Insurance Matters!

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A Newsletter of the **Insurance and Surety Committee**
of the Real Property Probate and Trust Law Section of The Florida Bar

Scott Pence, Tampa
Chair

Entitlement to Contingency Risk Multiplier

By: Cynthia B. Beissel, Esq. Coquina Law Group, P.A.

Is the law concerning contingency risk multipliers changing in favor of insurers? At first glance, one might think so but after a more detailed analysis of current case law it does not appear to be the case.

Contingency fee multipliers increase the rate of attorney's fees awarded to the prevailing party's attorney. In determining whether a multiplier is necessary in breach of contract cases, *e.g.*, in first-party insurance cases, the court should consider 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 factors set forth in *Rowe*, *infra*, are applicable, especially the amount involved, results obtained, and fee arrangement. *Bell v U.S.B. Acquisition Co.*, 734 So.2d 403, 409 (Fla. 1999).

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What Coverage is Provided by Self-Insurance?

By: Charles E. Comiskey, CPCU, CIC, CPIA, CRM, PWCA, CRIS, CCM, CMIP,
Brady Chapman Holland & Associates, Inc., Houston, TX

Do the agreements you draft address self-insurance? If not, you're in the vast majority. If so, what is your expectation of coverage? "Self" obviously means retained. "Insured" refers to a transfer of financial responsibility, so "self-insured" is an oxymoron. "Retention" means exactly what it says: Retained. Hence, the phrase "self-insured retention" is a redundant oxymoron. But what does it mean?

Let's first look at deductibles. When coverage is subject to a deductible, the insurance company's responsibilities are triggered from the first dollar of loss, and the insurance company must collect payment of the deductible from the insured. Whether the insured ever pays the deductible or not, the insurance company is on the hook for a covered loss. In the case of a self-insured retention, the insurance company's obligations are not triggered unless and until the amount of that retention has been fully met by the insured. If the insured has a $250,000 self-insured retention, the coverage provided by the insurance company does not begin until after the retained $250,000 amount (the "attachment point") has been expended by the named insured.

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If those factors are shown, the multiplier should be awarded as follows:

1. If the trial court determines that success was more likely than not at the outset, it may apply a multiplier of 1 to 1.5;
2. If the trial court determines that the likelihood of success was approximately even at the outset, the trial judge may apply a multiplier of 1.5 to 2.0; and,
3. If the trial court determines that success was unlikely at the outset of the case, it may apply a multiplier of 2.0 to 2.5. *Id.* at 408.

Once the court determines the reasonable hourly rate for the attorney, the rate is multiplied by a factor ranging from 1 to 2.5, as stated above, substantially increasing the attorney's fee award. As such, 200 hours at $450 an hour would be a $90,000 attorney's fee, but with an award multiplier of 1.5, that $90,000 fee now becomes $135,000. Historically, the multiplier is based upon the likelihood of success at the outset of the case, based on the theory that multipliers incentivize attorneys to take the cases on a contingency basis. While there are numerous instances when a multiplier can be awarded, it is most common to see the prevailing party seeking a multiplier in first-party insurance cases. Relatedly, Section 627.428, Florida Statutes awards an insured its attorney's fees if the insured is the prevailing party or the insurer settles the claim. It has become a lucrative market for plaintiff's attorneys even without the multiplier.

"Section 627.428, Florida Statutes awards the insured's attorney's fees if the insured is the prevailing party or the insurer settles the claim."

In *Joyce v. Federated National Insurance Company*, the Fifth District Court of Appeal (DCA) tried to limit when a court could apply a contingency fee multiplier to an award of attorneys' fees to a prevailing party only in "rare" and "exceptional" circumstances. 179 So. 3d 492, 494 (Fla. 5th DCA 2015). The Florida Supreme Court reversed the Fifth DCA and reaffirmed the application of a contingency fee multiplier as outlined above. *See Joyce, supra,* 228 So. 3d 1122 *citing to Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990), and *Bell, infra* 734 So. 2d 403.

