

**RATING THE RATE SYSTEM: A REVIEW OF FLORIDA'S ENDORSEMENT OF
CONTINGENCY FEES FOR PUBLIC ADJUSTERS**

by Jessica Marks

I. Introduction

On June 24, 2008, Florida Governor Charlie Crist signed into law sweeping regulations for public insurance adjusters designed to protect consumers.¹ Included in the legislation were new caps on public adjuster fees:² public adjusters could charge no more than 10% of the amount the insured recovers from an insurance company on new hurricane claims and no more than 20% on new non-hurricane claims.^{3,4} Public adjusters help individuals who have suffered a loss file insurance claims, ensuring that the individuals receive the amount due to them.⁵ For large losses, the increased payout of the claim, the reduction of stress on the insured, and the speed and expertise with which the claim is filed outweigh the relatively minor costs associated with hiring a public adjuster.⁶ Resistance from the insurance industry has made it difficult for public

¹FLA. STAT. § 626.854; *see also* Press Release, Florida State Senator Mike Fasano, Governor Signs Senator Fasano's Public Adjuster Bill, Legislation that Will Protect the Homeowner, Into Law (June 24, 2008) (on file with author), available at http://www.flsenate.gov/cgi-bin/View_Page.pl?Tab=legislators&Submenu=1&File=062408.html&Directory=legislators/senate/011/press/ [hereinafter *Fasano Press Release*]. A need for comprehensive consumer protection legislation was necessary to reign in the behavior of a few unethical individuals such as "adjusters operating without a license; others who abandoned claims; still others who charged excessive fees; and even adjusters who offered "commissions" – such as wide-screen televisions – to homeowners who hired them to challenge their insurers." Philip C. Silverberg & Ira S. Bergman, *Adjusting to Change: Pending Florida Legislation will Change how Public Adjusters Conduct Business*, Best's Review, May 1, 2008, available at http://goliath.ecnext.com/coms2/gi_0199-7858137/Adjusting-to-change-pending-Florida.html-page.html.

² FLA. STAT. § 626.854(11)(b).

³ *Id.* Hereinafter, the shorthand "10%/20%" will be used to refer to the caps of "10% of the amount the insured recovers from an insurance company on new hurricane claims and no more than 20% on new non-hurricane claims."

⁴ It is important to note that these caps only apply to initial or new claims. E-mail from Mark D. Boardman, FAPIA Legislative Affairs Committee Chair and Florida Licensed Public Adjuster (April 9, 2008) [hereinafter *Boardman E-mail*]. They do not cap reopened claims. *Id.* In a reopened claim, the public adjuster must prove the entire claim's worth again, as well as proving that the consumer is entitled to an additional amount that was overlooked when the claim was originally filed. *Id.* Nevertheless, the public adjuster may only take a percentage of the additional payout. *Id.* Therefore, a larger percentage is appropriate for the extra work, and the law does not impose caps on such claims. *Id.*

⁵ National Association of Public Insurance Adjusters (NAPIA), www.napia.com (last visited April 15, 2009). Many individuals do not realize that they are responsible for proving the loss of their property, the best way to prove those losses, and other details of filing claims. *Id.* Having an experienced public adjuster handle the claim reduces the risk that claims will be rejected by the insurance company or overlooked by the consumer altogether. *Id.*

⁶ *Id.*

adjusters to establish their profession,⁷ and unethical individuals who do not conform to the standards set by the National Association of Public Insurance Adjusters (NAPIA)⁸ and the Florida Association of Public Insurance Adjusters (FAPIA)⁹ make the situation for legitimate public adjusters worse. Therefore, to ensure ethical public adjusters can continue helping disaster victims in Florida, this reform was necessary.¹⁰

Florida's 2008 public adjuster reform legislation was supported by FAPIA.¹¹ Although supporting caps on fees instead of requiring public adjusters to charge hourly rates was not discussed a great deal before the bill's passage,¹² this paper will show that such caps, which allow contingency fees to flourish, were the best decision for both public adjusters and consumers.¹³ Despite the dearth of scholarly work regarding public adjusting,¹⁴ a multitude of authors have debated the merits of contingency and hourly rate schemes in the legal field. Because the contingency system aligns the interests of the public adjuster with that of the consumer, gives the public more access to public adjuster services, allows the more experienced

⁷ See *infra* Part II.

⁸ NAPIA Rules of Professional Conduct and Ethics, <http://www.napia.com/learn/code-conduct.asp> (last visited April 7, 2009).

⁹ FAPIA's Rules of Professional Conduct & Adjuster Ethics, <http://www.fapia.net/code-of-ethics/fapias-rules-of-professional-conduct-adjuster-ethics.html> (last visited April 7, 2009).

¹⁰ Telephone Interview with William F. Merlin, Jr., founding member of FAPIA and Managing Partner of Merlin Law Group (Mar. 17, 2009) [hereinafter *Merlin Interview*].

¹¹ *Merlin Interview*, *supra* note 10; see also Telephone Interview with Mark D. Boardman, FAPIA Legislative Affairs Committee Chair and Florida Licensed Public Adjuster (Mar. 19, 2009) [hereinafter *Boardman Interview*]; Posting of William "Chip" Merlin to Property Insurance Coverage Law Blog, "Public Adjusters, Part Two," <http://www.propertyinsurancecoveragelaw.com/tags/public-adjusters/> (June 25, 2008) (last visited April 7, 2009).

