Denver Law Review

Volume 49 | Issue 3 Article 5

March 2021

The Colorado Captive Insurance Company Act

W. James Foland

NOTE

THE COLORADO CAPTIVE INSURANCE COMPANY ACT

I. THE CAPTIVE CONCEPT

A captive insurance company is an insurance company organized by a business or manufacturing concern to insure the risks of that concern, its branches, and affiliates.[1] The true captive (hereinafter referred to as captive) is a wholly owned subsidiary that insures only the risks of its parent. Certain insurance companies located in the United States are sometimes confused with the captive facility, but they are distinguishable in that their coverage of the parent is simply an adjunct to the sale of insurance to the general public.[2] There are true captives owned by American firms, but they are off-shore captives located mainly in the Bahamas or Bermuda.[3] The passage of the Colorado Captive Insurance Company Act[4] has made it possible for the true captive to be incorporated as a domestic cor-

[1] Burge, *Foreign Risks and the Captive Insurance Company*, THE PRICE WATERHOUSE REVIEW, Autumn 1970, at 38. For an explanation of the types of captives see Hare, *Have You Ever Thought of Your Own Insurance Company*, FINANCIAL EXECUTIVE, Dec. 1967, at 56-57:

> Within the framework of captive insurance companies, there are two basic types. The first type, which is the more common, provides coverage backed by reinsurance; the second provides coverage which is funded. The first category — coverage backed by reinsurance — would insure liability for which coverage can be obtained in the insurance market. The second category — funding — provides insurance normally unavailable because of the type of loss or amount of liability. In funding, two very basic elements must be looked at carefully: tax problems that can arise and structural problems and requirements that must be satisfied.

[2] Some examples of so-called domestics and their owners are as follows:

Corporation	*Insurance Company*
Sears Roebuck	Allstate Insurance Company
General Motors	Motors Insurance Corporation
Mobil Oil	Safety Casualty Company
National Turkey Federation	Property Owners Mutual Insurance Co.

Hare, *supra* note 1.

[3] Wall Street Journal, May 26, 1971, at 34, col. 1; Wall Street Journal, Sept. 8, 1971, at 1, col. 5. An example of an off-shore captive is Oil Insurance Ltd., incorporated in Hamilton, Bermuda, to insure against pollution liability. Its owners are Atlantic Richfield Co., Cities Service Co., Gulf Oil Co., Signal Cos., Standard Oil of Cal., Marathon Oil Co., and Union Oil of Cal. Wall Street Journal, Nov. 17, 1970, at 8, col. 3.

[4] Act of March 9, 1972 (H.B. No. 1041) (to be codified as COLO. REV. STAT. ANN. §§ 72-36-1 to -30 (1973)). [Provisions of the Act will hereinafter be cited and referred to as COLO. REV. STAT. ANN. (1973).]

poration. This Act is the first law passed in the United States specifically designed to enable the captive to be so organized.[5]

A great deal of confusion seems to surround the concept of the captive. Some of the confusion arises from the belief that the captive is primarily a means of tax evasion. As will be later demonstrated, this belief is incorrect. Another factor contributing to the widespread misunderstanding is

> the erroneous belief of some financial executives that, by establishing a captive insurance company, the corporation is recklessly abandoning outside insurance and is taking all risks upon itself. This is a complete misunderstanding of how a captive operates. A captive reinsures all the risks which the group deems prudent to insure in the conventional insurance market. But, in addition, the captive insures any risk which the group is now bearing itself through deductibles and self-insurance and all manner of specific trade risks for which there is virtually no commercial coverage. Thus, basically, the captive is a vehicle for formalizing self-insurance, although it may be much more.[6]

Colorado, in passing an act to encourage domestic captives, demonstrated an understanding of the advantages of the captive as well as a knowledge of the potential benefits accruing to a state permitting this form of insurance.

The concept of the captive is today becoming increasingly popular with American corporations. The reason for the rise in popularity is the difficulty these corporations are experiencing in obtaining adequate coverage on their facilities; or, if coverage is available, the insurance companies are charging excessive rates with unreasonable deductibles. The causes of the difficulty are complex and are probably equally attributable to insurers and insureds (improper planning, failure to comply with loss prevention plans, inadequate premiums to risk, etc.).

