RISK[Y] BUSINESS: TRANSITIONING TO A STAND-ALONE SELF-INSURANCE PROGRAM

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I. INTRODUCTION

In today's modern society, all actions are measured against risk. Although not exactly the same as Newton's third law, it is without doubt that both individuals and the collective of present-day society must evaluate how likely any given action will result in a possible negative consequence. Generally speaking, this is the core understanding of "risk." The different consequences can be physical, financial, mental, or even emotional. But regardless of the category of risk that is being evaluated and the correlated potential negative outcome, it is almost impossible to simply

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avoid understanding risk and continue to survive in today's world.

As mentioned above, risk is a concept that is present in virtually all areas of society. This includes risks for businesses, government agencies, and even nonprofit entities. This Article focuses on the application of risk in the context of local government in Florida—specifically municipalities—and the reasons why it is necessary to understand risk and reasonably mitigate risk. Understanding and mitigating risk is accomplished by the process known as "risk management."

There are many different tools utilized in risk management. They include changing risky behaviors through both positive incentives—such as an accident-free safety bonus—and negative punishments—such as discipline or termination for risky behavior. Another tool is to evaluate whether the action or program is worth having in place—such as "stop and frisk" police interactions or operating a public pool—and possibly discontinuing it. Perhaps the most well-known risk management tool is the use of insurance. Insurance, in its most basic form, is essentially legalized gambling, but in the negative. It is the practice of paying a certain amount of money today so that if a negative event happens in the future, the insured will receive more money to offset the cost of the negative event.

There are many insurance companies that will provide insurance to address any and all manner of risk: auto liability, auto comprehensive and collision, property damage, even terrorism and catastrophic events coverage. Many of these insurance policies require only payment of an annual premium. After that, in the event of a covered claim, the insured may not have to pay anything else or may only have to pay a small deductible. However, as an alternative to the traditional full coverage or "fully insured" model, there is another approach. Today, it is possible for governments to be "self-insured," such that the entity has no insurance policy or an insurance policy that requires the government to "self-pay" most of a claim. In exchange, the policy itself has a much smaller annual premium.

The focus of this Article is to explore and analyze the "self-insured" approach to risk management by a municipality. The Article begins with necessary exploration of the types of risk most often facing municipalities and the implication of sovereign immunity in Florida when evaluating those risks. The Article then delves into a more in-depth discussion of the differences between fully insured and self-insured risk management programs, followed by an examination of the several factors most often utilized in deciding whether a municipality might choose a self-insured risk management program. Finally, the Article discusses the case study of the City of Palm Bay's risk management program and submits for the reader's conclusion, "where do we go from here"?

II. THE HISTORY OF RISK MANAGEMENT

A. Negligence

A plaintiff's ability to bring a negligence claim against a governmental entity depends upon a waiver of sovereign immunity. While argument exists as to the origin of sovereign immunity and whether it was based on the personal prerogative of the king of England or the notion that the crown was divine and could do no wrong, sovereign immunity dates back to the feudal system.[1] Even though the king could not be sued, if one was injured by the king's ministers, he could petition the king for reprieve.[2] Most petitions for legal relief pertained to real property disputes; however, "[t]he early precedents may even be read as allowing a petition of right against the king for the torts of his servants."[3]

The United States government fully accepted the sovereign immunity doctrine in the early 1800s when the Court stated that

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1. Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 458 n.1 (Cal. 1961) (citations omitted).

> In the feudal structure the lord of the manor was not subject to suit in his own courts. The king, the highest feudal lord, enjoyed the same protection: no court was above him. Before the sixteenth century this right of the king was purely personal. Only out of sixteenth century metaphysical concepts of the nature of the state did the king's personal prerogative become the sovereign immunity of the state.

Id.; *see also* State v. Love, 126 So. 374, 377 (Fla. 1930) ("The legal doctrine that a sovereign state is immune from suit is an ancient one. . . . [I]t probably had its origin in the old theory that sovereignty was inherent in the crown, and that the king could do no wrong, and hence could not be sued.").

2. Cauley v. City of Jacksonville, 403 So. 2d 379, 381 (Fla. 1981); *see also Muskopf*, 359 P.2d at 460 (citations omitted) (explaining that only those who were injured by governmental agency could recover money).

3. *Muskopf*, 359 P.2d at 458 n.1 (citations omitted).

"no suit can be commenced or prosecuted against the United States,"[4] or an independent State, "except by its own consent."[5] The Court later reasoned that "[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[6]

The majority of American states adopted the sovereign immunity theory as well—the "legislative bodies are vested with the authority to grant relief for governmental wrongs through waiver of immunity"[7]—much like the king in feudal England. Florida adopted sovereign immunity in its earliest forms of a constitution and included the power of the Legislature to waive the immunity.[8] As the Florida Supreme Court explained, "It is to the interest of the state that its immunity from suit shall be maintained and protected until the state itself, through its Legislature, by the methods pointed out in the Constitution, consents to waive or withdraw such immunity."[9] The entities entitled to this sovereign immunity were the federal government,[10] the state government,[11] the counties as political subdivisions of the state,[12] and "public institutions created, owned, and controlled by the state or its subdivisions,"[13] such as school boards or county utility districts. Municipalities, however, do not have absolute sovereign immunity as they are not subdivisions of the State.[14] Any immunity they have is from the common law courts.[15]

4. Cohens v. Virginia, 19 U.S. 264, 411–12 (1821).

5. *Id.* at 380.

6. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

7. *Cauley*, 403 So. 2d at 381.

8. *See* FLA. CONST. art. IV, § 19 (1868); FLA. CONST. art. III, § 22 (1885); FLA. CONST. art. X, § 13 (1968).

9. State v. Love, 126 So. 374, 377 (Fla. 1930).

10. Cohens v. Virginia, 19 U.S. 264, 411–12 (1821).

11. *Cauley*, 403 So. 2d at 381.

