John Nygren

WISCONSIN STATE REPRESENTATIVE ★ 89TH ASSEMBLY DISTRICT

Co-Chair, Joint Committee on Finance

Senate Bill 609 – Risk Retention Groups
Senate Committee on Health and Human Services
Testimony by State Rep. John Nygren
March 6, 2014

Thank you, Chair Vukmir and members of the Committee for holding a public hearing on Senate Bill 609 today.

Currently in Wisconsin, doctors must purchase private medical malpractice insurance in order to participate in the Injured Families and Patients Compensation Fund or prove that they can self-insure. Twenty-five years ago, Wisconsin closed the door to a segment of medical malpractice insurers, known as Risk Retention Groups (RRGs) by preventing medical malpractice policies sold to physicians by RRGs from meeting this IFPCF "proof of insurance" requirement. Wisconsin is the only state in the nation with such a restriction.

RRGs were created by Congress through the Liability Risk Retention Act (LRRA) in the late 1980's to improve competition and choice in the liability insurance market. RRGs were designed to allow member-organizations (like those representing doctors or accountants or lawyers) to set up their own insurance companies to offer specialized professional liability insurance and programs to their members. Specifically, RRGs were authorized to be licensed in one state and sell insurance in all other states without being licensed in those states. The rationale for the one-state licensing model is to reduce administrative costs created by the 50-state licensure model of "traditional" insurance carriers and to allow these relatively small, specialized organizations to provide cost-competitive products to their members.

Functionally, RRGs are regulated by the state in which they are licensed. However, every state in which they sell insurance retains the ability to exercise regulatory oversight on its own. While states vary with regard to insurance regulations, by and large RRGs must follow the same rules as licensed insurers in every state.

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John Nygren

WISCONSIN STATE REPRESENTATIVE ★ 89TH ASSEMBLY DISTRICT

Co-Chair, Joint Committee on Finance

Unlike Wisconsin's markets for other types of insurance, our medical malpractice insurance marketplace is highly concentrated. According to OCI's latest data, more than 75% of medical malpractice insurance is sold by just 4 companies. In the highly competitive marketplaces for Worker's Compensation or Private Auto Insurance, for example, where Wisconsin companies are prominent, more than 20 companies share far smaller portions of their respective markets. Furthermore, in the health insurance marketplace, the top 20 insurers make up 80 percent and the largest insurer only has 10 percent of the marketplace. Our medical malpractice insurance market is precisely the type of market for which RRGs were designed.

In 1990, when Wisconsin closed RRGs out of our medical malpractice market, they were a new business entity, their function and viability unproven. Twenty-five years later, however, RRGs selling medical malpractice insurance are among the most stable, highest rated insurers in the U.S. It is time we join the 49 other states allowing RRGs to compete in their medical malpractice markets, remove this anti-competitive regulation and give Wisconsin physicians access to these high-quality insurance products.

This bill authorizes an otherwise qualifying medical malpractice insurance policy sold by an RRG to suffice as the "proof of insurance" required for a physician's participation in the IFPCF without requiring the RRG to be licensed in Wisconsin (consistent with the LRRA) . Under the bill, RRGs must be registered with the OCI Commissioner and approved to provide health care liability insurance coverage. RRGs will be subject to all the requirements under the health care liability provisions of the statutes that apply to other insurers that provide health care liability insurance. This includes policy approval by the OCI Commissioner, assessments for the peer review council, mandated payment of specified costs in the settlement of claims, and reporting requirements related to claims paid.

This bill does not affect any other type of insurance company, or any other type of insurance sold by an RRG. This bill has the support of the Wisconsin Academy of Ophthalmology, the Wisconsin Society of Anesthesiologists and the Wisconsin Chapter, American College of Emergency Physicians.

Thank you for your time, I would be happy to answer any questions from the Committee.

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Alberta Darling

Wisconsin State Senator

Joint Committee on Finance

TESTIMONY BEFORE THE SENATE COMMITTEE ON
HEALTH AND HUMAN SERVICES
Senate Bill 609
Senator Alberta Darling
March 6, 2014

Thank you Committee Chair Vukmir and members for giving me the opportunity to testify in favor of Senate Bill 609 which allows out-of-state risk retention groups to provide health care liability insurance in Wisconsin. I am pleased to be joined by Representative Nygren to discuss the details of the bill.

