The Florida Justice Reform Institute Supports HB 837 and Ending One-Way Attorney Fees in All Insurance Cases

The one-way attorney fee statutes, sections 627.428 and 626.9373, Florida Statutes, have essentially made insurance policy breach litigation risk-free for plaintiffs. Because these fee-shifting statutes are one-way—as only prevailing plaintiffs may recover their attorneys' fees, not prevailing insurers—they incentivize plaintiffs to bring suit, even over low-dollar disputes. This results in a perpetration of low severity damage claims driving high recovery of plaintiffs' attorneys' fees, which is costing insurers and Florida taxpayers billions of dollars per year.

In the December 2022 special session, the Florida Legislature finally ended the abuse of the one-way attorney fee statutes in property insurance cases by adding subsection (4) to section 627.428 and subsection (3) to section 626.9373, which subsections say expressly: "In a suit arising under a residential or commercial property insurance policy, there is no right to attorney fees under this section." § 627.428(4), Fla. Stat. (2022); § 626.9373(3), Fla. Stat. (2022). The same reasons supporting the end of one-way attorney fees in property insurance coverage disputes requires the end of those fees in other coverages too, which have similarly been plagued by rampant litigation. For all these reasons, the Florida Justice Reform Institute supports HB 837 which will end insurance litigation motivated by one-way attorney fees in litigation on other insurance coverages. Specifically, in Sections 6 and 7 of HB 837 (lines 403-405), the Legislature would repeal section 627.428 and section 626.9373. Additionally, Sections 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 would delete references to these statutes that are no longer needed in light of their repeal.

The Original Purpose of the One-Way Attorney Fee Statutes Was to Level the Playing Field Between Insureds and Insurers

Under the well-established common law rule, neither prevailing plaintiffs nor prevailing defendants are entitled to recover attorney's fees unless authorized by contract or statute.[1] Section 627.428, Florida Statutes, and its counterpart for surplus lines insurers in section 626.9373, are an exception to that common law rule. Called herein the one-way attorney fee statutes, the laws authorizes an award of attorney's fees to certain prevailing parties in disputes with insurers.[2] Under section 627.428(1), for example, "any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer" is entitled to an award of attorney's fees if he or she prevails in a dispute with an insurer, subject to some exceptions.[3]

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[1]*See Rivera v. Deauville Hotel, Emps. Serv. Corp.*, 277 So. 2d 265, 266 (Fla. 1973); *Stone v. Jeffres*, 208 So. 2d 827, 828-29 (Fla. 1968).
[2]*See Stone*, 208 So. 2d at 828-29; *see also* § 627.428, Fla. Stat.
[3]§ 627.428(1), Fla. Stat.; *see also, e.g.*, *Danis Indus. Corp. v. Ground Imp. Techniques, Inc.*, 645 So. 2d 420, 421 (Fla. 1994) (Section 627.428 "is a one-way street offering the potential for attorney's fees only to the insured or beneficiary.").

A number of purposes have been ascribed to such laws. Traditionally, one-way attorney fee statutes operate to "compensate the prevailing plaintiff, promote public interest litigation, punish or deter the losing party for misconduct, or prevent abuse of the judicial system."[4] Attorney fee statutes that categorically shift fees to only one type of losing party are intended to avoid "grave injustices" that arise with "strict adherence to the [common law] rule [that each party bears its own attorney's fees], indiscriminate to the equities of particular cases."[5] For example, statutory exceptions to the common law rule have been established for certain defendants perceived to have greater economic power, like railroads, and, in this case, insurance companies.[6]

In *Feller v. Equitable Life Assurance Society of the United States*,[7] the Florida Supreme Court described the purposes of the one-way attorney fee statute in section 627.428 as follows: "to discourage the contesting of policies . . . and to reimburse successful plaintiffs reasonably for their outlays for attorney's fees when a suit is brought against them, or they are compelled to sue, in Florida Courts to enforce their contracts."[8] According to the Court, reimbursing individual insureds and beneficiaries is necessary because "[i]t is an undue hardship upon beneficiaries of policies to be compelled to reduce the amount of their insurance by paying attorney's fees when suits are necessary in order to collect that to which they are entitled."[9] Large insurance companies do not incur the same hardship. Thus, the one-way attorney fee statutes "level the playing field so that the economic power of insurance companies is not so overwhelming that injustice may be encouraged because people will not have the necessary means to seek redress in the courts."[10] This economic power flows from not only the insurer's oft-superior resources in defending litigation, but also by virtue of the fact that the insurer has the most control in writing the contract of insurance, to which the two parties—the insurer and the policyholder—are held.

Further, when *Feller* was decided, finding an attorney was no small feat. Just a few years later, in 1959, there were only **7,520** members of the Florida Bar. Today, that number has grown to ***95,483***. The one-way attorney fee statutes are no longer necessary to ensure insureds find representation; instead, these statutes are simply exploited by plaintiffs' attorneys and holders of assignments of benefits ("AOBs").

