



2011

Fee-Shifting to Promote the Public Interest in Maryland

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/lf>



Part of the [Law Commons](#)

Recommended Citation

(2011) "Fee-Shifting to Promote the Public Interest in Maryland," *University of Baltimore Law Forum*: Vol. 42 : No. 1 , Article 3.
Available at: <http://scholarworks.law.ubalt.edu/lf/vol42/iss1/3>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Forum by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

ARTICLE

FEE-SHIFTING TO PROMOTE THE PUBLIC INTEREST IN MARYLAND

By: The Maryland Access to Justice Commission*

I. CHANGING INCENTIVES TO CREATE MEANINGFUL RIGHTS ENFORCEMENT IN MARYLAND

Markets are shaped by incentives. Incentives, in turn, are shaped by the laws and regulations that govern the market. When it comes to access to justice, a market that matters is the market for legal representation in civil rights and other types of cases with low or non-monetary relief potential. Under ordinary market conditions, few attorneys have an incentive to offer representation to these claimants, despite the relatively large number of potential claims. Statutes that authorize an award of attorney's fees in such cases can shift market forces, creating incentives for attorneys to take clients and pursue meritorious claims that do not normally make sense from a business perspective. Fee-shifting, in other words, connects the individuals who may have been harmed with counsel who can aid them in seeking to enforce their rights under the law. The action of these private individuals provides a significant public benefit by enforcing the law, deterring future misconduct and promoting compliance with the law. Fee-shifting also reduces the need for government resources for enforcement of critical remedial laws.

In its *Interim Report*, the Maryland Access to Justice Commission recognized the role fee-shifting schemes play in expanding access to legal representation.¹ The Commission noted the large number of independent fee-shifting statutes in the State, each of which is associated with a particular type of claim, creating a non-uniform panoply of individual, statutorily created fee provisions.² The Commission also highlighted the notable lack of a provision for fees in cases involving State constitutional claims, stating that “[f]ederal claimants have the benefit of 42 USC § 1988. There is no state equivalent in Maryland, forcing many litigants to focus on federal law claims and sue in federal court when they could instead litigate in their own communities under Maryland law if they

* This document is the work of the Maryland Access to Justice Commission only. It does not represent the policy of the Maryland Judiciary.

¹ MD. ACCESS TO JUSTICE COMM'N, INTERIM REPORT & RECOMMENDATIONS 25 (2009), available at <http://www.courts.state.md.us/mdatjc/pdfs/interimreport111009.pdf>.

² *Id.*

could attract counsel.”³ To strengthen and render more uniform the award of attorney’s fees in Maryland, the Commission “endorse[d] the principle of a general fee-shifting provision as a means to promote access to justice through an award of attorney’s fees for individuals successfully enforcing their rights under Maryland law or the Maryland Constitution.”⁴

In acting on this recommendation, Maryland will have an opportunity to shape the market for legal services to create economic incentives that protect important rights. This will, of necessity, require a nuanced approach that balances the need for increased access to counsel, and subsequently an increase in the use of litigation to enforce those rights in a way that does not unduly burden state and local governments and large institutional defendants who are most often the targets of this type of litigation.⁵ The challenge is to modify the current incentive structure to promote only meritorious actions like those anticipated by the framers of the Maryland Constitution and rights-creating statutes. While it may be difficult to achieve that balance, it is worth pursuing, for without it, many of the rights established in the State remain unenforceable.

This white paper is intended to address the many issues likely to be raised in a conversation about whether to adopt a general fee-shifting provision for State statutory and constitutional claims. Section II will examine the history of fee-shifting in the context of the American and English Rules. Section III will explore the various rationales for fee-shifting and its effect on market incentives. In Section IV, the paper will discuss several variants on the theme of how a fee-shifting scheme could or should be structured. Section V will discuss how fee awards are calculated and issues Maryland should consider in crafting its scheme. Section VI considers the implications of fee-shifting for sovereign immunity and the possible impact on the Maryland Tort Claims Act. Section VII will discuss the many fee-shifting provisions embedded in individual Maryland laws to address how those might be rendered more

³ *Id.* at 26; see also Stephen J. Shapiro, *Suits Against State Officials for Damages for Violations of Constitutional Rights: Comparing Maryland and Federal Law*, 23 U. BALT. L. REV. 423, 435-36 (1994) (“Although there is no statutory remedy in Maryland similar to Section 1983 for violations of rights provided by the Maryland Constitution, the [C]ourt of [A]ppeals has held that a common-law action for damages is available for such violations. In setting forth the guidelines for common-law actions against state officials, the [C]ourt of [A]ppeals has established different standards of liability than those in a Section 1983 action.”) (footnotes omitted).

⁴ MD. ACCESS TO JUSTICE COMM’N, *supra* note 1, at 26.

⁵ *Id.* at 25; see also Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress and Statutory Fees*, 69 TEX. L. REV. 291, 298-99 (1990) (explaining the effects of public interest litigation on society).

uniform by a generic statute. Finally, in Section VIII, the paper will propose language for a general fee-shifting statute in Maryland.

II. FEE-SHIFTING IN THE CONTEXT OF THE AMERICAN RULE

Under the prevailing “American Rule,” which Maryland follows, each party to a lawsuit generally must pay his or her own legal fees, regardless of the outcome, with only a few exceptions.⁶ This presumption was adopted early in the American colonies, as a rejection of the “English Rule” under which the losing party in British courts is required to pay the litigation costs of both parties.⁷ Today, the United States is in a minority of industrialized nations adhering to the American Rule. England and Europe generally follow the English Rule, also referred to as “general indemnity.”⁸ The English Rule discourages non-meritorious claims and only plaintiffs who expect to prevail are likely to take the significant risk of initiating litigation.⁹ The American Rule was intended to increase access to the courts so that “impecunious plaintiffs could bring meritorious lawsuits without fear that they would be responsible for paying opposing counsel’s fees if unsuccessful.”¹⁰

Despite the reduced risk under the American Rule, the rule also creates significant barriers for some potential claimants. For example, low-income individuals with legal needs may lack the resources to engage an attorney. The American Rule colors the type of claims that are brought by preserving the economic incentive for meritorious cases with high damage claims, but eliminating the incentive for cases with low or non-monetary claims.¹¹ Even plaintiffs who do go forward must be willing to be made “less than whole,” because they must deduct their litigation costs from the compensation awarded. Further, “[i]f a prevailing party can recover her physician bills, it is not clear why she cannot recover her attorney fees, since both represent out-of-pocket expenses.”¹² Finally, the American Rule discourages claims for non-monetary relief, as prayers for injunctive or declaratory relief could never survive a simple cost-benefit analysis. A plaintiff with means may elect

⁶ Thomas v. Gladstone, 386 Md. 693, 699, 874 A.2d 434, 437 (2005) (“[T]he prevailing party in a lawsuit may not recover attorney’s fees unless (1) the parties to a contract have an agreement to that effect, (2) there is a statute that allows the imposition of such fees, (3) the wrongful conduct of a defendant forces a plaintiff into litigation with a third party, or (4) a plaintiff is forced to defend against a malicious prosecution.”).

⁷ Thomas D. Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 651 (1982).

⁸ *Id.* at 651, 654.

⁹ *Id.* at 652-53.

¹⁰ Brand, *supra* note 5, at 297.

¹¹ Harold J. Krent, *Explaining One-Way Fee-Shifting*, 79 VA. L. REV. 2039, 2048 (1993).

¹² *Id.* at 2069.

to spend the money on counsel to pursue such claims. Those of limited means have neither the option to do so with their own resources, nor the ability to secure counsel on the promise of payment from the returns.¹³

It is precisely the poor and politically powerless who are likely to have more difficulty retaining counsel in such a market. Low-income individuals are likely to have lower damage claims, especially when based on lost income. Further, claims to vindicate important rights under the state constitution may nonetheless result in only nominal damages awards.¹⁴

Exceptions to the American Rule

The American Rule, while still the prevailing assumption under which the civil courts operate in the United States, is hardly inviolate. Exceptions to the American Rule were introduced early on to counter some of the rule's limitations.

