



## IIA'S CAPTIVE ADVOCACY TEAM IS GETTING THE WORK DONE

Written By Karrie Hyatt



IIA has long been supportive of captives in the self-insurance sector. The organization's Captive Committee has been at the forefront of addressing issues that affect captives industry-wide. A more recently formed sister task force, the Captive Advocacy Team, is focusing on critical and real-time regulatory and legislative issues that affect captives, particularly enterprise risk captives (ERCs).

The Captive Advocacy Team was formed in 2014 to counteract the negative reputation that the IRS is still trying to attach to ERCs. According to Jeffrey K. Simpson, partner with Womble Bond Dickinson (US) LLP, "The reason we formed the task force was to change public discourse regarding ERCs for the positive. All that has been getting into the media and the trade press is the IRS's negative view. We want to be a voice from the industry talking on behalf of the industry to try and have a positive impact."

Education is the key, Team members say. The focal point of advocating for captives is to educate regulators, legislatures, owners, and interested parties in the real benefits provided by ERCs. “We look to educate the detractors and the uninitiated. Captive insurance is not some hocus pocus, sleight-of-hand thing. It’s a real insurance product and provides real benefits to its owners and insureds,” said Alan Fine, Partner-in-Charge of Insurance Advisory Services with Brown Smith Wallace LLP and a member of the Team.



member. “Our goal is to show how mid-size businesses utilize and benefit from captives.”

For Joanne Shaver, senior vice president of The Intuitive Companies, the Captive Advocacy Team’s main purpose, “Is to educate members of congress about the importance of captives to small and medium sized business owners. My goal in working with the task force is to do my part as an industry stakeholder to help SIIA spread the word both in my local community and in Washington, D.C.

“Captive insurance companies are an integral part of risk management for nearly every large Fortune 1000 company,” said Josh Miller, CEO, The KeyState Companies and task force

## LAST YEAR’S SUCCESSES

Despite being hindered by the pandemic shutdown, the Captive Advocacy Team was able to do important work.

On December 1st, the U.S. Supreme Court heard oral arguments in *CIC Services v. IRS*. This was the first time a captive-related court case has been argued before the Supreme Court. The case asks if the IRS’s Notice 2016-66 was legal as pertains to the Administrative Procedures Act and the Anti-Injunction Act. In support of *CIC Services*, a broad coalition of industry organizations came together to submit an amicus brief. SIIA’s Captive Advocacy Team was integral in coordinating the brief.

For Simpson, the amicus brief was the most important work that the task force did in 2020. “The reason is not so much in the substance of the brief, but in the broad support for it—the way we were able to coordinate not only with SIIA members but other industry associations and organizations towards working together on this common goal. As an industry, we never really have done something like this before. I think that is a good sign that our industry is getting organized. Let’s see what we can do together as a collective.”

A decision from the Supreme Court is expected to be handed down in June or July.

Another thing the Advocacy Team did last year, to forward the goal of education, was to put captive business owners in direct contact with their elected representatives.

SIIA scheduled and held over 60 virtual congressional meetings. According to Fine, “I think one of the things we did that we were very proud of is that we were able to set up a number of meetings between captive owners and their representative and/or senators in Congress. The purpose of these was educating our legislators about the importance of captive insurance.”

“The congressional town hall events that SIIA held last year were a great way to get the task force’s message out to members of Congress. This format worked well for the

local business owners . . . to tell their captive story in a small, intimate setting,” said Shaver.

For Miller, connecting business owners with their elected officials was the most critical aspect of the Team’s work. “The business owner can outline the tangible benefits the captive has for their business, employees, and customers. These real-world examples are the only way that elected officials will understand the impact their support of captives has on their constituents and their local economy.”



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The Captive Advocacy Team had scheduled an in-person event at the end of March 2020 in Washington, D.C. for owners to meet with their representatives on Capitol Hill. That meeting was, of course, cancelled.