Healthcare providers are required to have at least $1 million in medical malpractice coverage per occurrence and $3 million for a policy year. Currently, the only options to gain this coverage are through an authorized in-state insurer or by qualifying as a self-insurer according the Office of the Commissioner of Insurance (OCI). This bill would create a third option of using an out-of-state risk retention group, something that is done in all 49 other states. Risk retention groups, which are set up by member-organizations to offer coverage for their specialized medical field, would register with and approved by OCI. They would operate under the same requirements that apply to other insurers that provide medical malpractice insurance, however they would only need to be licensed in one state and not all 50 which reduces administrative costs that allows for competitively priced coverage for their members. With four companies selling more than 75% of medical malpractice coverage in Wisconsin it is clear there is room for RRGs, which in 1990 were prevented from operating when they were a recently created entity by Congress and had yet to prove their viability. Over two decades later there is a successful track record and a demand for RRGs by healthcare professionals.

I ask that the committee support Senate Bill 609, to increase competition and provide more options for medical liability insurance in Wisconsin. Thank you again for allowing me to testify in favor of this important piece of legislation.

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ERIK SEVERSON

STATE REPRESENTATIVE • 28TH ASSEMBLY DISTRICT

Testimony on Senate Bill 609
Senate Committee on Health and Human Services

March 6, 2014

I would like to thank Chairman Vukmir and the members of the committee for holding a hearing on Senate Bill 609. I would also like to thank Representative Nygren and Senator Darling for their leadership on this important issue. While I am not available to testify, I want to provide members with written testimony on my support of this legislation.

As you are aware, physicians and other health care providers are required to carry medical malpractice insurance as proof of insurance for participation in the Injured Patients & Families Compensation Fund (IPFCF). Organizations such as the American Academy of Ophthalmology and the American College of Emergency Physicians have created risk retention groups (RRGs) that specifically apply to their members in order to provide coverage geared specifically for those practitioners.

Despite RRGs being authorized by the Federal Liability Risk Retention Act, Wisconsin continues to be the only state that prohibits RRGs from offering medical malpractice policies. By restricting RRGs from offering policies in this state, we are giving big insurance companies an unfair market advantage and limiting competition.

Senate Bill 609 allows qualified medical malpractice policies, sold by RRGs to qualify as a physician's proof of insurance for participation in the IPFCF. By passing this legislation, we are creating a competitive market place that gives providers more choices for where they receive their medical malpractice insurance coverage.

Thank you again Chairman Vukmir and members holding this public hearing on Senate Bill 609 and I look forward to working with you on passage of this legislation.

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Testimony of Paul Weber, JD, ARM
Vice President of Risk Management Legal Department, Ophthalmic Mutual Insurance Company (OMIC)
Senate Bill 609
Senate Committee on Health and Human Services
March 6, 2014

Madame Chair and Members of the Committee,

My name is Paul Weber. I am a lawyer and healthcare risk manager and have worked at Ophthalmic Mutual Insurance Company (OMIC), a Risk Retention Group for over 20 years.

I know that 25 years ago Wisconsin insurance regulators felt threatened by insurance companies formed as risk retention groups. Mind you, not all risk retention groups, just the ones providing healthcare liability insurance. And, not even all the risk retention groups that provide healthcare liability insurance carriers, just those who provide coverage to the physicians, hospitals, nurse anesthetists and others who participate in the Injured Patients and Families Compensation Fund (Patient Compensation Fund).

In 1990, the argument for excluding certain healthcare liability carriers was a fear that the Wisconsin Insurance Guaranty Fund would not help cover claims if the risk retention group became insolvent. The fear is the Wisconsin insured and injured person would be exposed to an uninsured risk. Apparently, this fear continues to be part of the current rationale for opposing SB 609. However, if solvency and the guaranty fund is truly the reason for opposing the change, why are approximately 54 risk retention groups currently registered and doing business in Wisconsin and writing approximately $11 million in premium. These carriers write coverage for attorneys, CPAs, colleges, trucking, aviation, nonprofits and the list continues. These Wisconsin registered risk retention groups, also write $3.3 million in healthcare liability coverage to orthodontists, oral maxillofacial surgeons, nursing homes and home healthcare. Since these companies do not participate in the guaranty fund, aren't insureds who have this coverage and claims of the injured exposed to an uninsured risk? How does the opposition to changing the law explain this inconsistency in regulating risk retention groups?

Those who oppose SB 609, also argue that Wisconsin is different than others states because they have a patient compensation fund and the proposed amendment won't work because there are no legal mechanisms to regulate risk retention groups in accordance with the patient compensation fund. OMIC provides coverage to over 515 ophthalmologists in 6 states with patient compensation funds: Louisiana, Pennsylvania, Kansas, South Carolina, Nebraska and Indiana. Annual fees are paid to the compensation fund, taxes are paid to the states and regulations followed that the state promulgates. The reality is that OMIC, and other risk retention groups, when necessary make simple amendatory endorsements to the policy to conform their policies to the regulations in a patient compensation state. For instance, in Indiana we amended our policy to exclude the insureds right to withhold consent to settlement. We have amendatory endorsements not only for Indiana, but also Pennsylvania, Kansas and Nebraska. This is the

standard way of doing business.

