Litigating Damages and Attorney Fees in Section 1983 Litigation: Capitalizing on the Law

By Edward S. Harmening and Craig M. Sandberg

Section 1983 is the vehicle by which plaintiffs seek compensation for violations of their constitutionally protected rights. This article addresses the framework of section 1983 claims generally and specific issues related to damages, taxation of recoveries, and attorney fees.

42 U.S.C. Section 1983 Claims Generally

"There can be no doubt that claims brought pursuant to § 1983 sound in tort. Just as common-law tort actions provide redress for interference with protected personal or property interests, Section 1983 provides relief for invasions of rights protected under federal law."[1] These claims are commonly referred to as "constitutional tort" claims.

Section 1983 originated in the post-Civil War Reconstruction Era, stemming from section 1 of the Civil Rights Act of 1871 and adopted to enforce the then-newly enacted Fourteenth Amendment. One main scourge the act was meant to address arose out of the conduct of the Ku Klux Klan,[2] and the inability of states to tide the bad acts of such groups.

That the state courts in several states have been unable to enforce the criminal laws of their respective states or to suppress the disorders existing, and in fact the preservation of life and property in many sections of the country is beyond the power of state government, is sufficient reason why Congress, so far as it has authority under the Constitution, should enact the laws necessary for the protection of citizens of the United States.[3]

Section 1983 is a remedial statute authorizing a civil action against defendants who act under color of state law and violate rights otherwise secured under federal law. The statute confers no substantive rights.[4] Consequently, there is no such thing as a section 1983 violation, absent a deprivation of a right secured under another law. Therefore, to be successful, a section 1983 claimant must identify the federally protected right that has been violated.

To state a cause of action under section 1983, a plaintiff must allege two elements: (1) challenged conduct by a person acting under color of law and (2) challenged conduct that deprived the plaintiff of a federal right.[5] To prevail under section 1983, the plaintiff must prove that the defendant's unconstitutional action was the "cause in fact" of the plaintiff's injury.[6]

Edward S. Harmening and Craig M. Sandberg are Assistant State's Attorneys in the Cook County State's Attorney's Office in Chicago assigned to the Special Litigation Division of the Civil Actions Bureau, where they handle a wide array of litigation on behalf of Cook County and affiliated officers, agencies, and other elected officials in state and federal courts. The views expressed here are those of the authors and are not necessarily those of the Cook County State's Attorney or its clients.

Under the statute, plaintiffs may hold individual state actors liable for violating their constitutional rights. Although the "state" itself is not a person that may be sued under section 1983,[7] a municipality is a proper defendant, where the conduct complained of relates to an official municipal policy, custom, or practice causing the constitutional tort.[8]

Most section 1983 cases involve constitutional claims based directly or indirectly on the Fourteenth Amendment. Typically, the claims are brought against governmental officials for acts committed in their official capacity. In those cases, there is no dispute that the conduct complained of was committed under the "color of law." The harder question arises in cases where a private individual allegedly acts in concert with governmental officials pursuant to state authority. Under concurrent jurisdiction, both state and federal courts may exercise jurisdiction over section 1983 claims.

Under concurrent jurisdiction, both state and federal courts may exercise jurisdiction over section 1983 claims.

In the 35 years since the U.S. Supreme Court decided *Monroe v. Pape*[9]—broadly delineating the nature of section 1983 claims—the number of complaints filed under the statute has increased dramatically. Cases decided after *Monroe v. Pape* also help delineate the damages and attorney fees available for such a claim.

Damages

A plaintiff successfully pressing a section 1983 claim may recover a broad range of both compensatory and punitive damages. Compensatory damages may include costs of medical care and supplies, lost wages (i.e., back pay and lost future earnings), physical pain and suffering, emotional pain and suffering, and disability/loss of normal life.[10] Where liability is found, but compensatory damages cannot be proven, the jury will be instructed to return a nominal damage award (typically one dollar). Although a trivial sum, even a nominal damage award may open

the door for an award of punitive damages or attorney fees.

