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Acquisition of Insurance Producers: Common Pitfalls

I. EXECUTIVE SUMMARY

According to OPTIS Partners' latest semiannual report, following a slowdown in the first quarter of 2022, the second quarter of 2022 saw a 20% increase in insurance agency and broker mergers and acquisitions activity. [1] There were 427 announced transactions in the first half of this year, which represented a 16% increase from the same period in 2021 (369 reported transactions). Private-equity and other financial buyers continued to play a significant role in these acquisitions; they were involved in 79% of announced transactions in the past 12 months and 75% during the third quarter.

Because the mergers and acquisitions market for such entities is likely to remain active in the foreseeable future, we are updating our prior alert regarding operational aspects of the insurance business that are significant in the due diligence process, as well as regulatory hurdles in such acquisitions that potential acquirors should be aware of when attempting an acquisition. These areas include the following:

- Ownership of policy renewal rights;
- Disputes relating to fiduciary funds;
- Issues associated with closely-held insurance producers;
- Overreliance on principals in the operation of an insurance producer;
- Inter-affiliate arrangements; and
- Required disclosures of information by direct and indirect owners of an acquiror (and to the extent they are entities, their officers and directors) that seeks to obtain "control" of an insurance producer with a resident or non-resident license in Texas.

With respect to each area, we suggest potential solutions to address certain issues that buyers may encounter as part of the acquisition process. For example,

- potential acquirors should confirm that fiduciary funds are properly segregated and that dividends or any other payments made to or for the benefit of the insurance producer's owners do not include any such funds;
- ownership of policy renewal rights for an insurance program should be documented in legal agreements between the insurance producer and the insurance company that underwrites the risks of the insurance program. A potential acquiror should review the insurance producer's existing agency agreements to ensure that the producer it intends to acquire owns renewal rights for any policy that it places, and will continue to own such rights following any termination of the agreement;
- potential acquirors should consider maintaining selling owners' associations with the producer post-acquisition and by requiring certain selling owners (and potentially key members of the management team) to roll a portion of the pre-closing ownership interests in the target company into the new buyer equity structure, conditioning the sale upon execution of employment agreements by such owners with the acquiror or insurance producer and/or structuring a portion of the purchase price as an earn-out; and
- in connection with preparation of certain required regulatory filings, work with counsel to analyze the acquiror's structure and affiliations to assess the scope and composition of the future control group with respect to the target entity.

II. TYPES OF INSURANCE PRODUCERS

Many insurance statutes do not fully distinguish between an insurance agency (which typically represents insurance companies and may have the authority to bind policies on behalf of such companies) and insurance brokers (which typically represent policyholders or prospective policyholders), and simply refer to these individuals or entities as insurance producers. Insurance producers engage in the sale, solicitation and negotiation of insurance policies directly with the policyholders and sometimes do so through intermediaries known as subagents.

A managing general agency (MGA), on the other hand, is a specialized type of insurance producer that often is delegated functions typically performed by the appointing insurance company, including underwriting, claims handling, administration, and appointment and management of subagents. The NAIC[2] Managing General Agents Act contains a narrower definition and includes quantitative thresholds for an insurance producer to qualify as a MGA:

Any person who:

(1) Manages all or part of the insurance business of an insurer (including the management of a separate division, department or underwriting office); and

(2) Acts as an agent for such insurer, whether known as a managing general agent, manager or other similar term, who… produces, directly or indirectly, and underwrites an amount of gross direct written premium equal to or greater than[,] five percent (5%) of the policyholder surplus as reported in the last annual statement of the insurer in any one quarter or year together with the following activity related to the business produced: (i) adjusts or pays claims in excess of $10,000 per claim (or some other amount determined by the commissioner of insurance) or (ii) negotiates reinsurance on behalf of the insurer.

Despite the distinctions set forth in many state insurance statutes and regulations, various issues raised in this article are for the most part pertinent to both insurance producers and MGAs. Except as otherwise set forth below, in this article we will refer to MGAs and insurance brokers and agencies as "insurance producers".

