# WHEN SHOULD THE VICTOR RECEIVE THE SPOILS?: DETERMINING THE PROPER THRESHOLD FOR ATTORNEY FEE AWARDS AND THE PREVAILING PLAINTIFF STANDARD UNDER THE NEW JERSEY CIVIL RIGHTS ACT'S FEE-SHIFTING PROVISION

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> Look beneath the surface: never let a thing's intrinsic quality or worth escape you.[1]

## *I. Introduction*

The fee-shifting provision of the New Jersey Civil Rights Act ("NJCRA" or the "Act")[2] encourages plaintiffs to enforce the Act's civil rights protections by authorizing courts to award attorney's fees to prevailing parties in cases brought under state law.[3] The most controversial issue involving this provision is whether New Jersey courts should construe it to require defendants to satisfy a higher threshold than plaintiffs before receiving attorney's fees.[4] The provision raises another important question concerning the point at which a plaintiff "prevails" in an action under the Act for the purpose of receiving attorney's fees.[5] Resolution of both issues requires an analysis of the statutory text and the legislative history of the NJCRA, along with an appraisal of the state judiciary's power to shape the Act's contours.

Following this introduction, Parts II and III of this article discuss the history of the NJCRA. Parts II and III also consider whether the courts should imply a heightened standard for defen-

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[1] MARCUS AURELIUS, MEDITATIONS 91 (Maxwell Staniforth trans., Penguin Books 1964).

[2] N.J. STAT. ANN. § 10:6-2(f) (West 2005). The fee-shifting portion of the Act states: "[i]n addition to any damages, civil penalty, injunction or other appropriate relief awarded in an action brought pursuant to subsection c. of this section, the court *may* award the prevailing party reasonable attorney's fees and costs." *Id.* (emphasis added); *see also* discussion *infra* Part VI (explaining how the word "may" in the Act's statutory text will likely impact how courts will interpret and apply the provision).

[3] N.J. STAT. ANN. §§ 10:6-2(c), (f). The NJCRA authorizes courts to award attorney's fees to prevailing parties in a cause of action for damages or injunctive relief brought by:

> Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law . . . .

*Id.* § 10:6-2(c).

[4] Robert G. Seidenstein, *NJ's Rights Law Sets Off a Fee-Shift Push*, N.J. LAW., Sept. 20, 2004, at 39.

[5] *See* discussion *infra* Part VI.

dant attorney's fee awards even though the statute does not expressly state one. Part IV discusses the federal approach to attorney's fee awards for prevailing defendants in civil rights actions.

The application of federal fee-shifting statutes in the context of civil rights actions lends valuable guidance to New Jersey courts on how they should apply the Act's own fee-shifting measure.[6] Part V discusses the proper threshold for awarding attorney's fees to prevailing defendants. Part VI of this article analyzes when a plaintiff should qualify as a "prevailing party" for the purpose of collecting attorney's fees under the Act. Another key question, discussed in Part VII of this article, is whether the New Jersey Supreme Court has the option of promulgating a court rule specifically addressing fee-shifting in the context of state constitutional claims, and whether the court should also use this avenue to require that plaintiffs litigate in bad faith for defendants to obtain attorney's fees.

## *II. Overview of the New Jersey Civil Rights Act*

Governor James E. McGreevey signed the NJCRA into law on September 10, 2004.[7] Assemblyman Neil Cohen, the primary sponsor of the Act, heralded the bill as decreasing the state's reliance on the federal government for safeguarding the civil rights of New Jersey citizens.[8] Senator Nia Gill, the Act's main sponsor in the Senate, said the state civil rights measure would "fill in gaps that exist under current law" and deter civil rights violations.[9] The governor's statement upon signing the NJCRA reflected Senator Gill's statements, noting that the Act "provides a powerful new procedural mechanism to safeguard the exercise of State and federal constitutional rights" and "integrate[s] seamlessly with the existing jurisprudence that protects civil rights."[10]

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[6] *See* discussion *infra* Part IV.

[7] *McGreevey Signs State Civil Rights Act into Law*, PHILA. INQUIRER, Sept. 13, 2004, at B02.

[8] *Id.*

[9] Press Release, N.J. Senate Democrats, Gill Measure to Establish the New Jersey Civil Rights Act Becomes Law (Sept. 13, 2004), *available at* http://www.njsedems.com/Releases/04/September/Gill%20Measure%20to%20Estabish%20the%20New%20Jersey%20Civil%20Rights%20Act%20Becomes%20Law,%209-13-04.htm [hereinafter New Jersey Senate Democrats].

[10] OFFICE OF THE GOVERNOR OF THE STATE OF NEW JERSEY, GOVERNOR'S STATEMENT

The legislature passed the NJCRA to create a state law claim analogous to 42 U.S.C. § 1983, the seminal federal civil rights statute.[11] The NJCRA grants private citizens a cause of action against actors who, "under color of law," deprive individuals of, or "interfere[] or attempt[] to interfere" with substantive rights arising under the equal protection, due process, or privileges and immunities provisions of the United States Constitution, or federal statutes or any substantive rights arising under either the New Jersey Constitution or state law.[12]

Additionally, the NJCRA gives the state attorney general authority to pursue a civil action in law on behalf of either the state or a private citizen for the above mentioned violations.[13] Unlike private citizens, however, the attorney general can sue individuals not acting "under color of law,"[14] in marked contrast to 42 U.S.C. § 1983, which exclusively applies to those acting under color of law even if the Attorney General of the United States brings the suit.[15] When the state attorney general brings an action under the NJCRA, the law entitles injured parties to collect any damages arising from the suit.[16] The court may also exact civil penalties, which are payable to the state treasury.[17]

The most controversial portion of the NJCRA is its fee-shifting provision, which expressly allows the prevailing party to receive attorney's fees regardless of whether that party was a plaintiff or a

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UPON SIGNING ASSEMBLY BILL 2073 (2004), *available at* http://www.judiciary.state.nj.us/legis/2004c143.pdf [hereinafter GOVERNOR'S STATEMENT].

[11] ASSEMBLY JUDICIARY COMM., STATEMENT TO ASSEMBLY NO. 2073, 211th Legis., at 2 (N.J. 2004) [hereinafter ASSEMBLY JUDICIARY COMM. STATEMENT]; GOVERNOR'S STATEMENT, *supra* note 10. The relevant text of 42 U.S.C. § 1983 states:

> Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2000).

[12] N.J. STAT. ANN. § 10:6-2(c)-(d) (West 2005).

[13] *Id.* § 10:6-2(b).

[14] *Id.* § 10:6-2(a)-(b).

[15] *See* 42 U.S.C. § 1983.

[16] N.J. STAT. ANN. § 10:6-2(a)-(b).

[17] *Id.* § 10:6-2(e).

defendant.[18] Although the plaintiffs' bar and the American Civil Liberties Union of New Jersey ("ACLU-NJ") applauded the substance of the Act, they fear that the fee-shifting provision will discourage plaintiffs from litigating under the state cause of action.[19] By contrast, the New Jersey League of Municipalities ("League") praised the fee-shifting measure for relieving local taxpayers of a potentially immense fiscal burden.[20] The unknown factor looming large over the NJCRA is how courts will interpret and apply the fee-shifting provision if a defendant prevails in an action brought under the Act.[21]

### *III. Legislative History of the New Jersey Civil Rights Act*

The legislative history of the NJCRA reveals how the legislature reached a compromise that furthers the goal of improving redress for civil rights violations while acknowledging the importance of preserving the financial well-being of the state's municipalities. An understanding of this basic compromise is indispensable in construing the Act's fee-shifting provision as applied to defendant attorney's fee awards.

