

SENATE BILL REPORT

SB 5090

As of January 17, 2023

Title: An act relating to tort actions.

Brief Description: Concerning tort actions.

Sponsors: Senators Padden, Kuderer and Holy.

Brief History:

Committee Activity: Law & Justice: 1/17/23.

Brief Summary of Bill

- Requires courts to establish the percentage of common fund damages which shall be paid as a fee to counsel at the time of class certification.
- Requires courts to grant standing to any plaintiff alleging a tort violation remediable by statutory damages.
- Increases statutory damage awards by the increase in the Consumer Price Index from December 31st on the year before the award to the date of the award.

SENATE COMMITTEE ON LAW & JUSTICE

Staff: Kevin Black (786-7747)

Background: Class Actions. A class action is an exception to the usual rule that litigation must be conducted by and on behalf of only the named parties. The primary function of a class action is to allow a representative plaintiff to bring a claim on behalf of other individuals whose claims would otherwise be too small to justify individual legal action, but which are of significant size and importance if taken as a group. A class must be certified before a case may be litigated as a class action.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Class action settlements may be approved by a court if the settlement is fair, adequate, and reasonable. Class members may object to a class action settlement if they do not believe the settlement was fair, adequate, and reasonable. Class members may opt out of a class action settlement.

Common Fund Attorney's Fees. Attorney's fees may be awarded only if authorized by contract, statute, or a recognized ground in equity, such as a percentage of a common fund recovery. Under a common fund recovery, litigant create or preserve a common fund for the benefit of others as well as themselves. In this case, attorney's fees are taken from a plaintiff's overall recovery, with a benchmark of 25 percent which may be adjusted by the court. Generally, only the plaintiff class may appeal a trial court's award of attorney fees under the common fund doctrine.

Reasonableness of Attorney's Fees. An award of attorney's fees to the prevailing party in a civil action is calculated in one of two ways—as a percentage of recovery, or using the lodestar approach. When a percentage of recovery is awarded, the court must determine that the percentage is reasonable. In the lodestar approach, the court sets attorney fees by first determining the number of hours that were reasonably spent, and multiplying it by a reasonable hourly rate, and then adjusting this amount based on additional factors.

Under state law, a party charged with payment of attorney's fees may petition the court within 45 days of the receipt of a final billing or accounting for determination of the reasonableness of the attorney's fees. The law provides factors for the court to consider in making a reasonableness determination, including the time, labor, and skill required, and the fee customarily charged in the locality for similar legal services.

Standing in Class Actions. To bring a lawsuit, a plaintiff must have standing. A plaintiff has standing if the plaintiff can identify an injury suffered by the plaintiff that was proximately caused by the defendant. Standing may also be conferred through legal rights created by statute.

In federal courts, a plaintiff's lack of standing deprives the court of subject matter jurisdiction, rendering the court unable to enter a judgment on the merits. In comparison, Washington superior courts have plenary jurisdiction, leaving few constraints when a plaintiff is able to assert a cognizable injury. In the United States Supreme Court case of *TransUnion LLC v. Ramirez*, the United States Supreme Court ruled in 2021 that a violation of a plaintiff's legal rights created by a statute are insufficient to confer standing in federal court, and that a concrete harm must also be proven.

Statutory Damages Provisions. Statutory damages are a type of damages awarded in a successful claim to compensate for an injury or loss whose amount is pre-established by statute. Statutory damages are commonly used in areas where it might be complex to establish the degree of harm or loss. The value of these fixed damages can be eroded over time by inflation. There are at least 44 sections of the Revised Code of Washington that

provide for some form of statutory damages.

The Consumer Price Index. The Consumer Price Index (CPI), is a measure published by the United States Bureau of Labor Statistics showing the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services. Using the CPI Inflation Calculator, a statutory damages award of \$1,000 made in December 1977 would have the same buying power as an award of \$4,779 made in December 2022.

Summary of Bill: The right of a party to petition state court for a determination of the reasonableness of attorney fees which the party is charged with paying is limited to situations in which damages are assessed against the party.

A court must establish the percentage of a common fund damages recovery, which shall be paid as a fee to class counsel at the time of class certification and appointment of class counsel, as a factor of determining whether counsel will provide competent and adequate representation to the class. At the time of settlement or judgment, the court must award the attorney's fee established under the class certification order unless the court enters written findings confirming that changed circumstances justify an adjustment to the award.

A court must grant standing to any party who alleges a violation of a civil tort statute which is remediable by an award of statutory damages.

A court must multiply an award of statutory damages by the change in CPI from December 31st in the year before the date of the award to the date of the award.

The provisions of this bill apply prospectively to lawsuits pending or filed on or after the effective date of the legislation.

Appropriation: None.

Fiscal Note: Not requested.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This bill attempts to clean up some things relating to class actions. This bill says that when a common fund is created at the end of a successful class action, the percentage fee award should not be established at that stage, but before judgment. Class actions are unique in establishing the percentage fee after the work is done and the size of the recovery is known, and it creates perverse incentives during the litigation and a counterintuitive analysis at the end. Setting the fee in advance would incentivize counsel to seek the greatest recovery possible in the most efficient manner, instead of making work driving up hours to justify higher fees. With consumer standing, it

is difficult to prove actual damages, particularly on a class-wide basis. This bill makes it clear that state law must be followed in this area instead of a recent United States Supreme court ruling. The interest provision is needed to preserve the intent of statutory damages awards, and we do not oppose an amendment to make the imposition of interest discretionary.

CON: There is a separation of powers question. On establishing fees at the front of the litigation, we believe that in class actions uniquely this has to be a determination that is resolved on the back end. Class members should retain their right to petition for review of fee awards. Common funds are used beyond class actions and this change could create conflicts.

OTHER: Washington Civil Rule 23 establishes the procedure for commencing a class action. This bill making alterations to the rule would violate separation of powers. The bill may make it more difficult to obtain class certification by forcing an up front discussion about fees, contrary to the public policy to encourage class actions to remedy broad consumer harms. The extra check on fees is designed to protect class members because of the unique way class actions are constructed.

Persons Testifying: PRO: Senator Mike Padden, Prime Sponsor; Joel Ard; David DeWolf.

CON: Larry Shannon, Washington State Association for Justice.

OTHER: Chris Love, Washington State Association for Justice.

Persons Signed In To Testify But Not Testifying: No one.