

NEW YORK INSURANCE LAW

ARTICLE 70

CAPTIVE INSURANCE COMPANIES

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Section 7001. Purpose and applicability.

(a) The purpose of this article is to facilitate the formation and operation of captive insurance companies within the state of New York.

(b) In addition to the provisions of this article and this chapter specifically referred to in this article, the following provisions of this chapter shall apply to captive insurance companies:

- (1) article one of this chapter, pertaining to general provisions;
- (2) sections three hundred one, three hundred two, three hundred three, three hundred four, three hundred five, three hundred six, three hundred eight, three hundred ten, three hundred eleven, three hundred twelve, three hundred thirteen, three hundred twenty-six, three hundred twenty-seven, three hundred twenty-nine, and three hundred thirty-two of this chapter, pertaining to certain administrative and procedural provisions; and
- (3) article seventy-four, pertaining to rehabilitation, liquidation, conservation and dissolution of insurers.

Section 7002. Definitions. In this article:

(a) "Affiliated companies" means companies in the same corporate system as an industrial insured by virtue of common ownership, control, operation, or management. Such term shall also include any statutory subsidiary, affiliate, contractor, subcontractor and consultant of any tier of a city with a population of one million or more for liability related to or arising out of activities in or near the World Trade Center site in response to the attacks of September eleventh, two thousand one.

(b) "Captive insurance business" means the business authorized pursuant to subsection (a) of section seven thousand three of this article.

(c) "Captive insurance company" means any pure captive insurance company or any group captive insurance company licensed to do a captive insurance business under the provisions of this article.

(d) "Captive manager" means any person or firm contracted by a captive insurance company to manage its affairs.

(e) "Industrial insured" means an insured:

- (1) whose net worth exceeds one hundred million dollars;
- (2) who is a member of a holding company system whose net worth exceeds one hundred million dollars;
- (3) who is the metropolitan transportation authority and its statutory subsidiaries. When filing an application to form a pure captive insurance company the metropolitan transportation authority shall submit written notice of such filing to the governor, the temporary president of the senate and the speaker of the assembly; or
- (4) who is a city with a population of one million or more. When filing an application to form a pure captive insurance company, a city with a population of one million or more shall submit written notice of such filing to the governor, the temporary president of the senate and the speaker of the assembly.

(f) "Group captive insurance company" means any domestic insurance company licensed under the provisions of this article for the primary purpose of providing insurance or reinsurance covering the risks of the industrial insureds that comprise the industrial insured group.

(g) "Industrial insured group" means any group of unaffiliated industrial insureds that are engaged in similar or related businesses or activities, however, the metropolitan transportation authority and cities with a population of one million or more shall not be a member of an industrial insured group, and that collectively:

- (1) own, control or hold with power to vote all of the outstanding voting shares of stock of a group captive insurance company incorporated as a stock insurer; or
- (2) represent one hundred percent of the voting members of a group captive insurance company organized as a mutual insurer.

(h) "Pure captive insurance company" means any company that:

- (1) is a subsidiary of an industrial insured which is one hundred percent owned by or is a statutory subsidiary of the industrial insured; and
- (2) is licensed under the provisions of this article for the primary purpose of providing insurance or reinsurance covering the risks of its parent and affiliated companies.

Section 7003. License; power; filing; fees.

(a) Any captive insurance company, when permitted by its articles of association or charter, shall apply to the superintendent for a license to do a captive insurance business under this article. A captive insurance business consists of the kinds of insurance set forth in section one thousand one hundred thirteen and section one thousand one hundred fourteen of this chapter, provided that:

- (1) a pure captive insurance company shall insure, on a primary basis, only risks of its parent and affiliated companies;
- (2) a group captive insurance company shall insure, on a primary basis, only risks of the industrial insureds that comprise the industrial insured group;
- (3) a pure captive insurance company or a group captive insurance company shall not be authorized to provide, on a primary basis or as reinsurance, the kinds of insurance specified in paragraphs one, two, three, eighteen, twenty-three and twenty-five of subsection (a) of section one thousand one hundred thirteen of this chapter;

(4) a pure captive insurance company or a group captive insurance company shall not be authorized to provide, on a primary basis:

(A) workers` compensation and employers` liability insurance; or

(B) any other kind of insurance, including motor vehicle liability insurance, that is required, under the laws of this state or any political subdivision of this state, as a demonstration of financial responsibility for obtaining a license or permit to undertake specific activities when such requirement must be satisfied by obtaining insurance coverage from an insurer authorized in this state, up to the minimum amount of insurance so required under such laws; and