Contingency fees were an initial departure from the rule that did not change its underlying premise.¹⁵ The adoption of contingency fees, once thought usurious, permitted the plaintiff to utilize damage recoveries to encourage and finance the litigation.¹⁶ Such an innovation was seen as a means to secure representation and redress for the poor.¹⁷ One reason suggested for the rise of contingency fees was the scarcity of circulating cash in the American colonies.¹⁸ Settlers deprived of land had no way to pay for an attorney up front.¹⁹ The use of contingency fees increased during the late 19th and early 20th Centuries.²⁰ Notably opposed to contingency fee arrangements at the turn of the 20th Century were railroad attorneys, physicians facing malpractice claims, and jurists.²¹

Fee-shifting schemes have become another significant departure from the American Rule and have their origins in both judge-made and statutory innovation.²² By the late 1930's, American courts, especially the federal courts, had begun to craft these types of exceptions to the

¹³ Daniel L. Lowery, "Prevailing Party" Status for Civil Rights Plaintiffs: Fee-Shifting's Shifting Threshold, 61 U. CIN. L. REV. 1441, 1443 (1993).

¹⁴ Brand, *supra* note 5, at 299.

¹⁵ *Id.*; see also Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 232-60 (1998) (providing a history of contingency fees).

¹⁶ Brand, *supra* note 5, at 299.

¹⁷ See generally Karsten, *supra* note 15.

¹⁸ Karsten, *supra* note 15, at 234.

¹⁹ *Id.* at 234-35 (quoting *State v. Chitty*, 17 S.C.L. 375, 401 (1830)).

²⁰ Karsten, *supra* note 15, at 248.

²¹ *Id.* at 254.

²² See THIRD CIRCUIT TASK FORCE, COURT AWARDED ATTORNEY FEES: REPORT OF THE THIRD CIRCUIT TASK FORCE, 108 F.R.D. 237, 241 (1985).

American Rule.²³ There were two primary doctrines courts drew upon in justifying the award of attorney's fees in contravention of the American Rule. The "common fund," or "fund-in-court," doctrine permits a plaintiff whose actions result in the creation of a fund in which others have a common interest, to be reimbursed from that fund for the costs they incurred in bringing the lawsuit.²⁴ The doctrine is designed to avoid the unjust enrichment of those who benefit from the fund created by the litigation, but would otherwise bear none of the litigation costs.²⁵ Courts also began to use their authority to fashion equitable relief to extend the common-fund doctrine to cases in which the returns were small, but the benefits widespread.²⁶

The second doctrine was the "private attorney general" doctrine, which justifies the extension of fee awards to individuals who initiate actions that secure non-monetary benefits or rights for persons not parties to the litigation.²⁷ Further, the private attorney general concept was crafted to acknowledge the role individuals play in supplementing government enforcement of the law.²⁸ Government may not be able to enforce all provisions of the laws that make up the complex remedial scheme created to protect individual rights. Many of those laws create a private right of action, precisely to encourage private individuals to take steps to enforce the law.²⁹ Those private actions put violators on notice that the law will be enforced, thereby deterring future non-compliance.³⁰ Under the private attorney general doctrine, this larger social benefit justifies the award of attorney's fees to the successful plaintiff.

The private attorney general doctrine was foreclosed to federal courts by *Alyeska Pipeline v. Wilderness Society*.³¹ Plaintiffs had sued the Secretary of the Interior seeking declaratory and injunctive relief to prevent the issuance of construction permits for the Alaska oil pipeline.³² The Court of Appeals, District of Columbia Circuit awarded fees under the private attorney general doctrine in the absence of a statutory fee-shifting provision.³³ The Supreme Court reversed, positing that the creation of a fee-shifting scheme was the prerogative of Congress and

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*; see also *Trustees v. Greenough*, 105 U.S. 527 (1882) (providing an early example of the common fund doctrine).

²⁶ See THIRD CIRCUIT, *supra* note 22, at 241.

²⁷ *Id.*

²⁸ *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 285 (1975) (Marshall, J., dissenting).

²⁹ See *id.* at 263 (majority opinion).

³⁰ See *id.* at 263-64.

³¹ *Id.* at 241-42.

³² *Id.* at 241.

³³ *Id.*

could not be judicially created under the private attorney general doctrine.³⁴ *Alyeska* closed one door but opened another, ushering in an era of statutorily created fee-shifting schemes. The most significant of these statutes was the Civil Rights Attorneys' Fees Awards Act of 1976 ("Fees Act"), which Congress passed in direct response to *Alyeska*.³⁵ The Fees Act authorizes a court to award reasonable attorney's fees to the prevailing party in civil rights litigation.³⁶ Other fee statutes were passed during this period, including the Equal Access to Justice Act,³⁷ the Freedom of Information Act,³⁸ and the Truth in Lending Act.³⁹ By 1990 there were over 100 federal fee-shifting statutes.⁴⁰

Contractions of the Private Attorney General System

Both judge-made and statutory expressions of the private attorney general doctrine have experienced some retrenchment over the last thirty years. A number of restrictions were imposed on organizations funded by the federal Legal Services Corporation (LSC) significantly affecting the ability of these providers to take advantage of fee-shifting rules to benefit the poor.⁴¹ The LSC Act of 1974, and additional provisions passed in 1996, prohibited funded organizations from, among other things, handling fee-generating cases, or receiving an award of attorney's fees.⁴² More onerously, the 1996 restrictions extended the prior restrictions to activities funded by non-LSC funds.⁴³

The Administration of George H.W. Bush (Bush I Administration) adopted a policy that disfavored fee-shifting under the aegis of the President's Council on Competitiveness and its Agenda for Civil Justice

³⁴ *Alyeska*, 421 U.S. at 265.

³⁵ 42 U.S.C. § 1988 (2006); *Maine v. Thiboutot*, 448 U.S. 1, 9-10 (1980) (holding that the Fees Act permits prevailing plaintiffs in a 1983 action to recover fees whether the claim is brought in state or federal court); *see also* THIRD CIRCUIT TASK FORCE, *supra* note 22, at 241.

³⁶ *See Thiboutot*, 448 U.S. at 9-10.

³⁷ 5 U.S.C. § 504(a) (West 2007); 28 U.S.C.A. § 2412(a)-(b) (West 2011); 42 U.S.C. § 1988 (West 2000) (providing fees to prevailing parties in non-tort civil litigation against the federal government).

³⁸ 5 U.S.C.A. § 552(a)(4)(E) (West 2009).

³⁹ 15 U.S.C. § 1640 (West 2010).

⁴⁰ *See Brand*, *supra* note 5, at 301. Another notable and long-standing exception to the American Rule has been the Alaskan experiment where for over one hundred years, court rules have provided for two-way fee-shifting, similar to the English Rule. Alaska provides fees on a specific schedule to the prevailing party. AK. R. CIV. P. 82; *see also* Walter Olson & David Bernstein, *Loser-Pays: Where Next?*, 55 MD. L. REV. 1161, 1186 (1996) (advocating the use of a two-way fee-shifting scheme similar to Alaska's in the interests of "symmetry").

⁴¹ *See* Camille D. Holmes, Linda E. Perle & Alan W. Houseman, *Race-Based Advocacy: The Role and Responsibility of LSC-Funded Programs*, 36 CLEARINGHOUSE REV. 61 (2002).

⁴² *See id.*

⁴³ *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, § 50 (1996); *see also* Holmes, *supra* note 41, at 62.

Reform in America.⁴⁴ At the Council's recommendation, President Bush signed an Executive Order, since revoked, discouraging federal agencies from seeking enactment of any more one-way fee-shifting statutes.⁴⁵ Fee-shifting schemes are admittedly designed to encourage litigation by small, individual complainants aggrieved by larger, institutional actors like governments, employers and corporations.⁴⁶ The Council, which was established to create a favorable climate for business and corporate interests, correctly perceived that fee-shifting statutes were designed to level the playing field for individuals who would otherwise have little opportunity to insist on enforcement of existing laws that check corporate and government behavior.⁴⁷ When the playing field is leveled, it seems even a lion can fear a mouse.

The federal bench has also played a role in narrowing the effectiveness of private attorneys general. The Supreme Court rejected the "catalyst theory" under which a plaintiff could be awarded fees when the lawsuit caused the defendant to change its behavior, whether or not the case went to trial.⁴⁸ *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources* altered the definition of "prevailing party" to exclude those who do not secure a judicially imposed result in their favor.⁴⁹

These and other retrenchments reflect a denigration of public interest practice and undercut the important public policy considerations that led Congress to pass the Fees Act and other statutory fee-shifting provisions. Specifically, Congress stated that "[t]he premise of the Fees Act is that there is a dearth of public interest lawyers and that competitive market rates are necessary to attract competent counsel."⁵⁰

III. RATIONALES FOR FEE-SHIFTING AND ITS EFFECT ON MARKET INCENTIVES

There are a range of rationales that have been used to justify fee-shifting. Some are based on equitable principles, others are incentive-based.⁵¹ An examination of these rationales and counterarguments helps to illustrate the range of implications to be considered in trying to craft a

⁴⁴ Krent, *supra* note 11, at 2039.

