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NEW YORK WORKER'S COMPENSATION SELF INSURED TRUSTS

Guidelines for Agents & Brokers

Updated April 2014

TABLE OF CONTENTS

Contents

History _____	1
Current Issues _____	2
Questions From Trust Participants _____	4
Assessment Relief _____	6
What Does This Mean to the Group Member? _____	9
Attorney Resources _____	10
IIABNY Resource Materials _____	11

History

BACKGROUND

The New York State Workers' Compensation Law Section 50(3)(a) authorizes employers who perform similar activities within a particular industry to self insure as a group for workers' compensation insurance coverage.

Self insured trusts gained popularity because they were viewed as a way for businesses to lower the costs of worker's compensation insurance coverage.

Businesses who agree to participate in self insured trusts must sign participation agreements that set forth their rights, duties and obligation related to the trust.

KEY ELEMENT

The trust participant must agree to be responsible for the workers' compensation obligation of not only its business but also of each and every other business that participates in any trust. The legal term for this obligation is joint and several liability.

This joint and several liability applies both within the participant's trust and also within any other trust.

Current Issues

- During the past several years a number of New York self insured trusts were found to have been under-funded and unable to pay claims.
- As a result of this, the New York State Workers' compensation Board began to levy assessments on healthy trusts based on the powers that it has to do so under section 50-5(g) of the New York Workers' compensation Law.
- This trust-to-trust liability (making assessments against healthy trusts in order to help pay claims of unhealthy trusts) was challenged in the New York courts but was ultimately upheld by the courts as being constitutional, and thus acceptable.

Technically, there is no "trust-to-trust" or "group-to-group" liability. If a trust is unable to meet its obligations to an injured worker because it is insolvent, payments are made by the Workers Comp Board from what is known as the "151 fund" (referring to section 151 of the Workers Comp Law), essentially through a transfer to the uninsured employers' fund. All insurance carriers, including self-insurers and the State Insurance Fund, are assessed for expenses of the fund. The allocation method for the assessment is detailed in WCL §151.

CURRENT SELF INSURED TRUSTS

- Because of new requirements for capitalization that were introduced in legislation in 2011, as of January 2012 there were only four remaining group self insured workers' compensation trusts. Existing groups had to reapply to the Workers Compensation Board and qualify under the new, more stringent, financial stability requirements. That number has since dropped to three, as of April 2014 – Electrical Employers Self-insurance Safety Plan, New York College & University Risk Management Group and New York Lumberman's Insurance Trust Fund.
- Groups that did not meet the new criteria were terminated effective December 31, 2011 and their members had to provide alternative coverage for their employees.
- The Self-Insured Group (SIG) program is limited to the existing groups that met the new requirements as of January 2012 and chose to continue their program under the amended law. The amended law does not allow for any new employer groups to be approved to self-insure.
- As of the end of 2011 the New York Workers' Compensation Board reported the total liability from the various insolvent group self insured trusts to be over \$810,000,000.
- The Workers' Compensation Board issues a monthly report with the status of all currently active and inactive self insured trusts.
- The current report, updated monthly, is accessible from the IIABNY website at www.IIABNY.org

CURRENT ISSUES

Businesses that are currently involved in self insured trusts, and those who were previously involved in self insured trusts, are regularly receiving notices of assessments that are due. Based upon the type of trust, the financial condition of the trust, and the type of businesses involved with the trust, and the size of the particular business participating in the trust, assessments may range from very modest sums to those that are well into millions of dollars. As a result of these assessments, New York insurance agents and brokers are regularly receiving inquiries from customers as to what they should do in response to the assessments that they receive.

QUESTIONS FROM TRUST PARTICIPANTS

Questions From Trust Participants

When an agency or brokerage receives inquiry from a customer concerning an assessment related to a group self insured trust, it may wish to provide assistance to the customer, but the agency or brokerage should be certain to proceed with caution; this is especially so if the agency or brokerage was the one that placed the customer in the subject self insured trust.