12. Kaulakis v. Boyd, 138 So. 2d 505, 507 (Fla. 1962) ("Counties, unlike municipalities, are organized as political subdivisions of the state and constitute a part of the machinery of the state government. Therefore, it has been held that they partake of the sovereign immunity from liability.") (citations omitted).

13. Gerald T. Wetherington & Donald I. Pollock, *Tort Suits Against Governmental Entities in Florida*, 44 FLA. L. REV. 1, 10 (1992).

14. City of Tampa v. Easton, 198 So. 753, 754 (Fla. 1940) ("Unlike a county, a municipality is not a subdivision of the State with subordinate attributes of sovereignty in the performance of governmental functions and correlative limited privileges, immunities

Even though the Constitution allowed the Legislature to waive immunity, the Florida Legislature "did not authorize a comprehensive, long-term, waiver of sovereign immunity, as permitted by Article X, section 13 of the Florida Constitution, until 1973, when the Florida Legislature enacted Florida Statutes [section] 768.28."[16] Today, section 768.28(1) provides, in pertinent part,

> [i]n accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.[17]

Even though constitutional sovereign immunity did not apply to municipalities,[18] municipalities still enjoyed common law immunity.[19] The Florida Legislature specifically included municipalities in the waiver, stating, "As used in this act, 'state agencies or subdivisions' include . . . the independent establishments of the state, including state university boards of trustees; counties and *municipalities*."[20] The enactment of the statute effectively waived sovereign immunity for tort actions brought against any state agencies or subdivisions listed in the statute, and plaintiffs could now bring negligence claims against the state.

and exemptions from liability for negligence of its employees or in other respects as may be recognized or provided by law.").

15. Wetherington & Pollock, *supra* note 13, at 11.
16. *Id.* at 6.
17. FLA. STAT. § 768.28(1) (2016).
18. *Easton*, 198 So. at 754.
19. *Id.*
20. FLA. STAT. § 768.28(2) (emphasis added).

But the waiver of sovereign immunity is limited. Courts have determined that the waiver does not apply to all governmental functions. The Florida Supreme Court held that "even absent an express exception in section 768.28," exceptions existed "for discretionary functions, certain policy-making, planning or judgmental governmental functions."[21] The Florida Supreme Court has further explained that "capital improvements and property control operations . . . and . . . providing professional, educational, and general services for the health and welfare of the citizens," were governmental functions that could give rise to liability, while "legislative, permitting, licensing, and executive officer functions[,] . . . enforcement of laws and the protection of the public safety," were functions for which the government possesses no duty of care.[22] The waiver is also limited by damages. The statute places a cap on the damages a plaintiff can recover at $200,000 per claim and $300,000 per incident.[23]

Even with the cap on damages, the waiver places a financial burden on governmental entities. The government could be liable for up to $300,000 per incident.[24] But this figure neither includes the opposing party's attorneys' fees—which may constitute up to twenty-five percent of any judgment or settlement—nor the opposing party's costs, which are not capped.[25] And even with the $300,000 cap, claimants can still ask the Legislature to approve a claims bill to allow them to collect amounts awarded above the cap.[26]

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21. Com. Carrier Corp. v. Indian River Cnty., 371 So. 2d 1010, 1020 (Fla. 1979).
22. Trianon Park Condo. Ass'n, Inc. v. City of Hialeah, 468 So. 2d 912, 919 (Fla. 1985).
23. FLA. STAT. § 768.28(5) (2016).

> Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $200,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $300,000.

Id.

24. *Id.*

25. FLA. STAT. §§ 768.28(8), 57.041(1). The cap includes attorneys' fees and costs: "[U]nder the statute as written, the trial court did not err in determining that the cap on the total amount of recovery includes any amounts recovered for attorney's fees and costs." Bd. of Trustees of Fla. State Univ. v. Esposito, 991 So. 2d 924, 928 (Fla. 1st Dist. Ct. App. 2008). The plaintiff would need a claims bill for any amount over the cap.

26. FLA. STAT. § 768.28(5) ("[A]nd that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature."); *see also, e.g.*, Gerard v. Dep't of Transp., 472 So. 2d 1170, 1172 (Fla. 1985) ("[W]hile the legislature has placed limits on recovery, 'claimants remain

Thus, governmental entities buy insurance for three primary reasons: (1) to indemnify their employees, alleviating their fear of having a judgment against them; (2) to protect the public because governmental entities have to use taxpayer dollars to pay judgments; and (3) to avoid monetary responsibility in the event that the Legislature passes a claims bill requiring payment.[27] "Although legislative claims bills are rare, they are an insurable contingency."[28]

Governments have options on the means of insurance for this particular waiver of sovereign immunity.

> Florida courts recognize different mechanisms for insuring governmental entities.
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> . . .
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> There are six options a governmental entity has to guard against a possible lawsuit: (1) do not protect from suit at all; (2) insure only up to $[3]00,000; (3) self-insure only up to $[3]00,000; (4) self-insure up to $[3]00,000 and take out excess liability insurance for amounts over $[3]00,000; (5) self-insure (over $[3]00,000); or (6) purchase only commercial insurance.[29]

The statutes also allow governmental entities to self-insure, obtain liability insurance, or a combination of both, and enter into risk management programs for the purpose of waived sovereign immunity.[30] However, each choice of insurance has its advantages and disadvantages, as discussed below.

The waiver of sovereign immunity for torts paved the way for risk management to expand from the private sector into the government sector as well. Now that the state agencies listed in section 768.28 could be held liable for negligence, governmental agencies needed to have coverage against claims. Today, a

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free to seek legislative relief bills, as they did during days of complete sovereign immunity.'" (citations omitted)); City of Lake Worth v. Nicolas, 434 So. 2d 315, 316 (Fla. 1983) (upholding the decision in *Berek*); Berek v. Metro. Dade Cnty., 422 So. 2d 838, 839 (Fla. 1982) (citing the provision in Florida Statutes, section 768.28(5), which allows the Legislature to award above the capped amount).

