

# Legislative Analysis



## COURT COSTS AND FEES IN CIVIL ACTIONS AND CONTESTED CASES

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<http://www.house.mi.gov/hfa>

**Senate Bill 100 as enrolled**  
**Sponsor: Sen. Tom Casperson**

Analysis available at  
<http://www.legislature.mi.gov>

**Senate Bill 101 as enrolled**  
**Sponsor: Sen. David Robertson**

**House Committee: Judiciary**  
**Senate Committee: Elections and Government Reform**  
**Complete to 2-4-19**

*(Vetoed by the Governor 12-28-18)*

### SUMMARY:

Senate Bill 100 would amend the Revised Judicature Act to change the legal standard under which certain costs and fees can be awarded to the prevailing party in certain civil actions involving the state. Senate Bill 101 would similarly amend the Administrative Procedures Act (APA) to change the standard for awarding costs and fees in certain contested cases.

The bills are tie-barred to one another, which means that neither can take effect unless both are enacted.

#### **Senate Bill 100**

Under current law, if the state is a losing party in a civil action, the court must order the state to pay to the prevailing (winning) party the costs and fees incurred by that party in connection with the civil action *if the court finds that the state's position in the action was frivolous*. SB 100 would change that threshold, so that the court must order the state to pay costs and fees to the prevailing party *unless the state demonstrates by clear and convincing evidence that its position in the action was substantially justifiable*. However, the court would still have to find that the state's position was frivolous before awarding costs and fees for three specific kinds of actions:

- An action to which the Liquor Control Commission is a party that involves illegal gambling and a licensee under the Michigan Liquor Control Code (MCL 436.1101 to 436.2303).
- An action to which the Department of Health and Human Services is a party that relates to the child abuse and neglect central registry or that relates to child support or the establishment of paternity under the federal Social Security Act.
- An action relating to the summary suspension of a license when a state agency finds that the public health, safety, or welfare requires emergency action under Section 92(2) of the Administrative Procedures Act (MCL 24.292).

Actions involving a tax administered by the Department of Treasury under Public Act 122 of 1941 would be specifically exempt from the clear and convincing standard. Instead, the court would award costs and fees as described above unless the state demonstrated that the department's position was *substantially justified*.

Both current law and SB 100 define “the state” as including an agency or department of the state, or an official of the state acting in his or her official capacity, except for an institution of higher education; the Department of Licensing and Regulatory Affairs in administering the worker’s compensation, employment security, or employment relations commission acts; or the Department of Corrections.

Under both current law and SB 100, to find that the state’s position was “frivolous,” the court must determine that one of the following is true:

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

Under current law, the award of costs and fees does not apply to civil actions that are settled, civil actions in which a consent agreement is entered into, or civil actions based in tort. The bill would eliminate the last of these exceptions and require costs and fees to be awarded, as described above, in *civil actions based in tort*.

Costs and fees that may be awarded currently include attorney fees based on the prevailing market rate, but not more than \$75 per hour. The bill would remove the language capping attorney fees at \$75 per hour, and would instead allow attorney fees to be calculated according to the prevailing market rate, with no specified limit. The bill does not define “prevailing market rate.”

The award of costs and fees is not available under current law to parties of a certain size or with certain levels of resources. The definition of “party” to a civil action specifically excludes an individual with a net worth of more than \$500,000, the sole owner of a business worth more than \$3.0 million, and the sole owner of a business with more than 250 full-time employees. The bill would eliminate these restrictions so that costs and fees must be awarded to a prevailing party of any size or wealth.

Additionally, the bill would strike language requiring a court to award court costs and fees to a prevailing party upon judicial review of a presiding officer in a contested case under the APA only if the state’s position was frivolous. This would conform with the changes made to the APA under Senate Bill 101.

Finally, the bill would make many technical changes to update sections and references, as well as revisions of an editorial nature.

MCL 600.2421b et seq.