Courts have rejected the availability of presumed damages unless traditional damages are difficult to prove.[11] In addition, a court may reduce compensatory damages where the plaintiff only offers generalized evidence of emotional pain and suffering, not rising to a level that is commensurate with the amount awarded by the jury.[12] While section 1983 damages are based on common law concepts, they are not dependent on the law of the forum state.[13]

An often-confused area of damages is related to front pay and lost future earnings awards, which are both available under section 1983 remedies. Front pay is an equitable remedy determined by the court, but lost future earnings qualifies as a compensatory remedy to be decided by a finder of fact.[14] "Front pay is an equitable remedy that is awarded in lieu of promotion when promotion is inappropriate or unavailable. Front pay is the functional equivalent of promotion because it is a substitute remedy that affords the plaintiff the same benefit (or as close an approximation as possible) as the plaintiff would have received had she been promoted."[15] Hence, front pay is limited in duration and that better replicates the effects of reinstatement because an employee is not expected to remain in that position indefinitely. An award of lost future earnings compensates a plaintiff for intangible nonpecuniary loss (i.e., reputational or other injury to professional standing). "To recover for lost earning capacity, a plaintiff must produce competent evidence suggesting that his injuries have narrowed the range of economic opportunities available to him. A plaintiff must show that his injury has caused a diminution in his ability to earn a living."[16]

Punitive damages are available against individual defendants where a plaintiff establishes actions were either intentional or committed with reckless or callous disregard for the plaintiff's rights.[17] Significantly, punitive damages may be available against individual defendants even absent actual damages.[18] Municipalities, however, are not subject to punitive awards.[19] Consequently, joint and several liability is applicable only for compensatory damages.

In determining the amount of the punitive damages, the jury considers the reprehensibility of the defendant's conduct, the impact of the defendant's conduct on the plaintiff, the relationship between the plaintiff and the defendant, the likelihood that the defendant would repeat the conduct if an award of punitive damages is not made, the defendant's financial condition and the relationship of any award of punitive damages to the amount of actual harm the plaintiff suffered.[20]

Under Supreme Court precedent, "[t]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[21] "The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff."[22] Although generally applicable, where a plaintiff's economic damages are nominal or essentially nominal, the Supreme Court recognizes that the ratio analysis has limited relevance.[23] Indeed, where "injuries are without a ready monetary value," such as invasions of constitutional rights unaccompanied by physical injury or other compensable harm, higher compensatory to punitive damage ratios are to be expected.[24]

Perhaps recognizing the added cost of section 1983 claims or otherwise seeking to limit punitive damage awards, the common law of some states requires a plaintiff who seeks punitive damages to establish actual malice. Other states require the higher clear and convincing standard of proof for punitive damage claims. Finally, Ohio and Kansas only allow the jury to determine if punitive damages should be awarded, with the judge then determining the amount of such an award. These issues continue to be the subject of litigation,[25] and it is currently unresolved whether such restrictions properly apply to section 1983 claims.

Tax Issues

The Internal Revenue Code defines gross income as "all income from whatever source derived," subject only to the exclusions specifically listed elsewhere in the Code.[26] The Code excludes from gross income "the amount of any damages received (whether by suit or agreement or whether as lump sums or as periodic payments) on account of personal injuries or sickness."[27] The issue facing section 1983 plaintiffs is that the Code offers no explanation of what a taxpayer must show in order to prove that the damages were received "on account of personal injuries."[28]

As noted above, generally, section 1983 claims are tort claims, meaning recoveries should be excludable from taxable income. That said, the issue of whether a section 1983 settlement or award is taxable arises in those cases where plaintiff seeks recovery for constitutional and statutory or state, nontort, theories. The potential tax issue routinely arises where a plaintiff alleges a constitutional tort as well as claims implicating lost wages or contract damages. In such cases, courts look to the true nature of the claim to determine whether the award is premised upon a claim of physical injury or sickness. By way of analogy, in a tort/employment case, back pay amounts established at trial may be presented as an evidentiary factor to assess tort damages, thereby relieving the plaintiff from any tax obligations. Depending upon how a settlement is characterized, or how a verdict is formulated, a plaintiff may be taxed on the award. "Even if a client has a good faith personal injury claim, attorneys should carefully construct the language of the complaint and settlement agreement to clearly and specifically allocate personal injury, punitive, and business-related damages."[29]

