IN THE SUPREME COURT OF FLORIDA

---

CASE NUMBER 73,319

---

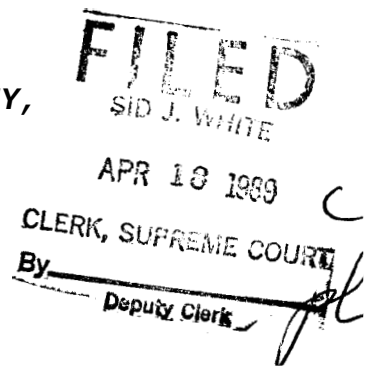
BANKERS INSURANCE *COMPANY*,

Petitioner,

vs.

CHARLES F. OWENS,

Respondent.




On review from the Fifth District Court of Appeal,
State of Florida

---

# PETITIONER'S INITIAL BRIEF ON THE MERITS

---

SHARON LEE STEDMAN
Attorney at Law
RUMBERGER, KIRK, CALDWELL,
CABANISS, BURKE & WECHSLER
A Professional Association
11 East Pine Street
Post Office Box 1873
Orlando, Florida 32802
(407) 425-1802

## TABLE OF CONTENTS

## TABLE OF CITATIONS

**STATUTES** AND **REGULATIONS:**

## PRELIMINARY STATEMENT

This is an appeal from a trial court's order awarding a personal injury protection claimant attorney's fees against Bankers Insurance Company, which order was affirmed by the Fifth District Court of Appeal based on the Fifth District's prior decision in *Quanstrom* v. *Standard Guaranty Insurance Company,* **519** So.2d **1135** (Fla. 5th DCA **1988),** *pending on the merits,* Case No. **72,100.**

The petitioner, Bankers Insurance Company, was the defendant in the trial court in a personal injury protection (PIP) action and the appellant in the Fifth District Court of Appeal. The respondent, Charles F. Owens, brought the action against Bankers Insurance Company in the Circuit Court in and for Brevard County, Florida. The respondent was the appellee in the Fifth District. In the brief, the parties will be referred to as "Bankers" or "petitioner, and "Owens" or "respondent".

The following symbols will be used:

"App." - Appendix attached to the brief

"R" - Record on appeal.

"Tr" - Transcript of hearing on attorney's fees.

## STATEMENT OF THE CASE AND FACTS

The trial court entered an order awarding Owens $16,875.00 for attorney's fee. (App.1). The award of attorney's fees was based on a final judgment entered against Bankers in the amount of $3,870.40 for the personal injury protection claim brought by Owens. (App.2). In ruling that Owens was entitled to an award of attorney's fees in the amount of $16,875.00, the trial court found:

> 1. That the plaintiff's attorney, James A. Sisserson, had expended ninety (90) hours in the handling of the matter.
>
> 2. That a reasonable hourly rate for Mr. Sisserson was $125.00 per hour.
>
> 3. That the case was handled on a contingency fee basis, and that the fees awarded were statutorily directed attorney's fees so that a contingency risk multiplier of 1.5 was appropriate.

(App.3).

Although the trial court initially granted Bankers' motion for rehearing, the trial court affirmed its prior order assessing attorney's fees. (App.4). In affirming its prior order, the trial court found that Owens and his attorney had an oral contract of representation which was contingent in nature and provided that the attorney would be entitled to a fee with the amount to be determined by the court under section 627.428, Florida Statutes, if the plaintiff prevailed on his PIP claim.

When Charles F. Owens retained James Sisserson as his attorney, they met and entered into a written agreement

authorizing Mr. Sisserson to represent Mr. Owens on April 22, 1986. (Tr.64). At that time, Owens had discussed with Mr. Sisserson arrangements for payment of his fees for pursuit of the PIP case. (Tr.48, 50). The written agreement entered into between Mr. Sisserson and Mr. Owens provided that the law offices of Nance, Cacciatori and Sisserson would be paid 33-1/3% of the gross amount of recovery if accomplished prior to filing suit and 40% of the gross amount of recovery if accomplished after suit was filed and/or demand for arbitration made. (Tr.64). The written contract was only meant to apply to Mr. Owens' claim for uninsured motorist coverage. (Tr.47). Mr. Owens testified, however, that his understanding at the time he entered into the written agreement was that on the PIP claim, his attorney's fees would be paid in accordance with whatever was awarded to Mr. Sisserson by the court. (Tr.51-53).

The underlying controversy arose out of an automobile accident which occurred while Owens was operating a motor vehicle which collided with a motor vehicle being operated by William T. Lockett. (R.159-160). At the time of the accident, Owens and Bankers were parties to a contract of automobile liability insurance wherein the contract provided that Bankers would pay personal injury protection benefits.