III. OWNERSHIP OF POLICY RENEWAL RIGHTS

Potential acquirors of insurance producers often attribute significant value to ownership of policy renewal rights, which afford the producer ownership of policyholder lists and the right to offer, quote and solicit the renewals of in-force policies produced by the insurance producer and to solicit replacement insurance coverage upon the expiration of such policies. On occasion, insurance producers mistakenly believe that they own such rights given that they maintain policyholder records and are the parties that interact directly with policyholders – soliciting and selling the policies, collecting premiums, and/or making claims payments directly to the policyholders. Unfortunately, insurance producers sometimes discover, particularly upon termination of an arrangement with an insurance company, that they do not own the renewal rights for the policies that they produce, or that there are significant confidentiality restrictions with respect to policyholder lists or other data pertinent to the renewal process. Sometimes, it is ambiguous as to which party – the producer or the insurance company on whose forms the policies are issued – owns such rights, which may create a risk of future disputes.

Ownership of policy renewal rights for an insurance program should be documented in legal agreements (such agreements include MGA, agency or program agreements and will be referred to in this article as "agency agreements") between the insurance producer and the insurance company that underwrites the risks of the insurance program. A potential acquiror should review the insurance producer's existing agency agreements to ensure that the producer it intends to acquire owns renewal rights for any policy that it places, and will continue to own such rights following any termination of the agreement. Representative contractual provisions granting the insurance producer such rights are set forth below:

- In the event of termination of the agency agreement, the insurance producer's (i) customer/client lists for the insurance program, and (ii) the use and control of policy expirations, policy renewals and the exclusive right to market to such customers shall remain the sole property of the insurance producer.
- In the event of termination of the agency agreement, the insurance producer's records, use and control of expirations shall remain the property of the insurance producer and left in its undisputed possession.

Agency agreements may also have other variations of these provisions that could, for example, potentially grant the issuing insurance company ownership of policy renewal rights upon a failure by the insurance producer to remit premium owed to the insurance company, including the following:

> In the event (i) the agency agreement is terminated for material breach for failure by the insurance producer to remit premium as required under the agency agreement or (ii) the insurance producer fails to account for and remit all premium required under the agency agreement on a timely basis in full within sixty (60) days following the effective date of any termination, all renewal ownership shall be the sole property of the insurance company.

Even though MGAs typically own the policy renewal rights for the insurance business they place, ownership would not be ubiquitous for insurance agencies and brokers. To the extent the target insurance producer does not own the renewal rights for some or all of the policies it places or if such ownership is conditional, as under the provision set forth above, a potential acquiror should be aware that certain types of insurance producers could lose all or a portion of the policyholders (or lose the right to solicit or sell renewal policies to such policyholders) associated with a specific insurance program upon termination or expiration of the agency agreement. Depending on the relative size of the insurance program, this could have an impact on the "persistency" of the producer's business and its revenue following such termination or expiration, and consequently on the ultimate accuracy of any valuation of such insurance producer.

IV. DISPUTES RELATING TO FIDUCIARY FUNDS

An issue that often arises during the legal due diligence process relates to the fact that an insurance agency, including a MGA, is generally responsible in a fiduciary capacity for all funds received or collected from policyholders. Neither a MGA nor any other insurance agency should commingle any such funds with its own funds absent express consent from the insurance company that writes the business and on whose behalf the MGA or other insurance agency holds such funds. Further, agency agreements are generally quite clear as to the duties of an insurance agency, including a MGA, with respect to fiduciary funds and may include some or all of the following provisions:

- all premiums collected by the insurance producer under the insurance program are collected on behalf of the insurance company and shall be held in a fiduciary capacity by the insurance producer;
- the insurance producer is required to remit all premiums collected to a segregated premium trust account;
- the insurance producer is required to remit to the insurance company (or provide instructions to the trustee to such effect) all fiduciary funds held in the premium trust account on a regular basis (and/or at the request of the insurance company), even if all or a portion of such funds are in dispute; and
- the fiduciary funds cannot be commingled with funds relating to other insurance programs, other insurance companies, the insurance producer's general/operating funds or capital funds, or funds for any other purpose.[3]

Despite the unambiguous nature of this language, disputes sometimes do arise between insurance companies and insurance producers as a result of the multi-faceted nature of premium trust accounts. For example, in certain producer arrangements, the premium trust account is not only used as an account where collected premiums are deposited, but also used to fund claims payments as a result of various internal net settlement procedures at the producer. Further, sometimes commissions owed to the insurance producer are deducted either before or after premiums are deposited in the account; certain amounts in the account are refunded to policyholders as a result of policy cancellations; and any interest or other income generated from the fiduciary funds typically belongs to the insurance producer.

