

Feeding Trolls

By: Sean Gregory King, JD, CPA, MAcc

There's an old saying among frequent users of the Internet: "Don't feed the trolls". By this is meant, don't respond to people who deliberately make controversial or misleading statements (as doing so just gives them the attention or business that they crave and don't deserve).

I try to honor this advice when I can. But occasionally I feel compelled to feed a troll in order to keep the public from being misled. You see, the problem with trolls is...sometimes they wear a disguise. In fact, by all appearances, some trolls may even appear to the uninformed public to be unbiased "experts" on the matters upon which they opine. Believe it or not, some trolls are even lawyers.

Take, for example, attorney Jay Adkisson. About once a quarter or so, Jay decides to publish some pretty scary and confusing things about captive insurance companies—things which seem designed to steer business away from his competitors and toward his own firm or favored third parties. Anyone knowing what I know, which includes an ever-increasing percentage of the captive insurance industry, easily sees through Jay's charade. But, the problem is...the general public doesn't usually know what I know, and so they are susceptible to being misled.

Speaking of which, consider Jay's most recent article published on a Forbes blog titled: "*Life Insurance and the 831(b) Captive Insurance Company—Wait for the Test Case Before Signing Up*" [Click Here](#) to read the article.. In it, he says some intentionally inflammatory and highly misleading things, and gives some incredibly foolish tax advice at the end (despite the fact that he is self-admittedly not a tax attorney), all in what appears to be an attempt to steer business owners away from his competitors, the "New Wave" captive consultants who are primarily helping small and mid-size businesses benefit from captive ownership as large companies have done for decades.

Reading Jay's article, the reader could be forgiven for concluding that Jay believes using life insurance in captive insurance companies is spurious and ill-advised, and that he therefore has had long-standing position against using life insurance in captives. But...the reader would be wrong, at least on the second count (and creating this misperception is partly the intent of Jay's article).

You see, Jay Adkisson was once an active promoter of "wedding" life insurance with captive insurance companies. See, for example, this post ([Click Here](#)) describing in great detail a transaction that Jay personally oversaw, one involving group captives established for the express purpose of purchasing cash value life insurance via LLC subsidiaries. **Or, see this presentation ([Click Here](#))** that Jay gave at the Association for Advanced Life Underwriting (AALU), an industry group of highly-skilled and knowledgeable insurance agents.

Additionally, I personally know of more than one example, other than the group captive transaction linked above, where Jay has assisted clients in “wedding” life insurance to their captive insurance companies.

You see, Jay wants you to think that there’s something wrong with combining life insurance and captives despite the fact that he was once an advocate and practitioner in this area (and may still be).

But...why? How do we make sense of Jay’s apparent about-face on the issue, an about-face that he rarely discloses and is, in fact, careful to conceal? Did Congress change the law since Jay spoke to the AALU promoting the group captive transaction linked above? Does that explain it? No. Have new regulations or notices or rulings on the subject been published? No. Have the laws been changed by court precedent? No.

So...what’s going on?

Well, to make any sense of most of Jay’s posts within the last few years, one must understand that there is currently pitched war being waged between the captive insurance industry’s “Old Guard” (primarily consultants with a strong property & casualty insurance background and a few specialist attorneys who entered the captive space more than a decade ago), who have historically focused exclusively on the liability side of a captive insurance company’s balance sheet, and the industry’s “New Wave” (financial planners, investment advisors, asset protection specialists, life insurance producers and others), who focus significantly on the asset side of the captive’s balance sheet. Partly with the encouragement of Jay (as evidenced by the AALU presentation and group captive transaction linked above), the New Wave has taken the captive insurance industry by storm over the last five years, accounting for an ever increasing percentage of new captives being formed. Contrary to Jay’s original intent in reaching out to the New Wave, this has left Old Guard captive managers holding the bag, or at least missing out on much of the industry’s growth. For instance, Jay worked in a two-lawyer firm more than five years ago, and last I heard still does today.

As a result, Jay has become one of the most vocal critics of the New Wave and, consequently, has earned his place as one of the primary spokespersons of the Old Guard. When Jay says scary things about the IRS, he is not the unbiased expert that he would have us believe. While this fact is well-known within the captive industry, the general public is unaware of this internal industry dynamic and therefore susceptible to being misled.