The complaint alleged that Bankers had failed to make payment for medical bills, medical services and loss of wages. The action was tried before the court, which trial

resulted in a final judgment which allowed some of Owens' claims but disallowed others. (App.2). Although Owens had made claim for approximately $10,000.00 worth of unpaid PIP benefits, the court found that Bankers, in fact, owed $3,520.40. Consequently, Owens only prevailed on a portion of the claims made in the litigation and was unsuccessful on others.

Based on the foregoing, the trial court determined an award for attorney's fees in the amount of $16,875.00 for a $3,520.40 recovery in an action wherein the plaintiff was unsuccessful in half of his claims. Bankers appealed the award of attorney's fees to the Fifth District Court of Appeal which ***per curium*** affirmed on the authority of ***Quanstrom*** v. ***Standard Guaranty Insurance Company,*** 519 ***So.*** 2d 1135 (Fla. 5th DCA 1988).

In ***Quanstrom,*** the issue involved was the question of whether an attorney's fee agreement between an insured and her attorney was a contingency fee agreement as contemplated in ***Florida Patients Compensation Fund v. Rowe,*** 472 So.2d 1145 (Fla. 1985). The agreement in ***Quanstrom,*** as the agreement in the instant case, was to the effect that if the attorney ultimately prevailed on the no-fault question, the attorney would be entitled to a fee which would be the amount the court allowed as an attorney's fee under section 627.428, Florida Statutes, rather than a percentage of the recovery. The court held that such an agreement whereby an attorney got

paid in the event of a result favorable to the client but did not receive a fee in the other event, was a contingency fee agreement under ***Rowe.***

Based on the Fifth District's reading of ***Rowe,*** the court held that application of a multiplier was mandatory in all contingency fee cases, including statutorily directed attorney's fee cases, by quoting to a single sentence from this court's decision in ***Rowe:***

> When the prevailing party's counsel is employed on a contingent fee basis, the trial court ***must*** consider a contingency risk multiplier when awarding a statutorily directed reasonable attorney's fee.

***Quanstrom, supra,*** 519 So.2d 1136, ***citing to Florida Patients Compensation Fund v. Rowe, supra,*** **472** So.2d at 1151. Bankers submits that it must be noted that the precise wording of the quote is "must consider" and not "must apply". A court can, of course, consider applying a multiplier and then determine that it is not appropriate.

The court in ***Quanstrom*** noted that its decision expressly and directly conflicted with the Third District Court of Appeal's decision in ***Travelers Indemnity Company v. Sotolongo,*** 513 So.2d **1384** (Fla. 3d DCA **1987).** Consequently, this court accepted ***Quanstrom*** pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(IV), and article a(V), section 3(b)(3), Florida Constitution. Therefore, when the Fifth District affirmed the instant case on the authority of ***Quanstrom, Quanstrom*** was pending in this court thereby giving

**this court jurisdiction over the instant case.**

## SUMMARY OF THE ARGUMENT

The lodestar analysis or approach adopted by this court in *Florida Patients Compensation Fund* ***v.*** *Rowe, supra,* 472 So.2d 1145, was designed to develop a consistent and reasonable approach to the award of attorney's fees. This court declared that such an approach produced a more objective estimate and was thought to be a better assurance of more even results. However, neither *Rowe,* nor its federal progenitors were designed to subsidize the legal profession or penalize unsuccessful parties in litigation.

Under the lodestar approach, the starting point in any determination for an objective estimate of the value of a lawyer's services is to multiply hours reasonably expended by a reasonable hourly rate. The result of that multiplication is known as the "lodestar figure". A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience and reputation. The applicant bears the burden of producing satisfactory evidence that the requested rate is in line with the prevailing market rate.

The next step in the computation of the lodestar is the ascertainment of reasonable hours. Hours that would be unreasonable to bill a client are excluded, *i.e.,* excessive or unnecessary work. The lodestar figure, then, reflects the attorney's skill, the complexity of the litigation, the risk involved, and those factors determined relevant both by the

Florida Bar and by the courts in determining appropriate and reasonable fees.

A lodestar figure is presumptively adequate to compensate counsel for their time and effort in a particular action, and only in the most extraordinary circumstances will the second phase of ***Rowe,*** the enhancement or reduction of the lodestar figure, come into play. Once the lodestar is determined, the trial court, under ***Rowe,*** must next consider whether an enhancement for the results obtained is necessary. If enhancement for contingency is ever appropriate, it is only in rare cases and only where shown that the enhancement is necessary to assure the availability of counsel. Adjustments are not granted routinely or liberally but are reserved for truly exceptional cases. The lodestar figure reflects the general quality of the attorney's work, and upward adjustment is awarded only in those cases where the attorney performed beyond the level that would be expected of an attorney commanding the hourly rate used to compute the lodestar figure. Moreover, if an enhancement is awarded, *Rowe* dictated that the total fee award could never exceed the fee agreed to by the claimant and his counsel, the "cap".

