

Downs Rachlin Martin PLLC  
Captive Insurance Update | Spring Edition | 2020



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## Developments in Vermont

### COVID-19 Impacts Vermont

Though Vermont's rural character has somewhat lessened the direct effects of the COVID-19 pandemic, at least compared with some of its neighbors, there can be no doubt that the virus' impact on the state will be devastating and long-lasting. Governor Phil Scott has ordered all non-essential businesses to close public-facing operations, except those deemed critical to public health and safety and economic and national security. Additionally, all schools have been closed for the remainder of the academic year and courts are operating only on an emergency basis. It is hoped that these extraordinary actions, along with the other social distancing measures that have been implemented, will allow Vermont to weather the worst of the storm while preserving, to the greatest extent possible, the lives and livelihoods of its residents. These measures, however, have resulted in significant hardship for most Vermont businesses and families.

For the most part, the captive industry in Vermont is fortunate in that many of its members worked remotely, at least part of the time, before the crisis. The Vermont Department of Financial Regulation (the "DFR") has also reconfigured to allow all, or nearly all, of its operations to be conducted remotely. The DFR has also issued a statement recognizing the likelihood that travel will continue to be challenging for much of 2020 and that, accordingly, captives are encouraged to seek waivers from the requirement for an in-state board meeting for 2020.

DRM has closed all five of its physical offices with all attorneys now providing legal services remotely. While we share many of the frustrations that others in the business world are experiencing with this new arrangement (and we miss our colleagues!), we recognize that we are very fortunate to be in a position to make such a transition and we are dedicated to assisting all of our clients in navigating the challenges ahead.

DRM has established a [COVID-19 Legal Resources for Business](#) website and is committed to providing timely guidance on rapidly evolving legal matters during this challenging time. Please contact us if you have any questions about the impact of COVID-19 on your business.

## 2020 Captive Legislation

Before its focus shifted to the COVID-19 response, the Vermont legislature was on track to pass its annual captive “housekeeping” bill, which was jointly proposed by the DFR and the Vermont Captive Insurance Association. Though it is unclear when the legislature will revisit the captive bill, the expectation remains that it will be passed at some point over the next few months. The current version of the bill includes the following notable provisions:

- Reduced Capital Requirements for Sponsored Captives. Minimum capital and surplus for sponsored captives will be reduced from \$250,000 to \$100,000.
- Clarification of Protected Cell’s Ability to Insure Controlled Unaffiliated Business. It will now be clear that, with DFR approval, protected cells will be authorized to insure controlled unaffiliated business.
- Separate Accounts Within Protected Cells. Protected cells will now be able to establish separate accounts.
- Investment Restrictions for Sponsored Captives and Protected Cells. Sponsored captives and protected cells will now be subject to the same investment restrictions as risk retention groups, meaning that they can either comply with the investment restrictions applicable to traditional insurers or obtain DFR approval of their own investment policies.
- Reduced Capital Requirements for Captives in Dissolution. The DFR will have discretion to reduce or waive required capital and surplus for captives winding down pursuant to an approved plan of dissolution.
- Merger of Non-Insurer Subsidiary. The DFR will have the authority to waive provisions of the insurance and corporate codes to facilitate the merger of a non-insurer subsidiary with its captive parent.
- Dormant Captives. Captives that enter dormancy without ever being capitalized will not be required to capitalize as a condition of entering dormancy.
- Required Disclosure for Agency Captives. Agency captives are now required to disclose in their policy forms that they may enter into reinsurance or other risk sharing arrangements with the related agency or brokerage.

In addition to the captive housekeeping bill, the DFR is pursuing a number of other legislative priorities, including changes to the laws governing credit for reinsurance (these changes are not expected to affect captives).

