The Push for Attorney's Fees in Maryland Constitutional Cases

I.
Introduction

During this past legislative session, the General Assembly came very close to passing Senate Bill 705 ("S.B. 705"), a bill that would have allowed the recovery of attorney's fees and legal expenses to prevailing parties in *some* State constitutional cases, including those against law enforcement officers. No state has ever enacted such legislation and Maryland should not be the first. The reasons that led to the enactment of the first attorney's fee awards (fee-shifting) statutes over 40 years ago have diminished over time. A playing field that admittedly was once tilted is no longer. This fact is evidenced not only by the staggering number of civil rights cases in federal and State courts, but also by the steady increase in the number of attorneys who practice solely in this area. In this new playing field, attorney's fee award statutes are often exploited by lawyers at the expense of their clients. Again, it is attorneys who cover these fees, not their clients. This paper discusses the role of attorney's fees in federal and State civil rights cases and explains why any additional fee shifting legislation in Maryland is unnecessary.

II.
Federal Constitutional Litigation: The Sword and the Shield

We begin with an overview of federal civil rights litigation, limited, in this context to claims under the federal Constitution.

A. Constitutional Litigation Under 42 U.S.C. § 1983

The statute, enacted shortly after the end of the Civil War, has become the wellspring for civil rights litigation in federal and state courts. It is an enabling statute that creates no rights of its own, but rather allows an individual to sue a state actor both "in an action at law" and a "suit in equity" for alleged federal constitutional violations. As litigation under § 1983 gained traction in the 1970s and 80s, the Supreme Court kept pace by striking a balance between plaintiffs and defendants in suits under § 1983, a balance that includes:

- qualified immunity (*Harlow v. Fitzgerald*);
- the contours of municipal liability, including the absence of *respondeat superio*r liability and the creation of policy, custom, practice liability (*Monell v. Department of Social Services*);
- the individual/ official capacity distinction (*Kentucky v. Graham*);
- the absence of punitive damages against municipalities (*City of Newport News v. Fact Concerts, Inc.*); and
- rigorous standards for punitive damages (*Smith v. Wade*).

In addition, the Federal Rules of Civil and Appellate Procedure, coupled with the local rules of federal appellate and district courts, have adapted to keep pace with the ever-increasing volume of civil rights litigation. For example, recognizing that municipal liability under § 1983 is derivative (*City of Los*

Angeles v. Heller), the United States District Court for the District of Maryland issued the opinion in *Marryshow v. Town of Bladensburg* in 1991, a decision that paved the way for the bifurcation of individual and municipal liability claims in actions under § 1983, thereby streamlining the entire litigation process.

As to the ever-increasing volume of cases impacting local governments, the number of civil rights and prisoner cases pending in federal trial courts is staggering. Between July 1, 2016 and June 30, 2017, there were thirty-nine thousand fifty six (39,056) new civil rights cases and sixty-one thousand thirty-one (61,031) prisoner cases filed. In the United States District Court for the District of Maryland, the numbers are equally as staggering. In the same time period, there were four hundred and fifty-nine (459) civil rights cases and eight hundred and eighty (880) prisoner cases filed. (Source: http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables).

Based upon the plaintiff friendly changes to the LGTCA, allowing attorneys to recoup their fees in State constitutional cases will result in many of these cases flooding state courts. In light of the fact that the playing field has long since been leveled there is no need for additional attorney's fee legislation. A look at recent verdicts in police cases in Maryland is proof of that. For example, *The Daily Record* on August 21, 2017 reported: "Federal jury awards $500K to Forestville man tasered by police." In another police excessive use of force case, the *Washington Post* reported on August 18, 2017: "…Prince George's jury [finds] the Maryland county…liable for $850,000." Finally, on September 24, 2017, *The Daily Record* reported: "Charles County jury awards $3M verdict in wrongful arrest case." Let us be clear that police are the targets in these lawsuits and there is no shortage of attorneys willing to sue them or jurors willing to find against them.