Assemblyman Neil Cohen made three prior attempts at passing a state civil rights bill through the state legislature.[22] In his fourth attempt, he introduced Assembly Bill 2073 ("A-2073") in the Assembly on February 9, 2004, which featured the same text as the previous three bills.[23] A-2073 established a state law remedy akin to 42 U.S.C. § 1983, the federal civil rights statute that provides a private cause of action for claims involving deprivation or

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[18] *See id.* § 10:6-2(f); Deborah Leah Stapleton, *2004 Legislative Agenda: Civil Rights Advance in Three NJ Bills*, CIVIL LIBERTIES REP. (ACLU of N.J., Newark), 2nd Quarter 2004, at 2, *available at* http://www.aclu-nj.org/downloads/2ndQuarter2004.pdf.

[19] *See* Robert G. Seidenstein, *Heralded Civil Rights Bill Might Turn Off Plaintiffs*, N.J. LAW., June 28, 2004, at 1.

[20] Memorandum from the N.J. League of Municipalities, to Mayors of New Jersey Municipalities (June 25, 2004), *available at* http://www.njslom.org/ml062504.html.

[21] Seidenstein, *supra* note 19, at 39. The New Jersey Supreme Court declined to consider the issue in *Pasqua v. Council*, No. A-131-04, 2006 N.J. LEXIS 171 (N.J. 2006), because the Act "did not exist when the complaint was filed or when argument was heard before the Appellate Division." *Id.* at *41-42.

[22] Assemb. B. 3991, 209th Leg. (N.J. 2001); Assemb. B. 510, 210th Leg. (N.J. 2002); Assemb. B. 1843, 211th Leg. (N.J. 2004).

[23] Assemb. B. 2073, 211th Leg. (N.J. 2004) (as introduced).

interference with an individual's federal rights.[24] The bill sought to fill in possible gaps left by remedies provided by New Jersey's Law Against Discrimination (the "LAD")[25] and the state statute granting a civil cause of action to victims of bias crimes.[26]

The League, reputed to be one of the most powerful lobbying organizations in the state,[27] vigorously opposed the original fee-shifting provision of A-2073,[28] which made clear that courts could only award fees to prevailing plaintiffs.[29] The League was concerned that municipalities would be compelled to spend large amounts on legal fees without the ability to recover those fees.[30] Although acknowledging that municipalities could seek fees under the state's frivolous lawsuit statute,[31] the League argued that the frivolous lawsuit statute failed to provide municipalities with

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[24] ASSEMBLY JUDICIARY COMM. STATEMENT, *supra* note 11, at 2.

[25] *Id.*

[26] *Id.* (citing N.J. STAT. ANN. § 2A:53A-21).

[27] Seidenstein, *supra* note 19, at 39. The New Jersey League of Municipalities is a lobbying organization representing all 566 New Jersey municipalities. N.J. League of Municipalities, *What Is the League?*, http://www.njslom.org/njlabout.html (last visited Jan. 16, 2006). The League is noted for its annual convention in Atlantic City, an event that in November 2004 attracted more than 21,000 people. *Id.*

[28] Memorandum from the N.J. League of Municipalities, to Mayors of N.J. Municipalities, A-2073/S-1558 Provision for an Award of Counsel Fees to a Prevailing Plaintiff (May 21, 2004), *available at* http://www.njslom.org/ml052104.html [hereinafter Counsel Fees Memorandum I]; Memorandum from the N.J. League of Municipalities, to Mayors of N.J. Municipalities, A-2073/S-1558 Plaintiff Attorney Fees (June 3, 2004), *available at* http://www.njslom.org/ml060304.html [hereinafter Counsel Fees Memorandum II].

[29] Assemb. B. 2073, 211th Leg. (N.J. 2004) (as introduced). The original fee-shifting provision in bill A-2073 stated the following: "In addition to any damages, civil penalty, injunction or other appropriate relief awarded in an action brought pursuant to this act, the court may award reasonable attorney's fees and costs." *Id.* The text makes clear that courts could only award fees over and above the relief it already granted to a plaintiff. *Id.*

[30] Counsel Fees Memorandum II, *supra* note 28.

[31] Counsel Fees Memorandum I, *supra* note 28; N.J. STAT. ANN. § 2A:15-59.1(b)(1)-(2) (West 2005). The statute defines the term "frivolous" as pertaining to complaints, counterclaims, cross-claims, or defenses that are:

> [c]ommenced, used, or continued in bad faith, solely for the purpose of harassment, delay, or malicious injury; or . . . the non-prevailing party knew, or should have known, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good-faith argument for an extension, modification or reversal of existing law.

*Id.*

reasonable relief because it requires complaints to have "no basis in law or fact" and thus establishes "a heavy, almost insurmountable burden" for municipalities seeking to recover attorney's fees.[32]

The League also objected to the original scope of the NJCRA, which extended a cause of action to plaintiffs alleging violations of procedural as well as substantive rights.[33] Citing the prospect of increased litigation and fiscal burdens necessitating an increase in property taxes, the League sought to motivate municipalities to introduce and pass resolutions opposing the bill.[34] The League also cited figures from the Municipal Excess Liability Joint Insurance Fund estimating that the Act would cost municipalities either between $25 and $50 million dollars or more annually.[35]

The assembly passed A-2073 on February 23, 2004 by a vote of 51-6, with 23 abstentions.[36] After the Senate Judiciary Committee voted out Senate Bill 1558 ("S-1558"), the senate's analogue to A-2073, on May 6, 2004,[37] Senator Gill proposed amending the fee-shifting provision so that any prevailing party could receive attorney's fees from the court.[38] The senate passed a version of the bill containing Senator Gill's amendment, along with additional amendments changing all statutory references from "individual" to "person"[39] and directing the court to award the state Attorney General's Office reasonable attorney's fees if the attorney general prevails in litigation.[40] The assembly concurred in the senate's

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[32] Counsel Fees Memorandum I, *supra* note 28.

[33] *See* N.J. Assemb. B. 2073; Counsel Fees Memorandum I, *supra* note 28. Among other things, the League feared a plethora of claims stemming from planning or zoning board rulings, liquor licenses, grievance hearings for municipal employees, and student disciplinary hearings. *Id.*

[34] Counsel Fees Memorandum I, *supra* note 28.

[35] Memorandum from the N.J. League of Municipalities, to Mayors of N.J. Municipalities, Sample Resolution Opposing A-2073/S-1558 (May 27, 2004), *available at* http://njslom.org/ml052704.html.

[36] Mary P. Gallagher, *Sponsors Confident As State Analog to § 1983 Heads Toward Floor Vote*, N.J. L.J., May 24, 2004, at 11.

[37] N.J. SENATE JUDICIARY COMM., STATEMENT TO S. 211-1558, at 2 (N.J. 2004) [hereinafter STATEMENT TO S. 211-1558].