Finally, courts generally "do not increase damages to compensate for expected tax liability on the damage award. When damages place a plaintiff in the position he would have occupied had the defendant's obligation been fulfilled, the amount recovered would (but for the breach) have been income, and thus taxable."[30]

Attorney Fees

"In the United States, parties are ordinarily required to bear their own attorney's fees—the prevailing party is not entitled to collect from the loser. Under this American Rule, we follow a general practice of not awarding fees to a prevailing party absent explicit statutory authority. Congress, however, has authorized the award of attorney's fees to the prevailing party in numerous statutes. . . ."[31] The Civil Rights Attorney's Fees Awards Act of 1976[32] provides in relevant part:

> In any action or proceeding to enforce [section 1983], . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

The basic purpose of a section 1983 damages award is to compensate a person for injuries caused by the deprivation of a constitutional right. Congress intended to authorize the award of attorney fees only when a party has prevailed on the merits.[33] Accordingly, a party must be a "prevailing party" to qualify for a discretionary award of attorney fees under section 1988. As noted by the Supreme Court, "[l]iability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant."[34]

"[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to 'affect the behavior of the defendant toward the plaintiff.' "[35] Attorney fees also are available pendente lite under section 1988: "Such awards are proper where a party has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal."[36]

Perhaps surprisingly, attorney fees are not available under the "catalyst theory,"[37] where a party achieved the desired result through a voluntary change in the defendant's conduct brought about because of the plaintiff's lawsuit, but without reducing those claims to judgment. The reason for this general rule is that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change."[38]

Although easy to state in the abstract, whether a party in a specific case is a "prevailing party" can be difficult to determine. One of the most critical factors in determining reasonableness of a fee award is "the degree of success obtained."[39] Decisions by two different panels of the U.S. Court of Appeals for the Seventh Circuit demonstrate the difficulty in application. In the first, Judge Easterbrook, writing for the panel, found that a plaintiff's failure to obtain at least 10 percent of the damages it had sought would weigh heavily against any award of attorney fees.[40] In the second, then-Chief Judge Posner, writing for the panel, held that "[s]ince a defendant must take seriously a large demand and prepare its defense accordingly, it is right to penalize a plaintiff for putting the defendant to the bother of defending against a much larger claim than the plaintiff could prove."[41] Chief Judge Posner recognized that "[b]ecause the cost of litigating a claim has a fixed component, a reasonable attorney's fee in the sense of the minimum required to establish a valid claim can exceed the value of the claim."[42] The Seventh Circuit explained that the purpose of fee shifting for a party who prevails on even a small claim is to enable such claims to be litigated, and that this purpose would be "thwarted by capping the attorneys' fees award at the level of the damages award."[43]

There are 12 factors identified by the Supreme Court to use in addressing the reasonableness of a fee award, a comprehensive discussion of which is beyond the scope of this article.[44] As noted by the Supreme Court, "[h]aving considered the amount and nature of damages awarded, the court may lawfully award low fees or no fees without reciting the 12 factors bearing on reasonableness, or multiplying 'the number of hours reasonably expended . . . by a reasonable hourly rate.' "[45]

Because section 1988 permits recovery of attorney fees to the prevailing party, a "defendant may argue that the plaintiff is not a 'prevailing party' when its recovery represents a small improvement over the Rule 68 offer."

A nominal damage award technically may qualify for prevailing party status, but often results in no fee award.

> In some circumstances, even a plaintiff who formally prevails under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party. . . [A] nominal damages award does render a plaintiff a prevailing party by allowing him to vindicate his absolute right to procedural due process through enforcement of a judgment against the defendant. In a civil rights suit for damages, however, the awarding of nominal damages also highlights the plaintiff's failure to prove actual, compensable damages. Whatever the constitutional basis for substantive liability, damages awarded in a § 1983 action must always be designed to compensate injuries caused by the constitutional deprivation. When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all.[46]

Therefore, to qualify for an attorney fee award, a plaintiff's vic-

tory must be more than technical or de minimis in nature. While a "pittance is enough to render [the plaintiff] a prevailing party, it does not by itself prevent his victory from being purely technical."[47]