Although an insurance producer may sometimes withhold fiduciary funds owed to insurance companies in the event the insurance producer is in distress and/or is facing solvency issues, more often than not insurance producers do so because they reasonably believe that such withheld funds are necessary to satisfy other obligations set forth in the agency agreement – pay claims to policyholders, refund premium to policyholders as a result of policy cancellations, pay agency commissions, etc. As a result, insurance companies may initiate lawsuits against the insurance producer to recover unremitted funds.

In addition, we have also seen circumstances where insurance producers improperly commingle fiduciary funds that they hold for different insurance companies or insurance programs or commingle such funds with their own funds. When questioned about these infractions, insurance producers have argued that it may be impractical or inconvenient to transfer fiduciary funds directly into a separate account. This is a red flag in the due diligence process.

In addition to potential litigation that an insurance producer may face as a result of improperly withholding or commingling of fiduciary funds, the insurance producer may also be subject to disciplinary actions from state insurance regulators over improper handling of fiduciary funds and breach of fiduciary duties, which in either case could create significant adverse exposure for the insurance producer. Potential acquirors should confirm that fiduciary funds are properly segregated and that dividends or any other payments made to the insurance producer's direct owners do not include any such funds.

V. CLOSELY-HELD INSURANCE PRODUCERS

Another issue pertinent to both due diligence and the structure of any acquisition of an insurance producer relates to the fact that some insurance producers may be closely held businesses (i.e., owned and run by a family or small number of individuals). It is not uncommon for small and medium sized insurance producers to be founded by a single person or a small group of family members or friends, who have developed and maintained relationships with many of the producer's contractual counterparties such as insurance companies, subagents, policyholders, etc. The parties with whom an owner has valuable relationships may attempt either to terminate an existing agreement with the insurance producer, renegotiate current terms, or choose not to renew a contract upon expiration as a result of the sale of the producer, particularly if the owner will not remain employed by or associated with the producer thereafter.

This risk is further exacerbated by the fact that many such agreements, especially agency agreements, include termination provisions which allow any party to terminate the contract without cause upon thirty or sixty days' prior notice (or immediately with cause) and often such short termination periods derive from state insurance laws and regulations[4]. We have also seen agency agreements allowing a party to terminate the agreement immediately or upon short notice to the extent the existing owner no longer owns the insurance producer. The issue is particularly acute if the insurance business the insurance producer places is concentrated among a small group of insurance carriers or policyholders or if a narrow group of subagents sells a disproportionate amount of such business. A similar issue may arise with respect to the departure of one or more of the principals of the insurance producer, which is discussed in Section VI below.

A potential acquiror could mitigate this risk by maintaining the selling owner's association with the producer post-acquisition and by requiring the selling owner (and potentially key members of the management team) to roll a portion of the pre-closing ownership interests in the target company into the new buyer equity structure and/or conditioning the sale upon execution of an employment agreement by the owner with the acquiror or insurance producer. Through rollover equity, the acquiror can not only reduce the amount of cash that will have to be paid to the seller at closing, but can also ensure that such seller retains "skin in the game", i.e. shares in the upside (and potential downside) associated with the target company post-closing. This approach is not, however, devoid of potential issues (especially if the size of the rollover equity is significant relative to the acquiror's equity interests). Adding the selling owner as an additional investor may weaken the acquiror's control over the target company and create conflict among the investors, especially if the seller has different priorities than the acquiror (e.g., focused on distributions rather than growth or has a divergent strategy as to how to grow and develop the target company) and has been able to negotiate significant governance and minority rights, including approval/veto rights, tag-along or preemptive rights, or director/manager appointment rights.

Assuming the acquiror holds significant leverage over the seller, potential solutions include creating multiple classes of equity interests in the buyer entity, under which the seller would own a separate class of interests, or granting certain rights solely to investors that hold a minimum percentage of ownership interests (this would have to be an amount greater than the amount that would held by the seller but less than the amount that would be held by the acquiror at closing). This bifurcation would help ensure that the acquiror retains important governance/control rights and potentially distribution and liquidation preferences.