¹² *Merlin Interview*, *supra* note 10. The reasons hourly rates were likely not discussed is because the vast majority of Florida public adjusters work on a contingency basis. *Id.* Hourly rates are often only a large consideration in states like Louisiana where hourly rates are required by statute. *Id.*

¹³ *Merlin Interview*, *supra* note 10.

¹⁴ Brian Goodman, Legal Counsel for the NAPIA, Remarks to the University of Maryland School of Law Insurance Seminar (Jan. 12, 2009).

public adjuster to control the claim, and is logistically the easier model to implement, Florida made the right decision by electing to *de facto* endorse¹⁵ contingency fees.¹⁶ Considering the public benefit of public adjusters' use of a contingency fee system,¹⁷ other state legislatures should consider implementing laws that encourage the contingency fee system as well, and members of NAPIA should consider supporting contingency fees as an ethical method of charging for most consumers.¹⁸

II. History of FAPIA and the 2008 Public Adjuster Reform Legislation

FAPIA was formed in the spring of 1993 in an attempt to legitimize and protect the practice of public adjusting.¹⁹ After Hurricane Andrew, unethical public adjusters gave the profession a bad name by charging exorbitant contingency fees,²⁰ abandoning claims, and

¹⁵ It is still up for debate whether the rate caps apply to both contingency fees and hourly rates. *Boardman Interview*, *supra* note 11. The plain text of the law does not differentiate between the two types of charges, only stating that “fees are capped[.]” FLA. STAT. § 626.854(11)(b). Because of Florida’s history of using contingency fees, and because this has not yet been tested in the courtroom, there may be a valid argument that only contingency fees are capped at 10%/20%, and hourly rates are not capped at all. *Boardman Interview*, *supra* note 11. However, based on the plain meaning of the text of the law, the cap appears to apply to all types of fees. FLA. STAT. § 626.854(11)(b). Thus, a public adjuster would only be able to maximize his earnings if he used contingency fees because, even if he were to use hourly rates, once those rates exceeded 10%/20% of the claim, they would be statutorily capped. *Id.* For the purposes of this article, the author will assume that the statute does cap all fees at 10%/20%.

¹⁶ *See infra* Part III.

¹⁷ *See infra* Part III.

¹⁸ *See infra* Part IV.

¹⁹ *Merlin Interview*, *supra* note 10. As noted by Senator Fasano, sponsor of Florida’s public adjuster reform bill, “[w]hile most public adjusters are decent, hardworking individuals, the bad players in the profession were causing enormous harm to vulnerable consumers devastated by partial or total loss of their homes.” *Fasano Press Release*, *supra* note 1.

²⁰ *Merlin Interview*, *supra* note 10. These fees were as high as 33%–50%. *Id.* Percentages higher than 10%/20% are sometimes warranted, such as for reopened claims. *Boardman Interview*, *supra* note 11; *Boardman E-mail*, *supra* note 4. For a reopened claim, the public adjuster only receives a percentage of the additional payout, but the entire claim needs to be proven again, so a larger percentage is appropriate for the extra work. *Boardman Interview*, *supra* note 11; *Boardman E-mail*, *supra* note 4. The large fees referenced here were unethical because they did not represent the amount of work done or were coupled with other unethical behaviors.

improperly soliciting consumers with inappropriate offers.²¹ Public outcry, led by the insurance industry, led the state government to look into regulating public adjusters.²² Convinced that all public adjusters were bad, the Florida Department of Insurance issued bulletins advising Floridian's not to hire public adjusters.²³ Realizing their livelihood was threatened, legitimate public adjusters, while attending the December 1992 meeting of the NAPIA, created FAPIA.²⁴ FAPIA, like NAPIA, encouraged legitimate public adjusters to educate themselves about the field of public adjusting, to charge reasonable fees, and to "conduct themselves in the spirit of fairness and justice to their consumers."²⁵

With this attitude, FAPIA was at the forefront of the discussion when legislation was proposed to curb the outrageous behavior of some public adjusters after the devastating hurricane seasons of 2004 and 2005.²⁶ After those hurricanes, some public adjusters were charging up to 50% contingency fees and again engaging in questionable behavior.²⁷ Working with Florida's Senator Mike Fasano and Representative Julio Robaina, FAPIA helped craft the legislation that

²¹ See Silverberg, *supra* note 1.

²² *Merlin Interview*, *supra* note 10.

²³ History of FAPIA, <http://www.fapia.net/fapia-history/history-of-fapia.html> (last visited April 15, 2009).

²⁴ *Merlin Interview*, *supra* note 10; *see also id.*

²⁵ FAPIA's Rules of Professional Conduct & Adjuster Ethics, <http://www.fapia.net/code-of-ethics/fapias-rules-of-professional-conduct-adjuster-ethics.html> (last visited April 7, 2009); NAPIA Rules of Professional Conduct and Ethics, <http://www.napia.com/learn/code-conduct.asp> (last visited April 7, 2009).