The fact is that today risk retention groups maintain a roughly 10 percent share of the healthcare liability market, providing nearly $1.5 billion of healthcare liability insurance nationwide in 2012 and expecting to climb to $1.7 billion for 2013. Healthcare systems such as the Harvard, Johns Hopkins, Yale, Columbia and other large institutions all are insured by risk retention groups. In fact, the risk retention group for Harvard insures nearly 7,000 physicians. Are all these states putting their citizens at risk of unpaid claims because these healthcare institutions mentioned are insured by risk retention groups that are not part of a guaranty fund? Clearly, the answer is no.

In the early 1990's there may have been some understandable concern about risk retention groups and those that insure healthcare provides. Now, after 25 years, the Wisconsin's regulator's fear is not rational and contrary to the facts as demonstrated by OMIC, PPMRRG and other risk retention groups that insure thousands of physicians and many acclaimed healthcare systems throughout the United States. By passing SB 609, you are simply allowing physicians in Wisconsin the opportunity to be insured by risk retention groups, something done in all other states in the United States.

Testimony of Harry Zink, MD
Board Vice-Chair, Ophthalmic Mutual Insurance Company (OMIC)
Senate Bill 609
Senate Committee on Health and Human Services
March 6, 2014

Madame Chair and Members of the Committee,

My name is Harry Zink. I am a physician practicing Ophthalmology in Wooster, Ohio. I am the Vice Chair of the Board of Directors of Ophthalmic Mutual Insurance Company (OMIC) and the current Chair of the OMIC Claims Committee. I am also a Past President of the American Academy of Ophthalmology.

Thank you for taking the time to consider Senate Bill 609

OMIC is sponsored by the American Academy of Ophthalmology, an organization that includes 94% of all US practicing ophthalmologists. In 1987 there was a malpractice insurance crisis. Ophthalmologists either could not find insurance or were being charged exorbitant rates. The Academy took action and formed its own insurance company, OMIC, to keep insurance affordable and accessible for its members. It formed OMIC as a mutual insurance company, choosing the structure of a risk retention group. This has allowed the company to efficiently and cost effectively provide liability insurance to over 4,500 Academy members nationwide.

In 1996 OMIC earned an A-, "Excellent" from AM Best and since 2007 it has been rated "A" while having handled over 4,000 claims against ophthalmologists, paying over $200 million in losses and loss related expenses since 1987.

Risk retention groups are owned by their insureds. The 19 ophthalmologists who make up OMIC's Board and Committees are practicing ophthalmologists who are actively engaged in the decision making and oversight of the company on behalf of their fellow 4,500 insureds.

Over 50% of OMIC insureds participate in risk management education every year. These ophthalmologists engage because what we offer is specific to their specialty. It's something meaningful, that they can apply in their own practices. Additionally, hundreds of OMIC insureds call the OMIC risk management hotline every year when they need help to handle difficult cases or deal with adverse outcomes.

When new ophthalmic procedures are being proposed and underwriting guidelines are being drafted, we have direct access to the American Academy of Ophthalmology for the most current trends and data to make sure that we protect patients. The guidelines we provide are industry standards.

Regarding claims management, over the past 10 years, OMIC has settled 8% fewer ophthalmology claims per insured, for 38% less indemnity paid and almost 40% less expense costs compared to multispecialty carriers handling ophthalmic claims. Ophthalmologists insured by OMIC know that their claim is being reviewed by other ophthalmologists who understand the medicine, know the best experts to retain and can identify the best approach to each claim.

By passing SB 609, you will allow Wisconsin ophthalmologists, once again, to be insured by a risk retention group sponsored by the American Academy of Ophthalmology.

Thank you.

Testimony on 2013 AB 808/SB609

Testimony of
Randy Blumer
Before the
Assembly Committee on Insurance
March 6, 2014

Representative Petersen and Members of the Assembly Insurance Committee, thank you for permitting me to testify on AB 808. My name is Randy Blumer and I am testifying for information purposes only.

Background

I am currently the Executive Director of the Wisconsin Insurance Security Fund (WISF). The WISF is Wisconsin's insurance guaranty fund. I am also currently on the Board of Directors of the Injured Patients and Families Compensation Fund (Patients Compensation Fund). You have received a letter from the Board of the Patients Compensation Fund opposing this proposed legislation. In my prior work life, I spent over 25 years at the Wisconsin Office of the Commissioner of Insurance (OCI) in various positions, including as both commissioner and deputy commissioner. While at the OCI, I also served as chairperson of the Patients Compensation Fund Board for a substantial number of years.