DOCUMENTATION

Usually, very little documentation, if any, is provided to a trust participant in order to back-up the assessment. If the assessment is from the employer's group, the agency or brokerage should advise its customer that it personally, or its accountant or attorney, should contact the third party administrator (TPA) for the trust and request that the following information be provided:

- 1. The gross premiums for the trust for each year that the customer was a participant in the trust.**
- 2. The gross premiums that were paid by the customer to the trust for each year during which it was a member of the trust.**
- 3. The assessment for each individual year and information regarding what percentage of that assessment is attributable to the customer's business.**
- 4. Details regarding how many claims are still open for each individual year.**
- 5. All documentation should be obtained that provides the support and back-up for the above information.**

If the assessment is the result of a Workers Compensation Board assessment an itemized statement of the expenses is open to public inspection for thirty days after notice to all insurance carriers, self-insurers and the State Insurance Fund before the Board makes the assessment.

REVIEW

The customer should be advised that once all the information listed above is obtained from the TPA for the trust or the Board, they should then review the information with their accountant and their attorney in

QUESTIONS FROM TRUST PARTICIPANTS

order to determine whether they believe that the numbers are correct and accurate. They should also discuss with their accountant and attorney whether they believe that the assessment should be paid, or instead whether they should explore other options that may be available to them. Some trust participants have made the decision that they will not pay the assessment. Unfortunately, the state may impose liens, work stoppages or commence lawsuits against trust members who do not pay their assessments. Some trust participants have approached the state as a group along with other members of their trusts and they proffered a deal to settle the assessments against them. In the case of members of an insolvent trust, payment options are indicated on the assessment notice, including an option to be considered for a hardship waiver.

DIFFICULT CASES

In some cases your client may not get the information requested, may not get complete information, or may not get the information in a timely manner. Any of these circumstances puts your client in a difficult position. And, if you helped place the client in the trust, it also puts you in a difficult situation.

Unfortunately, there are not any procedural remedies to this situation. So, your client's only real option to get the information is to obtain a court order requiring the TPA to give your client the full and accurate information in a timely way. So, your best advice for your client is to tell them they need to assess the potential cost of the legal action to obtain the court order against the costs of paying the assessment or the consequences of not paying the assessment.

We do not believe it is prudent for you to recommend an attorney for your clients, but as is noted elsewhere in the paper, you can provide them with the resources to find an attorney well schooled in this area.

ASSESSMENT RELIEF

Assessment Relief

Legislation enacted in 2011 provided limited relief to inactive group self insurers by allowing relief from assessments for the special disability fund and costs for operation of the Board. Insolvent groups can also be relieved of these assessments if they take certain actions by 2016. In either case all groups, both active and inactive, are still liable for assessments used to pay claims of insolvent groups (known as WCL §50-5 assessments).

ADMINISTRATIVE/DISABILITY FUND ASSESSMENTS PURSUANT TO WCL §15(8) AND §151.

- **Active Group Self-Insurers**

The allocation methodology for the administrative assessment levied pursuant to WCL §151 and the special disability fund assessment levied pursuant to WCL §15(8) were amended by statute in 2011. All active group self insurers will be assessed in the same manner as individual self insurers, municipalities, and the State Insurance Fund; which is based upon the relative percentage of indemnity payments.

In effect this will return the active groups to the same assessment methodology that was in existence before the 2007 change to pure premium. The overall amount of the assessments will remain unchanged, and the only change will be how that amount is allocated upon the participants in the workers' compensation system. This change in assessment methodology was retroactive to January 1, 2011. Therefore, for active group self-insurers the 2011 assessment basis was adjusted accordingly to reflect the new methodology.

- **Inactive Group Self-Insurers**

Groups that are inactive prior to December 31, 2011, will no longer have to pay special disability fund and administrative assessments. This change is also retroactive to January 1, 2011. For any groups that paid an assessment in 2011, the Board issued either credits or refunds as needed.

There is one important exception to the elimination of assessments for closed groups. The assessment relief is not available for those members of **insolvent** groups, unless they take one of the following actions by 2016:

- Enter into a settlement agreement or payment plan with the Board under which they agree to resolve all liabilities and remain current on their payments;

ASSESSMENT RELIEF

- They are members of a trust that transfers all of its remaining obligations pursuant to an Assumption Liability policy; or
- Pay all monies billed to them by the Board at the time such assessment was due.