In order to be considered an exceptional result, the result would have to be one not thought likely to be achieved at the start of the litigation. In all no-fault situations, as well as personal injury protection claims, there is absolutely no way that a plaintiff could achieve a result

considered to be an exceptional result, as the result could not be one thought not likely to be achieved at the start of the litigation. The Fifth District's decision making it mandatory on all trial judges to systematically enlarge what has been determined to be a reasonable attorney's fee by 50% to 300% is, to say the least, a windfall to plaintiffs' counsel. There is simply no basis in law or fact which would justify a cross-the-board windfall to plaintiffs. The lodestar figure alone would compensate plaintiffs and make them whole. There is no need to further enlarge what has been denominated by the federal courts as a presumption of reasonable attorney's fees.

Successful representation is not the type of extraordinary circumstance necessary to justify the enhancement of the lodestar figure. Attorneys of Florida have a duty to zealously represent their clients and to provide a high quality of legal services.

Issues presented in no-fault situations are neither extremely difficult nor novel, and counsel do not expend a great deal of labor in litigating cases through to the end. The lodestar figures alone satisfy the policy of encouraging attorneys to take no-fault cases on a contingency basis as they will be paid what they are due. Allowing a bonus because of contingency is a means of awarding counsel for accepting and prevailing in a case that, at the outset, had a low probability of success on the merits. No-fault cases

simply do not fall within the category of contingency cases to which an adjustment should be made.

Moreover, a fair reading of ***Rowe*** shows that the Fifth District's determination that the fee agreement entered into in the instant case is not a contingency fee case contemplated by ***Rowe.*** In adopting the federal lodestar approach, this court specifically put a cap on the enhanced dollar figure, such that the total attorney's fee award could never exceed the dollar figure of the original contingency agreement between the plaintiff and his counsel. Where there is no contingency fee agreement with its cap, the prerequisites for an enhancement simply do not exist.

## ARGUMENT

### POINT ON APPEAL

**THE APPLICATION OF A MULTIPLIER FACTOR IS NOT MANDATORY ON TRIAL COURTS WHEN THE PREVAILING PARTY'S COUNSEL HAD AN AGREEMENT WITH HIS CLIENT TO BE PAID A FEE DIRECTED BY THE COURT.**

In *Florida Patient's Compensation Fund* **V.** *Rowe,* **472** So.2d **1145** (Fla. **1985),** this court noted the great concern that had been focused on a perceived lack of objectivity and uniformity in court-determined reasonable attorney fees. In Rowe, this court cited to and quoted from *Baruch* V. *Giblin,* **122** Fla. **59, 63, 164 So. 831, 833** (1935), wherein it recognized the great impact attorneys' fees had on the credibility on the court system and the legal profession:

> There is but little analogy between the elements that control the determination of a lawyer's fee and those which determine the compensation of skilled craftsmen in other fields. Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently and expeditiously. The attorneys' fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact, it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that. It brings the court into dispute and destroys its power to perform adequately the function of its creation.

For the courts to systematically, without any concern for the individual facts of the case, to determine what a reasonably competent attorney would receive for a case and then to multiply that reasonable fee times **50%** to 300% can do nothing less than to bring the courts into disrepute and

destroy their power to perform adequately the function of their creation. It is axiomatic that if insurance companies are required to pay three times the rate that is considered reasonable, that it is the insureds that will ultimately pay by increased insurance rates which would surely undermine the confidence of the public in the bench and the bar. Bankers submits that a review of *Rowe* and the cases that *Rowe* relied on will show that the Fifth District misinterpreted the dictates of *Rowe* which led to an absurd conclusion.

*In Rowe,* this court set out to articulate specific guidelines to trial judges in the setting of attorneys' fees so that there would be a suitable foundation for an objective structure. In so doing, this court adapted the federal lodestar approach which incorporates Rule 4-1.5, Rules Regulating The Florida Bar. The factors contained in Rule 4-1.5 [Disciplinary Rule 2.1061 are essentially the same as those considered by the federal court derived from the ABA Code of Professional Responsibility DR2-106 and adopted in *Johnson* V. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *Florida Patient's Compensation Fund* V. *Rowe, supra,* 472 So.2d at 1150 n.5.

The Fifth District's declaration that a contingency-risk factor must always be applied when the prevailing parties' counsel is employed on any type of contingent basis runs afoul of *Rowe* as well as the United States Supreme Court decisions that evolved the lodestar process. The Fifth

District initially erred in holding that the contingency-risk factor is applicable to fee arrangements other than the standard contingency fee arrangement wherein the attorney agrees to take a case, and the fee will be a percentage of the monetary award.

