

ACT 180

S.B. NO. 1526

A Bill for an Act Relating to Insurance.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER
RISK RETENTION**

§ -1 **Definitions.** As used in this chapter:

“Commissioner” means the insurance commissioner of this State.

“Completed operations liability” means liability arising out of the installation, maintenance, or repair of any product at a site which is not owned or controlled by any person who:

- (1) Performs that work; or
- (2) Hires an independent contractor to perform that work; but shall include liability for activities which are completed or abandoned before the date of the occurrence giving rise to the liability.

“Domicile”, for purposes of determining the state in which a purchasing group is domiciled, means:

- (1) For a corporation, the state in which the purchasing group is incorporated; or
- (2) For an unincorporated entity, the state of its principal place of business.

“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 to:

- (1) Meet obligations to policyholders with respect to known claims and reasonably anticipated claims; or
- (2) Pay other obligations in the normal course of business.

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

"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 those other persons resulting from or arising out of:

- (1) Any business, whether for profit or nonprofit, trade, product, services, including professional services, premises, or operations; or
- (2) Any activity of any state or county government, or any agency or political subdivision thereof; but does not include personal risk liability and 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.

"Personal risk liability" means liability for damages because of injury to any person, damage to property, or other loss or damage resulting from any personal, familial, or household responsibilities or activities, rather than from responsibilities or activities referred to in the definition of "liability".

"Plan of operation" or "feasibility study" means an analysis which presents the expected activities and results of a risk retention group including, not less than the following:

- (1) The coverages, deductibles, coverage limits, rates, and rating classification systems for each line of insurance the group intends to offer;
- (2) Historical and expected loss experience of the proposed members and national experience of similar exposures to the extent that this experience is reasonably available;
- (3) Pro forma financial statements and projections;
- (4) Appropriate opinions by a qualified, independent casualty actuary, including a determination of minimum premiums or participation levels required to commence operations and to prevent a hazardous financial condition;
- (5) Identification of management, underwriting procedures, managerial oversight methods, investment policies; and
- (6) Other matters as may be prescribed by the commissioner for liability insurance companies authorized by the insurance laws of the state in which the risk retention group is chartered.

"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 the person when the incident giving rise to the claim occurred.

"Purchasing group" means any group which:

- (1) Has as one of its purposes the purchase of liability insurance on a group basis;
- (2) Purchases this insurance only for its group members and only to cover their similar or related liability exposure, as described in subparagraph (C);¹
- (3) Is composed of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations; and

(4) Is domiciled in any state.

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

- (1) Whose primary activity consists of assuming and spreading all, or any portion, of the liability exposure of its group members;
- (2) Which is organized for the primary purpose of conducting the activity described under paragraph (1);
- (3) Which:
 - (A) 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
 - (B) 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 this date, had certified to the insurance commissioner of at least one state that it satisfied the capitalization requirements of that state, except that any group shall be considered to be a risk retention group only if the group has been engaged in business continuously since this date and only for the purpose of continuing to provide insurance to cover product liability or completed operations liability, as defined in the Product Liability Risk Retention Act of 1981, 15 U.S.C. 3901 et seq., before the date of the enactment of the Liability Risk Retention Act of 1986, P.L. 99-563;
- (4) Which does not exclude any person from membership in the group solely to provide for members of the group a competitive advantage over the person;
- (5) Which has as its:
 - (A) Members only persons who have an ownership interest in the group and which has as its owners only persons who are members who are provided insurance by the risk retention group; or
 - (B) Sole member and sole owner an organization which is owned by persons who are provided insurance by the risk retention group;
- (6) Whose members are engaged in business or activities similar or related to the liability of which these members are exposed by virtue of any related, similar, or common business trade, product, services, premises, or operations;
- (7) Whose activities do not include the provision of insurance other than:
 - (A) Liability insurance for assuming and spreading all or any portion of the liability for its group members; and
 - (B) Reinsurance with respect to the liability of any other risk retention group, or any members of another group, which is engaged in businesses or activities so that this group or member meets the requirement described in paragraph (6) from membership in the risk retention group which provides this reinsurance; and
- (8) The name of which includes the phrase "risk retention group".

"State" means any state of the United States or the District of Columbia.

§ -2 Risk retention groups chartered in this State. A risk retention group seeking to be chartered in this State shall 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, shall comply with all of the laws, rules, and requirements applicable to these insurers chartered and licensed in this State and with section -3 to the extent these requirements are not a limitation on laws, rules, or requirements of this State. Prior to offering insurance in any state, each risk retention group shall also submit for approval to the commissioner of this State 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. Immediately upon receipt of an application for charter, the commissioner shall provide summary information concerning the filing to the National Association of Insurance Commissioners, including:

- (1) The name of the risk retention group;
- (2) The identity of the initial members of the group;
- (3) The identity of those individuals who organized the group or who will provide administrative services or otherwise influence or control the activities of the group;
- (4) The amount and nature of initial capitalization;
- (5) The coverages to be afforded; and
- (6) The states in which the group intends to operate.

Providing notification to the National Association of Insurance Commissioners is in addition to and shall not be sufficient to satisfy the requirements of section -3 or any other sections of this chapter.

