

***Task Force on Group Self-Insurance
Report to the Governor and the Legislature***

Chapter One - Executive Summary (continued)

E. SUMMARY OF FINDINGS AND RECOMMENDATIONS

Upon reviewing the extensive documentation and interviewing various stakeholders, the findings and recommendations of the Task Force are as follows:

1. Payment of Claims of Insolvent Groups

Collections from the employer members of the insolvent groups will continue to be pursued with the goal of satisfying, in full, the obligations of each insolvent trust. Ultimately, these collections will be used to pay the obligations of the insolvent trusts and to reduce the amount of future assessments made against the self-insurers, in the event *Held* is overturned and collection of such assessments resumes.

If the groups currently offering coverage were required to terminate or if more rigid financial standards were applied, the dramatic increase in the self-insurers' assessment resulting from the recent group defaults might be exacerbated by additional defaults. This potential certainly exists. There are a number of options which should be applied to mitigate these types of adverse consequences, including: improved funding levels for the active groups and/or those in run-off, earlier triggers for insolvency determination and posting of additional security deposits.

In addition, the Task Force is proposing a number of legislative and administrative enhancements which should increase the amounts collected and the timeliness of those collections, thus mitigating the impact that these defaults have on the remainder of the self-insurance community. A number of these elements have been included in an Article VII proposal (Part R of the General Government Article VII) contained in the 2010 Executive Budget.

The legislative enhancements will:

- Reaffirm the WCB's authority under Section 26 of the WCL to pursue judgments and provide other collection tools to the WCB in addition to traditional joint and several billings;
- Grant the WCB the authority to deem employers, in limited instances, who do not honor their joint and several obligations to be non-compliant with the coverage requirements of the WCL;
- Empower the WCB to pursue, in appropriate cases, all available actions such as stop-work-orders, debarment from public works and other penalties that are currently imposed on employers who do not have the required workers' compensation coverage;

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*Task Force on Group Self-Insurance
Report to the Governor and the Legislature*

Chapter One - Executive Summary (continued)

- Reaffirm the WCB's right as successor in interest to all the rights of the insolvent group trust;
- Reaffirm the WCB's right to immediate access to the records of the insolvent group trust and its advisor's records related to the trust including work products;
- Authorize the WCB to initiate joint and several lawsuits and other third party recoveries through retention of outside counsel, in addition to suits that may be brought by the Attorney General's Office; and
- Reform the State's assessment methodology for assessments other than the self-insurers' assessment by eliminating the GSIT category when distributing the initial indemnity liability among sectors. This option would result in the assessment liability being re-distributed to the remainder of the industry. The employers that participated in the group program would pay this liability with their new "carrier".

In addition to more timely collections of the joint and several liabilities of the employer members, the Task Force reviewed other tools which might limit the impact that insolvent groups have on the remainder of the self-insurance community.

The Task Force recommends:

- Legislation for Assumption of Workers' Compensation Liability Insurance Policy – An Assumption of Liability Policy, (ALP) will allow for the purchase of a policy to transfer the tail of workers' compensation claims and the risk of claims development to a carrier, absolving the self-insurance program from any further exposure. This alternative must be performed in a manner of assuring complete compliance with the WCB regulations and law, thus providing maximum protection for the claimant. In addition, the entity offering the ALP must make available liaison services for both the employees and the employers in the event there are issues that arise after transition. This option would be available to groups that are in run off and have adequate monies available to pay for the ALP as well as insolvent groups. The Task Force stresses that any such legislation should require a high level of financial participation by members of the insolvent group to ensure that a substantial portion of the deficit is covered by those members, thus mitigating the impact on the self-insurers' assessment. In addition, the Task Force recommends that the WCB consult with the individual and group advisory committees prior to the execution of any such transactions that impact the self-insurers' assessment.

***Task Force on Group Self-Insurance
Report to the Governor and the Legislature***

Chapter One - Executive Summary (continued)

- WAMO Settlements – The Waiver Agreement Management Office (WAMO) was created as part of the Workers’ Compensation Reform Act of 2007. The Act allows a carrier, self-insurer, or the State Insurance Fund to be “paid” an amount equal to the value of claims in the Special Disability Fund in return for waiving future claims against the Fund. The WCB should explore the option, consistent with the terms of the legislation, for the insolvent group trusts to provide interim cash to pay claims or settlements pursuant to Section 32 of the WCL for cases accepted by the Special Disability Fund.

2. Long Term Viability of the Group Program and Prevention of Future Defaults

The Task Force deliberated on the future of groups and the long term viability of the group model. In doing so, the Task Force considered, among other things:

- What would be the financial viability of group trusts under the proposed WCB regulations, particularly the new funding requirements?
- Could the WCB effectively regulate the financial status of trusts, even with the newly proposed regulations?
- Do the current financial risks related to participation in a group trust outweigh the benefits, as defined by trust members?
- Is there sufficient confidence in the accuracy of financial and claims data for group trusts to assure effective WCB regulation and oversight?
- What coverage alternatives are available, or could be made available, to current trust participants that would reduce risks and retain benefits of trust membership?
- What are the risks of, and options for, closing down still active but under funded trusts?