⁴⁵ Exec. Order No. 12778, 3 C.F.R. 359, 365 (1991), *invalidated by*, Exec. Order No. 12988, *reprinted in*, 28 U.S.C. § 519 (West 2006).

⁴⁶ Rowe, *supra* note 7, at 663-64.

⁴⁷ Krent, *supra* note 11, at 2042.

⁴⁸ *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001).

⁴⁹ *Id.* at 606.

⁵⁰ Brand, *supra* note 5, at 377.

⁵¹ Rowe, *supra* note 7, at 652.

market for legal representation that promotes access to justice without inappropriately burdening either the courts or institutional defendants.

Fee-Shifting Promotes Fairness

The primary argument for a rule of general indemnity is that of fairness, namely, “that the prevailing party, having been adjudged to be in the right, should not suffer financially for having to prove the justice of his position.”⁵² This argument is compelling, although it can be easily used to justify a two-way fee-shifting scheme. Congress, when it has imposed a statutory scheme, has generally favored one-way fee-shifting, for reasons that will be analyzed in Section IV.

Fee-Shifting Permits the Aggrieved to be “Made Whole”

An individual who has been harmed can point to two sources of injury—the damages she suffered in enduring the initial harm and the amount she expended to redress the wrong by bringing the suit. If the latter must be deducted from the former, she will feel acutely that she has not been “made whole.” There are some limitations to this rationale as well. “Make whole” compensation, considered alone, can lead to a particularly harsh result if it was an extremely close call whether the loser did anything wrong, such as when a novel question of law is involved.⁵³ It is only really justifiable if the loser is somehow at fault.⁵⁴ Where two parties have a legitimate, good faith, disagreement over the interpretation of law, fee-shifting may be less justified by the “make whole” rationale alone, as neither party created or exacerbated the litigation expense.⁵⁵ This is, in part, why such awards remain discretionary, even though they are intended to be virtually automatic.

Fee-Shifting Deters and Punishes Undesirable Behavior

Fee awards have been used by courts to punish willful disobedience of a court order, as part of a fine, or when the losing party has acted in bad faith.⁵⁶ More generally, statutory fee awards permit the significance of the defeat to have a larger effect on the loser, especially where the damage award itself is low or non-pecuniary.⁵⁷ When a statute includes a one-way fee-shifting provision, private actors must consider the potential plaintiff’s litigation expenses when weighing the full costs of non-

⁵² *Id.* at 654.

⁵³ *Id.* at 655-56.

⁵⁴ *Id.* at 658.

⁵⁵ *Id.* at 658-59.

⁵⁶ *Alyeska*, 421 U.S. at 258-59 (citing *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 426-28 (1923)); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967); *F.D. Rich Co. v. U.S. for Use of Indus. Lumber Co.*, 417 U.S. 116, 129 (1974).

⁵⁷ Krent, *supra* note 11, at 2050, 2053.

compliance.⁵⁸ In this way, the prospect of attorney's fees acts as a check on undesirable behavior.⁵⁹ Even for governmental agencies who do not normally internalize all the costs of litigation, the prospect of attorney's fees makes litigation more expensive, deters dilatory tactics and discourages deep pocket defendants from over-litigating small cases to intimidate opposing parties.⁶⁰

Fee-Shifting Promotes Compliance with the Law

The compliance benefits of fee-shifting are derived from the private attorney general doctrine.⁶¹ Private action minimizes the legislature's cost of monitoring executive branch and private behavior.⁶² Whistleblower lawsuits and private enforcement shed light on contested administrative practices and decisions.⁶³

Too Much Litigation?

The private enforcement rationale is vulnerable to the corollary presumption that fee-shifting encourages litigation. To the extent litigation is seen as a tool for strengthening the law, this is not necessarily a problem. Fee-shifting encourages litigation as a proxy for agency investigation and prosecution.⁶⁴ It removes what some would consider an undesirable "market constraint on litigation."⁶⁵ Statutes and constitutions that create rights were intended to generate litigation to ensure their efficacy.⁶⁶ To concerns about limiting access as a means of controlling crowded court dockets, Senator Mathias, quoting Justice Brennan, had this to say:

It is true of course that there has been an increasing amount of litigation of all types filling the calendars of virtually every state and federal court. But a solution that shuts the courthouse door in the face of a litigant with a legitimate claim for relief, particularly a claim for a deprivation of a constitutional right, seems to be not only the wrong tool but a dangerous tool for solving the problem.⁶⁷

⁵⁸ *Id.* at 2056, 2058.

⁵⁹ *See* Rowe, *supra* note 7, at 660-61; *see also* Krent, *supra* note 11, at 2063, 2065-69.

⁶⁰ Krent, *supra* note 11, at 2052.

⁶¹ Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 (2003).

⁶² Krent, *supra* note 11, at 2044.

⁶³ *Id.* at 2046-47.

⁶⁴ *Id.* at 2056.

⁶⁵ *Id.* at 2052.

⁶⁶ *Id.* ("The incentive to litigate small claims aggressively may prove beneficial to the system as a whole.")

⁶⁷ Brand, *supra* note 5, at 364-65.

One incentive-based analysis suggests “one-way” or “Pro-plaintiff” fee-shifting generates the least litigation.⁶⁸ One-way fee-shifting encourages both lawsuits, by enhancing access to the courts, and simultaneously encourages settlement, “because low non-compliance rates result in low predicted probabilities of success, which in turn reduce the settlement gap between plaintiffs and defendants.”⁶⁹ This describes the ideal incentive scenario and suggests one-way fee-shifting creates the most robust market for legal services.

The ideal scenario is one in which the legislature passes laws to express its values and priorities. While the legislature may not have the means to police enforcement, private citizens are able to secure counsel, and counsel are willing to take those cases precisely because they know that, even if their client has limited means, their fee will be covered by a fee award. Attorneys still bear the risk of losing their fee should they not prevail at trial and, thus, have an incentive to only accept meritorious cases. Potential defendants know that should they fail to comply with the law, the aggrieved will have few barriers in seeking redress. Thus, rational defendants have a strong incentive to comply with the law in the first place. It follows that few cases will be brought, and when they are brought, they will be worth litigating.

Fee-Shifting Addresses the Free Rider Problem

Few plaintiffs will undertake the considerable risk and expense of litigation unless it is likely to benefit them individually in some way. In other words, before taking on such a project, a plaintiff will perform a cost-benefit analysis. The problem with public interest activities is that the benefits to any single individual are relatively small and, in many cases, are non-pecuniary. The benefits may be small enough that no one individual could ever justify the risk and expense. However, these activities have a larger social benefit that, when valued in the aggregate, certainly justify the litigation costs.⁷⁰

It is appropriate for government to use its authority to create incentives for private individuals to take actions that have a larger social benefit.⁷¹ Governments act to shape markets all the time in a variety of contexts. For example, governments recognize the benefits of public interest activities undertaken by organizations and support those efforts by

⁶⁸ Keith Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069, 1097 (1993).

⁶⁹ *Id.*

⁷⁰ Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 234-35 (1984) (“[I]nherent in the concept of public interest activity is the notion of action benefitting a larger group than the individual or group responsible for the activity.”).

⁷¹ *Id.* at 235-36.

providing such organizations with tax-exempt status, and in some cases, by providing grant funding.⁷² Fee-shifting statutes are merely an extension of this idea—a tool government can use to shift market incentives to encourage individuals, including primarily private attorneys, to engage in certain types of activities that would otherwise be performed by a public entity.

IV. STRUCTURING THE FEE-SHIFTING SCHEME

There are a variety of ways to structure a fee-shifting scheme, each of which will have a different effect on market incentives. An argument may be made for two-way fee-shifting in the interests of equity and symmetry, although such a system may create perverse incentives. One-way fee-shifting in favor of a prevailing plaintiff, on the other hand, is narrowly targeted to fulfill the goals expressed by the private attorney general doctrine.⁷³ It will also be important to carefully define “prevailing party” to achieve the desired result.

A two-way fee-shifting system is one of general indemnity.⁷⁴ This is essentially the English Rule under which the losing party, whether plaintiff or defendant, is responsible for the prevailing party’s attorney’s fees.⁷⁵ Arguments have been made for general indemnity in the interests of symmetry⁷⁶ and fairness.⁷⁷ Advocates note that the English Rule provides a number of advantages. It discourages speculative or non-meritorious litigation⁷⁸ and the purposeful delay by defendants aware of probable liability.⁷⁹ Additionally, it addresses the question of fairness for defendants involuntarily subjected to litigation and forced to incur litigation expenses when, perhaps, they are without fault.⁸⁰ A “loser pays” system “limits the tactical leverage parties with weak cases can obtain by threatening to inflict the cost of litigation on their opponents.”⁸¹

However, two-way fee-shifting can create conflicts of interest for plaintiff’s counsel. One study of British cases where general indemnity was available examined the impact of “who pays” on lawsuit outcomes.⁸²

⁷² *Id.* at 237.