²⁶ *Boardman Interview*, *supra* note 11. The 2004 and 2005 seasons contained 8 of the top 30 costliest hurricanes on record in the U.S., adjusted for inflation. Eric S. Blake, et al. THE DEADLIEST, COSTLIEST, AND MOST INTENSE UNITED STATES TROPICAL CYCLONES FROM 1851 TO 2006 (AND OTHER FREQUENTLY REQUESTED HURRICANE FACTS) 9 (National Hurricane Center 2007), *available at* <http://www.nhc.noaa.gov/pdf/NWS-TPC-5.pdf>. These hurricanes were: (#1) Katrina, (#3) Wilma, (#4) Charlie, (#5) Ivan, (#9) Rita, (#11) Frances, (#13) Jeanne, and (#30) Dennis. *Id.*

²⁷ *Merlin Interview*, *supra* note 10. *See, e.g.*, Jeff Harrington, *Search for Unlicensed Adjusters Nets 2 Men*, ST. PETERSBURG TIMES, Aug. 28, 2004, *available at* http://www.sptimes.com/2004/08/28/Business/Search_for_unlicensed.shtml.

ultimately passed on July 24, 2008.²⁸ That bill included many reforms such as continuing education and apprenticeship requirements for public adjusters, rules on appropriate solicitation of business, and, importantly, a cap on the fees public adjusters charged consumers.²⁹ The decision to limit fees to a certain percentage was the only method of fee regulation seriously discussed.³⁰ Because the cap is a cap on the percentage of the insured's recovery, and because the majority of public adjusters use contingency fees, this legislation strongly indicates that Florida encourages the use of contingency fee arrangements.³¹

III. Comparing Contingency Fees to Hourly-Rate Fees

To determine whether Florida correctly decided to encourage contingency fees for public adjusters, the merits of the contingency fee and hourly rate systems must be compared.³² The pertinent factors are: 1. the alignment of the public adjusters' interests with the consumers' interests;³³ 2. the consumers' access to public adjusters;³⁴ 3. which party supervises the work;³⁵

²⁸ *Boardman Interview*, *supra* note 11.

²⁹ *Boardman Interview*, *supra* note 11. FAPIA is still pushing for tighter regulations on education and certification of public adjusters and this year FAPIA's Legislative chair hopes to convince the Florida legislature to require public adjusters to complete forty hours of training and an exam before practicing. *Id.*

³⁰ *See supra* note 12.

³¹ *See supra* note 15.

³² *See supra* note 14 and accompanying text. Since there is little scholarly literature about public adjusters, the comparisons made in this article are all based on works describing contingency fees in the legal profession.

³³ *See infra* Part III.A.

³⁴ *See infra* Part III.B.

³⁵ *See infra* Part III.C.

and, 4. the logistical issues in implementing each system.³⁶ In comparing these factors, contingency fees emerge as the better choice for Florida.³⁷

A. Alignment of Interests

Because they are entrusted with the consumer's financial well-being, public adjusters owe a fiduciary duty to their consumers.³⁸ However, public adjusters can also have other interests – such as being paid more money – which may conflict with this primary duty to the consumer.³⁹ Added to this conundrum is the fact that a claim has a finite worth, and therefore, a public adjuster can only net a reasonable return for a limited amount of work.⁴⁰ The work done on a claim will increase the amount the consumer will receive for that claim, but only to a point.⁴¹ It is inevitable that at some point, additional work by the public adjuster will garner no additional money for the consumer.⁴²

The question then becomes how to incentivize the public adjuster to work enough to maximize the value of the claim without working too much and wasting resources – either his own efforts or the consumer's money. The best way to do this is to have a system that rewards

³⁶ See *infra* Part III.D.

³⁷ See *infra* Part IV.

³⁸ See NAPIA Rules of Professional Conduct and Ethics, <http://www.napia.com/learn/code-conduct.asp> (last visited April 7, 2009).

³⁹ See William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1, 24–25 (1991).

⁴⁰ See Murray L. Schwartz & Daniel J. B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125 (1969-1970).

⁴¹ See *id.*

⁴² See *id.*

the public adjuster when the consumer is rewarded and does not reward him when the consumer is not rewarded.⁴³

The contingency fee model does just that. In a contingency fee model, the public adjuster is paid a set percentage of what the consumer receives from the insurance company. When a consumer is paid a large sum for their claim, the public adjuster is rewarded for his work with a percentage of that sum.⁴⁴ On the other hand, when a claim has reached its maximum value, the public adjuster is not paid any more for the additional work – he is incentivized to stop working when the consumer will no longer be rewarded by his work.⁴⁵ The public adjuster's and consumer's incentives and interests are thus aligned.⁴⁶

On the other hand, in an hourly rate system the interests of the public adjuster and the consumer are not aligned.⁴⁷ With hourly rates, the public adjuster is paid regardless of what happens to the claim. The public adjuster is thus incentivized to work more hours than necessary to secure the maximum benefit of the claim.⁴⁸ When a public adjuster 'overworks' a claim, the consumer may receive the maximum payout from the insurance company, but the consumer does