General Information on WISF

The WISF is a nonprofit organization governed by Chapter 646 of the Wisconsin Statutes. Its purpose is to pay the claims of Wisconsin policyholders and claimants under covered insurance policies in the event a Wisconsin-licensed insurer becomes insolvent. The WISF generally covers property and casualty, life and annuities and disability (health) insurance.

Since its inception in 1969, the WISF has paid over $260,000,000 in claims of insolvent P&C, life and disability insurers.

Guaranty Association Coverage For Medical Malpractice Insurance Issued by Wisconsin-Authorized Insurers

Under Wisconsin's current medical malpractice insurance structure, health care providers are required to provide proof of financial responsibility, either through insurance issued by an insurer authorized to do business in Wisconsin or self-insurance, for the first $1,0000,000 each occurrence and $3,000,000 for all occurrences in any one policy year.[1] The Patients Compensation Fund assumes the liability for paying the portion of a medical malpractice claim that exceeds the amount of insurance or self-insurance required of the provider.[2] Providers who choose to fully insure through a Wisconsin-authorized insurer are protected by the WISF in the event their insurer becomes insolvent and is placed into liquidation. As important, Wisconsin residents who sustain injuries due to medical malpractice have WISF protection in the event the medical malpractice insurer that issued the provider's policy becomes insolvent. The WISF provides protection by statute up to $500,000 for each "single risk, loss or life." If a Wisconsin-authorized insurer issuing medical malpractice insurance becomes insolvent, the WISF will assume the liability for and adjudicate the claims under the policies issued by the insolvent insurer up to $500,000 for each claim. The funds to pay these claims come from assessments on all other insurers authorized to write property and casualty insurance in Wisconsin. It is a requirement for doing business in Wisconsin that authorized insurers are a part of the WISF and

[1] Wis. Stat. § 655.23(4).
[2] Wis. Stat. § 655.27(1).

are subject to Wis. Stat. Chapter 646. This important protection is not available to providers and claimants under policies issued by Risk Retention Groups (RRGs).

Guaranty Association Coverage
For Medical Malpractice Insurance
Issued by Risk Retention Groups

The WISF does not cover insurance policies issued by RRGs. The WISF is, in fact, prohibited both by Wisconsin law and by the federal Liability Risk Retention Act of 1986 from covering insurance written by RRGs.[3] That means that there is no protection for Wisconsin providers covered by a RRG in the event that the RRG becomes insolvent and is unable to pay its claims. Even if an RRG was willing to subject itself to guaranty association coverage under Chapter 646, it could not do so because federal law provides that a state may not "require or permit" an RRG to participate in the guaranty association.

More importantly, however, is that there is no protection for injured Wisconsin claimants of providers who are covered by insolvent RRGs – at least until the Patient's Compensation Fund assumes liability for that part of a claim in excess of $1,000,000. In the event a RRG becomes insolvent, the providers who were covered under the RRG's policies and who have a claim for malpractice made against them may be required to cover the claim with the provider's personal assets up to $1,000,000 when the Patients Compensation Fund assumes liability.

If there could be WISF coverage of policies issued by RRGs, the WISF would cover up to $500,000 for each claim. For most medical malpractice claims, the entire claim would be

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[3] Wis. Stat. § 646.01(1)(a)2.h. provides that Chapter 646, the WISF's enabling chapter, excludes coverage for risk retention groups.

The Liability Risk Retention Act of 1986 also provides that states may not "require or permit a risk retention group to participate in any insurance insolvency guaranty association to which an insurer licensed in the State is required to belong." 15 U.S.C. § 3902(a)(2).

covered since the median medical malpractice claim in Wisconsin is only $225,000[4], less than half of the $500,000 per claim currently covered by the WISF. Even the nationwide median medical malpractice payment in the highest medical malpractice category tracked by the National Practitioners Data Bank (NPDB) does not exceed $350,000, and the nationwide mean exceeds $500,000 only for obstetrics-related claims where the mean was $548,733 in 2012[5]. So, if the WISF were not prohibited by federal law from covering policies written by RRGs, its $500,000 limit would most certainly cover the entire amount of the vast majority of medical malpractice claims payments. That is meaningful protection for Wisconsin policyholders and claimants and that is protection that cannot be provided under policies written by RRGs.

Conclusion

The Wisconsin Legislature chose to protect Wisconsin providers and claimants injured by medical malpractice from the risk of insurer insolvency through coverage by the WISF. That coverage is not, and cannot by federal law, be provided to providers and claimants under a policy issued by an RRG.

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[4] National Practitioners Data Bank 2012 Annual Report, Table 23. The 2012 Annual Report is the most recent NPDB report available.

[5] National Practitioners Data Bank 2012 Annual Report, Table 25.

