

**Public Policy Position
SB 1182 and SB 1183**

The Consumer Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 486 members. The Consumer Law Section is not the State Bar of Michigan and the position expressed herein is that of the Consumer Law Section only and not the State Bar of Michigan. The State Bar's position on this legislation is to oppose SB 1182 and SB 1183.

The Consumer Law Section has a public policy decision-making body with 14 members. On November 30, 2018, the Section adopted its position after an electronic discussion and vote. 11 members voted in favor of the Section's position on SB 1182 and SB 1183, 0 members voted against this position, 0 members abstained, 3 members did not vote.

Oppose

Explanation:

A complete explanation is included in the attached document.

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STATEMENT OF THE COUNCIL OF THE CONSUMER LAW SECTION
IN OPPOSITION TO SENATE BILLS 1182 and 1183

Senate Bill 1182 allows the court to award attorney fees based on some arbitrary percentages of the amount of judgment. The bill also allows the court to vary the attorney fee award based on an enumerated list of factors the court should consider. Some of the factors the court may consider are: 1) the complexity of the litigation, 2) the length of trial, 3) the reasonableness of the hourly rates and the number of hours expended, 4) the reasonableness of the number of attorneys used, 5) the attorney's efforts to minimize fees, 6) the reasonableness of the claims and defenses pursued by each side, and 7) the relationship between the amount of work performed and the significance of the matters at stake, etc. Senate Bill 1183 also allows the appellate court, on its own initiative, to assess attorneys' fees if it determines that the appeal was vexatious.

These bills are unnecessary as Michigan case law and its court rules already set out standards and factors to ascertain attorneys' fees. For example, the factors to determine what constitutes reasonable attorney fees are listed in the Michigan Rule of Professional Conduct 1.5(a).¹ Moreover, in *Kennedy v Robert Lee Auto Sales*, 313 Mich App 277; 882 NW2d 563 (2015), the Michigan Court of Appeals, incorporating the MRPC factors, set out the framework to determine attorneys fees. To follow the framework to determine attorney fees, the *Kennedy* court held that:

the court should first determine the fee customarily charged in the locality for similar legal services. In general, the court shall make this determination using reliable surveys or

¹ MRPC 1.5(a) - Fees

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the follow:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

other credible evidence. Then, the court should multiply that amount by the reasonable number of hours expended in the case. The court may consider making adjustments up or down to this base number in light of the other factors listed in . . . *MRPC 1.5(a)*. *Kennedy* at 303.

Thus it is clearly unnecessary for the legislature to now set out its own arbitrary method in calculating attorney fees and its own standards that are contrary to existing case law. The proper place to determine attorney fees is in the judiciary not the legislature.

Another concern of Senate Bill 1182, is the provision that allows the court to consider certain factors when varying from the calculated attorney fee award. Specifically, the court may vary the award if the court takes into consideration “the relationship between the amount of work performed and the significance of the matters at stake.” As consumer lawyers, the Council is concerned that this specific factor will undermine the goals of most consumer protection statutes. In addition, it would not be economical for consumer lawyers to continue to represent consumers, most of whom are low-income consumers, if the courts consider the value of the case when awarding attorney fees.

The Michigan Court of Appeals in *Jordan v Transnational Motors*, 212 Mich App 94; 537 NW2d 471 (1995), aptly articulated this concern when courts vary the attorney fee awards based on the value or significance of the case. The *Jordan* court explained:

In consumer protection [cases], the monetary value of the case is typically low. If courts focus only on the dollar value and the result of the case when awarding attorney fees, the remedial purposes of the statutes in question will be thwarted. Simply put, if attorney fee awards in these cases do not provide a reasonable return, it will be economically impossible for attorneys to represent their clients. Thus, practically speaking, the door to the courtroom will be closed to all but those with either potentially substantial damages, or those with sufficient economic resources to afford the litigation expenses involved. Such a situation would indeed be ironic: it is but precisely those with ordinary consumer complaints and those who cannot afford their attorney fees for whom these remedial acts are intended. *Jordan*, at 98-99. See also *Kennedy v Robert Lee Auto Sales*, 313 Mich App 277; 882 NW2d 563 (2015) quoting *Jordan*.

Consequently, these bills, if passed, will significantly impact the poor and deny them access to the courts at a time when they are exploited by unscrupulous businesses. Accordingly, the Council of the Consumer Law Section opposes Senate Bills 1182 and 1183.

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