In order to give full force and effect to all of this court's decision in ***Florida Patient's Compensation Fund v. Rowe, supra,*** **472** So.2d **1145,** the only type of contingency fee case that a contingency-risk multiplier should be applied to is the standard contingency fee case, ***i.e.,*** the prevailing party's counsel had a contract with his client that the attorney would receive a percentage of the monetary award. If a multiplier of **1.5** to **3** were applied across the board in cases such as the instant case, this court's declaration that in no case should the court-awarded fee exceed the fee arrangement reached by the attorney and his client would be superfluous.

That portion of ***Rowe*** wherein this court also declared, "Once the court arrives at the lodestar figure, it *may* add or subtract from the fee based upon a 'contingency-risk' factor and the 'results obtained' " would likewise have no force and effect. ***Id.*** at 1151 (emphasis added). Rather than analyzing and utilizing the entire opinion in ***Rowe,*** the Fifth District chose only to focus on that portion of the ***Rowe*** decision that noted:

> When the prevailing party's counsel is employed on a contingency fee basis, the trial court must

> consider a contingency-risk factor when awarding a statutorily directed reasonable attorney fee.

***Id.*** at **1151,** cited to in ***Quanstrom*** v. ***Standard Guaranty Insurance Company,*** **519** So.2d **1135, 1136** (Fla. 5th **DCA 1988).**

Not only did the Fifth District fail to give credence to the permissive language above, it also failed to acknowledge and follow the further dictates of ***Rowe*** that declared that the fee determined by multiplying the number of hours reasonably expended times the reasonable hourly rate should only be adjusted on the basis of the contingent nature of the litigation or the failure to prevail on a claim or claims when appropriate. Bankers respectfully submits that a fair reading of ***Rowe*** unequivocally shows that this court did not declare the law in Florida to be that whenever a fee is contingent on whatever a court awards that the award is to be enlarged by 50% to **300%.** Such an interpretation results in an unjustified windfall to prevailing parties' counsel in all such situations and a penalty to insurance companies. That interpretation also goes against the main purpose of considering attorney fees part of litigation costs: to make the prevailing plaintiff or defendant whole. ***Rowe, supra,*** **472** at **1149.**

Such an interpretation also runs counter to the federal lodestar approach, expressly approved by this court in adopting the lodestar process. This court specifically noted the Supreme Court decision in ***Hensley*** v. ***Eckerhart,*** **461 U.S. 424, 103** S.Ct. **1933, 76** L.Ed.2d **40 (1983).** ***Florida***

***Patient's Compensation Fund v. Rowe, supra,*** 472 So.2d at 1150 n.5.

The Supreme Court in ***Hensley*** adopted guidelines for determining what constitutes a reasonable attorney fee. The ***Hensley*** Court combined the elements developed by the Fifth Circuit in ***Johnson v. Georgia Highway Express, Inc.,*** 488 F.2d 714 (5th Cir. 1974), and the lodestar method of calculation developed by the Third Circuit in ***Lindy Brothers Building, Inc. v. American Radiator and Standard Sanitary Corporation,*** 487 F.2d. 161 (3rd Cir. 1973). As acknowledged by this court in ***Rowe,*** the ***Johnson*** 12-factor analysis is essentially the same as the factors set forth in Disciplinary Rule 2-106(b) of The Florida Bar Code of Professional Responsibility which are the identical factors contained in the revision of the Code of Professional Responsibility of The Florida Bar.

The factors of the Code of Professional Responsibility are:

> (1) The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or the circumstances.
>
> (6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

*Patient's Compensation Fund v. Rowe, supra,* 472 at 1150.

The lodestar is calculated by multiplying the hours spent by each attorney by a reasonable hourly rate. The reasonable hourly rate is established by the court's taking into account all of the factors set forth in Disciplinary Rule 2-106 except the "time and labor required", the "novelty and difficulty of the question involved", the "results obtained" and "whether the fee is fixed or contingent".

Once the lodestar is calculated, then the court could [not "shall"] apply the Third Circuit's approach found in *Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corporation, supra,* 487 F.2d 161. Under that approach, the court then *may* make adjustments to the lodestar figure based on the "riskiness" of the lawsuit and the quality of the attorney's work. *Jordan v. Multnomah County,* 515 F.2d 1258, 1262 n.5 (9th Cir. 1987).

As consistently declared by federal courts, a "strong presumption" exists that the lodestar figure represents a "reasonable" fee, and upward adjustments of the lodestar are proper only in "rare" and "exceptional" cases, supported by specific evidence on the record and detailed findings by the district court. *Pennsylvania v. Delaware Valley Systems Citizens' Counsel for Clean Air,* _____ U.S. _____, 106 S.Ct.

3088, 92 L.Ed.2d 439 (1986); *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984); *Save Our Cumberland Mountains, Inc. v. Hodel*, 651 F.Supp. 1528 (D.D.C. 1986).