⁷³ Hylton, *supra* note 68, at 1104.

⁷⁴ Olson & Bernstein, *supra* note 40, at 1166-67.

⁷⁵ *Id.* at 1161 n.1.

⁷⁶ *See id.*

⁷⁷ *See Note, Fee Simple: A Proposal to Adopt a Two-Way Fee Shift for Low-Income Litigants*, 101 HARV. L. REV. 1231, 1236-37 (1988).

⁷⁸ Olson & Bernstein, *supra* note 40, at 1161.

⁷⁹ *Id.* at 1163.

⁸⁰ *Id.* at 1162.

⁸¹ *Id.* at 1161.

⁸² *See* Herbert M. Kritzer, *What We Know and Do Not Know About the Impact of Civil Justice on the American Economy and Policy: Lawyer Fees and Lawyer Behavior in*

When litigation was privately funded, i.e., the plaintiff bears the cost of the representation, there was a substantial incentive for solicitors to settle the case, to ensure the defendant would pay their fee.⁸³ This permitted the solicitor to avoid having to collect from the plaintiff who may or may not have adequate means.⁸⁴ During the 1980's in England, solicitors with income-eligible clients were paid directly for their services by legal aid and received a reduced, but guaranteed, payment.⁸⁵ When a legal aid litigant lost, the prevailing party was not entitled to collect fees from either the losing party or the legal aid fund.⁸⁶ Thus, "if a settlement is not arrived at easily, the solicitor has little to lose by pursuing it as far as necessary."⁸⁷ One result was that fewer legal aid cases in England settled, and barristers found their trial calendar included a disproportionate number of legal aid cases.⁸⁸ Finally, during this period, a large number of individuals had legal services available to them through trade unions, where the solicitor was paid in full for her services by the union.⁸⁹ Statistics reflected that the union solicitor was the most successful advocate.⁹⁰ Full payment by the union removed the disincentives for advocacy associated with two-way fee-shifting.⁹¹

Other studies of litigation under the English Rule suggest that financial responsibility for litigation costs also affects whether the defendant will make an offer.⁹² Individual plaintiffs have fewer resources with which to pursue litigation, and are more likely to be risk averse.⁹³ These studies suggest that in a two-way fee-shifting system, large, corporate or institutional defendants have an advantage over one-time petitioners.⁹⁴ "If the plaintiff can be protected in some way from the risks of paying the other side's fee, the defendant will be more willing to make a settlement offer"⁹⁵, which resonates with the studies referenced above. When the plaintiff did not have to worry about paying the defendant's litigation costs, plaintiff's counsel was more likely to pursue the claim

Litigation: What Does the Empirical Literature Really Say?, 80 TEX. L. REV. 1943, 1955-66 (2002) (discussing studies of attorney's fees in the United Kingdom during the 1980s).

⁸³ *Id.* at 1962.

⁸⁴ *Id.*

⁸⁵ *Id.* at 1963-64.

⁸⁶ *Id.* at 1964.

⁸⁷ *Id.*

⁸⁸ Kritzer, *supra* note 82, at 1964.

⁸⁹ *Id.* at 1964-65.

⁹⁰ *Id.* at 1965.

⁹¹ *Id.* at 1957.

⁹² *Id.* at 1955-56.

⁹³ *See, e.g.*, Krent, *supra* note 11, at 2062.

⁹⁴ *See id.*; *see also* Kritzer, *supra* note 82, at 1957.

⁹⁵ Kritzer, *supra* note 82, at 1957.

aggressively.⁹⁶ Concomitantly, “[w]hen the plaintiff is fully at risk, the defendant can refuse to make an offer in the hope that the plaintiff will withdraw the claim rather than run the risk of a cost award.”⁹⁷

The incentives of a two-way fee-shifting scheme may appear attractive and more in line with the judicial goals of neutrality and impartiality. Unfortunately, such a system can create disincentives that undermine the goals of the private attorney general doctrine:

Legal costs influence all aspects of the litigation process, from the decision to file suit to the choice between settlement and trial to the question whether to take precautions against a dispute in the first place . . . The combination of all these external effects are too complicated to be remedied by a simple rule of “loser pays.” Instead, indemnity of legal fees remedies some externalities while failing to address and even exacerbating others.⁹⁸

Fee-shifting is not an administrative remedy designed to create a strictly neutral playing field. It is designed to level the inequities of the world outside the courtroom and to ensure that both parties to a dispute enter the neutral judicial forum on equal footing, despite the power imbalances that prevail outside the courtroom. These goals can only be fulfilled by the creation of a carefully crafted one-way fee-shifting mechanism.

The Supreme Court understood this to be Congress’s intent in enacting the Civil Rights Act of 1964, and articulated that understanding in *Newman v. Piggie Park Enterprises, Inc.*:⁹⁹

When a plaintiff brings an action under [Title II], he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a “private attorney general,” vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorney’s fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.¹⁰⁰

⁹⁶ See *id.* at 1956.

⁹⁷ *Id.* at 1957 (quoting Avery Weiner Katz, *Indemnity of Legal Fees*, in 5 ENCYCLOPEDIA OF LAW AND ECON. 64-65 (Boudewijn Bouckaert & Gerrit de Gees eds., 2000)).

⁹⁸ *Id.* at 1948.

⁹⁹ *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968).

¹⁰⁰ *Id.* at 402.

In providing for attorney's fees to a prevailing plaintiff, a legislature does not confer a legal advantage. The plaintiff must still prove her case in accordance with the standard set forth by the substantive law. Rather, a one-way fee-shifting provision merely shifts the incentive structure to permit individual plaintiffs to bring actions, thereby providing the opportunity to present their case: "the goal of fee-shifting statutes in general is to ensure that individuals, when injured by violations, or threatened violations, of certain laws, have access to legal counsel by a 'statutory assurance that [his or her counsel] will be paid a reasonable fee[.]'"¹⁰¹ If the legislature truly wanted to confer an advantage, it could do so by altering the liability standard or lowering the standard of proof. A fee-shifting provision is merely an affirmation that the legislature intends its substantive law to be meaningful and enforceable.

One way fee-shifting still contains the inherent risk that plaintiffs may be encouraged to pursue a weak case too far, unnecessarily increasing costs for an innocent defendant. This can be addressed by including a "bad faith exception" in the one-way fee-shifting provision. Fees may be awarded to a prevailing defendant only when the plaintiff brings an action in bad faith.¹⁰² An alternative would be an exception for "frivolous" actions. Section 1988 provides an exception where the action brought by the plaintiff is frivolous, which is less onerous for defendants, but still protects plaintiffs with non-frivolous claims.¹⁰³ A "frivolous" standard may be interpreted more generously by courts than a "bad faith" exception and may strike a better balance.¹⁰⁴

Fee-shifting provisions must carefully identify when the rule is triggered by articulating a clear definition of "prevailing party." To fully explicate what it means by "prevailing party," a well-crafted provision will address:

¹⁰¹ *Friolo v. Frankel*, 403 Md. 443, 457, 942 A.2d 1242, 1250 (2008) (citing *Friolo v. Frankel*, 373 Md. 501, 526, 819 A.2d 354, 369 (2003) [hereinafter "*Friolo I*"]).

¹⁰² See *Hylton*, *supra* note 68, at 1107. A "two-way" bad faith exception is found in Maryland Rule 1-341, which provides for fee-shifting in civil matters if the court finds the conduct of either party "was in bad faith or without substantial justification." The fee can be extracted from either the offending party, the attorney advising the conduct, or both. The rule has been applied infrequently and is intended only for cases where there has been a clear and serious abuse of judicial process. See, e.g., *Black v. Fox Hills N. Cmty. Ass'n Inc.*, 90 Md. App. 75, 83-84, 599 A.2d 1228, 1232, *cert. denied* 326 Md. 177, 604 A.2d 444 (1992).

¹⁰³ 42 U.S.C. § 1988 (West 2000).

¹⁰⁴ Compare *Christiansburg Garment Co., v. EEOC*, 434 U.S. 412, 421 (1978) (holding that plaintiff's subjective bad faith is not a necessary prerequisite to a fee award against him); with *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) ("The plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees.").

