

1 **Senate Bill No. 555**

2 (By Senators Carmichael, Sypolt and Blair)

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4 [Introduced March 18, 2013; referred to the Committee on the
5 Judiciary.]
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10 A BILL to amend the Code of West Virginia, 1931, as amended, by
11 adding thereto a new article, designated §55-19-1, §55-19-2,
12 §55-19-3, §55-19-4, §55-19-5, §55-19-6, §55-19-7, §55-19-8,
13 §55-19-9, §55-19-10, §55-19-11 and §55-19-12, all relating to
14 actions and suits; creating a loser-pays civil justice system;
15 providing for recovery of attorney's fees by prevailing party
16 and applicability to causes of action and parties; procedure
17 for recovery of attorney fees; rebuttable presumption;
18 election by plaintiff and defendant; revocation of election;
19 dismissal or nonsuit of action; award of litigation costs;
20 liability of attorney; and when this article controls over any
21 other law relating to the award of attorney's fees or other
22 costs of litigation in connection with the civil action.

23 *Be it enacted by the Legislature of West Virginia:*

24 That the Code of West Virginia, 1931, as amended, be amended

1 by adding thereto a new article, designated §55-19-1, §55-19-2,
2 §55-19-3, §55-19-4, §55-19-5, §55-19-6, §55-19-7, §55-19-8, §55-19-
3 9, §55-19-10, §55-19-11 and §55-19-12, all to read as follows:

4 **ARTICLE 19. LOSER PAYS.**

5 **§55-19-1. Recovery of attorney's fees by prevailing party;**
6 **applicability to causes of action and parties.**

7 (a) The prevailing party with respect to a claim may recover
8 reasonable attorney's fees from an individual, corporation, or
9 other legal entity if the claim is for:

- 10 (1) Rendered services;
- 11 (2) Performed labor;
- 12 (3) Furnished material;
- 13 (4) Freight or express overcharges;
- 14 (5) Lost or damaged freight or express;
- 15 (6) Killed or injured stock;
- 16 (7) A sworn account; or
- 17 (8) An oral or written contract.

18 (b) The prevailing party with respect to a claim may not
19 recover reasonable attorney's fees from an individual, corporation,
20 or other legal entity if the claim is for:

- 21 (1) Any civil action primarily governed by the family law
22 chapters of this code;
- 23 (2) A class action;
- 24 (3) A shareholder's derivative action;

1 (4) An action filed in magistrate court.

2 (5) A civil action in which the amount in controversy,
3 including all requests for damages, reimbursement of attorney's
4 fees, and litigation costs, is less than \$100,000 and the plaintiff
5 has made an election to proceed.

6 (c) This article applies to any party who is a claimant or
7 defendant, including, but not limited to:

8 (1) A county;

9 (2) A municipality;

10 (3) A public school district;

11 (4) A public junior college district;

12 (5) A charitable organization;

13 (6) A nonprofit organization;

14 (7) A hospital district;

15 (8) A hospital authority;

16 (9) Any other political subdivision of the state; and

17 (10) The State of West Virginia.

18 **§55-19-2. Procedure for recovery of attorney's fees.**

19 Attorney's fees may be recovered under this article if:

20 (1) The person seeking to recover attorney's fees is
21 represented by an attorney;

22 (2) The plaintiff presents the claim to the opposing party or
23 to a duly authorized agent of the opposing party; and

24 (3) Payment for the just amount owed is not tendered before

1 the expiration of the thirtieth day after the claim is presented.

2 **§55-19-3. Presumption.**

3 It is presumed that the usual and customary attorney's fees
4 for a claim of the type described in section one of this article
5 are reasonable. The presumption may be rebutted.

6 **§55-19-4. Judicial notice.**

7 The court may take judicial notice of the usual and customary
8 attorney's fees and of the contents of the case file without
9 receiving further evidence in:

10 (1) A proceeding before the court; or

11 (2) A jury case in which the amount of attorney's fees is
12 submitted to the court by agreement.

13 **§55-19-5. Liberal construction.**

14 This article shall be liberally construed to promote its
15 underlying purposes.

16 **§55-19-6. Defendant election.**

17 (a) A defendant may elect to apply the provisions of this
18 article to any civil action in which a plaintiff has asserted a
19 claim against the defendant.

20 (b) An election under this section must identify each
21 plaintiff against whom the election is made.

22 (c) An election may not be made before the sixtieth day after
23 the date the defendant filed an answer to the plaintiff's civil

1 action or within sixty days of the date of trial.

2 (d) The election must be:

3 (1) In writing;

4 (2) Signed by the attorneys of record of the defendant;

5 (3) Filed with the papers as part of the record; and

6 (4) Served on all plaintiffs against whom the election is
7 made.