B. Attorney's Fees Under 42 U.S.C. § 1988

The statutory scheme of 42 U.S.C. § 1983 did not mandate an award for attorney's fees, but, instead, allowed the lower courts to award reasonable attorney's fees in their discretion. This changed just twelve years after passage of the Civil Rights Act of 1964 ("the Civil Rights Act"), with the enactment of the Civil Rights Attorney's Fees Award Act of 1976 '("the Civil Rights Attorney's Fee Award Act"). Section 1988 was a follow-up to the Civil Rights Act designed to assist people who could not afford counsel in racially-oriented civil rights cases. Congress' intent was to enable poor individuals, seeking redress against discrimination, to attract competent counsel if, in the event that the low-income client prevailed, the attorney fees would be paid for by the other side.

1. Drivers of Attorney's Fee Litigation

But now, more than forty years after the passage of the Civil Rights Attorney's Fees Award Act, the question has become whether the original purposes of § 1988 are still being served or has the original purpose been subverted by plaintiff's attorneys driven to profit at the expense of their own clients.

There are numerous issues that arise in context of attorney's fee awards after the original litigation ends. Issues include:

- How is "prevailing party" defined?
- Must a prevailing party succeed on all claims, most claims, some claims, or a single claim?
- Is a party who prevails but recovers only nominal damages a prevailing party?
- How does a court quantify the value of injunctive relief as opposed to monetary damages?

- Is a party who settles privately without the input of the court a prevailing party?
- How are attorney's fees calculated?
- Should the existence of a contingency fee agreement be disclosed in determining an award of attorney's fees?

These and similar issues can burden trial and appellate courts for months, and years, after the underlying litigation has ended.

2. Examples of Attorney Overreach

One major problem driving attorney's fee litigation is attorney overreach. Egregious examples of attorney's fee recoveries, ones that far exceed what was awarded to the plaintiff, are not hard to find. Even worse is the unspoken truth that plaintiffs' attorneys in civil rights cases not only may be entitled to recover attorney's fees, but, through private fee agreements with their clients, may recover large percentages of the verdict or other judgment as well.

One recent example of attorney's fee litigation comes from California. In *Gonzalez v. City of Maywood*, a group of civil rights plaintiffs reached a $500,000 settlement with the City of Maywood, its police department, and other defendants. The agreement provided that plaintiffs' counsel could seek up to $1,025,000 in attorney fees. Ultimately, the plaintiffs' attorneys calculated that their "lodestar" figure, which is based on the "numbers of hours expended on the litigation multiplied by a reasonable hourly rate," was approximately $2,059,452. Thus, the attorneys requested the full amount of attorneys' fees allowed by the settlement.

Calling the fee request "offensive on its face," the United States District Court for the Central District of California objected to awarding attorney fees that exceeded the $500,000 received by the plaintiffs in the settlement. Upon examining the fee request, the district court reduced the hourly rates specified by the attorneys by 25 percent, and the court further reduced the hours claimed based on the "ambiguous" billing format used and for numerous problems with billing entries. After making these reductions, the district court awarded $473,138 in attorney's fees. This decision was the beginning of a ten-year odyssey between trial and appellate courts, solely related to the issue of attorney's fees. Eventually, in 2017, the plaintiffs' attorneys were awarded the $1,000,000 dollars they originally had sought, an amount that more than doubled what their clients had recovered.

Gonzalez is just one example of the exorbitant attorney's fees demanded in federal court. In late August 2017, a federal judge in Pennsylvania denied a request for nearly $1 million in attorney fees and promised to refer the lawyers who sought the money to ethics regulators. In *Clemens v. New York Central Mutual Fire Insurance Company*, the United States District Court for the Middle District of Pennsylvania deemed the fee request "astounding," "exorbitant" and "woefully deficient." The trial judge criticized claims for various portions of work as "abusively excessive" and "mind-boggling." Some entries were redundant and some were vague, the court said. "As other courts have noted," the trial court said, quoting from another opinion, "a fee request is not the opening salvo in a back and forth negotiation with the court. The request is not the sticker price on a used car that all parties understand is the starting point for spirited dickering." The plaintiff's lawyers had sought $902,655 in attorney fees, which swelled to $1.12 million with costs and interest, after prevailing on a bad-faith insurance claim. Jurors who heard the case in November 2015 awarded $100,000 on the bad-faith claim, while the underlying uninsured motorist claim settled for $25,000. Counsel had billed about 2,583 hours for the case, which was resolved in a trial that lasted five days. The trial court said. "Assuming an eight-hour billable work day, this would mean that the plaintiff's counsel worked on

nothing else but his case, every day, for approximately 323 days." The trial court used its discretion to deny the entire award.