⁴³ One way to do this is to allow public adjusters to purchase the rights to claims from consumers for a reasonable value, adjusted for risk. *See id.* Then the public adjuster would file the claims with the insurance company as the beneficiary of the policy. *See id.* at 1154. However, for various ethical and logistical reasons, this will likely never happen. *See* Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is it Price Competitive?*, 25 CARDOZO L. REV. 65, n. 169 (2003) (explaining that lawyers have been banned from purchasing claims). One hazard of purchasing a consumer's claim derives from the inequality of knowledge between the two parties. Because the public adjuster is very knowledgeable and the consumer most often does not know how much his own claim is worth, this system is very susceptible to unscrupulous public adjusters taking advantage of consumers. Also, there would be a large barrier to entry into such a market as public adjusters would have to raise enough capital in advance to purchase an entire claim from the consumer. Therefore, given the unlikelihood of such a system, it is not addressed further in this article.

⁴⁴ *See* Nuno Garoupa & Fernando Gomez-Pomar, *Cashing by the Hour: Why Large Law Firms Prefer Hourly Fees Over Contingent Fees*, 24 J. L. ECON & ORG. 458, 460–61 (2008).

⁴⁵ *See id.*

⁴⁶ *See id.* at 458.

⁴⁷ *See* Ross, *supra* note 39, at 2–3.

⁴⁸ *See id.* at 28.

not benefit because the consumer must pay the public adjuster for the additional time spent on the claim.⁴⁹ At some point, the consumer ends up paying more for the public adjuster to work additional hours than the consumer will receive from the insurance company for those hours spent on the claim.⁵⁰ Another problem with the hourly rate system is that it encourages a public adjuster to file claims with little to no merit because he has no stake in the outcomes.⁵¹ A public adjuster could then charge the consumer his hourly rate to file a claim that provided absolutely no benefit to the consumer, thus harming the consumer.⁵²

In Florida, with a 10% /20% cap on fees, the hazards of an hourly-rate system are reduced by turning it into a contingency fee system. Once the hourly fees equal 10%/20% of the claim, the public adjuster cannot charge anymore – the hourly rate becomes a *de facto* contingency rate.⁵³ Additionally, the 10%/20% cap discourages all public adjusters from filing claims without merit because 10%/20% of \$0 is \$0 no matter how a public adjuster charges. Therefore, this legislation, by only allowing contingency rates at the 10%/20% limit, has ensured that public adjuster incentives are aligned with the consumer’s interests so that the consumer is protected from the inherent conflict of interests in the hourly rate system. Since FAPIA members are able to stay in business by routinely charging less than 10-20%,⁵⁴ this legislation allows

⁴⁹ *See id* at 26–27.

⁵⁰ *See id* at 72–74.

⁵¹ *See id*; *see also* A. Mitchell Polinsky & Daniel Rubinfeld, *Aligning the Interests of Lawyers and Clients*, 5 AM. L. & ECON. REV. 165, 165 (2003).

⁵² *See* Ross, *supra* note 39, at 72–74; Polinsky, *supra* note 51, at 165.

⁵³ *See supra* note 15.

⁵⁴ *Merlin Interview*, *supra* note 10.

ethical public adjusters to continue charging a reasonable rate while preventing unethical public adjusters from convincing consumers to pay for unnecessary hours of work.⁵⁵

B. Access to Services

Another aspect of the debate is the access to services that each system allows. With regard to access, contingency fees are again a preferred method of charging for public adjusters for several reasons. First, public adjusters represent people who have recently suffered a large financial loss.⁵⁶ Due to that loss, consumers often have liquidity issues; if a consumer were forced to pay an hourly rate, many of them would be unable to do so.⁵⁷ However, using a contingency fee model, individuals with liquidity problems would have better access to justice.⁵⁸ Because the public adjuster is only paid if the consumer is paid, more consumers are able to hire public adjusters and receive better outcomes on their claims.

Additionally, because hourly rates require the consumer to pay regardless of what happens to the claim, many consumers might not hire a public adjuster for fear they would not earn enough on their claims to justify hiring a public adjuster.⁵⁹ Because no claim is ever guaranteed, an hourly rate system would leave those consumers who ultimately have a claim denied with more bills than when they started.⁶⁰ This fear alone would prevent individuals with viable claims from hiring public adjusters. However, with contingency-fee systems, the risk of

⁵⁵ *Id.*

⁵⁶ NAPIA, <http://www.napia.com/> (last visited April 8, 2009); FAPIA, <http://www.fapia.net> (last visited April 8, 2009).

⁵⁷ *See* Garoupa, *supra* note 44, at 460–61.

⁵⁸ *See* Herbert M. Kritzer, *Advocacy and Rhetoric vs. Scholarship and Evidence in the Debate Over Contingency Fees: A Reply to Professor Brickman*, 82 WASH. U. Q. 477, 479 (2004).

