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Critics worry about new Idaho 'loser pays' court rule

Betsy Z. Russell

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The Idaho Supreme Court has launched the state's entire court system on a new track that might be called "loser pay" – you lose a case, you pay the other side's attorney fees.

No other state in the nation has gone this route, and the Supreme Court's 3-2 ruling, issued this fall, has Idaho's legal community in an uproar.

"Being liable for the other party's attorney fees, that could be a huge, huge reason not to bring a lawsuit," said Shaakirrah Sanders, associate professor of law at the University of Idaho. In particular, she said, it would make small businesses or individuals less likely to sue deep-pocketed large businesses.

Justice Roger Burdick, in his dissent, said the ruling would inhibit access to justice and "tilt the table even further toward moneyed interests in our courts."

The justices set a March 1 start date for the new attorney-fees rule. That gives the Idaho Legislature, which convenes in January, a chance to change the law before it takes effect – and several attorney-lawmakers say they're already looking at possible changes.

"The Legislature should provide some guidance to the courts," Sanders said.

New standard has attorneys stumped

The "loser pays" approach conflicts with the fundamental "American rule" regarding attorney fee awards: That all parties in court cases pay their own legal fees unless a specific statute requires otherwise.

The rule that's been in effect in Idaho since 1979 requires that losers pay the winning side's attorney fees only if the case, or the defense, was "frivolous" and without basis.

The **new standard set by Idaho's highest court** would tell Idaho judges to award attorney fees to the prevailing party "when justice so requires" – a standard that has lawyers stumped.

"None of us know what 'when justice so requires' means," said Coeur d'Alene attorney Peter Smith, who led a recent continuing legal education session for area lawyers about the decision.

Howard Belodoff, associate director of Idaho Legal Aid Services, said more specific standards are needed.

“Ask 10 attorneys ‘when justice so requires’ and you get 10 different answers. I think everybody has questions,” he said.

He added many people can’t afford to hire their own attorneys, let alone pay for attorneys used by insurance companies or other deep-pocketed defendants.

“I don’t know what they were thinking on this one,” Belodoff said.

Christine Salmi, an attorney with Perkins Coie in Boise and the chair of the appellate practice section of the Idaho Bar, has researched other Idaho court rules that use the standard of “when justice so requires” and found just one. In those cases, “It’s basically always granted,” she said. “It’s a very, very broad legal standard. If we’re going that route … the loser will always pay – and that’s scary.”

What’s more, as of March 1, the new loser-pays rule would apply to all cases already in progress as of that date – including cases filed long before the new rule was in play.

“It’s very unfair,” said state Sen. Grant Burgoyne, D-Boise, an attorney who’s already drafted a proposed bill to write the previous rule directly into Idaho state law.

“I believe the court system ought to have predictability,” he said. “There’s agreement we have a problem and that we need to do something.”

The American rule, in place since the nation’s birth and upheld in numerous U.S. Supreme Court decisions, contrasts with the “English rule,” in which the loser pays, which is used throughout Europe and in Canada. But those court systems are run far differently than the U.S. system, said **Walter Olson, a senior fellow with the Cato Institute** and the nation’s leading advocate for more of a “loser-pay” system.

“It’s very hard to make fee-shifting work in a just way unless you have some control in there against sending in the Rolls Royce lawyer where an Uber would have sufficed,” Olson said. “The language the Idaho court uses is as broad and unspecified as it could get – it’s unusual. … Other states will be watching Idaho with a lot of interest.”

Congressional Republicans proposed a “loser-pay” law to follow up on a promise included in the 1994 Republican “Contract with America,” on the premise that if losers had to pay winners’ attorney fees, there would be fewer unjustified lawsuits. But Olson said it was a “bizarrely drafted bill” that never moved forward.

Texas enacted a “loser-pay” law in 2011 as part of a controversial package of court reforms, but once it was implemented, it only applied to frivolous lawsuits.

