The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Banking and Insurance

BILL:	CS/SB 914
INTRODUCER:	Banking and Insurance Committee and Senator Brandes
SUBJECT:	Contingency Risk Multipliers
DATE:	January 21, 2020
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Arnold	Knudson	BI	**Fav/CS**
2.			JU	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 914 codifies into state law the federal precedent regarding the award of attorney fees using the lodestar amount and contingency fee multipliers as applied in property insurance cases, as articulated in *Perdue*.[1] The bill creates a strong presumption that the lodestar amount is sufficient and reasonable. The bill provides further that the lodestar "sufficient and reasonable" presumption is rebuttable only in "rare and exceptional" circumstances by evidence that competent counsel could not be retained in a reasonable manner. Only when such evidence is presented to the court could a contingency risk multiplier be applied in property insurance litigation.

The lodestar amount, in the context of attorney fees awarded under s. 627.428, F.S., is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate for the services of the attorney of the insured or beneficiary.

The bill takes effect July 1, 2020.

[1] *See infra* Note 17.

II. Present Situation:

Attorney Fees in Insurance Litigation

In most United States jurisdictions, each party to the litigation pays its own attorney, regardless of the outcome of the litigation, and a court may only award attorney fees to the prevailing side if authorized by statute or agreement of the parties to the litigation.[2] This is often referred to as the "American Rule" for attorney fees, and contravenes the "English Rule" under which English courts generally awarded attorney fees to the prevailing party in litigation.[3]

Florida has enacted a number of statutes that authorize the award of attorney fees in civil litigation. As the Florida Supreme Court (Court) has noted, these statutory provisions are of two types.[4] In the first, statutes direct the courts to assess attorney fees against only one side of the litigation in certain types of actions. An example is found in s. 627.428, F.S., which directs the court to assess the insurer a reasonable sum as fees for the prevailing party's attorney. The second category adopts the English Rule, authorizing the prevailing party, whether plaintiff or defendant, to recover attorney fees from the opposing party. An example is found in the recently enacted s. 627.7152, F.S., which directs the court to award an attorney fee to the prevailing party in assignment of benefits litigation under a residential or commercial property insurance policy.

Attorney Fees Arising from Insurance Litigation

Section 627.428, F.S., allows an insured to recover his or her own attorney fees if the insured prosecutes a lawsuit to enforce an insurance policy. Some version of this statute has been the law in Florida since at least 1893.[5] The statute provides, in part:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.[6]

The Court recently explained the purpose of the statute:

> The need for fee and cost reimbursement in the realm of insurance litigation is deeply rooted in public policy. Namely, the Legislature recognized that it was essential to "level the playing field" between the economically-advantaged and sophisticated insurance companies and the individual citizen. Most assuredly, the

[2] *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1147-1148, (Fla. 1985).
[3] *Id*.
[4] *Id*.
[5] See *Tillis v. Liverpool & London & Globe Insurance Company*, 35 So. 171 (1903)(rejecting an insurance company argument that the 1893 law providing that an insured may recover attorney fees in actions against an insurance company to enforce a policy violates due process and equal protection).
[6] Section 626.9373, F.S., contains substantially similar language but it applies to surplus lines insurers. Florida courts have interpreted the statutes to have the same meaning.

> average policyholder has neither the finances nor the expertise to single-handedly take on an insurance carrier. Without the funds necessary to compete with an insurance carrier, often a concerned policyholder's only means to take protective action is to hire that expertise in the form of legal counsel… For this reason, the Legislature recognized that an insured is not made whole when an insurer simply grants the previously denied benefits without fees. The reality is that once the benefits have been denied and the plaintiff retains counsel to dispute that denial, additional costs that require relief have been incurred. Section 627.428, F.S., takes these additional costs into consideration and levels the scales of justice for policyholders by providing that the insurer pay the attorney's fees resulting from incorrectly denied benefits.[7]

Florida courts have broadly interpreted the statute to allow recovery of fees when the insurer ultimately settles the case before trial.[8] A finding of bad faith on the part of the insurer is not a necessary precondition for the award of fees under the statute.[9]

Lodestar Calculation

Florida courts set reasonable attorney fees using the federal lodestar approach, which is calculated as the product of the number of hours reasonably expended multiplied by a reasonable hourly rate.[10] In adopting a "suitable foundation for an objective structure" for the award of attorney fees, the Court explained in *Fla. Patient's Comp. Fund v. Rowe*, that:

> There is but little analogy between the elements that control the determination of a lawyer's fee and those which determine the compensation of skilled craftsmen in other fields. Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that. It brings the court into disrepute and destroys its power to perform adequately the function of its creation.[11]

In calculating the lodestar amount under *Rowe*, courts must consider the following elements:

- The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service.