### **Senate Bill 101**

SB 101 would amend the Administrative Procedures Act of 1969 to make similar changes regarding the award of court fees and costs in contested cases under that act.

Under current law, if an agency is a losing party in a contested case, the presiding officer must order the agency to pay to the prevailing (winning) party the costs and fees incurred by that

party in connection with the contested case *if the court finds that the agency's position in the proceeding was frivolous*. SB 101 would change that threshold, so that the presiding officer must order the agency to pay costs and fees to the prevailing party *unless the agency demonstrates by clear and convincing evidence that its position was substantially justifiable*. However, the presiding officer would still have to find that the agency's position was frivolous before awarding costs and fees for three specific kinds of proceedings:

- A proceeding to which the Liquor Control Commission is a party that involves illegal gambling and a licensee under the Michigan Liquor Control Code (MCL 436.1101 to 436.2303).
- A proceeding to which the Department of Health and Human Services is a party that relates to the child abuse and neglect central registry.
- A licensing proceeding relating to the summary suspension of the license when an agency finds that the public health, safety, or welfare requires emergency action under Section 92(2) of the APA.

Both current law and SB 101 exempt the following proceedings from the provisions that require costs and fees to be awarded to the prevailing party: hearings conducted by the Department of Corrections under chapter IIIA of the Corrections Code (MCL 791.251 to 791.256); proceedings before the parole board established under MCL 791.231a; a proceeding regarding the granting or renewing of a driver's license by the secretary of state; proceedings conducted by the Michigan Employment Relations Commission; worker's disability compensation proceedings; unemployment compensation hearings; and public assistance hearings under Section 9 of the Social Welfare Act (MCL 400.9).

Under both current law and SB 101, to find that an agency's position was "frivolous," the presiding officer must determine that one of the following is true:

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

Costs and fees that may be awarded currently include attorney or agent fees based on the prevailing market rate, but not more than \$75 per hour. The bill would remove the language capping attorney or agent fees at \$75 per hour, and would instead allow reasonable and necessary attorney or agent fees to be based on the prevailing market rate. The bill does not define "prevailing market rate."

The award of costs and fees is not available under current law to parties of a certain size or with certain levels of resources. The definition of "party" to a contested case specifically excludes an individual with a net worth of more than \$500,000, the sole owner of a business worth more than \$3.0 million, and the sole owner of a business with more than 250 full-time employees. The bill would eliminate these restrictions so that costs and fees must be awarded to a prevailing party of any size or wealth.

Additionally, the bill would add that a contested case is commenced by giving notice to the parties and specify that notice is properly served if it is mailed to the party or the representative of record of the party at the party's or representative's last known address of record.

Finally, the bill would make many technical changes to update sections and references, as well as revisions of an editorial nature.

MCL 24.271 et seq.

**HOUSE FLOOR ACTION:**

The House adopted, amended, and passed an H-3 substitute for Senate Bill 100, which the Senate concurred in and enrolled, that included sections of the Revised Judicature Act embracing such diverse topics as foreclosure by advertisement and actions arising from or relating to an easement held by a Michigan electric cooperative. That material is not included in this summary.

**FISCAL IMPACT:**

Senate Bills 100 and 101 would cause state liability to increase regarding costs and fees in civil cases and administrative hearings cases in which the state is not the prevailing party. This could lead to an increase in state costs, the magnitude of which would depend upon the number of cases in which the state is not the prevailing party. There are insufficient data to currently calculate what that magnitude would likely be.

**Vetoed 12-28-18:**

In his veto message, Governor Snyder wrote that “[t]he legislation could create legal uncertainty considering it contains a substantially justifiable standard coupled with a clear and convincing standard, which neither federal law nor other state laws contain.” He added, “In Michigan, as in the rest of the United States, each party to a lawsuit is generally responsible for paying its own costs and fees. I am not convinced that deviating from this well-established American rule is sound public policy for Michigan.”

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.