Maryland attorneys who litigate constitutional and other civil rights cases for the State or it's political subdivisions can document similar abusive conduct. Here are recent examples:

- Montgomery County: Police misconduct litigation (including excessive force claims) in federal court settled for approximately $50,000. The pending attorney's fee petition seeks $750,000, more than 10 times the amount of the settlement.

- City of Salisbury and Wicomico County: Police misconduct case (excessive force) in federal court settled for $50,000.00, inclusive of attorney's fees. At the time of the settlement, plaintiff's attorneys were claiming to have incurred approximately 15 times that amount ($750,000) in attorneys' fees.

- State of Maryland, Pocomoke City, and Worcester County: Multiple plaintiff (three) employment discrimination case at preliminary motions stage. No trial date scheduled. Prior to any discovery, plaintiffs' attorneys are reporting approximately $900,000 in attorney's fees.

- Montgomery County: suit by employee under Americans With Disabilities Act. A jury returned verdict against county but awarded no damages. The court then denied plaintiff's request for injunctive relief. Despite recovering zero dollars in damages and obtaining no injunctive relief, plaintiff's attorneys have petitioned the court seeking approximately $1.6 million dollars in attorney's fees.

- Anne Arundel County: Suit by twelve plaintiffs under the Maryland Public Information Act. At trial, plaintiffs recovered only nominal damages. Plaintiffs' attorneys claimed to have performed 1.4 million dollars' worth of work on the matter, but, in light of Plaintiffs' limited success asked the court for only $450,000 in attorney's fees.

3. Double-Dipping

One of the carefully guarded secrets kept by plaintiffs' lawyers in fee-shifting cases is the existence of private fee agreements that allow attorneys to "double dip," *i.e.*, to recover not only attorney's fees in the event of a successful outcome, but also to recover (usually forty (40%)) under the fee agreement itself. There is noting that precludes this "double-dipping," which is designed solely to enrich attorneys at the expense of their clients. In Maryland, neither federal nor State law or rule requires a plaintiff's attorney whose client has prevailed in a fee-shifting case to disclose the existence of a fee agreement.

In fact, in federal court, "double-dipping" is addressed, albeit indirectly, only in cases where counsel is assigned as *pro bono* counsel by the court to handle a case. The Regulations Governing Reimbursement of Expenses in *Pro Bono* Cases in the United States District Court for the District of Maryland, Appendix C, Rules of the U.S. District Court (Md) provide that, when an attorney has been appointed to represent an indigent party in a civil case, the attorney is allowed to petition the Court for

reimbursement of certain expenses. Reimbursable expenses are limited to $10,000.00. Further, Section II.B. of the regulations states that**:** "In no case shall an appointed attorney for a party who has been awarded costs and/or fees pursuant to a judgment in a suit before this Court be eligible for reimbursement of those costs and/or fees from the Admissions Fund." This provision does not preclude the recovery of fees; rather it simply directs that fees cannot come from the Admission Fund.

C. Federal Rule 68 and the Strategy to Limit Attorney's Fees

There is one effective means in federal court to combat mounting attorney's fees: Rule 68 of the Federal Rules of Civil Procedure (Offer of Judgment). There is no state counterpart in the Maryland Rules. The simple purpose of Rule 68 is to encourage settlement and avoid litigation. The history of the rule, which was adopted in the 1940s, is unimportant here, but it should be mentioned that its history was not tethered to 42 U.S.C. § 1983. The connection to § 1983 did not come until 1985, when, in *Marek v. Chesny*, the Supreme Court ruled that "costs" under Rule 68 *do* include attorney fees in a civil rights case brought under § 1983, although only in the context of the plaintiff's post-verdict application for fees under § 1988.