Read in this context (and only in this context), Jay’s most recent Forbes article regarding captives and life insurance makes sense. His bias on the matter and

disdain for the New Wave is evident from the get-go as he attacks the professions of “*life insurance agent[s], financial planners (and increasingly accountants and attorneys)*” [parenthetical in the original] that give any attention to the asset side of a captive’s balance sheet, especially if life insurance is involved. In an attempt to malign the New Wave and fix the reader’s opinion of them right up front, Jay says in the very first sentence of the article that “[l]ife insurance isn’t bought, it’s sold.” And furthermore, he insists that it’s sold in exchange for “big commissions” by advisors who “if in good with their insurance company, might make upwards of 40% of the first-year’s premium” in commissions while “never disclosing these commission(s) to their clients, of course”.

Besides being shamelessly and obviously biased, this rant, at least in the context of captive insurance companies, is also highly misleading. Captives don’t usually invest in life insurance because they were “sold” a bill of goods by some cunning salesman motivated by self-interested greed, but rather for the same reasons that banks had invested billions of dollars in cash value life insurance as bank-owned life insurance (BOLI). Also, nearly 70 percent of Fortune 1000 companies invest the retirement dollars of their *most senior* executives into corporate-owned life insurance (COLI).

Top banks usually invest ten to twenty percent of their tier one capital in

BOLI. As of 2011, JP Morgan Chase owned \$9.825 billion in life insurance comprising over 10% of tier one capital. At the same time, Bank of America owned \$18.5 billion in life insurance comprising over 16% of tier one capital. Wells Fargo had over 20% of its tier one capital in BOLI with \$19.3 billion invested. U.S. Bank and PNC both had over \$5 billion in BOLI comprising over 20% of tier one capital for both banks. The list goes on and on.

The fact is, as Jay surely knows, most life insurance, or at least that purchased by businesses, isn’t “sold” to an unsuspecting public by licensed con men, but rather is “bought” by the nation’s most experienced and sophisticated financial executives—CEO’s and CFO’s of our the country’s largest financial institutions and corporations—who, after performing considerable due diligence, elect to devote huge amounts of their company’s assets, not to mention their own retirement plan dollars, to life insurance policies. And, I assure you, these executives know exactly how much they are paying in commissions when these deals are done, contrary to Jay’s snarky implication.

So, why do the country’s most senior and experienced financial executives put money into life insurance if they weren’t conned into it? They do it because, unlike the captive insurance industry’s Old Guard, finance executives (especially at financial institutions like banks and insurance companies) don’t have the luxury of focusing only on one side of the business’s balance sheet. Yes, they must give due regard to the company’s liabilities (as the Old Guard insists), but they must also be good stewards of its assets and (maybe most importantly) match assets with liabilities. Pretending that you can run a company, especially a financial one like an insurance enterprise, while focused only on one side of its balance sheet is

dangerously and self-evidently short-sighted. Anyone suggesting the contrary clearly has an ulterior motive in doing so.

I'll spare the reader all the reasons why for now, but **when one is considering the various options for investing the assets of a financial enterprise that has liabilities of uncertain duration, a desire for liquidity, a disdain for volatility, and the need to access cash on short-notice (for instance, to pay claims) without generating undue tax liability, life insurance is oftentimes a compelling fit. Or, at least the senior executives of most every large bank and Fortune 1000 company seem to think so.**

And, contrary to Jay's implication, the business owners who are setting up captive insurance companies are, like their Fortune 1000 counterparts, superior business people. They operate sizeable and highly profitable businesses in a very competitive and cut-throat world. They are only considering a captive with an 831(b) election because they have sufficient free cash flow (usually close to \$1.2 million per year) that they can devote toward an enterprise risk management program. **In short, these guys and gals are no more likely than their Fortune 1000 counterparts to be hoodwinked by cunning Svengali's selling life insurance. Captives are not being marketed to "Joe Public", but to sophisticated business owners accustomed to analyzing numbers, weighing risks, and making decisions.**

After slandering the New Wave "life insurance agent[s], financial planners (and increasingly accountants and attorneys)" who, to Jay's great dismay, give due attention to the asset side of a captive's balance sheet, Jay then attempts in the Forbes article to plant seeds of doubt as to the legality of "wedding" smaller captives, with an 831(b) election, with life insurance.

