HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 305 Property Insurance Claims and Reimbursement
SPONSOR(S): Rommel and others
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee		Fortenberry	Luczynski
2) Civil Justice & Property Rights Subcommittee			
3) Commerce Committee			

SUMMARY ANALYSIS

The bill makes several changes to statutes related to property insurance.

Attorney Fees Awarded in Litigation – Florida courts calculate reasonable attorney fees under the "lodestar approach." This approach requires the court to determine the number of hours reasonably expended on the case and multiply that number by the reasonable hourly rate, which produces the "lodestar amount." In certain cases, courts further increase the lodestar amount by applying a "contingency risk multiplier" ("contingency fee multiplier") a concept that arose from judicial interpretations of fee-shifting statutes. In Florida courts, the size of the contingency risk multiplier varies from 1.0 to 2.5 based on the likelihood of success at the outset of the case. The bill creates a strong presumption that the lodestar amount awarded by a court in a property insurance policy dispute is sufficient and reasonable. This presumption can only be overcome in rare and exceptional circumstances, with evidence that the plaintiff could not have reasonably retained competent counsel to take his or her case.

Property Insurance Coverage for Roof Damage – Property insurance claims are adjusted on the basis of replacement cost or actual cash value (ACV), depending on which type of coverage a policyholder purchased. When claims are adjusted on an ACV basis, the insurer pays the policyholder the depreciated value of the property damage or loss that is being replaced or repaired. The bill allows insurers to provide limited roof coverage in personal lines residential property insurance policies by including a roof surface reimbursement schedule (schedule) that provides reimbursement for repair, replacement, and installation based on the annual age of a roof surface type. This schedule must provide full replacement coverage for any roof surface type less than ten years old and at least a specified percentage of coverage for roofs older than ten years based on age and roof type. It must include a notice to policyholders regarding the limited coverage they are receiving and must be approved by the Office of Insurance Regulation. Additionally, if there is a total loss to a primary structure that is caused by a covered peril, cash value coverage may not apply.

Notice of Property Insurance Claims – Currently, notice of hurricane or windstorm loss must be provided to a property insurer within three years of the date of loss. Notice for all other types of property insurance claims must be provided within five years of the date of loss, which is the statute of limitations for bringing breach of contract suits, because the Florida Insurance Code does not specify a time limit for these claims. The bill changes the notice of claim deadlines in the Code so that notice of any property insurance claim must be provided to a property insurer within two years of the date of loss.

The bill has no impact on state or local government revenues or expenditures. It may have positive and negative direct economic impacts on the private sector.

The bill has an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Attorney Fees Awarded in Property Insurance Litigation

Background

In certain situations, a court may require one party to pay the opposing party's attorney fees. The traditional English Rule entitled a prevailing party to attorney fees as a matter of right. Florida, however, with a majority of other U.S. jurisdictions, adopted the American Rule, under which each party is responsible for its own attorney fees unless a statute provides an entitlement to fees.

A contingency fee is an attorney fee that is charged only if the lawsuit is successful or favorably settled out of court.[1] An attorney and a client may enter into a contingency fee contract, agreeing that the client will pay the attorney a fee only if the attorney successfully recovers for the client.

The Florida Supreme Court, through its Rules Regulating the Florida Bar, allows contingency fee contracts but restricts their use.[2] Rule 4-1.5(f) prohibits contingency fees in criminal defense and certain family law proceedings.[3] The rule also requires a contingency fee agreement to:

- Be in writing;
- State the method by which the fee is to be determined;
- State whether expenses are to be deducted before or after the contingency fee is calculated; and
- In certain types of cases, include other provisions ensuring the client is aware of the agreement's terms.[4]

Upon conclusion of a contingency fee case, the attorney must provide the client with a written statement stating the outcome of the case, the amount remitted to the client, and how the attorney calculated the amount.[5]

Statutorily Provided Attorney Fees

Several state and federal statutes known as “fee-shifting statutes” state that a prevailing party in court proceedings is entitled to reasonable attorney fees as a matter of right.[6] When a fee-shifting statute applies, the court must determine and calculate what constitutes reasonable attorney fees.

Lodestar Approach

In *Fla. Patient’s Comp. Fund v. Rowe,* a 1985 case, the Florida Supreme Court held that courts should calculate the amount of statutorily-authorized attorney fees using the "lodestar approach."[7] Applying this approach requires the court to determine the number of hours reasonably expended on the case and to determine a reasonable hourly rate for the attorney to have charged. Then the number of hours reasonably expended, multiplied by the reasonable hourly rate, produces the "lodestar amount," which is considered an objective basis for what the attorney fee amount should be.