II. GENESIS OF THE CAPTIVE

During the 60's and 70's, severe losses were sustained by insurance companies from catastrophies such as the *Torrey Canyon* wreck, the Union Oil Company incident off Santa Barbara, the Los Angeles earthquake, and the destruction caused by hurricanes Betsy in 1965, Celia in 1970, and Agnes in 1972.[7] It has been suggested that coverage of these losses was not "un-

---

5 The author has been advised in interviews in Denver, Colorado, with Charles H. Groves, president of Frank B. Hall Management Co., and Frank J. Bucher, account executive for Transport Underwriters Association, on June 20, 1972, and July 21, 1972, respectively, that states such as Louisiana, Illinois, New Jersey, and perhaps others, are considering a bill much like the one passed in Colorado.

6 Burge, *supra* note 1, at 38.

7 *See, e.g., Why You Can't Buy The Insurance You Need,* BUSINESS WEEK, Nov. 7, 1970, at 65.

derwritten with the expectation that in any single instance losses of this magnitude could occur."[8] The reason that these facilities were underwritten at all is because "there had been a failure in the development of accurate engineering estimates of probable (or possible) maximum loss."[9]

A lag in premium rates has prohibited underwriters from recouping their losses, and thereby has reduced the willingness of underwriters to commit capital to risk.[10] Premiums adequate to recoup adverse experiences and to protect against prospective losses are inevitably resisted by the insured public and particularly by those corporations which have not been exposed to catastrophic loss.

Over the past decade, the concentration of value in insurable facilities has increased drastically, *e.g.*, airplanes, tankers, and plant equipment are becoming larger and more expensive each year.[11] Increased inventories and spiralling prices due to inflation make it more likely that insurance companies will sustain a substantial loss.[12] Equally important in the past decade has been the development of new insurance hazards such as the wide application by the courts of the legal doctrine of strict liability.[13] The application of the strict liability concept to such things as pollution of the environment and products liability claims has substantially increased the risk of loss for the insurance company.[14]

The exaggerated claims experience of many insurance companies, because of the new and higher risks, has necessitated an adjustment on their behalf. They have generally raised rates while forcing corporations to accept high deductibles. In some instances the insurance companies have even refused coverage of corporate facilities.[15] Corporations, faced with increased cost for decreased coverage, have begun to consider alternate insurance programs. One of those being considered is the captive.

III. Advantages of the Captive

The central advantage of the captive is the ability of the parent to design an insurance plan tailored to its own specific needs. The corporate management has an excellent understand-

[8] Groves, *Using a Captive Insurer to Insure Hard-to-Place Risks*, Best's Review, June 1972, at 78.

[9] *Id.* at 18.

[10] *Id.* at 20.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at 78.

ing of the inherent hazards of the industry. Management, working in conjunction with insurance experts of the same corporation, can develop a better contract for the parent than can an outside insurer. Because of the elimination of the overhead and profit of the outside insurer, lower insurance rates are available. These lower rates may be substantial and are certainly one of the large moneysavers for the captive.[16]

Another important feature of operating a captive is the parent's ability to insure hard-to-place or otherwise uninsurable risks. Acts of war, strikes, and expropriation losses may be covered by a captive when no other insurer will cover them.[17] The captive is most advantageous in an insurance market where premiums are rising and adequate coverage is becoming difficult to obtain. In such a market the captive can handle the risks of the parent more efficiently and inexpensively than an outside insurer.[18]

The economic advantages of the captive are manifold. One often cited advantage is the tax saving it will provide to the parent. The Colorado Act imposes a 1 percent tax on all premiums paid to the captive.[19] This rate is small when compared to the 2¼ percent levied on standard Colorado insurers,[20] and the 4 percent federal excise tax levied on premiums paid to off-shore captives.[21] Further savings accrue from the federal income tax deductions available to the parent for premiums paid to the captive.[22] This deductibility is in contrast to the nondeductible tax treatment of reserves established under self-insurance plans.[23] Because of the high premiums and large quantities of insurance purchased by corporations, the tax saving may be quite substantial.