(C) except that subparagraphs (A) and (B) of this paragraph shall not prohibit a pure captive insurance company from providing primary indemnity coverage to its parent and affiliated companies for any insurance or self-insurance program specified in such subparagraphs (A) or (B), provided the insurance or self-insurance program has qualified under the applicable state or federal law requiring the program; and

(5) a pure captive insurance company or a group captive insurance company shall reinsure only risks as set forth in section seven thousand ten of this article. Notwithstanding any inconsistent provisions of paragraphs one through five of this subsection, a pure captive insurance company formed by a city with a population of one million or more may insure or provide reinsurance for its parent, statutory subsidiaries and affiliated companies only for liability related to or arising out of activities in or near the World Trade Center site in response to the attacks of September eleventh, two thousand one.

(b) No captive insurance company shall do any captive insurance business in this state unless:

(1) it first obtains from the superintendent a license authorizing it to do captive insurance business in this state;

(2) its board of directors holds at least one meeting each year in this state;

(3) it maintains its principal office and its records in this state;

(4) it utilizes a captive manager resident in this state who is:

(A) licensed as an agent or a broker under the provisions of article twenty-one of this chapter; or

(B) any other person approved by the superintendent provided that the approval may be withdrawn by the superintendent, upon notice and hearing, if the person has:

(i) been guilty of fraudulent or dishonest practices; or

(ii) demonstrated incompetency or untrustworthiness to act in such a capacity; and

(5) it submits a power of attorney, in accordance with the provisions of section one thousand two hundred twelve of this chapter, designating the superintendent as its agent for the purpose of receiving service of process in any proceeding against it.

(c) (1) Before receiving a license to do a captive insurance business, a captive insurance company shall file an application for license with the superintendent for review and approval. Such application shall include a certified copy of its charter and bylaws, a financial statement certified by two

principal officers, a plan of operation, which shall include an actuarial report prepared by a qualified independent actuary, and any other statements or documents required by the superintendent.

- (2) In evaluating the plan of operation, the superintendent shall consider the following factors:
 - (A) the amount and liquidity of its assets relative to the risks to be assumed;
 - (B) the adequacy of the expertise, experience, and character of the person or persons who will manage it;
 - (C) the overall soundness of the plan and the projections contained therein;
 - (D) the adequacy of the loss prevention programs of its parent, member organizations, or industrial insureds as applicable; and
 - (E) such other factors deemed relevant by the superintendent in ascertaining whether the proposed captive insurance company will be able to meet its policy obligations.
- (3) Any material filed with the superintendent pursuant to this subsection shall be given confidential treatment and shall not be subject to public inspection under article six of the public officers law, or to discovery under article thirty-one of the civil practice law and rules, except to the extent the superintendent finds release of information necessary to protect the public or necessary to initiate any proceeding or action as provided by this article or except where a court of competent jurisdiction in an action involving a private litigant and a captive insurer finds that discovery of same should be allowed upon a showing that such information is essential to the establishment of the claim or defense brought or asserted and the party seeking discovery has demonstrated to the satisfaction of the court that such party is unable to otherwise obtain the substantial equivalent of the material.
- (4) In order to provide for the review of the application submitted pursuant to this subsection in a timely manner, the superintendent may engage such other qualified persons and services as may be necessary. Prior to retaining any such persons and services, the superintendent shall notify the applicant and provide an estimate of the cost of such services. The superintendent shall recover such costs in the manner prescribed in section three hundred thirteen of this chapter.
- (5) In the case of a pure captive insurance company formed by a city with a population of one million or more to insure such city and its affiliated companies for liability related to or arising out of activities in or near the World Trade Center site in response to the attacks of September eleventh, two thousand one, the superintendent, in addition to the provisions set forth in paragraph two of this subsection, shall consider such factors as the unique risk insured by such captive and the source and limits of the premium payments along with any limitations on the acceptance of claims and the payment of accepted claims so long as such limitations provide an equitable basis for the allocation of the assets of such company to pay claims.

(d) Any proposed amendments or revisions to the charter and bylaws of a captive insurance company shall be filed with the superintendent for review and approval.

(e) If the superintendent is satisfied that the documents and statements filed by the captive insurance company comply with the provisions of this article, a license authorizing it to do a captive insurance business in this state shall be issued for a term expiring on June thirtieth. Thereafter, the superintendent may issue a renewal license for successive one year terms expiring on June thirtieth.

Section 7004. Required capital and surplus as regards policyholders.

