Existing Tools To Curb Runaway Attorney Fee Awards

By Matthew J. Lavisky

Fee-shifting mechanisms often increase litigation. The following article reviews some tools for responding to situations where fees are threatening to run away with the underlying claims.

Florida provides one of the most generous insurance fee-shifting mechanisms in the nation. The lure of a large attorney fee award has spawned the very litigation that the fee-shifting statute was intended to avoid. It is common for attorneys representing insureds to file lawsuits over matters that could easily be resolved informally or to drive up a fee claim by unnecessarily aggressive litigation. Courts often reward these tactics by failing to adjust a claim for attorney fees to account for unnecessary litigation, or, worse, by applying a contingency fee multiplier. But courts can only respond to arguments made by the litigants. Florida law provides existing tools that, if applied, can help curb a runaway attorney fee award. This article sets out the current legal environment and discusses ways defendants can fend off a runaway attorney fee award.

I. How We Got Here: Evolution of the Alternative Contingency Fee Agreement

The law historically has recognized the conflict that arises when an attorney obtains a financial interest in the litigation of his or her client.[1] Even when the attorney and his or her client's interests coincide, an attorney's duties as an officer of the court may be compromised.[2] The rule in many jurisdictions, including Florida, which prohibits an attorney from obtaining an interest in his or her client's claim is based on the common law doctrines of champerty and maintenance.[3]

> "Champerty is simply a specialized form of maintenance in which the person assisting another's litigation becomes an interested investor because of a promise by the assisted person to repay the investor with a share of any recovery." Rule 1.8 is intended to avoid conflicts of interest between attorneys and clients. Specifically, the rule addresses the concern that "the lawyer will not seek and accept client guidance on major decisions in the lawsuit because of the lawyer's own economic interest in the outcome."[4]

An exception to this general rule exists for reasonable contingency fee contracts.[5] This was born primarily out of necessity.

> Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of the litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice.[6]

A contingency fee agreement based on a percentage of the amount recovered by the client provides some incentive for an attorney to put his or her interest above his or her client's interest or to compromise his or her duties as an officer of the court. But generally that incentive is *de minimis* because the attorney and the client's interests are aligned. The attorney receives a set percentage of any recovery, and, thus, the client and attorney share an aligned interest in maximizing the recovery. To the extent there still exists some tension, courts and agencies governing attorneys have made a policy judgment that the risk is outweighed by the need to ensure that potential clients

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with limited means are able to obtain representation.[7]

However, an alternative type of contingency fee agreement has become increasingly common. Under this agreement, the attorney takes a percentage of the recovery or the amount awarded by a court pursuant to a fee-shifting statute, whichever is greater. This agreement is common in insurance litigation because of the insurance fee-shifting statute.[8]

Unfortunately, this type of agreement has had unintended consequences. It has, in many instances, undermined the purpose of the fee-shifting statute by incentivizing litigation. In addition, the potential for a large attorney fee award at the end of a lawsuit, which is not tethered to the amount collected by the client, has created an actual, albeit not unethical, conflict between the interests of the client and the attorney. In *Dish Network Service L.L.C. v. Myers*, the Second District Court of Appeal detailed the tension created by these alternative contingency fee contracts.

> In a typical contingency fee case, the plaintiff's attorney will recover a fee based on a percentage of the total recovery. Thus, the monetary success of the client and the attorney are closely interrelated. By contrast, in this type of statutory fee case where the damages are relatively small, as the lawsuit progresses, it quickly becomes a larger monetary asset for the law firm than for the client. At $700 per hour under the award in this case, the law firm's monetary interest in this case exceeded the interest of its client within a dozen hours of work.
>
> By the time the lawsuit approaches trial, so long as the defendant is not making offers to settle that include a separate resolution of the fee issue, a reasonable offer for the client under a contingency contract is unlikely to be a reasonable offer from the perspective of the attorney….
>
> There is great merit in a system that creates "private attorneys general" to handle consumer claims, but the current structure seems to place private lawyers in a position where they have an economic incentive to pursue cases through to the end of a jury trial even when the real attorney general would never do so.[9]

Section 627.428, Florida Statutes allows an insured to recover attorney fees against his or her own insurer in a first-party claim upon obtaining a judgment against the insurer. This statute has been interpreted to allow the insured to recover attorney fees, even in the absence of a judgment, if the insurer "confesses judgment" during the litigation by, under certain circumstances, paying the claim.[10]

Section 627.428 specifically allows for the recovery of a "reasonable" attorney fee. In determining the reasonable amount to award for attorney fees, the Florida Supreme Court has held that the court awarded fee may not exceed the fee agreement reached by the attorney and his or her client.[11] This makes the client a check against an unreasonable attorney fee claim. The client has "skin in the game," so to speak, because the client only seeks to recover the amount he or she actually contracted to pay, and presumably paid, his or her attorney. Because success in litigation is not guaranteed, human nature dictates that the client will negotiate the best arrangement he or she can with their attorney and likely will negotiate with multiple attorneys for the financial arrangement that best fits the client's objectives. The opposing party benefits from this negotiation by only being exposed to a fee that is reasonable based on the market.

However, not long after the Florida Supreme Court announced this well-considered rule, it recognized an exception. In *Kaufman v. MacDonald*, the Supreme Court held that a trial court may award attorney fees that exceed the amount that would otherwise be recoverable based on a percentage of the recovery by the client.[12] The fee agreement in *Kaufman* allowed the attorney to recover "either a specific percentage of the recovery *or* the amount awarded by the court under the prevailing party statute—whichever yielded the higher fee."[13] The Supreme Court reasoned that, under this agreement, a court-awarded fee that exceeded a percentage of the recovery would not exceed the fee agreement entered into between the client and the attorney.[14] Predictably, this exception quickly swallowed the rule.

Today, it is rare to find a contingency fee contract involving an insurance dispute that does not contain such a provision. This provision makes the amount actually bargained for by the client irrelevant. That's because if the "reasonable fee" based on the number of hours expended by the attorney is less than the percentage of the recovery set out in the fee agreement, the opposing party only can be made to pay the lower amount based on the hours expended.[15] And if the "reasonable fee" based on hours expended exceeds the percentage, as almost always is the case, the alternative "court awarded" fee provision applies and the amount the client owed his or her attorney based on a percentage of the recovery does not determine the amount of the attorney fees recovered against the opposing party.