[1] *See* Black's Law Dictionary 338 (8th ed. 2004).
[2] R. Regulating Fla. Bar 4-1.5(f).
[3] R. Regulating Fla. Bar 4-1.5(f)(3).
[4] R. Regulating Fla. Bar 4-1.5(f)(1) and (4).
[5] R. Regulating Fla. Bar 4-1.5(f)(1).
[6] *See, e.g.*, s. 627.428, F.S., which is often referred to as the “one-way attorney fees statute” (providing that an insured who prevails against an insurer is entitled to "a reasonable sum" of attorney fees); s. 501.2105, F.S. (providing that the prevailing party in an action under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) is entitled to "a reasonable legal fee"); 42 U.S.C. s. 1988(b) (providing that a prevailing party seeking to enforce specified civil rights statutes may recover "a reasonable attorney's fee").
[7] *Fla. Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).

Contingency Risk Multiplier

In certain cases, the court increases the attorney fees awarded by applying a contingency risk multiplier (CRM) to the lodestar amount.[8] The concept of the CRM arose from judicial interpretations of statutory authorization of attorney fees in particular cases,[9] but the Legislature also expressly provides for the use of a CRM in certain cases.[10] In 1990, the Florida Supreme Court discussed three different types of cases and whether a CRM should be applied in each case, as follows:

- *Public policy enforcement cases.* These cases may involve discrimination, environmental issues, and consumer protection issues. In these cases, a CRM is usually inappropriate.
- *Family law, eminent domain, estate, and trust cases*. In these cases, a CRM is usually inappropriate.
- *Tort and contract claims, including insurance cases*. In these cases, a CRM may be applied if the plaintiff can demonstrate the following factors show a need for the multiplier:
    - Whether the relevant market requires a CRM to obtain counsel;
    - Whether the attorney can mitigate the risk of nonpayment; and
    - Whether any other factors established in *Rowe*[11] support the use of the multiplier.[12]

Further, in the same decision, the Court noted that the size of the CRM varies from 1.0 to 2.5 based on the likelihood of success at the outset of the case, as follows:

- 1.0 to 1.5, if the trial court determines that success was more likely than not at the outset
- 1.5 to 2.0, if the trial court determines that the likelihood of success was approximately even at the outset
- 2.0 to 2.5, if the trial court determines that success was unlikely at the outset.[13]

Therefore, under current law, an attorney is more likely to receive a higher CRM—and thus a higher attorney risk award—if he or she takes a case that at the outset seems unlikely to succeed.

Federal Court Treatment of the Contingency Risk Multiplier

Part of the Florida Supreme Court's rationale for adopting the CRM framework in 1985 was the application of CRMs in federal courts.[14] However, in *Burlington v. Dague,* the U.S. Supreme Court decided and rejected the use of a CRM under certain federal risk-shifting statutes. In that case the Supreme Court signaled that it was closing the door on the CRM's use in most, if not all, federal cases.[15]

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[8] The Court may also adjust the amount based on the results obtained by the attorney. *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828, 830-31 (Fla. 1990). CRMs are also referred to as contingency fee multipliers.

[9] The rationale for using a CRM to increase an attorney fee award is that plaintiffs and plaintiffs' attorneys generally do not recover any money unless they prevail. The attorney fee multiplier induces attorneys to take a risk on cases they might not otherwise take, allowing would-be plaintiffs to find attorneys willing to represent them.

[10] *See* s. 790.33(3)(f)1, F.S. (explicitly authorizing a contingency fee multiplier in certain cases relating to the preemption of firearm and ammunition regulation).

[11] The *Rowe* factors were based upon Disciplinary Rule 2-106(b) of the Florida Bar (which is now Rule of Professional Conduct 4-1.5), and were as follows:

- Time and labor required, novelty and difficulty of the question involved, and the skill and requisite to perform the legal service properly.
- Likelihood, if apparent to the client, that the acceptance of employment would preclude other employment by the lawyer.
- Fee customarily charged in the locality for similar legal services.
- Amount involved and results obtained.
- Time limitations imposed by the client and circumstances.
- Nature and length of the professional relationship with the client.
- Experience, reputation, and ability of the lawyer(s) providing services.
- Whether the fee is a fixed or contingency fee.

Rowe, 472 So. 2d at 1150–1151.

[12] *Quanstrom*, 555 So. 2d at 833-35.

[13] *Id.* at 834.

[14] *See Rowe*, 472 So. 2d at 1146 ("[W]e . . . adopt the federal lodestar approach for computing reasonable attorney fees").