[38] *Id.* (with amendments proposed by Sen. Gill).

[39] *Id.* By inserting "person" in place of "individual," the amendment expressly embraced "corporations and other legal entities" within the ambit of the statutory language. *Id.*

[40] S. 1558, 211th Leg. (N.J. 2004) (passed by senate with amendments for assembly consideration).

amendments.[41] In addition, the assembly passed an amendment proposed by Assemblyman Cohen limiting the scope of the bill's language to substantive rights.[42] The senate concurred in the assembly's amendments and sent the assembly's version of the NJCRA to the governor.[43]

The plaintiffs' bar, along with the ACLU-NJ, expressed concern over the amended fee-shifting language.[44] Both groups feared that the prospect of paying a defendant's litigation costs would discourage plaintiffs from bringing valid civil rights claims.[45] The executive director of ACLU-NJ asked the governor to return the bill to the legislature with recommendations for a provision permitting defendants to collect attorney's fees only if plaintiffs act in bad faith in bringing their claims.[46] The governor did not entertain this request and signed the bill into law as written.[47]

Assemblyman Cohen downplayed objections to the fee-shifting language, stating that the provision mirrored the wording of the fee-shifting provision in the federal civil rights law.[48] He added that federal courts rarely grant attorney's fees to defendants in civil rights cases because those courts have implied higher thresholds for defendant attorney's fee awards.[49] Those opposing the NJCRA's fee-shifting language hoped that courts would imply a requirement that plaintiffs act in bad faith in bringing their civil

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[41] Assemb. B. 2073, 211th Leg. (N.J. 2004) (enacted).

[42] *Id.*

[43] *Id.*

[44] Robert Schwaneberg, *New State Law Boosts Civil Rights Lawsuits*, STAR LEDGER (N.J.), Sept. 11, 2004, at 8; Stapleton, *supra* note 18, at 2.

[45] Seidenstein, *supra* note 19, at 1, 39; Stapleton, *supra* note 18, at 2.

[46] Schwaneberg, *supra* note 44. Notably, New Jersey's Law Against Discrimination ("LAD") expressly requires a finding that a plaintiff litigate in bad faith before awarding fees to a defendant. N.J. STAT. ANN. § 10:5-27.1 (West 2005). The Law Against Discrimination's fee-shifting provision reads:

> In any action or proceeding brought under this act, the prevailing party may be awarded a reasonable attorney's fee as part of the cost, provided however, that no attorney's fee shall be awarded to the respondent unless there is a determination that the complainant brought the charge in bad faith.

*Id.*

[47] Schwaneberg, *supra* note 44.

[48] *Id.*

[49] Seidenstein, *supra* note 19, at 1.

rights claims before awarding attorney's fees to prevailing defendants.[50]

### *IV. How Fee-Shifting Provisions Are Applied on the Federal Level*

The application of fee-shifting provisions on the federal level offers valuable guidance with respect to how legislative intent and public policy can impact the interpretation of fee-shifting statutes. Such analysis is highly useful in construing the NJCRA.

In *Alyeska Pipeline Service Co. v. Wilderness Society*,[51] the United States Supreme Court ruled that Congress must specifically authorize an award of attorney's fees to a prevailing party, and, in the absence of such authorization, a court may not exercise its equitable jurisdiction to grant such an award.[52] The Court held that absent express statutory enactment, the default principle of the "American Rule" requires that each party bear its own litigation costs.[53] The Court acknowledged that over time, lower courts have exercised their equitable authority to carve out various exceptions to a statute passed by Congress in 1853 expressly limiting courts' discretion to award attorney's fees.[54] Despite the failure of Con-

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[50] *Id.*

[51] 421 U.S. 240, 242-46 (1975). In this case, the respondent originally filed for declaratory and injunctive relief to restrain the Secretary of the Interior from issuing permits to the Trans-Alaska Pipeline Co. "in violation of § 28 of the Mineral Leasing Act of 1920 . . . and without compliance with the National Environmental Policy Act of 1969 (NEPA)." *Id.* at 242-43. The district court granted a preliminary injunction, at which point the court allowed Alyeska and the state of Alaska to intervene. *Id.* at 243. The district court then dissolved its preliminary injunction, denied a permanent injunction, and dismissed the complaint. *Id.* at 244. The Court of Appeals for the D.C. Circuit reversed. *Id.* Congress subsequently amended the Mineral Leasing Act as well as NEPA to allow issuance of the permits. *Id.* at 244-45. Neither the Mineral Leasing Act nor NEPA contained a provision allowing the prevailing party to receive attorney's fees. *Id.* at 245. Nonetheless, the Court of Appeals awarded plaintiff-respondents attorney's fees because the plaintiffs acted as "private attorneys general" vindicating "important statutory rights." *Id.* at 245-46 (quoting Wilderness Soc'y v. Morton, 495 F.2d 1026, 1032 (D.C. Cir. 1974)). The Supreme Court overturned the Court of Appeals' ruling. *Id.* at 271.

[52] *Id.* at 261-64.

[53] *Id.* at 247. The American Rule states that parties must pay their own way through litigation, standing in contrast to the English Rule, which gives courts discretion to award attorney's fees to a prevailing party. *Id.* at 247 n.18 (citing Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967)).

[54] *Id.* at 252, 257-59. Examples of exceptions to the American Rule created under the equitable authority of the federal courts include allowing trustees to recover at-

gress to attack these judicially created exceptions, the Court noted that Congress maintained the language of the 1853 statute up to the present time and never enacted an enabling statute authorizing the federal judiciary to award fees to a prevailing party at the court's discretion.[55]

The Court recognizes, however, that certain fee-shifting provisions enacted by Congress give district courts discretion to award attorney's fees in a manner that is consistent with statutory policy.[56] For example, in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, the United States Supreme Court rejected the petitioner's argument that the fee-shifting provision in Title VII of the Civil Rights Act of 1964[57] requires courts to award defendants as well as plaintiffs attorney's fees "unless special circumstances would render such an award unjust."[58] According to the Court, because Congress bestowed upon Title VII plaintiffs the function of private attorneys general, which entails the enforcement of federal law and the implementation of important public policies, equitable considerations require defendants to meet a higher burden than plaintiffs in order to collect attorney's fees.[59] The Court implemented a heightened threshold requiring a plaintiff's action to be "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith" before allowing prevailing defendants to receive attorney's fees.[60] In *Hughes v. Rowe*, the Court specifically applied this holding to defendant attorney's fee awards under 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Award Act of 1976.[61]

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torney's fees, and awarding attorney's fees to a party whose adversary committed "willful[] disobedience of a court order" or "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 257-58 (citations omitted).

[55] *Id.* at 260.

[56] Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416 (1978).

[57] 42 U.S.C. § 2000e-5(k) (2000). In relevant part, this provision states, "[i]n any action or proceeding under this title [Title VII of the 1964 Civil Rights Act] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee." *Id.*

[58] *Christiansburg Garment Co.*, 434 U.S. at 418 (quoting EEOC v. Christiansburg Garment Co., 550 F.2d 949, 953 (4th Cir. 1977) (Widener, J., dissenting)); *see also* Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 (1968) (originally stating the identical proposition in the context of a federal civil rights action under Title II).