The decision of the Supreme Court in *Pennsylvania v. Delaware Valley Citizens' Counsel, supra,* established two important principles in determining fees under the federal lodestar method. First, it established that application of a multiplier to the lodestar can only occur if the results obtained are out of the ordinary. 107 S.Ct. at 3089. Second, enhancement is appropriate only where the fee arrangement is contingent and the rare case where evidence established that it was necessary to assure the availability of counsel to handle such cases. *Id.* at 3089, 3091. *Accord, Perkins v. Mobile Housing Bd.,* 2 F.L.W. Fed.C.806 (11th Cir. June 20, 1988); Marshall v. Housing Authority of the City of Montgomery, 836 F.2d 1292 (11th Cir. 1988).

Since this court adopted the federal lodestar approach and specifically cited to the United States Supreme Court, Bankers submits that the reasoning of the Supreme Court is very persuasive, at a minimum. In the *Pennsylvania* case, the Supreme Court declared that most of the factors used to justify application of multipliers are adequately addressed in the lodestar determination. *Pennsylvania v. Delaware Valley Citizens' Counsel, supra,* 107 S.Ct. at 3087. The risky nature of particular cases because of the difficult and novel issues involved and the possibility of protracted

litigation are taken into account. The riskier and more difficult the undertaking, the more hours will be expended in preparing and litigating the case. Once a client prevails, therefore, a risk is already incorporated into the lodestar figure. As the Court pointed out, the risk factor will be addressed in determining the reasonable number of hours expended and the reasonable hourly rate. Increasing the lodestar figure would result in a windfall, not a reasonable fee. Id. While the Supreme Court did not completely foreclose the use of a contingency-risk multiplier, a plurality of the Court addressed the question of the size of the multiplier when applicable, and determined that it would not exceed **30%** or 1.3 under any circumstances. Id.

The Court also discussed the inequity involved in enhancing fees for risk of loss. Engaging in such a practice "forces losing defendants to compensate plaintiffs' lawyers for not prevailing against defendants in other cases". Id. at **3086**. This is clearly not the purpose of a fee-shifting statute. However, adding a multiplier to every contingent fee case in which the plaintiff prevails will necessarily have the effect of having the losing defendants pay fees based on the fact that other defendants have prevailed and paid no fees.

A contingency adjustment is only allowable if certain considerations are met. "Allowing a bonus because of contingency is a means of rewarding counsel for accepting and

prevailing in a case that, at the outset, had a low probability on the merits." *Ursic* V. *Bethlehem Mines,* **719** F.2d **670, 673** (3d Cir. **1983).** Thus, courts must assess the probability that plaintiffs would have lost the case and counsel not recover a fee. *Laffey* V. *Northwest Airlines, Inc.,* 572 F.Supp. **354, 378** (D.D.C. **1983).** A reasonable assessment of risk can be made by considering (1) the legal and factual complexity of the case; (2) the probability of defendant's liability; and (3) the difficulty or ease with which damages could be proven. *Id.* Even assuming *arguendo* that no-fault coverage cases fell within contingency-risk multiplier situations, such cases could not fit within the considerations that would allow a contingency adjustment. Of course, neither would personal injury protection benefit, etc.

An analysis of all of the factors point to the inevitable conclusion that *Rowe* does not require automatic application of a contingency-risk multiplier every time there is a contingent fee arrangement. The language in *Rowe* stating that a court must consider application of a multiplier does not mean that it must be applied. As declared by the court in *Perkins* V. *Mobile Housing Board, supra,* 2 F.L.W. Fed. at C807, the present state of the law is "... if enhancement for contingency is every appropriate, it is in rare cases and only where necessary to assure the availability of counsel."

Furthermore, the severe limitation on use of contingency-risk multipliers under the federal lodestar formula, adopted specifically by this court in *Rowe,* provides ample justification to interpret *Rowe* as did the courts in *Travelers Indemnity Company* v. *Sotolongo,* 513 So.2d 1384 (Fla. 3d DCA 1987), and *National Foundation Life Insurance Company v. Wellington,* 526 So.2d 688 (Fla. 3d DCA June 14, 1988).

The court in *Sotolongo* was presented with an action brought on a homeowners policy for personal property lost when the insured's automobile was stolen from a shopping center parking lot. The trial court had awarded a fee of $28,125, while the client's recovery was $6,793. In reversing and remanding the case for further consistent proceedings, the court initially noted that they did not read *Rowe* as obligating a trial court to adjust the lodestar fee in every case where a successful prosecution of the claim was unlikely.