(a) No pure captive insurance company or group captive insurance company shall be issued a license unless it shall possess and thereafter maintain unimpaired paid-in capital and surplus as regards policyholders of:

- (1) in the case of a pure captive insurance company incorporated as a stock insurer, not less than two hundred fifty thousand dollars of total surplus as regards policyholders, of which one hundred thousand dollars shall represent paid-in capital;
- (2) in the case of a pure captive insurance company incorporated as a mutual insurer, not less than two hundred fifty thousand dollars of total surplus as regards to policyholders;
- (3) in the case of a group captive insurance company incorporated as a stock insurer, not less than five hundred thousand dollars of total surplus as regards policyholders, of which two hundred thousand dollars shall represent paid-in capital; and
- (4) in the case of a group captive insurance company incorporated as a mutual insurer, not less than five hundred thousand dollars of total surplus as regards policyholders.

(b) The minimum capital and surplus to policyholders required in subsection (a) of this section shall be in the form of:

- (1) cash;
- (2) minimum capital or surplus to policyholders investments of the type specified in paragraphs one and two of subsection (b) of section one thousand four hundred two of this chapter; or
- (3) an irrevocable letter of credit, in a form approved by the superintendent, naming the superintendent as beneficiary for the security of the captive insurance company's policyholders and issued by a bank acceptable to the superintendent.

(c) The superintendent may prescribe additional capital and surplus to policyholders based upon the type, volume and nature of insurance business transacted. Any additional capital and surplus to policyholders so required shall be in the form as set forth in subsection (b) of this section.

Section 7005. Organization and corporate procedure.

(a) A pure captive insurance company may be incorporated

- (1) as a stock insurer with its capital divided into shares and held by the stockholders;
- (2) or as a mutual insurer without capital stock, the governing body of which is appointed by the parent industrial insured; or
- (3) in the case of a public benefit corporation, public authority or other public entity, as the applicable state law may require. In the case of a city with a population of one million or more, a pure captive insurance company also may be formed as a public benefit corporation or not-for-profit corporation at the discretion of the mayor of such city, for the purpose of providing insurance that is retroactive to September eleventh, two thousand one, for risks incurred by such city and its affiliated companies related to or arising out of activities in or near the World Trade Center site in response to the attacks of September eleventh, two thousand one. Such pure captive insurance company formed by a city with a population of one million or more shall be exempt from all state and local taxes. The members or directors, as the case may be, of such pure captive insurance company shall be appointed by the mayor of such city or by such other city official as the mayor may designate. Neither the

mayor of such city, nor any of the captive's members, directors, officers, employees or agents appointed by or with the approval of such city, nor any officials, officers, employees or agents of the city, while acting within the scope of their authority, shall be subject to any personal liability resulting from the exercise or carrying out of any of the city's or captive's purposes or powers under this article.

(b) A group captive insurance company may be incorporated:

- (1) as a stock insurer with its capital divided into shares and held by the stockholders, or
- (2) as a mutual insurer without capital stock, the governing body of which is elected by the member organizations of the industrial insured group.

(c) The proposed incorporators shall submit to the superintendent the company's proposed charter, which shall contain:

- (1) the corporation's name, which shall not be the same as, deceptively similar to, or likely to be confused with or mistaken for any other existing business name registered in this state;
- (2) the kind of insurance business to be transacted;
- (3) the place where the principal office is to be located;
- (4) the number of directors;
- (5) the amount of its capital, if a stock corporation; and
- (6) any other particulars necessary to explain the corporation's objectives, management and control.

(d) The charter and any organization fee shall be transmitted to the attorney general, who shall record the charter.

(e) The recorded charter shall be filed in the superintendent's office and a certified copy shall be issued to the incorporators.

(f) The capital stock of a captive insurance company incorporated as a stock insurer shall be issued at not less than par value.

(g) The board of directors of a captive insurance company incorporated in this state shall have at least three members, with at least two of the members required to be residents of this state.

(h) The provisions of article seventy-one of this chapter shall apply in determining the procedures to be followed by captive insurance companies in carrying out any of the transactions described therein, except the superintendent may waive or modify the requirements in accordance with rules or regulations which the superintendent shall adopt addressing such categories of transactions.

(i) The articles of incorporation or bylaws of a captive insurance company shall authorize a quorum of a board of directors to consist of no fewer than one-third of the fixed number of directors.