A few months ago, an insurance company prevailed in reversing an award of a contingency risk multiplier. In *Citizen's Property Insurance Corporation v. Anderson*, the First DCA reversed a 1.7 contingency fee multiplier awarded to the plaintiff after the plaintiff prevailed at trial on her breach of contact claim against her insurer. 43 Fla. L. Weekly D 353 (Fla. 1st DCA February 14, 2018), The lower court awarded the plaintiff $493,246.50 in attorney's fees which included the 1.7 contingency fee multiplier.

On appeal, *Citizens* argued that the trial court's failure to make a finding as to whether the market required a contingency fee multiplier pursuant to *Quanstrom*, was error on the face of the record and therefore a lack of a record was not required. Moreover, no court reporter was present at post-trial fee hearing, leaving the record silent as to the court's findings as to the propriety of the multiplier. The First District Court of Appeal agreed with the insurance company and reversed the trial court's order.

As the First DCA has reaffirmed in *Anderson*, the application of a contingency risk multiplier must be supported by competent, substantial evidence and the trial court must include specific findings supporting the application of a multiplier. The First DCA also reiterated that a trial court should consider the factors in *Bell, Rowe,* and *Quanstrom,* referenced above, and evidence of these factors must be presented to justify the use of a multiplier. In reversing the award of the 1.7 contingency risk multiplier in *Anderson*, the First DCA noted the lack of evidence, such as whether the Plaintiff had any difficulty in retaining counsel to handle the case or, the relevant market which would support application of the contingency risk multiplier. However, in reversing the decision as to the multiplier, the First DCA concluded that they were not "radically shifting the law or extending the holding of *Rowe* or *Quanstrom* to require written findings in all instances." The court further held that it did not mean to suggest that a reversal would be required in any case where a trial court fails to include a written finding on a factor in awarding attorneys' fees. The First DCA also acknowledged the Supreme Court's recent

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decision clarifying that the contingent fee multiplier is not limited to "rare and exceptional circumstances" and that it should be considered whenever the requirements for its application are met. It appears that the First DCA, by this recent opinion, is not applying a stricter standard for the application of the multiplier than is required by *Rowe* and *Quanstrom*, but, rather, is suggesting that there must be evidence to support the multiplier award.

The takeaway from *Anderson* is that contingency risk multipliers are still permitted in first-party cases but the party seeking a contingency risk multiplier must present evidence of the ***Rowe*** factors supporting a contingency risk multiplier and the court should make findings in its order to support the multiplier. Thus, while contingency risk multipliers remain, there is a way for insurance companies to fight the award of a multiplier. Insurance companies should be gathering evidence that would disprove the need for a multiplier and presenting this evidence at the fee hearing. To be done correctly, a half day hearing (a mini bench trial if you will) is likely required. IM

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So back to the original question: What coverage is provided during the first $250,000 exposure in this example? Nothing. "Self-insured" equates to NOT INSURED. All of the insurance requirements in your agreement therefore have no force or effect with regard to the retained amount, leaving your client with nothing more than an indemnity, subject to all of its frailties.

A self-insured retention therefore requires special handling from the standpoint of the upstream party. Let's start with certificates of insurance that commonly make no reference whatsoever regarding deductibles or self-insured retentions in a primary liability insurance program. Might it be important to you or your client to know if the $1,000,000 limit of liability being certified was subject to a $1,000,000 self-insured retention? This comes from a real situation, applying to coverage provided to an elevator company, discovered only because a building owner contractually required that company to disclose any deductibles or self-insured retentions in excess of $50,000. The elevator company obviously would not change its coverage, but the owner engaging the elevator services was in a better position to make a well-informed decision about whether it wanted to engage that particular service provider.