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[7] *Johnson v. Omega Ins. Co.*, 200 So.3d 1207, 1215-1216 (Fla. 2016)(internal citations omitted).
[8] *Johnson v. Omega Ins. Co.*, 200 So.3d 1207, 1215 (Fla. 2016)(noting that it is it is "well settled that the payment of a previously denied claim following the initiation of an action for recovery, but prior to the issuance of a final judgment, constitutes the functional equivalent of a confession of judgment").
[9] *Insurance Co. of North America v. Lexow*, 602 So.2d 528, 531 (Fla. 1992)("We reject the argument that attorney's fees should not be assessed against INA because this dispute involved a type of claim which reasonably could be expected to be resolved by a court. INA's good faith in bringing this suit is irrelevant. If the dispute is within the scope of s. 627.428, F.S., and the insurer loses, the insurer is always obligated for attorney's fees").
[10] *Fla. Patient's Comp. Fund v. Rowe*, 472 So.2d 1145, 1150 (Fla. 1985).
[11] *Id*. at 1149 (quoting *Baruch v. Giblin*, 122 Fla. 59, 63, 164 So. 831, 833 (1935)).

- The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- The fee customarily charged in the locality for similar legal services.
- The amount involved 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, and ability of the lawyer or lawyers performing the services.
- Whether the fee is fixed or contingent. [12]

Contingency Risk Multipliers

Florida Court Discretion to Apply a Contingency Risk Multiplier and the Contingency Risk Multiplier Schedule

Florida courts have discretion to apply a contingency risk multiplier to the produced lodestar amount.[13] However, in determining whether a multiplier is warranted, Florida courts must consider the following elements to determine whether a multiplier is warranted:

- Whether the relevant market requires a contingency fee multiplier to obtain competent counsel.
- Whether the attorney was able to mitigate the risk of nonpayment in any way.
- Whether any of the factors set forth in *Rowe* are applicable, especially, the amount involved, the results obtained, and the type of fee arrangement between the attorney and the client.[14]

When courts conclude the presented evidence supports utilization of a multiplier, courts may use the following *Quanstrom* multiplier schedule:[15]

Contingency Risk Multiplier	Case's Likelihood of Success at Outset
1.0 to 1.5	More likely than not.
1.5 to 2.0	Approximately even.
2.0 to 2.5	Unlikely.

Florida's adoption of this approach in *Rowe* was followed by a series of United States Supreme Court (SCOTUS) decisions rejecting and limiting the use of contingency fee multipliers in federal cases. In response, the Court has reaffirmed Florida precedent and the underlying public policy reasoning for the use of contingency fee multipliers as articulated in *Rowe* on multiple occasions.

Federal Precedent Limiting the Use of Contingency Risk Multipliers

Following the Court's decision in *Rowe*, Justice Scalia, writing the SCOTUS majority opinion in *Dague*, couched his disapproval of contingency fee multipliers by reasoning that the multipliers incentivize nonmeritorious claims, so that those claims are effectively raised as often as meritorious claims:

[12] *Fla. Patient's Comp. Fund v. Rowe*, 472 So.2d 1145, 1150 (Fla. 1985).
[13] *Standard Guar. Ins. Co. v. Quanstrom*, 555 So.2d 828, 834 (Fla. 1990).
[14] *Id.*
[15] *Id*.

> [T]he consequence of awarding contingency enhancement to take account of this "merits" factor would be to provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones. Assume, for example, two claims, one with underlying merit of 20%, the other of 80%. Absent any contingency enhancement, a contingent-fee attorney would prefer to take the latter, since he is four times more likely to be paid. But with a contingency enhancement, this preference will disappear: the enhancement for the 20% claim would be a multiplier of 5 (100/20), which is quadruple the 1.25 multiplier (100/80) that would attach to the 80% claim. 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. We think that an unlikely objective of the "reasonable fees" provisions.[16]

Building on *Dague*, SCOTUS in *Perdue* further limited the use of contingency fee multipliers, reserving them for "rare and exceptional circumstances" in which the lodestar insufficiently accounts for a factor that may properly be considered in determining a reasonable fee.[17] Such circumstances "require specific evidence that the lodestar fee would not have been 'adequate to attract competent counsel.'"[18]

Florida Precedent Approving the Use of Contingency Risk Multipliers

The Court has rejected the SCOTUS reasonings in *Dague* and *Perdue* on multiple occasions. Beginning with *Bell*, the Court reaffirmed the *Rowe* rationale for contingency fee multipliers, explaining:

> [W]e find that the primary policy that favors the consideration of the multiplier is that it assists parties with legitimate causes of action or defenses in obtaining competent legal representation even if they are unable to pay an attorney on an hourly basis. In this way, the availability of the multiplier levels the playing field between parties with unequal abilities to secure legal representation.[19]

In *Lane*, the Court similarly noted the role full contingency fee cases, generally, and partial contingency fee cases, specifically, play in providing access to the court system:

> Attorneys should be encouraged to take cases based on a partial contingency-fee arrangement, since this policy also will encourage attorneys to provide services to persons who otherwise could not afford the customary legal fee. No incentive would exist under the approach taken by the district court below, because no "enhancement" of the customary fee would be given to offset losses.[20]

More recently, the Court has rejected the "rare and exceptional" standard as articulated in *Perdue*. In *Joyce*, the Court held there is no "rare and exceptional" circumstances requirement

