HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7071 PCB JDC 20-03 Contingency Risk Multipliers
SPONSOR(S): Judiciary Committee, Beltran and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 914

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Judiciary Committee	13 Y, 5 N	Jones	Luczynski
1) Commerce Committee	16 Y, 7 N	Fortenberry	Hamon

SUMMARY ANALYSIS

In certain situations after the resolution of a court case, the court may require one party to pay the opposing party's attorney fees. Several Florida and federal statutes, known as "fee-shifting statutes," entitle the prevailing party to a "reasonable" attorney fee as a matter of right. When a fee-shifting statute applies, the court must determine what constitutes a "reasonable" attorney fee.

Florida courts calculate reasonable attorney fees under the "lodestar approach." This approach requires the court to determine the number of hours reasonably expended on the case and multiply that number by the reasonable hourly rate, which produces the "lodestar amount."

In certain cases, courts further increase the lodestar amount by applying a “contingency risk multiplier" (“contingency fee multiplier”) a concept that arose from judicial interpretations of fee-shifting statutes. In Florida courts, the size of the contingency risk multiplier varies from 1.0 to 2.5 based on the likelihood of success at the outset of the case, as follows:

- 1.0 to 1.5, if the trial court determines that success was <u>more likely than not</u> at the outset
- 1.5 to 2.0, if the trial court determines that the likelihood of success was <u>approximately even</u> at the outset
- 2.0 to 2.5, if the trial court determines that success was <u>unlikely</u> at the outset

In 1992, federal courts began to restrict the use of contingency risk multipliers, in most, if not all, circumstances. While there has been a shift away from that standard as of 2010, federal case law provides that a contingency risk multiplier may only be used in rare circumstances, and that the multiplier is completely unavailable under certain federal statutes. The Florida Supreme Court has taken a different approach, holding in 2017 that the contingency risk multiplier in Florida courts is not subject to a "rare and exceptional circumstances" requirement. Accordingly, currently Florida and federal law differ with respect to this issue.

The bill creates a strong presumption that the lodestar amount awarded by a court in a property insurance policy dispute is sufficient and reasonable. This presumption can only be overcome in rare and exceptional circumstances, with evidence that the plaintiff could not have reasonably retained competent counsel to take his or her case.

The bill appears to have no fiscal impact on state or local governments. The bill may have a positive direct economic impact on the private sector in the form of decreases in property insurance rates if litigation costs, which are a contributing factor to those rates, are reduced.

The bill has an effective date of July 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

In certain situations, a court may require one party to pay the opposing party's attorney fees. The traditional English Rule entitled a prevailing party to attorney fees as a matter of right. Florida, however, with a majority of other U.S. jurisdictions, adopted the American Rule, under which each party is responsible for its own attorney fees unless a statute provides an entitlement to fees.

<u>Contingency Fees</u>

A contingency fee is an attorney fee that is charged only if the lawsuit is successful or favorably settled out of court.[1] In turn, an attorney and a client may enter into a contingency fee contract, agreeing that the client will pay the attorney a fee only if the attorney successfully recovers for the client.

The Florida Supreme Court, through its Rules Regulating the Florida Bar, allows contingency fee contracts but restricts their use.[2] Rule 4-1.5(f) prohibits contingency fees in criminal defense and certain family law proceedings.[3] The rule also requires a contingency fee agreement to:

- Be in writing.
- State the method by which the fee is to be determined.
- State whether expenses are to be deducted before or after the contingency fee is calculated.
- In certain types of cases, include other provisions ensuring the client is aware of the agreement's terms.[4]

Upon conclusion of a contingency fee case, the attorney must provide the client a written statement stating the outcome of the case, the amount remitted to the client, and how the attorney calculated the amount.[5]

<u>Statutorily Provided Attorney Fees</u>

Several Florida and federal statutes state that a prevailing party in court proceedings is entitled to attorney fees as a matter of right.[6] These statutes are known as "fee-shifting statutes" and often entitle the prevailing party to a reasonable attorney fee.[7] When a fee-shifting statute applies, the court must determine and calculate what constitutes a reasonable attorney fee.