State of Wisconsin / OFFICE OF THE COMMISSIONER OF INSURANCE

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Testimony of Julie E. Walsh, Senior Attorney
On behalf of the Board of Governors for
The Injured Patients and Families Compensation Fund

Before the
Senate Committee on Health and Human Services
March 6, 2014

Regarding 2013 SB 609

Senator Vukmir and Members of the Senate Committee on Health and Human Services, thank you for permitting me to testify regarding 2013 SB 609. My name is Julie Walsh and with me is Jeff Kohlmann, Director of the Injured Patients and Families Compensation Fund. I am testifying in opposition to SB 609 on behalf of the Wisconsin Injured Patients and Families Compensation Fund Board of Governors.

Background

I am in-house counsel to the Injured Patients and Families Compensation Fund (Fund), supporting the Board of Governors (Board), the Director and the Board's committees. I have served in this capacity for nearly 16 years. The Fund is governed by a 13-member Board with diverse representation including representatives from the insurance industry, the Wisconsin Association for Justice, the State Bar of Wisconsin, the Wisconsin Medical Society, the Wisconsin Hospital Association, and four public members appointed by the Governor. The Commissioner of Insurance, or his designee, serves as Chair. The Board recently sent a letter to every member of the Legislature and individually to each sponsor of the proposed bill and leadership of both houses expressing the Board's significant concerns with AB 808 and the companion bill SB 609. (Attached.)

Injured Patients and Families Compensation Fund:
Background and Statistics

The Fund was created in 1975 to provide medical malpractice coverage for Wisconsin health care providers in excess of the provider's primary limits of coverage. Participation in the Fund is mandatory for health care providers including physicians and physician partnerships, corporations and health professionals they employ, CRNAs, hospitals and their employees. The Fund provides coverage in excess of the primary limit, established by statute currently at $1 million per occurrence and $3 million aggregate per year. The Fund is unlimited in its coverage under Wis. Stat. § 655.27 (1), and since July 1, 1975 has been named in 5,955 medical malpractice cases and has made payments in 667 claims totaling $845,665,150 to injured persons and their families on behalf of health care providers that are Fund participants. The combination of being both a fund with mandatory participation and unlimited in coverage makes the Wisconsin Injured Patients and Families Compensation Fund wholly unique throughout the United States.

The participating health care providers pay annual fees to the Fund based upon their medical specialty or type of health care organization. These fees are actuarially determined as an amount necessary to adequately cover anticipated losses for each category of provider that could arise in that given year. No state dollars are expended, however, there is a legislative "sum sufficient" not to exceed $100,000,000 should the Fund itself be determined to have insufficient money. See, Wis. Stat. § 20.145 (2).

The Fund currently provides excess coverage to 15,684 participants who include: 13,523 physicians; 695 nurse anesthetists; 128 hospital with 19 affiliated nursing homes; 18 hospital-owned or controlled entities; 66 ambulatory surgery centers; 1 cooperative; 24 partnerships; and 1,210 corporations.

State's Authority to Regulate under Liability Risk Retention Act of 1986

Briefly, the Liability Risk Retention Act of 1986, (LRRA), and its predecessor the Products Liability Risk Retention Act, authorized the creation of risk retention groups to increase the affordability and availability of commercial liability insurance. LRRA incorporated preemption language to minimize regulatory burdens on RRGs operating in multiple states and broadened the scope of the liability products RRGs could offer. The regulatory framework incorporated under LRRA significantly limits financial and market conduct oversight to the home or domestic state and specifically preempts the vast majority of non-domestic state insurance laws. Specifically, under LRRA 15 U.S.C. § 3902, a non-domestic RRG is exempt from non-domiciliary state laws, rules, regulations or orders if and when such laws, rules, regulations or orders would make it unlawful for a RRG to operate in that state or would impose regulatory oversight over a non-domestic risk retention group, directly or indirectly.

Due to the breadth of LRRA's preemptions, the proposed amendment to Wis. Stat. § 655.23 (3) (am), would create an uneven field for issuers of medical malpractice insurance and potentially disrupt the stable medical malpractice environment in Wisconsin. Currently the state has managed to avert a medical malpractice crisis – where providers are unable to obtain affordable coverage and injured patients are unable to be fully compensated – unlike the majority of states. The stability of the Fund is beneficial to Wisconsin providers and consumers; providers are able to readily obtain coverage from 25 different insurers and an insurer of last resort, the Wisconsin Health Care Liability Insurance Plan. Consumers benefit with increased access to providers and knowing that if they unfortunately are injured by an act of medical malpractice they will be fully compensated as determined by a court or through settlement.

Although the proposal would amend the definition of insurer to include non-authorized foreign RRGs and thereby bring RRGs theoretically under all applicable provisions of Wis. Stat. Chapter 655, recent federal case law raises the concern that those provisions cannot be enforced upon a non-domestic RRG unless the domiciliary state of that RRG has similar provisions. If a foreign RRG objects to compliance with Ch. 655 provisions and litigation ensues Wisconsin would likely be found to have violated the preemption clause of LRRA. This could have a long-lasting negative impact on the state's providers, consumers and insurers. The concern for the Fund is significant.