⁵⁹ *See id.*

⁶⁰ *See* Schwartz, *supra* note 40, at 1125.

putting in resources to a low-paying claim is shifted to a public adjuster.⁶¹ This is preferable because the public adjuster is typically the one with the resources to work on a claim that ultimately has a low return or one that is denied altogether.⁶² The public adjuster is able to risk losing the resources to file a claim because, even if one claim is denied, he is working on many other claims that will succeed and subsidize the loss.⁶³

The contingency fee system does suffer from some hazards, but in the context of public adjusting, these hazards are not as great as they first might appear to be. For example, one of the largest critiques of the contingency fee system is that it only promotes claims with high returns; an individual paid on a contingency fee will only agree to help file a claim if he knows that it has the potential to earn a high fee.⁶⁴ However, in regard to public adjusters and contingency fees, this fear is reduced. First, public adjusters are only recommended for larger claims, typically over \$10,000.⁶⁵ This is because an individual consumer usually has the ability to file smaller, less complicated claims on his own, so a public adjuster is only *needed* on larger claims where he has

⁶¹ See Garoupa, *supra* note 44, at 469–70. This is an efficient way to share the risk of lost resources in the public adjuster/individual consumer relationship. *See id.* However, when the consumer is a corporation, the efficiency of risk-sharing may tip the scales in the other direction, making hourly rates the preferred method of payment. *See id.* For large corporations, whose board of directors is shielded from personal liability by corporate statutes, the company may be more risk tolerant and more able to spend the resources necessary to file claims than a public adjuster who is typically a sole proprietor, in a partnership, or in a limited liability partnership. *See id.* To put it another way, individuals with a single claim are typically least risk tolerant and have the least access to capital to fund filing the claim, followed by sole proprietors, partnerships, and limited liability partnerships, and finally corporations are often most risk tolerant and most able to fund the expense of filing a claim. *See id.* Because the cost of filing a claim should be put on the party who is most risk-tolerant and most able to afford it, individual/public adjuster relationships should be contingency-fee arrangements, whereas corporations should be willing to pay an hourly fee. *See id.*

⁶² *See id.*

⁶³ *See id.*

⁶⁴ See Winand Emons, *Expertise, Contingent Fees, and Insufficient Attorney Effort*, 20 INT'L REV. L. & ECON. 21, 22 (2000).

⁶⁵ NAPIA, <http://www.napia.com/> (last visited April 8, 2009); FAPIA, <http://www.fapia.net> (last visited April 8, 2009).

the ability to earn a higher fee.⁶⁶ Additionally, as many experienced public adjusters know, individuals who have extremely large claims are often the savviest consumers, and they will negotiate contingency fees down to less than 10%.⁶⁷ This makes it practically impossible for public adjusters to wait for only the most lucrative cases and still make a living. Another danger is that individuals working on a contingency fee will charge a large rate for only a few hours work. But, due to Florida's 10%/20% caps on fees, public adjusters do not have the ability to charge outrageous rates on claims that will only require a few hours work. The 10%/20% cap means that rates will always be kept at a reasonable amount, so by necessity, public adjusters must take on many cases.⁶⁸ Finally, contingency fees can sometimes encourage the fiduciary to engage in long negotiations to see if the insurance company will increase the amount they are willing to pay. Long negotiations can hurt the consumer more than they help because the consumer may need the insurance money to replace or rebuild what he has lost. The Florida legislation also protects against this hazard of contingency fees because the 10%/20% is such a small amount that there is little incentive for a public adjuster to unnecessarily draw out negotiations with insurance companies in an attempt to get the insurer to raise the payout.

Therefore, because the contingency fee system does not restrain access to public adjuster services, and because Florida's legislation reduces the hazards of such a system by capping the fees, a contingency fee is the appropriate way for a public adjuster to charge consumers.

⁶⁶ This is different than the legal system where individual clients often do not know enough about the legal system and the court system is not "user-friendly" enough for an individual to easily file their case.

⁶⁷ *Merlin Interview*, *supra* note 10.

⁶⁸ *Id.*

C. Supervision of Work

A third consideration for payment systems is how much supervision the consumer is allowed over the work. In a contingency fee system, a consumer is normally given very little authority to direct the work done.⁶⁹ However, in an hourly rate system, the consumer has great control over what is or is not done on his behalf because consumers can agree to pay only for certain types of work.⁷⁰ A consumer on a contingency rate system does not have that power because the pay is agreed upon at the outset of the relationship, and the public adjuster's percentage does not change regardless of the amount of work the public adjuster puts into the process.⁷¹

For a consumer who knows what he wants, an hourly rate system seems like the best choice. In a perfect world, consumers would be completely knowledgeable about their claims and would only pay for the services that they needed.⁷² However, in reality, most consumers lack knowledge about how to file a large insurance claim.⁷³ Therefore, even if allowed to tell a public adjuster what to do, the typical consumer would not know where to start. Combined with the conflict of interest that the public adjuster suffers in an hourly-rate system,⁷⁴ this knowledge imbalance could be very detrimental to most consumers.⁷⁵ Public adjusters could work for hours

⁶⁹ See Garoupa, *supra* note 44, at 462.

⁷⁰ See *id.* Additionally, in an hourly rate system, some consumers may also refuse to pay or try to negotiate the amount of hours charged after the work is complete.

⁷¹ See *id.*

⁷² See Polinsky, *supra* note 51, at 165.

⁷³ See *id.*

⁷⁴ See *supra* Part II.A.

