

CAPTIVE INSURANCE CLE FOR THE FLORIDA BAR ASSOCIATION'S CONSTRUCTION LAW GROUP

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WHAT IS A CAPTIVE INSURANCE COMPANY?

- Florida law defines a captive insurance company as:

a domestic insurer established under this part. A captive insurance company includes a pure captive insurance company, special purpose captive insurance company, or industrial insured captive insurance company formed and licensed under this part. *Fla. Stat. § 628.901(2).*



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WHAT IS A CAPTIVE INSURANCE COMPANY? (cont...)

- In layman's terms, a "captive" is an insurance company that is privately-owned and controlled by the very business(es) that it insures. Captives are state-regulated insurance companies owned by corporate affiliates or subsidiaries that insure the risks of related entities.*
- Florida's Captive Insurance Law is Chapter V, Fla. Stat. §§ 628-901 *et seq.*
- Very few captives are domiciled in Florida. Why?

* <https://content.naic.org/cipr-topics/captive-insurance-companies> (last visited October 15, 2025).



WHAT CAN CAPTIVES INSURE?

- Only commercial risks. They cannot be used to insure personal property lines like homeowners' or auto liabilities.
- Common to the construction industry, captives can be used to insure against losses associated with:
 - a) Workplace injuries
 - b) Property damage (builder's risk)
 - c) Pollution liability
 - d) Project delays not caused by insured (business interruption)
 - e) Subcontractor default
 - f) Professional liability (errors and omissions)
 - g) Surety bonds and performance guarantees



WHAT CAN CAPTIVES INSURE (cont...)?

- Other property/casualty risks include:
 - a) product liability
 - b) D&O
 - c) loss of key contracts
 - d) loss of key person
 - e) workplace violence, etc.
 - f) medical stop loss
 - g) workers' compensation
 - h) commercial auto/fleet liability
 - i) representations and various contractual warranties



WHY USE A CAPTIVE?

- Plug in the gaps in the commercial insurance market where coverage is either unavailable or simply too expensive.
- Improved, more transparent claims process.
- Captives can directly access the reinsurance market.
- Premiums paid to a captive, as with a commercial carrier, are deductible as an ordinary business expense.*
 - > > Rate stability.
- Premium surpluses can be invested in a variety of ways, pursuant to state regulations, bolstering the corporate bottom line.
- Cover high deductibles.

* See, *R.V.I. Guaranty Co., Ltd. v. Commissioner*, 45 T.C. 209 (2015)(premiums paid to captive were deductible); See also, *Harper Grp. & Includible Subsidiaries v. Comm'r*, 96 T.C. 45, 60 (1991), *aff'd sub nom*; and *Harper Grp. v. Comm'r*, 979 F.2d 1341 (9th Cir. 1992) (concluding premiums paid to a captive insurer were deductible.).



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CAPTIVE FORMATION DETAILS

- Each state that has captive enabling legislation identifies the types of captives that it will allow.
- Florida only allows pure captives, industrial captives, and special purpose captives. *See, Fla. Stat. § 628.905*
 - Florida does not allow association captives, agency captives, sponsored captives, protected cell captives and limited liability series captives which, for these latter two, because of their lower capitalization requirements, make forming and using a captive more accessible to smaller and middle market businesses. *Id.*



SELF-PROCUREMENT LAWS

- *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451 (1962) – Insureds have a constitutional right to go out of state and procure coverage with any insurer of their choice, though the state where the insured business operates and incurs its risks may assess a tax on the transaction and require it to be reported (the “self-procurement tax”).*
- Captives now represent 25% of the commercial insurance market, having diverted hundreds of billions of dollars in premiums from traditional channels over the past decade. - Ernst & Young's *2024 Global Insurance Outlook Report*
- Captives cannot sell policies to the public.

* Florida's self-procurement tax is 5.3%, an expense that can be built into the premium.
See, Fla. Stat. § 626.938.



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IS OWNING AND OPERATING A CAPTIVE HARD?

- No, but it is a serious commitment.
- Safe harbors: *
 - a) the risk must be transferred to another entity (to the captive) and off the books of the insured;
 - b) the risks must be insurable and fortuitous. *i.e.*, there must be a real probability of a future risk-of-loss occurring that is outside the insured's control and a quantification of possible loss;
 - c) that risk must also be diversified among a sufficiently large number of unrelated, independent risks; and
 - d) the captive should operate like a true insurance company

* *Helvering v. LeGriese*, 312 US 531, 539 (1941); *Rent-A-Center v. Comm.*, 142 T.C. 1 (2014); *R.V.I. Guar. Co. & Subs. v. Commissioner*, 145 T.C. 209, 228 (2015); *Clougherty Packing Co. v. Commissioner*, 811 F.2d 1297, 1300 (9th Cir. 1987), *aff'g* 84 T.C. 948 (1985).



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WHAT DOES IT MEAN, TO OPERATE LIKE A “REAL INSURANCE COMPANY?”*

- Risk transfer and risk distribution
- Adherence to corporate formalities (i.e., annual meetings, corporate binders, separate bank accounts, etc.)
- Sufficient capitalization which is established by state statute and feasibility studies prepared by an actuary
- Insurance applications, underwriting and actuarial processes
- Timely issuance of unambiguous insurance policies (courts frown on tardy delivery)
- Obedience to claims protocols and the ability to promptly pay valid claims.

* See, IRS Revenue Ruling 2001-31 and *Rent-A-Center v. Commissioner*, 142 T.C. 1 (2014).



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CONSTRUCTION INDUSTRY-SPECIFIC ISSUES

- Importance of captive managers.
- Needing “rated paper” on projects and fronting.
 - Captives function well as the reinsurer in these situations.
- Claims-made v. occurrence-made considerations
 - Long-tail risks are best for occurrence-made policies (*i.e.*, pollution, professional liability, etc.)
 - Short-tail risks are best for claims-made policies (*i.e.*, property damages, project delays, cyber risks, etc.)



SPEAKER BIOGRAPHY

Amanda has served since 2023 as General Counsel to Alliance Captive Management, LLC, a national captive management company based in Nashville, Tennessee. Prior to joining ACM, she was GC for another national captive manager for nearly seven years. Licensed to practice law in Florida and Kentucky, Amanda spent eight years with Shutts & Bowen, LLP as a partner in its construction practice group; and prior to that, she was an associate with GrayRobinson, P.A.'s construction and commercial litigation group. Mindful that the captive industry has done an historically poor job of marketing itself outside of the insurance industry, Amanda welcomes the chance to speak with law firms throughout the United States to educate lawyers about these critical risk management tools. She is the author of "What Every Business Lawyer Needs To Know About Captive Insurance - And Why It Matters" (FBJ Vol. 98, No. 2 March/Apr 2024).

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