

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1601

Attorney's Fees

SPONSOR(S): Brummer

TIED BILLS:

IDEN./SIM. BILLS: SB 1990

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Insurance Committee	17 Y, 2 N	Cooper	Cooper
2) Judiciary Committee		Thomas	Hogge
3) Commerce Council			
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

Under Florida's no-fault automobile insurance system, all drivers must obtain insurance that covers their own injuries and their passengers' injuries in motor vehicle accidents without regard to which driver is at fault. This coverage is known as Personal Injury Protection (PIP). A person is allowed to sue for damages beyond the limits of no-fault coverage only with respect to specified, serious injuries.

Under present law, insurers are required to pay attorney's fees if they lose in court to insureds or to beneficiaries under an insurance policy or contract. The courts utilize a lodestar approach that involves consideration of the number of hours expended by an attorney multiplied by an hourly rate, as well as the possible application of a contingency risk multiplier. The lodestar factors utilized by a court in determining a reasonable attorney's fee include the nature and length of the professional relationship with the client; the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the legal skill requisite to perform the legal service in the case; the significance of, or amount involved in, the subject matter of the representation; the fee customarily charged in the locality, and other factors. Once the lodestar amount is determined, the court may, depending upon the deliberation of additional factors, apply a risk modifier that accounts for the chance of success at the trial's outset.

This bill prohibits the application of a contingency risk multiplier in awarding attorney fees in PIP cases, except in limited circumstances.

The bill will not have any fiscal impact on local and state government.

The bill takes effect July 1, 2005.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard Individual Liberty – The bill prohibits the application of a contingency risk multiplier in awarding attorney fees in PIP cases, except in limited circumstances.

B. EFFECT OF PROPOSED CHANGES:

Current Automobile Insurance Requirements

In 1971, the Legislature passed the “Florida Motor Vehicle No-Fault law”. Under the law, every owner of a four-wheeled motor vehicle registered in Florida is required to maintain \$10,000 of no-fault personal injury protection (“PIP”) insurance¹ and \$10,000 in property damage (“PD”) insurance.

Subject to co-payments and other restrictions, PIP insurance provides compensation for bodily injuries to the insured driver and passengers regardless of who is at fault in an accident. This coverage also provides the policyholder with immunity in tort from liability for economic damages up to the policy limits and for non-economic damages (pain and suffering) for most injuries.² However, the immunity does not extend to injuries consisting of: (1) significant and permanent loss of an important bodily function; (2) permanent injury within a reasonable degree of medical probability (other than scarring or disfigurement); (3) significant and permanent scarring or disfigurement; or (4) death. This is known as the “verbal threshold.” In summary, a plaintiff must suffer a permanent injury in order to seek pain and suffering damages against a motorist with PIP coverage.³

Persons required to have PIP must also obtain property damage liability coverage. Property damage liability insurance must provide a minimum per-crash coverage of \$10,000 for property damage, or \$30,000 for combined property damage and bodily injury liability. Property damage to an individual’s personal vehicle is not covered under his or her no-fault/PIP portion of the policy if the individual is at fault in the accident; the person who negligently causes the property damage is liable.

Benefits Available

Personal injury protection covers the named insured, relatives residing in the same household, passengers, persons driving the vehicle with the insured’s permission, and persons struck by the motor vehicle while not an occupant of a self-propelled vehicle. A vehicle owner’s PIP coverage will pay 80 percent of medical costs, 60 percent of lost income, and a \$5,000 per-person death benefit with respect to injuries sustained in a motor vehicle accident, regardless of who is at fault.

Attorney’s Fees

Under present law, insurers are required to pay attorney’s fees under s. 627.428, F.S., if they lose in court to insureds or to beneficiaries under an insurance policy or contract. However, if insurers prevail in court, their fees are not paid by the losing side. This section is known as the “one-way attorney’s fee” provision. Attorney’s fees are calculated according to the application of two common law-created provisions: lodestar and contingency risk multipliers.⁴ A contingency risk multiplier is a number ranging

¹ Sections 627.730-627.7405, F.S.

² Section 627.737(1), F.S.

³ Section 627.737(2), F.S.