27. Robert L. Blank, *Pulling the Nails Out of the Avallone Coffin: Should Excess Liability Coverage on a Self-Insurance Fund Constitute A Waiver of Sovereign Immunity?*, 20 STETSON L. REV. 971, 985 (1991).

28. *Id.*

29. *Id.* at 981, 986.

30. FLA. STAT. § 768.28(16)(a).

competent risk management program is absolutely instrumental in considering whether a stand-alone self-insurance program is the right fit for a governmental entity. For this reason, it is strongly recommended that the agency's risk management program be placed under the care of the local government's attorney's office, for only licensed attorneys are competent to evaluate and defend against active litigation and threatened or pending litigation.

B. Workers' Compensation

When discussing workers' compensation in an insurance context, it is important to note that workers' compensation is a social form of insurance, like unemployment or social security, and is the oldest social insurance.[31] Workers' compensation began during the Industrial Revolution of the late 1800s in Europe.[32] As the Industrial Revolution progressed, the realization of the dangers of being a factory worker increased as well as the number of on-the-job injuries.[33] Countries "developed programs that provided workers with medical care for on-the-job injuries and compensated them for lost wages while they recovered."[34] However, this system was more employer-liability based, and the amount of cases grew as the legal profession started taking on the issue.[35] This caused the courts to become backlogged.[36] It became clear that the current liability system was not working, so a "workmen's compensation" act was implemented.[37]

Some states attempted to create programs to aid workers injured on the job in the late 1800s and early 1900s, but modeled the programs as employer liability.[38] The implementation of these programs caused the same backlogging issues seen in Europe.[39]

31. Lloyd Harger, *Workers' Compensation, A Brief History*, MYFLORIDACFO.COM, http://www.myfloridacfo.com/Division/WC/InfoFaqs/history.htm (last visited Apr. 2, 2017).
32. Timothy A. Watson & Michael J. Valen, *A Historic Review of Workers' Compensation Reform in Florida*, 21 FLA. ST. U. L. REV. 501, 502 (1993).
33. *Id.*
34. *Id.*
35. Harger, *supra* note 31.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

This prompted the United States government to take action—in 1908, the Federal Employer's Liability Act was enacted.[40]

Following the Federal Employer's Liability Act, states began to adopt their own workers' compensation laws, with the most significant change happening in Wisconsin in 1911 when "the employer agreed to provide medical and indemnity (wage replacement) benefits and the injured employee agreed to give up his/her right to sue the employer."[41] "In 1917, the United States Supreme Court upheld the constitutionality of . . . workers' compensation laws. . . . These decisions removed most of the constitutional concerns, and state workers' compensation systems proliferated. Within three years, forty states had adopted workers' compensation systems."[42]

Today, every state has, in some fashion, a workers' compensation act.[43] They may vary as to classification and level of benefits provided, but some form of protection for the worker is mandatory across the nation.[44] As discussed above, all programs arose historically as no-fault systems, where employers would agree to provide medical care and lost wages for industrial accidents, regardless of fault.[45] In exchange, the employee forfeits the right to pursue the employer in negligence.[46] In many states, this trade-off has evolved considerably over the last century.[47]

Because Florida's industry was more limited to agriculture and mining, it did not adopt workers' compensation laws until the 1930s during the Great Depression.[48] "Florida started an aggressive campaign to attract business to the warmer, more economical climate in mid-depression," and workers'

40. *Id.*

41. *Id.*; *see also* Robert Asher, *The 1911 Wisconsin Workmen's Compensation Law: A Study in Conservative Labor Reform*, 47 WIS. MAG. OF HIST. 123, 131–36 (1974) (providing an overview of how the first workers' compensation laws were drafted in Wisconsin lead by the Industrial Insurance Committee involving "enlightened employers" from companies like the International Harvester Company, Allis-Chalmers Company, Pabst breweries, and National Association of Manufacturers).

42. Watson & Valen, *supra* note 32, at 503.

43. Harger, *supra* note 31.

44. *Workers' Compensation Laws by State*, FINDLAW.COM, http://injury.findlaw.com/workers-compensation/workers-compensation-laws-by-state.html (last visited Apr. 2, 2017).

45. Watson & Valen, *supra* note 32, at 501.

46. *Id.*

47. *See id.* (explaining that workers' compensation laws have "evolved into a complicated and confusing system").

48. Harger, *supra* note 31.

compensation laws were necessary to meet the growing industrial employment.[49] Florida passed its first workers' compensation statute in 1935.[50]

Since the adoption of the law in 1935, Florida's workers' compensation laws have gone through many changes. This quid pro quo of employers providing benefits while employees forfeit their right to sue the employer in negligence was originally billed as "The Grand Bargain" during the debates over the 1968 Constitutional Revisions.[51] Then, in 1970, the Florida Workers' Compensation Act statutorily became the "exclusive remedy" for employees, and employers officially were immune from actions in negligence.[52] With the sweeping 2003 legislative reforms of Chapter 440, Florida's Workers' Compensation statute, the "Grand Bargain" became less equitable as applied to many employees.[53]

Thus, in Florida from essentially the 1970s to about 2007, the only way for an employer to be at risk for litigation would be in situations that essentially rose to the level of an intentional tort (e.g., strict liability, negligent security, or assault). Most straight workers' compensation policies had an addendum, commonly called "Coverage B," for these claims, as well as for spoliation of evidence and other discovery violations.[54] Until recently, recovery under those policies was capped at $100,000.00,[55] and the only way an employee could recover more was through a separate Employer Liability policy. However, that

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49. *Id.*

50. *Id.*

51. *See, e.g.*, Scott Szymendera, *Reviewing Workers' Compensation for Federal Employees*, CONG. RES. SERVICE, at 2 (May 12, 2011), *available at* http://edworkforce.house .gov/uploadedfiles/05.12.11_szymendera.pdf (noting that "[w]orkers' compensation is commonly referred to as 'the grand bargain'"); *see also* Harger, *supra* note 31 (referencing this quid pro quo as the "great trade-off").