[16] *City of Burlington v. Dague*, 505 U.S. 557, 563 (1992).
[17] *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 543 (2010).
[18] *See Perdue* 559 U.S. at 543.
[19] *Bell v. U.S.B. Acquisition Co. Inc.*, 734 So.2d 403, 411 (Fla. 1999).
[20] *Lane v. Head*, 566 So.2d 508, 511 (Fla. 1990).

before a court can apply a contingency fee multiplier.[21] *Joyce* also reaffirmed *Rowe, Quanstrom*, and *Bell.*

Additional Statutes Applicable to the Award of Attorney Fees In Property Insurance Litigation

Section 627.428, F.S., generally governs the award of attorney fees in civil litigation under a property insurance policy. There are circumstances, however, where the insurer may obtain attorney fees from an insured. These circumstances include when litigation is brought by an assignee of benefits under a residential property insurance policy, when a claimant brings an action that has no good faith legal or genuine factual basis, or in certain circumstances when the insurer's offer of settlement is refused.

Attorney Fees Arising from Assignment of Benefits

Section 627.7152, F.S., prevents recovery of "one way" attorney fees under s. 627.428, F.S., for assignees of post-loss benefits under a residential property insurance policy or commercial property insurance policy, and instead provides a formulaic means by which either party may recover attorney fees.[22] An award of attorney fees is based on the difference between the judgment obtained and the presuit settlement offer. Fees are awarded as follows:

- If the difference between the judgment obtained and the presuit offer is less than 25 percent of the disputed amount, the insurer is entitled to an award of reasonable attorney fees.
- If the difference between the judgment obtained and the presuit offer is at least 25 percent but less than 50 percent of the disputed amount, no party is entitled to an award of attorney fees.
- If the difference between the judgment obtained and the presuit offer is at least 50 percent of the disputed amount, the assignee is entitled to an award of reasonable attorney fees.[23]

Attorney Fees Arising from Unsupported Claims, Defenses, or Delays

Section 57.105, F.S., provides the court with authority to award attorney fees, including prejudgment interest, to the prevailing party if the court finds the losing party or losing party's attorney brought a civil claim or raised a defense in a civil cause of action that has no good faith legal or genuine factual basis. The court may also award attorney fees if the opposing party took any action, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, for the primary purpose of unreasonable delay.[24]

Attorney Fees Arising from Offers of Judgment

Section 768.79, F.S., provides for attorney's fees where a party's offer to settle a case has been rejected. The statute states, in part:

> (1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days,

[21] *Joyce v. Federated National Insurance Company*, 228 So.3d 1122, 1135 (Fla. 2017).
[22] Chapter 2019-58, s. 23, L.O.F.
[23] Section 627.7152(10)(a), F.S.
[24] Section 57.105(2), F.S.

> the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him…if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer….If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees….

An offer must:
- Be in writing and state that it is being made pursuant to this section;
- Name the party making it and the party to whom it is being made;
- State with particularity the amount offered to settle a claim for punitive damages, if any; and
- State its total amount.[25]

When determining the reasonableness of an award of attorney fees, the court must consider the following factors along with other relevant criteria:
- The then merit or lack of merit in the claim;
- The number and nature of offers made by the parties;
- The closeness of questions of fact and law at issue;
- Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer;
- Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties; and
- The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

Section 768.79(7)(a), F.S., allows the court discretion to disallow an award of costs and attorney fees to the prevailing party if it is determined the prevailing party did not make the offer in good faith.

III. Effect of Proposed Changes:

Section 1 amends s. 627.428, F.S., to create a strong presumption that the lodestar fee is a sufficient and reasonable award of attorney fees in a claim arising under a property insurance policy. This presumption is rebuttable only in rare and exceptional circumstances with evidence that competent counsel could not be retained in a reasonable manner. Only when such evidence is presented to the court could a contingency risk multiplier be applied in property insurance litigation.

The lodestar amount, in the context of attorney fees awarded under s. 627.428, F.S., is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate for the services of the attorney of the insured or beneficiary.

Section 2 provides an effective date of July 1, 2020.

[25] Section 768.79(2), F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The Court has noted the Legislature has discretion to limit the elements for consideration of attorney fee awards.[26] Similarly, the Court has noted application of contingency risk multipliers is not mandatory.[27]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[26] *See Quanstrom*, 555 So.2d at 834.
[27] *See Quanstrom*, 555 So.2d at 830.

VIII. Statutes Affected:

This bill substantially amends section 627.428 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Banking and Insurance on January 21, 2020:
Creates a strong presumption that the lodestar amount is a sufficient and reasonable award of attorney fees under s. 624.428, F.S., in property insurance litigation. The bill provides further that the lodestar "sufficient and reasonable" presumption is rebuttable only in "rare and exceptional" circumstances by evidence that competent counsel could not be retained in a reasonable manner. Only when such evidence is presented to the court could a contingency risk multiplier be applied in property insurance litigation. The original filed bill would have prohibited the use of a contingency risk multiplier in awarding an attorney fee under s. 624.428, F.S., related to property insurance litigation.

B. Amendments:

None.