**SB 76 – RESERVING ATTORNEY CONTINGENCY FEE MULTIPLIERS
FOR RARE AND EXCEPTIONAL CIRCUMSTANCES**

The Florida Legislature should enact Senate Bill 76 Relating to Residential Property Insurance, which will rein in the use of contingency fee multipliers. Such multipliers have been used to drastically increase attorney's fee awards even in run-of-the-mill property insurance cases. Specifically, Section 1 of the bill would add the following language to section 627.428, Florida Statutes, which authorizes an award of attorney's fees to a prevailing insured:

> In an award of attorney fees under this section for a claim arising under a property insurance policy, a strong presumption is created that a lodestar fee is sufficient and reasonable. Such presumption may be rebutted only in a rare and exceptional circumstance with evidence that competent counsel could not be retained in a reasonable manner.

This legislation would correct the course set by the Florida Supreme Court in the concerning decision *Joyce v. Federated National Insurance Company*, 228 So. 3d 1122 (Fla. 2017), which greatly expanded the situations to which contingency fee multipliers apply, as explained below.

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, such as section 627.428, authorizes an award of fees. *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 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 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 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.

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, 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*, 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 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*, --- So. 3d ----, No. 3D19-1566, 2020 WL 6600972, at *3 (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).

What follows are example attorney's fee awards including multipliers. Although the sample size is small, attorney's fee awards including multipliers are commonplace. Examples are difficult to find, however, because there is no readily accessible way to locate county court and circuit court attorney's fee awards. The decisions of Florida circuit court and county court judges are rarely published in legal reporters (books that contain judicial opinions) or captured by legal databases like Westlaw and LexisNexis. Sometimes too such attorney's fee awards are confidential by agreement.

Example 1: *Santiago v. Florida Peninsula Insurance Co.*, Case No. 15-005272-CI-21 (Fla. 6th Cir. Ct., Pinellas County 2019)

In *Santiago*, litigation over insurance coverage for and repair of a plumbing leak resulted in a jury awarding the plaintiffs **$41,000**. The plaintiffs sought to recover their attorney's fees and application of a contingency fee multiplier. Despite evidence that there were numerous attorneys practicing insurance law able and willing to take the case, the judge was swayed by testimony that

the vast majority of such attorneys would only take such cases with the possibility of receiving a fee multiplier. The judge agreed that a **2.0 multiplier** was appropriate, doubling the lodestar amount of attorney's fees from $600,835 to **$1,201,670—almost 30 times more than the jury verdict award**.

Example 2: *Deshpande v. Universal Property & Casualty Insurance Co.*, Case No. 2017-020911-CA-01 (Fla. 11th Cir. Ct., Miami-Dade County 2019)

Deshpande was a first-party property insurance case involving an amount in dispute (completed repair costs) of $23,335.38; ultimately, the plaintiff's attorneys secured a settlement of **$25,000** from the insurer, Universal Property & Casualty Insurance Co. Although the parties agreed that the plaintiff was entitled to his attorney's fees, the dispute over the amount of attorney's fees spilled over into litigation. After a hearing, the judge found that the lodestar amount of plaintiff's attorney's fees was $206,090.00, including hourly rates as high as $675 and $700 for two of the plaintiff's attorneys. The court also found that a contingency multiplier should apply, despite expert evidence presented by the defendant insurance company that 161 attorneys or firms were available and could have taken the case. The court applied a **2.0 multiplier**, bringing the total attorney's fee awarded to plaintiff to **$415,495.00**—again based on a **$25,000 settlement**. As noted above, however, the Third District Court of Appeal reversed, finding that the fee award including a multiplier was not supported by competent, substantial evidence. *See Deshpande*, 2020 WL 6600972, at *3.

Example 3: *Pedrero v. Citizens Property Insurance Corp.*, Case No. 16-006136 CA 34 (Fla. 11th Cir. Ct., Miami-Dade County 2019)

After trial, the plaintiff secured a settlement from the insurance company in the amount of **$35,000**. The court was swayed by testimony from the plaintiff's expert that very few competent attorneys in South Florida would have taken the case absent the availability of a fee multiplier. Consequently, the court found a **multiplier of 2.01** was appropriate, bringing the total attorney's fee award to **$702,927.15—more than 20 times the settlement amount.**

Example 4: *Martinez v. Citizens Property Insurance Corp.*, Case No. 17-002228 CA 30 (Fla. 11th Cir. Ct., Miami-Dade County 2019)

The plaintiff's attorneys obtained a net recovery of **$60,000** for their client and sought their attorney's fees from the defendant insurance company. The cumulative lodestar for plaintiff's attorneys was $157,560. The court, however, was persuaded that a **multiplier of 1.5** was necessary, given the fact that "without the imposition of a contingency multiplier, very few attorneys would have taken this matter." After application of the multiplier, the plaintiff's attorneys were awarded **$236,340 in fees**.