Alaska has a fee-shifting rule on its books, but it requires the losing party to pay only a small percentage of the judgment in the case to the winning side – not the full bill for attorney fees.

‘It’s not the lawyers who are going to have to pay’

Civil filings in Idaho’s court system have dropped sharply in recent years, which has caused budget problems for the courts because a large portion of their funding comes from filing fees. Most theories about the drop in filings focus on the already high cost of going to court.

Those concerned about the ruling say that with a “loser-pays” rule in place, many cases won’t be filed, even if plaintiffs have legitimate claims. That’s because people of modest means would be informed by their attorneys that if they lose for any reason, they could owe huge sums of money.

“It’s not the lawyers who are going to have to pay,” said Salmi, the Perkins Coie attorney. “The public is going to see this as a guarantee that lawyers are going to get paid.”

Already, under Idaho’s current system, an **87-year-old North Idaho man was ordered this fall** to pay more than $185,000 in attorney fees after losing a drawn-out case over a $1,600 timber trespass in which an employee of his inadvertently cut 19 trees that were across the property line on a neighbor’s land. In that decision, Chief Justice Jim Jones wrote that the “legal system catastrophically failed” the elderly man, and reforms were needed.

But Jones joined the majority in the attorney-fees ruling, Hoffer v. Shappard, a case that revolved around medical malpractice when a doctor incorrectly diagnosed a young child’s developmental dysplasia of the hip and repeatedly declined treatment, causing her to suffer disabilities and require extensive surgeries throughout her life.

The court awarded attorney fees to the family, but also took the opportunity to say it was implementing the new attorney-fees standard on March 1. It found that the medical provider’s appeal was frivolous under current attorney-fee rules.

Justices Dan Eismann and Jones joined in Justice Joel Horton’s majority opinion; Justice Warren Jones joined in Burdick’s dissent, which concurred with the entire opinion except for the change in attorney fee rules. Burdick wrote that the change would “overturn a vast body of law.”

“With such an amorphous standard, there will be no effective appellate review of attorney fee awards,” he wrote.

That’s a concern Salmi, Smith and other lawyers around the state share. Higher courts typically don’t take appeals on decisions that a lower-court judge is within his or her discretion to make – and the new rule gives judges full discretion to determine “when justice so requires” that fees be awarded.

The Supreme Court majority cited the **original 1976 law** about fee awards passed by the Idaho Legislature, which says, “In any civil action, the judge may award reasonable attorney’s fees to the prevailing party or parties,” unless another statute applies.

After that standard was in effect for three years, Idaho’s courts saw vastly varying views by different judges on when fees should be awarded. That led to “judge-shopping,” where parties sought out specific judges on the basis of how they approached attorney fee awards. So in 1979,

the court adopted the current Idaho Rule of Civil Procedure, which set the standard for awarding attorney fees as when the case was "brought, pursued or defended frivolously, unreasonably or without foundation."

Horton, writing for the majority, said the court went too far in setting a rule that exceeded the state law: "This court is without authority to amend laws enacted by the Legislature because we think them unwise."

The court noted a "statement of legislative intent" included with a 1987 amendment to the 1976 law, which said winners in civil cases have "the right to be made whole for attorney's fees and costs when justice so requires." Though the intent statement doesn't have the force of law, that's what the justices adopted as their new rule.

Idaho Senate Majority Leader Bart Davis, R-Idaho Falls, said the court in the past several years has been taking "a very strict-construction reading of statutes."

"Frankly, I applaud the court for wanting to interpret the statutes the way they're written and not the way they think they should be," he said. "It also puts the responsibility back on the Legislature to make sure we say what we mean, instead of hoping that the courts will read our minds."

Davis, an attorney, said he favors changes to the law in the upcoming legislative session to allow Idaho to keep the current rule for attorney fee awards, which "litigants have felt quite comfortable with over the years." But he added that lawmakers likely will "wrestle and struggle with what's the right standard."