Separately, through an earn-out a potential acquiror could tie a portion of the purchase price to the performance of the insurance producer post-acquisition so that the acquiror and the owner would share the risk of counterparties terminating existing contracts with the insurance producer *en masse* following the acquisition. An earn-out also incentivizes the owner to serve as an ambassador to existing counterparties and encourages them to retain business ties with the insurance producer going forward.

An earn-out is of course a useful tool to bridge any gap between a founder's asking price and an acquiror's valuation. Founders often have strong emotional ties to their companies and may have very rosy projections of their insurance producers' future performance and, accordingly, may value their companies higher than potential acquirors. This may make it difficult for potential acquirors to reach an agreement on purchase price with the existing owners. Further, an individual performance-based earn-out in which the former owner is entitled to additional compensation to the extent the insurance producer meets certain financial metrics (e.g., revenue, EBITDA, net income, etc.) for a fixed period following the acquisition could potentially be a tool to resolve any impasse between the parties and mitigate persistency risk discussed above. The earn-out could also be conditioned upon the owner and/or founder remaining employed by or associated with the insurance producer until the end of the earn-out period.

To the extent the potential target insurance producer is intended to serve as a platform for future producer acquisitions, certain adjustments can be made to an earn-out formula to encourage such acquisitions while not creating risk for the earn-out beneficiary of diminished net income or return on equity, after giving effect to subsequent acquisitions, and to other financial metrics that could be adversely affected by a roll-up program. For example, if the earn-out payment is determined based on the change in the insurance producer's EBITDA between the closing date of the acquisition and the end of the earn-out period, the EBITDA could be calculated to include EBITDA of any subsequently acquired insurance producer during the earn-out period and discounted by an agreed-upon percentage of the purchase price for such subsequently acquired insurance producer.

Further, even if the parties reach an agreement on price, an existing owner(s) may make various demands with respect to the operation of the insurance producer following the sale, for example, retaining substantially all employees for a specified number of years, maintaining headquarters or offices at existing locations, providing employees with the same or substantially similar salary and benefits as prior to the sale, continuing arrangements with other entities owned by the owners following the sale (i.e., inter-affiliate arrangements; see Section VII below for further discussions on this topic) or agreeing not to divest any portions of the business for a fixed number of years.

VI. PRINCIPALS OF INSURANCE PRODUCERS

Some insurance producers are managed by an individual or small group of individuals (often, the founder(s) or a couple key officers) who play an outsized role in the operations of the producer (i.e., principals). Acquiring an insurance producer that relies heavily on certain principals could be problematic if such principals are no longer employed by or associated with the insurance producer (e.g., death, disability, resignation, termination, etc.) following the sale of the producer. Following a principal's departure, an insurance producer's performance may suffer if the remaining employees of the insurance producer lack the same or similar levels of skill, knowledge and experience as the departing principal. Further, as noted in Section V above, principals may have developed relationships with many of the producer's counterparties (e.g., insurance companies and subagents), and these persons and entities may either attempt to terminate the existing arrangements with the insurance producer or choose not to renew a contract upon its expiration following the departure of such principals. This issue is of particular concern if the insurance business the insurance producer places is concentrated among a small group of insurance carriers or policyholders or if a small group of subagents sells a disproportionate amount of such business.

To minimize the potential pitfalls associated with an overreliance on certain principals of an insurance producer and the risks associated with any departure of such principals, we would recommend the following:

- Confirm that the insurance producer is diversified with respect to its policyholders, subagents and insurance companies (i.e., no single (or small group of) policyholder, subagent or insurance company is responsible for an outsized portion of the premium generated by the insurance producer);
- Condition the transaction upon execution of employment agreements with key employees of the insurance producer and establish performance targets for such employees or an management incentive plan;
- Engage in discussions with material counterparties (either directly, if permissible, or indirectly through current employees of the insurance agency) regarding the potential sale of the insurance producer and gauge whether such counterparties express any hesitancy or concern with the change of control; and
- Review existing agency agreements to ensure that there are no principal or "key man" triggers or short termination provisions, including any change of control provisions, and if there are any such provisions, consider conditioning the closing of any sale upon the re-negotiation and amendments to these existing contracts to include more robust protections for the insurance producer (e.g., longer contract term or notice period for termination or narrower termination rights, etc.). [5]

VII. EXISTING INTER-AFFILIATE ARRANGEMENTS

Although not unique to insurance producer acquisitions, potential acquirors should pay close attention to whether the insurance producer has entered into arrangements with affiliates, such as claims administrators or captive reinsurers, that will not be acquired as part of any insurance producer acquisition. A potential acquiror should review all inter-affiliate agreements to ensure the following:

- that no agreements provide "sweet heart" deals; and
- that these agreements, unless they are essential for the long-term operation of the insurance producer, continue only for a limited period of time post-closing.