Lodestar Approach

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[1] *See* Black's Law Dictionary 338 (8th ed. 2004).
[2] R. Regulating Fla. Bar 4-1.5(f).
[3] R. Regulating Fla. Bar 4-1.5(f)(3).
[4] R. Regulating Fla. Bar 4-1.5(f)(1) and (4).
[5] R. Regulating Fla. Bar 4-1.5(f)(1).
[6] *See, e.g.,* s. 627.428, F.S. (providing that an insured who prevails against an insurer is entitled to "a reasonable sum" of attorney fees); s. 501.2105, F.S. (providing that the prevailing party in an action under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) is entitled to "a reasonable legal fee"); 42 U.S.C. s. 1988(b) (providing that a prevailing party seeking to enforce specified civil rights statutes may recover "a reasonable attorney's fee").
[7] *See* s. 627.428, F.S., which is sometimes referred to as the "one-way attorney fees statute."

In 1985, the Florida Supreme Court held that courts should calculate the amount of statutorily-authorized attorney fees under the "lodestar approach."[8] Under this approach, the first step is for the court to determine the number of hours reasonably expended on the case. The second step requires the court to determine a reasonable hourly rate. The number of hours reasonably expended (determined in the first step), multiplied by the reasonable hourly rate (determined in the second step), produces the "lodestar amount," which is considered an objective basis for what the attorney fee amount should be.

Contingency Risk Multiplier

In certain cases, the court increases the lodestar amount by applying a contingency risk multiplier.[9] The concept of the contingency risk multiplier arose from judicial interpretations of statutory authorization of attorney fees in particular cases,[10] but the Legislature may also expressly provide for use of a contingency risk multiplier in certain cases.[11] In a 1990 case, the Florida Supreme Court discussed three different types of cases and whether a contingency risk multiplier should be applied in each case, as follows:

- *Public policy enforcement cases.* These cases may involve discrimination, environmental issues, and consumer protection issues. In these cases, a contingency risk multiplier is usually inappropriate.
- *Family law, eminent domain, estate, and trust cases*. In these cases, a contingency risk multiplier is usually inappropriate.
- *Tort and contract claims, including insurance cases*. In these cases, a contingency risk multiplier may be applied if the plaintiff can demonstrate the following factors show a need for the multiplier:
  - Whether the relevant market requires a contingency risk multiplier to obtain counsel;
  - Whether the attorney can mitigate the risk of nonpayment; and
  - Whether any other factors established in *Rowe*[12] support the use of the multiplier.[13]

Further, in the same decision, the Court noted that the size of the contingency risk multiplier varies from 1.0 to 2.5 based on the likelihood of success at the outset of the case, as follows:

- 1.0 to 1.5, if the trial court determines that success was <u>more likely than not</u> at the outset
- 1.5 to 2.0, if the trial court determines that the likelihood of success was <u>approximately even</u> at the outset
- 2.0 to 2.5, if the trial court determines that success was <u>unlikely</u> at the outset.[14]

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[8] *Fla. Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).

[9] The Court may also adjust the amount based on the results obtained by the attorney. *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828, 830-31 (Fla. 1990). Contingency risk multipliers are also referred to as contingency fee multipliers.

[10] The rationale for using a contingency risk multiplier to increase an attorney fee award is that plaintiffs and plaintiffs' attorneys generally do not recover any money unless they prevail. The attorney fee multiplier induces attorneys to take a risk on cases they might not otherwise take, allowing would-be plaintiffs to find attorneys willing to represent them.

[11] *See* s. 790.33(3)(f)1, F.S. (explicitly authorizing a contingency fee multiplier in certain cases relating to the preemption of firearm and ammunition regulation).