In fact, Jay gets particularly snarky on this point (which is telling). He writes, "There are now tax shelter promoters [his disparaging label for the New Wave]...actively marketing and selling 831(b) companies as a conduit to purchase life insurance with pre-tax dollars." He goes on to say that "*sometimes they try to disguise the transaction by having the captive do a split-dollar transfer to a trust that buys the life insurance, or having the captive invest in a preferred share of an LLC that buys the life insurance. Others just tell their clients to purchase life insurance directly inside the captive.*" Either way, Jay tells us that such techniques are the equivalent of "*putting lipstick on a pig.*"

Jay feigns even more anxiety over arrangements where the captive was formed for multiple, independent purposes and where life insurance was considered before or shortly after its formation. He says, "*[C]lients are being shown illustrations where the life insurance is being purchased soon after the first premiums are paid to the captive (the advisors want their commissions now, not later), and the efficiency of the captive is being measured not in its effectiveness as a risk-*

management tool (it's proper purpose) but rather as an investment and estate planning tool (the improper tax shelter purpose)." [Parentheticals in the original]

Remember Jay's words above closely as you revisit the presentation ([Click Here](#)) that Jay gave to the Association for Advanced Life Underwriting (AALU) just a few short years ago, especially his comment that establishing a captive in part for "investment" and/or "estate planning" reasons is an "improper tax shelter purpose" and his concerns about introducing life insurance early in the process.



In the AALU presentation, Jay and his co-presenter Tim Vorhees, also an attorney, explain exactly how to wed captives with life insurance, and the compelling benefits of doing so. In their presentation, they express virtually none of the concerns noted in the Forbes article. In fact, they actively contradict them.

In the AALU presentation, Jay and Tim say confidently that "life insurance is a permissible investment within a captive...". But, they also say much, much more than that.

Slide 12 of the presentation lists the "Primary Benefits of a Captive". Included among them is **income tax planning**, especially the ability to reserve for claims on a pre-tax basis and the tax "**arbitrage**" available by trading ordinary income tax for long-term capital gains. The same slide emphasized opportunities for **estate and gift tax planning** via the captive. **Again, these are not mentioned as mere "ancillary" benefits of a captive, but as "primary" ones.**

Primary Benefits of Captives



- **Insurance Savings**
 - Obtain Unavailable Insurance
 - Retain Underwriting Profits

- **Income Tax Savings**
 - Reserve for Claims Pre-Tax
 - Arbitrage Income vs. LTCG Rates

- **Wealth Transfer**
 - Estate/Gift Tax Savings
 - Asset Protection Benefits

As previously alluded, slide 25 of the AALU presentation says explicitly that life insurance is a “permissible investment” for a captive, and talks up its **tax advantages** (rather than its unique economic attributes, which is rather more important in my estimation). It notes specifically that captives can be structured **from the beginning** so that they, and therefore the death benefit of the life insurance policies they own, are outside of the business owner’s taxable estate, resulting in a “**dramatic**” (their words) planning impact.

Captives and Life Insurance



- Life Insurance is a permissible investment within a captive in most domiciles
- The advantage to life insurance is that internally it grows tax-free to the captive
- If the captive is owned outside the business owner’s estate, the impact of life insurance planning can be dramatic
- Popular life insurance arrangements with captives include key man, buy-sell, and split-dollar
- **Caution: Captive insurance programs designed just to sell pre-tax life insurance**



The slide goes even further to say specifically that the life insurance within a captive can be structured to serve needs completely unrelated to those of the captive, such as key man insurance or funding a buy-sell agreement or split dollar arrangement. To Jay's credit, the presentation does warn about setting up a captive "just" to purchase pre-tax life insurance, but that's not the warning given in Jay's most recent article. In his most recent article, he disingenuously warns the public away from any and every arrangement that "weds" life insurance and captives regardless of the multiple purposes for which the captive was originally formed.

Unbelievably, slide 27 of Jay's AALU presentation lists again the potential benefits of owning a captive, and notes first and foremost the ability to ***"create business tax deductions for the insured company" resulting in the ability to have a "tax-advantaged investment portfolio"***. ***It also notes the ability to "create family wealth transfer opportunities" and to "purchase life insurance on the owner"***.