Another major source of savings is derived from first hand

---

[16] Hare, *supra* note 1, at 58.

[17] Burge, *supra* note 1, at 38, 41.

[18] Groves, *supra* note 8, at 20.

[19] COLO. REV. STAT. § 72-36-28 (1973).

[20] COLO. REV. STAT. ANN. § 72-1-14 (1963).

[21] A tax is imposed on each policy of insurance, indemnity bond, annuity contract, or policy of reinsurance issued by any foreign insurer or reinsurer at the following rates:

> four cents on the dollar of the premium charged on the policy of casualty insurance or indemnity bond. . . . one cent on each dollar . . . on the premium charged on the policy of reinsurance covering any of the contracts which are subject to the four cent tax on the original policy.

INT. REV. CODE of 1954, § 4371.

[22] Treas. Reg. § 1.162-1 (1964).

[23] Treas. Reg. § 1.461-2 (1964).

negotiation of reinsurance.[24] Reinsurance will almost certainly be the captive's single largest expense, and, because of the volume involved, a considerable saving can be obtained from a relatively small percentage reduction in cost. The reduction is possible because of the elimination of certain broker and negotiation fees usually included in premiums quoted by outside insurers.

Other equally important, but smaller, cost reduction features attend the use of a captive. Premium payment and dividend return between parent and captive can be structured to best facilitate the needs of each,[25] as opposed to the advance payments required for coverage by outside insurers.[26] Further, money paid to the captive, not used for the purchase of reinsurance, may be invested in the parent or in facilities to lease to the parent.[27] The effect of such a program is not only to provide a return on investment but to provide additional capital or services to the parent. In another area, claims and settlements can be more efficiently and realistically handled as an in-house operation.[28] As may be seen from these few examples, the captive offers immediate and substantial savings to the parent. The question then is not how to set up the captive in order to reduce costs, but rather which captive form best suits the purposes of the individual parent.

There are two differing conceptions of the captive as an economic entity. The first views the captive as a moneysaver — a near-department of the parent whose primary function is the procuring of the best possible coverage at the lowest possible rate. The second sees the captive as a profit-center — a semi-autonomous company seeking to produce additional revenue for the parent. Either concept could be attractive to a particular company under differing circumstances.

Those who view the captive as a moneysaver rather than as a moneymaker present attractive arguments for its implementation. The captive is seen as having a single function: the

---

[24] For a general discussion of reinsurance see Ingray, *Reinsurance Values in U.S. and Possible Ways of Making a Profit*, THE NATIONAL UNDERWRITER, Sept. 10, 1965; *Factors to Weigh in Selecting a Proper Reinsurance Program*, THE NATIONAL UNDERWRITER, Oct. 29, 1965; A. Deters, The Captive Insurance Company, Its Feasibility and Operation, June 4, 1966 (unpublished thesis in University of Louisville Library).

[25] Hare, *supra* note 1, at 57.

[26] *Id.*

[27] Groves, *supra* note 8, at 79.

[28] Transport Underwriters Association, *So You Want Your Own Captive Insurer?*, 1972 (pamphlet of limited circulation that may be obtained from Transport Underwriters Association, 3670 Wilshire Boulevard, Los Angeles, California 90010).

reduction of insurance cost. The captive would receive no overcost premiums from the parent, nor would it be designed to make any profit. The idea behind this concept is to provide more working capital for the parent so that the parent can increase its earnings. Proponents of this format argue that a separation of investment funds between two entities simply lowers return rates. Another advantage achieved by retaining the captive in a simple form is a reduction in operating costs.