⁷⁵ See Polinsky, *supra* note 51, at 165.

on issues that would do little to increase the settlement amount of the claims; and, perhaps even worse, public adjusters could accept claims that do not have any merit at all.⁷⁶

But, in a contingency fee system, the public adjuster is rightly given control over how the claim is filed because he is the one most knowledgeable about the claim.⁷⁷ Because a public adjuster's interests are aligned with the consumer's interests, a consumer can be more confident that the public adjuster will not need external supervision from the consumer.⁷⁸ Moreover, because the public adjuster and the consumer normally have a very limited work history together, the agency costs of hiring a public adjuster indicate that a contingency system should be used.⁷⁹ Losses large enough to dictate hiring a public adjuster occur relatively infrequently, so each individual consumer rarely needs to hire a public adjuster.⁸⁰ Thus, the consumer is less likely to know the skill or ethics of the public adjuster prior to hiring him, and, similarly, the public adjuster is unlikely to work for the same individual consumer more than once. For such one-time relationships, it is difficult to know how much to pay a public adjuster on an hourly rate

⁷⁶ *See id.*

⁷⁷ *See generally* Schwartz, *supra* note 40 (indicating that as the consumer becomes less knowledgeable about his claim, the fee structure should change from hourly-rate to contingency fees).

⁷⁸ *See supra* Part II.A.

⁷⁹ *See* Garoupa, *supra* note 44, at 461–62 (indicating that principals who have several interactions with an agent are in a better position to pay hourly rates). Agency cost is a business term that refers to the costs inherent in hiring an agent. Those costs can stem from the informational asymmetry in the relationship requiring time and money to bring both parties up to speed, the inability the consumer to accurately assess the value of the agent's work, extra effort needed to learn to work with a new agent or consumer or any number of other reasons. These costs usually decrease as the number of interactions increase. This is because over time, the agent becomes familiar with the principal's problems, they both become familiar with each other's working styles, and with experience, the principal becomes better able to evaluate the value of the agent's work.

⁸⁰ Consumers are encouraged to only hire public adjusters for large losses of more than \$10,000, which would correspond to a loss that is statistically rare. NAPIA, <http://www.napia.com/> (last visited April 8, 2009); FAPIA, <http://www.fapia.net> (last visited April 8, 2009).

system because the value of the public adjuster's work is unknown.⁸¹ However, by paying with a contingency fee, the amount the public adjuster earns is largely dependent on the quality of the work done, so the cost of hiring an agent corresponds to the work the agent does.⁸²

The final issue when setting up a contingency fee system is determining what percentage the public adjuster should take from a successful claim.⁸³ The market is not a good regulator of contingency fees, largely because consumers do not know the value of their claims.⁸⁴ The percentage should be dictated by the amount of risk the public adjuster assumes, the possible payout of the claim, and the amount of work the public adjuster needs to commit to filing the claim.⁸⁵ Again, this is all information that the average consumer would not know, which would allow an unscrupulous public adjuster to overcharge consumers.⁸⁶ The Florida law reduces the

⁸¹ See Garoupa, *supra* note 44, at 460–61. Hourly-rate systems become very practical when there are several interactions and an ongoing relationship between the consumer and the fiduciary. *See id.* Once the consumer is able to judge how much value he is getting for each hour of work the fiduciary does, the consumer is in a better position to negotiate hourly rates. *See id.* This is why hourly rates work well with corporate lawyers who represent the same client over and over again. *See id.*

⁸² *See id.*

⁸³ Although finding the right price is an issue for any transaction, the consumer in contingency fee situations may need more protection than other consumers. Since the contingency fee model is especially suited for individuals who lack knowledge about how to file their claims, it follows that those individuals are often the same individuals who lack knowledge about the worth of their claim. *See generally* Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L. Q. 653 (2003) [hereinafter *Brickman Effective Hourly Rates*]. *See also* Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503, 503–04 (1996).

⁸⁴ *See generally* *Brickman Effective Hourly Rates*, *supra* note 83, at 658–64 (noting that the effective hourly rates of some lawyers who charge contingent fees of up to 50% are equal to thousands of dollars an hour which indicates a failure of the market to control such contingency fees).

⁸⁵ *See generally* Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L. Q. 739 (2002) (observing that lawyers do not always charge a “standard” 33%; a contingency fee can appropriately equate to a higher hourly rate than the lawyer would otherwise get with hourly rates because of the risk the lawyer has assumed; although some cases are “windfalls” for lawyers where they have to do little work, in most cases the expected recovery corresponds to the fee charged and windfalls are balanced out by unexpected losses). *See also* *Merlin Interview*, *supra* note 10 (indicating that public adjusters adjust their percentage contingency fees depending on the expected amount of the claim and the effort needed to file the claim).

⁸⁶ *See* NAPIA, <http://www.napia.com> (last visited April 7, 2009) (stating a knowledge disparity exists between the average consumer and the public adjuster).

perils of the knowledge imbalance by capping rates at 10%/20%. As members of FAPIA can attest, such rates are reasonable for almost all claims, and for very large claims, consumers often negotiate even lower rates.⁸⁷ Therefore, with respect to the issue of consumer control, the Florida law rightly endorses the more appropriate contingency fee arrangement for public adjusters while providing extra protections for consumers, compensating for the pitfalls of the system.

