

“LOSER PAYS” IS ONE ANSWER TO FRIVOLOUS LAWSUITS

Courts over the years have adopted rules which are intended to discourage frivolous lawsuits. One such rule prohibits putting the amount of claimed damages in the complaint, thereby creating “headline news” or intimidating the person sued. Also, Supreme Court decisions have limited the amount of punitive damages that may be awarded. States have also enacted laws limiting damages and requiring expert reports before filing certain kinds of lawsuits. Federal laws are also being considered to restrict patent infringement lawsuits, a recent source of abuse by a number of law firms known as “patent trolls.”

The one obvious means of discouraging lawsuits in general has not received any serious consideration, the losing party being required to pay the attorney fees of the successful party. The almost universal rule in the United States is just the opposite. Known as the American Rule, each party to a lawsuit pays its own attorney fees. Only a few states deviate from this standard rule. There are two commonly recognized exceptions to the American Rule, where a statute provides that an award of attorney fees may be made to the prevailing party and where a contract between the parties allows for an award of attorney fees.

Courts in Kentucky have recognized a third exception, which is applicable in limited circumstances, including when a person has filed a frivolous lawsuit. Dating back to at least 1938, court cases have permitted an award of attorney fees to the successful party where such an award is “equitable.” By this “equitable rule,” an award of counsel fees is within the discretion of the trial court “depending on the circumstances of each particular case.” One such circumstance is the filing of a frivolous

lawsuit. Another circumstance is where the lawsuit was filed in “bad faith.” In a recent case, the Court of Appeals agreed that “bad faith” is a legitimate reason to award attorney fees, but required the trial court to make specific findings of fact in support of the award. These same rules apply in federal courts, as the United States Supreme Court has announced in several cases over the last 25 years.

Therefore, despite the American Rule, an award of attorney fees is a potent tool for discouraging frivolous lawsuits or lawsuits brought in bad faith. That such awards of attorney fees are few and far between most probably attests to the erroneous belief, though commonly held belief, that the courts are inundated with frivolous lawsuits. Insurance companies and other business interests promote the myth of a tsunami of frivolous lawsuits. If this were actually true, there would be many more awards of attorney fees to the victims of frivolous or bad faith lawsuits. Naturally, it is an understandable reaction when sued that the lawsuit is thought to be frivolous. But under the “equitable” exception to the American Rule, a neutral person, the trial court judge, will decide if the lawsuit is truly frivolous or was brought in bad faith. While by no means perfect, this “equitable” approach is a sound and practical means of discouraging frivolous lawsuits.