- Whether a formal judgment in the plaintiff's favor is required, or whether a consent decree, settlement or change in the defendant's behavior is sufficient to trigger the award of fees, the Equivalency Doctrine.¹⁰⁵
- If a change in the defendant's behavior is sufficient, whether the plaintiff's lawsuit must have been the "catalyst" or direct cause of the change, the Catalyst Theory.¹⁰⁶
- Whether the relief must alter the "legal relationship" between the parties, the Legal Relationship Test.¹⁰⁷
- The impact of partial resolutions and whether the outcome must have been resolved in the plaintiff's favor on the "central issue."¹⁰⁸
- Whether the plaintiff must have benefited from the outcome.¹⁰⁹
- The impact of settlement offers.¹¹⁰
- Whether the parties can simultaneously negotiate settlement and attorney's fees, and whether the defendant can extract a waiver of fees in exchange for a favorable settlement.¹¹¹ Permitting settlement offers contingent upon a waiver of fees can have a

¹⁰⁵ Brand, *supra* note 5, at 318; *see also* Rhodes v. Stewart, 488 U.S. 1, 3-4 (1988) (per curiam); Hewitt v. Helms, 482 U.S. 755, 755-56 (1987); Hanrahan v. Hampton, 446 U.S. 754, 756 (1980) (per curiam); Hyundai Motor Am. v. Alley, 183 Md. App. 261, 272-73, 960 A.2d 1257, 1263-64 (2008) (holding that no express judicial approval of the settlement was necessary where the procedure used was sufficiently indicative of prevailing party status).

¹⁰⁶ Karlan, *supra* note 61, at 206; *see also* Buckhannon, 532 U.S. at 605.

¹⁰⁷ Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792 (1989).

¹⁰⁸ *Id.* at 787-88.

¹⁰⁹ Farrar v. Hobby, 506 U.S. 103, 109 (1992).

¹¹⁰ *See* Marek v. Chesny, 473 U.S. 1 (1985) (holding that the prevailing plaintiff was not entitled to statutory fees for work performed after the date of a Rule 68 offer of judgment if the plaintiff failed to achieve better results than those offered, putting defendants in the driver's seat. Once the defendant makes an offer, plaintiff's counsel is at risk for losing his post-offer fee, which can create a conflict of interest for plaintiff's counsel who must counsel his client to accept the offer or risk losing any subsequent fee if he were to pursue his client's case more aggressively).

¹¹¹ Evans v. Jeff D., 475 U.S. 717 (1986) (allowing defendants to condition settlement of civil rights case on the waiver or reduction of plaintiff's attorney's fees); *see also* Paul Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. LAW & PUB. POL'Y 1 (2008) (suggesting that *Evans* destroyed the enforcement mechanism of the Civil Rights Act by permitting the defendant to condition settlement on a waiver of fees, which can create a conflict of interest as well for plaintiff's counsel who may have to forgo a fee in order to secure a favorable settlement for her client. This can become problematic for defendants who may need to know their bottom line before making a settlement offer. Some suggested solutions have included: standardizing market rates so defendants know what to expect; permitting defendants to discover information about probable attorney's fees; permitting defendants to make settlement offers contingent on a satisfactory resolution of the fees; or permitting defendants to make lump sum offers intended to cover both liability and fees); THIRD CIRCUIT, *supra* note 22, at 268-70.

deleterious effect on access to justice, and creates an untenable conflict for counsel.¹¹²

- Whether the fee belongs properly to the litigant only¹¹³, or whether the award can be made directly to the attorney.¹¹⁴
- Whether fees can be awarded to legal services providers representing the prevailing party *pro bono*.¹¹⁵
- The impact of mootness.¹¹⁶
- The impact of injunctive, declaratory or otherwise non-pecuniary relief.¹¹⁷
- The impact of nominal damages or *de minimis* relief.¹¹⁸

In Maryland, the Court of Special Appeals of Maryland has not followed *Buckhannon*, suggesting the catalyst theory under which the plaintiff's lawsuit must have been the "catalyst" or direct cause of the change may still be grounds for establishing prevailing party status.¹¹⁹ Under current Maryland law, the court need not sanction a settlement by issuing a consent decree before a party can be determined to have prevailed.¹²⁰ In *Hyundai Motor America v. Alley*¹²¹, the Maryland Court of Special Appeals found the plaintiff had prevailed even though the settlement was not finalized in a consent decree, although the court clearly acquiesced to the settlement, and the settlement was entered into the record.¹²² Maryland courts may prefer an interpretation of these issues that promote settlement. Most recently, the Court of Appeals of Maryland found that fees were the property of the attorney, and thus

¹¹² It has been suggested that this issue might best be settled by the creation of an ethical rule to outlaw the type of quandary created by *Jeff D*. See 475 U.S. at 717; see also Ashley E. Compton, *Shifting the Blame: The Dilemma of Fee-Shifting Statutes and Fee-Waiver Settlements*, 22 GEO. J. LEGAL ETHICS 761, 761-62 (2009).

¹¹³ *Astrue v. Ratliff*, 56 U.S. ___, 130 S.Ct. 2521 (2010) (explaining that fee awards under the Equal Access to Justice Act are payable to the litigant, not the attorney, and as such are subject to a government offset to satisfy a pre-existing debt the litigant owes to the United States); *Marek*, 473 U.S. at 1.

¹¹⁴ This issue has implications for whether the attorney can decline to accept a settlement offer contingent upon a waiver of fees, whether the fee can be diverted to pay a government debt, and also for whether fees can be awarded to a legal services provider who represented the prevailing party *pro bono*. Some legislatures and state courts, including the Maryland Court of Appeals, have made attorney's fees under fee-shifting statutes the property of the attorney. *Henriquez v. Henriquez*, 413 Md. 287, 290-92, 992 A.2d 446, 448-49 (2010).

¹¹⁵ Maryland has said "yes." *Id.* at 290-92, 992 A.2d at 448-49.

¹¹⁶ *Rhodes v. Stewart*, 488 U.S. 1, 2 (1988).

¹¹⁷ *Buckhannon*, 532 U.S. at 642-43.

¹¹⁸ *Farrar*, 506 U.S. at 109.

¹¹⁹ *Hyundai*, 183 Md. App. at 269, 960 A.2d at 1261-62.

¹²⁰ *Id.* at 270-72, 960 A.2d at 1262-63.

¹²¹ *Id.* at 272-73, 960 A.2d at 1263-64.

¹²² *Id.*, at 272-73, 960 A.2d at 1264.

payable directly to a legal services provider, avoiding the diversion of funds to cover the litigant's outstanding state debt.¹²³

V. CALCULATING THE FEE AWARD

Courts have articulated several methods for calculating attorney's fees, when warranted. Until the early 1970's, fee calculations were largely left to the court's discretion. Courts generally used a standard of reasonableness to award fees.¹²⁴ Further, courts often used a reasonable "percentage of recovery" to determine the award even though this sometimes drew criticism when awards appeared disproportionate to the actual effort expended by counsel.¹²⁵ Awarding fees based on a percentage of recovery also fails to provide a market incentive for attorneys to accept clients with claims for injunctive or other non-pecuniary relief, or where the anticipated damages are low.

In the federal system, the Fifth Circuit established an alternative method for calculating fees, delineating in *Johnson v. George Highway Express, Inc.* twelve factors the court must consider.¹²⁶ These factors included, among others, considerations of time and labor, novelty and difficulty, the skill required, the preclusion of other employment by the attorney, and the attorney's customary fee.¹²⁷ According to some, the *Johnson* method failed to provide a meaningful analytical framework to guide courts in calculating the fee award, and awards based on the method may be more subject to reversal and remand.¹²⁸

Today, federal courts generally use the "lodestar" approach in calculating fee awards. As noted by Judge Wilner in the Court's opinion in *Friolo v. Frankel*:¹²⁹

The term "lodestar" has an Anglo-Saxon origin – "lad," a way or path, and "sterre," a star. It thus was a guiding star. See WEBSTER'S UNABRIDGED DICTIONARY at 1062. It later came to denote a "guiding ideal; a model for imitation." *Id.* At some point, the term began to be applied to the method noted for determining reasonable attorney's fees.¹³⁰

¹²³ *Henriquez*, 413 Md. at 302, 992 A.2d at 455-56.

¹²⁴ THIRD CIRCUIT, *supra* note 22, at 242.

¹²⁵ *Id.*

¹²⁶ *Johnson v. George Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

¹²⁷ *Id.* at 717-19.