D. Logistical Issues

In addition to the public policy arguments discussed above that support using the contingency fee system, the actual implementation of the plan must be considered. For several logistical reasons, the contingency fee system is again the better choice. First, although hourly rates are useful when administrative resources and systems are in place to track all common resources,⁸⁸ many public adjusters are sole proprietors or are in small partnerships with few administrative resources. Parsing out which consumer should pay for which resource would be pragmatically impossible, and adding staff to track the use of resources would itself be an increased cost which would be passed to consumers. On the other hand, contingency fee systems do not track the use of common resources because all of the costs are absorbed by the public adjuster and are reimbursed when the client's claim is paid. Because contingency fee systems require fewer administrative resources, it is the better system for public adjusters and consumers. Second, public adjusters typically file claims for an individual for a single event, making it easy to calculate the contingency fee. The multi-insurance company, multi-event claims that make calculating contingency fees difficult are incredibly rare, so there is no need to resort to hourly

⁸⁷ *Merlin Interview, supra* note 10; *Boardman Interview, supra* note 11.

⁸⁸ *See Garoupa, supra* note 44, at 464.

rates for the vast majority of consumers.⁸⁹ Third, even though hourly rates provide incentive for fiduciaries to research, draft, and engage in other internal activities,⁹⁰ public adjusters typically do not need to do much research on previous cases and most of their activities are external, such as documenting the damage and submitting forms to the insurance company.⁹¹ Therefore, contingency fees provide adequate incentive for public adjusters to complete their work efficiently for the consumer.

Additionally, billing hourly rates have the drawback of being easier for the fiduciary to manipulate: claims can be overstuffed, public adjusters can do clerical work that they would otherwise have their secretaries do, public adjusters can work too hard on internal documents that do not need to be perfected, etc.⁹² Conversely, the contingency fee system encourages a public adjuster to work efficiently because the more efficient he is, the more time he can spend on other claims to earn more money.⁹³

Also, when using hourly rates, consumers see, and have an opportunity to question, everything they are being charged.⁹⁴ These opportunities to negotiate the public adjuster's fees may be appropriate when a consumer is knowledgeable about the claims. But such protests may be more of a nuisance to the fiduciary when the consumer does not understand what is required

⁸⁹ *See id.* at 470. For attorneys, hourly rates are often easier to charge than contingency fees when there is multi-district litigation going involving several different, but related events. *Id.* In those cases, the client may win in a couple of cases, but lose in others, making contingency fees for the entire representation difficult to determine. *Id.*

⁹⁰ *See id.* at 469.

⁹¹ *See generally* NAPIA, <http://www.napia.com> (last visited April 7, 2009).

⁹² *See generally* Ross, *supra* note 39. Ross also lists several other ways to bill time unnecessarily. *See id.* Some are only applicable to attorneys, such as dragging out document production and review; but others are directly applicable to public adjusters, such as how public adjusters treat small increments of time (i.e. is it appropriate to "round up" a 30-second phone conversation to bill a 6-minute increment). *See id.*

⁹³ *See* Schwartz, *supra* note 40.

⁹⁴ *See id.* at 3–4.

to represent them. An unsophisticated consumer may be unwilling to pay for enough hours for the public adjuster to submit a proper claim. This means a consumer may unwittingly undermine the success of his claims because he does not know what he should and should not pay for.⁹⁵ Finally, the hourly-rate system may even cause a consumer to complain when a public adjuster works very efficiently.⁹⁶ For example, if a public adjuster worked very efficiently and only charge the consumer a few hours,⁹⁷ the consumer may be skeptical of the quality of the work done and wonder if the public adjuster could have gotten more if he spent more time on the claim.⁹⁸ A contingency fee system alleviates this concern because the public adjuster's fee is contingent on the quality of work he does, giving the public adjuster the incentive to do his best work. And, because the fee is negotiated at the start of the claim and not billed continuously throughout the processing of the claim, there are fewer opportunities for the consumer to protest.

Finally, regarding the situation of Florida public adjusters in particular, the system public adjusters use most often is the contingency fee system.⁹⁹ Since the new law is a *de facto* endorsement of the contingency fee system,¹⁰⁰ most public adjusters practicing in Florida do not need to change what they are doing. If they had been required to switch to hourly rates, they

⁹⁵ The problem of the consumer not being willing to pay enough to produce sufficient effort in the fiduciary is also a problem in contingency fee arrangements. See Michael McKee et al. *Contingent Fees, moral Hazard, and Attorney Rents: A Laboratory Experiment*, J. LEGAL STUD. 253, 253–55. This argument is only intended to bring to light the fact that an hourly-rate system offers consumers more opportunities to haggle over price, which increases the likelihood that the price will be negotiated down, increasing the risk that the public adjusters will not be paid enough for their work.

⁹⁶ See Ross, *supra* note 39, at 20.

⁹⁷ A public adjuster might want to do this if he expected repeat business to come from this one-time extra effort. See *id.* Otherwise, there is little incentive for a public adjuster to work especially efficiently for any one consumer since such interactions are likely to be one-shot deals.