Example 5: *Maso, LLC v. Citizens Property Insurance Corp.*, Case No. 2018-021168-CA-01 (Fla. 11th Cir. Ct., Miami-Dade County 2019)

The favorable "result" obtained by the plaintiff's attorneys in this case was incredibly small—**$2,754.10**, with interest. Yet the court found that a **1.75 multiplier** was appropriate, bringing the total amount of attorney's fees to **$42,971.25—more than 15 times the award to the plaintiff**.

Example 6: *Bush v. Homeowners Choice Property & Casualty Insurance Co.*, Case No. 12-CA-19360-O (Fla. 9th Cir. Ct., Orange County 2018)

      Bush was a first-party property insurance case involving an amount in controversy that the judge admitted was "relatively small"—**$18,911.72** for the plaintiffs' roof. Yet the court concluded a **multiplier of 2.5** was appropriate given the difficulty of the case "from a damages and coverage standpoint, against a skilled and knowledgeable Defendant." Thus, the court awarded **$756,887.50 in attorney's fees** (not including prejudgment interest), based on application of a 2.5 multiplier and incorporating attorney hourly rates of $550, $600, and $700.

Example 7: *Martinez v. Universal Property & Casualty Corp.*, Case No. 11-12845 CA (22) (Fla. 11th Cir. Ct., Miami-Dade County 2018)

      Martinez was another case involving a "relatively small amount in controversy" according to the court—the plaintiff's initial claim was for $98,000, an appraisal resulted in an award of less than $6,000, and the parties ultimately settled the case for **$27,500**. But the court found—in part due to the relatively small amount in controversy—that a multiplier was appropriate because the plaintiff would be unlikely to secure counsel otherwise. Accordingly, the court applied a **multiplier of 1.25** to arrive at a total plaintiff's attorney's **fee award of $116,000**.

Example 8: *Cabrera v. Tower Hill Preferred Insurance Co.*, Case No. CACE14007966 (21) (Fla. 17th Cir. Ct., Broward County 2018)

      A water loss claim resulted in a jury verdict in the plaintiff's favor in the amount of **$26,085**. Swayed by testimony from the plaintiff's attorney's fee experts that a multiplier was necessary given the hotly contested nature of the litigation, the judge determined a **multiplier of 1.5** was appropriate, bringing the total attorney's fee award to plaintiff to **$622,957.50.**

Example 9: *Defreitas v. Citizens Property Insurance Corp.*, Case No. 15-026365 CA 30 (Fla. 11th Cir. Ct., Miami-Dade County 2018)

      In *Defreitas*, the plaintiff's attorneys obtained a net recovery of **$75,000** for the plaintiff in a first-party property insurance dispute. The judge found that the attorneys' cumulative lodestar figure was $75,050 and then determined a **multiplier of 1.5** was proper, again based in large part on the finding that attorneys would not take such cases without the availability of a multiplier. With the 1.5 multiplier, the court awarded the plaintiff a total of **$131,138.03 in attorney's fees and costs**.

Example 10: *Kile v. Security First Insurance Company*, Case No. 05-2015-CA-040091-XXXX-XX (D) (Fla. 18th Cir. Ct., Brevard County 2017)

      In another first-party insurance case, the court found a **multiplier of 1.5** was appropriate "based on the small amount of the claim [the case settled for **$16,500**], that only a few attorneys might have been willing to take the case, and that there was in the course of the litigation an initial low Proposal for Settlement by Defendant, thereby creating a possible risk of non-payment of attorneys' fees." Application of that multiplier turned an initial attorneys' fee award of $20,760.00 into an award of **$31,140.00**.

Example 11: *Anderson v. Citizens Property Insurance Corp.*, Case No. 51 2011 CA 0821 ES (Fla. 6th Cir. Ct., Pasco County 2016)

In yet another first-party insurance case, the plaintiff Anderson disputed insurer Citizens' denial of her sinkhole claim. At trial, Anderson won a jury verdict of **$84,000**. The trial court granted Anderson's request for attorneys' fees and applied a **multiplier of 1.7**, for a total attorneys' fee award of **$493,246.50**, reasoning that "[t]he trial of this case was by far the best tried sinkhole case this judge has ever seen." On appeal, the Second District Court of Appeal reversed because the trial court failed to make the requisite findings on the record supporting the application of a multiplier, and the lack of an evidentiary record meant the appellate court could not find another basis to affirm. *Anderson*, 241 So. 3d at 225-28.