If the parent treats the captive as a profit-center, premiums will be paid to the captive in amounts sufficient to cover reinsurance, reserves for self-insurance, expenses, and profit. These payments are tax deductible to the parent.[29] The captive will then use the self-insurance and profit portion of the premium for investment in an attempt to further increase profits. The captive's year-end profit would serve two functions: (1) it would augment the parent's profit thereby enhancing the corporation's profit-loss statement, and (2) it could be used to build revenues in order to insure an increased percentage of the parent's risk in the future. This latter reserve would, of course, further increase profit potential, thereby establishing a reserve capable of underwriting a major portion of the parent's risk. As of the writing of this note, the Internal Revenue Service has made no determination of the tax consequences of either concept, but in the long run that decision may determine the survivor.

The captive provides certain intercompany advantages as well. The president of an insurance company, even when a wholly owned captive, has more authority in the implementation of loss prevention engineering plans than the safety manager of a corporation.[30] Equally important is the captive's access to the knowledge and experience of the parent's safety engineers which it may use to formulate the best possible loss prevention plan. A successful loss prevention plan may reduce the cost of insurance to the parent, thereby making the captive an even greater source of savings.

Three apparently significant disadvantages are frequently cited to discount the captive's importance as an economically advantageous form of insurance. On closer examination, however, these apparently fatal disadvantages are found to be of little consequence. Opponents of the captive usually begin by

[29] Treas. Reg. § 1.162-1 (1964). *See also* Peter Theodore, 38 T.C. 1011 (1962).

[30] Burge, *Captives: Bermuda, Colorado, taxes and beyond,* BUSINESS INSURANCE, Apr. 1972, at 47.

discussing the expense of starting a captive. They mention the feasibility study, corporate start-up costs, and reinsurance negotiation expenses as examples. But these costs are minuscule when compared with the truly substantive savings the captive can provide.[31] Secondly, critics point to the lack of expertise and operating expense a corporation will be faced with in the running of the captive. Two alternatives are available to rebut this criticism. First, many large corporations have insurance departments. The experts already available will operate the captive. If, on the other hand, the corporation does not have the expertise necessary, management companies are available in Colorado to provide services ranging from an initial study to full operation.[32] Finally, the possibility of catastrophic loss is raised. Critics state that a major loss could occur before reserves sufficient to cover such loss are established. They are, however, forgetting that the majority of risk is reinsured, and that the portion covered by the captive is probably no more than the parent previously self-insured because of high deductibles. No extra risk is being assumed. As is demonstrated by such analyses, the disadvantages of the captive are in fact negligible.

IV. The Decision to Establish a Captive

The decision to establish a captive must be based on a number of factors and should not ordinarily be made without the preparation of a feasibility study. The captive is not the solution to every insurance dilemma. It must be remembered that high premiums and a lack of capacity, while widespread, are not universal.[33] Further, if "there [will be] a frequency of large shock losses, a captive must be approached with caution."[34] These elements, or any other detrimental factors arising from a particular corporate situation, may make the captive unattractive or even impossible.

However, should a company, for any reason, find its existing coverage inadequate, three areas must be probed before any change is considered. A study should:

(1) check to see if the facilities to be covered are not adequately insurable by standard insurance companies at rea-

---

[31] It has been estimated that the initial study and start-up cost of a captive would be about $5,000. Interview with Charles H. Groves, president of Frank B. Hall Management Co., in Denver, Colorado, June 20, 1972.

[32] As of October 19, 1972, three such companies had been established: Frank B. Hall Management Co.; Transport Underwriters Ass'n, Ltd.; and Darrah Associates, Inc.

[33] Groves, *supra* note 8, at 16.

[34] Hare, *supra* note 1, at 60.

sonable rates with a reasonable deductible. If such coverage is readily available a captive may not be warranted;
(2) check to make sure that if reinsurance is necessary to cover catastrophe loss, the reinsurance is available and within the area of world wide reinsurance capacity; and,
(3) check to insure that the captive is potentially profitable.[35]

Should a feasibility study incorporating these questions determine the captive to be a valid alternative to existing coverage, a decision must be made to determine whether the off-shore or Colorado captive best serves the purposes of the proprietor. A comparison of their advantages and disadvantages must be made to ascertain the more profitable location.[36]

