Insurance Matters!

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A Newsletter of the **Insurance and Surety Committee**
of the Real Property Probate and Trust Law Section of The Florida Bar

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In This Issue:

Show Me The Money—Florida Supreme Court: Insurer Bad Faith Not Needed for Attorney's Fees

By: Gregory D. Podolak, Saxe Doernberger & Vita, P.C., Naples, FL

Florida's insurance attorney fee recovery statute – Fla. Stat. § 627.428 – has long been a policyholder litigation tool designed to level the playing field between the resource and experience rich insurance industry, and its policyholder counterparts. The latest challenge to its scope went all the way to Tallahassee, with the Supreme Court Justices emphatically reinforcing its broad application.

The statute provides, in relevant part:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

Drafted expansively to apply to any judgment or decree by a Florida court against an insurer and in favor of a policyholder, the statute has long been recognized as a way to "to discourage the contesting

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What's In a Name? Revisiting Wrap-Up "Feasibility"

By: Kathleen A. Creedon, CIC, CRM, CRIS, Wrap Strategies, Auburn, CA

Sustained mastery of a subject requires frequently reexamining the basics of that subject. Continual reassessment is necessary to test one's core understanding and assumptions for their current applicability. Circumstances can change quickly or subtly, and we must be able to adapt our thinking to new ideas or realities. Since the concept of wrap-up or controlled insurance program (CIP) "feasibility" is one of the fundamentals or basics, let's revisit what is meant by wrap-up "feasibility" and the reasons to conduct a feasibility analysis.

Wrap-up utilization has increased steadily over the past 15 years. Consequently, the field of practitioners has grown proportionately, and the topic of wrap-ups, and of feasibility in particular, can generally elicit some widely differing opinions and approaches. Some opinions about wrap-up feasibility are shaped by experience, some by training, and others are based strictly on anecdotal conversation. In forming one's own basis of understanding, it is important to solicit and consider as many views—including divergent ideas—as possible. With this practice, knowledge or opinions may change or evolve over time. When I look back at my earliest presentation work, I subscribed to a more limited and common definition of the term "feasibility," as applied to wrap-ups, than what is presented below.

Wrap-Up Term Definitions or Descriptions

Wrap-up practitioners have their own language and jargon, and terminology matters. Consistency in language is important to avoid misunderstandings and is in the collective best interest of wrap-up

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practitioners and stakeholders. For the purposes of this discussion, the following are current definitions and descriptions of wrap-up terms I use for the topic of wrap-up feasibility. Fair warning: since IRMI articles often have second lives as reference material, I am including some dry technical definitions and descriptions as backup to support the narrative below and for future reference. If detailed definitions are not your cup of tea, feel free to skip ahead to the next section: **What Is a Wrap-Up "Feasibility"?**

Feasible—Able to be realized. Highly likely to meet the specified goals and attain the desired outcome(s).

Feasibility Analysis—The process of considering, analyzing, and developing a detailed understanding of the following components, both nonfinancial and financial, to help determine the probable feasibility of a controlled insurance program (CIP).

- The project(s) and its/their risk exposures
- The sponsor's specified goals for the project(s)
- Applicable jurisdictional requirements or constraints
- Applicable contractual or lender requirements or constraints, if available
- Sponsor's knowledge, experience, risk tolerance, safety commitment, ability, and inclination to implement a CIP
- Insurance market conditions, coverage and limit availability, and cost
- All risk financing options available to sponsor
- For each available risk financing option, a review of whether the project(s) are likely to meet the specified goals, based on its/their characteristics (e.g., scope, delivery method, contractors, size, location, duration, schedule, labor market, etc.)
- Projection of the likely financial outcome(s) for all viable risk financing option(s) using multiple scenarios (also called pro forma)
- For all applicable risk financing options, a discussion of the advantages and disadvantages of each method

This analysis can be formal or informal, documented, written, or discussed in a meeting or series of meetings. The work can be performed individually or, preferably, as a work team. Risk assessment is especially suited to a collaborative effort.

"A wrap-up pro forma provides a projection of the expected financial outcome(s) of a CIP using data estimated for the project."

