The Florida Justice Reform Institute Supports CS/CS/SB 236 and Limiting Contingency Risk Multipliers to Only Rare and Exceptional Cases

During the 2023 general session, the Legislature will have the opportunity to approve CS/CS/SB 236 ("SB 236"), which will rein in the use of contingency risk multipliers. Multipliers have been used to drastically increase attorney's hourly fee awards even in run-of-the-mill cases, spurred largely by the Florida Supreme Court's concerning decision *Joyce v. Federated National Insurance Company*, 228 So. 3d 1122 (Fla. 2017).

Thus, the Florida Justice Reform Institute supports SB 236, which would confirm that in awarding attorneys' fees in ***any*** litigation, the traditional calculation of attorneys' fees—i.e., multiplying the attorney's hourly rate by the hours reasonably expended on the matter—is the presumptive amount of any attorneys' fee award. Specifically, Section 1 of SB 236 (lines 60-64) would amend section 57.104, Florida Statutes, to add the following subsection (2):

> In any action in which attorney fees are determined or awarded by the court, there is a strong presumption that a lodestar fee is sufficient and reasonable. This presumption may be overcome only in a rare and exceptional circumstance with evidence that competent counsel could not otherwise be retained.

Overview of Calculation of Attorneys' Fees and Contingency Risk 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 begin with 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 determining what is reasonable, however, the *Rowe* Court outlined the following factors that are considered by courts:

> (1) The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly.
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> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.
(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

Id. at 1150; *see also id.* at 1152.

In some cases, 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 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. With a multiplier, that attorney's fee award may more than double.

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 risk multipliers. As set forth in *Quanstrom*, the trial court must consider whether to apply a contingency risk 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 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. *Id.* at 563. 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 risk multipliers outlined in *Dague*, the Florida Supreme Court 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 risk multipliers and went further, holding that a multiplier may be applied in almost any case, regardless of whether the lodestar amount represents a reasonable fee.

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 authorized 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*.

With Multipliers, Attorney's Fee Awards Often Dwarf the Actual Amount in Controversy

As a consequence of *Joyce*, 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 can double what attorneys would otherwise receive as fees under a typical billable hour arrangement. To the extent requests for multipliers are denied after *Joyce*, it is typically due to a lack of competent, substantial evidence supporting application of the multiplier. *See, e.g.*, *Citizens Prop. Ins. Corp. v. Anderson*, 241 So. 3d 221, 225-28 (Fla. 2d DCA 2018) (reversing trial court's award of legal fees including a contingency fee multiplier because the trial court failed to make a specific finding that the application of the multiplier was required by the relevant market and the lack of an evidentiary record meant the court could not otherwise find a basis to affirm); *see also, e.g.*, *Universal Prop. & Cas. Ins. Co. v. Deshpande*, 314 So. 3d 416 (Fla. 3d DCA Nov. 12, 2020) (reversing award of legal fees including contingency fee multiplier where there was no record evidence that Deshpande could not have obtained other competent counsel in the relevant market absent the availability of a contingency fee multiplier). But as these cases also suggest, it is unusual that a court will *decline* to apply a contingency fee multiplier, so long as the plaintiff presents evidence in support of the application of a multiplier. *See, e.g.*, *Wesson v. Fla. Peninsula Ins. Co.*, 296 So. 3d 572, 573-74 (Fla. 1st DCA 2020) (reversing trial court's decision that denied use of multiplier where trial court erroneously "considered the Wessons' actual difficulty in locating an attorney" and "the likelihood of success as mitigating the risk of nonpayment" as factors in denying multiplier).

The Florida Legislature Should Make Multipliers the Exception, Not the Rule

Section 1 of SB 236 would directly address Justice Canady's concerns in *Joyce* and conform Florida law with that of the federal courts, where contingency fee multipliers are the exception and not the rule. The strong presumption and the predominant standard for a reasonable attorney's fee should be the lodestar amount—i.e., the simple calculation of the hours reasonably expended multiplied by the relevant rate. Under SB 236, litigants may still overcome the presumption in rare and exceptional circumstances where competent counsel could not otherwise be retained, just as it was before *Joyce.* As a result, contingency fee multipliers will be used for their intended purpose—to ensure litigants have access to counsel—and not to simply "improve the financial lot of lawyers." *Dague*, 505 U.S. at 563. Thus, the Florida Justice Reform Institute supports SB 236.