We have seen circumstances under which an insurance producer is a sister affiliate of a third-party administrator[6] that handles claims and other administrative functions associated with the insurance producer's business. A potential acquiror should conduct proper due diligence on any affiliated third party administrator to ensure that, among other things, there have not been any significant or recurring issues with any of the services provided by the third-party administrator (including any potential regulatory issues and/or policyholder complaints), and that the fees paid to such administrator are fair and reflect market terms.

MGAs are also sometimes involved in captive and/or fronting arrangements in which all or a portion of the underwriting risk associated with the insurance business placed by the MGA is ceded by the insurance company to a reinsurer affiliated with the MGA. In these types of arrangements, it is not unusual for the insurance company to act as little more than a service provider and retain no underwriting risk; all such risks are ultimately borne by the reinsurer(s) and/or the MGA. These types of structures are particularly attractive to the extent the affiliate is not licensed as an insurance company in the U.S.

In such captive and/or fronting arrangements, one area of potential concern is if the existing agency agreement contains a cross-default trigger which allows an insurance company to terminate the agency arrangement with the insurance producer if an affiliated reinsurer defaults on any of its obligations under a reinsurance agreement or if the reinsurance agreement is otherwise terminated. Furthermore, indemnification provisions under the agency agreement which require the insurance producer to indemnify the insurance company for any breaches by the reinsurer may raise additional concerns about unfunded contingent liabilities.

VIII. PRODUCER CHANGE OF CONTROL FILING WITH TEXAS DEPARTMENT OF INSURANCE

Section 4001.253 of the Texas Insurance Code prohibits an individual or entity from acquiring "an ownership interest in an entity licensed as an agent…if such [entity or] person is, or after the acquisition would be, directly or indirectly in control of the license holder, or otherwise acquire control of or exercise any control over the license holder" unless a filing is made with the Texas Department of Insurance (TDI) (contents of such filing are detailed below). Under the Texas Insurance Code, "control" means the power to direct or cause the direction of the management and policies of a licensed insurance producer, whether directly or indirectly, by any means, including through the ownership of voting securities or by contract, and there is a presumption of control if such person holds 10% or more of the voting stock or rights of the producer. In other words, an investor may be required to make such filing even if it acquires a small minority interest in an insurance producer licensed in Texas.

To the extent a filing is required, a potential acquiror would have to file with the TDI the following:

- A biographical form/affidavit for each person by whom or on whose behalf the acquisition of control is to be effected;
- A statement certifying that no person who is acquiring an ownership interest in or control of the licensed insurance producer has been the subject to a disciplinary action taken by a financial or insurance regulator of Texas, another state or the United States;
- A statement certifying that, immediately upon the change of control, the insurance producer will be able to satisfy the requirements for the issuance of the license to solicit each line of insurance for which it is licensed; and
- Any additional information that the Texas commissioner of insurance by rule may prescribe as necessary or appropriate for the protection of the insurance consumers of Texas or as in the public interest.

In addition, the TDI expects acquirors (with assistance from sellers) to complete TDI Form FIN531 – Biographical Form and Certification of License Qualification Following a Change of Control, where information regarding new individuals (e.g., officers, directors or parents of the agency and new individuals in control of 10% or more of the agency's voting stock) that will be associated and disassociated with a licensed insurance agency and individuals or entities that will obtain control over a licensed insurance agency will have to be disclosed.

Further, to the extent the acquiror is an entity, disclosure of the foregoing information may be required with respect to the entity's owners, directors and officers. Specifically, the Texas Insurance Code provides that to the extent the acquiror is a partnership, syndicate, or other group, the TDI may require each partner of the partnership, each member of the syndicate or group, and each person who controls the partner or member to make a filing. If the acquiror or any such partner or member is a corporation, the TDI may require information pertaining to the corporation, each individual who is an executive officer or director of such corporation and each person who is directly or indirectly the beneficial owner of more than 10% of the outstanding voting securities of such corporation, be provided.

