



Senate Bill 362

Award of Attorney's Fees and Expenses – Violation of Maryland Constitutional Right

MACo Position: **OPPOSE**

Date: March 1, 2016

To: Judicial Proceedings Committee

From: Leslie Knapp, Jr.

The Maryland Association of Counties (MACo) **OPPOSES** SB 362. The bill seeks to ensure there is adequate legal representation for low-income individuals asserting a State constitutional claim. In practice, the bill would likely lead to an increase in litigation and costs for the State and local governments and create an unbalanced system that favors plaintiffs over defendants.

SB 362 would authorize a court to award a prevailing party reasonable attorney's fees and expenses in a civil action to enforce a right secured by the Maryland Constitution or Declaration of Rights. This includes claims such as due process, seizure of goods or property, right to an adequate education, and freedom of the press.

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).

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 SB 362 is purportedly attempting 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.

As mentioned previously, a prevailing defendant can only be awarded attorney's fees if the court finds that a plaintiff's lawsuit was made in bad faith or without substantial cause. But prior court holdings have shown that the standards for such a finding are high. Again, SB 362 encourages plaintiff attorneys to bring potentially weak but good faith claims against a county with little downside if the county prevails.

Additionally, while the rule is in effect at the federal level, there are additional protections for defendants, including qualified immunity and Federal Rules of Civil Procedure Rule 68. Rule 68 provides that if a defendant makes an offer of judgment at least 14 days before trial and that offer is rejected but the prevailing plaintiff is subsequently awarded the same or less than what was contained in the offer, the defendant's liability to pay attorney fees is stopped at the time the offer was made. Qualified immunity and Rule 68 provide an important balance at the federal level which is currently lacking at the state level.

Costs to Local Governments

The bill's fiscal note states correctly that "[l]ocal expenditures increase for (1) payments for claims filed under the Local Government Tort Claims Act (LGTC) and other eligible claims and (2) higher assessments for local governments if the Local Government Insurance Trust (LGIT) incurs losses from payments authorized by the bill."

Since many of the cases that would be brought under SB 362 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 if the Local Government Insurance Trust (LGIT) incurs losses from payments authorized by the bill.

Conclusion

SB 362 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. Accordingly, MACo urges the Committee to give SB 362 an **UNFAVORABLE** report.