

# NCCI Estimates Florida Supreme Court Decisions Create Workers Compensation Unfunded Liability Potentially Exceeding \$1 Billion

NCCI has estimated that the combined total statewide unfunded liability related to the Florida Supreme Court’s decisions in *Emma Murray*<sup>1</sup>, *Castellanos*<sup>2</sup>, and *Westphal*<sup>3</sup> could potentially exceed \$1B. This cost will be borne by insurance companies, individual self-insured employers, and employers with deductible policies (due to growth in out-of-pocket costs, or in other words, the amount that the employer agreed to pay on losses up to the deductible threshold).

These court decisions are expected to increase overall system costs in Florida for certain accidents occurring prior to 10/1/2016. The unfunded liability relates to costs that cannot be recouped through revising Florida workers compensation rates. Therefore, the unfunded liability is an additional cost over and above the proposed 19.6% increase in Florida workers compensation rates proposed effective 10/1/2016. If the filing effective date of 10/1/2016 is delayed, the unfunded liability will necessarily grow.

## Background

Two recent Florida Supreme Court decisions, *Castellanos* and *Westphal*, have retroactively changed Florida’s workers compensation law. Prior to these decisions, the last Florida Supreme Court decision to retroactively change Florida’s workers compensation law was *Emma Murray* in 2008. Each of the above retroactive changes in the law has resulted in additional workers compensation claims costs for certain claims. The chart below describes the type of claims retroactively impacted by each Florida Supreme Court decision.

Case	Date of Decision	Effect of Law Before	Effect of Law After	Claims Retroactively Impacted
<i>Emma Murray</i>	10/23/2008	Attorney fee schedule based on the percentage of benefits secured	Hourly fees	As of 10/23/2008, open/re-opened claims with accident dates between 10/1/2003 and 6/30/2009
<i>Castellanos</i>	4/28/2016	Attorney fee schedule based on the percentage of benefits secured	Hourly fees	As of 4/28/2016, open/re-opened claims with accident dates between 7/1/2009 and 9/30/2016
<i>Westphal</i>	6/9/2016	Temporary total benefits limited to 104 weeks	Temporary total benefits limited to 260 weeks	As of 6/9/2016, open/re-opened claims with accident dates between 1/1/1994 and 9/30/2016

Workers compensation ratemaking does not address the added costs associated with these claims because ratemaking is prospective. As an example, the rates approved by the Florida Office of Insurance Regulation in 2014 for use on a Florida policy effective from 1/1/2015 to 12/31/2015 were calculated based on the law in effect during 2014. An injury that occurred on 7/1/2015 is expected to be paid for by the premiums collected on the 1/1/2015 policy—even if the claim remains open for 20 or more years. When there is a retroactive change in the law that results in additional costs, there is no ability to go back and amend the 1/1/2015 Florida workers compensation rates in order to collect additional premium for the 2015 year. Nor is there any other current method for collecting additional premium for that 1/1/2015 policy. As a result, any additional costs incurred must be absorbed by the insurers that wrote those policies, or in the case of individual self-insured employers and employers with deductible policies, by each employer.

On occasion, the Florida Legislature will change the law in response to decisions of the Florida Supreme Court. Any legislative changes to Florida law under this scenario would apply only on a going-forward basis. This occurred

<sup>1</sup> *Emma Murray vs. Mariner Health Inc. and ACE USA*, No. SC07-244 (“*Emma Murray*”)

<sup>2</sup> *Castellanos vs. Next Door Company, et al.*, No. SC13-2082 (“*Castellanos*”)

<sup>3</sup> *Bradley Westphal vs. City of St. Petersburg, etc, et al*, No. SC13-1930 (“*Westphal*”)

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subsequent to *Emma Murray*. After the *Emma Murray* decision on 10/23/2008, the Florida Legislature enacted a change to the attorney fee law which was effective on 7/1/2009. The retroactive impact of *Emma Murray* remained however for open or re-opened claims for accidents occurring between 10/1/2003 and 6/30/2009. Similarly, any potential legislative response to *Castellanos* or *Westphal* would apply on a going-forward basis and would not address the additional workers compensation costs for claims retroactively impacted.

### **Retroactive Impact of *Castellanos* and *Westphal* Decisions Are Not Part of the Proposed 10/1/2016 Rate Increase**

On 6/30/2016, NCCI submitted to the Florida Office of Insurance Regulation (OIR) an amended filing proposing an increase of 19.6% in Florida workers compensation rates effective 10/1/2016. The *Castellanos* component of this filing (+15%) addresses the expected first-year impact on Florida workers compensation system costs for accidents occurring on or after the proposed filing effective date of 10/1/2016. The decision in *Castellanos* is expected to increase overall system costs in the state for open or re-opened claims related to accidents occurring between 7/1/2009 (the effective date of the last reform to the attorney fee statute) and 10/1/2016.

The *Westphal* component of this filing (+2.2%) addresses the impact on Florida workers compensation system costs for accidents occurring on or after the proposed filing effective date of 10/1/2016. The decision is also expected to increase overall system costs in the state for open or re-opened claims related to accidents occurring between 1994 (the effective date of the last reform to temporary benefits) and 10/1/2016.

As noted previously, the Florida Supreme Court's decision in *Emma Murray* also retroactively changed the law. That decision increased overall system costs in the state for certain accidents occurring on or after 10/1/2003 and prior 7/1/2009. Many of those claims remain open today.

***NCCI has estimated that the combined total statewide (including individual self-insured employers) unfunded liability related to the Florida Supreme Court's decisions in Emma Murray, Castellanos, and Westphal could potentially exceed \$1B. If the filing effective date of 10/1/2016 is delayed, the unfunded liability will grow.***

This estimate of the unfunded liability does not consider the following:

- Impacts related to the First District Court of Appeal decision dated 4/20/2016 known as *Miles v. City of Edgewater Police Department* related to claimant paid attorney fees
- Subsequent year impacts, if any, that NCCI is unable to quantify

An individual insurer or self-insured employer should not draw any conclusions as to its own unfunded liability from NCCI's estimate of the statewide figure. Each insurer's/self-insured employer's unfunded liability will vary based on many factors, including, but not limited to, the number and type of open claims, average claim costs, and claims handling practices.

In order to place this \$1B figure in context, note that since the 2003 reform, Florida's annual statewide direct written premium volume (including individual self-insured employers) has ranged from a low of \$2.4B to a high of \$5.5B. In 2015, Florida's premium volume was \$3.6B.

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