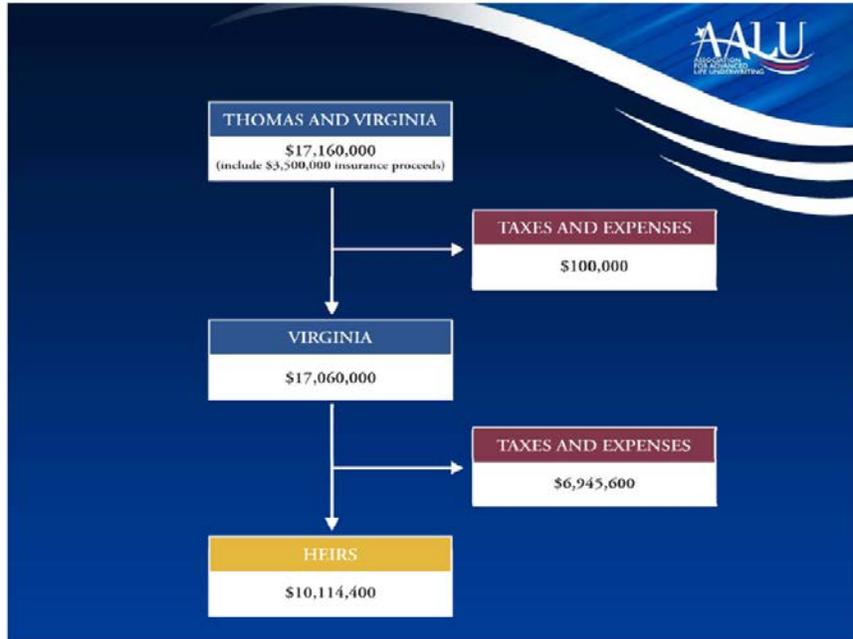
KEY BENEFITS

The Captive Insurance Company has the potential to:

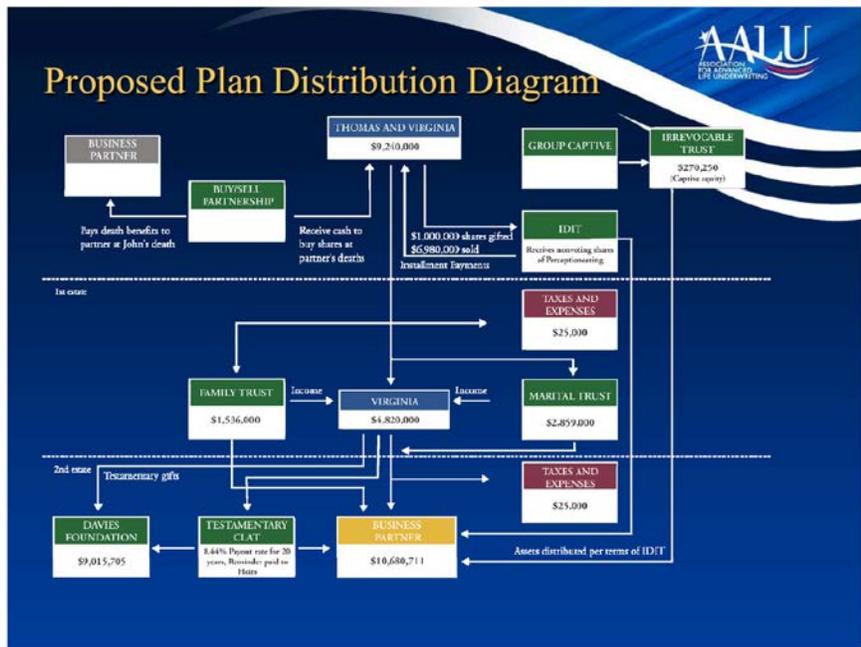
- ♦ Create business tax deductions for the insured company
- ♦ Generate underwriting profits
- ♦ Provide an attractive environment for tax-advantaged investment portfolio management
- ♦ Provide asset protection
- ♦ Create family wealth transfer opportunities
- ♦ Use some of its surplus to invest in life insurance on the owner