[59] *Christiansburg Garment Co.*, 434 U.S. at 418-19.

[60] *Id.* at 421.

[61] Hughes v. Rowe, 449 U.S. 5, 14-15 (1980). 42 U.S.C. § 1988 creates a fee-

In *Christiansburg Garment*, the Court rejected the Equal Employment Opportunity Commission's argument that the Court must imply a requirement that plaintiffs act in bad faith before defendants could collect attorney's fees.[62] The Court rejected the subjective bad faith standard because there was no indication that Congress, in enacting Title VII's fee-shifting provision, meant to "distort" the judicial process by greatly encouraging plaintiffs to litigate, while barring a defendant from receiving an award of attorney's fee no matter how groundless a plaintiff's claims.[63] Although the Court found the legislative history sparse, it supported its holding by citing the statements of several senators regarding an identical fee-shifting provision in Title II of the Civil Rights Act of 1964, which indicates that the legislature intended for the statute to apply to defendants burdened by frivolous or unwarranted litigation.[64] The Court, however, cautioned lower courts against assuming that a prevailing defendant has met the threshold for receiving an award of attorney's fees merely because the plaintiff did not prevail, emphasizing the generally unpredictable nature of litigation.[65]

## *V. How the State Judiciary Should Imply a Heightened Threshold for Awards of Attorney's Fees to Defendants Under the New Jersey Civil Rights Act*

The text of the NJCRA's fee-shifting provision does not impose a higher standard on defendants seeking attorney's fee awards.[66] One can therefore argue that the statute mandates the application of the same threshold to both plaintiff and defendant

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shifting provision giving courts discretion to award attorney's fees to the prevailing party in actions under 42 U.S.C. § 1983. 42 U.S.C. § 1988 (2000).

[62] *Christiansburg Garment Co.*, 434 U.S. at 419. The Court, analyzing the "sparse" legislative history of 42 U.S.C. § 2000e-5(k), concluded that Congress sought to protect defendants from "burdensome litigation having no legal or factual basis." *Id.* at 420.

[63] *Id.* at 419.

[64] *Id.* at 420. The Court stated that "[i]f anything can be gleaned from these fragments of legislative history, it is that while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis." *Id.*

[65] *Id.* at 421-22.

[66] *See* N.J. STAT. ANN. § 10:6-2(f) (West 2005).

attorney's fee awards.[67] However, the United States Supreme Court's decision in *Christiansburg Garment* provides a ready-made public policy rationale for requiring a heightened threshold for defendant attorney's fee awards in the absence of express statutory authorization.[68] Moreover, New Jersey courts have shown a willingness to look to federal fee-shifting rules when interpreting fee-shifting provisions in state legislation.[69]

The New Jersey Supreme Court has interpreted state law fee-shifting provisions, such as those in New Jersey's LAD[70] and Consumer Fraud Act,[71] with an eye toward the federal policies underlying 42 U.S.C. § 1988, the fee-shifting provision of 42 U.S.C. § 1983.[72] The paramount goal of the New Jersey Supreme Court when applying such fee-shifting provisions has been to further the statutory policy of attracting competent counsel to vindicate the rights of plaintiffs, particularly the poor, through the judicial process.[73] The state judiciary is therefore very likely to consider closely the legislative history and underlying policies of the NJCRA

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[67] *See Christiansburg Garment Co.*, 434 U.S. at 417-18 (involving a petitioner that made a similar argument).

[68] *See* discussion *supra* Part IV.

[69] *See, e.g.*, Rendine v. Pantzer, 141 N.J. 292, 333 (1997).

[70] N.J. STAT. ANN. § 2A:15-59.1 (West 2005).

[71] N.J. STAT. ANN. § 56:8-19 (West 2005).

[72] *Rendine*, 141 N.J. at 322-23; Coleman v. Fiore Bros., 113 N.J. 594, 597-98 (1989). Both cases quote the following statement of Sen. John Tunney (D-Cal.) pertaining to 42 U.S.C. § 1988, the Civil Rights Attorney's Fee Awards Act of 1976:

> The problem of unequal access to the courts in order to vindicate congressional policies and enforce the law is not simply a problem for lawyers and courts. Encouraging adequate representation is essential if the laws of this Nation are to be enforced. Congress passes a great deal of lofty legislation promising equal rights to all. Although some of these laws can be enforced by the Justice Department or other Federal agencies, most of the responsibility for enforcement has to rest upon private citizens . . . but without the availability of counsel fees, these rights exist only on paper. Private citizens must be given not only the rights to go to court, but also the legal resources. If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers.

*Rendine*, 141 N.J. at 323 (quoting 122 CONG. REC. 33, 313 (1976)); *Coleman*, 113 N.J. at 597 (quoting 122 CONG. REC. 33, 313 (1976)).

[73] *Coleman*, 113 N.J. at 597 (citing Carlstadt Educ. Ass'n v. Mayor & Council of the Borough of Carlstadt, 530 A.2d 34, 34-35 (N.J. Super. Ct. App. Div. 1987)).

in light of the private attorneys general rationale.[74]

In determining whether the Act's fee-shifting provision mandates a higher threshold for defendant attorney's fee awards, New Jersey courts may also have to decide whether any such heightened threshold should take the form of the one articulated in *Christiansburg Garment*[75] or should instead require that plaintiffs have litigated in bad faith.[76] Upon determining the propriety of establishing a heightened standard for defendant awards of attorney's fees under the NJCRA, courts must be mindful of the Act's inherent compromise between the interests of plaintiffs in enforcing their civil rights and government entities in protecting taxpayer dollars.[77] The Act's fee-shifting provision embodies a compromise similar to that of the federal civil rights statute in *Christiansburg Garment* in that both pieces of legislation seek to encourage plaintiffs to bring civil rights claims and at the same time protect defendants from the burdens of frivolous litigation.[78]

As in *Christiansburg Garment*, there is legislative history in the NJCRA that supports allowing courts the discretion to establish a higher threshold for defendant attorney's fee awards than for plaintiff awards. Upon introduction of the Act to the Assembly, the bill statement emphasized the need for a state cause of action for civil rights violations going beyond existing state and federal protections.[79] The Assembly and Senate Judiciary Committees acknowledged the Act's roots in the federal Civil Rights Act.[80] In fact, Assemblyman Cohen stated that the Act mirrored the language of the fee-shifting provision applicable to the federal Civil Rights Act.[81] He also noted that in federal civil rights cases, courts

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[74] *See id.*

[75] Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

[76] *See* Seidenstein, *supra* note 19, at 39.

[77] *See* discussion *supra* Part III.

[78] *Christiansburg Garment Co.*, 434 U.S. at 420. Here, the Court characterizes the legislative history as revealing "little more than the barest outlines of a proper accommodation of the competing considerations [encouraging plaintiffs to file civil rights claims and thus acting as private attorneys general versus] protect[ing] defendants from burdensome litigation having no legal or factual basis." *Id.*

[79] Assemb. B. 2073, 211th Leg. (N.J. 2004) (as introduced).

[80] ASSEMBLY JUDICIARY COMM. STATEMENT, *supra* note 11, at 2; STATEMENT TO S. 211-1558, *supra* note 37, at 2.