II. Calculating Attorney Fees under the Alternative Court Awarded Fee Provision

Florida has adopted the federal lodestar approach to calculate a "reasonable" court awarded attorney fee.[16] Under this approach, courts look to the number of hours reasonably expended in the litigation.[17] Courts then determine the reasonable hourly rate for the prevailing party's attorney's services.[18] Next, courts multiply the number of hours expended by the hourly rate to come to the "lodestar."[19]

Once a court arrives at the lodestar figure, it may increase or decrease that figure based upon the contingency risk and the results

obtained.[20] An increase to the lodestar is based on application of a contingency fee multiplier. In determining whether to apply a contingency fee multiplier, a court considers the following 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 [*Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla.1985)], are applicable, especially, the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client.[21]

A request for a contingency fee multiplier must be supported by competent, substantial evidence.[22] A multiplier should not be awarded absent evidence that the relevant market required a contingency fee multiplier in order to obtain competent counsel.[23]

III. Unintended Consequences of the Insurance Fee-Shifting Statute

The insurance fee-shifting statute serves several purposes. One is to "level the playing field" between insurers and insureds.[24] Another is to discourage insurers from contesting valid claims.[25] A third is to reimburse insureds for the fees they incur to enforce their insurance contracts in court.[26] A fourth is to discourage litigation.[27]

As is true with almost everything, overcorrection to one perceived problem creates new, unintended ones. The insurance fee-shifting statute, as it is often applied, leads to fee awards that often exceed, several times over, the amount claimed by the insured. Consequently, the exposure to the insurer for contesting a claim it truly believes to be invalid, or challenging a charge it truly believes to be excessive, is several times over the amount of the actual claim. With the risk of being "wrong" so great, the fee-shifting statute now not only discourages insurers from contesting valid claims, but it incentivizes insurers to pay invalid ones.[28]

Also, the potential reward to an attorney for suing an insurer has become so great that the statute subverts its purpose of discouraging litigation. The statute now incentivizes the very litigation it was intended to stop. There are countless examples of this playing out in Florida courts. For example, in *Allstate Ins. Co. v. Regar*, the Second District Court of Appeal observed:

> The number of bad faith cases filed in the courts appears to be exponentially increasing, but the increase does not appear to be directly linked to the actions of the insurers. Instead, plaintiff's attorneys are filing bad faith actions over issues that it seems could be simply resolved, like the wording of the release in this case. These attorneys are perhaps motivated by the promise of fees under section 627.428 upon prevailing in these actions.[29]

In *State Farm Florida Insurance Co. v. Lorenzo*, the Fifth District Court of Appeal refused to allow an insured to recover attorney fees for "bringing a premature suit against State Farm, which was complying with its policy obligations."[30] In *Nationwide Property & Casualty Insurance v. Bobinski*, the Fifth District Court of Appeal said there could be "no doubt" that the lawsuit was filed against the insurer "solely in order to obtain attorney's fees."[31] Another example involved a Florida Bar disciplinary proceeding where a case did not settle at mediation even though the insurer offered to pay the plaintiff in full. The referee found the offer at mediation was rejected in order to protect the attorney fee claim.[32]

The "Assignment of Benefits" crisis also appears to be directly driven by the insurance fee-shifting statute. A 2015 Report by the Florida Office of Insurer Regulation stated that insurers reported that they are, in many cases, not finding out about a claim until they are served with a lawsuit.[33] In *Security First Insurance Co. v. State, Office of Insurance Regulation*, the First District Court of Appeal recognized that the insurer had presented evidence that a "'cottage industry' of 'vendors, contractors, and attorneys' exists that use the 'assignments of benefits and the threat of litigation' to 'extract higher payments from insurers.'"[34]

This unnecessary litigation is not without risk to the client. Proposals for settlement create a risk that the client will be personally liable for the defendant's attorney fees.[35] In the Florida Bar proceeding case, the client ultimately lost after rejecting an offer at mediation and was held liable for the insurer's attorney fees.[36]

Fee-shifting statutes are well-intended, and, at times, necessary. But the current litigation environment for insurance claims in Florida suggests that Florida has overcorrected. The prospect of a large attorney fee award encourages litigation where the fee-shifting statute was intended to discourage it.

Fee-shifting statutes also have led to a decrease in civility and may undermine respect for the legal system.[37] In fee-shifting cases, havoc and chaos increase the number of hours expended, which, in turn, increase the number of hours claimed. If the attorney for the plaintiff can claim the case was "hotly contested," all the better. Predictably, this has led to efforts by some to make insurance litigation unnecessarily acrimonious.

Nearly twenty-five years ago, the Fourth District Court of Appeal wrote about the problem.

> We cannot let this occasion pass without commenting on what we perceive to be the source of fee awards such as this one. Since the Florida Supreme Court's decision in *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla.1985), there seems to be a virus loose in Florida. As Judge Schwartz said in *Miller*, the obsession with hours and hourly rates required by *Rowe* has spawned among lawyers

moving for court awarded fees the "multiple evils of exaggeration, duplication, and invention."…

This obsession with hours and rates has apparently caused judges and lawyers to lose sight of a truth they formerly accepted almost universally: viz., that there is an economic relationship to almost every legal service in the market place. The value of any professional service is almost always a function of its relationship to something else-i.e., some property or other right. In this case, for example, no business could long expect to spend $60,000 to collect $100 accounts. Trial judges and lawyers used to accept *a priori* the idea that, no matter how much time was spent or how good the advocate, the fair price of some legal victories simply could not exceed-or, conversely, should not be less than-some relevant sum not determined alone by hours or rates. Since *Rowe*, that all seems lamentably forgotten. This case appears to exemplify what has gone wrong. Fees of the kind awarded here threaten to make the respect of nonlawyers for judicial control of fees-indeed, for the very legal system itself-a thing of the past.[38]

Things have only worsened since.

IV. Providing a Balance with Existing Tools

Because fee-shifting is often based on a statute, a common response from courts to complaints that a fee-shifting statute is leading to undesirable results is that the problem rests with the Legislature.[39] This is, of course, partly true. But Florida law provides existing tools that, if applied, can provide some protection against a runaway attorney fee award.