52. *See* FLA. STAT. § 440.03 (Supp. 1970) (explaining that workers' compensation liability applies to "[e]very employer and employee"). For a more detailed account of the 1970 amendment to Florida's Workers' Compensation Act, see Viktoryia Johnson, *Florida Workers' Compensation Act: The Unconstitutional Erosion of the Quid Pro Quo*, 45 STETSON L. REV. 119, 127–29 (2015).

53. *See, e.g.*, Initial Brief of Petitioner, at 9–10, Stahl v. Hialeah Hosp., 191 So. 3d 883 (Fla. 2016) (No. SC15-725) (providing an excellent summary of this metamorphosis).

54. *See, e.g.*, Francis J. Mootz III, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1, 11 (1997) ("Coverage B provides coverage to the insured for certain intentional torts it commits against others.").

55. *E.g.*, Mark L. Zientz, *Dr. Strangelaw: Or How I Learned to Stop Worrying and Love Coverage B*, MZLAW.COM, http://www.mzlaw.com/PUBLISHEDARTICLES/Article-CovB .html (last visited Apr. 2, 2017).

coverage is not mandatory. In our experience, while employers did see fewer petitions and lower fees paid out in the first few years following the 2003 changes, they did not necessarily benefit from the reduced premiums promised.

The State of Florida (Department of Risk Management), counties, municipalities, and cities are treated no differently than private companies in terms of the requirements to cover and protect their employees.[56] In fact, the most recent constitutional challenge to the "Grand Bargain" arose out of a municipal workers' compensation claim. As the Florida Supreme Court held:

> We conclude that [section 440.15(2)(a)] of the worker's [sic] compensation statute is unconstitutional under [A]rticle I, section 21, of the Florida Constitution, as a denial of the right of access to courts, because it deprives an injured worker of disability benefits under these circumstances for an indefinite amount of time—thereby creating a system of redress that *no longer functions as a reasonable alternative to tort litigation*.[57]

As a result of this ruling, indemnity benefits in workers' compensation claims have now, at the very least, been increased from a maximum of 104 weeks to 260 weeks.[58] What does this mean for municipalities? In our experience, municipal employees are not transient, short-term workers, but rather pension-driven and motivated to return to work, leaving their claims open and unsettled. Governmental agencies are hard pressed to secure a resignation at the time of a settlement, and thus, these claims normally stay open for several years. With the changes in the law as directed by the Florida Supreme Court (as to indemnity as well as to attorneys' fees this year), all employers face much greater exposure.

Thus, it is even more incumbent upon employers, both public and private, to take and maintain greater control over their Risk

56. *See, e.g.*, FLA. STAT. § 440.03 (2016) (providing that the Florida workers' compensation laws apply to "[*e*]*very employer* and employee" (emphasis added)).

57. Westphal v. City of St. Petersburg, 194 So. 3d 311, 313 (Fla. 2016) (emphasis added).

58. *Id.* at 319. This implication is based on the Florida Supreme Court's ruling in *Westphal*. The Court reasoned that if it strikes down unconstitutional language in a statute, and there was a predecessor statute, the appropriate remedy is that the predecessor statute is automatically revived unless it too would be unconstitutional. *Id.* at 327. The Court concluded that the relevant predecessor statute, which provided for a limitation of 260 weeks, satisfied constitutional review and was thus revived. *Id.*

Management Program from a workers' compensation standpoint. This means insisting on increased oversight with carriers and servicing agents and their defense counsel, considering self-insurance with a third-party administrator ("TPA"), self-insured with in-house administration, developing aggressive return-to-work programs, complying with a drug-free workplace, and ensuring buy-in from the top down—including City Council, department heads, and field personnel.

Much like there are exceptions to sovereign immunity, there are also exceptions to employer immunity, even if the employer has coverage. Section 440.11(b)(1) lists these exceptions:

> 1. The employer deliberately intended to injure the employee; or
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> 2. The employer engaged in conduct that the employer knew, based on prior similar accidents or on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to the employee, and the employee was not aware of the risk because the danger was not apparent and the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work.[59]

These exceptions can be covered by employers' liability insurance.[60] Florida statutes also allow employers the option of being self-insured.[61] An employer may qualify as self-insured

> [b]y furnishing satisfactory proof to the Florida Self-Insurers Guaranty Association . . . that it has the financial strength necessary to ensure timely payment of all current and future claims individually and on behalf of its subsidiary and affiliated companies with employees in this state and receiving an authorization from the department [of Financial Services] to pay such compensation directly.[62]

Insurance is a requirement of workers' compensation. However, when considering the exceptions to immunity and the

59. FLA. STAT. § 440.11(b)(1).
60. Travelers Indem. Co. v. PCR Inc., 889 So. 2d 779, 796 (Fla. 2004).
61. FLA. STAT. § 440.38(1)(b).
62. *Id.*

loss that could be prevented by a well-maintained risk management program, workers' compensation claims are a good candidate for a stand-alone self-insurance program.

III. GOING MAJOR MEDICAL: FULLY INSURED TO STAND-ALONE SELF-INSURED

A. Fully Insured vs. Self-Insured

1. What Do the Terms "Fully Insured" and "Stand-Alone Self-Insured" Mean?

When considering why an entity should go from fully insured to self-insured, it is important to understand the difference between the two. In the context of this Article, "fully insured" refers to an entity that has insurance for all risk management claims, including liability and workers' compensation. "Stand-alone self-insurance" refers to a program that allows an entity to indemnify oneself or one's interests by maintaining "[a] plan under which a business maintains its own special fund to cover any loss," and handles the risk management in-house.[63]

The difference is most important when determining if Florida Statutes permit self-insurance for the risk of loss against which the entity would like to self-insure. The Florida Statutes define insurance as "a contract whereby one undertakes to indemnify another or pay or allow a specified amount or a determinable benefit upon determinable contingencies."[64] The courts have interpreted this definition, stating that insurance "is a mere contract of indemnity against contingent loss,"[65] and insurance contracts contain five elements including

> [a]n insurable interest[,] . . . [a] risk of loss[,] . . . [a]n assumption of the risk by the insurer[,] . . . [a] general scheme to distribute the loss among the larger group of persons

63. BLACK'S LAW DICTIONARY 875 (Bryan A. Garner ed., 9th ed. West 2009).

64. FLA. STAT. § 624.02.

65. Brock v. Hardie, 154 So. 690, 697 (Fla. 1934); *see also* First Commerce Realty Investors v. Peninsular Title Ins. Co., 355 So. 2d 510, 511 (Fla. 1st Dist. Ct. App. 1978) (citing *Brock*, 154 So. 690) ("The dominant characteristic of insurance is the granting of indemnity, or security against, loss for a stipulated consideration.").