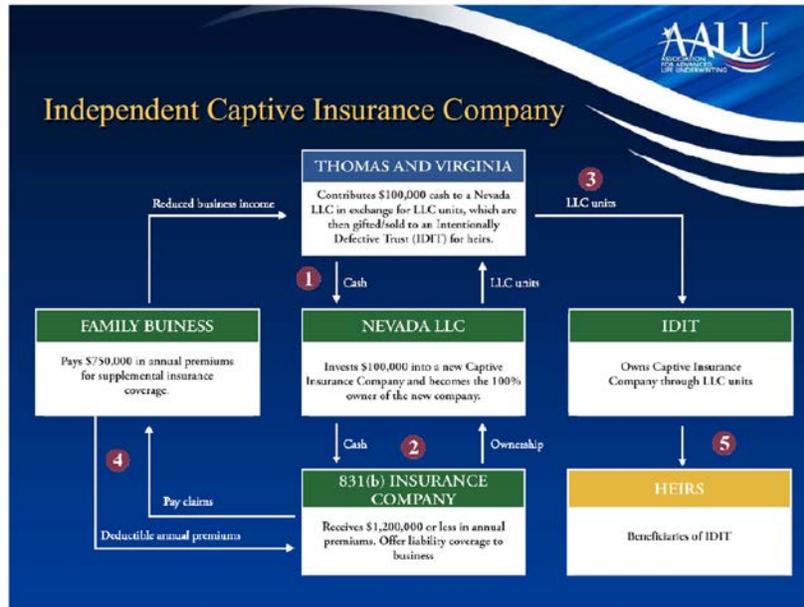


Slides 34 through 36 offer up an enlightening case study illustrating exactly how captives can be ***prearranged to create dramatic income tax and estate tax savings***, the benefits of which are summarized on slide 37. ***Slide 37 notes that the proposed structure results in some \$8 million of "increased income tax deductions" over the period in question, and saves nearly \$7 million in estate taxes, all while accumulating a tax-favored portfolio of more than \$6 million and overall financial benefits to the surviving family (counting life insurance death benefits) of over \$9.7 million.***



Proposed Plan Distribution Diagram





COMPARISON OF BENEFITS
IF DEATH OCCURS IN CURRENT YEAR

	EXITING PLAN	PROPOSED PLAN
NEW INCOME TAX DEDUCTIONS	\$ -	\$ 8,072,250
HEIRS RECEIVE IMMEDIATELY	\$ 10,114,400	\$ 7,762,250
PV OF FUTURE BENEFITS TO HEIRS FROM TCLAT	\$ -	\$ 2,918,461
FAMILY FOUNDATION	\$ -	\$ 9,015,705
ESTATE TAX	\$ -	\$ -

PROPOSED PLAN SUMMARY	
INCREASED INCOME TAX DEDUCTIONS	\$ 8,072,250
INCREASED NET TO HEIRS	\$ 566,311
INCREASE TO FAMILY FOUNDATION	\$ 9,015,705
ESTATE TAX SAVINGS	\$ 6,845,600

Clearly, Jay thought that captives were a fantastic tax planning opportunity when he gave this talk a few years ago, he believed that combining life insurance and captives wasn't just permissible, but advisable, and he had no problem thinking through these issues on the front end of a transaction and not just after the fact.

And yet today he says that doing such things represents an "improper" tax-motivated transaction.

Which is it, Jay?

In the recent Forbes article, Jay says *“From a tax perspective, the benefits of a captive with an 831(b) election are not that great—most of the money should be used to pay claims if the actuarial calculations of the premiums are anything like close, and then the balance of the money is subject to capital gains taxes when the company is liquidated.”*

This comment is disingenuous in the extreme. The combined income and estate tax benefits of a typical captive are phenomenal over time, as illustrated on Slide 37 noted above. Jay knew that then and he knows it now. Furthermore, captives are now and always have been highly profitable entities (for very valid actuarial reasons). The idea that a captive should operate at near break-even if the “actuarial calculations are anything like close” is simply a lie and is revealed as such just two paragraphs later when Jay says that, *“the truth is that it is probably fine for a mature captive, meaning one that has been around for some time and has large reserves and surplus, to use a small amount of its investable assets to purchase [life insurance].”*

Uh...what? Huh? I thought Jay just said that captives pay most all their premiums out in claims. How can any captive, even a “mature” one, have “large reserves and surplus” if its “actuarial calculations are anything like close”, Jay? **Jay obviously knows, as does everyone else in the industry, that any captive that’s more than just a few years old is very likely to be highly profitable and have tremendous reserves, and for very sound actuarial reasons.** Captives are unable to spread their risk to the same extent third party commercial insurers do. Consequently, any one claim can constitute a far larger percentage of the captive’s assets than would ever be the case with a third party commercial insurer. The responsible way to protect against such a contingency is to plan for much higher margins in any given year, and much higher reserves, than third party insurers ever would, knowing full well thy captive could suffer assize losses at any time. The appropriateness of managing captives differently than a third party insurer was acknowledged recently by the tax court in the Rent-a-Center case ([Click Here](#) for a review of the court case).

Slide 39 of Jay’s AALU presentation further illustrates the extent of Jay’s deceit on this subject. It begins by discussing the types of risks that a captive might insure, saying explicitly that *“a key to a profitable captive is to identify and insure risks that are legitimate but that have a low probability of happening”*, because *“insuring risks that have a high probability of occurring would inhibit the ability of the captive to help achieve the owners (sic) other financial goals”*. It notes further that a qualified actuary or underwriter should have little trouble identifying such risks. The presentation lists several such risks, including losses due to terrorist attack.