¹²⁸ THIRD CIRCUIT, *supra* note 22, at 245.

¹²⁹ *See, e.g., Friolo I*, 373 Md. at 501, 819 A.2d at 354.

¹³⁰ *Id.* at 504, 819 A.2d at 356, n.1.

In its most elemental form, the lodestar method requires the court to multiply reasonable hours actually worked by a reasonable market rate.¹³¹ The lodestar method, however, was always used as part of a more nuanced approach. Even when the lodestar method was used early on it was intended to be used in the context of other factors including the likelihood of success, the complexity and novelty of the issues, the quality of the attorney's work, and the recovery obtained.¹³² After *Hensley v. Eckerhart*¹³³ and *Blum v. Stenson*¹³⁴, the lodestar method became the predominant method for calculating fees in the federal system.¹³⁵

The Court of Appeals of Maryland has applied the lodestar method to the state's wage and hour laws and "indicated a general approval of the approach in conjunction with other fee-shifting statutes that provide for the possible award of attorney's fees, but lack criteria for how to calculate such fees."¹³⁶ According to the court, *Friolo I* established the lodestar method as generally acceptable, but did not mandate its use, and did not preclude the use of other standards such as those provided in *Johnson*, *Hensley*, or Rule 1.5 of the Maryland Rules of Professional Conduct.¹³⁷ While lodestar is the presumptive method of calculation under the wage and hour laws in the state, its use will necessarily involve the "clear application and explanation of factors" and "case-specific adjustments."¹³⁸

These factors can be applied as multipliers to increase or decrease an award of fees. California, for example, permits the use of multipliers to account for a variety of factors, including: the quality of the representation; the results obtained; contingent risk; the preclusion of other employment; the undesirability of the case; a delay in payment; partial success; public benefit; and the identity and resources of parties or counsel.¹³⁹ As noted by the California Supreme Court:

¹³¹ THIRD CIRCUIT, *supra* note 22, at 243.

¹³² *Friolo I*, 373 Md. at 521, 819 A.2d at 366 (citing *Lindy Bros. Bldrs., Inc. of Phila. v. Am. Radiator & Standard Sanitation Corp.*, 487 F.2d 161, 168 (1973)).

¹³³ *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

¹³⁴ *Blum v. Stenson*, 465 U.S. 886, 895, 897 (1984).

¹³⁵ THIRD CIRCUIT, *supra* note 22, at 245-46.

¹³⁶ *Manor Country Club v. Flaa*, 387 Md. 297, 320, 874 A.2d 1020, 1034 (2005) (citing *Friolo I*, 373 Md. at 504-05, 819 A.2d at 356).

¹³⁷ *Manor Country Club*, 387 Md. at 320, 874 A.2d at 1034.

¹³⁸ *Friolo I*, 373 Md. at 505, 819 A.2d at 356.

¹³⁹ Gregory M. Bergman & John P. Dacey, *Speaker Handouts: Attorney Fee-Shifting Litigation: Obtaining and Contesting Attorney Fees and Cost Awards*, STRAFFORD, slide 34 (Dec. 16, 2009), available at <http://media.straffordpub.com/products/attorney-fee-shifting-litigation-2009-12-16/speaker-handouts.pdf> (last visited Oct. 16, 2011).

[The purpose of a multiplier] is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services. . . . [The multiplier] for contingent risk [brings] the financial incentives for attorneys enforcing important constitutional rights . . . into line with incentives they have to undertake claims for which they are paid on a fee-for-services basis.¹⁴⁰

In a recent opinion, the Supreme Court expressed concern about multipliers and enhancements to a fee.¹⁴¹ In *Perdue v. Kenny A.*, the Court held that the party seeking fees has the burden of identifying a factor that the lodestar method does not adequately address.¹⁴² Without completely precluding multipliers and enhancements, the opinion certainly further decreases the likelihood that a multiplier will be applied in a federal case.

While multipliers are less favored in the federal context¹⁴³, the Court of Appeals of Maryland seems to suggest that multipliers might be permissible in the state, since the lodestar calculation is not the sole method of arriving at a reasonable fee.¹⁴⁴ In *Friolo I*, the court suggested this in saying that Rule 1.5, which requires an attorney's fee be reasonable, "is not inherently in conflict with fee-shifting statutes," because "[t]here are situations in which the two can be in harmony and where appropriate adjustments to a lodestar approach can produce a fee that would be reasonable under both the rule and the statute."¹⁴⁵ The

¹⁴⁰ Ketchum v. Moses, 17 P.3d 735, 741-42 (2001).

¹⁴¹ *Perdue v. Kenny A. ex rel. Winn*, 130 S.Ct. 1662, 1669 (2010).

¹⁴² *Id.* at 1673.

¹⁴³ See Brand, *supra* note 5, at 336, 338-39. In *Hensley*, the court entertained the possibility of adjustments to the lodestar. *Hensley*, 461 U.S. at 432-33. In *Blum*, the Court reversed a 50% enhancement of the lodestar. *Blum*, 465 U.S. at 903-04. In *Penn. v. Del. Valley Citizens' Council for Clean Air*, the Court permitted an enhancement for risk of loss. *Penn. v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711, 728 (1987). Additionally a plurality of justices suggested there should be no enhancement in such instances absent a showing that the adjustment was necessary to attract competent counsel in that particular type of litigation. *Id.* at 732-33 (plurality opinion). Subsequently, in *City of Burlington v. Dague*, the Court, by invalidating an enhancement, called into question whether a multiplier for contingent risk would ever be endorsed. *City of Burlington v. Dague*, 505 U.S. 557, 565-66 (1992). The Court noted that the lodestar is the presumptive method for federal courts, and that its calculations already presumably account for contingent risk. *Id.* The Court also emphasized that the use of enhancements would add uncertainty to the process and would increase the probability of fee litigation. *Id.*

¹⁴⁴ See, e.g., *Friolo I*, 373 Md. at 528-29, 819 A.2d at 370-71.

¹⁴⁵ *Id.* at 529, 819 A.2d at 370.

court further stated that, when courts have used lodestar, such as in *Friolo I*, the “strict hours times rate methodology . . . is . . . simply the beginning point.”¹⁴⁶

Finally, in determining how fees are computed, legislatures and courts may want to consider whether a losing defendant should have to pay a “contingency bonus” to plaintiff’s counsel, “who assumed the risk of not being paid in case of defeat.”¹⁴⁷ Another consideration is whether counsel should be able to recover the difference between a fee award and a negotiated contingency rate. Some jurisdictions provide that the attorney can recover, from the prevailing plaintiff, additional fees established in a contingency fee agreement.¹⁴⁸

Whatever method is chosen, proportionality has no place in it. The Supreme Court has stated, “[a] rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress’ [sic] purpose”¹⁴⁹ Therefore, proportionality is antithetical to the underlying purposes of fee-shifting.

The use of the lodestar method, nuanced or not, is limited in Maryland. The Court of Appeals of Maryland recently clarified in *Monmouth Meadows Homeowners Ass’n, Inc., v. Hamilton*,¹⁵⁰ that the “lodestar method is an inappropriate mechanism for calculating fee awards in private, contractual debt-collection cases. Use of the lodestar in such cases is inappropriate because they lack the substantial public interest justification underlying its application in the context of true fee-shifting statutes.”¹⁵¹ The cases in *Monmouth Meadows* involved actions by homeowners’ associations against residents delinquent in paying their annual assessments.¹⁵² The residents in each case were contractually required to pay costs and fees incurred by the associations in collecting delinquent assessments.¹⁵³ These types of contractual provisions, while enforceable under Maryland law, do not share the public policy underlying most fee-shifting statutes.¹⁵⁴ The court was not persuaded that the enforcement of the contractual provisions, while authorized by law, provided any real public benefit that might warrant the greater fees

¹⁴⁶ *Id.* at 529, 819 A.2d at 370-71.

¹⁴⁷ Rowe, *supra* note 7, at 673.

¹⁴⁸ Rowe, *supra* note 7, at 674.

¹⁴⁹ *City of Riverside v. Rivera*, 477 U.S. 561, 578 (1986).

¹⁵⁰ *Monmouth Meadows Homeowners Ass’n, Inc. v. Hamilton*, 416 Md. 325, 7 A.3d 1 (2010).

¹⁵¹ *Id.* at 336, 7 A.3d at 7.

¹⁵² *Id.* at 329, 7 A.3d at 3.

¹⁵³ *Id.*, 7 A.3d at 3.