8 (e) A deadline under this section may be amended or modified
9 by agreement of the parties or by order of the court in a discovery
10 control plan as provided by Rule 26, West Virginia Rules of Civil
11 Procedure.

12 **§55-19-7. Plaintiff election.**

13 (a) Plaintiffs may elect to apply the provisions of this
14 article in a civil action which:

15 (1) The total amount of damages the plaintiff seeks to
16 recover for all claims is not less than \$10,000 and not more than
17 \$100,000; and

18 (2) The plaintiff files and serves a written election.

19 (b) A plaintiff election must be made at the time the electing
20 plaintiff first files a claim in the action.

21 (c) A plaintiff may make an election not later than the
22 sixtieth day after the date the last defendant has filed an answer.

23 (d) An election made by a plaintiff under this section is
24 binding on all parties to the expedited civil action unless a

1 defendant files a claim more than sixty days before trial and in
2 that claim makes a good faith claim that the recovery of monetary
3 damages might be in excess of \$100,000.

4 **§55-19-8. Revocation of election.**

5 (a) An election made under sections six and seven of this
6 article may be revoked wholly or partly by agreement of the
7 parties.

8 (b) A revocation under this section must identify the
9 plaintiffs and defendants for whom the revocation is made. A
10 revocation may be made at any time before an award is made under
11 section ten of this article based on the election. The revocation
12 must be:

13 (1) In writing;

14 (2) Signed by the attorneys of record of all parties to whom
15 the revocation applies; and

16 (3) Filed as part of the record.

17 **§55-19-9. Dismissal or nonsuit of action.**

18 If a plaintiff against whom an election is made by a defendant
19 under section six of this article nonsuits or voluntarily dismisses
20 with prejudice the civil action for which the election is made not
21 later than the fifteenth day after the date the plaintiff was
22 served with the election, the election does not apply to the
23 nonsuited or dismissed civil action.

24 **§55-19-10. Award of litigation costs.**

1 (a) If an election is made under this article, the prevailing
2 party may recover the prevailing party's litigation costs.

3 (b) The determination of which party is the prevailing party
4 is a question of law for the court.

5 (c) Litigation costs under this article are costs directly
6 related to the civil action between the plaintiff and the
7 defendant. Litigation costs include:

8 (1) Reasonable and necessary attorney's fees;

9 (2) Reasonable and necessary travel expenses;

10 (3) Reasonable fees for not more than two testifying expert
11 witnesses; and

12 (4) Court costs.

13 (d) A fee agreement that results in a fee that is fixed or
14 contingent on results obtained or uncertainty of collection before
15 the legal services have been rendered may not be considered in the
16 determination of the amount of reasonable and necessary attorney's
17 fees.

18 **§55-19-11. Liability of attorney.**

19 (a) This section applies to a civil action if:

20 (1) A party is entitled to recover litigation costs under
21 section ten of this article;

22 (2) The election under sections six and seven of this article
23 states that the party making the election will seek litigation
24 costs under section ten; and

1 (3) An attorney of record for the party against whom
2 litigation costs are recoverable has a financial interest in the
3 civil action.

4 (b) If the trier of fact determines that a civil action is an
5 abusive civil action, an attorney of record for the party against
6 whom litigation costs are recoverable is liable to the prevailing
7 party, jointly and severally, for the amount of the litigation
8 costs awarded.

9 (c) The determination of whether an attorney has a financial
10 interest in a civil action is a question of law for the court. An
11 attorney is not an attorney of record for the purposes of this
12 section if the attorney withdraws as attorney of record and
13 relinquishes any financial interest in the civil action more than
14 sixty days before trial.

15 (d) The determination of whether a civil action is an abusive
16 civil action is a question of fact. In a case in which the
17 determination of whether a civil action is an abusive civil action
18 is submitted to a jury, the charge to the jury must ask whether the
19 civil action filed by the plaintiff was an abusive civil action.
20 The following instruction must be included in the charge: "You are
21 instructed that an abusive civil action is a civil action that a
22 reasonable person would conclude is a misuse of the civil justice
23 process."

24 **§55-19-12. Applicability of other law.**

1 If an election is made under sections six or seven of this
2 article, this article controls over any other law to the extent the
3 other law requires, authorizes, prohibits, or otherwise governs the
4 award of attorney's fees or other costs of litigation in connection
5 with the civil action.

NOTE: The purpose of this bill is to create a loser pays civil justice system providing for recovery of attorney's fees by the prevailing party and its applicability to causes of action and parties.

This article is new; therefore, strike-throughs and underscoring have been omitted.