



# 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

## Representations and Warranties Insurance Fundamentals

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Representations and Warranties Insurance (“RWI”) is one of the hottest trends in insurance through the first half of 2015. Although Representations and Warranties Insurance has been available for over a decade, it has only recently moved into the mainstream as a common means of allocating risk and increasing deal value in mergers and acquisitions transactions. Understanding the fundamentals of this insurance product can help transform one’s approach to getting a deal done in an increasingly fast-paced and competitive M&A marketplace.



### FAQs – What is it?

RWI is a specialized insurance product that protects against unknown and unanticipated financial losses post-closing that result from inaccuracies in, or breach of, contractual representations and warranties contained in transaction documents. The policy language tracks the terminology used in the underlying transaction agreement and covers only unknown risks at the time of closing - not identified contingent liabilities. Typical representations and warranties covered by RWI can include financial statement warranties, compliance with environmental laws, inventory levels, vendor contracts, no undisclosed litigation or tax liabilities, and employee benefits funding. RWI may exclude from coverage consequential damages, post-closing purchase price adjustments, exceptions to representations and warranties on disclosure schedules, fraudulent transfers, forward looking statements or projections, misrepresentations in a closing letter, and pension underfunding. Other industry-specific exclusions – such as asbestos for heavy manufacturing – may also come into play.

**See Reps & Warranties**, continued on Page 2

## Avoiding Scams After a Disaster

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For more information, please visit [www.iii.org](http://www.iii.org).*

If your home was destroyed by a hurricane, wildfire or other disaster, be cautious.

Unfortunately, there are dishonest service providers that prey on disaster victims. They know that people who have lost their homes and valuables may not be thinking clearly. If you have suffered this type of loss, don’t make any rash decisions. Talk to your insurance agent, who may recommend service providers in your area.

**See Avoiding Scams**, continued on Page 3

## Reps & Warranties, continued from page 1

### Who Benefits From RWI?

The Insured can be either the buyer or the seller. Current estimates suggest that 80% of the current market is for Buy-Side policies, where the buyer is the insured. But as recently as five years ago, the RWI market was much more evenly split between Buy-Side and Sell-Side policies. A “Buy-Side” policy provides first-party coverage, allowing the buyer to recover from the insurer for its losses due to a seller’s breach of a representation or warranty. A “Sell-Side” policy provides third-party liability coverage, allowing the seller to tender to its insurer a claim from the buyer alleging that the seller mistakenly breached a representation or warranty made at the time of closing.

For buyers, RWI offers more secure deal protection, especially if the seller will be dissolved post-transaction or if pursuing an indemnity claim against the seller would prove difficult (due to numerous shareholders, poor credit risks, etc.). In addition, this coverage helps preserve a buyer’s relationship with a seller’s principals, an important consideration in instances where a buyer employs such individuals post-transaction. Also, the policy period generally will exceed the survival period negotiated in the transaction agreement, giving a buyer a longer period of time to detect breaches. Lastly, RWI is often seen as a cleaner bid in a competitive auction environment.

For sellers, RWI can reduce tension among seller groups over how to allocate liability for breaches. It may also lessen or eliminate a seller’s indemnification obligations. By shifting the risk of unintentional breaches to an insurer, RWI frees up a seller’s capital more quickly and minimizes the risk of future, costly legal claims. Both buyers and sellers can utilize RWI to resolve impasses in negotiations over whether a specific representation or warranty will be issued, the scope, duration and limits of an indemnity, or the size of an indemnification escrow.

### What is the Current State of the RWI Market?

Underwriters are struggling to respond to the increased demand for RWI, and, as a result, are focusing on larger transactions. The average RWI deal size is approaching \$150 million, and the minimum deal size is generally between \$10 million and \$15 million. A decade ago, insureds considering RWI faced premiums at up to 10% of policy limits. Today, premiums generally cost 3-4% of policy limits, although smaller deals may require higher premium (5%). The market has improved underwriting processes that allow coverage to be bound in as quickly as a few days. Policyholders continue to be concerned, however, about the lack of data as to how often RWI claims are being paid – to date, there is still only anecdotal evidence available about the frequency of claims and how those claims have been resolved.

### How Does RWI Fit into the Deal Process?

First, a discussion with the insurance market regarding potential coverage structures will need to occur. In order to have such conversations, the insurers will need to review the proposed deal structure, financial statements and any drafts of the transaction documents (including disclosure schedules, if available). Once provided with quotes, your broker and counsel can review and analyze potential structure options.