GOOD AND BAD RISKS

A key to a profitable Captive is to identify and insure risks that are legitimate but have a low probability of happening. Insuring risks that have a high probability of occurring would inhibit the ability of the Captive to help achieve the owners other financial goals. A qualified underwriter should have little trouble identifying suitable risks for which a Captive can provide coverage. Here is a short list of potential risks:

- ♦ Commercial vehicle liability
- ♦ Claims against copyright infringement
- ♦ Directors and officers liability
- ♦ Employment practices
- ♦ Errors and omissions
- ♦ Malpractice
- ♦ Product liability
- ♦ Structural defects
- ♦ Claims against trademark infringement
- ♦ Business interruption
- ♦ Computer data loss
- ♦ Identity theft
- ♦ Computer software liability
- ♦ Financial (white collar) crime
- ♦ Loss of key customer
- ♦ Theft of intellectual property
- ♦ Adverse regulatory changes
- ♦ Loss due to terrorist attack



Taken together, Slides 34 through 39 of the AALU presentation make it clear that it is possible and legal to set up and operate legitimate, highly profitable captives that build significant reserves over time (that is, that *don't* usually pay out “most of the money...in claims”) and that can be used to fulfill other needs of the captive’s owners, including life insurance needs, and not **purely** for risk management. This directly contradicts Jay’s contentions in the recent Forbes article.

The remaining 22 pages of the AALU presentation are, in light of Jay’s writings in the recent Forbes article, enough to leave one gobsmacked. I’ll mention just a few more slides in the interest of time.

Slides 40 and 41 discuss how the captive can make indirect ***loans to the business owner*** or use the captive’s assets to invest in life insurance. Slide 41 is specifically titled “***Ways to Invest Capital Funds in Life Insurance***”, and it lists four:

- Direct Ownership
- Loans to an ILIT (irrevocable life insurance trust)
- Split Dollar Agreement
- Preferred LLC

ADVANCED PLANNING APPLICATIONS

- ◆ Arrange for children of the business owner to be shareholders (indirectly in a trust)
- ◆ Arrange for the Captive to use some of its surplus to capitalize another planning entity such as an LLC which, if properly executed, could make loans to family members or facilitate the purchase of life insurance on the business owner.

The image shows the logo for the Association for Advanced Life Underwriting (AALU) in the top right corner, identical to the one above. The main content of the slide is a dark blue rectangle with white wavy lines on the right side. The title "Ways to Invest Capital Funds in Insurance" is written in a gold, serif font. Below the title is a bulleted list of four items, each preceded by a small red square.

Ways to Invest Capital Funds in Insurance

- Direct Ownership
- Loans to ILIT
- Split Dollar Agreement with ILIT/IDIT
- Preferred LLC

Oddly enough, these are the *exact four* approaches that Jay attacks in the Forbes article saying they merely represent a “disguised” effort to put “lipstick on a pig.” I can’t decide if these direct contradictions are *shameful* or *shameless* on Jay’s part. Either way, they are obvious. But only to those “in the know.” And now, *you* know.

Given the glaring inconsistencies (actually outright contradictions) between what Jay said then in his AALU presentation and what he says now in the

Forbes article, Jay should be expected to explain his dramatic about-face. But, he never does and never will for the simple reason that there is no explanation that those in the know will accept. As previously noted, there have been no (zero, none, nada) changes in tax law that explain his switch.

In an attempt to cite at least some tiny amount of legal authority for his conveniently self-interested position on this subject, Jay points to a law review article by Associate Professor (without tenure) Beckett Cantley, who is likewise a mouthpiece for the Old Guard. The article was published in a Law Review run by law students that is not peer-reviewed ([Click Here](#)). Despite the fact that Jay calls the article “excellent”, it is in fact a lackluster and routinely illogical piece of legal (non)reasoning. I dismantled the article point-by-point previously ([Click Here](#)), but suffice it to say for now that, in criticizing the combination of life insurance and captives, Cantley is forced to argue from a very stretched analogy and anchors his arguments in several misleading (and sometimes outright deceitful) statements. Read my critique at the above link for all the details if you’re interested.