Example 12: *Carter v. Castle Key Insurance Co.*, Case No. 2015-CA-003033 (Fla. 2d Cir. Ct., Leon County 2016)

In *Carter*, the plaintiffs obtained an appraisal award of **$25,164.67**. The court granted the plaintiffs' request for attorney's fees and costs, which amounted to a lodestar figure of $5,228. Without explanation, the court found a **multiplier of 2.0** was appropriate, awarding the plaintiffs **$29,018 in attorney's fees and costs**.

Example 13: *Sunshine State Insurance Co. v. Davide*, 117 So. 3d 1142 (Fla. 3d DCA 2013)

In *Davide*, the plaintiff filed an action against insurer Sunshine State Insurance Co. for breach of contract, bad faith, and to confirm an appraisal award. The suit resulted in the plaintiff's recovery of the wrongfully withheld appraisal award amount of **$49,000**. The trial court applied a **multiplier of 2.0**, resulting in an attorney's fee award of **$138,000**—close to three times the amount of the plaintiff's recovery. The Third District Court of Appeal affirmed, finding that the trial court did not abuse its discretion in applying a multiplier of 2.0.

Example 14: *Taylor v. People's Trust Insurance Co.*, Case No. 502011CA001265 XXXX MB (Fla. 15th Cir. Ct., Palm Beach County 2011)

In a simple insurance case with a relatively small recovery—the plaintiff recovered approximately **$26,000**, including the insurer's initial payments on the claim and an additional settlement payment of $16,000—the trial court applied a **multiplier of 1.5**, arriving at a total attorneys' fee award of **$46,800** in the plaintiff's favor.

Limiting the Application of Contingency Fee Multipliers Will Not Discourage Attorneys from Taking Cases

As the above examples illustrate, an often cited reason for awarding a contingency fee multiplier is that, without one, attorneys are unwilling to take low-value cases, leaving plaintiffs with meritorious claims without representation. But that is not necessarily true.

In the mid-2000s, litigation involving no-fault automobile insurance, personal injury protection ("PIP"), ran rampant. Despite the fact that a PIP claim's value is typically no more than $10,000, courts awarded plaintiffs' attorneys in PIP lawsuits the attorneys' full hourly fees and then enhanced that fee by applying a contingency risk multiplier of 1.0 to 2.5. This would turn,

for example, a $60,000 lodestar fee in a case with a 50-50 chance of success into a $90,000 to $120,000 plaintiff's attorney fee award. At such rates, plaintiffs' attorneys received about 10 times as much compensation as their clients from PIP lawsuits.

In 2012, the Florida Legislature responded to the PIP crisis with a number of reforms, including prohibiting application of contingency fee multipliers on attorney's fee awards in PIP cases. Ch. 2012-197, § 10, at 31, Laws of Fla. (codified at § 627.736(8), Fla. Stat.). Immediately after these reforms were passed, PIP litigation dropped. As shown by data pulled from the Florida Department of Financial Services Service of Process website, cases involving common PIP providers dropped from 53,639 in 2012 to 40,736 in 2013.

But the number of PIP lawsuits has begun climbing. In 2017 and 2018, PIP litigation rose to 61,583 and 65,001 PIP lawsuits filed, respectively. Consequently, despite the fact that a contingency fee multiplier has been unavailable in PIP lawsuits since 2012, attorneys are still taking relatively low-value PIP cases, and PIP litigation is at an all-time high.

Unlike the PIP reform in 2012, SB 76 would not eliminate the availability of contingency fee multipliers in insurance cases; SB 76 would simply ensure multipliers are only applied in rare and exceptional circumstances. If elimination of contingency fee multipliers did not discourage PIP litigation, limiting the use of multipliers will certainly not discourage attorneys from taking property insurance cases.

The Legislature Should Pass SB 76's Limitation on Contingency Fee Multipliers

SB 76 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. The application of a contingency fee multiplier only results in double counting, as the lodestar figure already considers the difficulty of a case through the hours expended and/or the attorney's hourly rate. A party seeking an attorney's fee award under section 627.428 may only overcome that strong presumption in "rare and exceptional circumstance[s] with evidence that competent counsel could not be retained in a reasonable manner." 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.