(a) A purchasing group that intends to do business in this State shall furnish notice to the Commissioner that shall:

- (1) identify the state in which the group is domiciled;
- (2) specify the lines and classifications of liability insurance that the purchasing group intends to purchase;
- (3) identify the insurer from which the group intends to purchase its insurance and the domicile of such insurer;
- (4) identify the principal place of business of the group; and
- (5) provide such other information as may be required by the Commissioner to verify that the purchasing group is qualified under G.S. 58-506(9).

(b) The purchasing group shall register with and designate the Commissioner as its agent solely for the purpose of receiving service of legal documents or process, except that such requirement does not apply in the case of a purchasing group:

- (1) that
 - a. was domiciled before April 2, 1986, in any state of the United States; and
 - b. is domiciled on and after October 27, 1986, in any state of the United States;
- (2) that before October 27, 1986, purchased insurance from an insurer licensed in any state; and since October 27, 1986, purchased its insurance from an insurer licensed in any state;
- (3) that was a purchasing group under the requirements of the Product Liability Retention Act of 1981 before October 27, 1986; and
- (4) that does not purchase insurance that was not authorized for purposes of an exemption under that act, as in effect before October 27, 1986.

"§ 58-513. Restriction on insurance purchased by purchasing groups.—A purchasing group may not purchase insurance from a risk retention group that is not chartered in a state nor from an insurer not admitted in the state in which the purchasing group is located, unless the purchase is effected through a licensed agent or broker acting pursuant to the surplus lines laws and regulations of such state.

"§ 58-514. Administrative and procedural authority regarding risk retention groups and purchasing groups.—The Commissioner is authorized to make use of any of the powers established under this Chapter to enforce the laws of this State as long as those powers are not specifically preempted by the Product Liability Risk Retention Act of 1981, as amended by the Risk Retention Act of 1986. This includes, but is not limited to, the Commissioner's administrative authority to investigate, issue subpoenas, conduct depositions and hearings, issue orders, and seek or impose penalties. With regard to any investigation, administrative proceeding, or litigation, the Commissioner can rely on the procedural law and regulations of the State. The injunctive authority of the Commissioner in regard to risk retention groups is restricted by the requirement that any injunction be issued by a court of competent jurisdiction.

"§ 58-515. Penalties.—A risk retention group that violates any provision of this Article is subject to G.S. 58-9.7.

"§ 58-516. Duty of agents or brokers to obtain license.—Any person acting, or offering to act, as an agent or broker for a risk retention group or purchasing group, that solicits members, sells insurance coverage, purchases coverage for its members located within the State, or otherwise does business in this State shall, before commencing any such activity, obtain a license from the Commissioner.

"§ 58-517. Binding effect of orders issued in U.S. District Court.—An order issued by any district court of the United States enjoining a risk retention group from soliciting or selling insurance, or operating, in any state, or in all states or in any territory or possession of the United States, upon a finding that such a group is in a hazardous financial condition, is enforceable in the courts of this State."

Sec. 2. This act is effective upon ratification.

In the General Assembly read three times and ratified this the 8th day of June,
1987.