Indeed, examples abound which illustrate that litigation over relatively low dollar amounts snowballs into expensive litigation, all driven by the recovery of one-way attorneys' fees. These

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[4]John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U. L. Rev. 1567, 1588 (1993).
[5]Lawrence J. Hollander & Michael H. Cramer, *Attorney's Fees—Should They Be Taxed as Costs?*, 8 Miami L.Q. 573 (Summer 1954).
[6]*Id.* at 573 (citing § 356.04, Fla. Stat. (1953) (railroads); § 625.08, Fla. Stat. (1953) (insurance companies)); *see also, e.g.*, John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 Law & Contemp. Probs. 9, 25 (1984) (with the creation of one-way attorney fee statutes, legislatures "were beginning to look at realistic attorney fee awards less as bounties for greedy lawyers and more as aids to needy plaintiffs or sanctions against corporate defendants").
[7]57 So. 2d 581 (Fla. 1952).
[8]*Id.* at 586; *accord State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 831 (Fla. 1993); *Ins. Co. of N. Am. v. Lexow*, 602 So. 2d 528, 531 (Fla. 1992).
[9]*Feller*, 57 So. 2d at 586.
[10]*Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 684 (Fla. 2000).

examples also illustrate that attorney fee-driven litigation is still a problem in the two insurance coverages we highlight next: personal injury protection ("PIP") and auto glass.

- In *United Automobile Insurance Co. v. Xunda A. Gibson, M.D., P.A.*, No. 4D22-1186 (Fla. 4th DCA Feb. 15, 2023), a PIP insurer filed a confession of judgment in the amount of ***$21.31 in benefits and $7.00 in interest*** and conceded the assignee medical provider's entitlement to attorneys' fees under section 627.428. The trial court granted the provider's motion for fees in the amount of $***10,328.80,*** with interest. Although the appellate court reversed and remanded as part of the attorneys' fee award was founded upon pre-litigation conduct, the appellate court did not disturb the finding that the provider was entitled to its attorneys' fees no matter the low value of the claim.

- In *Superior Auto Glass of Tampa Bay, Inc. v. GEICO General Ins. Co.*, No. 16-CC-008433 (Fla. 13th Cir. Ct. Feb. 6, 2021), the plaintiff, Superior Auto Glass (acting as assignee of the insured's benefits), sought damages of only ***$216.67***, plus interest. By operation of section 627.428, Florida Statutes, Superior Auto Glass was entitled to its attorneys' fees as the prevailing party. The court awarded Superior Auto Glass a total of ***$102,477.75*** in attorneys' fees after application of a multiplier (and based on a "lodestar" amount of $68,318.50).

- In *United Automobile Insurance Co. v. 5-Star Rehabilitation Center, Inc.*, No. 2018-000229-AP-01 (Fla. 11th Cir. Ct. Oct. 27, 2020), the circuit court acting in its appellate capacity approved a trial court award of ***$19,357.49*** in attorneys' fees premised only on a claim that the PIP insurer had failed to pay a statutory penalty of ***$250***.

- In *State Farm Fire & Casualty Co. v. Palma*, 555 So. 2d 836 (Fla. 1990), the Florida Supreme Court approved an attorneys' fee award of ***$253,500***, in a case where the amount of damages in controversy was merely a ***$600*** medical bill.

Abuse of One-Way Attorney Fees Continues in Other Insurance Coverages

Until recently, the one-way attorney fee statutes applied to all insurance disputes with no carve-outs for any coverages. The 2022 Legislature changed that and eliminated the applicability of the one-way attorney fee statutes to property insurance disputes. While the Legislature addressed the abuse of these laws in property insurance coverage, the statutes remain available for plaintiffs in other insurance coverages. In fact, the endless pursuit of one-way fees under these laws has infected other first-party insurance coverages, in particular motor vehicle physical damage coverage (specifically, auto glass or windshield repair coverage) and PIP insurance.

Much like first-party property insurance litigation, windshield litigation has exploded due to the plaintiffs' bar's use of the one-way attorney fee statute to manufacture litigation over relatively small price disputes. In fact, in most cases, auto glass claims have been paid by carriers, but windshield shops—that have taken AOBs from customers—are asking for more money and suing insurers over the difference. Remarkably, many of these cases are over amounts in dispute less than the filing fee of the lawsuit. Certainly, such cases crystallize the true motivation of the law suit: one-way attorney's fees.

PIP lawsuits are most frequently brought using AOBs. A PIP health care provider will take an AOB, and then create a price dispute with the payor, for which it will file a lawsuit and ask for one-way attorney's fees. As illustrated above, these disputes are often over de minimis amounts. For instance, in *Baker Family Chiropractic, LLC v. Liberty Mutual Insurance Co.*, No. 5D21-3137 (Fla. 5th DCA Feb. 6, 2023), the litigation concerned the net difference between the interest calculated and paid by the PIP insurer and the amount claimed by the health care provider—a difference of only ***$1.48***. Yet the Fifth District remanded the case so that the trial court could determine whether an award of attorneys' fees under section 627.428 was appropriate to the health care provider. While the Fifth District said that it was "free to philosophically disagree with the Legislature as to the wisdom or efficacy of awarding attorney's fees in every PIP dispute," no matter the small amount involved, it was "not free to ignore or rewrite the aforementioned statutory provisions. Furthermore, the Legislature has revised the insurance-related statutory attorney's fees provisions in the past and can do so again if it sees the need." *Id.* at 22.

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While the Legislature carved out property insurance disputes from the one-way attorney fee statutes in the December 2022 special session, the statutes remain available to plaintiffs pursuing PIP and auto glass claims, as well as other coverages. It is time to end the abuse of the one-way attorney fee statutes in ***all*** insurance coverages. For these reasons, the Institute supports HB 837, which will repeal both statutes entirely and end the availability of one-way attorney fees in any insurance-related dispute.