

INSURERS OPERATING UNDER ASSUMED OR FICTITIOUS NAMES: WHEN, HOW AND . . . WHAT?!

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Trust Insurance Company (“Trust”) wishes to obtain a certificate of authority to sell insurance in California. Trust learns it must first submit an application with the California Insurance Commissioner seeking and obtaining approval of its corporate name before it can do business in California under that name. Trust complies, but is informed by the Commissioner’s office that it will reject the Trust name because it is too similar to a name already in use by another entity, Trustworthy Insurance Company. The Commissioner’s office suggests that Trust adopt a fictitious or “operating name” for its California operations. Trust is warned, however, that every activity it engages in which directly or indirectly reaches the California public must be done only in the fictitious name. Trust is unsure of the full implications of this suggestion and calls for your advice and representation. What do you counsel?

As regulatory counsel for the insurance industry, we are all aware of state rules prohibiting insurance companies from conducting business under assumed or fictitious names different from their actual or incorporated names. The origin of these rules varies from state to state. Michigan, for example, has a provision in its insurance code expressly requiring insurers to “transact its business under [their] own name” and prohibiting insurers from “adopt[ing] any assumed name.”² Wisconsin has statutory provisions stating that “[n]o intermediary or insurer may use any business name, . . . that is misleading” and that the “corporate name” of the issuing insurer must be “conspicuously display[ed]” on the first page of “[e]very insurance policy.”³ Prohibitions in other states are not as explicit, but rather may be implied from the language of related statutes. For example, statutes prohibiting unfair trade practices typically prohibit insurers from “[m]aking or disseminating . . . any statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his or her insurance business, which is untrue, deceptive or misleading . . .”⁴ Such language is open to an interpretation prohibiting an insurer’s use of an assumed or fictitious name.⁵

Perhaps the best source of authority for the prohibition against using fictitious names, however, is found in a widely-recognized exception to the prohibition. As suggested in the hypothetical case posed above, several states do not allow an insurer – or any business entity, for that matter – to conduct business under a corporate name that is deceptively similar to the name of another insurer or entity doing business therein.⁶ However, rather than prevent these insurers from doing business in the state altogether, many states allow an insurer to adopt an assumed or fictitious name by which it will transact business within their respective borders.⁷ Indeed, such statutes are often written so as to suggest that the only time an insurer may operate under a fictitious name is when there is a deceptive similarity between its own name and that of another company.⁸ Important here, however, is the fact of the exception: An insurer who – like the hypothetical client above – desires to do business in a state in which its actual corporate name is not sufficiently distinct from that of another entity doing business therein may simply adopt a fictitious name otherwise acceptable to the state Insurance Commissioner.

Or is it really that simple? How one goes about taking advantage of the foregoing exception depends on the state in which your client is seeking to do business. The National Association of Insurance Commissioners (“NAIC”) has not issued a model law or regulation on the matter. However, several states have developed their own fairly elaborate schemes for reserving and/or registering a fictitious business name. For example, Florida and Texas have entire chapters of their respective statutes devoted to the reservation and registration of assumed or fictitious business names.⁹ These statutes are not specific to insurance companies, but rather are worded broadly to cover any commercial entity doing business in the state.¹⁰ As such, they presumably apply to insurance companies. Such statutes typically require the submission of a certificate or sworn statement with the respective Secretary of State and/or local County Clerk setting forth the relevant information regarding the assumed and corporate names.¹¹ They also typically require the publication of formal notices in state newspapers of the entity’s intention to engage in business under a fictitious or assumed name.¹² Other states, however, have less detailed requirements. For example, California requires submission of the assumed name to the Insurance Commissioner for approval, and then submission to the Secretary of State for issuance of a Certificate of Qualification.¹³ Wisconsin only requires the insurer to submit an application to the state Commissioner of Insurance reserving the assumed name.¹⁴ Obviously, an analysis of the requirements of all 50 states in this regard is beyond the limitations of this article, but it suffices to say that practitioners must be careful to review the relevant statutory provisions – and contact the state Insurance Commissioner – for the state in which their client seeks to do business before proceeding.