> bearing similar risks [and,] . . . [t]he payment of a premium for the assumption of risk.[66]

Self-insurance, on the other hand, is the converse of insurance. The courts have long discussed what constitutes insurance and whether self-insurance qualifies.

> So-called "self- insurance" is not insurance at all but rather is the antithesis of insurance; the essence of an insurance contract is the shifting of the risk of loss from the insured to the insurer, while the essence of self-insurance, a term of colloquial currency rather than of precise legal meaning, is the retention of the risk of loss by the one upon whom it is directly imposed by law or contract.[67]

The courts have generally upheld this idea, stating, "As an individual self-insurer is not, for most purposes, an 'insurer' under the Florida Insurance Code,"[68] and "[s]elf-insurance is not considered a 'policy' of insurance."[69] The courts have found self-insurance's requirement of showing financial responsibility is not enough to fit the definition of insurance.[70]

Because of the differences between fully insured and self-insured, self-insurance may not qualify as an acceptable form of indemnification as required by the Florida Statutes. Therefore, an entity must look to the Florida Statutes to determine if the Legislature has created a provision that allows self-insurance for the type of risk that the entity wants to insure. The Florida Statutes allow governmental entities to self-insure for both

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66. Prof'l Lens Plan, Inc. v. Dep't of Ins., 387 So. 2d 548, 550 (Fla. 1st Dist. Ct. App. 1980) (quoting Guaranteed Warranty Corp., Inc. v. State *ex rel.* Humphrey, 533 P.2d 87, 90 (Ariz. Ct. App. 1975)).

67. Steven Plitt et al., *Couch on Insurance*, 3d., § 10:1 n.1 (West 2016) (quoting Fellhauer v. Alhorn, 838 N.E.2d 133, 137 (Ill. App. Ct. 2005)).

68. Gov't Emps. Co. v. Wilder, 546 So. 2d 12, 13 (Fla. 3d Dist. Ct. App. 1989) (referencing FLA. STAT. § 624.03 (1987)).

69. Lipof v. Fla. Power & Light Co., 558 So. 2d 1067, 1068 (Fla. 4th Dist. Ct. App. 1990), *approved sub nom.*, Lipof v. Fla. Power & Light Co., 596 So. 2d 1005 (Fla. 1992).

70. S.E. Title & Ins. Co. v. Collins, 226 So. 2d 247, 248 (Fla. 4th Dist. Ct. App. 1969).

> As correctly stated by the appellee, insurance has been judicially defined as follows: 'Insurance, of ancient origin, involves a contract, whereby, for an adequate consideration, one party undertakes to indemnify another against loss arising from certain specified contingencies or perils. Fundamentally and shortly, it is contractual security against possible anticipated loss. Risk is essential and, equally so, a shifting of its incidence from one to another.'

Id. (internal citations omitted).

negligence (for which sovereign immunity has been waived)[71] and workers' compensation.[72]

2. Pros and Cons of Stand-Alone Self-Insurance

Making the transition from fully insured to stand-alone self-insurance has both benefits and detriments, which are important to know and evaluate before making such a decision. One of the greatest advantages of a stand-alone self-insurance program is the potential for cost savings. A stand-alone self-insurance program allows an entity to no longer pay the high premiums for insurance, and instead invest the money in self-insurance loss reserves that can offset unexpected liabilities.[73] There is also a greater amount of cash flow as "[n]o pre-funding of losses is required as in the case of many traditional insurance plans, and no significant capital outlay is needed as in the case of establishing a captive insurance company."[74]

Switching to a self-insured program also allows an entity to have more control over the claims coming into the entity. In workers' compensation, entities are able to implement better work safety standards, which can cut the number of claims.[75] In tort liability, entities are able to devise programs for employees to inspect infrastructure to prevent future accidents. In general, entities are able to better control which matters are litigated and which are settled; this saves discovery expenses, outside counsel fees, and other litigation costs. Because of this control in the risk management program of the governmental entity, there is a greater awareness of safety in the workplace and a greater focus on cost control.[76] This creates long-term savings while simultaneously creating a safer work environment, city, county, and entity.[77] Another collateral benefit includes the increased

71. FLA. STAT. § 768.28(16)(a) (2016).

72. *Id.* § 440.38(1)(b).

73. DAVID A. NORTH & CATHERINE D. BENNETT, THE ART OF SELF INSURANCE 15–16 (2002), *available at* https://www.sedgwick.com/resources/Documents/Publications/AOSS.pdf.

74. *Id.* at 16.

75. The idea is that under a self-insured program, there is a "heightened sense of awareness." *Id.* at 18. The company is incentivized to adhere to safer work practices and respond promptly to any claims because the company is spending its own money, as opposed to the insurance company's money. *Id.*

76. *Id.*

77. *Id.*

collaboration between the city or county manager (including the various governmental departments reporting thereto) and the local government's attorney's office—both sharing a common goal of saving money for the taxpayers while increasing efficiency.

