FLORIDA
Justice Reform
INSTITUTE

February 24, 2020

Governor Ron DeSantis
Executive Office of the Governor
400 South Monroe Street
Tallahassee, Florida 32399
Via Handy Delivery

Re: CS/SB 914 and HB 7071 on Contingency Risk Multipliers

Dear Governor DeSantis:

I urge you to support CS/SB 914 and HB 7071, legislation which answers Chief Justice Charles T. Canady's call to reexamine the use of contingency risk multipliers by Florida courts to double an attorney's fee award. Under both bills, attorney's fee awards in ordinary insurance disputes would be limited to the traditional attorney's fee award called the "lodestar" fee—i.e., the number of hours reasonably expended by the attorney multiplied by his or her hourly rate.

When used properly, contingency risk multipliers are designed to compensate an attorney in rare and exceptional circumstances where the lodestar figure does not represent a reasonable fee, particularly where the case is a difficult one for which it is hard to locate capable and willing counsel. Unfortunately, as the result of the Florida Supreme Court's decision three years ago in *Joyce v. Federated National Insurance Company*, 228 So. 3d 1122 (Fla. 2017), contingency risk multipliers are now the norm, despite the U.S. Supreme Court's express repudiation of them decades earlier.

As Justice Antonin Scalia explained in writing the majority opinion in *Burlington v. Dague*, 505 U.S. 557 (1992), a contingency risk multiplier 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 already 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, taking account of it again through a contingency risk multiplier amounts to "double counting" and incentivizes bringing meritless claims. As Justice Samuel Alito underscored 18 years later, such unjustified enhancements "serve only to enrich attorneys" and not their clients. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 559 (2010).

Yet in *Joyce*, the Florida Supreme Court explicitly rejected the U.S. Supreme Court's well-reasoned rationale in *Dague* and held that contingency risk multipliers may be used to double attorney's fee awards in ordinary cases. In dissent, Chief Justice Canady thoroughly explained why the court should have followed *Dague*, and noted too that on the facts of *Joyce*, a contingency risk multiplier was especially unjustified where there were thousands of attorneys in a neighboring county that might have taken the case and it took a single phone call to obtain counsel. 228 So. 3d at 1140-41 (Canady, C.J., dissenting).

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As a consequence of *Joyce*, Florida courts now routinely award attorney's fee awards which often double what attorneys would otherwise receive as fees under a typical billable hour arrangement. If it would be helpful, I can provide 10 example court orders where the use of a multiplier resulted in an attorney's fee award that dwarfed the amount of the plaintiff's own damages award. As just one example, in a run-of-the-mill insurance coverage dispute, *Santiago v. Florida Peninsula Insurance Co.*, Case No. 15-005272-CI-21 (Fla. 6th Cir. Ct., Pinellas County 2019), the court awarded the plaintiff's attorney **$1.2 million** in fees (based on a 2.0 multiplier), almost 30 times what the jury awarded the plaintiff, $41,000. Of course, the reality is that most litigation settles and does not proceed to a trial and court award of attorney's fees. Yet the high risk a court will award a contingency risk multiplier permeates **all** litigation and informs the settlement value of all cases. Consequently, even for the large percentage of cases in which a court never awards attorney's fees, defendants are still paying higher settlement amounts to account for the risk that a court would likely apply a multiplier in an attorney's fee award.

As Chief Justice Canady observed in *Joyce* and Justice Scalia observed in *Dague*, contingency risk multipliers fail to serve the purpose for which they were designed—to ensure litigants have access to counsel—and instead simply improve the financial lot of lawyers. For all these reasons, the Florida Justice Reform Institute asks that you support CS/SB 914 and HB 7071, which would limit the use of contingency risk multipliers to only truly exceptional insurance disputes that justify an award above the lodestar, as the lodestar already represents a reasonable attorney's fee.

Sincerely,

William W. Large

cc: Shane Strum, Chief of Staff
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