A more difficult issue – and one that is often not subject to clear answers – is the degree to which the insurer operating under an assumed or fictitious name in a given state can and/or must reference that name during its operations within

that state. In addition, to what degree can and/or must such an insurer use or disclose its actual corporate name during its dealings within that state? For example, must the insurer disclose its actual identity in all solicitations, applications or policies of insurance? One would think so, else an insured could be induced to purchase insurance from a company it might otherwise have rejected. Must the insurer disclose its actual identity in all filings or communications with the state? Again, one would think so, else the state could fail to properly monitor the insurer's financial condition and overall regulatory compliance in other states. What about the application of other laws? Unfair trade practice statutes can be interpreted to require the maximum disclosure possible of the insurer's actual corporate identity. How does this presumption square with fictitious name statutes? Moreover, to the extent an insurer solicits or offers the sale of stock within a given state, federal and state securities laws are likely to require all circulars, prospectuses and certificates to disclose or reference the actual corporate identity. How does this requirement square with fictitious name statutes? Finally, if the foregoing considerations lead to frequent use and disclosure of the actual corporate identity along with the assumed or fictitious identity, the risks of public confusion – the identified evil which prompted the required use of a fictitious name to begin with – are back in play.

The NAIC has not issued a model law or regulation dealing with these issues. It appears that only a couple of states have addressed the matter through a formal statute, regulation or bulletin.¹⁵ Even in those states, interpretive issues exist. As is often the case in regulatory matters, informal negotiations and communications with the state Insurance Commissioner will prove critical.

Michigan provides a good example of the interpretive difficulties which can arise. Michigan does not allow an insurer to do business within its borders “if its name is the same as or closely resembles the name of any other insurer organized under or authorized to do business under the laws of [Michigan].”¹⁶ However, such an insurer may obtain authorization to do business in Michigan simply “by adding to its corporate name a word, abbreviation, or other distinctive and distinguishing element.”¹⁷ Once that is accomplished, “[t]he certificate of authority issued to the insurer shall be issued in the name applied for, and the insurer shall use that name in all its dealings with the Commissioner and in the conduct of its affairs in [Michigan]. Any document used or advertising offered in [Michigan] shall identify the incorporated name of the insurer.”¹⁸ On its face, the statute arguably supports three interpretations. First, one could interpret the statute as drawing a distinction between the insurer's official dealings with the State of Michigan and its regulatory agencies – where the insurer is required to use its assumed or modified name – and the insurer's business activities directed at the general public – which require use of the actual incorporated name. Such an interpretation is consistent with the notion that full and accurate disclosure of the insurer's actual identity is crucial vis-à-vis the consumer, but contradicts the notion that use of a fictitious name is necessary to prevent public confusion arising from two insurers using similar names. Second, the statute might require the use of the assumed or modified name in *all* of the insurer's activities or communications within the State of Michigan, regardless of whether they are directed at official state agencies or the general public. If the latter, however, an additional disclosure of the actual incorporated name is required. Third, the statute may simply require adding the modified name as a d/b/a to the incorporated name for all activities or communications directed at the State of Michigan.¹⁹ The second and third options are more reasonable interpretations of the language because they are each consistent with the often contradictory goals of maximizing public disclosure while minimizing public confusion. They also provide a means for avoiding the clash of conflicting statutes, i.e., fictitious name statutes vs. unfair trade practice statutes, fictitious name statutes vs. federal and state securities laws, etc. But these are only interpretations, and the careful practitioner will seek direction from the Michigan Department of Insurance.

California is an even better example of the interpretive problems that arise, problems which a client of mine encountered recently when attempting to effect a name change in California. As indicated *supra*, California requires all insurers to file an application with the state Commissioner of Insurance seeking approval of the corporate insurer's name before conducting business in California under that name.²⁰ California also provides that “[t]he Commissioner may reject any name so submitted when it is an interference with, or too similar to one already appropriated, or when it is likely to mislead the public in any respect.”²¹ “In the event of such a rejection,” the statute continues, “the applicant shall legally change its name to one approved by the commissioner or, if a foreign or alien insurer, *may arrange to conduct any business it may do with the public in California under an approved name as an operating name, identifying itself under both its true name and operating name in the conduct of all official business with the Commissioner.*”²² This statute seems to clearly require use of the insurer's fictitious or assumed name in all dealings with the California public and the use of both names in official dealings with the state Insurance Commissioner (the reverse of the second, “more reasonable” interpretation of the Michigan statute, *supra*). And indeed, the California Department of Insurance agrees. In response to my client's inquiry, the department stated as follows:

