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Comparing The Delaware Captive Statute To The Vermont Captive Statute

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In General

Both the Delaware and Vermont captive insurance statutes are modern statutes, with leading edge provisions, carefully tended by thoughtful and committed local captive insurance communities. While the two statutes are quite similar, they ultimately have some distinct and significant differences. Overall, Vermont's captive insurance statute is more conservative than Delaware's and less flexible than Delaware's.

Taxation

Delaware and Vermont differ on taxation. Vermont uses a reverse graduated premium tax, common among captive insurance domiciles, whereas Delaware uses a flat premium tax. The upshot of this distinction is that Delaware's tax is easier to calculate and generally less burdensome for smaller captives in that smaller captives would pay less tax in Delaware than in Vermont. Both domiciles have a minimum tax requirement, with Delaware's minimum being one third lower than Vermont's. Also, both states employ comparable aggregate caps, but Delaware has lower component caps for direct premium and reinsurance premium, where Vermont does not. The states' respective captive taxation schedules compare as follows:

Category	*Vermont*	*Delaware*
Direct premiums – first $20 million	.0038	.002
Direct premiums – second $20 million	.00285	.002
Direct premiums – third $20 million	.0019	.002
Direct premiums – above third $20 million	.00072	.002
Reinsurance premiums – first $20 million	.00214	.001
Reinsurance premiums – second $20 million	.00143	.001
Reinsurance premiums – third $20 million	.00048	.001
Reinsurance premiums – above third 20 million	.00024	.001
Annual minimum aggregate tax	$7,500	$5,000
Annual maximum tax on direct premium	None	$125,000
Annual maximum tax on reinsurance premium	None	$75,000
Annual maximum aggregate premium tax	$200,000	$200,000

Overall, tax treatment of captive insurance companies is generally more favorable in Delaware. While Vermont and Delaware are comparable in aggregate caps, Delaware has advantages in minimum tax, in tax rate for smaller captives and in maximum tax on direct premiums or reinsurance premiums.

Types of Entities

Vermont and Delaware vary greatly on the types of entities that may be licensed as captive insurance companies. Vermont essentially limits captives to stock corporations, non-profit corporations, manager-managed limited liability companies, mutual insurers or reciprocal insurers. Further, the selected entity must be formed under Vermont law. So, the Vermont captive insurance statute restricts choice of entity to only a few forms of Vermont entities.

Delaware, on the other hand, permits virtually any type of entity, whether or not a Delaware entity, to be licensed as a captive insurance company. With only minor restrictions, Delaware permits stock and non-stock corporations, limited liability companies, partnerships, limited partnerships, statutory trusts, and reciprocal insurers to be licensed as captive insurance companies. Expanding on the traditions of Delaware's corporate law and alternative entity laws, the Delaware captive insurance statute is designed to offer captive owners the greatest possible opportunity to structure and organize their business operation in the manner most useful, productive and convenient for them. The Delaware captive statute is intended to facilitate creativity in captive insurance planning by offering a flexible environment in which captive owners and planners can easily structure their captive insurance companies and their respective transactions in ways not yet imagined.

Types of Captives

Delaware permits every type of captive permitted in Vermont, plus one significant addition. Both states permit pure, association, industrial insured, sponsored and special purpose financial captives. Both states also permit risk retention groups to be formed as captives.

Delaware also permits special purpose captives, a catch-all category structured to maximize Delaware's Insurance Commissioner's flexibility in approving captives. The special purpose captive allows the Commissioner to approve captives that might not otherwise fit into one of the already authorized categories or that might be within one of the authorized categories but may wish to deviate from one or more of the requirements of that category. Recently, Delaware used the special purpose captive category together with the breadth of permissible entity types to license the world's first serial entity captive insurance company, a captive that uses a series limited liability company to function like a segregated cell company.

Vermont's statute expressly authorizes branch captives, which are treated as pure captives, whereas Delaware's statute is silent as to branch captives. While the Delaware statute is silent as to branches, they are certainly not prohibited in Delaware[1]. The drafters of the Delaware statute and the Commissioner's office believe that branching can be accomplished in Delaware via the special purpose captive provisions.