Feasibility Study or Feasibility Report—A detailed written report that provides the findings, conclusions, and recommendations as a result of a feasibility analysis. The report should address, at a minimum, the 10 items described above. The drafter may include a recommendation for a particular option(s) based on the result of the analysis. The report may also include additional topics, such as administration, implementation plan, timeline, safety, staffing, and service team considerations.

Pro Forma or Financial Pro Forma or Sensitivity Analysis—A wrap-up pro forma provides a projection of the expected financial outcome(s) of a CIP using data estimated for the project. A pro forma typically includes estimates for some or all of the following components.

- Construction hard cost
- Project payroll
- Contractor credit (i.e., the amount contractors will potentially remove from their bids based on their cost to provide insurance required for the project if a CIP was not implemented. Sometimes called avoided cost.)
- Program fixed cost, including taxes, assessments, inspections, etc., as applicable
- Loss cost, including claim service fees
- Administration cost
- Collateral requirements
- Cash flow options or implications
- Safety cost, including personnel, orientation, equipment, awareness programs, etc., as applicable
- Other costs, including pre-hire and post-accident drug screening, medical trailers, etc., as applicable
- Consultant oversight cost, as applicable
- Savings, as applicable

The pro forma may also include definitions or narrative discussions about the categories listed above.

Risk Financing—"Achievement of the least-cost coverage of an organization's loss exposures, while ensuring post-loss financial resource availability. The risk financing process includes five steps—identifying and analyzing exposures, analyzing alternative risk financing techniques, selecting the best risk financing technique(s), implementing the selected technique(s), and monitoring the selected technique(s)" (partial excerpt from **IRMI Glossary of Insurance**

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Wrap-Up Feasibility, continued from page 2

& Risk Management Terms, with permission).

Risk Financing Options—All potential risk financing options that may be available to a project owner or program sponsor, which may include the following.

- Traditional insurance procurement (non-CIP). All parties provide own insurance.
- Owner controlled insurance program (OCIP). Combined line (includes workers compensation and general liability).
- Contractor controlled insurance program (CCIP). Combined line.
- Owner sponsored general liability only program
- Contractor sponsored general liability only program
- Project specific insurance
- Other nontraditional option(s)

What Is a Wrap-Up "Feasibility"?

With those definitions behind us, it would make life a little less complicated if we could all agree on terminology. However, many wrap-up practitioners regularly use the term "feasibility" or "feasibility study" when they really mean pro forma, as defined above. A pro forma is an important element and is a requirement of a thorough feasibility analysis and feasibility study or report. However, presented on its own, it may be incomplete. That is, it may be missing up to 9 out of the 10 components described above under Feasibility Analysis.

Wrap-up feasibility, or probable feasibility, is generally best determined by a thorough feasibility analysis. That said, there may be times when a pro forma is all that is needed at a particular point in time. This could be the case when a feasibility analysis was previously conducted formally or informally, and an updated pro forma is subsequently published as project information is developed. Or, perhaps a quick pro forma is used to rule out conducting a comprehensive feasibility analysis when savings are the main goal of the sponsor. In that case, however, if the project is deemed financially feasible, the practitioner should still proceed with conducting a complete feasibility analysis to definitively determine or confirm feasibility. In both examples above, it is more accurate to identify such financial projections as pro formas rather than "feasibilities."

If you are curious, you can find both good and bad examples of published feasibility study reports on the Internet to review. Many of these studies are incomplete according to the criteria stated above. Some OCIP feasibility studies fail to mention all risk financing options that may be available to a project owner and are even preferable based on the goals for the project. For example, where a marginally feasible one-off project for a developer may be better suited to a CCIP, and the only comparable option presented in the study is a traditional (non-CIP) approach. It is less common for published feasibility studies to contain any mention of the disadvantages of a CIP approach.

Why Conduct a Feasibility Analysis?