In our opinion this section [highlighted above] prohibits the use by such an insurer of its true name on at least the following items: Insurance policies of every kind and class; all types of endorsements to the foregoing; assumption Certificates; any and all advertising brochures and sales literature of every kind with which a reasonably prudent person either employed by or acting for an insurer . . . knew or should have known would

be presented or offered directly or indirectly to persons in the State of California; any stock sales announcements, circulars, prospectuses, advertisements and literature.

All of these items must show the operating name alone and should not contain the true corporate name either in the caption, signature or text thereof or any other place in the writings. Further any and all business conducted orally with the public in this State as with an “800” phone number, must similarly be conducted only in the approved operating name. (Emphasis added.)

This interpretation of the California statute presents a host of obvious problems for an insurer trying to conduct its operations lawfully and efficiently. Most striking is the suggestion that stock offering materials – including prospectuses and possibly stock certificates – must contain only the assumed name and should make no reference to the actual corporate name. Such a requirement obviously conflicts with federal securities laws. For example, federal securities laws require that the “exact name of [a] registrant as specified in its charter” be disclosed in any registration statement filed under the Securities Act of 1933, as amended, i.e., forms S-1, S-2, S-3, S-4, and S-8, as well as in current and periodic reports filed under the Securities Exchange Act of 1934, as amended, i.e., forms 10-K, 10-Q, and 8-K. The registrant’s name must also appear on the first page of the corresponding prospectus, and federal regulations further explain that “[i]f your name is the same as that of a company that is well known, include information to eliminate any possible confusion with the other company.”²³ Accordingly, rather than using a fictitious name to alleviate possible confusion in situations involving deceptively similar names, federal securities laws implicitly reject this approach and instead require the registrant to fully disclose its true name and distinguish itself from any and all companies with similar names.²⁴ Another potential conflict arises from unfair trade practice statutes. As suggested *supra*, conducting business in a fictitious name without any additional or supplementary disclosure of the actual corporate identity runs contrary to one of the important underlying purposes of unfair trade practice statutes, i.e., to prevent insurers and other entities from conducting business in a manner that deceives consumers regarding who they are contracting with and what they are getting in return. Of course, the fact that the insurer is only using the fictitious name because the state required the use of that name should protect the insurer from claims of unfair trade practices, but a prudent practitioner will (if possible) have this clarified by the state department of insurance in advance. On the practical front, other problems include the inefficiencies which result from having to develop marketing materials and customer service resources that are unique to the California market, i.e., separate advertising materials, policy forms, “800” numbers, etc. If an insurer is prohibited from any reference to its actual corporate identity on materials submitted to the California public – even a reference that serves only the purposes of full disclosure – then the insurer is precluded from even attempting to develop universal marketing materials and other universal resources.

To conclude, the use of fictitious or assumed names within the insurance industry can be tricky business, and not just for consumers. Insurers and practitioners confronted by such issues must exhaustively review the insurance and general corporate statutes of each state which the insurer seeks to enter. More importantly, they must also obtain clarification and/or guidance from each state’s department of insurance on the specific issues presented by the insurer’s particular goals and plans. In addition to increased certainty, such communications provide opportunities for the practitioner to lobby for a reasonable interpretation of the statutes and regulations up front, thereby minimizing the possibility of disputes down the road. That is a good result for insurers and regulators alike.

