



## *Contingency Fee Multipliers*

### **Overview of Contingency Fee Multipliers**

The general rule is that each party must pay his or her own attorney's fees and costs, regardless of the outcome of the action. *See Johnson v. Omega Ins. Co.*, 200 So. 3d 1207, 1214 (Fla. 2016). There is an exception, however, when a statute authorizes an award of fees to the prevailing party in an action. *See id.* Such fee-shifting statutes are designed to encourage injured parties to enforce their statutory rights when the costs of litigation, absent a fee-shifting statute, would discourage them from doing so. *See Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986). Generally, such statutes authorize the recovery of a "reasonable fee," and so long as plaintiffs "find it possible to engage a lawyer based on the statutory assurance that he will be paid a 'reasonable fee,' the purpose behind the fee-shifting statute has been satisfied." *Id.*

To calculate an attorney's fee award, Florida courts follow the lodestar method established by the federal courts. *Fla. Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1150-52 (Fla. 1985). Under this method, attorney's fees are calculated using the number of attorney hours reasonably expended on the matter multiplied by the reasonable hourly rate. *Id.* at 1150-51.

In some cases, however, a court may decide that the lodestar figure does not represent a reasonable fee. In contingency fee cases, for example, the attorney taking on the representation has agreed to receive no compensation if his client does not prevail. Under *Rowe*, the Florida Supreme Court instructed trial courts that they may adjust the lodestar amount in light of that contingency risk and apply a multiplier from 1.5 to 3.0 based on the "likelihood of success" at the outset of the case. *Id.* at 1151. Notably, the lodestar amount often awards *more* than a contingency fee would, as the lodestar produces an award that roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case. And with a multiplier, that attorney's fee award may double or triple.

The Florida Supreme Court reexamined *Rowe* in *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990), and modified the analysis for contingency fee multipliers. As set forth in *Quanstrom*, the trial court must consider whether to apply a contingency fee multiplier but is not required to apply one. *Id.* at 831. When determining whether a multiplier is necessary, a trial court should consider three factors: (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) 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 his or her client. Competent, substantial evidence must

justify the application of a multiplier. *Id.* at 834; *see also State Farm Fire & Cas. Co. v. Palma*, 555 So. 2d 836, 838 (Fla. 1990).

In contrast, the U.S. Supreme Court strongly disfavors contingency enhancements and finds that they should apply only in “rare” and “exceptional” cases. As Justice Scalia explained in the majority opinion in *Burlington v. Dague*, 505 U.S. 557 (1992), an attorney’s contingency risk “is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits. The second factor, however, is ordinarily reflected in the lodestar—either as the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so.” *Id.* at 562. Thus, “[t]aking account of it again through lodestar enhancement amounts to double counting.” *Id.* at 563. Justice Scalia also discouraged consideration of the first factor in any fee award, as it would incentivize bringing meritless claims. As Justice Scalia explained:

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. These statutes were not designed as a form of economic relief to improve the financial lot of lawyers.

*Id.* at 563 (internal quotation marks omitted). Justice Scalia was also concerned that overcompensating attorneys in contingency fee cases “would in effect pay for the attorney’s time (or anticipated time) in cases where his client does *not* prevail,” which would be antithetical to the purpose of prevailing party fee-shifting statutes. *Id.* at 565. Finally, Justice Scalia said, “[c]ontingency enhancement would make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable.” *Id.* at 566.

### **In *Joyce*, the Florida Supreme Court Makes Multipliers the Rule, Not the Exception**

Unfortunately, notwithstanding the excellent reasons for repudiating contingency fee multipliers outlined in *Dague*, the Florida Supreme Court has instead expanded their use. In 2017, the Florida Supreme Court confirmed in *Joyce v. Federated National Insurance Company*, 228 So. 3d 1122 (Fla. 2017), the continued viability of contingency fee multipliers and went further, holding that a contingency fee multiplier may be applied in almost any case, regardless of whether the lodestar amount represents a reasonable fee.

The action in *Joyce* arose from a denial of insurance coverage based on an alleged material misrepresentation in the Joyces’ homeowners’ insurance application; the insurer argued that the Joyces had failed to disclose two previous insurance claims at the time of the application. *Federated Nat’l Ins. Co. v. Joyce*, 179 So. 3d 492, 493 (Fla. 5th DCA 2015). Early in discovery, however, the insurer learned that the Joyces had disclosed the prior claims. *Id.* The insurer

acknowledged the error, and the parties settled the case for \$23,500, exclusive of attorney's fees. *Id.* Under section 627.428, Florida Statutes, which authorizes attorney's fee awards to prevailing insureds, the trial court awarded the Joyces' attorney—who was operating on a contingency fee basis—more than \$38,000 in attorney's fees using the lodestar method. *Joyce*, 179 So. 3d at 493. However, the trial court went further, awarding a multiplier of 2.0, resulting in a total fee award of \$76,300. *Id.*