§ -3 Risk retention groups not chartered in this State. Risk retention groups chartered in states other than this State and seeking to do business as a risk retention group in this State shall observe and abide by the laws of this State as follows:

- (1) 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 of this State may require to verify that the risk retention group is qualified as a risk retention group;
 - (B) A copy of its plan of operations or a feasibility study and revisions of this plan or study submitted to its state of domicile; provided 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 was:
 - (i) Defined in the Product Liability Risk Retention Act of 1981, 15 U.S.C. 3901 et seq., before October 27, 1986; and
 - (ii) Offered before that date by any risk retention group which had been chartered and operating for not less than three years before that date; and
 - (C) 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 the insurance commissioner of 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 in its state of domicile;
 - (C) Upon request by the commissioner, a copy of any audit performed with respect to the risk retention group; and
 - (D) Information as may be required to verify its continuing qualification as a risk retention group;
- (3) Taxation of risk retention groups shall be as follows:
 - (A) All premiums paid for coverages within this State to risk retention groups shall be subject to taxation at the same rate and subject to the same interest, fines and penalties for nonpayment as that applicable to foreign admitted insurers;
 - (B) To the extent agents or brokers are utilized, the agents or brokers shall report and pay the taxes for the premiums for risks which the agents or brokers have placed with or on behalf of a risk retention group not chartered in this State; or
 - (C) To the extent agents or brokers are not utilized or fail to pay the tax, each risk retention group shall pay the tax for risks insured within the State; provided that each risk retention group shall report all premiums paid to it for risks insured within the State;
- (4) Any risk retention group shall comply with section 431-641 to 431-648 regarding deceptive, false or fraudulent acts or practices, and unfair claims settlement practices; provided that if the commissioner seeks an injunction regarding such conduct, the injunction shall be obtained from a court of competent jurisdiction;
- (5) Any risk retention group shall 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. Any such examination shall be coordinated to avoid unjustified repetition and conducted in an expeditious manner and in accordance with the National Association of Insurance Commissioner's Examiner Handbook.
- (6) Any 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 rules of your state. State insurance insolvency guaranty funds are not available for your risk retention group;

- (7) 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;
- (8) 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 this risk retention group, other than in the case of a risk retention group all of whose members are insurance companies;
- (9) No risk retention group may offer insurance policy coverage prohibited by chapter 431 or declared unlawful by the highest court of this State;
- (10) 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 any state insurance commissioner if there has been a finding of financial impairment after an examination under paragraph (5).

§ -4 Compulsory associations. (a) No risk retention group shall be permitted to join or contribute financially to any insurance insolvency 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 shall participate in this State's joint underwriting associations and mandatory liability pools as provided by any law of this State.

§ -5 Countersignatures not required. A policy of insurance issued to a risk retention group or any member of that group shall not be required to be countersigned as otherwise provided in section 431-104.

§ -6 Purchasing groups; exemption from certain laws relating to the group purchase of insurance. A purchasing group meeting the criteria established under the provisions of the Federal Liability Risk Retention Act of 1986, P.L. 99-563, shall be 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 would discriminate against a purchasing group or its members. In addition, an insurer shall be exempt from any law of this State which 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 shall be subject to all other applicable laws of this State.

§ -7 Notice and registration requirements of purchasing groups. (a) A purchasing group which intends to do business in this State shall furnish notice to the commissioner which shall include the following:

- (1) Identification of the state in which the group is domiciled;
- (2) Specification of the lines and classifications of liability insurance which the purchasing group intends to purchase;

- (3) Identification of the insurance company from which the group intends to purchase its insurance and the domicile of such company;
- (4) Identification of the principal place of business of the group; and
- (5) Provision of other information as may be required by the commissioner to verify that the purchasing group qualifies as such under section -1.

(b) The purchasing group shall register with and designate the commissioner or other appropriate authority as its agent solely for the purpose of receiving service of legal documents or process, except that these requirements shall not apply in the case of a purchasing group which:

- (1) Was domiciled before April 1, 1986, and is domiciled on and after October 27, 1986 in any state of the United States;
- (2) Before October 27, 1986, purchased insurance from an insurance carrier licensed in any state, and since October 27, 1986, purchased its insurance from an insurance carrier licensed in any state;
- (3) Was a purchasing group under the requirements of the Product Liability Risk Retention Act of 1981, 15 U.S.C. 3901 et seq., before October 27, 1986; and
- (4) Does not purchase insurance that was not authorized for purposes of an exemption under that Act, as in effect before October 27, 1986.

§ -8 Restrictions 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 or 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 that state.

§ -9 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 chapter 431 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, 15 U.S.C. 3901 et seq., as amended by the Risk Retention Amendments of 1986, P.L. 99-563. This includes, but is not limited to, the commissioner's administrative authority to investigate, issue subpoenas, conduct depositions and hearings, issue orders, and impose penalties. With regard to any investigation, administrative proceedings, or litigation, the commissioner may rely on the procedural law and rules of this State. The injunctive authority of the commissioner in regard to risk retention groups shall be restricted by the requirement that any injunction be issued by a court of competent jurisdiction.

§ -10 Penalties. A risk retention group which violates any provision of this chapter shall be subject to fines and penalties applicable to licensed insurers generally, including revocation of its license, the right to do business in this State, or both.

§ -11 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, which solicits members, sells insurance coverage, purchases coverage for its members located within the State or otherwise does business in this State, before commencing any such activity, shall obtain a license from the commissioner.

§ -12 Binding effect of orders issued in United States 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 the group is in a hazardous financial condition shall be enforceable in the courts of this State.

§ -13 Rules. The commissioner may adopt rules under chapter 91, relating to risk retention groups as may be necessary or desirable to carry out this chapter.”

SECTION 2. This Act shall take effect upon its approval.

(Approved June 6, 1987.)

Note

1. So in original.