Endnotes

1. The Author gratefully acknowledges the considerable contribution of his colleague, Thomas Hrdlick, in the preparation of this Article. The Author also acknowledges with thanks the editorial review of his partner, Kevin Fitzgerald.
2. Mich. Comp. Laws § 500.5209.
3. Wis. Stat. §§ 628.34(1), 631.64.
4. Cal. Ins. Code § 790.03(b); *see also* Mich. Comp. Laws § 500.2007; Fla. Stat. Ann. § 626.9541(1)(b).
5. Not every state prohibits or restricts an insurer’s use of a fictitious name. For example, Oregon provides that “[a]ny insurer doing business in this state may file and register . . . an assumed name that it will use in transacting insurance in this state.” Or. Rev. Stat. § 731.430(2).
6. *See, e.g.*, Cal. Ins. Code § 881; Mich. Comp. Laws §§ 500.454, 500.5012; Fla. Stat. Ann. §§ 607.0401(4), 628.041; Wis. Stat. §§ 180.0402, 611.10; Or. Rev. Stat. § 731.430 (1)(a); Tex. Ins. Code Ann. art. 21.43 § 13(c); Colo. Rev. Stat. § 10-3-103; Mo. Rev. Stat. § 375.821.1(2). Deceptively similar names are a frequent problem within the

insurance industry. One reason for this is the prevalent use of similar names among affiliated entities within the same holding company structure. Another is the penchant among insurers to incorporate geographical descriptions (*i.e.*, Northwestern, Midwestern, etc.) and terms suggesting safety and stability (*i.e.*, Trust, Safe, Guardian, Security, etc.).

7. *See, e.g.*, Cal. Ins. Code § 881; Mich. Comp. Laws §§ 500.454, 500.5012; Fla. Stat. Ann. §§ 607.1506, 865.09; Wis. Stat. §§ 180.0402, 611.10; Or. Rev. Stat. § 731.430(2); Tex. Ins. Code Ann. art. 21.43 § 13(c); Mo. Rev. Stat. § 375.821.1(2).
8. For example, the California statute provides that “[t]he commissioner may reject any name ... when it is an interference with, or too similar to one already appropriated . . . *In the event of such a rejection*, the applicant shall legally change its name to one approved by the commissioner or, if a foreign or alien insurer, may arrange to conduct any business it may do with the public in California under an approved name as an operating name, identifying itself under both its true name and operating name in the conduct of all official business with the commissioner.” Cal. Ins. Code § 881(3)(emphasis added). *See also* Mo. Rev. Stat. § 375.821.1(2); Tex. Ins. Code Ann. art. 21.43 § 13(c).
9. *See* Fla. Stat. Ann. § 865.09; Tex. Bus. & Com. §§ 36.01 *et. seq.*
10. *See Id.*
11. *See Id.*
12. *See Id.*
13. *See* Cal. Corp. Code §§ 201(b), 2106 (b). It is not entirely clear whether this is all an insurer need do to operate under an assumed name in California. Like Florida and Texas, California also has a formal statutory scheme governing the reservation and registration of fictitious business names. *See* Cal. Bus. & Prof. Code §§ 17900 *et. seq.* It purports to apply to every person – including corporations – “who regularly transacts business in this state for profit under a fictitious business name.” Cal. Bus. & Prof. Code § 17910. It is unclear whether this language is intended to include an insurance company using an “operating name” already approved by the California Insurance Commissioner under Cal. Ins. Code § 881(3), although that is certainly a reasonable interpretation. So interpreted, such insurers would also have to file a fictitious name statement with the local county clerk and publish a newspaper notice of its intention to conduct business under the assumed name. *See* Cal. Bus. & Prof. Code §§ 17910, 17915 and 17917.
14. *See* Wis. Stat. §§ 180.0402, 610.01(4), and 611.10.
15. *See, e.g.*, Mich. Comp. Laws § 500.454; Cal. Ins. Code § 881(3).
16. *See* Mich. Comp. Laws § 500.454.
17. *See Id.*
18. *See Id.*
19. Conversations held recently with the Florida Department of Insurance indicate that Florida interprets its own statutes and regulations in this fashion.
20. *See* Cal. Ins. Code § 881.
21. Cal. Ins. Code § 881(3).
22. *Id.* (emphasis added).
23. 17 C.F.R. § 229.501(b)(1).
24. In addition, if the California law is interpreted to apply to stock certificates, there are obvious problems with respect to a California investor’s ability to publicly re-sell his or her stock, *i.e.*, the name on the stock certificate does not reflect the name of the actual issuer of the stock.