¹⁵⁴ *Id.* at 335, 7 A.3d at 6-7.

available under a lodestar calculation.¹⁵⁵ The proper method for calculating fees in private debt collection actions is the reasonableness approach provided for in Rule 1.5 of the Maryland Lawyer's Rules of Professional Conduct. To those who might worry that use of the lodestar approach could create a slippery slope, likely to lead to enhanced fee awards in a broad range of case types, *Monmouth Meadows* suggests that there are limits.¹⁵⁶

VI. IMPLICATIONS FOR SOVEREIGN IMMUNITY AND THE MARYLAND AND LOCAL TORT CLAIMS ACT

Claims against the Maryland state government are permitted subject to the limited waiver of sovereign immunity provided for by the Maryland Tort Claims Act.¹⁵⁷ The act limits damages for injuries to a single claimant to \$200,000.¹⁵⁸ Further, the act provides that attorney's fees are not to exceed 20% for a settlement or 25% of a judgment.¹⁵⁹ This means that a prevailing plaintiff may receive an award of no more than \$40,000 in a case that settles, and no more than \$50,000 in a case which results in a judgment in his favor.

The limits contained within the Maryland Tort Claims Act creates several problems for the potential litigant, especially in light of the holding in *Lee v. Cline*¹⁶⁰, that immunity under the Maryland Tort Claims Act covers constitutional torts.¹⁶¹ Some claims, especially constitutional claims, are likely to result in low damages. Potential constitutional claimants would have to have deep pockets, and a willingness to part with their resources, in order to pursue a claim that would limit attorney fee awards to a percentage of recovery. The use of a percentage scheme to award fees eliminates all incentives for these types of claims for damages, and its effect has a disproportionately higher impact on low-income Marylanders.

Even a claimant able to secure maximum damages under the act, may incur attorney's fees well in excess of \$50,000. In such an instance, the claimant would either be made less than whole, or would have a significant incentive to settle the case when the \$50,000 mark, or the likely percentage cap, were reached in attorney's fees. Plaintiff's counsel

¹⁵⁵ *Id.* at 335, 7 A.3d at 7.

¹⁵⁶ *Monmouth Meadows*, 416 Md. at 325 36, 7 A.3d at 1, 7.

¹⁵⁷ MD. CODE ANN., STATE GOV'T §12-104 (West 1999).

¹⁵⁸ *Id.*

¹⁵⁹ MD. CODE ANN., STATE GOV'T § 12-109 (West 1985).

¹⁶⁰ *Lee v. Cline*, 384 Md. 245, 266, 863 A.2d 297, 310 (2004) (“[I]mmunity under the Maryland Tort Claims Act . . . encompasses constitutional torts and intentional torts.”).

¹⁶¹ Karen J. Kruger, *Governmental Immunity in Maryland: A Practitioner's Guide to Making and Defending Tort Claims*, 36 U. BALT. L. REV. 37, 51 (2006).

may also have a conflict of interest that might cause them to urge settlement once it became clear that the fees incurred were approaching the cap, rather than pursuing their client's claim to the fullest extent possible. As aforementioned, limiting fees to a percentage of recovery undercuts the public policy foundations of the private attorney general doctrine. It creates a remedy gap between those with means and those without.

In considering a general fee-shifting provision, the Maryland General Assembly should consider amending the Maryland Tort Claims Act to ensure that fee incentives permit aggrieved parties to have a meaningful opportunity to invoke the limited waiver of immunity provided by the act. Such an amendment might include revising the fee provisions of the Maryland Tort Claims Act to create an exception to the fee caps for constitutional torts and actions to enforce rights under Maryland laws, and to permit fees to be awarded in addition to, rather than subject to, the limited liability provided under the act in this subset of cases.

Similar changes might be contemplated for the Local Government Tort Claims Act, which includes no fee provision.¹⁶² The Act provides for a cap on damages in cases involving the liability of a local government.¹⁶³ In such claims, liability may not exceed \$200,000 per individual claim, or \$500,000 for claims that arise from the same occurrence.¹⁶⁴ The act does not provide for attorney's fees. It might be appropriate to invoke the general fee-shifting provision in that act, or amend the act itself to provide for reasonable fees to a prevailing plaintiff in actions involving constitutional claims or to enforce rights under Maryland law.

VII. MARYLAND'S NUMEROUS FEE-SHIFTING PROVISIONS

Maryland law includes numerous statutes with fee-shifting provisions including laws governing:

- Wages and hours of employment;¹⁶⁵
- Wage payment and collection;¹⁶⁶
- Worker's compensation;¹⁶⁷
- Consumer protection;¹⁶⁸

¹⁶² See MD. CODE ANN., CTS. & JUD. PROC. § 5-303 (West 2007).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ MD. CODE ANN., LAB. & EMPL. § 3-427(d) (West 1991).

¹⁶⁶ MD. CODE ANN., LAB. & EMPL. § 3-507(b)(1) (West 1991).

¹⁶⁷ MD. CODE ANN., COM. LAW § 4A-305(e) (West 1991).

¹⁶⁸ MD. CODE ANN., COM. LAW § 2A-108(4)(a) (West 1994).

- Email fraud;¹⁶⁹
- Whistleblowers.¹⁷⁰

These separate provisions, of which there are over eighty, provide for fees using a variety of terms, expressions, and specifics. Some provide for “reasonable attorney’s fees¹⁷¹” or “reasonable counsel fees¹⁷²,” while others provide for “fees that are just and proper under all the circumstances.¹⁷³” Some provide for “expenses¹⁷⁴” or reasonable or necessary expenses “of prosecuting or defending the proceeding¹⁷⁵” while others add specific conditions under which fees may be awarded.¹⁷⁶ In an action to recover unpaid wages, for example, the court may award a prevailing employee reasonable counsel fees and other costs, provided the action was not the result of a bona fide dispute.¹⁷⁷

Most include no guidance on how the fee is to be calculated. The family law fee-shifting provisions provide some direction to the court in determining whether to exercise its discretion to award fees, but no guidance on precisely how the fee is to be calculated.¹⁷⁸ In actions concerning divorce, marital property, alimony and child support, before granting an award of attorney’s fees, the court must consider the financial status or resources, the financial needs of both parties, and whether there was substantial justification for prosecuting or defending the proceeding.¹⁷⁹ On the other hand, attorney’s fees in civil actions by merchants against shoplifters are to be calculated without regard to the ability of the respondent to pay.¹⁸⁰ Fees are capped at \$500 in actions brought to impose a lien for nonpayment of ground rent.¹⁸¹ For the most

¹⁶⁹ MD. CODE ANN., CTS. & JUD. PROC. § 10-4A-08 (West 1988).

¹⁷⁰ MD. CODE ANN., STATE FIN. & PROC. § 11-303-305(6) (West 2004); MD. CODE ANN., STATE PERS. & PENS. § 5-311 (West 1996); *see also* PAUL MARK SANDLER & JAMES K. ARCHIBALD, PLEADING CAUSES OF ACTION IN MARYLAND 42 (4th ed. 2008) (providing a comprehensive list of statutory provisions for plaintiff’s attorney’s fees).

¹⁷¹ *See, e.g.*, MD. CODE ANN., REAL PROP. § 8-203(b)(2) (West 2006); *see also* MD. CODE ANN., STATE GOV’T § 20-1035(e)(2) (West 2009).

¹⁷² *See, e.g.*, MD. CODE ANN., LAB. & EMPL. § 3-507(b)(1) (West 2002).

¹⁷³ *See, e.g.*, MD. CODE ANN., FAM. LAW § 12-103(a) (West 2006) (regarding an action for child support).

¹⁷⁴ *See, e.g.*, MD. CODE ANN., COM. LAW § 3-411 (West 2002) (stating in the Comments that “[t]here is no express provision for attorney’s fees, but attorney’s fees are not necessarily meant to be excluded.”).

¹⁷⁵ *See, e.g.*, MD. CODE ANN., FAM. LAW § 7-107(b) (West 2006) (in divorce matters).

¹⁷⁶ *See generally*, PLEADING CAUSES OF ACTION IN MARYLAND, *supra* note 170.

¹⁷⁷ MD. CODE ANN., LAB. & EMPL. § 3-507.2(b) (West 2010).

¹⁷⁸ *See* MD. CODE ANN., FAM. LAW §§ 7-107(c), 8-214(c), 11-110(c), 12-103(b) (West 2006).

¹⁷⁹ *Id.*

¹⁸⁰ MD. CODE ANN., CTS. & JUD. PROC. § 3-1305(b) (West 1991).