In the event that none of these conditions are satisfied, then the member will become subject to an assessment in the amount of the group self insurer's share of the WCL §15(8) assessment multiplied by the employer's remaining unpaid obligations to their former trust. Any funds collected under these conditions will be used to offset future 15(8) & 151 assessments imposed on other employers.

- **Assessments for Liability of Defaulted Groups (WCL §50-5)**

All group self-insurers, both active and inactive, will continue to be liable for WCL §50-5 assessments. These are the assessments used to pay claims of insolvent self-insurers. While there was a legal challenge to the constitutionality of this statute by several group trusts, the law was upheld by the New York Appellate Division, Third Judicial Department, and the New York Court of Appeals has declined to hear an appeal. These assessments are authorized under WCL §151, 50-5(c) and 50-5(g).

- **Bond Sales to Fund Claims Payments for Failed Group Self-insured Trusts (GSITs)**

The 2013 Business Relief Act authorized the issuance of New York State bonds to assist in the funding of the claims obligations of failed group trusts. The Act authorizes up to \$900 million in bonds and in December 2013 it was announced that \$370 million in bonds were issued through the Dormitory Authority of the the State of New York. The NYS Workers' Compensation Board will use the proceeds from the bonds to purchase Assumption of Liability (ALP) policies that will pay the claims of injured workers of insolvent self-insured group trusts. The businesses in the failed trusts will reimburse the Board for the cost of the ALP over 10 years at a low interest rate. The ALP does not relieve trust members of liability but does provide a lower cost mechanism to meet their obligations. The ALP also serves to cap the cost of claims for employers. Employers are free to individually enter into settlement agreements with the Workers' Compensation Board (WCB) and will be given full and final release from the Board upon receipt of the member's final payments. It is important to note that, prior to the bonding program, the WCB employed a "tender offer" model which required a minimum number of GSIT members to participate before the settlement became binding on the WCB and the settling members. The bonding program allows an individual employer to enter into an agreement with the WCB on its own.

ASSESSMENT RELIEF

Inactive Group Trust

Voluntarily ceased operations prior to March 2011 legislation

Managed by group trustees with WCB oversight

Relieved of NYS assessments (Special Injury Fund, WCB Administration) as of 1/1/11

Group members are responsible until all claims are gone

Assessments - within the group or as a result of assessments required under WCL §50-5 (c) & (g) - Administrative expenses or §50-a - group self-insurer default offset fund.

If members are out of business or refuse to pay, WCB issues judgement against business (which could transfer to individual, depending on how business was set up)

Cannot be relieved of future assessments resulting from failed trusts

Insolvent Group Trust

Underfunded, in default - assets do not meet liabilities

Managed by the WCB, including liabilities

Relieved of NYS assessments (Special Injury Fund, WCB Administration) as of 1/1/11

As assets are used up WCB pays claimants from the "151 fund", which is then assessed to ALL self-insured groups to reimburse the 151 fund as authorized under WCL §151 as an administrative expense

Assessments - as required under WCL §50-5 (c) & (g) - Administrative expenses or §50-a - group self-insurer default offset fund. If members are out of business or refuse to pay, WCB issues judgement against business (which could transfer to individual, depending on how business was set up), if members are not located then surviving members are surcharged for that portion of assessment

Release from future assessments when there is agreement on assessment amount - can be accomplished by: Deficit Assessment Contractual Agreement, Memo of Understanding (agreeing to pay WCB for cost of claims), transfer of claims to another insurer, transfer to Assumption of Liability Policy, tender offer

Run-off Group Trust

Did not meet new funding requirements to continue after 12/31/11

Managed by WCB but trustees are required to administer its liabilities

Relieved of NYS assessments (Special Injury Fund, WCB Administration) as of 1/1/11

When assets = 18 months of liabilities there is an immediate assessment of group members. Less than 9 months group becomes insolvent status and then under the control of WCB

Assessments - within the group or as required under WCL §50-5 (c) & (g) - Administrative expenses or §50-a - group self-insurer default offset fund. If members are out of business or refuse to pay, WCB issues judgement against business (which could transfer to individual, depending on how business was set up).