Rule 68 itself is straightforward in its application. A defending party makes an "offer of judgment," and if the plaintiff accepts, the clerk automatically enters the offer of judgment as the judgment of the court. Despite its limitations, Rule 68 gives defendants, not plaintiffs, a powerful tool to get the case settled at an early stage. It is a means to pit plaintiff's counsel against a client and vice versa. However, obtaining a client's consent to such a strategy (which does result in the entry of a judgment, whether prophylactic or not) is not an easy task, and is complicated in cases where there are multiple defendants and plaintiffs. Despite its flaws, however, Rule 68 can and should be used, optimally at the earliest stages of the litigation, to drive a wedge between attorney and client.

Buttressing Rule 68 is Appendix B (Rules and Guidelines for Determining Attorneys' Fees in Certain Cases) of the Rules of the United States District Court. These guidelines are far more specific than any existing Maryland rule relating to the calculation of attorney's fees and require the submission of "quarterly statements showing the amount of time actually spent on the case and the total value of that time." Failure to submit these statements *may* result in a denial or reduction of fees. Unfortunately, Appendix B does not compel the disclosure of a fee agreement between the prevailing party in an action under § 1983 and his/her attorney. Further, Appendix B does not apply to cases in which statutes or contracts authorize fees based on a fixed percentage or other formula, such as Social Security and Prisoner Litigation Reform Act cases.

Again, Maryland has no rule like Rule 68, and the only statutory embodiment of the rule protects health care providers and their insurers. The absence of a state counterpart to Rule 68 is one of the major arguments against legislation such as S.B. 705.

III.
Maryland Constitutional Litigation: The Sword Without the Shield

The differences between federal and State law are many and are significant. The decisions of the Court of Appeals of Maryland over the past thirty years have charted a course for Maryland civil rights litigation that, in many ways is fully understandable, and in many other ways, inexplicable. We will discuss the litigation landscape below.

A. The Existence of Money Damage Suits for Violation of Individually Guaranteed Rights

Initially, few states have enabling statutes patterned after 42 U.S.C. § 1983. The Arkansas Civil Rights Act of 1993, Ark. Code Ann., § 1-123-105(a), is one of the limited examples that exists, and it does not provide for the recovery of attorney's fees. A similar Nebraska statute extends a cause of action to violations of federal as well as state constitutional rights, but explicitly exempts political subdivisions from liability. Neb. Rev. Stat. §20-148 (1997). Contrary to this approach, in the clear majority of states, including Maryland, legislatures have not affirmatively addressed the issue of suing for state constitutional violations. In the absence of legislative guidance, several state courts have approved a damages action despite the absence of legislative authority. Other state courts have permitted lawsuits to enjoin unconstitutional conduct, but have refused recovery of money damages. As is discussed below, Maryland's highest court has taken a different path, recognizing an action for money damages for the violation of individual state constitutional guarantees, and injunctive relief for other constitutional provisions unrelated to personal liberty.

In contrast to the volume of case law, rules, and guidelines governing federal litigation under § 1983, it was not until 1984 when the Court of Appeals of Maryland, in *Widgeon v. Eastern Shore Hospital Center*, 300 Md. 520 (1984), expressly recognized the existence of an action at law for money damages under Articles 24 and 26 of the Declaration of Rights. Four years later, in *Clea v. Mayor & Council of Baltimore City*, 312 Md. 662 (1988), the Court of Appeals expressly held that a public official who violates a plaintiff's rights under the Maryland Constitution is entitled to no immunity. The plaintiff may recover compensatory damages regardless of the presence or absence of malice. Immunity was rejected because "constitutional provisions like Articles 24 or 26 of the Maryland Declaration of Rights, or Article III, § 40, of the Maryland Constitution, are specifically designed to protect citizens against certain types of unlawful acts by government officials. To accord immunity to the responsible government officials, and leave an individual remediless when his constitutional rights are violated, would be inconsistent with the purpose of the constitutional provisions." *Clea*, 312 Md. at 684-85.