Unfortunately, if switching to a stand-alone self-insurance program only reaped benefits, there would be no need for this Article. While there are many benefits to switching to a self-insurance program, there are also several drawbacks. One such drawback is the sharp increase in administrative responsibilities. "[S]elf-insureds are responsible for meeting all state requirements including maintenance and submission of requested loss data and financial information, completion of state filings and forms, and timely payment of state taxes and assessments."[78]

Additionally, a stand-alone self-insured entity requires more staff and responsibilities for implementing a risk management program. "These include risk management information systems and services, safety and loss control, claims handling and investigation, check issuance, financial and accounting, actuarial, legal, and other management services deemed appropriate."[79] Consequently, more personnel may be needed—e.g., qualified claims adjusters, legal counsel, safety engineers, and loss control consultants.[80] This can cut into some of the cost savings associated with self-insurance initially, but the long-term savings benefit will still be a positive aspect of switching to a stand-alone self-insurance program.

Perhaps the single greatest detriment of making the change to self-insurance is the potential for an unanticipated catastrophic loss or accident. By self-funding losses, a major event can quickly deplete the reserves.[81] "By nature, self-insurance is a program for which budgeting is difficult, but there are methods for addressing this problem."[82] However, methods such as a well-structured excess insurance program can insulate the detriment.[83] Just be sure to consider the legal implications of contracting for an excess insurance program.[84]

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78. *Id.* at 20.
79. *Id.* at 55.
80. *Id.*
81. *Id.* at 21.
82. *Id.* at 22.
83. *Id.* at 21.
84. *See infra* Part III(B)(2) (explaining the legal implications of self-insurance).

B. Factors to Consider When Switching to Self-Insurance

1. Size and Ability to Fund Loss Reserves

One of the factors to consider when determining whether to go from fully insured to self-insured is the size of the entity. This is important for determining if the entity has the capacity to fund and manage a self-insurance program. One way to analyze size is by comparing the size of the entity to other self-insured entities.[85] Entities that have a fully insured program pay premiums based on the size of the entity operations,[86] including population, geographical size, number of employees, and the amount of real and personal property owned. It is rather simple: the higher the numbers, the higher the premiums for insurance. Comparing the size of the entity with other entities that have moved from a fully insured to a self-insurance program can provide an estimate on the cost savings or losses that are associated with shifting to a self-insurance program.[87] Be sure to network with other governmental agencies of comparable size that have made the switch and/or hire a qualified risk-management consultant to get an accurate estimate. This comparison can help determine whether implementing a stand-alone self-insurance program or looking for a self-insurance fund or a mutual fund with other entities to fund the program would be more appropriate.

The size of the entity's operations also helps determine the entity's ability to fund losses. The Florida Statutes require entities that self-insure workers' compensation to

> secure the payment of compensation under this chapter . . . [b]y furnishing satisfactory proof to the Florida Self-Insurers Guaranty Association, Incorporated, created in [section] 440.385, that it has the financial strength necessary to ensure timely payment of all current and future claims individually and on behalf of its subsidiary and affiliated companies with employees in this state and receiving an authorization from the department to pay such compensation directly.[88]

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85. NORTH & BENNETT, *supra* note 73, at 34.
86. *Id.* at 45.
87. *E.g.*, Memorandum from Ben Few, III, CEO, Ben Few & Co., Inc., to Andrew P. Lannon, City Attorney, City of Palm Bay, Florida, *Risk Exposure and Financing Analysis*, 24 (June 5, 2015) (on file with *Stetson Law Review*).
88. FLA. STAT. § 440.38 (2016).

In workers' compensation, the Florida Self-Insurers Guaranty Association may require the entity to place a security deposit, which the entity must provide before being authorized to self-insure.[89] It is very important to confirm adequate funding for losses.

2. *Legal Implications of Self-Insurance*

When considering whether to switch from fully insured to self-insured, it is not only important to consider whether the law permits self-insurance but also what the legal implications may be for each option. Self-insuring for negligence liability, for which sovereign immunity has been waived, may have different implications than self-insuring for workers' compensation. This may help determine whether to be self-insured for all types of liability, stay fully insured, or be insured for one type of liability and self-insured for another. Which option is best depends on the legal implications.

When considering self-insurance for tort liability, it is important to consider purchasing excess liability. Section 768.28(5) states that

> a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $200,000 or $300,000, as the case may be; and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature.[90]

This allows the plaintiff to ask the Legislature for a claims bill—if the Legislature agrees, the governmental entity will have to pay the excess. "The waiver of sovereign immunity statute expressly allows a claimant to seek a claims bill from the Legislature to pay all or any portion of the judgment in excess of the statutory caps."[91] This can be devastating to the funds of an entity that is self-insured with no excess carrier.

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89. *See id.* § 440.38 (describing the security deposit conditions that may be required before one is allowed to self-insure).

90. *Id.* § 768.28(5).

91. 6 THOMAS D. SAWAYA, FLA. PRAC., PERSONAL INJURY & WRONGFUL DEATH ACTIONS WITH WRONGFUL DEATH ACTIONS § 9:11 (ed. 2016–2017).

However, there has been some caselaw that may prevent an entity from contracting for excess coverage. In the past, the Florida Supreme Court and the United States Court of Appeals for the Eleventh Circuit have held that governmental entities waive sovereign immunity up to the amount of excess coverage.[92] The Florida Supreme Court specifically carved out an exception for entities participating in self-insurance trust funds, relying on the differences in definition discussed above.[93] The court held that if self-insurance excess coverage is not through a contract for insurance with an insurer, then the entity does not waive sovereign immunity up to the amount of coverage, as self-insurance, in and of itself, is not insurance.[94] Some have argued that the holding "merely allows the injured party to collect a judgment in excess of the statutory limits up to the limits of the insurance coverage after liability has been established under the waiver of sovereign immunity statute," which "may be exceeded by the purchase of liability insurance."[95] They explain that "[i]t is only the insurer who may be obligated to pay any amount over the statutory limits pursuant to its contract of insurance."[96] However, there is no caselaw on point to determine whether an

92. *E.g.*, Avallone v. Bd. of Cnty. Com'rs of Citrus Cnty., 493 So. 2d 1002, 1004 (Fla. 1986).