A. A critical review of whether the claimed fee is "reasonable"

The lodestar formula requires a court to determine the number of hours reasonably expended in the litigation. This analysis is partly task-based, *i.e.* was it reasonable to spend a certain amount of time completing a specific task. But reasonableness also requires a look at the total number of hours spent in light of the specifics of the case.[40] "The establishment of a reasonable fee for an attorney's service is not simply the number of hours times the hourly rate."[41] Determining whether an attorney has spent a reasonable number of hours litigating a case depends, in part, on the "novelty and difficulty of the questions involved."[42]

Most insurance litigation is neither novel nor particularly difficult. But it is not uncommon, in, for instances, cases where the only issue is the amount owed for a covered claim, to see an attorney for the insured employ a litigation strategy that would be patently unreasonable if the client was paying for the services out of his or her pocket. This may include, for instance, numerous depositions, unnecessary motion practice, burdensome discovery, and letter-writing campaigns. When reviewing a future attorney fee claim in such a case, a court should not look at simply whether, for example, it was reasonable to spend three hours drafting a particular motion. The court, instead, should look at the entire case and ask, for example, whether it was reasonable to spend 200 hours of attorney time in a dispute over $10,000. If the answer is no, the court should find that the number of hours expended in the litigation is not reasonable, and reduce that number accordingly.

The number of hours reasonably spent on a case also must include consideration of the economic relationship to the thing or amount in dispute.[43] The law does not *ipso facto* preclude a claim for attorney fees that exceeds the amount recovered by the client.[44] But a claim for fees that exceeds the amount recovered by the client should "raise a judicial eyebrow."[45] In a run-of-the-mill case that requires no precedent to be established or other extraordinary circumstances, an attorney fee claim that approaches or exceeds the amount recovered by the client should be considered excessive.[46]

B. Measuring the "results obtained" by comparing the client's recovery with the amount of the attorney fee claim

In determining reasonable attorney fees, courts consider several factors, one of which is the "results obtained."[47] The familiar refrain by the proponent of the fee award is that the client recovered all, most or some significant portion of the amount claimed so the results were excellent. But at what cost?

To determine the results obtained, courts consider not only the recovery,[48] but also the amount of attorney time expended to obtain that recovery. In other words, courts must consider the value of the legal service in relationship to the amount recovered by the client.[49] Several cases make this point.

In *Eckhardt v. 424 Hintze Management, LLC*, the First District Court of Appeal found the trial court erred by not reducing the attorney fee award based on the results obtained.[50] The First District noted that the trial court awarded $34,387.50 in attorney fees even though there was only $17,716.37 in controversy and the jury awarded only $4,250. The First District held that the client's success was limited "in comparison to the scope of the litigation as a whole."[51] Likewise, in *Donald S. Zuckerman, P.A. v. Alex Hofrichter, P.A.,* the Third District Court of Appeal reversed an attorney fee award finding, among other things, the amount awarded was "excessive in relation to the results obtained."[52]

The case of *Lumbermens Mutual Casualty Co. v. Quintana* involved a coverage dispute where the insurer's total liability was $15,000.[53] The insureds prevailed, and the trial court awarded $20,000 in attorney fees. The Third District Court of Appeal reversed. The Third District found that an attorney fee award must bear a reasonable relationship to the results obtained. The attorney fee of $20,000 in that case did not bear a reasonable

relationship to the results obtained.[54]

The Fourth District Court of Appeal's decision in *Jones v. Minnesota Mutual Life Insurance Co.* provides a great framework for reviewing the results obtained in connection with a claim to a contingency fee multiplier.[55] *Jones* involved a dispute over disability benefits. The parties eventually settled for $75,000 to the insured. The settlement left open the attorney fee claim under section 627.428. The trial court awarded attorney fees of $76,843.50. The trial court, however, declined to award a contingency fee multiplier. The trial court made two important observations to support its decision. The first was that "the amount awarded by the court was significantly in excess of the contingency fee [the attorney] would have received under the parties' fee agreement."[56] The attorney would have been paid $30,000 under a straight contingency agreement.[57] The alternative contingency agreement had already resulted in a recovery that exceeded that amount by more than double. The second observation was that "application of a multiplier in this case would provide a fee award to counsel 'more than double the amount recovered by the client and… approximately six to eight times what the contingency fee award would have been, absent the statute.'"[58] The Fourth District affirmed.

These cases show that when considering the "results obtained" factor, courts and litigants should analyze both the recovery by the client, and also the amount of attorney fees claimed in relation to the recovery.

C. Combatting the multiple evils of exaggeration, duplication, and invention

In Miller v. First American Bank & Trust, the Fourth District Court of Appeal lamented the "notorious billable hours syndrome" in attorney fee litigation "with its multiple evils of exaggeration, duplication, and invention."[59] Several rules, however, help combat this syndrome.

First, a claim for attorney fees must be "supported by evidence detailing the nature and extent of the services performed."[60] Generally, an attorney fee claim is supported with contemporaneous time records.[61] An attorney's failure to keep such records does not necessarily bar an attorney fee claim. An attorney fee award "may be secured based on a reconstruction of the time expended."[62] But an award cannot be based on simply a guess or estimate.[63] Thus, the first step in analyzing any attorney fee claim is to review the time records and determine whether those records were kept contemporaneously or were reconstructed after the fact based on guesses and estimates.

Second, what is reasonable from the perspective of a paying client is not necessarily reasonable when a litigant tries to have his or her adversary pay the fee. This rule often comes into play when multiple attorneys or law firms are involved. The Third District Court of Appeal has recognized that "although a party has the absolute right to hire as many attorneys as it desires, if, however the fee is to be shifted to the opposing party, the opposing party is not required to compensate for overlapping efforts should they result."[64] In that case, the Third District held that the fee "must be reduced to reflect the reasonable efforts of one law firm."[65] The Fourth District Court of Appeal described the problem colorfully: "It does not require one three hundred dollar an hour attorney to review the work of another equally expensive attorney. One is clearly enough."[66]

Third, courts and litigants must carefully review the specific time entries for "red flags." These include:

- Unit billing — "[U]nit billing is a practice where the attorney bills a predetermined number of minutes for a given task."[67] Although it is doubtful a proponent of an attorney fee claim would admit to unit billing, its equivalent appears, for instance, in cases where an attorney claims to have spent several hours on a form complaint or motion that has been filed previously in numerous other cases.
- Block billing — Block billing "refers to the practice of including multiple distinct tasks within the same time entry."[68] "[B]lock billing results in 'imprecision in an attorney's records ... a problem for which the opponent should not be penalized.'"[69] Block billing often results in an across-the-board reduction of a specific percentage of the amount claimed.[70]
- Travel time — Attorney fees incurred for travel generally are not compensable.[71]
- Time spent on clerical and semi-clerical work — "Even when not excessive, time spent doing purely clerical tasks, including 'prepare cover letter to court' and 'complete file opening process' is not compensable."[72] This issue arises often with fees claimed for work by paralegals. The efforts of a paralegal should be recovered only when the paralegal performs work traditionally done by an attorney.[73] Scheduling, filing, copying, gathering materials and other clerical or secretarial tasks are not recoverable.[74]
- Multiple attorneys — Courts and litigants should scrutinize cases, especially relatively simple ones, that involve multiple attorneys. The Third District Court of Appeal recently stated: "[T]he records reflect that eleven different lawyers billed on this file. This alone should have alerted the trial court to a problem. A court should be extremely wary of paying fees to so many lawyers for such a relatively small case with relatively straightforward legal issues and no precedential value."[75]
- Interoffice communications and communications between co-counsel — Interoffice communications, including conferences between attorneys and paralegals, and partners and associates are often not recoverable, and should be scrutinized.[76] The same is true for communications between co-counsel.[77]
- Reviews of a single document by multiple attorneys — Courts and litigants should scrutinize the reasonableness and necessity of having multiple attorneys review or work on a single document. Duplication of efforts is not recoverable against one's adversary.[78]

- The plaintiff has prevailed on some, but not all, claims — "[T]he trial court, in determining the fee award, may take into account the fact that the insured or beneficiary has not prevailed on all issues and the degree to which this has extended the litigation or increased its costs."[79]
- The plaintiff has made claims, some of which attorney fees are not awardable — "[T]he party seeking fees has the burden to allocate them to the issues for which fees are awardable or to show that the issues were so intertwined that allocation is not feasible."[80]

D. (Un)reasonable hourly rates

To calculate the lodestar requires a court to determine the reasonable hourly rate for the attorney's services. In *Rowe*, the Florida Supreme Court explained:

> In establishing this hourly rate, the court should assume the fee will be paid irrespective of the result, and take into account all of the [Florida Bar Rule] factors except the "time and labor required," the "novelty and difficulty of the question involved," the "results obtained," and "[w]hether the fee is fixed or contingent." The party who seeks the fees carries the burden of establishing the prevailing "market rate," i.e., the rate charged in that community by lawyers of reasonably comparable skill, experience and reputation, for similar services.[81]

The reasonable hourly rate must be supported by expert testimony.[82] Unfortunately, the use of experts in these types of cases has become a charade of sorts. As explained in *Ziontz*:

> The use of lawyers as expert witnesses to justify the fees sought as reasonable seems to have lead only to more exaggeration and invention. Perhaps it is quixotic to expect the lawyer witnesses who actually testify at fee hearings to do anything but justify the fee claimed, for if they do not they simply would not be called to testify. Opposing expert witnesses may not be much of a reliable check on the claimant's lawyers, because lawyers in general profit from the patina of authority given to one's own fees by a court award of a similar one. Hence, the obsession to justify hours and rates now seems to riddle the fee process with an air of mendacity.[83]

It is not uncommon in these types of cases for the expert to seek compensation from the opposing party at the same hourly rate sought by the litigant's attorney, thus suggesting the opinion may be driven by the expert's desire to obtain a high hourly rate for their testimony.[84] That is true even though the Florida Supreme Court has said that expert testimony about attorney fees should be done as a matter of professional courtesy.[85] Consequently, courts should view with skepticism testimony by hired guns in this arena who seek to have the opposing party pay them generously for their testimony.[86]

Courts and litigants also should scrutinize the basis of the testimony. Many experts in insurance attorney fee litigation base their opinion about a reasonable hourly rate based on what other attorneys who practice in insurance litigation say is their reasonable hourly rate.[87] However, *Rowe* dictates that the reasonable hourly rate is based on the "market rate" which *Rowe* defines as "the rate charged in that community by lawyers of reasonably comparable skill, experience and reputation, for similar services."[88]

Expert testimony in this area is oftentimes entirely theoretical. Because these cases are taken on a pure contingency basis, and the reasonable hourly rate of the services comes into play only when the insured and his or her attorney ask the court to award attorney fees, these reasonable hourly rates are not based on the market for legal services. Few, if any, insurance litigation clients agree to pay their attorney a set hourly rate. Consequently, the expert's testimony is based only on their view of a reasonable hourly rate, bolstered by the view of others in this area of law, untested in a competitive market for the services offered. Courts and litigants should scrutinize this testimony because it is not reliable. And an award of attorney fees must be supported by substantial, competent evidence.[89] To determine the reasonable hourly rate, courts should consider the hourly rates agreed to, charged *and actually paid* by clients for comparable services, in comparable cases, by attorneys with comparable credentials, reputation and experience, in comparably sized law firms and legal markets.

E. Contingency fee multipliers

1. Criteria for awarding a contingency fee multiplier

In contingency fee cases, the trial court must consider whether or not to apply a contingency fee multiplier.[90] However, the Supreme Court has emphasized that "must consider" does not mean "must apply."[91] "A primary rationale for the contingency risk multiplier is to provide access to competent counsel for those who could not otherwise afford it."[92] The Florida Supreme Court has reasoned that "[b]ecause the attorney working under a contingent fee contract receives no compensation when his client does not prevail, he must charge a client more than the attorney who is guaranteed remuneration for his services."[93] A contingency fee multiplier should not be awarded absent evidence that the relevant market requires a contingency fee multiplier in order to obtain competent counsel.[94] If a court determines a contingency fee multiplier is warranted, it may increase the lodestar by up to 2.5 times.[95]

Contingency fee multipliers have likely outlived their usefulness in run-of-the-mill insurance litigation. The Fifth District Court of Appeal

explained the realities of Personal Injury Protection insurance litigation ten years ago in *Progressive Exp. Ins. Co. v. Schultz*:

> Common sense also plays a role here. We are not so isolated from the world around us to know that few people have any difficulty retaining competent counsel in these circumstances. Our docket, and the dockets of the trial courts in Central Florida, have hundreds, and perhaps thousands, of PIP suits pending at any given time. It seems that few insureds, if any, have difficulty obtaining competent counsel to represent them. To the contrary, every television station and telephone book, and many billboards and buses, call out with ads from lawyers seeking to represent the injured.[96]

Although this statement was made in the context of PIP litigation, it is equally true for nearly every other type of run-of-the-mill insurance litigation. The 2004-2005 hurricanes, the prevalence of sinkholes, and "Assignment of Benefits" have created a glut of attorneys in Florida who handle property insurance litigation. There also is no shortage of attorneys for bad faith litigation, automobile insurance litigation, and other types. In *Rynd v. National Mutual Fire Insurance Co.*, the court noted that "based on my experience, there are law firms experienced in insurance litigation that are willing to take cases based on an unenhanced statutory fee, so that it is not apparent that the expectation of a multiplier would be dispositive in counsel accepting the case."[97] In *State National Insurance Co. v. White*,[98] the court held that "competent representation in such insurance disputes does not hinge upon the possibility of a contingency risk multiplier."