But, what’s most troubling about Beckett Cantley is that, like Adkisson, he is two-faced. He practices the exact opposite of what he preaches. You see, not only does Cantley actively moonlight by practicing captive insurance law on the side, but he also moonlights by selling life insurance policies (life settlements to be precise). **And...you’ll never believe this...he actually *sells* these life insurance policies to captives that *he* helps clients form (or LLC subsidiaries of them), and receives a handsome (often six figure) fee or commission for doing so, or otherwise profits from the transaction. Lastly, Cantley has been known to agree in writing to give his captive clients five-figure discounts on his captive formation fees if they agree to cause their captive to invest its assets in life insurance policies offered through Cantley’s affiliated company. life . Note that this language is included in his agreement with the client *to form the captive, meaning that the captive was contemplating investments into life insurance (or other things) even before it was formed.***

Jay now disingenuously wants you to believe that considering such things (the captive’s ownership of investments, especially life insurance) in advance of the captive’s formation, or even shortly thereafter, is proof positive of an improper tax shelter purpose. Remember his feigned concern about “tax shelter promoters” showing clients life insurance illustrations shortly after the captive was formed? He’d have his Forbes readers believe that life insurance is conclusive evidence of an improper tax motivation.

For instance, he says in the Forbes article:

“By identifying 831(b) companies that have purchased significant amounts of life insurance, whether directly or through split-dollar arrangements, etc., the IRS can more readily identify en masse captive arrangements that are technically defective

insofar as they cover risk that barely exist and have premium amounts for certain policies that are not even in the time zone as reality.”

And yet, the supposed authority that Jay cites for his proposition that most such arrangements are “technically defective”, Beckett Cantley, secretly does the very thing that Jay so disingenuously admonishes against. And Jay knows this about Cantley. **I know he knows this because I personally have told him so. In fact, Jay banned me from participation in his LinkedIn captive group when I last brought this to his attention, and deleted all references to its. Thus, Jay is complicit in Cantley’s deceit. Or...Cantley is complicit in Jay’s. Whichever.**

Very few people within the captive industry know these details about Cantley and Adkisson. But now both you and they are “in the know.”

Don’t get me wrong, I have no problems with Cantley placing life insurance inside of captives, or with him earning commission or brokerage fees for doing so. My problem is with the fact that, like Jay Adkisson, he all too frequently practices the exact opposite of what he preaches, because even he knows that what he preaches isn’t true.

Jay’s purpose in writing the Forbes article is now clear. He hopes to steer potential customers away from the New Wave—financial and estate planners, asset protection specialists, life insurance agents and other asset managers—who give attention to employing the captive’s assets properly, and toward his firm or favored third parties who (he’d like everyone, especially the IRS) to believe only focus on the liability side of the captive’s balance sheet and are completely disinterested about how captives deploy their assets.

It’s bad enough that trolls like Jay Adkisson and Beckett Cantley hope to malign their fiercest competitors by spreading lies to an uninformed public. But it’s obscene that they try to con the world into believing that their competitors are doing something illegal or untoward when they, in fact, have advocated doing the same thing (and in some cases continue to do the same thing). And it’s downright criminal, or at least it should be, that they try to use their lawyer/professor credentials to sick the IRS on their competition for doing the very same things that they have advocated for and in many instances have done (and continue to do). **Has Jay Adkisson or Beckett Cantley been in contact with Lois Lerner? Wouldn’t surprise me.**

This is why Jay’s Forbes article concludes the way it does, with a plea to not throw the baby out with the bathwater. You see, he doesn’t want to scare the public away from forming captives in general (that would be slitting his own throat, after all). So, he bends over backward to reassure readers that it’s not all *captives*, or even all small captives making 831(b) tax elections, that are likely to draw IRS’s scrutiny, only those “promoted” by his primary competitors, the New Wave. So, dear reader, go ahead and do your captive, Jay implores, just don’t talk to your financial planner, insurance agent, asset protection specialist or investment advisor

about it, at least not until the IRS gives us more “clarity”. Instead...call Jay! Tell everyone else that you’re just going to take a “wait and see approach” for now.

Jay drives home this point with one more bogus statement, a misleading appeal to authority:

“While there are many highly-credentialed and experienced experts in taxation that warn against an 831(b) being used as a conduit to purchase life insurance, there is pretty much nobody outside those selling the strategy who think that it is anything like a good idea.”

This is a self-serving statement if there ever was one, and it’s deceitful in many ways. First nobody, and I mean nobody, argues that a captive should be formed only for the purpose of acting as a conduit for the purchase of life insurance, and I’ve never seen one done for that purpose. So, by making the statement above, Jay slays a straw man rather than his real competition.