## 2019 Vermont Formations

In 2019, 22 new Vermont captives were licensed, bringing the total to 1,159 captives licensed, of which 559 (and one affiliated reinsurance company) were active as of December 31, 2019. The types of active captives break down as follows:

Pure	352
Risk Retention Groups	87
Special Purpose Financial	44
Sponsored	37
Industrial Insured	21
Association	14
Branch	4
Affiliated Reinsurance Company	1

Notably, Vermont’s 37 sponsored captives have experienced significant growth, with well over 200 cells.

## 2018 Aggregate Data

The aggregate amount of gross premium written by all Vermont captives for the year 2018 was \$22.6 Billion; total net written premium was \$20 Billion. Aggregate total capital and surplus as of December 31, 2018 was \$81 Billion and total assets were \$195 Billion. Total Vermont premium tax paid on 2018 gross written premiums was approximately \$24 Million.

Aggregate data for the year 2019 will likely be published during the summer of 2020.

## COVID-19 Issues

### Business Interruption Coverage

Plaintiffs’ lawyers are seeking insurance coverage for COVID-19 business losses in a number of recently filed cases. Additionally, New York, New Jersey, Massachusetts, Ohio, Rhode Island, and Louisiana have legislative efforts underway seeking to require insurers to cover coronavirus-caused business losses. At issue are the business interruption or time element and extra expense coverages available under commercial property policies. Many carriers began placing virus exclusions in their policies after the SARS coronavirus emerged fifteen years ago. Coverage under such policies also typically requires “physical loss or damage” that causes a business shutdown or curtailment. Insurers generally take the position that the presence of coronavirus in the business premises or surrounding community does not qualify as “physical damage.” Policyholders, on the other hand, assert that loss of the ability to use a property because of the presence of the COVID-19 virus is sufficient to render the property “physically damaged.” Government closure orders or interruption of the business supply chain are other events that trigger coverage, but coverage still typically requires “physical loss or damage” through events such as earthquakes or hurricanes. We will be watching these developments closely over the coming months.

## **Telemedicine Rules Relaxed**

On March 20, 2020, the Department of Health and Human Services (“HHS”) announced that it would refrain from imposing penalties for HIPAA violations against most healthcare providers providing telemedicine-based services for the duration of the COVID-19 crisis.

These services must be provided through non-public facing remote communication technologies, such as FaceTime, Zoom or Skype. Public-facing products, that are open to the public or easily disseminated, may not be used.

The telehealth services need not be COVID-19 related. The goal is to empower healthcare providers to reach patients with any health issues, while reducing the risk of COVID-19 transmission attendant to in-person visits, especially for elderly or at-risk patients.

This safe harbor applies only to healthcare providers, insurance companies are not covered. The announcement also outlines conduct that it considers to be in bad-faith, and thus not covered. Bad-faith conduct includes conduct in furtherance of a criminal act, further use or disclosure prohibited by HIPAA privacy rules (e.g., unauthorized commercial use of any information), and violations of state licensing laws or professional ethical standards.

## **Applicability of State Coronavirus Mandates to Risk Retention Groups**

Numerous states are enacting emergency rules restricting insurers’ rights to cancel or non-renew insurance policies, and requiring extended grace periods for payment of premium, during the COVID-19 pandemic. At least one state has issued an order requiring insurers to submit COVID-19 preparedness plans to the state. These rules differ and it is not clear whether they are intended to apply to risk retention groups in any particular state.

As member-owned insurers, risk retention groups will try to provide as much flexibility as is necessary to meet their insureds’ financial difficulties, especially during this pandemic. These emergency orders may be preempted by the federal Liability Risk Retention Act, which provides that only the domiciliary state may regulate the operations of a risk retention group. Please contact us if you have any questions about the applicability of state emergency rules or mandates to risk retention groups.

## **TRIA Reauthorization**

At the close of 2019, the U.S. Congress approved the Terrorism Risk Insurance Program Reauthorization Act of 2019, which extends the Terrorism Risk Act (“TRIA”) for an additional seven-year term. TRIA’s substantive provisions remain essentially unchanged, and the related data call is due on May 15, 2020.

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