In addition to the market for legal services, other factors counsel against application of a multiplier in insurance cases. One is that an alternative contingency fee agreement combined with a mandatory fee-shifting statute helps mitigate against the risk of non-payment.[99] Although the insurance fee-shifting statute "cannot logically serve as the basis, per se, for rejecting a multiplier,"[100] it is a factor to be considered. Another consideration is the disparity between the hourly rates awarded to attorneys for insureds, and the hourly rates charged by attorneys representing the insurer. The contingency nature of the fee is already accounted for by the disparity between these rates.[101]

In *Sun Bank of Ocala v. Ford*, the Florida Supreme Court found a multiplier was not appropriate in a case brought by a commercial bank.[102] The Supreme Court said:

> We are not aware of any situations where commercial banks have had difficulty finding attorneys to represent them. Indeed, from the myriad of cases involving banks it seems as though attorneys are anxious to represent them.[103]

The same holds true if one substitutes "insureds" for "commercial banks" and "banks" with "insurance."

Florida's intermediate appellate courts had held that contingency fee multipliers should be reserved for "rare and exception circumstances."[104] This requirement certainly fits with the analysis set out above. However, in *Joyce v. Federated National Insurance Co.*, the Supreme Court recently disapproved of the "rare and exceptional" requirement.[105]

In *Joyce*, the Supreme Court explained that because a contingency fee multiplier "is intended to incentivize an attorney to take a potentially difficult case, it is properly analyzed through the same lens as the attorney when making the decision to take the case."[106] The Supreme Court reiterated "three factors for trial courts to consider in determining the necessity of a contingency fee multiplier: '(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 in *Rowe* are applicable, especially, the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client.'"[107] The Supreme Court also explained that "trial judges are not required to use a multiplier; but when they do, evidence must be 'presented to justify the utilization of a multiplier.'"[108]

The *Joyce* opinion likely will be misinterpreted by some as suggesting there is a presumption in favor of a multiplier. But a close reading of the opinion shows that not to be so. The *Joyce* opinion has one primary holding. It is that there is no "rare and exceptional circumstances" requirement to a multiplier.[109] Rather, the decision to award a multiplier is determined based on the three factors set out above.

There also are two subsidiary holdings. The first is that appellate courts should not substitute their judgment on the factual findings by the trial court regarding whether the relevant market requires a contingency fee multiplier to obtain competent counsel.[110] The second is that whether the relevant market requires a multiplier is determined by looking at the relevant market itself, not the plaintiff's actual experience in the market.[111] But the *Joyce* opinion does not undue the rule that "[i]f there is no evidence that the relevant market required a contingency fee multiplier to obtain competent counsel, then a multiplier should not be awarded."[112]

In most instances, the relevant market will not require a contingency fee multiplier. The *Joyce* opinion rested largely on the fact that there apparently were no other attorneys in the venue who specialized in insurance litigation.[113] Most venues have a plethora of attorneys competent to handle insurance litigation. It will be important for attorneys defending claims for a contingency fee multiplier to introduce evidence to that effect.

2. Evidentiary basis for contingency multiplier

The proponent of an attorney fee claim usually tries to support that the relevant market requires a contingency fee multiplier to obtain

competent counsel through expert testimony. This testimony must be carefully scrutinized. In *Florida Peninsula Insurance Co. v. Wagner*, the expert in support of a multiplier testified that he had contacted a few attorneys "to ask whether it was important to have the possibility of a contingency fee multiplier in deciding whether to accept a first-party coverage dispute."[114] The Second District Court of Appeal held that this type of testimony did not prove the demands of the legal market.

> [T]here was no evidence that the Tampa Bay legal market could not provide competent counsel… at the prevailing hourly rates. Certainly, most (all?) attorneys would *prefer* to collect twice their market rate at the conclusion of a successful contingency fee case, a point that perhaps needed no expert testimony to illuminate. It does not follow, though, that that preference would create a dearth of competent lawyers who would have taken this case at the prevailing rate. On that critical point, this record is silent.[115]

Likewise, in *USAA Casualty Insurance Co. v. Prime Care Chiropractic Enterprises, P.A.*, the Second District refused to allow a multiplier based on an expert who "summarily concluded that the market required a multiplier" but who did not "provide the court with any evidence to support his broad assertion."[116]

A party defending an attorney fee claim should take testimony from the plaintiff about whether he or she actually had trouble securing competent counsel. Expert testimony must be scrutinized. A multiplier must be supported by "competent, substantial evidence."[117] Conclusory testimony that the market requires a multiplier will not suffice. The expert must support his or her opinion that the relevant legal market requires that an attorney receive a multiplier added to an otherwise reasonable fee in order for a plaintiff to secure competent counsel with the facts underpinning the opinion. Given today's legal market, that should, in most cases, be a tall order.

3. A few thoughts on *Joyce*

The *Joyce* opinion did not announce a groundbreaking rule. Still, it was disappointing. Those who practice in insurance litigation know, through experience, that a multiplier is not needed in order for insureds to obtain competent counsel in nearly every legal market in Florida. Just look at the number of billboards that have popped up since Hurricane Irma.

Moreover, attorney fee awards in insurance litigation usually already account for the risk that, in some cases, the attorney may lose and not recover. It is not uncommon for the "reasonable hourly rate" of the attorney representing the insured to more than double the amount charged by the attorney representing the insurer. To add a multiplier on top of that seems excessive. This was recognized by the Court in *Rynd*: "the contingency nature of the fee is already taken into account to a significant extent in the hourly rate, as evidenced by the disparity between the hourly rates of plaintiff's counsel and defense counsel."[118]

The *Joyce* opinion, no doubt, will lead to even more claims for a contingency fee multiplier, which will make attorney fee claims—and insurance lawsuits in general—more difficult to settle. That's unfortunate because the result will be that insurance litigation will become even more focused on the attorneys rather than the insureds.