Finally, "[t]he fact that the attorneys' fees awarded exceed the damages awarded is not decisive either. Because the cost of litigating a claim has a fixed component, a reasonable attorney's fee in the sense of the minimum required to establish a valid claim can exceed the value of the claim."[48]

Interplay of Section 1988 with Rule 68

"Rule 68 permits a defendant to offer judgment to be taken against it in a specified amount; if the plaintiff fails to accept the offer and later obtains a judgment less favorable than the offer, then the plaintiff must pay the defendant's cost incurred from the time of the offer."[49] "Rule 68 of the Federal Rules of Procedure can be a powerful mechanism for driving plaintiffs to a reasonable settlement."[50] Because section 1988 permits recovery of attorney fees to the prevailing party, a "defendant may argue that the plaintiff is not a 'prevailing party' when its recovery represents a small improvement over the Rule 68 offer."[51] Similarly, "in cases where the recoverable damages are small and recovery of attorneys' fees is the main motivation for pursuing the cases, a Rule 68 offer in excess of what the plaintiff could recover at trial may deprive the court of jurisdiction under Article III of the Constitution."[52]

Practical Considerations

According to David A. Ball, Ph.D., a trial consultant and author, "[t]he *only* goal of trial is to get money for your client."[53] While, admittedly, monetary damages may not be the only consideration in pursuing a section 1983 case, the only relief that can be obtained from a jury is damages. According to Dr. Ball, the purpose of a jury is to fix what can be fixed, to help what can be helped, and to make up for, or balance, what cannot be fixed or helped.[54] The job of a plaintiff's attorney is to show the jurors how they can fulfill their obligation through the assignment of damages. "Jurors cannot gauge the full weight of the harm unless [the trial attorney can] get them to walk in [the plaintiff's] shoes."[55]

"Time is money,"[56] and an attorney seeking damages for a client must remember to spend significant, not just sufficient, time addressing damages. "A third to a half [of a trial] should be on harm, losses, and money."[57] It is hard enough for a jury to decide how much the verdict should be; "a trial attorney must explain to the jury how they can figure out how much it will take to make up for the harms and losses."[58] This is particularly important in the event the court limits the time for presentation of evidence. Rule 16(c)(15) of the Federal Rules of Civil Procedure provide that, at any pretrial conference held under the rule, "the court may take appropriate action, with respect to . . . an order establishing a reasonable limit on the time allowed for presenting evidence." "Faced with crowded dockets and limited judicial resources—the recurring conflict between supply and demand—courts are increasingly invoking their authority under Rule 16 to impose specific limits on the amount of time the parties are allotted to present their case at trial."[59] An attorney's effective use of time can mean the difference between merely nominal damages and appropriate compensatory (and/or punitive) damages.

The number of section 1983 claims filed shows no indication of declining under current law. Counsel for the defense and the plaintiff must recognize the central components of these claims and must be well versed on the intricacies of the damages awardable in these cases. Only with such information is counsel prepared and able to fully and properly advise and represent the client.♦