[81] Schwaneberg, *supra* note 44.

rarely award attorney's fees to prevailing defendants.[82] In conjunction with the statutory text of the NJCRA, which gives courts discretion to grant attorney's fees to prevailing parties,[83] these statements strongly imply that the legislature envisioned courts using their discretion when applying the Act's statutory policy to create a heightened threshold for awarding defendants attorney's fee awards. Given this context, merely looking to the text of the NJCRA's fee-shifting measure fails to take into account that the Act's main sponsor in the General Assembly cited the plaintiff-friendly application of § 1983's fee-shifting provision, thereby assuming that state courts will apply a heightened threshold for defendant attorney's fee claims.[84] The New Jersey courts' acceptance of the private attorneys general rationale,[85] along with the Act's discretionary language,[86] thus points in the direction of requiring a heightened threshold for defendant attorney's fee awards. Such a heightened threshold may require plaintiffs to litigate in a manner "frivolous, unreasonable, or without foundation."[87]

The discretion granted to the courts by the NJCRA's fee-shifting provision, along with the Act's legislative history and overall historical context, do not support implying a bad-faith threshold for defendants to receive attorney's fee awards.[88] Although one could argue that the legislative history of the Act is sparse, the United States Supreme Court in *Christiansburg Garment* decided against implying a bad faith requirement on the basis of a similarly sparse legislative history.[89] Most importantly, the fee-shifting provision of the LAD explicitly specifies such a bad-faith standard for defendant attorney's fee awards,[90] whereas the NJCRA does not.[91] Additionally, the successful lobbying effort of the League trans-

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[82] Seidenstein, *supra* note 19, at 1.

[83] N.J. STAT. ANN. § 10:6-2(f) (West 2005). The provision states "the court may award the prevailing party reasonable attorney's fees and costs." *Id.*

[84] *See* Seidenstein, *supra* note 19, at 1.

[85] *See* Rendine v. Pantzer, 141 N.J. 292, 322-23 (1997) (citing Coleman v. Fiore Bros., 113 N.J. 594, 597 (1989)).

[86] *See supra* note 83 and accompanying text.

[87] Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

[88] *See* discussion *supra* Part III.

[89] *Christiansburg Garment Co.*, 434 U.S. at 420.

[90] N.J. STAT. ANN. § 10:5-27.1 (West 2005).

[91] *Id.* § 10:6-2(f).

formed the Act's fee-shifting provision from one that exclusively authorized attorney's fees for plaintiffs to one that grants, at least on a textual level, the same opportunity to defendants.[92] Surely in lobbying for the Act's fee-shifting provision, the League did not expect that courts would imply a threshold barring a defendant from receiving attorney's fee awards unless the plaintiff acted in bad faith.[93] Based on this context, New Jersey courts applying the Act's fee-shifting provision could justifiably follow the lead of the United States Supreme Court in *Christiansburg Garment* and refuse to imply a bad-faith requirement for defendants seeking attorney's fee awards.[94]

## *VI. Who Qualifies as a Prevailing Party Under the New Jersey Civil Rights Act?*

### A. *Who Qualifies As a Prevailing Party Under Current New Jersey and Federal Law for the Purpose of Civil Rights Fee-Shifting Statutes?*

Under the NJCRA, a court may only award attorney's fees to a "prevailing party."[95] A crucial issue likely to arise in litigation concerns the proper definition of "prevailing party." Parties that receive a judgment on the merits in their favor qualify as prevailing parties under state and federal fee-shifting statutes.[96] However, the so-called "catalyst theory" defines the term more expansively, stating that a party prevails when the defendant, of his own accord, alters his behavior and eliminates the conduct that was the subject of the plaintiff's lawsuit.[97] Although New Jersey courts have in-

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[92] *See* discussion *supra* Part III.

[93] *See generally* Counsel Fees Memorandum I, *supra* note 28 (arguing that the NJCRA risked watering down the American Rule, which requires litigants to pay their own way through litigation).

[94] *See Christiansburg Garment Co.*, 434 U.S. at 419.

[95] N.J. STAT. ANN. § 10:6-2(f).

[96] Buckhannon Bd. & Home Care v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 604 (2001).

[97] Baumgartner v. Harrisburg Hous. Auth., 21 F.3d 541, 544 (3d Cir. 1994); *see also* Jackson v. Georgia-Pacific Corp., 685 A.2d 1329, 1342 (N.J. Super. Ct. App. Div. 1996), *cert. denied*, 149 N.J. 141 (1997).

> In order to succeed on the catalyst theory, plaintiff must be able to demonstrate that the litigation was a material factor in the actions by the defendant that is claimed to warrant counsel fees, as where "the litigation terminates in [plaintiff's] favor via a consent decree, an out-of-court set-

voked the catalyst theory to determine who is a prevailing party under the LAD,[98] the United States Supreme Court's recent decision in *Buckhannon Board & Home Care v. West Virginia Department of Health & Human Resources* rejected the catalyst theory in favor of a narrower definition of "prevailing party" that is more protective of defendants.[99] The Court held that a party only prevails when there is either an "enforceable judgment[] on the merits" or a "court-ordered consent decree[]."[100] In *Buckhannon*, the United States Supreme Court overruled precedent in nearly every federal circuit, as most circuits had previously interpreted the term "prevailing party" consistent with the catalyst theory.[101] In accord with the Fourth Circuit's contrary view,[102] the Court held that a judgment on the merits or a consent decree is necessary for a party to prevail under federal statutes awarding attorney's fees.[103] Therefore, following *Buckhannon*, a plaintiff may not recover attorney's fees if a defendant voluntarily changes the conduct that was the subject of plaintiff's federal lawsuit and a court did not sanction

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tlement, a voluntary cessation of the defendant's unlawful practices, or other mooting of the case where the plaintiff has vindicated his or her rights."

*Id.* (quoting Hughes v. Lipscher, 852 F. Supp. 293, 303-04, 304 n.17 (D.N.J. 1994)).

[98] *See, e.g.*, Warrington v. Village Supermarket, Inc., 746 A.2d 61, 66-67 (N.J. Super. Ct. App. Div. 2000); *Jackson*, 685 A.2d at 1340-44.

[99] *Buckhannon*, 532 U.S. at 600-01. The *Buckhannon* case involved the closing of an assisted living facility in West Virginia because the state determined residents would not be able to escape the building without assistance in the event of a fire or other imminent danger, thereby violating the state "self-preservation" statute. *Id.* at 600. Buckhannon Board & Care, Inc. sued "on behalf of itself and other similarly situated homes and residents . . . seeking declaratory and injunctive relief" that the state statute violated the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990. *Id.* at 600-01. During discovery, the West Virginia Legislature repealed the relevant statute containing the self-preservation requirement. *Id.* at 601. The plaintiffs then unsuccessfully sought attorney's fees under the catalyst theory. *Id.* at 601-02.

[100] *Id.* at 604.

[101] *Id.* at 601-02. The only circuit to outright reject the catalyst theory prior to *Buckhannon* was the Fourth Circuit Court of Appeals in *S-1 & S-2 v. State Board of Education*, 21 F.3d 49, 51 (4th Cir. 1994). *Buckhannon*, 532 U.S. at 626-27 (Ginsburg, J., dissenting).