Extensive documentation regarding the pros and cons of group self-insurance was reviewed, and various industry participants were asked to present information they deemed pertinent to this review. The benefits of group self-insurance were measured against the risks to employers and claimants.

According to group members and group administrators the benefits of group membership may include but are not limited to:

- Improved loss control services and outcomes;
- Aggressive return-to-work programs;
- Increased stability of rates;
- Enhanced coverage options for certain types of employers that have difficulty obtaining coverage in the commercial market; and
- Potential for dividends.

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*Task Force on Group Self-Insurance
Report to the Governor and the Legislature*

Chapter One - Executive Summary (continued)

Despite these asserted benefits, based on input from remaining active groups, serious concerns were raised regarding the future cost-competitiveness of groups given the new funding requirements. In contrast, the Task Force generally agreed that the rules and regulations are a minimum threshold but even the proposed requirements cannot ensure financial viability of the group self-insured trusts, particularly when such trusts are subject to manipulation by various parties associated with the trust. In addition, questions remain as to whether the WCB has or will have in the future sufficient and appropriate staff to provide effective oversight, especially with regard to financial, actuarial and claims management issues.

Based on evidence reviewed and extensive discussions, the Task Force has concluded that the inherent risks of group self-insurance, combined with the financial risks posed by insolvent groups, out-weigh the potential benefits.

The most notable flaws inherent to the group self-insurance program include the following:

- The joint and several liabilities can significantly impact the member employer's business operations and can have a serious impact on the employer's financial position, including their ability to borrow and acquire surety bonds, for years into the future.
- The amount of the assessment liability imposed by 50-5 fluctuates significantly and it is often required to be paid in a short time frame in order to meet the cash flow needs related to the unfunded liabilities of insolvent groups. Further, the future ability of the WCB to impose such assessments has been called into question by the *Held* decision.
- A significant level of trustee involvement and oversight is essential to ensure proper administration of the groups. This level of involvement for small business owners is overly burdensome and often not achievable.
- There is a conflict of interest that exists between the group administrator and the third party administrator particularly with regard to establishing accurate reserve estimates. Accurate reserves are the cornerstone of ensuring that a group remains healthy and able to meet its financial obligations. When manipulation of reserves is a product of such conflict of interest, effective regulation of the groups becomes nearly impossible. Gross understatement of the required reserves by the group's key advisors has been identified as a major reason for the downfall of a majority of failed group trusts.
- It is not cost beneficial, nor is it likely attainable, to provide the level of regulatory oversight needed to ensure that the group's maintain the necessary financial and operational standards to protect the employer members that participate in the group self-insurance program.

***Task Force on Group Self-Insurance
Report to the Governor and the Legislature***

Chapter One - Executive Summary (continued)

- The information provided to and submitted by the independent consultants on behalf of the groups, including claims, actuarial and fiscal data is a key component to ensure that the group's funding position remains viable. It is difficult to ensure the veracity of the data in a cost beneficial manner.
- The excessive costs and time associated with pursuing litigation to enforce the joint and several provisions of the WCL further delay collection efforts.

The group model is built upon the joint and several liabilities of the employer members which likely outweigh the benefits that may be derived from belonging to a group. The Task Force finds that the group model imposes too much risk on the employers that participate in it and recommends that the group self-insurance program be terminated.

The Task Force recommends that efforts should be made to find acceptable alternatives to help the employers who are members of GSITs obtain alternative coverage, with appropriate arrangements for orderly transition and provisions for all appropriate benefits for claimants and uninterrupted coverage for employers.

3. Regulation of Group Self-Insurers (to the extent group self-insurance continues to exist)

As a result of the precarious position of the group program and the significant increase in the 50-5 assessment related to defaults, it is imperative that the WCB continue to pursue rules, regulations and prescribed reports which make an effort to address past deficiencies while the recommendations of the Task Force are under deliberation by the Governor and the Legislature.

Prior to the first meeting of the Task Force, the WCB drafted rules and regulations which would replace the current version (NYCRR Part 317) in its entirety. These rules and regulations have been reviewed, revised and are largely supported by the Task Force members and have been submitted to the Governor's Office of Regulatory Reform for pre-proposal review prior to formal promulgation.

The most notable enhancements included in the proposed rules and regulations include:

- Contribution year funding and reporting;
- Funding requirements which include a risk margin;
- Enhanced reporting; and
- More extensive independent examination of records and affairs of the group at least once every three years by service providers chosen by the WCB.