A pro forma only, with no other explanatory narrative, inherently assumes the primary goal of the sponsor is to save money. While that may indeed be one of the sponsor's goals, there are many instances where program savings are not the primary motivation for a sponsor to implement a CIP. It is essential to know the motivation and goals for the program to determine if a CIP is truly feasible. A wrap-up practitioner should not make assumptions about the goals of a sponsor. Some examples of sponsor goals, both financial and nonfinancial, are as follows.

Coverage certainty through statute or repose	Project completed on time
Improved coverage	Project completed on budget
High limit in the event of catastrophic loss	Lowest possible program cost
Effective and streamlined administration	Safe project
Ability to use small and DBE contractors	Zero or very low injuries or losses
Buy-in from general contractor and participants	Max/stipulated amount of contractor credits obtained
Positive or improved public relations	Minimal litigation
Speedy program close-out	Conflict-free claims resolution

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"Wrap-up feasibility, or probable feasibility, is generally best determined by a thorough feasibility analysis."

" It is essential to know the motivation and goals for the program to determine if a CIP is truly feasible."

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Certainty of coverage and high limits are very common sponsor goals. Understanding the goals for the project will help to elicit buy-in by, and the focus of, the project team. Goals may also inform program design and marketing, and provide a basis for the issuance of program status and stewardship reports.

A thorough feasibility analysis can uncover exposures, project characteristics, or sponsor attributes that may affect program success and/or negatively affect the financial outcome. A detailed description of the potential advantages and disadvantages of each applicable risk financing option outlined in a feasibility study is transparent and informative. For example, prior to receipt of a published study, a sponsor may not have fully understood that substantial collateral may be held by the insurer for several years in a combined line program. A pro forma may only disclose the requirement for collateral.

"Understanding the goals for the project will help to elicit buy-in by, and the focus of, the project team."

Additionally, a comprehensive feasibility analysis helps with the marketing process, as the majority of the information needed for putting together the underwriting submission will have been collected and reviewed during analysis. In some cases, all or portions of the feasibility study may be shared with the selected underwriter(s).

As stated above, a feasibility analysis does not always have to result in a published document or report. However, the 10-step analysis process ensures that the topic is well considered and researched. In the unfortunate event of litigation, a detailed written feasibility study or report can be used to demonstrate the intent of the parties and may protect the drafter.

The best interpretation of the wrap-up term "feasibility" is a feasibility analysis. A comprehensive and balanced feasibility analysis, which looks well beyond the pro forma or savings model, can provide essential information about a wrap-up's potential to meet the risk financing and other goals for a sponsor and project.

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of valid claims against insurance companies and reimburse successful insureds for their attorney's fees." *Progressive Express Ins. Co. v. Schultz*, 948 So.2d 1027, 1029-30 (Fla. 5th Dis. Ct. App. 2007). Over the years, there have been numerous attempts by the insurance industry to limit the statute in court; often with little success. The statute can apply even without the benefit of a judgment in the coverage dispute: a settlement can suffice. *Wollard v. Lloyd's & Cos. Of Lloyd's*, 439 So.2d 217, 218 (Fla. 1983). And recovery can be had even where a policyholder is found to have committed fraud, so long as the contractual entitlement to coverage is proven. *Citizens Prop. Ins. Corp. v. Bascuas,* 178 So.3d 902 (Fla. Dist. Ct. App. 3d Dist. 2015). In the latest foray, the Florida Supreme Court considered whether the statute requires a showing of bad faith. The answer: a resounding no.

In *Omega Ins. Co. v. Johnson*, Johnson filed a sinkhole claim with Omega after noticing structural damage to her home. 2014 Fla. App. LEXIS 13737 (Fla. 5th Dist. Ct. App. Sept. 5, 2014). Under Fla. Stat. 626.707, an insurer investigating a sinkhole claim must inspect the property, determine whether any damage is due to sinkhole activity, and allow the policyholder the opportunity to request a neutral evaluator. Omega hired a professional firm to inspect Johnson's property, concluded that a sinkhole was not the source of the damage, and denied Johnson's claim. The sinkhole statute gave the insurer's report a presumption of correctness and the court shifted the burden to Johnson to rebut Omega's findings. Johnson then hired a firm to conduct an independent review and that study concluded that her damage was the result of sinkhole activity. Based on that information, Johnson sued Omega.