[102] *Id.* at 601-02 (majority opinion).

[103] *Id.* at 600. Although the case concerned awards of attorney's fees under the Federal Housing Act and the Americans with Disabilities Act, the majority in *Buckhannon* applied its holding to all federal statutes containing the term "prevailing party," including 42 U.S.C. § 1988. *Id.*

the final outcome.[104]

The majority in *Buckhannon* focused on the dictionary definition of "prevailing party" rather than relying on the legislative history of 42 U.S.C. § 1988, which appeared to favor the catalyst rule.[105] Noting that the dictionary deems a "prevailing party" to be "one who has been awarded some relief by the court,"[106] the Court held that parties to a private settlement may not claim prevailing party status because private settlements do not have the requisite judicial involvement present in a consent decree or a judgment on the merits.[107] The majority in *Buckhannon* also argued that the catalyst theory contained serious flaws.[108] Writing for the Court, Chief Justice Rehnquist noted that if a defendant voluntarily changes his conduct as a result of a plaintiff's suit, it remains unclear whether or not that defendant actually violated a plaintiff's civil rights.[109] In addition, the Chief Justice pointed out that the catalyst test necessitated a complex and highly burdensome "second major litiga-

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[104] *Id.* at 604-05.

[105] *Buckhannon*, 532 U.S. at 604. The House Report accompanying 42 U.S.C. § 1988 stated the following:

> The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or a jury. If the litigation terminates by consent decree, for example, it would be proper to award counsel fees . . . . A 'prevailing party' should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed.

Michael Ashton, Note, *Recovering Attorneys' Fees with the Voluntary Cessation Exception to Mootness Doctrine After* Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 2002 WIS. L. REV. 965, 971 n.35 (quoting H.R. REP. NO. 94-1558, at 5 (1976)). The Senate Report to 42 U.S.C. § 1988 stated "'parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.'" *Buckhannon*, 532 U.S. at 607 (quoting S. REP. NO. 94-1011, at 7 (1976)). While the majority thought the legislative history ambiguous as to the definition of the term "prevailing party," *id.* at 607-08, the dissent saw the congressional reports as hard evidence of Congress's intent that the catalyst rule apply to 42 U.S.C. § 1988, *id.* at 637-38 (Ginsburg, J., dissenting).

[106] *Id.* at 603 (majority opinion).

[107] *Id.* at 605.

[108] *See id.* at 608.

[109] *Id.*

tion" over the defendant's motive in changing his conduct.[110] Concurring in the judgment, Justices Scalia and Thomas viewed the catalyst theory as a tool for "extortionist" litigation by plaintiffs.[111] Justices Scalia and Thomas argued that the catalyst theory tends to reward plaintiffs with "greater strength in financial resources, or superiority in media manipulation, rather than superiority in legal merit."[112]

In dissent, Justice Ginsburg argued in favor of the catalyst theory, noting that in civil rights cases the underlying motive for bringing a claim is to change the actions or conduct of a defendant rather than to obtain a judgment per se.[113] Moreover, the catalyst rule encourages parties to settle cases before attorney's fees pile up over the course of litigation.[114] Taking issue with Justice Scalia's argument that the catalyst rule enables extortionist litigation tactics on the part of plaintiffs, Justice Ginsburg argued that the catalyst rule is integral to the proper functioning of individuals as private attorneys general, who, in Congress's judgment, are necessary for proper enforcement of civil rights laws.[115] Also, in response to the majority's contention that the catalyst rule is difficult to apply, Justice Ginsburg argued that judges applying the rule are able to distinguish unworthy plaintiffs from those who legitimately carry out Congress's mission.[116]

### B. *Factors for New Jersey Courts to Consider in Construing the Term "Prevailing Party" in the Fee-Shifting Provision of the New Jersey Civil Rights Act*

The continued viability of the catalyst theory in the state law context is uncertain because New Jersey courts have not yet recon-

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[110] *Id.* at 609. The "three-thresholds" test accompanying the catalyst theory asked the following: (1) "whether the claim was colorable rather than groundless," (2) "whether the lawsuit was a substantial rather than an insubstantial cause of the defendant's change in conduct," and (3) "whether defendant's change in conduct was motivated by the plaintiff's threat of victory rather than threat of expense." *Id.* at 610.

[111] *Buckhannon*, 532 U.S. at 618 (Scalia, J., concurring).

[112] *Id.* at 617.

[113] *Id.* at 640 (Ginsburg, J., dissenting).

[114] *Id.* at 639.

[115] *Id.* at 635-36.

[116] *Id.* at 639-40.

sidered the catalyst theory in light of *Buckhannon*. While New Jersey courts generally look to federal courts' construction of federal fee-shifting provisions for guidance in construing state fee-shifting statutes,[117] the courts have shown a willingness to look beyond federal precedent in the fee-shifting arena.[118] In addition, the New Jersey Supreme Court is willing to construe the New Jersey Constitution to provide more expansive freedoms when the court deems the prevailing construction of the United States Constitution insufficiently protective.[119] As such, any departure from the federal definition of "prevailing party" is not inconceivable considering the state judiciary's general approach toward constitutional jurisprudence[120] and the Act's goal of providing additional civil rights protections to New Jersey residents.[121]

In comparison with 42 U.S.C. § 1988, little, if any, legislative guidance exists regarding the definition of a "prevailing party" under the NJCRA.[122] However, it is important to note that the Act seeks to supplement existing civil rights protections,[123] a policy goal that could motivate state courts to utilize the catalyst theory in determining whether a party prevails under the NJCRA. It is possi-

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[117] *See* Coleman v. Fiore Bros., 113 N.J. 594, 597 (1989).

[118] *See, e.g.*, Rendine v. Pantzer, 141 N.J. 292, 333 (1997) (discussing how the New Jersey Supreme Court is willing to go beyond federal precedent when that precedent is deemed inappropriate).

[119] Stewart G. Pollock, *State Constitutions As Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 714-15 (1983). The article, a published version of a lecture by former New Jersey Supreme Court Justice Pollock, places New Jersey Supreme Court decisions such as *Robinson v. Cahill*, 62 N.J. 473 (1973) (involving school funding); *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151 (1975); and *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158 (1983) (concerning municipal zoning laws); and *State v. Alston*, 88 N.J. 211 (1981) (dealing with unreasonable searches and seizures), in the larger context of state constitutions as a source of constitutionally protected rights and freedoms over and above that of the often more strictly constructed United States Constitution. *See also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). The late Justice Brennan's seminal article forcefully argued that state constitutions are "individual fonts of liberty," which, when read more expansively than the United States Constitution, extend protections and freedoms where the United States Supreme Court has taken a narrower construction of various constitutional amendments. *Id.* at 491.

[120] *See supra* note 119.

[121] *See* discussion *supra* Part III.

[122] *See* discussion *supra* Part VI.A.