[15] *See City of Burlington v. Dague*, 112 S. Ct. 2638 (1992) ("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 . . . [W]e hold that enhancement for contingency is not permitted under the fee-shifting statutes at issue").

In *Perdue v. Kenny A. ex. rel. Winn,* a 2010 case involving a class action lawsuit filed on behalf of 3,000 children in the Georgia foster care system, the U.S. Supreme Court again addressed the CRM issue.[16] The plaintiffs argued in the underlying case that the foster care system in two counties was constitutionally deficient. The case was mediated and the parties entered a consent decree resolving all issues. Subsequently, the plaintiffs' attorneys sought attorney fees under 42 U.S.C. s. 1988.[17]

The federal district court calculated the fees using the lodestar approach, arriving at a $6 million figure, and then applied a 1.75 CRM, for a total attorney fee of $10.5 million. The district court justified the CRM by finding that the attorneys had:

- Advanced $1.7 million with no ongoing reimbursement.
- Worked on a contingency basis, and therefore were not guaranteed payment.
- Displayed a high degree of skill, commitment, dedication, and professionalism.
- Achieved extraordinary results.[18]

On review, the U.S. Supreme Court reversed the district court's calculation of attorney fees, remanding the case because the district court did not provide adequate justification for the 75 percent increase. The Court reiterated that "there is a strong presumption that the lodestar figure is reasonable," but that such presumption "may be overcome in those *rare circumstances* in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee."[19] The Court also determined that a CRM may be applicable in "exceptional" circumstances.[20]

The Court determined that the application of CRMs may sometimes be appropriate, while also issuing several warnings about CRMs, as follows:

- When a trial court fails to give detailed explanations for why it applies a CRM, "widely disparate awards may be made, and awards may be influenced . . . by a judge's subjective opinion regarding particular attorneys or the importance of the case."[21]
- "[U]njustified enhancements that serve only to enrich attorneys are not consistent" with the aims of a statute that seek to compensate plaintiffs.[22]
- In many cases, attorney fees "are not paid by the individuals responsible for the constitutional or statutory violations on which the judgment is based . . . . Instead, the fees are paid . . . by state and local taxpayers," resulting in a diversion of funds from other government programs.[23]

Recent Florida Supreme Court Treatment of the Contingency Risk Multiplier

In 2017, in the case of *Joyce v. Federated Nat'l Ins. Co.,* the Florida Supreme Court rejected the U.S. Supreme Court's *Dague* decision, instead holding that the CRM in Florida courts is not subject to the "rare and exceptional circumstances" requirement.[24] The Court acknowledged that, based upon its decision to maintain the applicability of the CRM without the restrictions implemented by the *Dague* decision, Florida "separat[ed] from federal precedent in this area."[25]

In *Joyce*, an elderly couple who sustained water damage to their home, filed a claim with their insurer, who subsequently denied coverage on the basis of alleged material misrepresentations on the part of the Joyces during their application for insurance.[26] The Joyces hired an attorney on a contingency fee basis and sued their insurer, but eventually settled the case.[27] The parties agreed that the Joyces were entitled to attorney fees and a fee hearing occurred in which the trial court applied a 2.0 CRM to the

[16] *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010).
[17] 42 U.S.C. s. 1988(b) allows the court to award attorney fees to the prevailing party in certain civil rights actions.
[18] *Perdue*, 130 S. Ct. at 1670.
[19] *Id.* at 1673 (emphasis added).
[20] *Id.*
[21] *See id.* at 1676.
[22] *See id.*
[23] *See id.* at 1677.
[24] *See Joyce v. Federated Nat'l Ins. Co.*, 228 So. 3d 1122 (Fla. 2017) ("[W]ith all due deference to the United States Supreme Court, we do not accept the *Dague* majority's rationale for rejecting contingency fee multipliers").
[25] *Id. at* 1132.
[26] *Id.* at 1123.
[27] *Id.*

lodestar attorney fee amount previously calculated.[28] The insurer appealed the case to the district court of appeal, which affirmed the lodestar amount, but reversed the application of the CRM.[29] The Joyces then appealed to the Florida Supreme Court, which accepted review and ruled in the Joyces' favor.[30] In his dissent to the *Joyce* opinion, however, Justice Canady stated that the case "illustrates the arbitrary results that can flow from application of the contingency risk multiplier….[which] have previously been exposed."[31]

Attorney Fees Applicable to Property Insurance Litigation ("One-way Attorney Fees")