For example, the Fund relies upon the certificate of insurance filing, Wis. Stat. § 655.23 (3) (b), to identity the provider's risk classification and coverage period that are then used as the basis for billing Fund assessments. Without this information the Fund has no means to appropriately assess the provider for Fund coverage. Additionally, the filing of the certificate of insurance is critical to the Fund's ability to monitor provider compliance with coverage requirements and is a required condition of the provider's license. As the Fund has mandatory participation the provider's compliance with proof of financial responsibility is linked to the provider's license to practice in this state. The Fund must report to the Department of Safety and Professional Services the provider's non-compliance and may affect that provider's licensure status. If the Fund is unable to enforce this filing requirement upon a foreign RRG, the Fund cannot extend coverage to that provider which leaves the provider and the potential injured patient and family exposed.

LRRA does however contain a "savings" clause. Specifically, Congress left to the states the ability to specify acceptable means of demonstrating financial responsibility when the financial responsibility is a condition, as in the case of the Fund, for

obtaining a license to practice[1]. Under that clause Wisconsin's requirement that providers participating in the Fund are required under Wis. Stat. § 655.23 (3) (a), "to insure and keep insured the health care provider's liability by a policy of health care liability insurance issued by an insurer authorized to do business in this state or shall qualify as a self-insurer."

Wisconsin's statute, Wis. Stat. § 655.23 (3) (a), was the subject of litigation resolved in 1998. The Court in *Ophthalmic Mut. Ins. Co. v. Musser et. al.*, 143 F.3d 1062 (7th Cir. 1998), hinged its ruling on the ability under LRRA for states to regulate financial responsibility statutes as long as it did not discriminate against RRGs. This is still good law.

Solvency of Underlying Carriers

Unlike licensed insurers authorized to write medical malpractice coverage, a RRG, foreign or domestic, is precluded from participating in a state insolvency guaranty fund like the Wisconsin Insurance Solvency Fund (WISF). If a licensed insurer is placed into liquidation the WISF would cover up to $500,000 for any claim under a policy issued in Wisconsin. This ensures that the Fund and the named health care provider will have primary coverage for the defense of a medical malpractice claim and some level of coverage for the award. This provides protection to the provider named in the suit whose coverage was through the insolvent licensed insurer and to those harmed by an act of medical malpractice.

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[1] 15 U.S. C. § 3905 (d), provides: (d) State authority to specify acceptable means of demonstrating financial responsibility. Subject to the provisions of section 3902 (a)(4) of this title relating to discrimination, nothing in this chapter shall be construed to preempt the authority of a State to specify acceptable means of demonstrating financial responsibility where the State has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specified activities. Such means may include or exclude insurance coverage obtained from an admitted insurance company, an excess lines company, a risk retention group, or any other source regardless of whether coverage is obtained directly from an insurance company or through a broker, agent, purchasing group, or any other person.

The Fund is concerned with the financial solvency of underlying carriers as the Fund is frequently held jointly and severally liable for the entirety of the verdict or settlement. Although by statute the Fund attaches above the $1 million dollar exposure, plaintiffs have sought initial payment for the entire awards in cases where the verdict was entered with the Fund joint and severally liable for the entire award. Without a solvent primary layer the Fund would be unnecessarily exposed. Additionally the Fund is concerned for the providers who may find themselves without primary coverage or a primary defense against claims of medical malpractice. This would shift expenses to the Fund without the Fund's ability to have adequately reserved for that exposure.

Conclusion

The Board of Governors for the Injured Patients and Families Compensation Fund rarely comments or testifies on proposed legislation as the Fund is a statutory entity. However, at the December 2013 Board meeting the Board of Governors voted unanimously to communicate its significant concerns with SB 609 to the legislature and to testify in opposition to this proposal. Thank you for your time and consideration.

State of Wisconsin / OFFICE OF THE COMMISSIONER OF INSURANCE

Scott Walker, *Governor*
Theodore K. Nickel, *Commissioner*

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February 20, 2014

MEMBERS OF THE LEGISLATURE
211 S STATE CAPITOL
MADISON WI 53702

Re: Proposed Risk Retention Groups Legislation

Dear Senator or Representative to the Assembly:

The Board of Governors for the Wisconsin Injured Patients and Families Compensation Fund (Fund) has serious concerns with the proposed legislation, recently numbered 2013 SB 609, that would modify Wisconsin law pertaining to entities that can write medical malpractice insurance for Fund participants. As you are aware, the Fund provides excess medical malpractice coverage to Wisconsin health care providers and ensures that funds are available to fully compensate injured patients. Health care providers obtain primary medical malpractice insurance from private licensed insurance companies authorized to do business in this state in an amount required by statute. Currently approximately 25 insurers and self-insured providers offer primary medical malpractice insurance coverage to providers in the state.

