SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Banking and Insurance Committee

BILL:	SB 1990
SPONSOR:	Senator Alexander
SUBJECT:	Attorney's Fees/Vehicle No-Fault Law
DATE:	April 1, 2005 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Knudson	Deffenbaugh	BI	**Pre-meeting**
2.			JU	
3.				
4.				
5.				
6.				

I. Summary:

Senate Bill 1990 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 makes a finding that its decision created new law.

The bill would take effect on July 1, 2005.

This bill substantially amends the following section of the Florida Statutes: 627.428

II. Present Situation:

The Legislature enacted Florida's "no-fault" insurance provisions in 1971.[1] Under the Florida Motor Vehicle No-Fault 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) insurance[2] 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 from liability for economic damages up to the policy limits and for non-economic damages (pain and suffering) for most injuries. 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

[1] Ch. 71-252, L.O.F. The law became effective January 1, 1972.
[2] Sections 627.730-627.7405, F.S.

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.

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 a vehicle is not covered under the no-fault law; that is, the person who negligently causes the property damage is liable, which is covered by PD liability.

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. With respect to injuries sustained in a motor vehicle accident, regardless of who is at fault, 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, up to a limit of $10,000. The Financial Services Commission may determine that cost savings under PIP have been realized due to the provisions of CS/SB 32-A, prior reforms, or other factors, and increase the minimum $10,000 benefit coverage requirement. However, in establishing the amount of the increase, the Commission must determine that the additional premium for such coverage is approximately equal to the premium cost savings that have been realized by the $10,000 PIP coverage.

Financial Responsibility Law

The Florida "Financial Responsibility Law" (ch. 324, F.S.), requires drivers to demonstrate their ability to respond to damages for bodily injury caused in an accident. This law requires a minimum level of bodily injury liability (BI) insurance, or other allowable form of security, but only *after* a driver has been involved in an accident or convicted of certain serious traffic offenses. Such proof of BI coverage is *not* required as a condition of registering a vehicle, as required for PIP and PD, unless the Financial Responsibility law has been triggered by a prior accident or conviction. The minimum amounts of liability coverage required are $10,000 in the event of bodily injury to, or death of, one person; $20,000 in the event of injury to two or more persons; and $10,000 in the event of injury to property of others; or $30,000 combined single limit. If the owner or operator of the vehicle is not financially responsible at the time of an accident, that individual's driver's license is suspended as well as the registration of the owner of the vehicle. An individual can comply with the Financial Responsibility Law in several ways: liability insurance, surety bond, deposit of cash or securities, or self-insurance.

Current PIP Provisions

Under present law, PIP insurance benefits paid pursuant to s. 627.736, F.S., are overdue if not paid within 30 days after the insurer is furnished written notice of the fact of the covered loss and the amount of such loss. If a written notice is not furnished to the insurer as to the entire claim, any partial amount supported by written notice is overdue if not paid within 30 days after such written notice is furnished to the insurer.

A demand letter is a condition precedent to filing "any action" under s. 627.736, F.S. The demand letter is a written notice to the insurer of intent to initiate litigation unless specified benefits are paid by the insurer. The demand letter must include the name of the insured, claim number, and the medical provider who rendered treatment, along with an itemized statement listing the exact amount, dates of treatment, service, and type of benefits claimed to be due. An insurer has 15 calendar days to respond to the demand letter. If the demand letter involves an insurer's withdrawal of payment for future treatment not yet rendered, no action may be brought against the insurer if, within 15 days after its receipt of the notice, the insurer mails to the person filing the notice a written statement of the insurer's agreement to pay for such treatment and provides a penalty the insurer must pay. If the claim, along with applicable interest, is paid within 15 calendar days, the claimant is prohibited from bringing an action against the insurer for nonpayment or late payment of a claim. The statute of limitations is tolled for a period of 15 days by the mailing of the notice. Any insurer who engages in a general business practice of not paying valid claims until receipt of the notice commits an unfair trade practice under the Insurance Code.