Current Florida law provides that when a court issues a judgment against an insurer, and in favor of an insured who is represented by an attorney, the court shall order that the insurer pay a reasonable amount of attorney fees to an insured's attorney.[32] This provision regarding attorney fees is applicable to various insurance claim disputes, including property insurance claim disputes.[33]

Effect of the Bill

For property insurance litigation, the bill applies a standard for awarding a CRM that is similar to the standard applied in federal courts, in that it allows for the CRM only in "rare and exceptional" circumstances.[34] The bill provides that the award of attorney fees creates a strong presumption that the lodestar amount awarded by a court in a property insurance policy case is sufficient and reasonable, and thus that the court should not ordinarily apply a CRM. The plaintiff can overcome this presumption only in a rare and exceptional circumstance, and only if he or she can demonstrate that he or she could not have otherwise reasonably retained competent counsel.

Property Insurance Coverage for Roof Damage

Background

Property insurance claims are adjusted on the basis of replacement cost or actual cash value (ACV), depending on which type of coverage a policyholder purchased. When claims are adjusted on a replacement cost basis, the insurer will pay for the entire cost of repair or replacement without a reduction for depreciation.[35] However, when claims are adjusted on an ACV basis, the insurer pays the policyholder the depreciated value of the property damage or loss that is being replaced or repaired.[36] Property insurers must offer policyholders the option to purchase replacement cost coverage for all portions of their property, including roofs.[37]

Currently, insurers may offer roof surface endorsement forms approved by the Office of Insurance Regulation (OIR). A roof surface endorsement operates as ACV coverage for roofs by using a depreciation schedule to determine coverage for roofs over a certain age.[38] By accepting a roof surface endorsement, policyholders are giving up replacement cost coverage for their roofs in

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[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at 1132.
[32] S. 627.428, F.S.
[33] Of note, the Florida legislature has expressly prohibited the use of contingency risk multipliers for personal injury protection cases. *See* s. 627.736(8)(c), F.S.
[34] The bill reverses the standard set in the *Joyce* case.
[35] For example, if a roof is destroyed beyond repair, and a policyholder has replacement cost coverage, the insurer will pay to replace the entire roof, minute the deductible, regardless of the age or condition of the roof at the time of the loss.
[36] If a roof damage claim is adjusted on the basis of ACV rather than replacement cost, this would mean that the cost of replacing an entire roof when the roof has been damaged beyond repair may not be covered. There is a concern that policies that contain ACV coverage for roofs will not comply with the requirements of Fannie Mae and Freddie Mac, which require insurance to be placed at 100 percent replacement cost of the dwelling for homes that are in catastrophe areas. *See Multifamily Selling and Servicing Guide*, (effective Feb. 4, 2019), at 272-273, https://multifamily.fanniemae.com/sites/g/files/koqyhd161/files/migrated-files/content/guide/multifamily-selling-servicing-guide.pdf (last visited Mar. 13, 2021).
[37] S. 627.7011, F.S.
[38] Florida Office of Insurance Regulation, Agency Analysis of 2021 House Bill 305, p.3 (Feb. 18, 2021).

exchange for a discount that accounts for the increased risk that they are assuming by accepting ACV coverage on their roofs.

Effect of the Bill

The bill clarifies that insurers are authorized to provide limited roof coverage in personal lines residential property insurance policies by including a roof surface reimbursement schedule (schedule) that does the following:

- Provides reimbursement for repair, replacement, and installation based on the annual age of a roof surface type;
- Provides full replacement coverage for any roof surface type less than ten years old;
- Provides for reimbursement of at least 70 percent for a metal roof type, 40 percent for concrete tile or clay tile roof types, 40 percent for wood shake and wood shingle roof types,[39] and 25 percent for all other roof types, unless the insurer can provide actuarial justification to OIR that that percentages should be less than these;
- Provides the following statement at the top of the schedule:

  "PLEASE DISCUSS WITH YOUR INSURANCE AGENT. YOU ARE ELECTING TO PURCHASE COVERAGE ON YOUR ROOF ACCORDING TO A ROOF SERVICE REIMBURSEMENT SCHEDULE. IF YOUR ROOF IS DAMAGED BY A COVERED PERIL, YOU WILL RECEIVE A PAYMENT AMOUNT FOR YOUR ROOF ACCORDING TO THE SCHEDULE BELOW. BE ADVISED THIS MAY RESULT IN YOUR HAVING TO PAY SIGNIFICANT COSTS TO REPAIR OR REPLACE YOUR ROOF. PLEASE DISCUSS WITH YOUR INSURANCE AGENT."
- Allows for the application of actuarial rating methods pursuant to s. 627.062, F.S.;
- Is approved by OIR; and
- Is provided to the policyholder at issuance and at renewal of a policy.

