

August 19, 2016

To the Honorable Members of
The Illinois House of Representatives,
99th General Assembly:

Today I return House Bill 1380 with specific recommendations for change.

House Bill 1380 was intended to prevent parties to an arbitration award from delaying enforcement through bad faith litigation tactics that are intended to delay the hearing or exhaust the financial resources of the opposing side. The legislation sought to prevent these bad faith tactics by adopting a universal, state-wide "loser pays" system, in which the losing party in any effort to challenge or stay the enforcement of an arbitration award must pay the fees and cost of the winning side. This sweeping solution goes too far and, as drafted, would have the unintended consequence of preventing equal access to justice and the legal system. A more nuanced and hybrid approach will achieve the same purpose without preventing parties from seeking judicial review of hard, or close, cases.

American legal tradition discourages the "loser pays" concept in most forms of litigation. The "American Rule," as it is known, provides that each party to litigation should pay for their own costs. However, to deter bad faith by the parties in litigation, many states including the Federal Courts have adopted narrow discretionary fee shifting rules. Under these fee shifting rules, if the prevailing party can show that the other side was acting in bad faith or pursuing frivolous claims in order to merely delay the outcome or exhaust the resources of their opponent, then a judge may exercise his or her discretion and order the losing party to pay the reasonable costs and attorney's fees of the prevailing party. These fee shifting rules allow judges to decide when fee shifting is appropriate – not in every case, but when there is a showing of bad faith.

As written, House Bill 1380 goes a giant step farther than simply empowering judges to order reasonable costs and fees upon a showing of bad faith. House Bill 1380 makes the loser automatically and always responsible for the prevailing party's fees and costs, even if they acted in good faith, or even if it was a close case upon which reasonable minds could differ as to the appropriate outcome. This automatic fee shifting – acting as an appeal penalty – will make it far more difficult for parties to seek redress in the courts, especially for those levels of government that already cannot meet all costs of their obligations. Rather than achieving fairness, this bill will have the practical and unintended effect of limiting access to justice for everyone except the most well financed litigants. It will have a chilling effect on all parties, regardless of whether they are a local government, labor union, or the State of Illinois itself.

Minor changes can prevent the unintended consequence and still achieve the goals of bill. Simply by changing "shall" to "may" and providing judges with a familiar standard of review will ensure that bad faith tactics are penalized but those parties acting in good faith can still have their day in court.

My recommendations for changed are modeled after the fee shifting rule applicable in Federal court. Parties will still have access to the courts, and the prevailing party will have the ability to recover reasonable costs and attorney's fees by showing that the losing side acted in bad faith by unreasonably and vexatiously multiplying the proceedings in order to delay compliance or enforcement of the arbitration award. The "unreasonably and vexatiously" standard already exists in law, so it will be familiar to applying courts and parties alike.

These simple changes will allow judges use their independent judgment to ensure the proper dispensation of justice based on the totality of the circumstances, accomplish the purpose of the original bill, but not obstruct parties' access to justice when they have good faith claims for relief.

Therefore, pursuant to Section 9(e) of Article IV of the Illinois Constitution of 1970, I hereby return House Bill 1380, entitled "AN ACT concerning government", with the following specific recommendations for change:

On page 2, line 2, by replacing "shall" with "may be ordered by a reviewing court to"; and

On page 2, by replacing lines 9 and 10 with "non-compliant party if the prevailing party can demonstrate that the opposing party proceeded in bad faith by unreasonably and vexatiously multiplying the proceedings in order to delay compliance or enforcement of the arbitration award. Any mutual agreements otherwise shall be a permissive subject of bargaining."; and

On page 12, line 20, by replacing "shall" with "may be ordered by a reviewing court to"; and

On page 13, by replacing line 24 with "to that party if the prevailing party can demonstrate that the opposing party proceeded in bad faith by unreasonably and vexatiously multiplying the proceedings in order to delay compliance or enforcement of the arbitration award. Any mutually agreed procedures providing for".

With these changes, House Bill 1380 will have my approval. I respectfully request your concurrence.

Sincerely,

Bruce Rauner
GOVERNOR