Criminal Penalties for PIP Fraud

SB 32-A enacted by the Legislature during the 2003 special session A, created new crimes for engaging in a wide array of activities in an attempt to commit PIP fraud. Activities prohibited by the legislation include soliciting accident victims, intentionally causing motor vehicle accidents, disclosing confidential vehicle accident reports, presenting false or fraudulent motor vehicle insurance cards, and specified fraudulent actions by insurers and providers. The bill increased penalties for soliciting accident victims and presenting false or fraudulent insurance applications; provided minimum mandatory penalties for intentionally causing motor vehicle accidents and soliciting accident victims during the 60-day period accident reports are confidential; and increased the ranking of solicitation crimes and certain motor vehicle insurance fraud offenses under the Offense Ranking Chart law.

Sunset Provision

Effective October 1, 2007, the primary sections of the Motor Vehicle No-Fault Law are repealed, unless reenacted by the Legislature during the 2006 Regular Session and such reenactment becomes law to take effect for policies issued or renewed on or after October 1, 2006. Insurers may provide in policies that are issued or renewed after October 1, 2006, that such policies may terminate on or after October 1, 2007.

Attorney's Fees in PIP Cases

An insurer must pay the attorney's fees of its insureds if it loses in an appeal to the insured or a beneficiary under an insurance policy or contract under s. 627.428, F.S. If the insurer prevails in court, their fees are not paid by the losing side. The Florida courts use two different common law methods to calculate attorney's fees, one being utilized in all cases where the statutes mandate that the losing party pays attorney's fees, while the other is used to multiply that fee under certain circumstances. In any case where the Florida Statutes require the losing party to a lawsuit to pay the victor's attorney's fees, the court applies the "Lodestar" approach to calculate the fees

to be paid to the winning attorney. In some cases, that fee is multiplied by an amount ranging from 1 to 2.5 the Lodestar amount if the court finds that the client would not have been able to obtain competent counsel without the possibility of the multiplier. The court determines the amount of the multiplier by analyzing after the fact what the attorney's likelihood of success was at the start of the trial.

Calculating a Reasonable Attorney's Fee When the Insured Prevails in a PIP Injury Case

In 1985, the Florida Supreme Court determined that the federal lodestar approach "provided a suitable foundation for an objective structure" in calculation of the fee an attorney is to be paid when the Florida Statutes require the loser in a lawsuit to pay the winner's attorney's fees.[3] In a PIP case, this occurs when the insured or insured's beneficiary wins a lawsuit against an insurer.[4] Florida's application of the lodestar calculation uses the eight factors contained in Rule 4-1.5 of the Florida Bar Code of Professional Responsibility to determine a proper attorney's fee. Those criteria are as follows:

1. The time and labor required, the novelty complexity and difficulty of the questions involved, and the skill required to perform the legal service properly.
2. The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer.
3. The fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature.
4. The significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained.[5]
5. The time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client.
6. The nature and length of the professional relationship with the client.
7. The experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services.
8. Whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.[6]

The lodestar approach may be summarized by saying that a court determines the number of hours reasonably expended by the attorney and a reasonable hourly rate for those services, and multiplies the two together to arrive at the lodestar amount.[7] In determining the number of hours reasonably expended by the attorney, the court is to look at "the novelty and difficulty of the question involved" in the litigation.[8] In determining the hourly rate for services, the court should

[3] *Florida Patient's Compensation Fund v. Rowe, 427 So.2 1145 at 1150 (Fla. 1985).*
[4] s. 627.428, F.S.
[5] This is the first factor listed in the professional responsibility code for determining a reasonable fee.
[6] This last factor is not used by a court in setting the Lodestar amount, but is a key factor utilized when a contingency risk multiplier is applied by the court.
[7] ROWE, 427, So.2d at 1150-1151.
[8] Id. at 1150.

take into account all the factors enumerated in Rule 4-1.5 of the Florida Bar Code of Professional Responsibility except for the time and labor required, the novelty and difficulty of the question involved,[9] the results obtained, and whether a fixed or contingent fee arrangement was utilized.[10]

Use of a Contingency Risk Multiplier to Enhance Attorney's Fees

In certain cases, a Florida court may utilize a contingency risk multiplier to add to the fee calculated under the Lodestar methodology. The Florida Supreme Court has stated that a contingency fee multiplier is useful in determining a reasonable fee in a tort or contract case where a risk of nonpayment is established.[11] The primary rationale for a contingency risk multiplier is to provide access to competent counsel for those who could not otherwise afford it.[12] The court is to examine three factors in determining whether a multiplier is necessary:[13]

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;[14]
3. The amount involved in the case, the result obtained, and the type of fee arrangement between the attorney and client.