The court noted in a footnote that while *Sotolongo* had been pending, the United States Supreme Court decided *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, supra,* 107 S.Ct. 3078. The court in *Sotolongo* declared that the plurality of the Supreme Court was critical of the contingency-risk factor to enhance a lodestar fee. The court specifically cited to the concurring opinion authored by Justice O'Connor that legal risks and risks unique to the

case were already factored into the lodestar fee and that the contingency-risk factor should apply only where there is a finding the risk multiplier is necessary to attract competent counsel in a relevant community. Since counsel in all communities will always receive a reasonable fee if they prevail in insurance cases, there is simply no need to automatically enhance what has been determined to be a reasonable attorney fee.

The court in ***National Foundation Life Insurance Company v. Wellington, supra,*** **526** So.2d **688,** likewise declared that they did not read ***Rowe*** as compelling a trial court to apply a multiplier factor simply because the prevailing party and his attorney had entered into a contingency fee contract. The Fifth District's approach in ***Quanstrom,*** that simply because the fee arrangement counsel had with their clients was contingent that a multiplier must always be applied, was also specifically rejected in ***Cherry*** v. ***Rockdale County,*** **601** F.Supp. **78** (N.D. Ga. **1984).**

The Fifth District clearly erred in holding that the reasonable fee determined by multiplying the reasonable number of hours expanded times a reasonable hourly rate must always be enlarged. The court's holding that the application of a multiplier factor is mandatory on trial judges when the prevailing party's counsel was employed on a contingency fee basis is in conflict with the ***Rowe*** decision itself as well as decisions from other district courts of appeal in Florida and

federal court decisions. The court in ***Appalachian, Inc. v. Ackmann,*** 507 So.2d 150 (Fla. 2d DCA), ***review denied,*** 515 So.2d 229 (Fla. 1987), was presented with the issue of whether an award of attorneys' fees was correct. The trial court awarded attorneys' fees pursuant to the Interstate Land Sales Full Disclosure Act, 15 U.S.C. 51701, ***et seq.*** One of the issues on appeal was whether the trial court erred in its enhancement of the fee.

The ***Ackmann*** court declared that the case was governed by ***Florida Patient's Compensation Fund v. Rowe, supra,*** 472 So.2d 1145. The court declared that ***Rowe*** formulated and announced criteria or principles which are to be followed when a prevailing party is either a statutory or contractual beneficiary of entitlement to an attorney's fee. ***Appalachian, Inc. v. Ackmann, supra,*** 507 So.2d at 152. The court correctly declared that, under ***Rowe,*** trial courts have been instructed to determine a reasonable hourly rate multiplied by the hours reasonably expended in the representation of the prevailing party in reaching a reasonable fee to be paid by the unsuccessful party. "Once those determinations are accomplished, the resultant product is denominated the 'lodestar'. In the context of a contingency fee arrangement, the lodestar *may* be enlarged by a multiplier ranging from a factor of 1.5 to 3." Id. (emphasis added). The court then discussed the

considerations to be made in order to determine the degree of enhancement of a lodestar.

Likewise, in ***Freedom Savings & Loan Association v. Biltmore Construction Company, Inc.,*** 510 So.2d 1141 (Fla. 2d DCA 1987), the court held that the ***Rowe*** decision mandates that in computing an attorney fee, the trial judge should:

> 1. Determine the number of hours reasonably expended on the litigation;
>
> 2. Determine the reasonable hourly rate for this type of litigation;
>
> 3. Multiply the result of (1) and (2); and, when appropriate,
>
> 4. Adjust the fee on the basis of the contingent nature of the litigation for failure to prevail on a claim or claims.

Bankers respectfully submits that the wording, "when appropriate", invests a trial judge with discretion. If, in fact, the application of a multiplier was mandatory, then this court would have used the wording "shall".

Indeed, the standard of review for a trial court's determination of whether a risk multiplier should have been applied or not is an abuse of discretion standard. *E.g.,* ***Perkins v. Mobile Housing Bd., supra,*** 2 F.L.W. Fed. C806; ***In re Burlington Northern, Inc. Employment Practices Litigation,*** 810 F.2d 601 (7th Cir. 1986); ***Jones v. Central Soya Company, Inc.,*** 748 F.2d 586 (11th Cir. 1984). In ***In re Burlington,*** the court declared that the Supreme Court has emphasized and re-emphasized that "the proper first step in determining a reasonable attorneys' fee is to multiply the

number of hours reasonably expended on the litigation times a reasonable hourly rate, citing to *Pennsylvania v. Delaware Valley Citizens, Counsel for Clean Air, supra,* _____ U.S. ____, **106** S.Ct. at **3098.** The Seventh Circuit then declared that the Court re-emphasized in *Pennsylvania* that the resultant figure is "more than a mere rough guess or initial approximation of the final award to be made. Instead, **...** '[w]hen **...** the applicant for a fee has carried his burden of showing that the claimed rate number of hours are reasonable, the resulting product is Presumed to be the reasonable fee' to which counsel is entitled." Id. at **3098,** quoting *Blum v. Stenson, supra,* **465 U.S.** at **897, 104** S.Ct. at **1548.**