[123] GOVERNOR'S STATEMENT, *supra* note 10.

ble that New Jersey courts will find that the definition of a prevailing party enunciated by the United States Supreme Court in *Buckhannon* hinders the vindication of a plaintiff's civil rights by undermining the private attorneys general policy imbued in the state's fee-shifting measure.[124] Given this scenario, a court could follow the reasoning in Justice Ginsburg's dissent and invoke the catalyst theory when applying the fee-shifting provision of the NJCRA.[125]

In the final analysis, New Jersey courts will use a definition that best serves the interests of justice and fulfills the underlying statutory policy of the NJCRA.[126] A viable option would likely involve incorporating the New Jersey Supreme Court's pre-*Buckhannon* two-part test to determine whether a party "prevailed" under the fee-shifting provision of 42 U.S.C. § 1983.[127] In *Singer v. State*, the New Jersey Supreme Court adopted the following two-prong test for determining whether a party prevailed: (1) the plaintiff's lawsuit must have been "a necessary and important factor" that was "causally related to securing the relief obtained," and (2) the plaintiff "must establish that the relief granted had some basis in law."[128] The first prong of the *Singer* test preserves the catalyst theory, while the second prong addresses some of the concerns cited by the *Buckhannon* majority.[129] The second prong of the *Singer* test addresses the catalyst theory's main weakness by requiring a judicial determination as to whether the law required a defendant to change his conduct.[130] Utilizing the catalyst theory as defined in the *Singer* test provides a good balance between providing greater opportunities for plaintiffs to obtain relief for civil rights violations while also protecting defendants, particularly

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[124] *See, e.g.*, Coleman v. Fiore Bros., 113 N.J. 594, 597 (1989) (citing Carlstadt Educ. Ass'n v. Mayor & Council of the Borough of Carlstadt, 530 A.2d 34, 34-35 (N.J. Super. Ct. App. Div. 1987)). A major concern of those opposed to the *Buckhannon* decision is the possibility of governmental entities evading liability for attorney's fees by ceasing their illegal conduct before a court can get involved in the issue. Ashton, *supra* note 105, at 990. Flowing from this is the fear that *Buckhannon* could open a Pandora's Box of litigation regarding the mootness of civil rights claims. *Id.* at 968.

[125] *See supra* note 118 and accompanying text.

[126] *See, e.g., Coleman*, 113 N.J. at 597.

[127] *See* Singer v. State of New Jersey, 95 N.J. 487, 494 (1984).

[128] *Id.* (quoting Nadeau v. Helgemoe, 582 F.2d 275, 280 (1st Cir. 1978)).

[129] *See* discussion *supra* Part VI.A.

[130] *Singer*, 95 N.J. at 494-95.

government entities, from financial hardship.[131]

### *VII. Can the New Jersey Supreme Court Promulgate a Court Rule Going Beyond Fee-Shifting Statutes Promulgated by the Legislature?*

In its current form, New Jersey Court Rule 4:42-9 permits courts to order fee-shifting in certain instances, including whenever a statute permits attorney's fee awards.[132] The revision of New Jersey Court Rule 4:42-9 proposed prior to passage of the NJCRA would grant courts the ability to award fees to parties prevailing on state constitutional claims.[133] Boosted by civil rights advocates and many in the plaintiffs' bar,[134] this rule would permit courts to award attorney's fees to private plaintiffs who have prevailed in state constitutional claims against defendants regardless of whether they were acting "under color of law."[135] Although the New Jersey Su-

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[131] *See* discussion *supra* Part III.

[132] N.J. CT. R. 4:42-9(a)(8). The other instances where a court may award attorney's fees include:

> (1) In a family action . . . (2) Out of a fund in court . . . (3) In a probate action . . . (4) In an action for the foreclosure of a mortgage . . . (5) In an action to foreclose a tax certificate or certificates . . . (6) In an action upon a liability or indemnity policy of insurance . . . [and] (7) As expressly provided by these rules with respect to any action.

*Id.* R. 4:42-9(a)(1)-(7).

[133] N.J. SUPREME COURT CIVIL PRACTICE COMM., SUPPLEMENTAL REPORT 11-12 (2004); Gallagher, *supra* note 36, at 11.

[134] Seidenstein, *supra* note 4, at 1, 31.

[135] N.J. SUPREME COURT CIVIL PRACTICE COMM., *supra* note 133, at 11. Proposed Rule 4:42-9(a)(7) states as follows:

> *In an action to establish or enforce a right under the New Jersey Constitution,* a reasonable counsel fee and litigation expenses shall be allowed to a prevailing claimant providing that (A) there is no provision in rule, statute or otherwise for an award of counsel fees and litigation expenses to the claimant; (B) the fee is calculated only on those services directly related to the state constitutional issue on which the claimant prevailed; (C) the hourly fee shall not exceed $150 an hour for attorneys and expert witnesses or $50 an hour for paralegals, law clerks and comparable support staff; (D) the fee shall not be enhanced by the novelty or complexity of the claim; and (E) the extent to which, if any, claimant sought to resolve the constitutional issue prior to and during trial is considered in determining the reasonableness of the time expended by claimant's counsel. The foregoing notwithstanding, the court, in its discretion, may abate the award in full or in part if it finds that the award would otherwise result in substantial and undue financial hardship to the party opponent or, if a public entity, to its taxpayers. This rule shall not apply to eminent domain proceedings.

preme Court's Civil Practice Committee endorsed the amended fee-shifting rule, the court declined to adopt the committee's recommendations to change Rule 4:42-9,[136] possibly desiring to wait until the governor signed the Act.[137]

The main issue raised by this proposed rule is whether or not the New Jersey Supreme Court possesses the power to adopt a fee-shifting rule in the area of state constitutional claims where the legislature has already promulgated one through legislation.[138] While some argue that the fee-shifting provision of the Act preempts any additional action by the New Jersey Supreme Court with regard to fee-shifting for state constitutional claims, others believe that the high court and the legislature have concurrent legislative authority in the fee-shifting area.[139]

In fact, the New Jersey Supreme Court retains exclusive power over fee-shifting provisions, and the New Jersey legislature is only able to enact fee-shifting statutes pursuant to the Supreme Court's authorization as provided in a court rule.[140] This state of affairs contrasts with the federal system, where courts may only award attorney's fees pursuant to specific congressional authorization.[141] In *Winberry v. Salisbury*, one of the seminal decisions on state constitutional law, the New Jersey Supreme Court construed article VI, section II, paragraph 3 of the state constitution[142] to grant the court exclusive authority over the administration, practice, and procedure of all state courts.[143] Included within the state supreme court's exclusive sphere of power is the awarding of attorney's fees through fee-shifting mechanisms.[144] In other words, if the state leg-

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*Id.* at 11-12.

[136] Mary P. Gallagher, *N.J. Civil Rights Act Takes Effect*, N.J. L.J., Sept. 20, 2004, at 1.

[137] Seidenstein, *supra* note 4, at 31. Since Gov. McGreevey signed the Act in September 2004, the New Jersey Supreme Court has not taken any further action with regard to this proposed rule.

[138] Gallagher, *supra* note 36, at 11.

[139] Seidenstein, *supra* note 4, at 31.

[140] McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 554 (1993).

[141] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 261-62 (1975).

[142] N.J. CONST. art. VI, § 2, ¶ 3 states: "[t]he Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted." *Id.*

[143] Winberry v. Salisbury, 5 N.J. 240, 255 (1950).