Omega received Johnson's independent report during discovery and sought a neutral evaluation. The neutral evaluator reached the same conclusion as Johnson, prompting Omega to change course and pay the claim, with one exception: Johnson's attorney's fees. Relying on *State Farm Florida Ins. Co., v. Colella*, 95 So.3d 891, Omega argued that because it did not withhold Johnson's policy benefits, a fee award was inappropriate.

In *Colella,* the insurer denied plaintiff's claim for sinkhole damages and plaintiff brought suit. When the insurer sought a neutral evaluator, the policyholder refused to cooperate, leading the evaluator to recommend that a third-party perform additional testing. Rather than hire an additional engineer, the insurer paid the claim, which, as the trial court noted, was so the insurer could avoid the costs and expenses of litigating a case with an uncooperative counterpart. After the insurer issued payment, the policyholder argued that the payment constituted a confession of judgment and as such, she was entitled to attorney's fees. The record revealed, however, that the insurer had offered to pay the policyholder's fees and costs. Based on the questionable facts and suspect actions of the policyholder, the court con-

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cluded that insurer's "compliance with the sinkhole statute goes a long way to fulfilling State Farm's obligations under its contract." In *Omega*, Omega essentially argued that because it had complied with the sinkhole statute, it had no obligation to pay under 627.428. The Fifth District agreed and held that section 627.428 required a finding of bad faith by the insurer to justify a fee award.

The Supreme Court felt otherwise. In *Johnson v. Omega Ins. Co.,* No. SC14-2124 (Fla. Sept. 29, 2016), the court reasoned that the Fifth District's ruling conflicted with two cases, *Universal Insurance Co. of North America v. Warfel,* 82 So.3d 47 (Fla. 2012) and *Ivey v. Allstate*, 774 So.2d 679 (Fla. 2000). First, *Warfel* established that the presumption of correctness granted to an insurer's report only applied to the initial claims process and did not continue to apply during the trial stage nor does it preclude an award of attorney's fees. Therefore, Johnson did not have the burden of rebutting the initial Omega report with an independent review. Second, *Ivey* established that in order to award attorney's fees, section 627.428 simply required an insurer to incorrectly deny policy benefits. The insurance company's "good faith in bringing suit is irrelevant. If the dispute is within the scope of section 627.428 and the insurer loses, the insurer is always obligated for attorney's fees. An insurer's intentions do not factor into a policyholder's recovery of fees, [if anything], bad misconduct on the side of the policyholder is more relevant to an award of attorney's fees." Furthermore, *Colella* does not support a requirement of bad faith or malicious conduct under 627.428. In that case, the insured's misleading conduct, not the insurer was the relevant factor in determining whether to award attorney's fees and the court was concerned with allowing an insured who litigates in bad faith to profit from a technicality. Here, there was nothing to suggest that Johnson acted maliciously or in bad faith. She cooperated fully with all aspects of the investigation and had she not sought an independent contractor, her claim would have been improperly denied.

The Supreme Court concluded that "once an insurer has incorrectly denied benefits and the policyholder files an action in dispute of that denial, the insurer cannot abandon its position without repercussion. To allow the insurer to backtrack after the legal action has been filed…eliminates the insurer's burden of investigating a claim."

Fla. Stat. § 627.428 consistently receives strong support from Florida jurists, with *Omega* effectively silencing any debate over the threshold for recovery. Insurers should take great care in issuing coverage decisions, while policyholders would do well to recognize the import of the statute and proactively make use of it in any coverage dispute. IM

"If the dispute is within the scope of section 627.428 and the insurer loses, the insurer is always obligated for attorney's fees."