What is important to the instant case is the *Pennsylvania* Court's rationale for the presumption that the resultant figure above is to be the reasonable fee. The first rationale is that fee-shifting provisions ordinarily are not meant to provide a windfall to attorneys or to "replicate exactly the fee an attorney could earn through a private fee arrangement with his client", *Pennsylvania v. Delaware Valley Citizens, Counsel for Clean Air, supra,* **106** S.Ct. at **3098.** Rather, the aim of fee-shifting statutes is to enable private parties to obtain legal counsel. The second rationale for presuming that the lodestar constitutes a reasonable fee is that

> [w]hen an attorney first accepts the case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results commensurate

> with his skill and his client's interest. Calculating the fee awarded in a manner that accounts for these factors, either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rate, thus adequately compensates the attorney, and leaves very little room for enhancing the award based on his post-engagement performance.

Id. Consequently, in the federal court system, appellate courts will not reverse as an abuse of discretion district courts' refusals to award a multiplier.

To affirm the Fifth District's holding that a risk multiplier factor is mandatory in all fee-shifting situations would run counter to the rationale for the fee-shifting statutes themselves. Prevailing parties' attorneys would always receive a windfall. Without the application of a risk multiplier, the prevailing attorneys would, without question, receive that to which they are entitled, ***i.e.,*** a reasonable attorneys' fee that is determined by the number of hours expended times a reasonable hourly rate. There is no rationale or logic to then, in every situation, multiply what is reasonable times **1.5** to **3**. The legislature has already made it possible for private parties to obtain legal counsel by shifting the fee to be paid to the insurance companies if the insured prevails. There simply is no reason to multiply that amount further.

Bankers respectfully submits that federal courts have articulated the factors that may justify an enhanced attorneys' fee award. For instance, the Court declared in ***Hensley v. Eckerhart, supra,*** **461 U.S.** at **434, 103** S.Ct. at

1940, 76 L.Ed.2d at 52, that in some cases of exceptional success an enhanced award may be justified. In ***Ramos*** v. ***Lamm,*** 713 F.2d 546, 557 (10th Cir. 1983), the court declared that exceptional success may be based on extraordinary economies of time given the complexity of the task.

Other courts have declared that the development of new law furthering important congressional policies may justify and enhance attorneys' fee awards. ***See Phillips*** v. ***Smalley Maintenance Services, Inc.,*** 711 F.2d 1524, 1530-31 (11th Cir. 1983); ***Johnson v. Georgia Highway Express, supra,*** 488 F.2d at 718. ***Accord, Ramos v. Lamm, supra,*** 713 F.2d at 557 ("unusually difficult circumstances").

The fact that a class was benefited, rather than an individual, has been a consideration in the past in calculating an award of attorneys' fees. ***See, e.g., Morqado v. Birmingham-Jefferson Civil Defense Corps,*** 706 F.2d 1184, 1194 (11th Cir. 1983), ***cert. denied,*** ____ **U.S.** ____, 104 S.Ct. 715, 79 L.Ed 2d 178 (1984) (not abuse of discretion for district courts to determine that case was less difficult because a plaintiff was an individual rather than a class).

In an analogous situation, the court in ***Elser*** v. ***I.A.M. National Pension Fund,*** 579 F.Supp. 1375, 1381 (C.D. Cal. 1984), held that there should not be enhancement under 28 U.S.C. section 1132(g) when the "relief obtained by [the] plaintiffs was that due them ...". The court declared that in order to be considered an exceptional result, it would

have to be one not thought likely to be achieved. For example, in *White v. City of Richmond*, 559 F.Supp. 127, aff'd., 713 F.2d 458 (9th Cir. 1983), in spite of the stringent requirements for obtaining injunctive relief against municipal police departments, the consent decrees obtained by plaintiffs resulted in significant procedural changes by the Richmond police department: changes much more extensive than one could have reasonably expected at the start of the litigation. Id., 559 F.Supp. at 133-34.

There can be no way that a plaintiff prevailing on a no-fault question obtained relief considered an exceptional result as it could not be one not felt likely to be achieved. Even in insurance coverage questions, a prevailing plaintiff gets what is due him under the policy, nothing more. There just is no basis in law or fact for enhancing attorney fee awards in normal insurance cases. Bankers submits that this is precisely the reason that this court in *Rowe* impliedly limited the application of a risk multiplier factor to the standard percentage-type contingency fee arrangements.