Regardless, the fact is that a great many highly credentialed tax attorneys and CPA’s, in fact the majority of those that I’ve spoken with (and I’ve spoken with a great many, several having Master of Laws degrees in Taxation from New York University, which is the preeminent tax credential in the country, or Masters in Accountancy degrees in Taxation, which is the CPA’s equivalent), agree that a captive formed for legitimate risk management and other business reasons is perfectly free under the law to purchase life insurance, even in high amounts, under a great many circumstances. One of the premier tax litigators in the South gave a talk a few months ago to the Kentucky captive association titled “Defending Captives Against The Guards”, which discussed, in part, this very topic, and included precautions for structuring life insurance inside of a captive.

And, as we have seen, even the Associate Professor that Jay cites (in a desperate attempt to find some legal justification for his paranoid hatred of the New Wave), Beckett Cantley, doesn’t accept Jay’s recommendation to “wait and see”, but rather actively promotes and facilitates the placement of life insurance policies within captives that he himself formed, giving some clients who agree to do so a large discount on their legal fees.

In short, Jay’s new-found (within the last many years) disdain for the New Wave in general and life insurance in particular is not a result of any changes in the tax law; is not anchored in any statute, regulation, ruling our court case that he can cite; isn’t consistent with the opinion of the vast majority of tax professionals I’ve spoken with or the practices that I know they keep; isn’t consistent with private practices of his shill, Beckett Cantley; and isn’t consistent with Jay’s prior writings on the subject (written at a time when he viewed the New Wave as potential allies rather than a definite threat). So, if anyone is an outlier on the subject of life insurance and captives, it’s Jay Adkisson.

Which makes Jay's parting advice in the Forbes article all that more suspect. Jay advises his readers to take a "wait and see approach". **However, as any real business owner knows, "wait and see" can be very expensive.** Should Uber ([Click Here](#)) "wait and see" what regulators think before it enters a new market? Or...how about AirBnB? ([Click Here](#)). Or the developers of Bitcoin. ([Click Here](#)). Or, maybe Google should have "waited to see" whether the laws would change in its favor before developing self-driving cars? ([Click Here](#)).

No, business owners rarely have the luxury of "waiting to see". They are accustomed to making decisions without complete information. After all, that's the very definition of an entrepreneur. What entrepreneurs understand (that Jay Adkisson pretends not to) is that that doing nothing has a price. An opportunity cost. A forgone chance of gain that can never be recovered. Furthermore, by choosing to wait, the chances of suffering that lost opportunity cost are 100%. **In other words, "waiting to see" results in a certain loss of the forgone opportunity.**

And, in the case of captives and life insurance, that loss amounts to a lot. The benefits of combining a captive insurance company with life insurance are, as Jay Adkisson himself so eloquently noted in his presentation to the AALU (and as Beckett Cantley implicitly recognizes through his own actions), simply "dramatic". As a result, the cost of forgoing those benefits for some amount of time (how long--one, five, ten, or maybe twenty years?) in hopes of the eventual regulatory certainty that will come from a "test case" is something just shy of "dramatic"..

By contrast, making the decision to act now avoids the certain and known opportunity cost of a "dramatic" amount, but exposes us to lessor known, and less than certain, risks. Sure...something could go wrong if one acts now rather than waits. The IRS might choose your business for an audit. The IRS might audit your captive. The IRS might discover and dislike the life insurance it owns. The IRS might challenge your captive as a result. The IRS appeals officer might be unreasonable and offer a lousy settlement. You might end up in court. You might win. In fact, the chances of winning might be really good if you've done things right. Or, you might lose. And, if you lose, you'll owe taxes that you would have had to pay anyway, plus some interest at a very low rate (at least currently). You might (but almost certainly won't if you've done things right) owe some penalties too.

Personally, I've never seen one of these captive cases go to trial. In every audit I've seen, which is several, some recent and many involving life insurance, the IRS either walked away empty handed or else agreed to settle at appeal for a nominal amount. As a result, I know (and most of the captive industry knows), that the fear, uncertainty and doubt (FUD) that Jay works so hard to instill in the public (and gin up at the IRS) for his own self-indulgent reasons is misplaced. And now you know that too.

But, a smart business owner won't take my word for it. Or Jay's. Rather, he or she will weigh the certain loss of a "dramatic" and mostly determinable amount--the opportunity cost of doing nothing--against the possibility and probability, however remote, that the outcome of proceeding might be something less than desirable or maybe a lot less than desirable in a worst-case scenario. Or, maybe just a little less.

And then, after weighing the upside and downside and the risk of each, the business owner will make a decision and will "own" it, because ***that's what entrepreneurs do.***

Full Disclosure: Like Beckett Cantley, I make lots of money by, among other things, selling life insurance to individuals and businesses. I just happen to be honest about it.

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