The individual rights guaranteed in the Constitution of Maryland mirror some, if not all, of the rights guaranteed in the Bill of Rights, and are identified below:

The Constitution of Maryland

Declaration of Rights

- the right to petition the legislature for redress of grievances (Article 13)
- the right against cruel and unusual punishment (Article 16)
- a remedy for injury to person or property (Article 19)
- the rights of the accused (Article 21)
- right against self-incrimination (Article 22)
- the rights of due process of equal protection (Article 24),
- the right against excessive bail and cruel and unusual punishment (Article 25)
- the right against illegal searches and seizures (Article 26)
- the right to be free of Martial Law (Article 32)
- right of religious freedom (Article 36)
- the freedom of press and speech (Article 40)
- the right of sexual equality (Article 46)

- the rights of crime victims (Article 47)

Constitution of Maryland

- Voting rights (Article I, Sections 2-4)
- Free Public Schools (Article VIII, Sections 1-3)
- Article III, Section 40 (Eminent Domain)

Of the thirteen Declaration of Rights Articles, four pertain exclusively to the criminal justice system (Articles 21, 22, 25, and 47); two pertain to convicted prisoners (Articles 16 and 25); one pertains to Martial Law (Article 32), six, apart from the criminal justice articles, are the virtual counterparts to rights secured in the Bill of Rights (Articles 13, 16, 24, 26, 36, and 40). As to the Constitution, the rights secured under Article VIII (Education), are protected as a property interest under both Article VIII and the Fourteenth Amendment to the United States Constitution. Accordingly, on the civil side, individuals can sue for money damages under the Maryland Constitution for alleged violations of all the provisions listed above. Individuals can sue for equitable relief only as to violations of any other State constitutional provision.

Since *Clea*, Maryland's appellate courts have been quick to comment on the vast schism between litigation under 42 U.S.C. § 1983 and under the State Constitution:

> Although, as noted, the State Constitutional provisions allegedly violated here mirror, for the most part, the Federal provisions underlying the Section 1983 action, different rules apply with respect to the remedies available for these violations….[T]he right of recovery for Federal violations arises from statute---§ 1983---whereas the redress for state violations is through a common law action for damages.

DiPino v. Davis, 354 Md. 18, 50 (1999). These "different rules" include the express rejection of some principles under § 1983 and the adoption of principles expressly rejected by the federal courts:

- Rejection of the federal distinction between official and personal capacity suits;

- Rejection of the availability of *any* form of immunity against state constitutional claims, an issue further complicated by the availability of a qualified immunity for State personnel against State constitutional and intentional torts (§5-522 of the Courts and Judicial Proceedings Article as interpreted by the Court of Appeals in *Lee v. Cline*, 384 Md. 245 (2004)), when local (county and municipal officials and officers) have no such immunity protection. *See Ashton v. Brown*, 339 Md. 70 (1995)(§5-507 of the Courts and Judicial Proceedings does nothing more than codify common law public official immunity which is inapplicable to intentional and State constitutional torts)).

- Acceptance of *respondeat superior* as a basis of liability in a state constitutional claim, thus subjecting local governments to joint and several liability for the acts or omissions of their employees; and

- Recognition of non-derivative suits against local governments based upon unconstitutional policies, customs, or practices, regardless of the liability of the actor giving rise to the claim.

In this landscape, the existence of tort liability caps in both the Maryland and Local Government Tort Claims Acts remains the one true "shield" in state constitutional litigation, and even they have been dramatically increased.

B. The Availability of Injunctive Relief Under the Maryland Constitution

If the remedy for violation of an individual right guaranteed by the Maryland Constitution is a common law tort action for money damages, the question remains as to the availability of injunctive relief. In *Benson v. State*, 389 Md. 615 (2005), the Court of Appeals considered the remedies available under Articles 14 (no aid, tax, charge, fee or burthen shall be rated or levied without consent of the Legislature) and 8 (separation of powers) of the Maryland Declaration of Rights. As to Article 14, the Court of Appeals held that a private right of action exists for a violation because it is a self-executing constitutional provision. The question then shifted to whether monetary damages could be awarded for a violation of Article 14. The Court explained that, in the past, it had "employed th[e] common law tort analysis for constitutional claims previously, finding a right to sue for damages, but ha[d] done so only when it concluded that the constitutional provision at issue conveyed an individual right—for example, the right to be free from unreasonable searches and seizures or the right to be free from the taking of private property without just compensation." *Benson,* 389 Md. at 630. The court then held that, in contrast to Articles 24 and 26, Article 14 does not secure or proclaim an individual right; rather, its terms address principles akin to those of federalism, separation of powers, and the government's authority to tax. *Benson,* at 631. Thus, since Article 14 does not secure an individual right, no suit for money damages could be brought for its violation. *Id.* Instead, the court concluded that "[t]his kind of asserted constitutional violation is best corrected by declaratory or injunctive relief, not damages…." *Id.*

It is at least arguable from the decisions in *Clea, Longtin, and Benson*, that, unlike the broad remedies available to an individual under §1983, that only a common law action for money damages, and not injunctions or other equitable remedies, are available to persons suing under the state constitution for a violation of their own, individually guaranteed rights.