The event was replaced by town hall webinars which Simpson believes could be a more effective way of bringing captive insurance concerns to Congress. “When we go to D.C. and we visit congressional offices, we don’t usually get the senator or representative themselves, just their top staff. In going to these meetings, we really want the congressperson themselves and through these webinars we got to do that. The extraordinary part for me was that Representative Lisa Blunt-Rochester [DE] was on our webinar and we had her direct attention. You might argue that we did better this way than we did in person.”

## THE IRS AND CAPTIVE DETRACTORS

The IRS doubled down on its pursuit of ERCs, or what they call microcaptives, in 2020. On October 1, the Service issued Letter IR-2020-226 which indicates that it will be even more aggressive towards microcaptives using the IRC 831(b) option. This statement came at a time when captives were both showing their worth and expanding in the wake of the pandemic.

For Shaver, “I believe the IRS feels, wrongly so, that most captives taking the 831(b) exemption are doing so merely for the tax deduction that the insured receives and subsequent exemption of the underwriting profits on the insurer side. Those of us serving on the Advocacy Team all know this is not the case, but it’s difficult to convince the IRS of this.”

“As the audit and enforcement teams focus their efforts going after abusive captives,” said

Miller, “I’m worried that they have tunnel vision and do not take the time to consider and evaluate captives are operating correctly. This is really the main issue. The industry and the IRS have a completely different view on the how many captives are operating abusively. The IRS believes it is a very high percentage, and based on my industry experience, it’s actually the opposite.”

The IRS can't seem to see that captive insurance has been beneficial for their owners. According to Fine, "The captive insurance industry has done a lot of good things for business owners by being able to provide insurance where other insurance was simply not available. For example, if you think about the events of the past 12 months, most commercial policies specifically exclude anything emanating from something like a virus, like the pandemic. Yet, I have a number of clients who were able to continue business because they were able to submit claims to their captive insurance company and that allowed them to weather the storm."

While the Captive Advocacy Team would like for the IRS to change its stance on captive insurance, the Service has made it clear that they have no intention of changing their focus. Instead, the task force would like to work with them to create guidance. For Simpson, "I don't think we're ever changing the attitude of the IRS, but we would like to get them to agree on some substantive things that can help distinguish good operations from bad."

According to Miller, "I'd like to see the captive industry and the IRS agree upon some clear, objective criteria that demonstrates that a captive insurance company is operating reasonably and should not be subject to additional scrutiny or reporting requirements. Captives that meet the criteria wouldn't be presumed to be abusive, which is how it currently seems the IRS views 831(b) captives."



## THE FUTURE OF ADVOCACY

Education will continue to be the main focus of the Captive Advocacy Team. Educating both detractors and those new to captive insurance will take several approaches, including more congressional meetings and educational webinars. The Team is looking to partner with a think tank or academia to produce studies on the benefits of captives written by experts not directly involved in the industry.

On the top of the list for task force members is sponsoring more meetings between captive stakeholders and their congressional representatives. "Ryan Work, who leads captive advocacy activities on behalf of SIIA, always stresses the importance of captive owner engagement," said Shaver. "I think this is going to be key in 2021, especially given everything that our captive owners faced last year. My understanding is that the task force is planning to hold more congressional town hall events this year. I am hopeful that the Team members will reach out to their clients to ask more captive owners to tell their stories during these town hall events."

According to Miller, "I think the task force needs to redouble our efforts to keep captive owners engaged with members of Congress and other elected officials. It's critical that members of Congress understand how these businesses utilize captives."

“The pandemic has provided concrete examples of risks that people believed would never ever happen. Things that weren't even considered a real risk. Yet here we are with captives paying claims on those risks,” said Simpson. “We need to get word out about those positive examples of captives providing real benefits.”

Shaver said, “As an industry stakeholder and captive manager, I believe the best thing we can do is to work with captive owners and their advisors to ensure that captives are being formed for the right reasons. In today's hard insurance market and given the business interruption losses that most of our clients faced during the pandemic, there has never been a better time to own a captive. I believe we should take advantage of this situation and ask our captive owners to tell the story of how their captive helped them create leverage with the insurance carriers and/or helped them offset the business losses they faced during the government shutdowns in 2020.” ■