[12] The *Rowe* factors were based upon Disciplinary Rule 2-106(b) of the Florida Bar (which is now Rule of Professional Conduct 4-1.5), and were as follows:

- Time and labor required, novelty and difficulty of the question involved, and the skill and requisite to perform the legal service properly.
- Likelihood, if apparent to the client, that the acceptance of employment would preclude other employment by the lawyer.
- Fee customarily charged in the locality for similar legal services.
- Amount involved and results obtained.
- Time limitations imposed by the client and circumstances.
- Nature and length of the professional relationship with the client.
- Experience, reputation, and ability of the lawyer(s) providing services.
- Whether the fee is a fixed or contingency fee.

Rowe, 472 So. 2d at 1150–1151.

[13] *Quanstrom*, 555 So. 2d at 833-35.

[14] *Id.* at 834.

Therefore, under current law, an attorney is more likely to receive a higher contingency risk multiplier—and thus a higher attorney risk award—if he or she takes a case that at the outset seems unlikely to succeed.

Federal Court Treatment of the Contingency Risk Multiplier

Part of the Florida Supreme Court's rationale for adopting the contingency risk multiplier framework in 1985 was that, at the time, it was being applied in federal courts.[15] However, in 1992, the U.S. Supreme Court decided *Burlington v. Dague*, in which it rejected the use of a contingency risk multiplier under certain federal risk-shifting statutes. *Dague* essentially signaled that the Supreme Court was closing the door on the contingency risk multiplier's use in most, if not all, federal cases.[16]

In 2010, in the case of *Perdue v. Kenny A. ex. rel. Winn,* a case involving a class action lawsuit filed on behalf of 3,000 children in the Georgia foster care system, the U.S. Supreme Court again addressed the contingency risk multiplier issue.[17] The plaintiffs argued in the underlying case that the foster care system in two counties was constitutionally deficient. The case went to mediation, and the parties entered a consent decree resolving all issues. Subsequently, the plaintiffs' attorneys sought attorney risks under 42 U.S.C. s. 1988.[18]

The federal district court calculated the fees using the lodestar approach, arriving at a $6 million figure, and then applied a 1.75 contingency risk multiplier, for a total attorney fee of $10.5 million. The district court justified the contingency risk multiplier by finding that the attorneys had:

- Advanced $1.7 million with no ongoing reimbursement.
- Worked on a contingency basis, and therefore were not guaranteed payment.
- Displayed a high degree of skill, commitment, dedication, and professionalism.
- Achieved extraordinary results.[19]

On review, the U.S. Supreme Court reversed the district court's calculation of attorney fees, remanding the case because the district court did not provide adequate justification for the 75 percent increase. The Court reiterated that "there is a strong presumption that the lodestar figure is reasonable," but that such presumption "may be overcome in those *rare circumstances* in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee."[20] The Court also determined that a contingency risk multiplier may be applicable in “exceptional” circumstances.[21]

Thus, the *Perdue* Court determined that the application of contingency risk multipliers may sometimes be appropriate, while also issuing several warnings about contingency risk multipliers, as follows:

- When a trial court fails to give detailed explanations for why it applies a contingency risk multiplier, "widely disparate awards may be made, and awards may be influenced . . . by a judge's subjective opinion regarding particular attorneys or the importance of the case."[22]
- "[U]njustified enhancements that serve only to enrich attorneys are not consistent" with the aims of a statute that seek to compensate plaintiffs.[23]
- In many cases, attorney fees "are not paid by the individuals responsible for the constitutional or statutory violations on which the judgment is based . . . . Instead, the fees are paid . . . by state and local taxpayers," resulting in a diversion of funds from other government programs.[24]

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[15] *See Rowe*, 472 So. 2d at 1146 ("[W]e . . . adopt the federal lodestar approach for computing reasonable attorney fees").
[16] *See City of Burlington v. Dague*, 112 S. Ct. 2638 (1992) ("Thus, enhancement for the contingency risk posed by each case would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well . . . [W]e hold that enhancement for contingency is not permitted under the fee-shifting statutes at issue").
[17] *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010).
[18] 42 U.S.C. s. 1988(b) allows the court to award attorney fees to the prevailing party in certain civil rights actions.
[19] *Perdue*, 130 S. Ct. at 1670.
[20] *Id.* at 1673 (emphasis added).
[21] *Id.*
[22] *See id.* at 1676.
[23] *See id.*
[24] *See id.* at 1677.