Cannot be relieved of future assessments resulting from failed trusts until such time as status changes to insolvent, then by methods shown

WHAT DOES THIS MEAN TO THE GROUP MEMBER?

What Does This Mean to the Group Member?

(Excerpt from Workers Compensation Board website)

INACTIVE GROUP TRUSTS

Any group that was inactive when legislation was enacted in March 2011 was immediately relieved from any non WCL §50(5) assessment beginning on or after January 1, 2011. Groups that had already paid the 2011 assessment before the legislation was enacted received either a credit or refund from the Board. However, as discussed above, members of certain insolvent GSITs may face an assessment pursuant to §15-a in the event that their liabilities have not been satisfied in one of the three ways set forth in WCL §15-a by January 1, 2016.

Inactive groups will continue to be liable for the Self Insurers' Assessment Levied pursuant to section 50-5 of the WCL.

Finally, inactive or insolvent members who do not pay their obligations assessed by the Board may be subject to a WCL §26 judgment. A stop work orders can be issued against employers who fail to pay a judgment under WCL § 26 within 90 days after notice of the judgment and where the employer has not moved to modify or vacate the judgment. The Board also has the authority to issue a stop work order.

ACTIVE GROUP TRUSTS WHO WILL NOT BE CONTINUING UNDER THE NEW PROGRAM (NOW KNOWN AS "RUN-OFF")

Groups that are currently active continued to be assessed for the special injury fund and administrative costs of the Board for 2011. The basis for their 2011 assessment was indemnity and bills were adjusted accordingly. However, since they no longer offer coverage after 12/31/11 they receive the same assessment relief discussed above for fiscal cycles beginning on or after January 1, 2012.

ACTIVE GROUPS THAT WILL CONTINUE UNDER THE NEW PROGRAM.

Groups that meet the minimum qualifications outlined under the new subdivision 10 will be allowed to continue to offer coverage provided they meet the posting requirements outlined therein. It is important to note, however, that they will not be relieved of their assessment obligations prospectively. Rather, their assessment allocation has been changed from pure premium to indemnity. Therefore, to the extent the group is able to close claims quickly or complete an assumption of workers' compensation liability policy; their assessments will be reduced accordingly.

Attorney Resources

There are attorneys who represent the interests of trust participants who are asked to pay assessments by New York self insured trusts that they were, or are currently, involved with. Unfortunately, as part of their representation of the business/trust participant, these attorneys often explore the option of making claims or bringing an E & O lawsuit against the agency or brokerage that placed the business in the trust. For this and other reasons, it is always best for an agency or brokerage not to refer a customer to a particular attorney or law firm to assist with trust related issues.

Instead, the agency or brokerage should direct the customer to contact either their state or local Bar Association, each of which maintains directories of attorneys that specialize in particular practice areas.

New York State Bar Association

www.nysba.org

(518) 463-3200

OTHER LARGE BAR ASSOCIATIONS (CHECK LOCAL LISTINGS FOR YOUR COUNTY):

Albany County Bar Association

www.albanycountybar.com

(518) 445-7691

Erie County Bar Association

www.eriebar.org

(716) 852-8687

Nassau County Bar Association

www.nassaubar.org

(516) 747-4070

New York County Bar Association

www.nycbar.org

(212) 382-6600

Suffolk County Bar Association

www.scba.org

(631) 234-5511

IIABNY RESOURCE MATERIALS

IIABNY Resource Materials

IIABNY has a number of articles, guides and reports that relate to the issue of New York self insured trusts. These reference materials can be found on the IIABNY web site (www.IIABNY.org) under the IIABNY Information section. The information on our website is updated on a regular basis.

The materials that concern workers compensation self insured trusts that are currently contained in this library consist of the following:



GUIDE

The guide to New York's new rules for group self insurers



REPORTS

The report of the New York Worker's Compensation Board to the Governor and the Legislature on the status of insolvent group self insured trusts.

The monthly group self insured trusts funding status report

If you have additional questions or need further assistance, please contact Tim Dodge at tdodge@iiabny.org or 800-962-7950, ext. 229.



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