Although the *Joyce* opinion is disappointing to those who believe contingency fee multipliers have outlived their usefulness in insurance litigation and serve now primarily as a windfall for plaintiff attorneys, it is important to take *Joyce* in context. The opinion is fact-specific. As this article said at the beginning, courts can only respond to arguments made by the litigants. The *Joyce* opinion gave substantial deference to the findings by the trial court.

Going forward, it will be very important for attorneys defending attorney fee claims to challenge the evidence presented by the proponent of a multiplier, and also to introduce evidence of their own. For instance, the evidence in *Joyce* was that "there were no other attorneys in St. Johns County who specialized in" first-party insurance litigation.[119] That type of testimony must be challenged. Defendants must put on evidence of other attorneys in the relevant market who practice in the relevant area of law.

The plaintiff in *Joyce* also persuaded the trial court that the relevant legal market was St. Johns County. The defense, on the other hand, argued unsuccessfully that the legal market included Duval County, which has no shortage of attorneys. The majority in *Joyce* deferred to the trial court to define the relevant market.[120] Thus, particularly in smaller markets abutting large markets, it will be important to broadly define the market to include all attorneys who frequently practice in or near the venue, not just those who happen to have an office in it.

Finally, Justice Canady's dissent goes through each piece of evidence relied on by the insured to support a multiplier, and refutes it. For those preparing to defend an attorney fee hearing, Justice Canady's dissent provides an excellent roadmap to debunk the commonly encountered arguments in support of a multiplier. The dissent is noteworthy for another reason. The introduction states that "[t]he majority's decision here underscores the need for a full re-examination in a future case of our multiplier jurisprudence…."[121] And the dissent concludes: "The majority's decision points unmistakably to the need for a full re-examination of this Court's multiplier jurisprudence."[122] Hopefully the Florida Supreme Court will have the opportunity soon to do just that.

Conclusion

Courts in Florida long have lamented runaway attorney fee claims, albeit not consistently. Attorneys who practice in cases involving fee-shifting statutes understand the frustration when a case becomes less about the merits or the relief sought by the plaintiff and more about the

attorneys and the quest for attorney fees. Predictably, the lure of a large attorney fee has led to manipulation of insurance litigation to maximize a potential attorney fee claim, often times at the expense of the client. However, Florida law provides a few tools to combat a runaway attorney fee award. These tools are not a fix. But they provide modest relief in cases where the litigation is being driven by attorney fees.