> Political subdivisions are authorized to spend public money for the purchase of liability insurance. However, if such insurance is purchased and is within the purview of the statute, the contract shall prohibit the assertion of sovereign immunity to the extent of the coverage, even if it is otherwise a valid defense.

Id. See also Hattaway v. McMillian, 903 F.2d 1440, 1454–55 (11th Cir. 1990).

> When the Sheriffs' Fund purchases insurance it does so with taxpayer dollars, and therefore, the *Avallone* considerations are applicable. In effect, when the Sheriffs' Fund purchases insurance, the Sheriffs are purchasing insurance . . . [and] the provisions of section 768.28(13) at issue . . . only authorize a self-insurance pool to pay claims "which [the agency] may be liable to pay pursuant" to $100,000 waiver of sovereign immunity in section 768.28. Therefore, because the insurance purchased by the Sheriffs' Fund only covers liabilities in excess of the section 768.28 waiver, the authority to purchase this insurance cannot come from section 768.28(13).

Id.

93. *See supra* Part II(A)(1) (discussing the different definitions).

94. Hillsborough Cnty. Hosp. & Welfare Bd. v. Taylor, 546 So. 2d 1055, 1058 (Fla. 1989) (holding a waiver only occurs "when there was (1) a contract for insurance supported by consideration (2) with an insurer"; and a "self-insurance trust fund established in this insurance did not result in a waiver of sovereign immunity because it was not a contract with an insurer").

95. *E.g.*, SAWAYA, *supra* note 91.

96. *Id.*

entity with a stand-alone self-insurance program could also be liable.

The Florida Legislature also took action, amending section 768.28(5), in 1987, to include "the state or agency or subdivision thereof shall not be deemed to have waived any defense of sovereign immunity or to have increased the limits of its liability as a result of its obtaining insurance coverage for tortious acts in excess of the $100,000 or $200,000 waiver provided above."[97] While the Legislature's intent seems to provide that no excess coverage should cause an entity to waive immunity up to the amount in excess, the caselaw is contradictory. Until the caselaw is overturned, or the issue of waiving immunity when a governmental entity self-insures and also purchases excess liability insurance is brought to and decided by the Florida Supreme Court, an entity needs to be aware of the possibility of waiving the statutory caps if contracting for excess coverage.

3. History of Claims and Exposure

While premiums are calculated based on the size of the entity's operations, they are also based on "the types of exposure it represents."[98] Therefore, it is important to look at the entity's history of claims in the past fiscal year. It is also important to analyze the different types of claims separately. For example, compile the history of automobile claims in one section and third-party property damage in another. This can help determine what type of excess insurance may be needed, as well as any need for outside administrators to handle claims. It is especially important to look at the workers' compensation claims history: "Since there is no sovereign immunity protection available to a public entity for workplace injury claims brought about in the course of employment," this makes workers' compensation "one of the most volatile exposures that the [entity] faces."[99] When analyzing workers' compensation, it is also important to look at the payroll classifications to determine the exposure.

Once the history of claims has been analyzed, an estimate of the exposure can be made. One way to analyze exposure is to look

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97. Tort Liability of Governmental Entities, 1987 FLA. SESS. LAW SERV. 87–134 (West) (superseded 2010) (changing statutory caps to $200,000 and $300,000 respectively).

98. NORTH & BENNETT, *supra* note 73, at 45.

99. Memorandum from Ben Few, III, *supra* note 87, at 4.

at whether any statutory caps apply.[100] For this reason, it is important to gather the history of each claim separately. For example, as discussed in the history Part of this Article, there is a statutory cap on negligence claims. Unless the plaintiff brings a claims bill, which should be taken into consideration, the damages the plaintiff can collect are limited to $200,000 per claim or $300,000 per incident.[101]

It is also important to look at the payment of large claims. For example, the payment of large workers' compensation claims is spread over time,[102] while negligence claims are generally paid in full once a settlement or final judgment is received. This affects the cash flow of the entity and the ability to self-fund a self-insurance program.[103] The determination of the entity's exposure will allow the entity to compare its exposure to others who have transitioned to stand-alone self-insurance programs to determine if the move would be more cost effective and the right choice for the entity.

4. Ability to Handle In-House or Supervise Third-Party Administrators

Determining who will handle the claims is also an important element when deciding whether to stay fully insured or become self-insured. Some entities will have the means to administer their own claims; if the entity chooses to self-insure workers' compensation claims, the Division of Workers' Compensation must certify that the entity's employees are capable of handling claims.[104] To administer the claims in-house, staff is needed with

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100. Christine Fuge, *The Workers Compensation Self-Insurance Decision*, IRMI (Aug. 2001), https://www.irmi.com/articles/expert-commentary/the-workers-compensation-self-insurance-decision.

101. FLA. STAT. § 768.28(5) (2016).

> Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $200,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $300,000.

Id.

102. Fuge, *supra* note 100.

103. *Id.*

104. JAMES N. MCCONNAUGHHAY, 2015 WORKERS' COMPENSATION DESK MANUAL 166–67 (2015).

medical knowledge and actuarial experience.[105] "Like a traditional insurance program, a self-insurance program requires risk management information systems and services, safety and loss control, claims handling and investigation, financial and accounting, actuarial, legal, and other desired services."[106]

However, not all entities have the in-house infrastructure of personnel to handle all aspects of a claim. As an alternative, an entity with a self-insurance program can choose to hire TPAs to handle the claims.[107] TPAs can perform many of the same functions as an insurance company—such as the medical and actuarial analysis necessary for handling claims—and insurance companies make up a large portion of available TPAs.[108] The entity should first determine which services it can handle in-house and which would be better handled by a TPA.[109] Then it is important to search for reputable TPAs and ensure that the contractual relationship is fully documented.[110]

5. *Effective Functionality of Risk Management Program*

An effective risk management program can make the savings of transitioning to a self-insurance program much larger. This is because the costs of a self-insurance program are controlled by losses.[111] Therefore, having a well-functioning risk management, loss control, and safety program in place is an important factor in the decision to transition to a self-insurance program. A successful self-insurance program will save costs associated with medical services, lost-time wages, legal fees, reduced productivity caused by time off and training of replacements, and time necessary for handling more claims, among other issues.[112] A successful program will also have adequate training and education, full management support, and employee input and suggestions.[113] This program should be in place at the time of the

105. Fuge, *supra* note 100.
106. NORTH & BENNETT, *supra* note 73, at 58.
107. MCCONNAUGHHAY, *supra* note 104, at 167.
108. Fuge, *supra* note 100.
109. *Id.*
110. MCCONNAUGHHAY, *supra* note 104, at 167.
111. NORTH & BENNETT, *supra* note 73, at 69.
112. *Id.* at 69–70.
113. *Id.* at 69–73.

transition, or there should be a comprehensive plan outlined to implement a program during the transition.