Neither exceptional results nor a contingency fee contract as that term is used in *Rowe* exist in the present case. This court declared in *Rowe* that "if the court decides to adjust the lodestar, it must state the grounds on which it justifies enhancement or reduction". *Rowe*, supra, 472 So.2d at 1151. There must be a strong showing to justify deviation from the lodestar figure. This is a heavy burden and rests

squarely on the requesting party. There must be a specific showing in an evidentiary hearing, affidavits, or other record evidence, to justify deviating from the established lodestar criteria. ***See, Jordan v. Multnomah County, supra,*** **815** F.2d **1258; *Murray v. Weinberger,* 741** F.2d **1433 (D.D.C. 1984); *Travelers Indemnity Co. v. Sotolongo, supra,* 513** So.2d **1384.** There has been, as well as there could be, no showing in the instant case of any activity which was extraordinary, exceptional, or in any way created the "rare" circumstance necessary for consideration of the enhancement factor. The record in the instant case reveals more than adequate compensation for the work actually performed and the results obtained by awarding plaintiff's counsel for the hours he expended times the reasonable hourly rate of **$125.00** per hour. If anything, the award should have been reduced since plaintiff only prevailed on a portion of his claim. To enhance a reasonable amount of attorney's fees by 50% under the facts of the instant case defies logic.

The trial court's sole justification for allowing the multiplier was simply because the instant case was a "contingency fee contract". The very language of the agreement between Owens and Sisserson and the testimony of Owens himself points to the fair agreement for the PIP claim outside of the scope of ***Rowe.*** Not only the intent of the specific declaration of both Sisserson and Owens was that the fee agreement was not a "percentage" contingency fee

arrangement as was the agreement for the attorney's fees for the uninsured motorist litigation.

This court specifically declared in *Rowe* that the potential enhancement factor had to be capped in some way. This court capped the factor by declaring that "... in no case should the court-awarded fee exceed the fee arrangement reached by the attorney and his client". *Rowe, supra,* **472** So.2d at **1151.** The cap established by the contractual agreement by the parties is to assure some type of control or upward figure for court-awarded attorney's fees. The approach adopted in *Rowe* provides a checks and balances system. While it allows an enhancement or reduction factor in certain extraordinary cases, it put a cap on the enhanced dollar value such that the total attorney's fees could never exceed the dollar figure of the original contingency agreement between the plaintiff and his counsel. If no such "contingency fee arrangement" exists, there cannot be a cap, and hence, the analysis in *Rowe* would be open-ended, defeating the purpose of adopting the lodestar theory in the first place. If there is in fact a contingency fee contract sufficient to trigger the multiplier in *Rowe,* then the fee must also be capped by limiting the award to **40%** of the **$3,870.40.** All of *Rowe* must be applied or none. As the old cliche' goes, "One cannot have his cake and eat it too".

In Old Equity *Life Insurance Company v. Bernard,* **171** S.E.2d 636 (Ga.App.1969), the court defined a contingency

fee contract in the way that has been up to *Quanstrom* understood to be the case in Florida. The court in *Bernard* held:

> A contingent fee may or may not be reasonable, but it is by definition the proportionate part of the judgment recovered by the attorney for his client.

*Id.* at 639. That definition has been used in years since *Rowe, i.e.,* to be that type of contract delineating a percentage of recovery. *The Florida Bar Re: Amendment to the Code of Professional Responsibility (Contingent Fee),* 494 So.2d 960 (Fla. 1986). In the *Amendment to the Code of Professional Responsibility,* this court specifically discussed requirements and conditions of contingent fee agreements and used the term "contingent fee" to mean a percentage of plaintiff's recovery. The fee agreement in the instant case is not a contingent fee as the term has been used in its legal context in Florida for decades. Neither does the instant case involve exceptional results as envisioned by *Rowe* to justify enhancement of the lodestar factor.

The lodestar approach yields an attorney's fee which adequately compensates counsel for his work, taking into account not only his special skills, but the complexity of the case, and all other factors delineated by the Florida courts as being important in determining a reasonable fee. Those factors are subsumed within the lodestar calculation, and thus do not justify an enhancement factor. Enhancement

of the lodestar figure is only appropriate in rare and extraordinary circumstances. There is no basis in the record of the instant case justifying enhancement.

## CONCLUSION

**Based on the foregoing arguments and authorities cited therein, Bankers respectfully requests that this Honorable Court reverse the decision rendered by the Fifth District in the instant case.**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail this 17th day of April, **1989**, to EDWARD **A**. PERSE, ESQUIRE, **410** Concord Building, Miami, Florida **33130**.

**SHARON LEE STEDMAN**
Florida Bar No. **303781**
RUMBERGER, KIRK, CALDWELL,
CABANISS, BURKE & WECHSLER
A Professional Association
**11** East Pine Street
Post Office Box **1873**
Orlando, Florida **32802**
**(407) 425-1802**

Attorneys for Petitioner,
BANKERS INSURANCE COMPANY