⁹⁸ See *id.*

⁹⁹ Merlin Interview *supra*, note 10.

¹⁰⁰ See *supra* note 15.

would have incurred costs that they would then pass to the consumer. Therefore, keeping the same contingency fee billing system in place, in addition to being the correct choice for public policy reasons, was also the correct choice for logistical reasons as well.

IV. Conclusion and Recommendations

The legislation Florida passed in June of 2008 included caps on fees that represented an endorsement of contingency fees for public adjusters.¹⁰¹ Contingency fees align the public adjuster's interest with the consumer's interest, allowing the claim to be handled without wasting the public adjuster's time or the consumer's money.¹⁰² Because contingency fees do not require consumers to pay up front, and the amount they do pay is tied to the amount of return they receive on the claim, this system allows for greater access to public adjusters.¹⁰³ Control of the claim is given more to the public adjuster in the contingency fee system, which is appropriate since the public adjuster is the party with more knowledge about filing claims.¹⁰⁴ And, because the contingency fee system was already in place in Florida, it was a logistically desirable to continue to endorse this system.¹⁰⁵

Moreover, the 10%/20% caps remedy the drawbacks of contingency fees. A public adjuster cannot charge exorbitantly more than the work is worth because of the cap.¹⁰⁶ And the

¹⁰¹ *See supra* notes 1, 2, 4, and 15 and accompanying text.

¹⁰² *See supra* Part III.A.

¹⁰³ *See supra* Part III.B.

¹⁰⁴ *See supra* Part III.C.

¹⁰⁵ *See supra* Part III.D.

¹⁰⁶ *See supra* Part III.B; *supra* note 15.

cap prevents a public adjuster from drawing out the negotiations and harming clients waiting for the insurance money.¹⁰⁷

For these reasons, states looking to protect consumers should consider endorsing contingency fees as well. States that only permit hourly rates run the risk of allowing their citizens to be taken advantage of by unscrupulous public adjusters. Hourly rates pit the public adjuster's interests against the consumer's.¹⁰⁸ They allow public adjusters to charge for claims that have little or no merit,¹⁰⁹ overwork claims,¹¹⁰ and encourage public adjusters to pad their hours in a variety of ways.¹¹¹ Even for states that currently have an hourly rate system, switching to a contingency fee system may have logistical advantages since contingency fee systems are easier and cost less to administer.¹¹² Because of the knowledge inequalities between the public adjuster and the consumer, an hourly rate system makes it virtually impossible for a consumer to be assured that he is getting what he has paid for, and states that encourage or mandate such arrangements should reconsider switching to contingency fees.

Finally, NAPIA should advocate the use of contingency fees in most situations because the system is beneficial for the profession of public adjusting. The field of public adjusting has faced much opposition.¹¹³ Because the contingency fee system encourages ethical charging of

¹⁰⁷ *See supra* Part III.C.

¹⁰⁸ *See supra* Part III.A.

¹⁰⁹ *See supra* Part III.B.

¹¹⁰ *See id.*

¹¹¹ *See supra* Part III.D.

¹¹² *See supra* Part III.D.

¹¹³ *See* Postings of William "Chip" Merlin to Property Insurance Coverage Law Blog, "Public Adjusters, Part Two" (June 25, 2008), "A Few Bad Apples" (Nov. 11, 2008), and "Insurance Adjusters Dislike Public Adjusters" (Jan. 13, 2009), <http://www.propertyinsurancecoveragelaw.com/tags/public-adjusters/> (last visited April 15, 2009).

clients, such resistance should be reduced. Therefore, since contingency fees are in the best interest of the consumer while still allowing public adjusters to earn a living, it should be the preferred method of charging clients.

Furthermore, the few public adjusters that charge extremely high rates for new claims harm the reputation of all public adjusters.¹¹⁴ Therefore, like FAPIA members, other members of NAPIA should also consider supporting rate caps like those passed in Florida to prohibit exorbitant fees charged by unethical public adjusters. Similar to the Florida legislation allowing different fees for hurricane or non-hurricane claims, a variety of rate caps can be used as they apply to the types of claims prevalent in a state.¹¹⁵ By working with the state legislature, FAPIA was able to promote the 10%/20% caps, which were as much or more than what the legitimate public adjusters were charging.¹¹⁶ This model of cooperation can work elsewhere to create laws that encourage the ethical practice of public adjusting, weeding out the few unethical public adjusters while allowing the legitimate public adjusters to continue aiding individuals in their disputes with insurance companies.

All in all, Florida's legislation appropriately supports contingency fees, allowing for the best outcome for consumers and the public adjusting profession. As such, it should be used as a model for other states attempting to protect its citizens while allowing legitimate public adjusters to continue helping individuals file claims.

¹¹⁴ See Posting of William "Chip" Merlin to Property Insurance Coverage Law Blog, "A Few Bad Apples," <http://www.propertyinsurancecoveragelaw.com/tags/public-adjusters/> (Nov. 11, 2008) (last visited April 15, 2009).

¹¹⁵ See *supra* notes 1, 2, and 4 and accompanying text.

¹¹⁶ *Boardman Interview, supra* note 11.