A risk management, loss control, and safety program is also important, as parts of Florida law require a well-functioning program before authorizing the entity to self-insure.[114] "As a condition to authorization to self-insure, the employer shall provide proof that the employer has provided for competent personnel with whom to deliver benefits and to provide a safe working environment."[115] Having a safe working environment helps to save costs, qualify the entity to self-insure, and protect the employees.

C. Case Study: City of Palm Bay

The City of Palm Bay City Attorney's Office researched ways to improve the safety and quality of its workplace, while at the same time saving money for the city. The City Attorney, Andrew Lannon, and Deputy City Attorney, Peter Sweeney, contracted with a consultant firm to provide a comprehensive review and analysis of the City's current risk management program and to determine if the City was a financially and structurally qualified candidate for a stand-alone self-insurance program.[116]

The consultant firm performed site inspections, interviewed the City's staff, reviewed insurance documents, immunity statutes, City policies, procedures and contracts, in-house risk management and safety committee processes, as well as loss exposures and previous losses.[117] The company looked at the City's workers' compensation coverage, property coverage, auto physical damage, general liability and law enforcement liability, public official liability, automobile liability, and other miscellaneous coverage.[118] The report also analyzed the exposure to loss by reviewing past claim data.[119] It compared the benefits of a fully insured program to the benefits of a stand-alone self-

114. FLA. STAT. § 440.38 (2016).
115. *Id.*
116. Memorandum from Ben Few, III, *supra* note 87, at Executive Summary.
117. *Id.*
118. *Id.*
119. *Id.* at 3–12.

insurance program,[120] and it outlined a timeline of implementation for a stand-alone self-insurance program.[121]

The consultants recommended some changes to the safety committee and risk management structure—explaining the need for a safety committee for each department, more training available for employees, and more procedures put in place.[122] The consultants ultimately recommended the City consider a stand-alone self-insurance program for workers' compensation and automobile liability, and predicted the transition would result in a reduction of the overall costs associated with the City's risk management program.[123]

Because of the recommendations of the consultant and the direction from City Council, the City of Palm Bay transitioned to a stand-alone self-insurance program for workers' compensation, general liability, and automobile liability. Since 2013, the City has saved $2,929,248.16. The City implemented a Safety Committee comprised of at least one member from each department in the City that meets monthly. The City is also working on a program to give employees access to online safety training modules to help create a safer work environment.

The City uses a TPA to handle intake and initial claims management of all workers' compensation claims. The strict statutory requirements for initial reporting of workers' compensation claims dictated the engagement of a TPA instead of handling this aspect of the program in-house. Although there is a cost to contracting with a TPA and a consultant, the City ultimately concluded that there were cost savings in having the TPA handle this aspect of the program.

As for all other claims, they are directly reported to the in-house risk management department. In the event that liability claims are reported directly to the TPA inside of the internal risk management department, the TPA will perform the initial intake and evaluation of the claim. Subsequently, the TPA will contact the City's risk management department and provide the information, as well as provide support and suggested direction on the handling of the claim, which can be particularly useful in the unusual or unique claim situation.

120. *Id.* at 21–27.
121. *Id.* at 27–28.
122. *Id.* at 2, 13.
123. *Id.* at 29.

Continuous monitoring and minor modifications of the program will continue throughout the first year and into the near future. In doing so, it will enable the City to objectively review the differences from the prior insurance and risk management program to the current stand-alone self-insurance program.

IV. WHERE DO WE GO FROM HERE?

After deciding to make the switch from fully insured to self-insured, the entity needs to determine what type of program fits best for the needs of the entity. There are many options depending on the evaluation of the several factors, such as using a TPA, determining what type of excess carrier, fully self-insured, fully insured, self-insurance fund/mutual fund, or a hybrid, as outlined previously in this Article. There are many companies with the experience and trained staff to help make the decision. The insurance companies can help perform a review of the entity to determine if self-insurance is right and which services would be best: in-house or with an outside contractor. The insurance companies can also help to set up an excess carrier insurance program. The consultants at the insurance company can compare financing plans, efficiency based on the entity's operations, and other issues to help understand which will be the most practical choice for the entity. It is very important to have an analysis of the entity completed to structure a detailed plan on how to transition to a stand-alone self-insurance program.

IV. CONCLUSION

In today's economy, it is critical to explore new cost-effective ways of managing a governmental entity. If the entity's insurance premiums are rising, but the coverage is shrinking, it may be beneficial to transition to a stand-alone self-insurance program. It allows greater control over expected losses and expenses. It allows flexibility in the structure of the insurance program by allowing the entity to choose which area of liability to insure or self-fund. It allows the choice of whether to handle claims in-house or hire a TPA. And it allows the entity to have loss reserves to invest, instead of paying it all up front.

While there are many benefits associated with transitioning to a stand-alone self-insurance program, there are disadvantages as well. It requires more training of staff to administer claims. It requires a larger staff to handle the increase in administrative responsibilities. Most importantly, it could be devastating if a catastrophic loss occurs unexpectedly.

The choice is up to your entity. However, if you are looking for a new way to save money, consider a stand-alone self-insurance program.