Recently the Board of Governors (Board) became aware of the potential legislation amending Wis. Stat. ch. 655, (2013 SB 609), permitting Risk Retention Groups (RRGs) to write primary medical malpractice coverage for Fund participants. The Board is concerned with the proposal due to potential exposure to the Fund, the potential risk to health care providers and potential harm to consumers injured by acts of medical malpractice.

The draft legislation raises the following concerns:

- The Liability Risk Retention Act of 1986 (LRRA) is a federal law that exempts a non-domestic RRG from "any state laws, rules, regulations or orders . . . which regulate, directly or indirectly the operation of risk retention group." 15 USC 3902 (a) (1). LRRA precludes this state from enforcing the provisions contained within the draft legislation regardless of an agreement or willingness by an RRG to voluntarily comply with state law. A similar approach was used in Louisiana including an agreement that non-domestic RRGs would comply with the state regulatory requirements. However, when Louisiana attempted to enforce those provisions the RRGs sued the state and successfully argued that in accordance with LRRA, the state was preempted from enforcing the requirements on non-domestic RRGs.

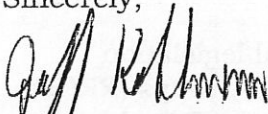
- Under LRRA RRGs cannot participate in states insurance guaranty funds like the Wisconsin Insurance Security Fund (WISF). The WISF would cover up to $500,000 for any claim under a policy issued by a licensed insurer that has been placed into liquidation. While this does not cover the full exposure for the primary limit, it does insure that there is primary coverage for defense and some level of coverage in the event of insolvency. This protects the insured provider and the consumers.

- The legislative proposal will destabilize the medical malpractice regulatory playing field that has maintained a competitive marketplace in the state. Domestic and non-domestic authorized insurers comply with rigorous financial and market regulatory oversight. If RRGs are permitted to offer coverage but with lesser regulatory oversight authorized insurers would be disadvantaged and the competitive marketplace could become volatile.

- Wisconsin has no domestic RRGs. In accordance with federal law the regulatory oversight of the RRG rests with the domestic state. There is no other entity in any state similar to the Fund affording unlimited coverage to participating providers. Therefore, it is highly unlikely that any other state would have requirements as vigorous as Wisconsin's for insurers offering medical malpractice insurance coverage as primary coverage in accordance with statutory requirements of the Fund.

The Board appreciates your time and would welcome the opportunity to discuss this issue with you further. Please contact me at 267-1237 or by email at jeff.kohlmann@wisconsin.gov should you have questions or wish to discuss this matter further.

Sincerely,



Jeff Kohlmann
Director
Injured Patients and Families Compensation Fund

On behalf of the Board of Governors:

Theodore K. Nickel
Randy Blumer
Carla Borda
Angela Dentice
Susan Engler
Christopher Flatter
Robert Jaeger, M.D.
David Maurer
Kathryn Osborne
Linda Syth
Ralph Topinka
John Walsh

LEGISLATIVE TESTIMONY: Regarding SB 609 and AB 808
March 6, 2014

Steve Sanford, CEO, Preferred Physicians Medical Risk Retention Group, Inc.
9000 W. 67th Street, Shawnee Mission, KS 66202
800-562-5589

Thank you Chairman and members of the Committee for the opportunity to speak in favor of legislation allowing Risk Retention Groups to offer medical professional liability coverage to physicians practicing in Wisconsin.

I am Steve Sanford, President and CEO of Preferred Physicians Medical. I joined PPM in 1991 and have held a number of positions, including Chief Operating Officer, In-house Counsel, and Vice President of Claims.

Preferred Physicians Medical (PPM) provides malpractice insurance exclusively for Anesthesiologists and their practices in more than 35 states (registered to conduct business in 42 states and DC), in a single specialty approach similar to that offered to Ophthalmologists by my colleagues at OMIC. Unlike most traditional insurance companies providing coverage to a broad range of physician specialties, our two organizations pioneered the concept of specialty-specific insurance designed to focus 100 percent of our attention toward a single medical specialty.

It is not coincidental, that both OMIC and PPM elected to use the structure of a Risk Retention Group to create this unique insurance platform. The very purpose of the Liability Risk Retention Act (LRRA) was to encourage small groups of like-minded individuals to join together to share risk in a manner that traditional insurance companies were unable or unwilling to provide. Both organizations' success over the last 26 years speaks to the soundness of the business model, the attractiveness of our specialty-specific programs and the leadership that our organizations provide in addressing both liability issues and patient safety. With respect to the latter, both OMIC and PPM are recognized as leading patient safety advocates and it is this patient safety leadership that many Wisconsin physicians will find attractive.