Section 7006. Annual report. Every captive insurance company licensed to do a captive insurance business in this state shall file with the superintendent:

(a) annually on or before March first, a statement of its financial condition and any amendment to the plan of operation at last year-end, verified by the oath of at least two of its executive officers. The statement shall be in the form prescribed by the superintendent; and

(b) annually on or before July first, a report of its financial condition at last year-end with an opinion of an independent certified public accountant; and

(c) annually on or before July first, evidence in a form prescribed by the superintendent, that the industrial insured or member of the industrial insured group owning the captive insurance company continues to meet the financial standards set forth in subsection (e) of section seven thousand two of this article.

(d) the superintendent shall report to the governor, the temporary president of the senate, and the speaker of the assembly, by September first of each year on the state of the captive insurance industry in New York. The report shall include a status on the number and type of captive insurers, the lines of insurance written through them, and their overall effect on the New York insurance market.

Section 7007. Examinations. The superintendent may make an examination into the affairs of any captive insurance company licensed to do a captive insurance business in this state whenever it is deemed necessary for the protection of the interests of the people of this state but the superintendent shall conduct at least one examination every five years. Such examinations shall be conducted in accordance with the provisions of sections three hundred ten, three hundred eleven, three hundred twelve and three hundred thirteen of this chapter.

Section 7008. Suspension or revocation of license.

(a) The license of a captive insurance company to do a captive insurance business in this state may be suspended or revoked by the superintendent for any of the following reasons:

- (1) insolvency or impairment of required capital or surplus to policyholders;
- (2) refusal or failure to submit an annual report, as required by section seven thousand six of this article, or any other report or statement required by law or by lawful order of the superintendent;
- (3) failure to comply with the provisions of its own charter or bylaws;
- (4) failure to submit to examination or any legal obligation relative thereto, as required by section seven thousand seven of this article;
- (5) refusal or failure to pay the cost of examination as required by section seven thousand seven of this article;
- (6) refusal or failure to pay the taxes as required by section seven thousand twelve of this article and section fifteen hundred two-b of the tax law;
- (7) removal of home office or records from this state;
- (8) use of practices that, although not otherwise specifically prohibited by law, nevertheless render its operation detrimental or its condition unsound with respect to the public or to its policyholders; or
- (9) failure to otherwise comply with laws of this state.

(b) If the superintendent finds, upon examination, hearing, or other investigation, that any captive insurance company has committed any of the acts specified in subsection (a) of this section, the license to do a captive business may be suspended or revoked. In addition, the license to do a captive business may be suspended or revoked if it is deemed to be in the best interests of the public and the policyholders of such captive insurance company, notwithstanding any other provision of this article.

Section 7009. Investments.

(a) No captive insurance company shall be subject to any restrictions on allowable investments, except as set forth in subsections (b) and (c) of this section.

(b) A group captive insurance company shall not make loans to the industrial insureds that comprise its industrial insured group. A pure captive insurance company may make loans to its parent company or affiliates with the prior approval of the superintendent. Such loan must be evidenced by a note in a form approved by the superintendent. Loans of minimum capital and surplus funds required by section seven thousand four of this article are prohibited.

(c) The superintendent may prohibit or limit any investment that threatens the solvency or liquidity of any captive insurance company.

Section 7010. Reinsurance.

(a) Any captive insurance company may assume reinsurance on risks ceded by any other insurer when the risks ceded under the reinsurance agreement are solely those of the industrial insured or members of industrial insured group owning the captive insurance company.

(b) With the approval of the superintendent, any captive insurance company may assume risks of any other insurer, provided the reinsurance premiums assumed do not exceed fifty percent of the assuming captive insurance company's gross premiums written in any calendar year.

(c) Any captive insurance company may take credit for reserves on risks or portions of risks ceded to reinsurers complying with the provisions of paragraph fourteen of subsection (a) of section one thousand three hundred one and section one thousand three hundred eight of this chapter. Prior approval of the superintendent shall be required for ceding or taking credit for reserves on risks or portions of risks ceded to reinsurers not complying with these sections.

Section 7011. Exemption from compulsory associations. No captive insurance company shall be permitted to join or contribute financially to any plan, pool, association, or guaranty or insolvency fund in this state, nor shall any captive insurance company, or its insured, or its parent or any affiliated company, or any member organization of its association, receive any benefit from any such plan, pool, association, or guaranty or insolvency fund for claims arising out of the operations of such captive insurance company.

Section 7012. Franchise taxes. Captive insurance companies licensed to do a captive insurance business shall be liable for the payment of franchise taxes in accordance with section fifteen hundred two-b of the tax law.