The Fifth District Court of Appeal reversed, finding that the trial court had improperly awarded the multiplier. *Id.* Looking to a number of Florida district court of appeal decisions interpreting both the Florida Supreme Court's jurisprudence and the U.S. Supreme Court's jurisprudence on multipliers, the Fifth District acknowledged that the lodestar typically represents a reasonable fee, and "[t]he application of a multiplier is the exception, not the rule," only overcome in "rare and exceptional circumstances." *Id.* at 493-94 (internal quotation marks omitted). This was not a rare and exceptional circumstance, as the Joyces' case was a basic insurance dispute not involving "esoteric legal issues or complicated factual disputes." *Id.* at 494. Further, there was "no evidence the Joyces had any difficulty obtaining counsel to handle this matter"; indeed, it took "only one phone call." *Id.*

The Florida Supreme Court, however, ruled that the Fifth District erred by "imposing a 'rare' and 'exceptional' circumstances requirement before a trial court may apply a contingency fee multiplier." *Joyce*, 228 So. 3d at 1123. In doing so, the Court explicitly rejected the well-reasoned rationale of the U.S. Supreme Court in *Dague* that application of a contingency fee multiplier makes little sense in ordinary cases and thwarts the purpose of fee-shifting statutes. At the same time, the Court claimed that contingency fee multipliers provide "trial courts with the flexibility to ensure that lawyers, who take a *difficult case* on a contingency fee basis, are adequately compensated." *Id.* at 1132 (emphasis added).

In his dissent, Justice Canady argued that the multiplier was applied here "without sufficient justification under the requirements of our case law," as the record failed to support the notion that the case was difficult or that a multiplier was necessary to obtain counsel. *Joyce*, 228 So. 3d at 1135-36 (Canady, J., dissenting). Justice Canady went through the evidence before the trial court and concluded that a multiplier was not justified in this "simple, straightforward case," particularly where there were thousands of attorneys in a neighboring county that might have taken the case and it took only one phone call to obtain counsel. *Id.* at 1140-41. In light of the availability of the one-way fee statute in section 627.428, Justice Canady rejected the notion that a multiplier was necessary to motivate insurance attorneys to take such cases. *Id.* at 1140. He also encouraged a reevaluation of the need for contingency fee multipliers given the rationale of the U.S. Supreme Court in *Dague*.

### **Florida Must Rein in the Use of Contingency Fee Multipliers**

As a consequence of *Joyce*, contingency fee multipliers are the rule and not the exception, even in run-of-the-mill insurance cases. Florida courts now routinely award attorney's fee awards which double or triple what attorneys would otherwise receive as fees under a typical billable hour arrangement. *See, e.g., Citizens Prop. Ins. Corp. v. Laguerre*, 259 So. 3d 169 (Fla. 3d DCA 2018) (affirming award of \$120,250 in attorney's fees award using 2.0 multiplier where damages award was \$27,267.63); *Santiago v. Fla. Peninsula Ins. Co.*, Case No. 15-005272-CI-21 (Fla. 6th Cir. Ct.

July 31, 2019) (awarding \$1.2 million in attorneys' fees using 2.0 multiplier where damages award was \$41,000).

As Justice Canady recommended in *Joyce*, Florida must reexamine the need for contingency fee multipliers, as they more often fail to serve the purposes for which they were designed—to ensure litigants have access to counsel—and instead simply “improve the financial lot of lawyers.” *Dague*, 505 U.S. at 563. In sum:

- Contingency fee multipliers result in double counting as the lodestar calculation of attorney's fees already considers the difficulty of a case through the hours expended or the attorney's hourly rate;
- A market-based approach—i.e., an approach that requires consideration of the availability of competent counsel in a relevant market—cannot intelligibly be applied absent some direction as to the nature and scope of the “relevant market,” which the Florida Supreme Court has declined to provide, and further, there is no shortage of competent attorneys in Florida capable of handling most cases, particularly basic insurance coverage disputes;
- Contingency fee multipliers allow attorneys to offset losses from other cases in contravention of fee-shifting statutes, including section 627.428, which authorizes an award for fees associated with only “the suit in *which the recovery is had*,” § 627.428(1), Fla. Stat. (emphasis added));
- Contingency fee multipliers always result in enhancing an attorney's fee award and can never be used to reduce it, often resulting “in a fee windfall for the attorney,” as it was in the case of the Joyces' attorney who testified explicitly that she hoped to get a “big fee” as opposed to a reasonable fee, *Joyce*, 228 So. 3d at 1143 (Canady, J., dissenting); and
- Contingency fee multipliers make fee awards more complex and arbitrary, as exemplified by *Joyce* in which the Court arbitrarily set the “relevant market” for attorneys as the smaller city of St. Augustine where the Joyces lived, ignoring the existence of a robust legal market in neighboring Duval County, *id.* at 1143-44.

For all these reasons, the Legislature should either prohibit application of contingency fee multipliers or severely limit their use to only truly exceptional cases that justify an award above the lodestar, which already represents a reasonable fee.