(1) The Colorado captive will be taxed on profits at the normal federal income tax rate, but no state income tax will be assessed. The off-shore captive is not required to pay an income tax on profits to its host country,[37] but it will be subject to United States income tax on profits where the amount of premiums on domestic risks exceeds 5 percent of the total.[38] The apparent income tax advantage of the off-shore captive is illusory if substantial domestic risk is involved.
(2) The Colorado captive must pay a 1 percent state tax on premiums received. The off-shore captive is not taxed by the host nation on premiums received, but it is subject to a 4 percent federal excise tax on all premiums paid to it by United States corporations.
(3) The Colorado captive is governed by the state insurance investment statutes, but these "provide all reasonable latitude desired assuming that the captive management follows prudent business practices."[39] The off-shore captive is unrestricted in the investments it can make.[40]

Other advantages and disadvantages of the two are essentially identical. The three paragraphs above support the conclusion that unless substantial foreign risks comprise the majority of the parent's business, the adverse cost factor generated by the

[35] *Id.* at 61. A comprehensive analysis of what should be included in a feasibility study of this nature may be found in Deters' unpublished thesis. Deters, *supra* note 24.

[36] As a majority of off-shore captives owned by United States firms are currently located in Bermuda, the Colorado captive insurance laws are compared to the Bermuda laws.

[37] Burge, *supra* note 30, at 47.

[38] INT. REV. CODE of 1954, §§ 952(a)(1), 953(a). The Revenue Act of 1962, which added Subpart F to the Code, provided that a U.S. shareholder of a Controlled Foreign Corporation (CFC) would be taxable on certain undistributed income of the CFC as if a dividend had been paid to the U.S. shareholder. Among the principle types of Subpart F income are passive investment income, including capital gains on securities sales and income derived from the insurance of U.S. risks. Burge, *supra* note 1, at 42. *See also* INT. REV. CODE of 1954, § 954(c).

[39] Groves, *supra* note 8, at 79. *See also* COLO. REV. STAT. ANN. §§ 72-2-1 to -3, -6, -11, -16, -22, -31, -32 (1963); §§ 72-2-17 to -18 (Supp. 1965); §§ 72-2-4 to -5, -13, -19 to -21, -23 to -27, -29, -30, -34 to -36, -39 to -44 (Supp. 1969); §§ 72-2-10, -22, -28, -32, -37, -38, -45 to -48 (Supp. 1971).

[40] Burge, *supra* note 30, at 47.

4 percent federal excise tax gives the Colorado captive a clear advantage in profitability not overcome by the off-shore captive's slight edge in investment flexibility.

V. The Colorado Requirements

The Colorado Captive Insurance Company Act defines a "pure captive insurance company" as

> any domestic insurance company licensed under the provisions of this article for the purpose of making insurance and reinsurance . . . . Said insurance shall be limited to the risks, hazards and liabilities of its parent, associated and affiliated companies.[41]

This definition could include the off-shore captives mentioned above, but would exclude wholly owned insurance companies that sell insurance to the public.

The Act also provides for the establishment of "association captive insurance companies." These are defined in the same manner as pure captives in terms of coverage, but the owners must be member organizations of the association. Further requirements state that "the association must have been in existence for a year and that members of the association own or control all of the outstanding voting securities of the association captive insurance company."[42] Other requirements of the Act are substantially the same for both types of captives. The purpose in allowing the association captive is to give smaller corporations the chance to take advantage of the captive form.[43]

Prerequisites for the establishment of a captive in Colorado appear in the Act mainly for the protection of existing domestic insurance companies and agents and to guard against abuse of the state's liberal law. Any corporation desiring to start a captive in Colorado must demonstrate to the satisfaction of the commissioner of insurance the following:

> (1) That adequate insurance markets *in the United States* are not available to cover the risks, hazards and liabilities of the parent and companies to be insured, *or* that the insurance needed is available only at excessive rates or with unreasonable deductibles.[44]

---

41 Colo. Rev. Stat. Ann. § 72-36-4 (10) (1973).

42 Colo. Rev. Stat. Ann. § 72-36-4 (4)-(5) (1973).

43 The "association captive" corporations do have a special problem. A captive is established to provide the same services as an outside insurer. Most associations do not employ the experts necessary to run the captive. For this reason, management companies, useful in the establishment of pure captives, are especially important to the association captive. They provide the essential services of feasibility studies, chartering, negotiation of reinsurance treaties, claims handling and settlement, safety engineering services, and accounting and data processing services. Transport Underwriters Association, *supra* note 28.