C. The Absence of a State Version of Federal Rule 68

Finally, in addition to the differences in federal and state civil rights litigation discussed above, we are all fully cognizant of the fact that there is no Maryland version of Rule 68. In this regard, it is worth noting that Rule 68 is a *rule*, not a statute, and one that applies across the board to both federal constitutional and statutory right claims. The proponents of bills such as S.B. 705 willingly point out that *no* Maryland statute contains a version of Rule 68, neglecting to inform legislators of *the difference between a specific statute and an across the board rule*. This is disingenuous at best. The proponents also fail to mention that there *is* one Maryland version of Rule 68, albeit a statute. It is found in §3-2A-08A (Offer of Judgment)—and it is limited to Health Care Medical Malpractice Claims, attesting to the lobbying strength of the insurance and health care industries. Also, there is another statute worth mentioning, §12-109 of the Maryland Tort Claims Act (MTCA). Pursuant to §12-109, counsel "may not charge or receive fees that exceed: (1) 20% of a settlement made under the MTCA, or (2) 25% of a judgment made under the MTCA. No similar provision is contained in the LGTCA.

Thus, with one exception, this essential tool against skyrocketing attorney's fees in federal civil rights cases simply does not exist in Maryland. And, since Rule 68 is a rule of procedure, its absence in Maryland is a compelling reason to remove *any* federal civil rights claim brought in state court. Not unexpectedly, any mention of Rule 68 is anathema to the proponents of legislation such as S.B. 705, just as is compelling the disclosure of fee agreements. Without a state version of Rule 68, there is no incentive for plaintiffs' lawyers to settle viable civil rights claims early, or to settle them at all. To the contrary, the incentive is to keep litigating, at all cost, and profit at the end at the expense of your own client. The absence of such a rule deprives local governments, *i.e.*, taxpayers, of the ability to reign in attorneys driven solely by profit or to drive any wedge between attorney and client in an effort to settle legitimate claims as early as possible.

IV.
The Absence of Similar Legislation in Other States

The 2011 "white paper" authored by proponents of adopting attorney's fees in Maryland misleadingly touted that at least two states, Massachusetts and Connecticut, have fee-shifting legislation like S.B. 705. Both statutes are set forth in Appendix A. As to Massachusetts, its statute extends only to persons who have their constitutional or statutory rights under federal or state law "interfered" with by "threats, intimidation or coercion." The statute is intended to augment the existing federal criminal penalty for civil rights violations, and the Massachusetts courts have interpreted the terms "threats" and "intimidation" to require proof of physical harm or of a confrontation that involves a threat of physical harm. The remedies available under the statutes are not applicable to municipalities, who are not deemed "persons," under the act. The Massachusetts Supreme Judicial Court has held that the Act "was not intended to create, nor may it be construed to establish, a 'vast constitutional tort.'" *Bell v. Mazza*, 394 Mass. 176, 182 (1985).

As to Connecticut, its law is essentially what is described below as "human rights" or "human relations" legislation. In other words, an anti-discrimination law. The statute, which is found in chapter 814c, "Human Rights and Opportunities," makes it a "discriminatory practice" to deprive a person of constitutional or statutory rights "on account of religion, national origin, alienage, color, race, sex, gender identity or expression, sexual orientation, blindness or physical disability." The statute does not, as S.B. 705 would have done, provide across the board recovery of attorney's fees for prevailing parties in state constitutional claims. Instead, the statute only authorizes a civil action for relief from a "discriminatory practice," and allows for recovery "of such legal and equitable relief which [the court] deems appropriate including, but not limited to, temporary or permanent injunctive relief, attorney's fees and court costs." In short, the statute does little more than the existing Maryland Human Relations law.