As a former Regulatory Attorney with the Kansas Department of Insurance and a former Senior Attorney for the Kansas patient compensation fund (Kansas Healthcare Stabilization Fund), I can speak with some authority and experience regarding the history of RRGs as an alternative source of malpractice insurance and the interaction of RRGs with patient compensation funds.

The impetus for the passage of the LRRA was the recognition that traditional insurance markets were not adequately serving significant segments of the liability marketplace. Coverage for many physicians was either extremely limited, exceedingly expensive or both. With respect to anesthesiologist, rates for anesthesiologists in 1986 were as high as $40,000 per year in Arizona to $50,000 per year in New York for $1 million in coverage.

Today, in large part due to the introduction of specialty-specific coverage, rates in Arizona average closer to $13,000 per year and in New York rates range between $7,000 and $26,000 per year.

While early skepticism about the ability of Risk Retention Groups to address the availability and affordability crisis was prevalent in many State Insurance Departments during the late 1980s and early 1990s, those concerns eventually gave way to the evidence of success presented by a number of RRGs in the marketplace. Except for here in Wisconsin, a well-demonstrated record of providing financially sound insurance coverage has been acknowledged and RRGs have become an important source of medical professional liability insurance. Proven results, underscored by strong financial ratings from recognized insurance rating organizations, like A.M. Best, have now been accepted in every other State Insurance Department in which we operate. This acceptance has occurred not only in states that have a purely market-based approach to medical professional liability insurance, but also in states like Wisconsin (and my home state of Kansas) that created a government-based excess insurance entity as a mechanism to address availability and affordability concerns.

The medical professional liability insurance marketplace has evolved dramatically over the last 25 years and is expected to evolve even more dramatically in the near future. Commercial carriers that both historically dominated and yet under-served the liability insurance needs of physicians have been replaced in large measure by physician-owned insurance organizations like OMIC and PPM, but also single-state physician insurance providers (like the former PIC-Wisconsin). Unfortunately for physicians in Wisconsin, many of the modern insurance choices that have benefited physicians in other parts of the country are simply not available to physicians here.

In my experience both as a Regulatory Attorney and Senior Attorney to a Patient Compensation Fund, nothing in the Wisconsin insurance environment, including its Patient Compensation Fund, justifies the continued exclusion of RRGs. Instead, the historical exclusion appears to be based on outdated reliance on historical precedent and an unwillingness to consider over 25 years of proven results. Modernizing Wisconsin's statutory framework to better reflect the current insurance marketplace and provide more insurance options is the goal of the legislation before you today. It is our hope with this legislation that Wisconsin will open the door to business and provide Wisconsin physicians with access to our high quality insurance and patient safety resources.

Thank you.

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Anthem Blue Cross and Blue Shield in Wisconsin
Delta Dental of Wisconsin, Inc.
Humana, Inc.
Managed Health Services Insurance Corp.
Molina Healthcare of Wisconsin
Physicians Plus Insurance Corporation
UnitedHealthcare of Wisconsin
WEA Insurance Corporation
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President and CEO,
Managed Health Services Insurance Corporation

Linda Hoff
President, Physicians Plus Insurance Corporation

Mark Moody
President and CEO,
WEA Insurance Corporation

TO: Senate Committee on Insurance & Housing

FROM: The Alliance of Health Insurers

DATE: March 6, 2014

RE: Risk Retention Legislation (SB 609)

The Alliance of Health Insurers has concerns over SB 609 which authorizes out-of-state risk retention groups to provide health care liability insurance in Wisconsin.

Wisconsin is widely recognized as having a comprehensive and fair body of insurance regulation that protects consumer interests without placing an unnecessary burden on the industry. As a result we enjoy a robust insurance market for virtually all lines of insurance in our state. Consumers benefit from both competitive pricing and appropriate protections.

Senate Bill 609 would authorize out-of-state risk retention groups to provide health care liability insurance in Wisconsin without having to comply with a substantial portion of the regulation imposed on insurance companies currently providing this coverage. This would put insurance companies at a competitive disadvantage vis-à-vis risk retention groups, which, in turn, could cause significant deterioration of the current insurance market for health care liability insurance.

The existing body of insurance regulation exists for a reason. The legislature has made the determination that it is necessary to protect consumers and promote a competitive market place. It is illogical to require one set of companies to comply with significant consumer protection regulations and relieve their direct competitors of the same burden.

We believe that SB 609 would disrupt the current, competitive market for health care liability insurance and jeopardize important consumer protections. Therefore, we urge the committee to reject SB 609 and preserve Wisconsin's uniform system of insurance regulation.