



Senate Fiscal Agency  
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## BILL ANALYSIS



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Senate Bills 189 and 190 (as introduced 3-9-15)  
Sponsor: Senator Tom Casperson (S.B. 189)  
Senator Dave Robertson (S.B. 190)  
Committee: Elections and Government Reform

Date Completed: 10-21-15

**CONTENT**

**Senate Bills 189 and 190 would amend the Revised Judicature Act and the Administrative Procedures Act, respectively, to delete requirements that a prevailing party in a civil action or a contested case establish that the position of the State or a State agency was frivolous, in order for costs and fees to be awarded to the party.**

**The bills also would delete provisions under which an attorney or agent fee may not be awarded at a rate of more than \$75 per hour, absent special circumstances. In addition, Senate Bill 189 would delete a provision under which costs and fees may not be awarded to a party whose net worth or number of employees exceeds a certain level.**

Senate Bill 189 is tie-barred to Senate Bill 190. Each bill would take effect 90 days after its enactment.

**Award against the State or a State Agency**

Chapter 24 of the Revised Judicature Act (RJA) governs the awarding of court costs and fees, and requires a court that conducts a civil action brought by or against the State as a party, except for a civil infraction action, to award to a prevailing party other than the State the costs and fees incurred by the party in connection with the civil action, if the court finds that the position of the State was frivolous. The Administrative Procedures Act (APA) requires the presiding officer who conducts a contested case to award to a prevailing party, other than an agency, the costs and fees incurred by the party in connection with the case, if the presiding officer finds that the position of the agency was frivolous. (The APA defines "agency" as a State department, bureau, division, section, board, commission, trustee, authority, or officer, created by the Constitution, statute, or agency action.)

To find that the State's or agency's position was frivolous, the court or presiding officer must determine that at least one of the following conditions has been met:

- The State's or the agency's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party.
- The State or the agency had no reasonable basis to believe that the facts underlying its legal position were in fact true.
- The State's or the agency's legal position was devoid of arguable legal merit.

The bills would delete the requirements that the court or presiding officer find that the State's or agency's position was frivolous in order to award costs and fees to a prevailing party, and would delete the conditions for making that determination.

Under the RJA, if the parties to an action do not agree on the awarding of costs and fees, a party may move the court to award costs and fees. Under the APA, if the parties to a contested case do not agree on the awarding of costs and fees, the presiding officer must hold a hearing on the issue if requested by a party. Under each Act, the party seeking an award must establish all of the following:

- That the position of the State or the agency was frivolous.
- That the party was the prevailing party.
- The amount of costs and fees sought, including an itemized statement from an attorney or expert witness showing the rate at which they were computed.
- That the party is eligible to receive an award as provided in the Act.

The bills would delete the requirements that the party seeking an award establish that the position of the State or the agency was frivolous.

#### Rate of Attorney's Fee

Chapter 24 of the RJA requires the amount of costs and fees awarded to a prevailing party in a civil action to include those reasonable costs actually incurred by the party and any costs allowed by law or by court rule. As a rule, the amount of fees awarded must be based upon the prevailing market rate for the kind and quality of the services furnished.

Both the RJA and the APA provide that an attorney fee may not be awarded at a rate of more than \$75 per hour unless the court determines that there were special circumstances justifying a higher rate or an applicable law or court rule provides for the payment of a higher rate. Under the APA, this also applies to an agent fee.

The bills would delete the provisions limiting the hourly rate of an attorney (or agent) fee that may be awarded.

#### Exclusion of Certain Parties

Chapter 24 of the RJA defines "party" as a named plaintiff or defendant involved in a civil action but excludes the following:

- An individual whose net worth was more than \$500,000 at the time the civil action was commenced.
- The sole owner of an unincorporated business or any partnership, corporation, association, or organization whose net worth exceeded \$3.0 million at the time the action was commenced and that is not exempt from taxation under Section 501(c)(3) of the Internal Revenue Code (a nonprofit charitable organization) or a cooperative association as defined in the Federal Agricultural Marketing Act.
- The sole owner of an unincorporated business or any partnership, corporation, association, or organization that had more than 250 full-time equivalent employees at the time the action was commenced.

Senate Bill 189 would delete those exclusions, as well as the definition of "net worth".

MCL 600.2421b-600.2421e (S.B. 189)  
24.323 (S.B. 190)

Legislative Analyst: Suzanne Lowe

## **FISCAL IMPACT**

The bills would have an indeterminate impact on State government and no impact on local government. The bills would increase potential liability exposure of the State for costs and fees (in cases in which the State is not the prevailing party) by eliminating the requirement that the State position be determined to be frivolous, eliminating limits on attorney fees, and eliminating the ceiling on the net worth of a prevailing party that may be awarded costs and fees.

While Section 2421e of the Revised Judicature Act and Section 126 of the Administrative Procedures Act require the Department of Technology, Management, and Budget (DTMB) to report annually to the Legislature regarding the amount of costs and fees paid by the State during the preceding fiscal year, no report has been provided by the DTMB. The Department of Licensing and Regulatory Affairs reports that there were approximately 93,882 cases in the Michigan Administrative Hearing System in FY 2013-14. However, there are no summary data on the number of cases in which the State was not the prevailing party. Also, no summary data are available regarding court cases that could be affected by the proposed changes. Future liability will depend on the number of civil actions and contested cases in which the State is not the prevailing party and the amount of costs and fees assessed.

Fiscal Analyst: Bill Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.