Recent Florida Supreme Court Treatment of the Contingency Risk Multiplier

In 2017, the Florida Supreme Court rejected the U.S. Supreme Court's *Dague* decision, instead holding that the contingency risk multiplier in Florida courts is not subject to the "rare and exceptional circumstances" requirement.[25] The Court acknowledged that, based upon its decision to maintain the applicability of the contingency risk multiplier without the restrictions implemented by the *Dague* decision, Florida "separat[ed] from federal precedent in this area."[26]

Attorney Fees Applicable to Property Insurance Litigation

Current Florida law provides that when a court issues a judgment against an insurer, and in favor of an insured who is represented by an attorney, the court shall order that the insurer pay a reasonable amount of attorney fees to an insured's attorney.[27] This provision regarding attorney fees is applicable to various insurance claim disputes, including property insurance claim disputes.[28]

Effect of Proposed Changes

For property insurance litigation, the bill applies a standard for awarding a contingency risk multiplier that is similar to the standard applied in federal courts, in that it allows for the multiplier only in "rare and exceptional" circumstances.[29] The bill provides that the award of attorney fees creates a strong presumption that the lodestar amount awarded by a court in a property insurance policy case is sufficient and reasonable, and thus that the court should not ordinarily apply a contingency risk multiplier. The plaintiff can overcome this presumption only in a rare and exceptional circumstance, and only if he or she can demonstrate that he or she could not have otherwise reasonably retained competent counsel.

The bill has an effective date of July 1, 2020.

B. SECTION DIRECTORY:

Section 1: Amends s. 627.428, F.S., relating to attorney fees.
Section 2: Provides an effective date of July 1, 2020.

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:

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[25] *See Joyce v. Federated Nat'l Ins. Co.*, 228 So. 3d 1122 (Fla. 2017) ("[W]ith all due deference to the United States Supreme Court, we do not accept the *Dague* majority's rationale for rejecting contingency fee multipliers").
[26] *Id. at*, 1132
[27] *Id.*
[28] Of note, the Florida legislature has expressly prohibited the use of contingency risk multipliers for personal injury protection cases. *See* s. 627.736(8)(c), F.S.
[29] In essence, the bill shifts the standard for the use of a contingency risk multiplier in property insurance cases away from that of the *Joyce* case.

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill's creation of a strong presumption in favor of a "lodestar" fee, only to be overcome in a "rare and exceptional circumstance" may reduce the amount of fees some attorneys recover if contingency risk multipliers are applied in fewer cases. Property insurance rates are based upon multiple factors, including litigation costs. To the extent the bill reduces litigation costs for property insurance cases, it may cause property insurance rates to decrease. The bill may also result in a reduced incentive for attorneys to litigate property insurance cases. This may cause fewer property insurance cases to be litigated, which might further reduce property insurance rates. However, this could have the unintended consequence of making it more difficult to obtain an attorney for a property insurance case, resulting in the applicability of the contingency risk multiplier when a case is litigated.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 30, 2020, the Judiciary Committee considered the bill as a PCB, adopted a strike-all amendment and reported the PCB favorably, as amended. The amendment:

- Limited the PCB's application to claims arising under a property insurance policy.
- Removed the prohibition of a contingency risk multiplier, instead creating a strong presumption that a contingency risk multiplier is inappropriate to enhance a lodestar calculation for attorney fees.
- Clarified that the presumption can be overcome only in a rare and exceptional circumstance.

This analysis is drafted to the bill, which was the PCB as amended by the Judiciary Committee.