Private equity acquirors should be aware that owners (including limited partners of a fund), directors and officers of an acquisition vehicle or of any controlling entity of such acquisition vehicle, and any owner that exercises "control" (directly or indirectly) over such vehicle may have to make the disclosures required under the Texas Insurance Code. Where a private equity fund is acquiring control, it may be a negotiated point with the TDI regarding whether limited partners providing more than 10% of the capital commitments of the fund are deemed to be controlling persons but who are arguably passive from a governance standpoint.

Specifically, the Texas biographical form requires such individuals and entities to disclose their name, mailing addresses and to the extent they are individuals certain personally identifiable information (e.g., address, date of birth, social security number, etc.). Individuals are also required to submit fingerprint cards to the TDI.

After receipt of the necessary information, the TDI may disapprove an acquisition of control of an insurance producer if the Texas commissioner of insurance determines that:

- Immediately on the change of control, the insurance producer would not be able to satisfy the requirements for the issuance of the license to solicit each line of insurance for which is presently licensed;
- The competence, trustworthiness, experience and integrity of the persons who would control the operation of the insurance producer are such that it would not be in the interest of the insurance consumers of Texas to permit the acquisition of control; or
- The acquisition of control would violate any state or federal laws.

The TDI may affirmatively approve a change of control, but to the extent it does not, a change in control is considered approved if the TDI has not proposed to deny the requested change within 60 days following the TDI's receipt of all required information and documentation. Acquirors typically seek written confirmation of the regulator's non-objection to the transaction.

IX. CONCLUSION

We have highlighted in this alert only a handful of issues that potential acquirors should be aware of prior to acquiring an insurance producer. Furthermore, there has been renewed scrutiny by state insurance regulators and the NAIC of acquisitions by private equity funds in the insurance sector. The NAIC has been focused predominantly on direct and indirect investments in insurance companies, rather than insurance producers, and has been considering additional requirements on acquirors and target companies. Some of the initiatives currently being discussed include disclosure requirements concerning control relationships that do not trigger the statutory presumption of control standard (i.e., beneficial ownership of 10% or more of the voting securities), including corporate governance and/or fee-extracting contractual arrangements. To the extent such new requirements are implemented by the NAIC and state legislatures or regulators with respect to insurance company acquisitions, it is conceivable that they could also eventually influence insurance producer acquisitions.

If you have any questions regarding the topics discussed in this article or other points you would like us to consider in connection with producer acquisitions, feel free to contact us.

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[1] https://optisins.com/wp/2022/07/h1-2022-ma-report/

[2] The National Association of Insurance Commissioners (NAIC) is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia and five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer review, and coordinate their regulatory oversight.

[3] Certain state insurance laws and regulations preclude insurance producers from commingling fiduciary funds with the producer's own funds. For example, *see* N.Y. Comp. Codes Rules and Regs. tit. 11, § 20.3 (2006) (Regulation 29) ("Fiduciary responsibility of insurance agents and brokers; premium accounts") and N.H. Code Admin. R. Ins 4301.05.

[4] For example, the Connecticut Insurance Law provides that "[n]o insurance agency contract entered into in this state, by a licensed insurer with an insurance producer licensed under section 38a-769, shall be terminated by the licensed insurer appointing such producer unless the licensed insurer upon terminating such contract shall give not less than *ninety days' written notice* in advance to the other party" (emphasis added).

[5] For example, the Connecticut Insurance Law provides that "[n]o insurance agency contract entered into in this state, by a licensed insurer with an insurance producer licensed under section 38a-769, shall be terminated by the licensed insurer appointing such producer unless the licensed insurer upon terminating such contract shall give not less than *ninety days' written notice* in advance to the other party" (emphasis added).

[6] According to the NAIC Third Party Administrator Act (Version 1), a "Third party administrator" or "TPA" is defined as "a person who directly or indirectly underwrites, collects charges, collateral or premiums from, or adjusts or settles claims on residents of this state, in connection with life, annuity, health, stop-loss or workers' compensation coverage…"