***Task Force on Group Self-Insurance
Report to the Governor and the Legislature***

Chapter One - Executive Summary (continued)

At the same time, the Task Force recognizes that there are a number of fundamental components of the group model that are difficult to regulate even with the most stringent of regulatory environments. These challenges include:

- Appropriate reserving for claims;
- Adequate group oversight by trustees;
- Adequate WCB oversight;
- Prevention of misconduct by administrators;
- Enforcement and collection of joint and several; and
- Preparation, submission and evaluation of accurate actuarial and other financial reports.

These various challenges create an environment where it is difficult to identify mismanagement and potential fraud. In spite of the regulatory enhancements, Task Force members continue to have concerns that the group self-insurance model places participating employers, especially small employers, at significant financial risk. This is particularly true with respect to joint and several liability.

4. Other Topics Related to Group Self-Insurance

In addition to the specific topics to be reviewed by the Task Force per the legislation, there are two additional issues which were addressed. These issues are alternatives to group self-insurance for providing the required workers' compensation coverage and the overall impact of assessments on group trusts.

These topics were evaluated in the context of group self-insurance no longer being an option going forward.

Alternative Coverage: There are a number of alternatives that would provide employers with some degree of the benefits enjoyed with group self-insurance without exposing them to the risks discussed above. These alternatives may include but are not limited to:

- Safety group with the State Insurance Fund;
- Safety group with a carrier;
- Individual self-insurance;
- Selective self-insurance legislation that would allow for alternative coverage which might include "quasi-individual" self-insurance for a specific sector that exhibits a unique need and satisfies certain criteria.

*Task Force on Group Self-Insurance
Report to the Governor and the Legislature*

Chapter One - Executive Summary (continued)

Assessments: The various assessments (other than the self-insurers' assessment) should be reformed by eliminating the GSIT category when distributing the initial indemnity liability among sectors. This option would result in the assessment liability being re-distributed to the remainder of the industry and the employers that had participated in the group program would pay this liability with their new "carrier" like all other employers.

F. CONCLUSION

It is the recommendation of the Task Force that legislation be prepared to terminate the group self-insurance program effective December 31, 2010. The Task Force strongly recommends that such legislation include alternative coverage options and be enacted sufficiently in advance so that all existing groups and their members have time to find alternative coverage which maintains the full benefits and rights of claimants.

In addition, in an attempt to mitigate the impact on all self-insured employers and to allow existing groups to better manage the run off, the following other legislative provisions should be included:

- Reaffirm the WCB's authority under Section 26 of the WCL to pursue judgments and provide other collection tools to the WCB in addition to traditional joint and several billings;
- Grant the WCB the authority to deem employers who do not honor their joint and several obligations non-compliant with the coverage requirements of the WCL;
- Empower the WCB to pursue all available actions such as stop-work-orders, debarment from public works and other penalties that are currently imposed on employers who do not have the required workers' compensation coverage;
- Reaffirm the WCB's right as successor in interest to all the rights of the insolvent group trust;
- Establish the WCB's right to immediate access to the records of the insolvent group trust and its advisor's records related to the trust including work product;
- Authorize the WCB to initiate joint and several lawsuits and other third party recoveries through retention of outside counsel, in addition to suits that may be brought by the Attorney General's Office;
- Reform the assessments (excluding the self-insurers' assessment) by eliminating the GSIT category when distributing the initial indemnity liability among sectors. This option would result in the assessment liability being re-distributed to the remainder of the industry and the employers that participated in the group program would pay this liability with their new "carrier".

*Task Force on Group Self-Insurance
Report to the Governor and the Legislature*

Chapter One - Executive Summary (continued)

- Authorize assumption of workers compensation liability insurance policies to give GSITs the ability to manage or eliminate their tail of claims. This alternative must be performed in a manner which assures complete compliance with the WCB regulations and law, thus providing maximum protection for the claimant. In addition, the entity offering the assumption of liability policy must make available liaison services for both the employees and the employers in the event there are issues which arise after transition.

In the interim, while the recommendations of the Task Force are being considered by the Governor and the Legislature, the Task Force is recommending that the WCB take the following administrative actions:

- Upon finalization, implement the regulations to mitigate any additional deterioration of the group self-insurance program;
- Continue its independent reviews and remediation efforts with the GSITs to verify and strengthen their financial condition;
- Intervene earlier for under funded GSITs that may become insolvent to ensure timely collections under joint and several so there is minimal self-insurers' impact;
- Aggressively work with the under funded GSITs to increase the funding levels and, where possible, increase security deposits for under funded GSITs;
- Work with the Waiver Agreement Management Office to secure amounts owed from the Special Disability Fund to help offset the ongoing claims costs for accepted cases;
- Assist existing group members to obtain alternative coverage as needed; and
- Increase the number and type of staff at the WCB to ensure aggressive and adequate oversight of the group trust industry.