Another Success in Court for RRGs

By Karrie Hyatt

Risk Retention Groups (RRGs) were established by Congress under the 1986 Federal Liability Risk Retention Act (LRRA). RRGs are regulated in their state of domicile and, by the intention of the law, can operate in any other state as long as they register to do business in that state. While the intention of the federal law is clear, many states would like to have a hand in regulating RRGs operating in their states and often try to apply state laws to govern a RRG's business.

In May, the Georgia Supreme Court handed down a decision that supports non-domiciled RRGs operate unhindered in states in which they do business. The court decided in favor of OOIDA Risk Retention Group in the case of *Reis et al. v. OOIDA Risk Retention Group, Inc.* The case revolved around Georgia's direct action statute and whether or not non-domiciled risk retention groups should be exempted. Direct action statutes are laws that allows an injured party to take legal action against the insurer of a guilty party. There are less than a dozen states that allow for this action.

Details of the Case

In February 2015, a car carrying plaintiffs Candace Reis and Melvin Williams was in a collision with a commercial truck driven by Andre Robinson. The truck was owned by James Powell, doing

business as Zion Train Express, Inc., and insured by OOIDA RRG. The truck driver, Robinson, was found to be at fault for the accident.

OOIDA (Owner-Operator Independent Drivers Association) is an international trade association that represents owner-operator and professional drivers of heavy-duty trucks and small truck fleets. The organization was established in 1973 and has over 160,000 members. OOIDA Risk Retention Group was formed by OOIDA in the mid-1990s to offer commercial auto liability coverage to members of the association.

In the case of *Reis,* OOIDA RRG denied the insurance claim because Robinson was not driving as an employee of Zion Train Express at the time of the accident, but as a driver for a repair facility. OOIDA RRG directed that the claim should be covered by the repair facility's insurance, not the vehicle's insurance. The repair facility denied employing Robinson. Under Georgia's direct action statute, injured parties are allowed to directly sue insurance companies, so Reis and Williams sued all the parties involved, including OOIDA RRG.

OOIDA RRG requested a motion for summary judgement claiming that risk retention groups are not subject to direct action statutes and are exempted by the LRRA. The Wheeler County Superior Court granted the motion in favor of OOIDA RRG in April 2017. The plaintiffs appealed the case. The Georgia Court of Appeals directed the case to the Georgia Supreme Court as the case dealt with a federal preemption which could conflict with the Georgia State Constitution.

Arguments were heard this past March. The National Risk Retention Association (NRRA) stepped in on behalf of OOIDA RRG and filed an Amicus brief. The Georgia Supreme Court affirmed the lower court's decision with a pronouncement released in May.

The Decision

The plaintiffs argued that direct action statutes do not seek to regulate RRGs, but are, in effect, financial responsibility laws. The Court dismissed this argument summarily, asserting that, "The direct action statutes are not financial responsibility laws as they in no manner assure the financial soundness or solvency of a risk retention group. Rather, the direct action statutes provide a vehicle for directly naming a risk retention group as a party in a lawsuit."

The decision relied heavily on *Wadsworth v. Allied Professionals Insurance Co., A RRG*, a case decided by the 2nd Circuit Court of Appeals in 2014. Allied Professionals RRG (APIC) provides professional and general liability coverage to three risk purchasing groups whose members consist of alternative health practitioners, including chiropractors, acupuncturists,

and massage therapists. In *Wadsworth*, a New York chiropractor pled guilty to sexually assaulting several patients. Sexual misconduct is excluded under APIC's policies, so the insured's claims were denied.

The action in this case was brought by one of the insured's victims who sought to recover a state court judgment of $101,175 against the chiropractor from APIC in a suit citing New York state's direct action statute. In the Federal Appeals Court decision, it was stated that the LRRA, "Contains sweeping preemption language that sharply limits the authority of states to regulate, directly or indirectly, the operation of risk retention groups chartered in another state."

The Supreme Court of Georgia's decision went into detailed discussion of *Wadsworth* referring to several of its more salient points. It found that direct action statutes are a form of regulation and would infringe on a RRG's exemption from being regulated by non-domiciliary states. This would directly impact the business operation of a RRG due to "the additional financial burden of defending unanticipated lawsuits in which they are directly named as parties, in affecting the relationship between an insurer and insured by creating possible conflicts of interest between the insurer and the policyholder, and in limiting their application to insurers of motor carriers."

In its concluding statement, the Court wrote, "The clear goal of the LRRA is to streamline the operations of risk retention groups like OOIDA [RRG] by subjecting them to consistent regulation overseen by their chartering state. The direct action statutes subject insurers of motor carriers to lawsuits as parties, and thus, exposes them directly to liability and any consequent damages. As such, direct action statutes both directly and indirectly regulate the operations of insurers of motor carriers in Georgia. 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."

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What It Means

In the last few years the NRRA and some of its member RRGs have been challenging state laws that are being incorrectly applied to non-domiciliary risk retention groups. Since RRGs were enabled by the LRRA, states have sought to regulate non-domiciliary RRGs. In its 32-year history there have been dozens of court cases decided both for and against RRGs and the other entity enabled by the LRRA—risk purchasing groups—but very few cases that became influential to the legal cases that followed.

The NRRA, to promote solutions that support RRGs operating across state lines unimpeded, established an Amicus committee to focus on supplementing court cases affecting RRGs with Amicus Briefs. While the NRRA is a trade association for a very small slice of the captive insurance sector, it views its main goal as being an advocate on behalf of its members and issuing Amicus Briefs is one important way that it can do that. There are a number of legal experts on the committee that work together to vet cases and choose the ones that will help support the LRRA.

Reis is important because it will help to create case law that in turn will help set precedent for RRGs to operate unimpeded throughout the U.S. Case law are decisions from the higher courts that establish new interpretations of the law and can then be cited as precedents. These precedents can be very influential in deciding lawsuits and other legal actions, sometimes even circumventing a lengthy court trial.

Building on the *Wadsworth* decision, which has already proved useful in several other court cases involving RRGs since it was handed down in 2014, Reis adds its own weight to help support risk retention groups operate unhindered by foreign state regulation. ■

Karrie Hyatt is a freelance writer who has been involved in the captive industry for more than ten years. More information about her work can be found at: www.karriehyatt.com.