If the court finds that a contingency risk multiplier should be applied, then the court determines what the amount of the multiplier should be by examining what the likelihood of success was for the attorney at the outset of the trial. If the trial court determines that success was more likely than not at the outset, it may apply a multiplier of 1 to 1.5; if the trial court finds that the likelihood of success was even then a multiplier of 1.5 to 2.0 may be used; and if success was unlikely at the outset, then a multiplier of 2.0 to 2.5 may be used. The multiplier system provides higher fees to attorneys who take difficult cases.

In 1992, the U.S. Supreme Court eliminated fee enhancement (such as that created by contingent fee multipliers) beyond the Lodestar amount in most cases.[15] Then, in 2003, the Florida Supreme Court ruled that a contingent fee multiplier cannot be used to enhance attorney's fees authorized under the offer of judgment statute found in s. 768.79, F.S.[16] The court ruled that the offer of judgment statute is intended to be a sanction, which is a different goal than that of a contingency fee multiplier, which seeks to provide access to courts.[17] The Florida Supreme Court also noted that the offer of judgment statute was designed to achieve the goal of quicker, less expensive litigation. This goal is at odds with the contingent fee multiplier which attempts to provide access to courts and encourages the filing of more lawsuits.[18] At the writing of this analysis for SB 1990, the question of whether a multiplier may be applied to enhance an award of attorney's fees

[9] These two factors are used in determining a reasonable number of hours for the lawyer to have expended on the litigation.
[10] *Rowe, 427 So.2d at 1150-1151*
[11] *Standard Guaranty Insurance Co. vs. Quanstrom, 555 So.2d 828, 834 (Fla. 1990).*
[12] *Bell v. S.U.B. Acquisition Company, Inc.,734 So.2d 403, 407 (Fla. 1999).*
[13] *See Quanstrom 555 So.2d at 834.*
[14] Perhaps by finding a third party to pay all or part of the attorney's fee.
[15] *City of Burlington v. Dague, 505 U.S. 557 (1992).*
[16] *Sarkis v. Allstate Insurance Company, 863 So.2d 210 (Fla. 2003).*
[17] *See Sarkis 863 So.2d at 222-223.*
[18] *See Sarkis 863 So.2d at 216, quoting Judge Altenbernd's concurrence in Doyle-Vallery v. Aranibar, 838 So.2d 1198 (Fla. 2d DCA 2003).*

granted under a fee-shifting statute such as s. 627.428, F.S., is before the Supreme Court in *Holiday v. Nationwide Mutual Fire Insurance*.[19]

III. Effect of Proposed Changes:

Section 1. Amends s. 627.468, F.S., to prohibit 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 case was exceptional in that it resulted in a decision creating new law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Some of the courts that have discussed the issue of contingency risk multipliers in tort or contract cases have stated that the multiplier is used in order to guarantee that all persons have access to courts in such cases as well as competent counsel. On the other hand, some courts have indicated the possibility that the use of contingency risk multipliers under statutes where only one party has access to the possibility of a multiplier may have equal protection implications.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Proponents of the legislation argue that the elimination of contingency risk multipliers will serve to reduce PIP costs and thus result in lower premiums for Florida's automobile insurance policyholders. Opponents of the legislation assert that elimination of the multiplier will inhibit the ability of certain parties (particularly the poor) to obtain competent representation in difficult PIP cases.

[19] *Holiday v. Nationwide Mutual Fire Insurance*, 864 So.2d 1215 (Fla. 1st DCA 2004); Florida Supreme Court case number SC04-184.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The bill says that contingency risk multipliers may be used when a case results in "new law." This term is not defined in the bill. The bill's intent is that the multiplier be used when the court decision results in new common law—rules of law that are promulgated by the courts. A definition of the term "new law" may be helpful in clearing up any possible ambiguity.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.