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Memorandum

TO: Citizens Property Insurance Corporation

FROM: Ricky L. Polston

DATE: March 24, 2025

RE: House Bill 1551 (2025)

You have asked me to analyze House Bill 1551 presented in the Regular Session of the 2025 Florida Legislature, an act that substantially changes attorney fee awards in insurance actions. More specifically, although it is included within the bill as revisions to the offer of judgment statute, the act effectively reinstates the attorney's fees provision, section 627.428, Florida Statutes, that was repealed by 2023-15, Laws of Florida, § 11 (effective March 24, 2023) on behalf of insureds.

HB 1551 Text

Section 2 of HB 1551 notes that section 768.79—the Offer of Judgment and Demand for Judgment statutory provision that applies to both plaintiffs and defendants equally—does not apply to a civil action where the newly added sections 626.9375 or 627.4275 apply. The newly added sections apply to any civil action by a named or omnibus insured or named beneficiary under an insurance policy, or contract executed by the insurer, against a surplus line insurer or insurer, respectively. In the added sections, only an offer of judgment by the insurer is available, not a demand for judgment by the insured.

Sections 626.9375(1)(a) and 627.4275(1)(a) require the court to award reasonable attorney's fees to the prevailing party. But this is not a "loser pays" attorney's fees provision based on who wins the lawsuit. Whether the party is a prevailing party is separately defined in the bill and determined by whether the judgment is greater than the "highest written, good faith settlement offer" previously

tendered by the insurer. *See* §§ 626.9375(1)(a)-(b), 627.4275(1)(a)-(b). The term "judgment" is defined to include damages, any reasonable attorney fees, taxable costs, and prejudgment interest that the insured had incurred when the highest good faith settlement offer was previously tendered. *See* §§ 626.9375(1)(c), 627.4275(1)(c).

If the judgment is greater than the highest written, good faith settlement offer previously tendered by the insurer, the insured or named beneficiary is the prevailing party. *See* §§ 626.9375(1)(a), 627.4275(1)(a). The insured has no opportunity to make a demand for judgment as exists in section 768.79, Florida Statutes. Whether there is a prevailing party is entirely based on the insurer's offer. In the event that the judgment is not greater than the insurer's offer, the insurer is the prevailing party. *See* §§ 626.9375(1)(b), 627.4275(1)(b).

In section 768.79, the offer of judgment and demand for judgment may entitle the defendant and plaintiff to recover reasonable attorney's fees if the judgment is at least 25% better than that offered or demanded. The purpose of the statute is to encourage settlement and penalize a party who does not accept a good-faith, reasonable settlement. *See Coates v. R.J. Reynolds Tobacco Co.*, 365 So. 3d 353, 356 (Fla. 2023). In *Coates*, the Florida Supreme Court explained that section 768.79 is ***not*** a prevailing-party statute. To support this conclusion, the Court noted that "the statute itself refers to its fee awards and costs as 'penalties,'" and accordingly, "Florida courts have uniformly characterized section 768.79 as a penalty statute." *Id.* at 355. Because the statute is not a prevailing-party statute, the Court provisionally granted plaintiff Coates' motion for reasonable attorney's fees although losing the merits of the appeal. *Id.* at 356.

Case Law Analysis

The Florida Supreme Court considered what it means to be a "prevailing party" in *Moritz v. Hoyt Enterprises, Inc.*, holding that "the party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney's fees." 604 So. 2d 807, 810 (Fla. 1992).

A year later, the Court considered who is a "prevailing party" in the context of section 713.29, Florida Statutes, holding that in considering whether to apply the net judgment rule, a trial judge had discretion to consider equities and determine which party had prevailed on significant issues. *Prosperi v. Code, Inc.*, 626 So. 2d 1360, 1363 (Fla. 1993). In so holding, the Court noted that "the fact that the claimant

obtains a net judgment is a significant factor but it need not always control the determination of who should be considered the prevailing party." *Id.*

And only a year after that, the Court considered whether the prevailing party test of *Moritz* applied to an award of attorney's fees made pursuant to section 627.428. *See Danis Indus. Corp. v. Ground Improvement Techniques, Inc.*, 645 So. 2d 420, 421 (Fla. 1994). Specifically, the Court considered the following statutory language:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

§ 627.428(1), Fla. Stat. (1989).

The *Danis* court agreed with the lower court on the meaning of the statute, "that a 'prevailing insured or beneficiary' is one who has obtained a judgment greater than any offer of settlement previously tendered by the insurer." *Id.* at 421. The Court emphasized that any offer should be construed to include all damages, attorney's fees, taxable costs, and prejudgment interest which would be included if the final judgment was entered on the date of the offer of settlement. *Id.* at 421-22.

It is still the general rule that "the 'prevailing party' for purposes of entitlement to attorney's fees is 'the party prevailing on the significant issues in the litigation.'" *Isola Bella Homeowners Ass'n, Inc. v. Clement*, 328 So. 3d 1132, 1134 (Fla. 4th DCA 2021). However, House Bill 1551 gives a different meaning to "prevailing party," specifying that the insured is the prevailing party when they obtain a judgment greater than the insurer's settlement offer. This is the precise law in *Danis*. Therefore, House Bill 1551 will lead to the same result as its predecessor, section 627.428, for the insured.