⁴ See *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So.2d 828, (Fla. 1990).

from 1.0 to 2.5 that may be applied by the court when it awards attorney's fees. It may be applied once the court initially determines the lodestar figure (which is basically the number of hours expended by an attorney on a particular case, multiplied by an hourly rate). The contingency risk multiplier may be applied to the lodestar figure by multiplying the risk multiplier number (ranging from 1.0 to 2.5) times the lodestar figure to determine the attorney's ultimate fee.

The lodestar factors utilized by a court in determining a reasonable attorney's fee are enunciated in the Florida Bar Code of Professional Responsibility under Rule 4-1.5. There eight factors listed include:

- The time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- The likelihood that the acceptance of the particular employment will preclude other employment by the attorney.
- The fee customarily charged in the locality for legal services of a comparable nature.
- The significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained.
- The time limitations imposed by the client or by the circumstances.
- The nature and length of the professional relationship with the client.
- The experience, reputation, diligence, and ability of the lawyer performing the services.
- Whether the fee is fixed or contingent.

After the lodestar is calculated, the court considers three factors as to whether the risk multiplier is necessary:

- 1) Whether the relevant market requires a contingency fee multiplier to obtain competent counsel;
- 2) Whether the attorney was able to mitigate the risk of nonpayment in any way; and,
- 3) The amount involved in the case, the result obtained, and the type of fee arrangement between the attorney and the client.

Other factors are utilized by the court that involve consideration of the chances of success at the outset of trial:

- 1) If success was more likely than not at the outset, the court may apply a multiplier of 1 to 1.5;
- 2) If success was approximately even at the outset of trial, the trial judge may apply a multiplier of 1.5 to 2.0;
- 3) If success was unlikely at the outset, a multiplier from 2.0 to 2.5 may be applied.

Changes Proposed by the Bill

This bill prohibits the application of a contingency risk multiplier in the award of attorney's fees in suits based on claims arising under the Florida Motor Vehicle No-Fault Law unless the court finds that the case was exceptional in that it resulted in a decision creating new law.

The effect of the exception is somewhat unclear because of the phrase "unless the court finds that the case was exceptional in that it resulted in a decision creating new law." By its terms, the judge will appear to have wide discretion in the exception's administration. Arguably, on the trial level where this provision will first be applied, there would not be any decision "creating new law" because that traditionally occurs in the appellate courts. Or, it may be interpreted by the trial court in a very liberal fashion, in that new facts exist in every trial and therefore the decision in the case is "new." On the appellate level, "a decision creating new law" may also be subject to varied interpretation.

Black's Law Dictionary, Sixth Edition, defines the term "new" to mean:

As an element in numerous compound terms and phrases of the law, this word may denote novelty, or the condition of being previously unknown or of recent or fresh origin, but ordinarily it is a purely relative terms and is employed in contrasting the date, origin, or character or one thing with the corresponding attributes of another thing of the same kind or class.

In order to be "new", as that word is used in the patent laws, the achievement must be either one that produces an unusual or improved or advanced result which was unknown to the same prior art at the time of the claimed invention; or the achievement must be one that produces an old result in an unusual and substantially more efficient, or more economical way.

If the intent of the bill is to underscore the meaning of "new law" as defined above, then the current language in the bill may have its desired affect. Another term that is also defined by legal scholars is "case of first impression" or more precisely, "first impression case." Blacks Law Dictionary, Sixth Edition, defines this latter term to mean:

First examination. First presentation of question of law to a court for examination or decision. A case is said to be "of the first impression" when it presents an entirely novel question of law for the decision of the court, and cannot be governed by any existing precedent.

C. SECTION DIRECTORY:

Section 1. Amends s. 627.468, F.S., to create subsection (4) to prohibit the application of a contingency risk multiplier in awarding attorney fees in PIP cases, except in limited circumstances.

Section 2. Provides an effective date of July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent the limitations on attorney fees impair a plaintiff's ability to retain counsel, an injured party may not be able to recover damages. To the extent the limitations on attorney fees reduces costs to insurers, premiums for policyholders may be lower or not increase as dramatically.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.