44 Colo. Rev. Stat. Ann. § 72-36-5(2) (a) (1973) (emphasis added).

(2) That the total insurance coverage necessary to insure all risks *could* develop, in the aggregate, gross annual premiums of at least $500,000 for a pure captive or $1,000,000 for an association captive.[45]
(3) That the company applying to the commissioner for a certificate of authority to engage in the insurance business be a valid Colorado corporation filed with the Secretary of State.[46]
(4) That the home office of the captive be located in Colorado.[47]

Any corporation or association that has found the captive to be feasible as well as potentially profitable should have no problem in fulfilling these requirements.

The Colorado captive is subject to all Colorado insurance laws except where they conflict with the Act.[48] In this regard several prohibitions, exemptions, and requirements are especially important. There is a prohibition against the sale of insurance to the general public,[49] a protection for agents and their domestic companies. The captive is exempted from participation in any pools, plans, guaranty, or insolvency funds,[50] thus providing the captive with another substantial saving. The Act does specifically require captives to comply with the Colorado insurance investment statutes,[51] a measure of regulation. The Act does allow "[a]ny captive insurance company to reinsure all of its risks in any reinsurer approved by the commissioner, and full credit will be allowed."[52] Provisions such as these make the Colorado Act unique.

The Act also provides for close scrutiny of captives by the insurance commissioner. This provision of the Act is essential to insure that the arm's-length dealings in rate setting required by the Act are observed.[53] The provision is even more important when considering that many of the rates set by the captives will not be comparable with independent insurers, as the captive will frequently be insuring otherwise uninsurable risks.

One final important provision of the Act states that a captive will not be authorized to do business in Colorado unless it possesses a minimum actual capital of $400,000 and an accumulated surplus of $350,000.[54] An irrevocable letter of credit issued

---

[45] *Id.* (emphasis added).
[46] *Id.* § 72-36-5(1).
[47] *Id.* § 72-36-7(4).
[48] *Id.* § 72-36-30.
[49] *Id.* § 72-36-3.
[50] *Id.* § 72-36-27; Groves, supra note 8, at 79.
[51] COLO. REV. STAT. ANN. § 72-36-21 (1973).
[52] *Id.* § 72-36-22(3).
[53] *Id.* § 72-36-24.
[54] *Id.* § 72-36-16.

by a national bank or approved state bank shall be accepted in lieu of cash or securities deposit.[55] Though not provided in the Act, the insurance commissioner requires a certain minimum cash surplus to cover operating expenses of the captive.[56] These monetary requirements are less stringent than those imposed upon domestic insurance companies.

VI. Conclusions

It appears that a very real need for the domestic captive exists today. Colorado presently has the only law specifically designed to accommodate this need. While it is probably true that the first domestic captives to be incorporated will be owned by large out-of-state corporations, Colorado also has some large companies that will undoubtedly take advantage of the Act. Corporate members of associations will become equally interested in association captives as, and when, they are confronted with the rate and capacity problems of their larger contemporaries. It must be realized that the Act was passed not only to benefit Colorado corporations, but also to provide a needed service to business in general.

The unique requirements and exemptions of the Colorado Act enable the captive to function in a manner best suited to serve the purposes of industry while at the same time promoting the general welfare. Ultimately the Colorado public is the beneficiary of the increased state revenue and production accompanying the captive decision. While the captive is not a remedy for all insurance ills, it is a very valuable domestic alternative. Colorado is wise to have taken advantage of this vacuum in domestic law.

W. James Foland

[55] *Id.* § 72-36-17 to -19.
[56] Interview with Bucher, *supra* note 5.