"Might it be important to you or your client to know if the $1,000,000 limit of liability being certified was subject to a $1,000,000 self-insured retention? "

Even with knowledge of the retention amount, the upstream party contracting with the downstream tenant or service provider is still left with no insurance coverage for defense cost, additional insured status, etc. within that amount. With that in mind, consider adding a provision to your agreements similar to the following:

If [Downstream Party] elects to self-insure or to maintain insurance required herein subject to deductible and/or retentions exceeding $25,000, [Upstream Party] and [Downstream Party] shall maintain all rights and obligations between themselves as if [Downstream Party] fully maintained the insurance required herein with a commercial insurer including but not limited to Additional Insured status, Primary and Non-Contributory Liability, Waivers of Rights of Recovery, Other Insurance Clauses and any other extensions of coverage required herein. [Downstream Party] shall pay from is assets the costs, damages, claims, losses and liabilities, including attorney's fees and necessary litigation expenses at least to the extent that an insurance company would have been obligated to pay those amounts if [Downstream Party] had maintained the insurance pursuant to this Exhibit without said deductible or self-insured retention. All deductibles and retentions shall be paid by, assumed by, for the account of, and at the sole risk of the [Downstream Party]. The [Downstream Party] shall not be reimbursed for same by [Upstream Party] or other additional insureds. IM

Committee Mission Statement

The purpose of the Insurance and Surety Committee is to educate the RPPTL Section of the Florida Bar on insurance, surety and risk management issues. The ultimate goal is to grow the Committee to the point it can seek Board Certification in Insurance and Risk Management. IM

Leadership & Subcommittees

Interested in getting involved? Contact one of the persons below:

Chair & Newsletter - Scott P. Pence (spence@carltonfields.com)
Co-Vice-Chair - Frederick R. ("Fred") Dudley (dudley@mylicenselaw.com)
Co-Vice-Chair and CLE - Michael G. Meyer (mgmeyer83@gmail.com)
Co-Editor of Newsletter - Mariela Malfeld (mmalfeld@watttieder.com)
Co-Editor of Newsletter - Cynthia Beissel (cindi@coquinalawgroup.com)
Legislative Subcommittee - Sanjay Kurian (skurian@becker-poliakoff.com
Legislative Liaison - Louis E. "Trey" Goldman (treyg@floridarealtors.org)
Secretary & Membership - Katherine "Katie" L. Heckert (kheckert@carltonfields.com)
Website - Derrick M. Valkenburg (dvalkenburg@shutts.com)

Schedule of Upcoming Committee Meetings

- Do you know the difference between the various forms of additional insured endorsements?
- Do you understand your ethical obligations when representing sureties and their principals?
- Do you know what a "your work" exclusion is?
- Can you describe the difference between an additional insured and a loss payee?
- Do you understand the risks to your clients if they fail to obtain a waiver of subrogation?
- Do you know the difference between "claims made" and "occurrence" based insurance policies?

Get answers to these, and many other questions, by attending our **FREE** monthly CLE programs.

When: Noon - 1:00 P.M. ET on the third Monday of every month, excluding government holidays.
Where: Via Teleconference
How: Dial-in number: **888-376-5050**
Participate Code: **7854216320#**

The first part of each teleconference is devoted to Committee business, followed by an insurance/surety-related CLE presentation that lasts approximately 45-50 minutes.

If you, or someone you know, might be interested in presenting at an upcoming meeting, please let us know.

Schedule of Upcoming RPPTL Section Meetings

July 25-28, 2018
Executive Council Meeting & Legislative Meeting
The Breakers
Palm Beach, FL

September 26-28, 2018
Executive Council Meeting, Out of State
The Westin Excelsior, Rome
Rome, Italy (with pre-event in Florence, Italy – TBA)

December 5-9, 2018
Executive Council Meeting & Committee Meetings
The Four Seasons
Orlando, FL

Mariela Malfeld
Co-Editor

Cynthia B. Beissel
Co-Editor

If you, or someone you know, would like to submit an article for possible inclusion in a future issue of ***Insurance Matters!***, please contact Mariela Malfeld at mmalfeld@watttieder.com or Cindi Beissel at cindi@coquinalawgroup.com

Did you know?

You can access previous issues of Insurance Matters!, as well as agendas, meeting minutes, presentation materials & CLE posting information from past committee meetings at our Committee Page once you've logged in to the RPPTL website located at http://www.rpptl.org.

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