A third statute merits some discussion. In California, pursuant to law passed in 1977 (one year after 42 U.S.C. § 1988), a court may award attorney's fees to a successful party against one or more opposing parties,

> in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

Cal. Civ. Proc. Code § 1021.5. The statute was intended to codify the Private Attorney General Doctrine, a doctrine based on the theory that privately initiated lawsuits are often necessary to enforce public policies. Essentially, the statute was intended to provide an incentive for plaintiffs to bring public interest suits when their personal stake in the outcome was insufficient to warrant incurring the costs of litigation. Nothing of the sort was contained in S.B. 705.

V.
Statutory Rights

A. Federal

Our discussion has been limited to what have been referred to as "constitutional claims," claims alleging violations of specific federal or state constitutional rights, filed pursuant to 42 U.S.C. § 1983 or directly under the Maryland Constitution. There are, however, a body of federal, state and local laws ranging from Title VII of the Civil Rights Act of 1964 to Title 20 of the State Government Article, to local ordinances that expand upon constitutional guarantees and create a class of rights that protect individuals' freedom from infringement by governments, social organizations, and private individuals. They essentially ensure one's ability to participate in the civil and political life of the society and state without discrimination or repression. Characteristics protected from discrimination include race, gender, national origin, color, age, political affiliation, ethnicity, religion, sexual orientation, gender identity, and disability; and individual rights such as privacy and the freedoms of thought, speech, religion, press, assembly, and movement.

Settings covered by these statutes include: education, employment, housing, lending, voting, and more. (Appendix B).

B. State

Of special interest, of course, is the Maryland's long standing Human Relations legislation, legislation that reaches far and provides for the award of attorney's fees. Maryland's entry into civil rights laws dates to Article 49B, now Title 20 (Human Relations) of the State Government Article. The General Assembly passed the Maryland Fair Employment Practices Law, codified at Article 49B, in response to the federal enactment of Title VII of the Civil Rights Act of 1964 and acted so quickly that Article 49B went into effect one day before its federal counterpart. Like the statutes discussed below, the Maryland Human Relations Law precludes discrimination in:

- housing practices;
- employment;
- places of public accommodation;
- licensing; and
- leasing of commercial property.

The legislation provides for both criminal and civil sanctions, and does include the award of attorney's fees (Title 20, § 20-1015: "In an action brought under this part, the court may award the prevailing party reasonable attorney's fees…."). In addition, to ensure that all children with disabilities are provided a free appropriate public education which emphasizes special education and related services designed to meet their unique needs and to assure that the rights of such children and their parents or guardians are protected, Maryland has its own version of the IDEA. See Md. Code Ann, Educ. §§ 8-401 *et seq*. (2014 Repl. Vol., 2015 Supp.); COMAR 13A.05.01.01, *et seq*. Finally, there are vast protections against discrimination also available pursuant to ordinances in Prince George's, Montgomery, and Howard Counties. The proponents of bills such as S.B. 705 omit any mention of Maryland's long standing Human Relations legislation, legislation that reaches far and provides for the award of attorney's fees.

These statutes and regulations do not deviate materially from their federal counterparts. (Appendix C).

VI.
Conclusion

Attorney's fees are often the driving force behind a lawsuit. The suggestion that attorney's fees are a necessary "incentive" for private lawyers to file civil rights law suits may have been viable forty (40) years ago, but is not so today. The tens of thousands of cases filed against police officers every year, as well as the subsequent jury awards, establish that the rationale for legislative proposals such as S.B. 705 are no longer tenable. Not content with the hundreds of federal and State statutes that already allow for fee shifting, a very limited group of attorneys has now turned to the State Constitution and State courts as yet another path to profit. If this were otherwise, the proponents of legislation such as S.B. 705 would readily embrace a statute like the one adopted in California which incentivizes private lawyers to bring public interest suits when their client's personal stake in the outcome is insufficient to warrant incurring the costs of litigation. Under this kind of law, cases truly benefit the public, not the plaintiff. The contrary is true with legislation like S.B. 705. And for this and all of the reasons discussed, this kind of fee shifting legislation, which no other state has ever adopted, must be exposed and rejected.

The views and opinions expressed in this paper are those of the author, John F. Breads, Jr., and do not necessarily reflect the official policy or position of the Maryland Municipal League, the Maryland Association of Counties, or the Local Government Insurance Trust.