Once a carrier is chosen, final underwriting and policy negotiations can begin. The carrier will review summaries of due diligence materials and reports and the revised drafts of the transaction documents and disclosure schedules. There will often be discussions with the deal team about various aspects of the transaction. It’s important to involve coverage counsel as well as deal counsel in the review of the proposed language, as RWI is a highly negotiated insurance product. Coverage counsel can work with the broker to ensure that favorable terms are included and that the policy language tracks the terminology used in the underlying transaction agreement. IM

“... Although Representations and Warranties Insurance has been available for over a decade, it has only recently moved into the mainstream as a common means of allocating risk.”



## Avoiding Scams, continued from page 1

Here are some basic guidelines for hiring service providers:

### Roofers and Builders

1. Don't be rushed into signing a contract with any company. Instead, collect business cards and get written estimates for the proposed job.
2. Beware of building contractors that encourage you to spend a lot of money on temporary repairs. Payments for temporary repairs are covered as part of the total settlement. If you pay a contractor a large sum for a temporary repair job, you may not have enough money for permanent repairs. In most cases, you should be able to make the temporary repairs yourself. Ask your insurance agent. And remember to keep receipts.
3. Investigate the track record of any roofer, builder or contractor that you consider hiring. Look for professionals that have a solid reputation in your community. You can call your Better Business Bureau for help. Also, get references and never give anyone a deposit until after you have thoroughly researched their background.

A common fraud scheme is for a so-called "contractor" to convince a homeowner that a large deposit must be provided before repair work can begin. Frequently, the job will be started, but not completed. Unfortunately, these con artists are never seen or heard from again.

### Public Adjusters and Attorneys

1. Don't make any rash decisions about hiring someone to handle your claim. Be especially wary of individuals who go door-to-door soliciting business in the aftermath of a catastrophe. Most importantly, don't let anyone scare you into signing a contract. You don't want to be victimized by someone who comes into town, hoping to make a fast buck. You could end up forfeiting a significant portion of your insurance dollars.
2. Before hiring a public adjuster or an attorney, try to settle your claim directly with your insurance company. Your insurer provides an adjuster at no charge to you. Ask your insurance agent or company representative to help you with your claim and don't be afraid to ask questions. If you decide to work directly with your insurer, you still have the right to hire a third-party professional to help you.
3. If your claim is complicated and you want to hire a public adjuster or attorney, make sure that person is qualified to handle your case. Ask your friends, relatives or business associates for the names of well-regarded professionals in your community. Also, call your state insurance department regarding a public adjuster, and your state or county bar association about a prospective attorney.
4. Understand that you will have to pay a public adjuster 15 percent and an attorney as much as 30 percent of your total claim settlement. 

*"A common fraud scheme is for a so-called 'contractor' to convince a homeowner that a large deposit must be provided before repair work can begin."*



### **SAVE THE DATE**

**September 16, 2015**

A special Section-wide CLE presentation on behalf of the Insurance and Surety Committee:

#### **Cyber and Data Risks and Related Insurance Issues**

to be presented by:

**Richard "Rick" Betterley, CMC**  
**Jeremy R. Henley, CHPC**  
**Roberta D. Anderson, Esq.**

Check the RPPTL Section's web page for more details about this and other CLE programs.

## 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. 

## Leadership & Subcommittees

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

Co-Chair - Wm. Cary Wright (cwright@cfjblaw.com.com)  
 Co-Chair, Secretary & Newsletter - Scott P. Pence (spence@cfjblaw.com.com)  
 Co-Vice-Chair - Frederick R. ("Fred") Dudley (dudley@mylicenselaw.com)  
 Co-Vice-Chair and CLE - Michael G. Meyer (michael@jrtampalaw.com)  
 Legislative Subcommittee - Sanjay Kurian (skurian@becker-poliakoff.com)  
 Legislative Liaison - Louis E. "Trey" Goldman (tre yg@floridarealtors.org)  
 Website - *Open*  
 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 45-60 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

September 30-October 4, 2015  
 Out-of-State Executive  
 Council Meeting  
 The Ritz Carlton  
 Berlin, Germany

November 11- 15, 2015  
 Executive Council Meeting  
 Boca Raton Resort and Club  
 Boca Raton, Florida

February 25 - 28, 2016  
 Executive Council Meeting  
 Marriott Tampa Waterside  
 Tampa, 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@cfjblaw.com](mailto:spence@cfjblaw.com).



### *We Need You!*

We are in need of persons to chair our website and membership subcommittees. Please contact us if you would like to get 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>.

<http://www.rpptl.org>