¹⁸¹ MD. CODE ANN., REAL PROP. § 8-402.3 (j)(3)(ii) (West 2002).

part, what guidance there is on calculating the fee comes primarily from Maryland case law.¹⁸²

The family law fee provisions highlight another feature of the panoply of statutory fee provisions. Most Maryland statutory fee provisions provide for one-way fee-shifting, authorizing the award of fees to a prevailing plaintiff. A few, including those governing fees in family law matters, and those involving time-shares¹⁸³, mobile home park rent¹⁸⁴, discriminatory housing practices¹⁸⁵, ground rent¹⁸⁶, violations of the Maryland condominium act¹⁸⁷, and those involving letters of credit¹⁸⁸, provide for two-way fee-shifting. A few others, like the family law provisions, provide for one-way fee-shifting, with a bad faith exception, permitting an award of fees to the defendant in an action brought in bad faith or without substantial justification.¹⁸⁹

In its *Interim Report*, the Maryland Access to Justice Commission urged the adoption of a generic fee-shifting provision, in part, to render more uniform the many different fee-shifting provisions embedded in the law.¹⁹⁰ Such a provision could codify Maryland case law on how those provisions should be interpreted, and how the fees should be calculated. A generic fee-shifting provision would improve the ability of Maryland judges to understand and apply those provisions uniformly, and would ensure that those provisions are effectively enforced to ensure access to representation in these matters that are so critical for many Marylanders.

VIII. A PROPOSED FEE-SHIFTING PROVISION FOR MARYLAND

Connecticut and Massachusetts have each adopted statutes that award attorney's fees to prevailing plaintiffs for state constitutional claims brought under those state's civil rights acts.¹⁹¹ California legislation, a

¹⁸² See *supra* Section V.

¹⁸³ MD. CODE ANN., REAL PROP. § 11A-125(c) (West 2002).

¹⁸⁴ MD. CODE ANN., REAL PROP. § 8A-1501(b)(4) (West 2002).

¹⁸⁵ MD. CODE ANN., STATE GOV'T. § 20-1035(e)(2) (West 2007).

¹⁸⁶ MD. CODE ANN., REAL PROP. § 8-402.3 (j)(3)(ii) (West 2002).

¹⁸⁷ MD. CODE ANN., REAL PROP. § 11-113(c) (West 1985).

¹⁸⁸ MD. CODE ANN., COM. LAW § 5-111(e) (West 2002).

¹⁸⁹ See, e.g., *Fox Hills*, 90 Md. App. at 83-84, 599 A.2d at 1232.

¹⁹⁰ MARYLAND ACCESS TO JUSTICE COMMISSION, *supra* note 1, at 26-27.

¹⁹¹ CONN. GEN. STAT. §§ 52-251(a), 46A-58 (West 1982) (allowing attorney's fees in a civil action to recover damages for injury to the person or property arising out of a deprivation of state or U.S. constitutional rights, privileges or immunities, on account of religion, national origin, alienage, color, race, sex, sexual orientation, blindness, or physical disability); MASS. GEN. LAWS ANN. ch. 12, § 11H, 11I (West 2010) (allowing an award of reasonable attorney's fees in an amount to be fixed by the court to an aggrieved person who prevails in an action under the commonwealth's civil rights statute); see also JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES 10-03 (4th ed. 2006) (reviewing state legislation authorizing attorney fee awards).

codification of the private attorney general doctrine, permits the award of attorney's fees to successful parties in any action that has resulted "in the enforcement of an important right affecting the public interest" provided a significant benefit, monetary or non-monetary, has been conferred on the general public or a large class of persons, the costs of private enforcement render an award appropriate, and such fees should not be paid out of the recovery, in the interests of justice.¹⁹² The California version is broader, including claims that affect the public interest, not just constitutional claims, although it appears to favor class actions and actions in which the benefit to a larger group is clearly evident.¹⁹³

The following proposed statutory language for Maryland is designed to capture the benefits of both types of provisions. On the one hand, it is designed to provide attorney's fees to prevailing plaintiffs asserting state constitutional claims or vindicating rights under Maryland remedial laws. It is also intended to bring under one umbrella the application of attorney's fees to other state laws that already authorize such an award. As such, it is designed to codify existing state law defining "prevailing plaintiff" and articulate the mechanism for calculating the fee award using the nuanced lodestar method envisioned by current Maryland case law. Finally, the proposed act would amend the fee provisions of the Maryland Tort Claims Act to create an exception to the fee caps for constitutional torts and actions to enforce rights under Maryland laws, and to permit fees to be awarded in addition to, rather than subject to, the limited liability provided under the act in this subset of cases. The latter change is likewise proposed for the Local Government Tort Claims Act.

The proposed statute should either cross-reference all existing statutory fee-shifting provisions or, in the alternative, replace those provisions with a reference to the proposed provision offered below, noting that "[p]revailing plaintiffs under this law are entitled to fees and expenses under this statute in accordance with [the new provision]."

MD. CODE ANN., CTS. & JUD. PROC. Title 3, NEW Subtitle 4A or 18:

§ 3-4A-01/3-1801. Attorney's fees in actions vindicating Maryland rights
Notwithstanding any other provision of law, in any civil action to enforce rights secured by the Constitution, Declaration of Rights, or laws of Maryland, the court may award the prevailing party reasonable attorney's fees and expenses as part of the costs.

¹⁹² CAL. CIV. PROC. CODE § 1021.5 (West 2010).

¹⁹³ See Friesen, *supra* note 191, at 10-03 ("[W]hile the language [of the California act] is not confined to suits in the nature of a class action, it is probable that the enforcement of a constitutional right must, in the particular case, have a broader impact than to rectify an individual injustice.").

§ 3-4A-02/3-1802. Prevailing party

(a) For purposes of this subtitle or any other provision of a remedial state statute authorizing an award of attorney's fees,

- (1) a prevailing plaintiff includes one whose litigation achieved the desired result in whole or in substantial part, by bringing about a voluntary change in the conduct of the defendant;
- (2) a defendant may be awarded attorney's fees only upon a finding that the plaintiff's action was frivolous.

§ 3-4A-03/3-1803. Calculation of award

(a) For purposes of this subtitle or any other provision of a remedial state statute authorizing an award of attorney's fees, the court shall determine the award by:

- (1) multiplying the number of hours reasonably expended by reasonable hourly rates;
- (2) determining whether any adjustment should be made to that total after considering:
 - (i) the time and labor required;
 - (ii) novelty and difficulty of the questions;
 - (iii) the skill required to perform the legal service properly;
 - (iv) preclusion of other employment by the attorney due to acceptance of the case;
 - (v) the customary fee for similar work in the community;
 - (vi) whether the fee is fixed or contingent;
 - (vii) time limitations imposed by the client or circumstances;
 - (viii) the amount involved and the results obtained;
 - (ix) the experience, reputation, and ability of attorneys;
 - (x) undesirability of the case;
 - (xi) the nature and length of professional relationship with the client; and
 - (xii) awards in similar cases; and
- (3) and awarding reasonable expenses.

Amendments to the Maryland Tort Claims Act:**MD. CODE ANN., STATE GOV'T. Title 12:**

§ 12-104. Waiver of State tort immunity

(a)(2) The liability of the State and its units may not exceed \$200,000 to a single claimant for injuries arising from a single incident or occurrence, IN ADDITION TO ANY AWARD OF ATTORNEY'S FEES AND

EXPENSES MADE PURSUANT TO COURTS AND JUDICIAL PROCEEDINGS § 3-4A-01/3-1801.

...§ 12-109. Counsel fees

EXCEPT PURSUANT TO COURTS AND JUDICIAL PROCEEDINGS § 3-4A-01/3-1801, Counsel may not charge or receive fees that exceed:

- (1) 20% of a settlement made under this subtitle; or
- (2) 25% of a judgment made under this subtitle.

Amendments to the Local Government Tort Claims Act:

MD. CODE ANN., CTS. & JUD. PROC. Title 5, subtitle 3:

§ 5-302. Representation by counsel; scope

(b)(2)(i) An employee shall be fully liable for all damages awarded in an action in which it is found that the employee acted with actual malice, IN ADDITION TO ANY AWARD OF ATTORNEY'S FEES AND EXPENSES MADE PURSUANT TO COURTS AND JUDICIAL PROCEEDINGS § 3-4A-01/3-1801.

§ 5-303. Local government liability; defenses available

(a)(2) The limits on liability provided under paragraph (1) of this subsection do not include interest accrued on a judgment OR ANY AWARD OF ATTORNEY'S FEES OR EXPENSES MADE PURSUANT TO COURTS AND JUDICIAL PROCEEDINGS § 3-4A-01/3-1801.