

Surprise! Conservative think tank study again suggests that "loser-pays" is right for America

Even a defense attorney agrees it would have a chilling effect on filing of many meritorious suits.

By Tami Kamin-Meyer

According to a recently released civil justice report issued by the Manhattan Institute for Policy Research, the American legal system would "improve" if it adopted the British standard of the loser paying the legal fees of their successful opponent.

"'Loser-pays' simultaneously makes innocence cheaper and liability more expensive," says Marie Gryphon, a Senior Fellow with the conservative think-tank and the report's author. Gryphon suggests that in a "loser-pays" system, potential defendants are willing to spend more to ensure they're in compliance with various regulations and laws, thereby reducing the possibility for future litigation.

That logic makes no sense to Gerald Sterns, a partner with Sterns and Walker in both San Francisco and Oakland.

"One does not follow the other. Most big companies have insurance, and they don't want to pay [anyone's] fees," says the longtime litigator. Sterns also cautions others to "consider the source" of the report when weighing its viability.

If the American legal system does adopt "loser-pays," it would join a crowd of nations who have already done so. According to Gryphon, the U.S. is the only nation in the world that does not espouse to "loser-pays."

So just who might benefit should "loser-pays" be adopted stateside? Would "loser-pays" discourage plaintiffs from filing lawsuits that are deemed frivolous, as Gryphon's report suggests? Would plaintiffs with meritorious but difficult-to-prove claims forego litigation for fear of losing and being ordered to pay the defendant's legal fees?

Who benefits?

If "loser-pays" became the rule of law in litigation matters, there is no question in attorney Leo Boyle's mind about who would benefit most.

"Corporate America," says the Boston-based former president of the American Association for Justice. Says Boyle, a civil litigator for 47 years, "to suggest ['loser-pays'] has anything to do with evening the playing field is beyond misleading."

Perhaps surprisingly, Marin County lawyer Michael R. Marron, who has primarily represented the defense in his 45 years of litigating, generally agrees with Boyle but for different reasons. He theorizes that insurance companies would benefit should the American system be revamped to emulate the British. If "loser-pays" is adopted, insurance firms would spend less defending their clients of frivolous claims since the cloud of paying the winner's legal costs would hang over the loser's head. Such claims "would not be brought by a plaintiff who fears 'loser-pays,'" says Marron. It stands to reason that if fewer complaints or lawsuits are brought against a defendant, the less their insurance company has to pay lawyers and for settlements and verdicts.

Marron perceives at least one merit of the "loser-pays" system. He thinks it will cause lawyers to think twice about "taking a stab by bringing a lawsuit." Litigation is so costly, in terms of both time and money, that defendants often settle a case just to be done with it. Because of that, the plaintiff often "will get a settlement even if their cause of action is flimsy," he says. The presence of "loser-pays" might just temper that quick trigger, he says.

While fervently opposed to the "loser-pays" system, Sterns says he isn't so sure defense lawyers working on large cases really care about it either way. "The defense attorney gets paid by the insurance company, so they don't care about 'loser-pays,'" he says.

Which loser would pay?

Both Sterns and Boyle agree that should "loser-pays" be adopted in the United States, the plaintiff class, in general, would suffer the most from its implementation.

For example, a plaintiff unknown to the court, meaning "the little guy," would likely be required to post a bond to cover the defendant's potential legal fees should the defendant win the case. That would, says Sterns, "close the courthouse doors to the little people" who are the

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typical tort victim. Often, they have limited financial means for posting such a large bond.

However, the situation differs with sophisticated litigants, since the plaintiff likely has the financial resources to post such a bond. The issue then, says Sterns, is how to define "sophisticated litigants."

Another concern is whether the "loser-pays" system would deter plaintiffs with meritorious yet difficult-to-prove claims from seeking financial redress through the legal system.

"For sure 'loser-pays' would eliminate questionable claims," says defense attorney Marron. But he's also worried that plaintiffs with credible claims might not pursue them for fear of losing and having to pay the defense's legal fees.

"That is a right I believe should be protected from extinction," he says.

In Boyle's mind, a clear distinction exists between those who favor "loser-pays" and those who don't. "People who think American corporations don't already have enough power love 'loser-pays.' If you think the average citizen needs their day in court, you're against 'loser-pays,'" he says.

"No injured person can ever take a risk of losing their savings and assets, no matter how remote that risk is," Boyle sums up.

Does "loser-pays" = tort reform?

The Manhattan Institute's Gryphon denies "loser-pays" is tantamount to tort reform, although she does say, "'Loser-pays' can co-exist with reasonable tort reform ideas because it's not a cure-all."

Marron agrees that "loser-pays" isn't synonymous with tort reform, although it would have a chilling effect on the numbers and types of civil lawsuits filed by plaintiffs. "Since tort reform is about eliminating fishing expeditions," and a "loser-pays" system typically translates into fewer lawsuits, it is a type of tort reform, he says.

Still, in the final analysis, because "loser-pays" presents the likelihood that deserving plaintiffs might not pursue their claims for fear of having to pay the defense's legal fees, Marron says he can't fully support loser-pays. "It may be tort reform, but this is not a price I'm willing to endorse," he says.

Not only does Boyle equate "loser-pays" to tort reform, he says another synonym could also aptly describe it. "'Loser-pays out' to be called 'Corporate America wins' because it's a patently unfair idea. 'Loser-pays' is the most extreme form of tort reform," he concludes.

Adds Sterns, "The push for 'loser-pays' is another buzz word for infringing" on plaintiffs' rights.

California and "loser-pays"

There are limited instances where California law allows for results similar to loser-pays.

According to Sterns, if a plaintiff sues a public entity and loses, California law permits the defendant city or county to request attorneys' fees. While the final decision rests with the trial court, Sterns notes the award is "discretionary." One factor for the court to consider is whether the lawsuit had any merit in the first place, says Sterns.

In California, prevailing party attorneys' fees clauses included in written contracts are governed by two statutes, California Civil Code section 1717 and section 1021 of the California Code of Civil Procedure.

California Civil Code section 1717 applies specifically to contract disputes. If the party prevailing in litigation was to be awarded attorneys' fees based on a one-sided contract, the recently modified statute overrides that contractual agreement. In other words, the award of attorneys' fees and costs to either party disputing a contract is within the court's discretion, despite a contractual agreement stating otherwise. California Code of Civil Procedure section 1021 permits a court to award attorney fees to a prevailing party on a claim of implied indemnity if, after reviewing the evidence, the court finds several factors favor such an award.

So, while "loser-pays" in its truest sense is not the rule in California, shades of it do exist in isolated cases. And it won't be the law of the land anywhere, if Sterns has his way.

"A lot of jurisdictions talk about it but it will shut the legal system down for the little guy," he says.

"Corporate America can easily take that chance, since "loser-pays" poses little risk to the defendant," says Boyle. "'Loser-pays' has nothing to do with fairness and everything to do with increasing the power of HMOs, pharmaceuticals and asbestos manufacturers," he says.

Tami Kamin-Meyer is a freelance writer and attorney licensed in Ohio, the Southern District of Ohio and the U.S. Supreme Court. [*Editor's note:The report can be found at www.manhattan-institute.org/html/cjr_11.htm*].

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