



## House Bill 1270

### *Access to Maryland Courts Act*

MACo Position: **OPPOSE**

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To: Judiciary Committee

From: Leslie Knapp, Jr.

The Maryland Association of Counties (MACo) **OPPOSES** HB 1270. In theory, the bill seeks to ensure there is adequate legal representation for low-income individuals asserting a constitutional claim in State courts. In practice, the bill would trigger a rush of litigation and costs for the State and local governments and create a profoundly unbalanced system that favors plaintiffs over defendants.

#### **The Bill**

HB 1270 would authorize a court to award a prevailing party reasonable attorney's fees and expenses in a civil action against the State or a local government to enforce a "self-executing" provision of the Maryland Constitution or Declaration of Rights. "Self-executing" is defined as a provision so complete that it may be enforced by a court without the need for further legislative authority or direction.

However, while a prevailing plaintiff can collect attorney's fees based on a variety of factors and considerations detailed in the bill, a prevailing defendant is only allowed to recover fees if the court determines that the plaintiff's suit was made in bad faith or without substantial justification. Attorney's fee awards in local government cases are subject to the liability cap of the Local Government Tort Claims Act (LGTCa).

#### **Overbroad Scope**

MACo understands that the bill's "self-executing" requirement is meant to limit the types of actions that may qualify for attorney fees, but is unclear on what claims this would actually cover. MACo believes the bill still retains an overbroad scope, including claims such as due process, seizure of goods or property, right to an adequate education, and freedom of the press.

The bill advocates have cited Massachusetts and Connecticut as two states that have fee shifting provisions similar to those found in HB 1270. Attorneys from the Local Government Insurance Trust (LGIT) have reviewed those fee shifting provisions (and those from every state) and found them far narrower in scope than the provisions in HB 1270. No state provides a law parallel to HB 1270.

LGIT's findings can be reviewed in the white paper attached to this testimony.

### **Increased Litigation**

The bill would result in an increase in claims brought against the State and local governments. While attorney's fees in county government cases would be subject to the LGTCA cap, the bill still incentivizes plaintiff attorneys to bring cases against county governments so long as they are not made in bad faith or without substantial justification (a deliberately high threshold for enforcement).

State constitutional and Declaration of Rights claims are often for injunctive or nonmonetary relief and do not include a monetary component. In such circumstances, an attorney's fee award is not "competing" with a plaintiff's monetary award under the cap, making plaintiff attorneys more willing to take borderline cases that would not be accepted now.

### **Unequal Treatment of Plaintiffs and Defendants**

A balanced justice system is arguably premised on the equal treatment of plaintiffs and defendants as they argue their case before a court or jury. But while HB 1270 purportedly attempts to establish a more level "playing field" for low-income plaintiffs, in reality it will create an unlevel playing field where defendants are put at a disadvantage. HB 1270 encourages plaintiff attorneys to bring potentially tenuous but arguably good faith claims against a county with little downside if the county prevails. The mere presence of an attorney fee award changes this dynamic, and provides incentive for such cases.

### **Lack of Equivalent Federal Protections**

While recovery of attorney fees is permitted in the federal court system, the system also includes key components that provide a plaintiff-defendant balance. However, HB 1270 does not contain these components, which include:

1. *Offer of judgment (Federal Rule 68)*: An offer of judgment is essentially a settlement offer made by a defendant prior to trial. If the plaintiff rejects that offer and subsequently receives a judgment that is equal to or less than the offer, then the potential attorney fees that the defendant must pay are capped at the time the offer was made.
2. *Quarterly reporting of attorney fees*: Federal district court requires the detailed quarterly reporting of attorney fees so as to provide an accountable and transparent record of costs accrued by plaintiffs.
3. *Vicarious liability or respondent superior*: In federal court, a local government is not liable for the unconstitutional acts of an employee unless it is shown that the government implemented a policy, practice, or custom that directly led to the constitutional violation.

Taken in total, these basic federal protections create the needed level playing field between plaintiffs and defendants.

### **Costs to Local Governments**

The fiscal note for the bill correctly states that “[l]ocal expenditures increase for (1) payments for claims filed under the Local Government Tort Claims Act (LGTCA) and other eligible claims, and (2) higher assessments for local governments.”

Since many of the cases that would be brought under HB 1270 involve nonmonetary damages, county costs would increase due to payment of attorney fees if the plaintiff prevails (where currently no fees would be paid). Additionally, counties will see increased costs to their law departments to defend against the additional claims and potentially higher assessments (premiums) if the Local Government Insurance Trust (LGIT) incurs losses from payments authorized by the bill. In short, self-insured governments will pay more in settlements and judgments, while insured governments will suffer higher premiums. In both cases, taxpayer resources are redirected away from other public priorities.

### **Outreach**

MACo and the Maryland Municipal League have tried to address local government concerns by meeting with the bill sponsor and proponents, who were receptive to the outreach. While those discussions have not resulted in an agreement to date, MACo remains committed to continuing good faith negotiations despite MACo’s opposition position, so long as there is a chance for a positive outcome.

### **Conclusion**

HB 1270 seeks to resolve the challenging issue of indigent individuals having full access to the justice system. However, the bill would vest additional power and opportunities in the hands of plaintiff attorneys at the expense of the State and local governments, and their taxpayers. Unless MACo is able to reach an accord with the bill’s advocates, MACo urges the Committee to give HB 1270 an **UNFAVORABLE** report.