[1] *Conflicts of Interest in Private Practice*, 94 Harv. L. Rev. 1284, 1288 (1981).
[2] *Id*.
[3] *See* Comments to R. Regulating Fla. Bar 4-1.8(i).
[4] *Ankerman v. Mancuso*, 860 A.2d 244, 247–48 (Conn. 2004)
[5] R. Regulating Fla. Bar 4-1.8(i).
[6] *P.D.Q., Inc. of Miami v. Nissan Motor Corp. in U.S.A.*, 61 F.R.D. 372, 379 (S.D. Fla. 1973).
[7] *Id*.
[8] § 627.428, Florida Statutes.
[9] 87 So. 3d 72, 76 (Fla. 2d DCA 2012).
[10] *Wollard v. Lloyd's & Companies of Lloyd's*, 439 So. 2d 217, 218 (Fla. 1983).
[11] *Florida Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145, 1151 (Fla. 1985)
[12] 557 So. 2d 572, 573 (Fla. 1990).
[13] *Id*.
[14] *W. & S. Life Ins. Co. v. Beebe*, 61 So. 3d 1215, 1217 n.3 (Fla. 3d DCA 2011).
[15] *See Rowe*, 472 So. 2d at 1151 ("[B]ecause the party paying the fee has not participated in the fee arrangement between the prevailing party and that party's attorney, the arrangement must not control the fee award: 'Were the rule otherwise, courts would find themselves as instruments of enforcement, as against third parties, of excessive fee contracts.'").
[16] *Id*. at 1150.
[17] *Id*.
[18] *Id*.
[19] *Id*. at 1151.
[20] *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828, 831 (Fla. 1990).
[21] *Id*. at 834.
[22] *USAA Cas. Ins. Co. v. Prime Care Chiropractic Enters., P.A.*, 93 So. 3d 345, 347 (Fla. 2d DCA 2012); *Eckhardt v. 424 Hintze Mgmt., LLC*, 969 So. 2d 1219, 1223 (Fla. 1st DCA 2007)
[23] *Prime Care Chiropractic*, 93 So. 3d at 347.
[24] *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 684 (Fla. 2000).
[25] *Pepper's Steel & Alloys, Inc. v. United States*, 850 So. 2d 462, 465 (Fla. 2003).
[26] *Bell v. U.S.B. Acquisition Co., Inc.*, 734 So. 2d 403, 411 (Fla. 1999).
[27] *Wollard*, 439 So. 2d at 218; *Goff v. State Farm Florida Ins. Co.*, 999 So. 2d 684, 688 (Fla. 2d DCA 2008).
[28] *Cf.* Sharon Tennyson & William J. Warfel, *The Law and Economics of First-Party Insurance Bad Faith Liability*, 16 Conn. Ins. L.J. 203, 240 (2009) (recognizing evidence that "tort liability for first-party bad faith may reduce insurers' incentives to monitor for claim fraud, leading to less intensive use of investigative techniques and to more paid claims that contain characteristics often associated with fraud.").
[29] 942 So. 2d 969, 973 (Fla. 2d DCA 2006).
[30] 969 So. 2d 393, 398 (Fla. 5th DCA 2007).
[31] 776 So. 2d 1047, 1048 (Fla. 5th DCA 2001).
[32] *The Florida Bar v. Patrick*, 67 So. 3d 1009, 1013 (Fla. 2011).
[33] *Report on Review of the 2015 Assignment of Benefits Data Call*, http://www.floir.com/siteDocuments/ssignmentBenefitsDataCallReport02082016.pdf (last visited September 16, 2017).
[34] 177 So. 3d 627, 628 (Fla. 1st DCA 2015).
[35] *See* § 768.79, Florida Statutes.
[36] *Patrick*, 67 So. 3d at 1012.
[37] *Cf. Ziontz v. Ocean Trail Unit Owners Ass'n, Inc.*, 663 So. 2d 1334, 1336 (Fla. 4th DCA 1993).
[38] *See id.* at 1335-36.
[39] *Security First*, 177 So. 3d at 628-29; *Myers*, 87 So. 3d at 76.
[40] *See State Farm Mut. Auto. Ins. Co. v. Physicians Injury Care Ctr., Inc.*, 6:06-CV-1757-ORL-DAB, 2012 WL 12906272, at *11 (M.D. Fla. 2012) (significantly reducing attorney fee claim from $2.4 million to $11,000 where "[a]ny reasonably competent attorney could have litigated the claim to judgment and through the appeal in just a few hours."); *Novak v. Safeco Ins. Co. of Illinois*, 615CV215ORL41DCI, 2016 WL 8849018, at *10 (M.D. Fla. 2016) *report and recommendation adopted by* 2017 WL 1552091 (M.D. Fla. 2017) ("[T]he undersigned finds, as an additional and alternative ground for reducing the number of hours prior to October 15, 2015, that the Plaintiffs wasted a significant amount of resources (of the parties and the Court) by attempting unsuccessfully to litigate an inappropriate claim for declaratory relief and an unaccrued bad faith claim.").
[41] *Schwartz, Gold & Cohen, P.A. v. Streicher*, 549 So. 2d 1044, 1046 (Fla. 4th DCA 1989).
[42] *Rowe*, 472 so. 2d at 1150.
[43] *Ziontz*, 663 So. 2d at 1336.
[44] *See State Farm Fire & Cas. Co. v. Palma*, 555 So. 2d 836, 837 (Fla. 1990) (affirming award of $253,000 in fees in dispute over $600 in case with "extraordinary circumstances"); *see also Labaton v. Mellert*, 772 So. 2d 622, 623 (Fla. 4th DCA 2000) ("An award is not unreasonable merely because the fee exceeds the recovery.").
[45] *Quality Holdings of Florida, Inc. v. Selective Investments, IV, LLC*, 25 So. 3d 34, 37 (Fla. 4th DCA 2009); *see also State, Dept. of Transp. v. Skidmore*, 720 So. 2d 1125, 1129–30 (Fla. 4th DCA 1998) ("[W]e find it unreasonable to expect that Skidmore would pay $900,000 to his attorneys to receive only about 25% more in benefits.").
[46] *Donald S. Zuckerman, P.A. v. Alex Hofrichter, P.A.*, 676 So. 2d 41, 43 (Fla. 3d DCA 1996).
[47] *Rowe*, 472 So. 2d at 1150.
[48] *See State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 64 (Fla. 1995) (reversing attorney fee award based on reduction of damages awarded from $265,753 to $24,00 because "the amount involved and the results obtained" changed based on this reduction).
[49] *Ziontz*, 663 So. 2d at 1336; *see also Ruwitch v. First Nat. Bank of Miami*, 327 So. 2d 833, 833 (Fla. 3d DCA 1976); *All-Star Ins. Corp. v. Scandia, Inc.*, 321 So. 2d 575, 577 (Fla. 3d DCA 1975).
[50] 969 So. 2d at 1222.
[51] *Id*.
[52] 676 So. 2d at 43.
[53] 366 So. 2d 529, 530 (Fla. 3d DCA 1979).
[54] *Id*.
[55] 759 So. 2d 723, 725 (Fla. 4th DCA 2000).
[56] *Id*. at 725.
[57] *Id*.
[58] *Id*.
[59] 607 So. 2d 483, 485 (Fla. 4th DCA 1992).
[60] *Trumbull Ins. Co. v. Wolentarski*, 2 So. 3d 1050, 1055 (Fla. 3d DCA 2009) *overruled on other grounds by Kopel v. Kopel*, SC13–992, 2017 WL 372074 (Fla. January 26, 2017).
[61] *Rowe*, 472 So. 2d at 1150.
[62] *Wolentarski*, 2 So. 3d at 1056.
[63] *Id*.
[64] *Cuervo v. W. Lake Vill. II Condo. Ass'n, Inc.*, 709 So. 2d 598, 600 (Fla. 3d DCA 1998); *see also Donald S. Zuckerman*, 676 So. 2d at 43 (same); *Indyne, Inc. v. Abacus Tech. Corp.*, 611CV137ORL22DAB, 2013 WL 11312471, at *19 (M.D. Fla. 2013) ("Defendants were free within their means to employ whichever and however many attorneys they wish and to give them free rein in devoting resources in defending an action. When seeking to shift the cost of such a defense to a losing adversary, however, those choices are subject to scrutiny, and the fee to be shifted may be more limited than the amount reasonably billed to and accepted by a client."); *Essex Builders Group, Inc. v. Amerisure Ins. Co.*, 604CV1838ORL22JGG, 2007 WL 9624720, at *7 (M.D. Fla. 2007) ("The Court finds that use of multiple law firms resulted in duplication of effort and excessive billings. As the redundant time entries are so numerous so as to make an itemization impractical, the Court will deduct an additional 30% from the fees sought.").
[65] *Id*.
[66] *Tomaino v. Tomaino*, 629 So. 2d 874, 875 (Fla. 4th DCA 1993).
[67] *Browne v. Costales*, 579 So. 2d 161, 162 (Fla. 3d DCA 1991).
[68] *Hiscox Dedicated Corp. Member, Ltd. v. Matrix Group Ltd., Inc.*, 8:09-CV-2465-T-33AEP, 2012 WL 2226441, at *4 (M.D. Fla. 2012).
[69] *Id*.
[70] *Id*.
[71] *Mandel v. Decorator's Mart, Inc. of Deerfield Beach*, 965 So. 2d 311, 315 (Fla. 4th DCA 2007).
[72] *Raimondi v. Zakheim & Lavrar, P.A.*, 6:11-CV-480-ORL-31, 2012 WL 1382255, at *5 (M.D. Fla. 2012).
[73] *Scelta v. Delicatessen Support Services, Inc.*, 203 F. Supp. 2d 1328, 1334 (M.D. Fla. 2002).
[74] *Id*.
[75] *State Farm Florida Ins. Co. v. Alvarez*, 175 So. 3d 352, 356 (Fla. 3d DCA 2015) *disapproved on other grounds by Joyce v. Federated Nat'l Ins. Co.*, SC16-103, 2017 WL 4684352 (Fla. Oct. 19, 2017).
[76] *See N. Dade Church of God, Inc. v. JM Statewide, Inc.*, 851 So. 2d 194, 196 (Fla. 3d DCA 2003) ("The time sheets also reflect a significant amount of time spent in conferences between the partner and the associate who were working on the case as well as multiple attorneys performing or reviewing the same items. Duplicative time charged by multiple attorneys working on the case are generally not compensable."); *see also Novak v. Safeco Ins. Co. of Illinois*, 615CV215ORL41DCI, 2017 WL 1552091, at *1 (M.D. Fla. 2017) ("[M]any of the requested hours are contributable to…internal conferences, which are not properly shifted to Defendant."); *Beishir v. Chase Home Fin. LLC,* 8:07-CV-65-T-27MAP, 2008 WL 533881,