SAVE THE DATES—Winter 2016-2017 Risk Management Series

Designed for both Real Estate, Probate & Trust Law Practitioners

Monday, November 21, 2016
Presentation Title: ***Risk Management Overview—Identifying and Analyzing Risks***
Summary: The first segment of the Risk Management Series will provide the listener with an overview of risk management addressing the following: the varied risks that affect most businesses; what risk professionals mean by the term "risk management"; what the different steps are in effectively analyzing risks; how businesses can and should develop and implement a risk management strategy(ies); and what is (or should be) the role of an attorney in assisting clients in managing risks.
Speaker: Craig F. Stanovich, CPCU, CIC, CRM, AU, Founding Partner of Austin & Stanovich Risk Managers LLC, which is a national risk management and consulting firm. Craig may be contacted by email at cstanovich@austinstanovich.com, or by phone at 508-829-8844.

Monday, December 19, 2016
Presentation Title: ***Risk Control—Implementation of Risk Management Plan and Policies***
Summary: Part Two of the Risk Management Series will provide the listener with an understanding of how risk management professionals analyze risks and work with businesses to successfully implement internal business policies, plans and procedures for managing their unique risks.

Monday, January 23, 2017
Presentation Title: ***Risk Finance/Risk Retention—Financing Business Risks***
Summary: Part Three of the Risk Management Series will provide the listener with an understanding of the different ways in which a business can protect itself against certain risks by financing the varied risks a business may face, whether by procuring insurance to cover those risks or by self-financing (self-insuring) against those risks.

Monday, February 27, 2017
Presentation Title: ***Risk Finance/Risk Transfer—Contractually Managing and Balancing Risks***
Summary: Part Four of the Risk Management Series will provide the listener with an overview of how attorneys can help their clients to effectively and successfully manage their risks through contractual negotiation, balancing, and transfer of certain risks. IM

http://www.rpptl.org

Committee Mission Statement

The purpose of the Insurance and Surety Committee is to educate the RPPTL Section of the Florida Bar on insurance, surety and risk management issues. The ultimate goal is to grow the Committee to the point it can seek Board Certification in Insurance and Risk Management. IM

Leadership & Subcommittees

Interested in getting involved? Contact one of the persons below:

Co-Chair - Wm. Cary Wright (cwright@carltonfields.com)
Co-Chair, Secretary & Newsletter - Scott P. Pence (spence@carltonfields.com)
Co-Vice-Chair - Frederick R. ("Fred") Dudley (dudley@mylicenselaw.com)
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Legislative Liaison - Louis E. "Trey" Goldman (treyg@floridarealtors.org)
Website - Derrick M. Valkenburg (DValkenburg@shutts.com)
Membership - ***Open***

Schedule of Upcoming Committee Meetings

- Do you know the difference between the various forms of additional insured endorsements?
- Do you understand your ethical obligations when representing sureties and their principals?
- Do you know what a "your work" exclusion is?
- Can you describe the difference between an additional insured and a loss payee?
- Do you understand the risks to your clients if they fail to obtain a waiver of subrogation?
- Do you know the difference between "claims made" and "occurrence" based insurance policies?

Get answers to these, and many other questions, by attending our **FREE** monthly CLE programs.

When: Noon - 1:00 P.M. ET on the third Monday of every month, excluding government holidays.
Where: Via Teleconference
How: Dial-in number: **888-376-5050**
Participate Code: **7854216320#**

The first part of each teleconference is devoted to Committee business, followed by an insurance/surety-related CLE presentation that lasts approximately 45-50 minutes.

If you, or someone you know, might be interested in presenting at an upcoming meeting, please let us know.

Schedule of Upcoming RPPTL Section Meetings

December 7-11, 2016
Executive Council Meeting
The Westin Resort and Marina
Key West, Florida

February 22-25, 2017
Out-of-State Executive Council Meeting
Four Seasons Hotel
Austin, Texas

May 31-June 4, 2017
Executive Council Meeting & Convention
Hyatt Regency Coconut Point
Bonita Springs, Florida

If you, or someone you know, would like to submit an article for possible inclusion in a future issue of ***Insurance Matters!***, please contact me at spence@carltonfields.com.

We Need You!

We are in need of persons to assist in leading various sub-committees. Please contact us if you would like to become more involved.

Did you know?

You can access previous issues of Insurance Matters!, as well as agendas, meeting minutes, presentation materials & CLE posting information from past committee meetings at our Committee Page once you've logged in to the RPPTL website located at http://www.rpptl.org.

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