[144] *McKeown-Brand*, 132 N.J. at 554. The New Jersey Supreme Court, shortly after

islature enacts a fee-shifting provision, that statute would be invalid were it not for the supreme court enabling fee-shifting statutes through Rule 4:42-9(a)(8).[145]

The court could conceivably create, by way of a court rule, a heightened threshold for defendant attorney's fee awards under the NJCRA.[146] Were the state supreme court inclined to do so, it has the authority to craft a fee-shifting rule requiring plaintiffs to act in bad faith in order for prevailing defendants to receive attorney's fees under the Act.[147] However, the court should proceed with caution: using Rule 4:42-9 to create a bad-faith threshold for defendant attorney's fee awards under the Act risks an unnecessary confrontation in an area where elected officials abstained from including such language upon balancing the interests of plaintiffs against the interests of taxpayers who fund government entities that must defend suits brought under the NJCRA.[148] Since the high court already enables statutory fee-shifting measures, deference to the legislature on the contours of the Act's fee-shifting provision would not infringe upon the judiciary's power under the state constitution.[149] However, because of state judicial supremacy in the area of fee-shifting, the parameters of the Act's

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the state adopted the 1947 Constitution, eliminated, *sua sponte*, a provision in the Rules permitting the award of attorney's fees when allowed by law [e.g., by statute]. *Id.* at 555. By doing so, the New Jersey Supreme Court placed fee-shifting awards within the court's exclusive purview. *Id.*; *see also Winberry*, 5 N.J. at 255 (establishing the primacy of the judiciary in practice and procedure). The high court, through its rulemaking power, thus retains the power to enable the legislature to enact fee-shifting statutes. *See McKeown-Brand*, 132 N.J. at 555-56. The high court currently enables fee-shifting statutes through N.J. CT. R. 4:42-9(a)(8), stating that "our acceptance of these [fee-shifting] statutes is consistent with our general approach of accepting legislation affecting procedural matters if it does not conflict with or supersede judicial power." *McKeown-Brand*, 132 N.J. at 556.

[145] *See supra* note 144.

[146] *See supra* notes 144-145 and accompanying text.

[147] *See supra* notes 144-145 and accompanying text.

[148] *See* discussion *supra* Part III.

[149] *See* McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 556 (1993); *see also* Jack M. Sabatino, *Assertion and Self Restraint: The Exercise of Governmental Powers Distributed Under the 1947 New Jersey Constitution*, 29 RUTGERS L.J. 799, 812-13, 815 (1998) (arguing that the state supreme court vigilantly protects its exclusive constitutional authority granted under N.J. CONST. art. 6, § 2, ¶ 3 and defined by decisions such as *Winberry*, but is willing to accommodate legislative action regarding the judicial process when such action does not "pose a threat to judicial independence or core judicial functions").

fee-shifting measure are at the mercy of the New Jersey Supreme Court's willingness to defer to the legislative branch.[150]

### *VIII. Conclusion*

The NJCRA is a creature of compromise. On the one hand, the Act clearly manifests the legislature's intent to grant plaintiffs greater access to state courts in order to vindicate their rights under state and federal law.[151] On the other hard, the successful efforts of the League to make the Act less plaintiff-friendly demonstrate the limits of the legislature's idealism in the face of political realities.[152]

The NJCRA's discretionary statutory language,[153] legislative history,[154] and underlying policy rationale of expanded protection of substantive rights for New Jersey citizens[155] combine to argue that the courts should imply a heightened threshold for defendant attorney's fee awards similar to that expounded by the United States Supreme Court in *Christiansburg Garment* and its progeny.[156] Buttressing this conclusion is the New Jersey courts' enthusiastic embrace of the private attorneys general rationale with regard to other New Jersey fee-shifting statutes.[157] Courts should not, however, overstep the bounds set forth within the overall context of the NJCRA's genesis. By requiring that plaintiffs litigate in bad faith before awarding attorney's fees to defendants , courts would be ignoring the fact that the legislature specified a bad faith standard in LAD and likely made a deliberate decision to omit such a standard from the Act.[158]

Furthermore, implying a bad-faith threshold on the face of the statute would ignore the legislature's acquiescence to the lobbying effort of the League.[159] The legislature amended the fee-

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[150] *See McKeown-Brand*, 132 N.J. at 555-56.

[151] *See* discussion *supra* Part II.

[152] *See* discussion *supra* Part III.

[153] N.J. STAT. ANN. § 10:6-2(f) (West 2005).

[154] *See* discussion *supra* Part III.

[155] *See* discussion *supra* Part III.

[156] *See* discussion *supra* Part IV.

[157] *See* discussion *supra* Parts V, VI.B.

[158] *Compare* N.J. STAT. ANN. § 10:5-27.1, *with* N.J. STAT. ANN. § 10:6-2(f).

[159] *See* discussion *supra* Part V.

shifting provision in exactly the way desired by the League, a change intended to place municipalities on an even playing field with respect to attorney's fee awards.[160] Adopting a heightened threshold requiring a prevailing defendant to establish that a plaintiff's claim is "frivolous, unreasonable, or without foundation" before receiving an attorney's fee award, as the United States Supreme Court did in *Christiansburg Garment*,[161] would strike a proper balance between the legislature's dual goals of expanding civil rights protections for plaintiffs while protecting government coffers.[162]

In determining when a plaintiff is a prevailing party under the NJCRA, the courts must make inferences as to legislative intent since, by and large, the legislative history gives no express guidance. In construing state fee-shifting statutes, New Jersey courts have generally followed the legislative policies behind federal fee-shifting statutes as well as the federal courts' interpretation of the statutes themselves.[163] However, if the New Jersey Supreme Court disapproves of the United State Supreme Court's recent decision in *Buckhannon* requiring a judgment on the merits before plaintiffs can receive attorney's fees, New Jersey courts will likely have no hesitation in using the catalyst theory as it pertains to plaintiff attorney's fee awards under the NJCRA.[164] By using the framework in *Singer v. State*, New Jersey courts can strike the proper balance between providing plaintiffs with sufficient opportunity for redress while protecting defendants, specifically government entities, from undue financial hardship.[165]

Despite arguments to the contrary, however, the New Jersey Supreme Court has the constitutional authority to promulgate a fee-shifting rule providing plaintiffs with attorney's fees or to withhold from the legislature the authority to pass fee-shifting statutes.[166] Although doing so would be a valid exercise of its exclusive power over court rules and procedure under the New Jer-

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[160] *See* discussion *supra* Part III.

[161] Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

[162] *See* discussion *supra* Part V.

[163] *See supra* notes 117-118 and accompanying text.

[164] *See supra* notes 117-118 and accompanying text.

[165] *See* discussion *supra* Part VI.B.

[166] *See* McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 554 (1993).

sey Constitution,[167] it is questionable whether it would be proper for the court to use its rulemaking power to define the threshold at which defendants could receive attorney's fee awards under the Act. The court should refrain from exceeding the limits decided upon by the legislature, the product of a balancing between vindicating plaintiffs' civil rights and protecting the economic health of defendants, particularly government entities.[168] The supreme court would exceed such limits if it chooses to promulgate a rule requiring plaintiffs to act in bad faith before defendants receive attorney's fees under the Act.[169]

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[167] *See* Winberry v. Salisbury, 5 N.J. 240, 255 (1950).

[168] *See* discussion *supra* Part III.

[169] *See* discussion *supra* Part VI.B.