at *1 (M.D. Fla. 2008) ("The time sheets include numerous inter-office conferences between co-counsel, 'office management conferences,' and several redundant entries by Condon and Vollrath. These hours are not reasonable or necessary."); *WHM LLC v. Nat'l Ass'n of Certified Home Inspectors*, 608-CV-864-ORL-22DAB, 2008 WL 5147367, at *3 (M.D. Fla. 2008) ("The timesheets reflect substantial redundancy such as numerous inter-office 'conferences,' and other duplicate efforts that are not chargeable to one's adversary.").

[77] *See Florida Birth-Related Neurological Injury Comp. Ass'n v. Carreras*, 633 So. 2d 1103, 1110 (Fla. 3d DCA 1994) ("While it is claimants' prerogative to use co-counsel, we do not think that the intercommunication time can be fairly charged against NICA.").

[78] *See N. Dade Church of God*, 851 So. 2d at 196 ("The time sheets also reflect…multiple attorneys performing or reviewing the same items. Duplicative time charged by multiple attorneys working on the case are generally not compensable."); *see also Novak*, 2017 WL 1552091, at *1 ("[M]any of the requested hours are contributable to multiple reviews of documents…which are not properly shifted to Defendant.").

[79] *Danis Indus. Corp. v. Ground Improvement Techniques, Inc.*, 645 So. 2d 420, 421 (Fla. 1994).

[80] *Lubkey v. Compuvac Sys., Inc.*, 857 So. 2d 966, 968 (Fla. 2d DCA 2003).

[81] 472 So. 2d at 1150-51.

[82] *Robin Roshkind, P.A. v. Machiela*, 45 So. 3d 480, 481 (Fla. 4th DCA 2010).

[83] 663 So. 2d at 1335.

[84] *Ottaviano v. Nautilus Ins. Co.*, 717 F. Supp. 2d 1259, 1269 (M.D. Fla. 2010).

[85] *Travieso v. Travieso*, 474 So. 2d 1184, 1186 (Fla. 1985).

[86] *See id.* at 1186 ("[E]xpert witness fees, at the discretion of the trial court, may be taxed as costs for a lawyer who testifies as an expert as to reasonable attorney's fees.").

[87] *Cf. Florida Peninsula Ins. Co. v. Wagner*, 196 So. 3d 419, 422 (Fla. 2d DCA 2016).

[88] 472 So. 2d at 1151.

[89] *Tutor Time Merger Corp. v. MeCabe*, 763 So. 2d 505, 506 (Fla. 4th DCA 2000).

[90] *Quanstrom*, 555 So. 2d at 831.

[91] *Id*.

[92] *Bell v. U.S.B. Acquisition Co., Inc.*, 734 So. 2d 403, 411 (Fla. 1999).

[93] *Rowe*, 472 So. 2d at 1151.

[94] *Prime Care Chiropractic*, 93 So. 3d at 347; *Wagner*, 196 So. 3d at 422.

[95] *Quanstrom*, 555 So. 2d at 834.

[96] 948 So. 2d 1027, 1031 (Fla. 5th DCA 2007). The Fifth District Court of Appeal reiterated this observation recently in *Garrison Prop. & Cas. Ins. Co. v. Rohrbacher*, 204 So. 3d 154, 156 (Fla. 5th DCA 2016) *rev. pending* SC16-2232 (Fla. 2016).

[97] 2012 WL 939387, at *18 (M.D. Fla. 2012) *report and recommendation adopted by* 2012 WL 939247 (M.D. Fla. 2012).

[98] 8:10-CV-894-T-27TBM, 2012 WL 6021462, at *8 (M.D. Fla. 2012) *report and recommendation adopted by* 2012 WL 6025761 (M.D. Fla. 2012).

[99] *Matrix Group Ltd*, 2012 WL 2226441, *9 ("[C]ounsel were able to mitigate the risk of non-payment by charging hefty hourly rates in the presence of a mandatory, statutory fee award to prevailing parties in insurance litigation"); *Rynd*, 2012 WL 939387, at *19 ("[M]andatory statutory fee award to prevailing plaintiffs in insurance litigation adequately mitigates this circumstance").

[100] *Jones*, 759 So. 2d at 725.

[101] *Rynd*, 2012 WL 939387, at *19.

[102] 564 So. 2d 1078 (Fla. 1990).

[103] *Id.* at 1079-80.

[104] *Federated Nat. Ins. Co. v. Joyce*, 179 So. 3d 492 (Fla. 5th DCA 2015); *Alvarez*, 175 So. 3d at 358; *Sawgrass Mut. Ins. Co. v. Mone*, 201 So. 3d 182, 185 (Fla. 5th DCA 2016) *rev. pending* SC16-1943 (Fla. 2016).

[105] SC16-103, 2017 WL 4684352, at *12 (Fla. Oct. 19, 2017).

[106] *Id*. at *10.

[107] *Id*. at *5 (citing *Quanstrom*, 55 So. 2d at 834.

[108] *Id*. at *6.

[109] *Id*. at *12.

[110] *Id*.

[111] *Id*. at *11.

[112] *Prime Care Chiropractic*, 93 so. 3d at 347.

[113] *Joyce*, 2017 WL4684352, at *11.

[114] 196 So. 3d at 421.

[115] *Id*. at 422.

[116] 93 So. 3d at 347.

[117] *Id*. at 347.

[118] *Rynd*, 2012 WL 939387, at *19.

[119] 2017 WL 4684352, at *11.

[120] *Id*.

[121] *Id*. at*12.

[122] *Id*. at *19.