Endnotes

1. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 119 S. Ct. 1624 (1999).
2. Monroe v. Pape, 365 U.S. 167, 175, 81 S. Ct. 473, 478 (1961).
3. *Id.* at 176 (citing Senator Osborn of Florida, CONG. GLOBE, 42d Cong., 1st Sess. 653).
4. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618, 99 S. Ct. 1905, 1916 (1979).
5. Gomez v. Toledo, 446 U.S. 635, 640, 100 S. Ct. 1920, 1923 (1980).
6. Carey v. Piphus, 435 U.S. 247, 263, 98 S. Ct. 1042, 1052 (1978).
7. Will v. Michigan Dep't of State Police, 491 U.S. 58, 66–67, 109 S. Ct. 2304, 2310 (1989).
8. Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658, 691, 98 S. Ct. 2018 (1972).
9. 365 U.S. 167, 175, 81 S. Ct. 473, 478 (1961).
10. 7th Cir. Pattern Jury Instructions § 7.23.
11. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 106 S. Ct. 2537 (1986)
12. Whitfield v. Melendez-Rivera, 431 F.3d 1, 47 (1st Cir. 2005).
13. Basista v. Weir, 340 F.2d 74, 86 (3d Cir. 1965).
14. Williams v. Pharmacia, Inc., 137 F.3d 944, 954 (7th Cir. 1998).
15. Miles v. Indiana, 387 F.3d 591, 601 (7th Cir. 2003) (internal citation and quotes omitted).
16. *Williams*, 137 F.3d at 952 (internal quotes omitted).
17. Smith v. Wade, 461 U.S. 30, 51, 103 S. Ct. 1625, 1637 (1983).
18. King v. Marci, 993 F.2d 294, 297 (2d Cir. 1993).
19. City of Newport v. Fact Concerts, Inc. 453 U.S. 247, 261, 101 S. Ct. 2748, 2756 (1981).
20. 7th Cir. Pattern Jury Instructions § 7.24.
21. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419, 123 S. Ct. 1513, 1521 (2003).
22. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580, 116 S. Ct. 1589, 1601 (1996).
23. Lee v. Edwards, 101 F.3d 805, 810–12 (2d Cir. 1996).
24. Argentine v. United Steel Workers of Am., AFL-CIO, CLC, 287 F.3d 476, 488 (6th Cir. 2002).
25. SWORD & SHIELD REVISITED: A PRACTICAL APPROACH TO SECTION 1983 (Mary Massaron Ross ed. 1998).
26. I.R.C. § 61(a) (1994).
27. I.R.C. § 104(a) (1994).
28. Seay v. Comm'r, 58 T.C. 32, 36 (1972); Nicole Marie Mosesian, *How to Avoid Unfavorable Tax Consequences for Your Personal Injury Client's Settlement or Judgment*, 30 GONZ. L. REV. 343, 344 (1995).
29. Mosesian, *supra* note 28, at 364.
30. Oddi v. Ayco Corp., 947 F.2d 257, 267 (7th Cir. 1991).
31. Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res., 532 U.S. 598, 602, 121 S. Ct. 1835, 1839 (2001) (internal citation and quotes omitted).
32. 90 Stat. 2641, as amended, codified at 42 U.S.C. § 1988.
33. Hanrahan v. Hampton, 446 U.S. 754, 758, 100 S. Ct. 1987 (1980) (per curiam).
34. Farrar v. Hobby, 506 U.S. 103, 109, 113 S. Ct. 566, 572 (1992).
35. *Id.* at 111 (internal citations omitted).
36. Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 790, 109 S. Ct. 1486, 1492 (1989).
37. Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res., 532 U.S. 598, 605 (2001).
38. *Id.* at 605.

39. *Farrar*, 506 U.S. at 114.
40. Perlman v. Zell, 185 F.3d 850, 859–60 (7th Cir. 1999).
41. Tuf Racing Prods., Inc. v. Am. Suzuki Motor Co., 223 F.3d 585, 592 (7th Cir. 2000).
42. *Id.*
43. *Id.*
44. *See* Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933 (1983) (reciting 12 factors bearing on reasonableness).
45. Farrar v. Hobby, 506 U.S. 103, 115 (1992) (internal citations omitted).
46. *Id.* at 115 (internal citation, quotes, and emphasis omitted).
47. *Id.* at 120 (internal citation omitted) (O'Connor, J., concurring).
48. Tuf Racing Prods., Inc. v. Am. Suzuki Motor Co., 223 F.3d 585, 592 (7th Cir. 2000).
49. *Id.*
50. Ian H. Fisher, *Federal Rule 68, A Defendant's Subtle Weapon: Its Use and Pitfalls*, 14 DEPAUL BUS. L.J. 89 (Fall 2001) (describing the use of Rule 68 offers of judgment).
51. *Id.* at 94.
52. *Id.*
53. DAVID A. BALL, DAVID BALL ON DAMAGES—THE ESSENTIAL UPDATE, A PLAINTIFF'S ATTORNEY'S GUIDE FOR PERSONAL INJURY AND WRONGFUL DEATH CASES xxi (2d ed. 2005).
54. *Id.* at 4.
55. *Id.* at 10.
56. *Id.* at 5.
57. *Id.*
58. *Id.* at 4.
59. Martha K. Gooding and Ryan E. Lindsey, *Tempus Fugit: Practical Considerations for Trying a Case Against the Clock*, FED. LAW., January 2006, at 42.