
The Risk Retention Reporter

Jon Harkavy— Outspoken Advocate for the Captive Industry

Jon Harkavy is a short man who stands tall. From his early days representing giant corporate insurance buyers he has been a fierce defender of the captive industry against hostile state regulators. As general counsel of the Risk and Insurance Management Society (RIMS), Harkavy fought for passage of the Liability Risk Retention Act of 1986 (LRRRA) and has been a central figure ever since in building support for captives in general and risk retention groups in particular.

In a way, the growth of RRGs since their inception in the mid-1980s is a David and Goliath story. Most RRGs are small companies without resources to fight powerful state regulators often backed by the National Association of Insurance Commissioners (NAIC). However, for the last 27 years RRGs have had a dogged advocate in Jon Harkavy who is undaunted by monolithic opposition and continues to rally the industry against the bureaucracy. Goliath is still out there, but he's taken some serious hits.

Harkavy is the first to give credit for advancing the cause of RRGs to other leaders who banded together through the National Risk Retention Association (NRRRA), but peers and adversaries alike recognize him as one of the most effective fighters for the industry—sometimes against the odds. Harkavy's style of advocacy makes him stand out. He is forceful and occasionally combative, but even opponents like him for his keen legal mind, dry wit, good humor, and willingness to engage in dialogue without rancor.

So, how did Harkavy find his way into the alternative risk transfer sector of the insurance industry? He was a political science and history major at Penn State, who in his own words, "saw law school as a pretty

good option for someone unclear as to a career path." However, he was never attracted to the practice of law—seeing "my legal education as good, broad background rather than an end in itself."

When a state legislator he knew in law school won a seat in Congress, Harkavy became a Congressional aide. "I found it a lot more fun to make law than to practice it in those ancient times when members of Congress actually compromised to pass legislation." When the Congressman left office, Harkavy did some stints as a court clerk and in private practice, but when RIMS was looking for a counsel and lobbyist, he seized the opportunity.

Harkavy on captive insurance

"Captive insurance always fascinated me, being the industry equivalent of the workers taking over the factories—or admittedly at times the inmates taking over the asylum."

At RIMS, he became a true believer in captives and risk retention groups. "It was extremely gratifying work—thrust into lobbying at the state and federal levels plus NAIC," Harkavy explained. "Vermont was just taking off as an onshore alternative to Bermuda as a captive domicile, and I believed that proposed changes to the product liability act of 1981 could provide RIMS members an attractive option for corporate liability programs within the United States."

Harkavy jumped into the fight. "There was a major movement to do something about the liability crisis, but the trial bar was too strong for any real tort reform. Members of Congress had little stomach for federalizing insurance regulation, even without the vociferous opposition of the NAIC," Harkavy said. In the end, a consensus developed around a lead-state regulatory framework that everybody but the NAIC could accept, and risk retention groups were authorized to write all forms of liability insurance, except workers compensation.

Harkavy left RIMS in 1989 to join Risk Services, LLC, a leading manager of captives and RRGs where he serves as executive vice president and general counsel. He guides client RRGs through the regulatory thickets and has become a vocal defender of the LRRRA and outspoken critic of the NAIC. Harkavy has played an active role in NRRRA over the years and he currently

Harkavy Honored

The **2013 Karen Cutts Visionary Award** was presented to **Jon Harkavy** at the recent annual conference of the *National Risk Retention Association*. The award was established four years ago in honor of Karen Cutts, the late founder and editor of the *Risk Retention Reporter*. Harkavy was recognized for his leadership role in the captive industry over the last 27 years.

serves as chairman of the Litigation Subcommittee of the Government Affairs Committee. "NRRA has been the most effective, and in many instances, the only defender of the LRRRA."

He points out that each state insurance department operates as a fiefdom with the NAIC as the quasi-official, non-governmental regulator with a \$90 million annual budget dedicated to preserving the individual autonomy of state insurance departments. "Against this array of antagonists, NRRA has been an effective advocate for RRGs in the regulatory, judicial, and legislative arenas," said Harkavy, noting that NRRA had successfully intervened on behalf of RRGs that don't have the resources to engage full time lobbyists or mount legal challenges to over reaching non-domiciliary state regulators.

Harkavy is both a strategist and spokesman—advocating bold action, but agreeing to compromise when needed to find solutions. His many articles in insurance trade publications and professional journals over the years have had a significant influence on public policy.

In Harkavy's opinion, the major problems facing RRGs today are the ongoing interference in legitimate RRG operations by some non-domiciliary states and the NAIC's accreditation program that attempts to force domicile states to regulate RRGs as if they were traditional companies.

Harkavy on Multi-State Regulation

"Multi-state regulation of insurance has not advanced in many ways beyond when America was governed by the Articles of Confederation after the revolution."

The industry was unsuccessful in promoting legislation in recent sessions of Congress to put teeth in the LRRRA with an arbitration or other enforcement mechanisms. Harkavy believes a federal legislative remedy is needed, but he is skeptical of arbitration or mediation panels overseen by bureaucrats. Instead, he proposes that the Act be amended to provide a form of "file and use" that would not be subject to review by any non-domiciliary state. In simple language, according to Harkavy, the amendment would state that, "eligibility to qualify as a RRG under the LRRRA as approved by the state of domicile cannot be challenged by any other state."

Without such legislation, the federal courts will remain the only way for RRGs to obtain relief from

hostile states. While the likelihood of getting a case before the Supreme Court is remote, Harkavy believes a class action suit could be brought by all RRGs against the states that levy fees on RRGs in violation of the LRRRA. The suit would seek return of the fees, which would fund the suit and resolve the issue for the future.

Harkavy on the NAIC accreditation program

"The NAIC program of accrediting state insurance departments appears to me to be a hijacking of democracy by an unelected trade association through violation of anti-trust principles applicable to trade associations."

Harkavy contends that the NAIC—operating in violation of federal anti-trust law—is a major obstacle to the growth and development of RRGs. The accreditation program mandates that accredited states cannot accept financial examinations conducted by non-accredited states on its chartered insurers licensed in other states.

Thus, said Harkavy, "if the NAIC should de-accredit Vermont because it does not like the way it regulates RRGs, Vermont's financial examinations on traditional insurance companies chartered in Vermont would not be accepted by accredited states where Vermont-chartered insurers may be licensed. This is a classic boycott. It poses a significant threat to the non-accredited state by penalizing its licensed insurers and in effect encourages them to re-domesticate to other states." Harkavy points out that the NAIC also violates anti-trust rules because the accreditation standards are made by NAIC members behind closed doors, instead of an outside, independent body. "There you have it, the role of lawmaker, judge, jury, and executioner all held by a private trade association."

Despite challenges facing the industry, Harkavy is optimistic about the future. In day-to-day contacts on behalf of Risk Services clients he finds that most state regulators respect the preemption provisions of the LRRRA and are willing to work out differences when problems arise. At the same time, he believes strongly that the industry must be vigilant in defending the Act against aggressive moves by some non-domiciliary states and the NAIC.

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