Minimum Capital and Surplus

The Delaware and Vermont requirements for minimum capital and surplus are virtually identical and compare as follows:

Type	*Vermont*	*Delaware*
Pure	$250,000	$250,000
Assocoation	$750,000	$750,000
Industrial Insured	$500,000	$500,000
Risk Retention Group	$1,000,000	$1,000,000
Sponsored	$500,000	$500,000
SPFC	$250,000	$250,000[2]
Special Purpose	N/A	$250,000[3]

A key point to note is Delaware's flexibility with minimum capital and surplus. Virtually all captive states, Delaware and Vermont included, permit their Commissioners to use their discretion to require capital and surplus in excess of the minimum. And, in many cases, if not most, the captive's activities reasonably require capital and surplus in excess of the floor set by the statute. However, Delaware's special purpose captive provisions permit the Commissioner to set lower minimum capital and surplus requirements, as the Commissioner deems appropriate, for special purpose captive insurance companies. So, in the case of special purpose captive insurance companies in Delaware, the minimum capital and surplus requirement of $250,000 is a default rather than a floor.

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(1) HB 314, a bill currently in the Delaware legislature would add express branch provisions to the Delaware statute. The proposed Delaware branch provisions are generally more liberal than Vermont's. Delaware branches would be permitted to write any line of business for which a captive could otherwise be formed in Delaware, whereas Vermont branches are restricted to employee benefits coverage. HB 314 would also expressly authorize agency captives, which are not authorized in Vermont. As usual, Delaware's agency provision will be broader than most others and will allow for reinsurance intermediaries to form captives, whereas the vast majority (if not all) of captive statutes limit agency captives to agents and brokers. Again, Delaware's drafters and regulators believe agency captives can be accomplished in Delaware via the special purpose captive provisions. But the addition of an express authorization adds clarity. As of the date of this update, HB 314 had unanimously passed the Delaware House of Representatives and was expected to be taken up shortly in the Delaware Senate.

(2) $500,000 for SPFCs that are also sponsored captives.

(3) Or such other amount as may be determined by the Commissioner.

Conclusion

While Delaware and Vermont each have leading edge captive statutes and are each diligent about keeping their statutes at the forefront of the captive insurance industry, Delaware's statute has an edge. As to taxation, Delaware's flat rate and separate component caps for direct insurance and reinsurance offer distinct advantages. But, perhaps more importantly, in overall flexibility and opportunities for creativity, Delaware's statute exceeds Vermont's. Delaware permits many more types of entities to be licensed as more types of captives, including special purpose captives, which have flexibility even as to minimum capital and surplus. All other things being equal, there is much more opportunity in Delaware's captive statute than in Vermont's.

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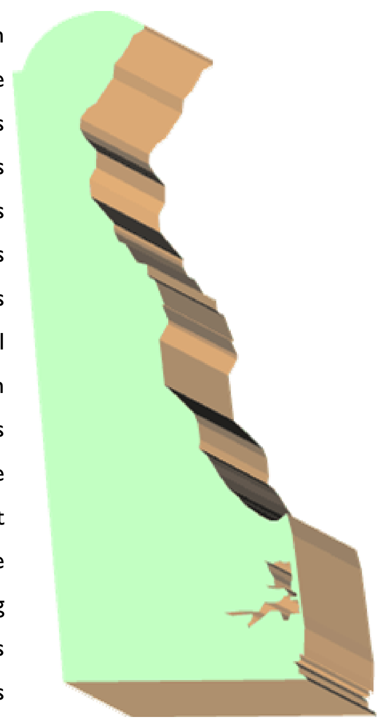

About the Author:

Jeffrey K. Simpson, Director, received his A.B. degree from Brown University and his J.D. from Villanova University School of Law (where he was Editor of Outside Articles for the Villanova Sports and Entertainment Law Journal). Jeff serves as outside general counsel for small businesses. He assists his clients with all matters in the lifecycle of a business, including formation, financing, contracts, employment and strategic planning. His experience as an entrepreneur gives him a uniquely practical perspective in advising his business clients. Jeff also has experience in the formation and operation of special purpose entities including passive investment companies, REITs and captive insurance companies. He was instrumental in founding the Delaware Captive Insurance Association and chaired the committee that drafted Delaware's updated captive insurance statute in 2005 and its special purpose financial captive provisions in 2007.