Additionally, if there is a total loss to a primary structure that is caused by a covered peril,[40] cash value coverage may not apply.

Notice of Property Insurance Claims

Background

Until 2011, the Florida Insurance Code (Code)[41] did not contain a time limit for giving notice of any type of property insurance claim. Section 95.11, F.S., requires that actions on contracts be brought within five years. Because an insurance policy is a contract, the five year statute of limitations for contract actions generally applied to claims under insurance policies. Since a claim must have been made before a policyholder could sue for breach of contract, and a policyholder had five years to sue for breach of contract, the claim must have been made within five years of the date of loss.

Section 627.70132, F.S., enacted in 2011, established that notice of any hurricane or windstorm claim, supplemental claim, or reopened claim[42] under a property insurance policy must be provided to an insurer within three years after the hurricane made landfall or the windstorm caused the covered damage. Any claim for which notice is not given within the three-year timeframe is barred.[43] The three-year time limit for providing notice of a hurricane or windstorm claim does not affect the five-year

[39] Wood shakes and wood shingles are very similar but differ slightly in shape and thickness.
[40] A peril is a cause of loss, e.g. fire, windstorm, collision. IRMI, https://www.irmi.com/term/insurance-definitions/peril (last visited Mar. 13, 2021).
[41] The Florida Insurance Code is comprised of chapters 624-632, 634-636, 641, 642, 648, and 651, F.S.
[42] S. 627.70132, F.S., defines both "supplemental claim" and "reopened claim" as "any additional claim for recovery from the insurer for losses from the same hurricane or windstorm which the insurer has previously adjusted pursuant to the initial claim." Because these terms have the same definition, it is unclear why the statute uses both of them.
[43] S. 627.70132, F.S.

statute of limitations for bringing suit under s. 95.11.[44] This means that while notice of a windstorm or hurricane claim must be provided to an insurer within three years of the date of loss, suit may still be brought for an additional two years past the notice deadline.[45] The time limit for notice of all other property insurance claims besides hurricane and windstorm claims has remained equal to the five-year statute of limitations because statutes do not specify otherwise.

Effect of the Bill

The bill changes the notice of claim deadlines in the Code so that notice of any property insurance claim must be provided to a property insurer within two years of the date of loss. It also makes technical changes to the statute regarding alternative dispute resolution of property insurance claims so that the changes to the notice of claim statute do not conflict with that statute.[46]

B. SECTION DIRECTORY:

Section 1. Amends s. 627.428, F.S., relating to attorney fees.

Section 2. Amends s. 627.7011, F.S., relating to homeowners' policies; offer of replacement cost coverage and law and ordinance coverage.

Section 3. Amends s. 627.70132, F.S., relating to notice of windstorm or hurricane claim.

Section 4. Amends s. 627.7015, relating to alternative procedure for resolution of disputed property insurance claims.

Section 5. Provides an effective date of July 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have positive and negative direct economic impacts on the private sector. The bill's creation of a strong presumption in favor of a "lodestar" fee, only to be overcome in a "rare and exceptional circumstance" may reduce the amount of fees some attorneys recover if contingency risk multipliers are applied in fewer cases. Property insurance rates are based upon multiple factors, including litigation costs. To the extent the bill reduces litigation costs for property insurance cases, it may cause property insurance rates to decrease.

[44] *Id.*
[45] Often, the type of suit that an insured brings against an insurer is a breach of contract suit based upon a denial of a claim.
[46] S. 627.7015, F.S.

The bill may also result in a reduced incentive for attorneys to litigate property insurance cases. This may cause fewer property insurance cases to be litigated, which might further reduce property insurance rates. However, this could have the unintended consequence of making it more difficult to obtain an attorney for a property insurance case, resulting in the applicability of the contingency risk multiplier when a case is litigated.

While purchasing a property insurance policy with ACV roof coverage rather than replacement costs will reduce a policyholders' insurance premiums, the limited roof coverage will likely increase out-of-pocket expenses for policyholders who have roof damage claims because they will need to cover a portion of the roof replacement repair cost themselves in addition to their deductible.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill neither authorizes nor requires administrative rulemaking.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Lines 92-93–The removal of the language that places parameters on the date of loss for a hurricane or windstorm claim could make it difficult to determine the exact deadline for giving notice of these type of claims. Consideration should be given to replacing this language or including similar language so that passage of the bill does not result in additional litigation regarding the date of loss.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES