

Recoverable Damages Under 42 U.S.C. Section 1983

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The purpose of 42 U.S.C. Section 1983 is to compensate a party for injuries caused by the deprivation of a constitutional right. Once it is found that a constitutional deprivation has occurred, the ultimate question is what, if any, damages are available to the plaintiff? Sometimes, the Section 1983 claim is not about monetary gain but rather remedying the constitutional deprivation(s). For instance, remedying a deprivation involving the right to protest in a public square may not necessarily require an award of monetary damages, but remedying any deprivation of the right to protest is crucial to our free society. On the other hand, some constitutional deprivations (false arrest, malicious prosecution) may require a significant award of damages to make the plaintiff whole following a constitutional deprivation. Accordingly, assuming that a plaintiff is successful in his or her Section 1983 claim, the plaintiff has an opportunity to recover a broad range of compensatory damages, nominal damages, punitive damages, and attorneys' fees. However, the availability of certain damages depends on a significant number of factors including but not limited to: the nature of the constitutional deprivation, the damages proven, the type of defendant, and the nature of the acts of the defendant(s).

This chapter provides a brief overview of the types of damages recoverable under a successful Section 1983 claim, as well as the conditions and limitations of each category of damages. Moreover, this chapter also discusses a major driver of Section 1983 suits: the ability to recover attorneys' fees for the successful prosecution of a claim. Lastly, this chapter discusses utilizing "Offers of Judgment" under Fed. R. Civ. P. 68 to "cut-off" attorneys' fees and litigation costs earlier rather than later in the litigation.

Compensatory Damages

Congress adopted the common-law system of recovery when it established liability for "constitutional torts." Consequently, the basic purpose of Section 1983 damages is "to *compensate persons for injuries* that are caused by the deprivation of constitutional rights."¹

When a plaintiff prevails on a Section 1983 claim for constitutional violations and can prove actual damages, a plaintiff is entitled to recover compensatory damages.² Compensatory damages (or actual damages) are "damages sufficient in an amount to indemnify the injured person for the loss suffered."³ Specifically,

¹ *Carey v. Phipus*, 435 U.S. 247, 254 (1978) (emphasis added).

² *See id.* at 254–55.

³ Black's Law Dictionary 174 (3rd pocket ed. 2006).

compensatory damages are designed to provide “*compensation* for the injury caused to plaintiff by defendant’s breach of duty.”⁴

The United States Supreme Court has expressly rejected the notion that Section 1983 authorizes an award of compensatory damages based on the fact-finder’s assessment of the value or importance of the substantive constitutional right which has been violated.⁵ Rather, the key inquiry is what injuries did the plaintiff suffer as a result of the constitutional deprivation and how can the plaintiff be compensated.

As in tort law, compensatory damages may include but are not limited to:

- Out-of-pocket losses;
- Medical bills;
- Impairment of reputation, personal humiliation;
- Lost or diminished earnings; and
- Financial, psychological, or physical injuries caused by the wrongful conduct.⁶

Compensatory damages are grounded in “concrete” damages and must be proven with some certainty. Unless a plaintiff can prove actual damages, a successful plaintiff is entitled to receive only nominal damages.⁷

While out-of-pocket damages and medical bills are easier to prove, emotional distress damages regularly concern defense counsel given the potential value range of the claim. The United States Supreme Court in *Carey v. Phipus*, 435 U.S. 247 (1978), held that “neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.”⁸ The Court further held that “[a]lthough essentially subjective, genuine injury in this respect may be evidenced by one’s conduct and observed by others. Juries must be guided by appropriate instructions, and an award of damages must be supported by competent evidence concerning the injury.”⁹

Carey involved a high school student and an elementary school student suspended for smoking marijuana; the students claimed that they were denied procedural due process because they were suspended without an opportunity to respond to the charges against them. The Court of Appeals for the Seventh Circuit held that even if the suspension was justified, the student could recover substantial compensatory damages simply because of the insufficient procedures used to suspend them from school. The Supreme Court reversed, and held that the students could recover compensatory damages *only* if they proved actual injury caused by the denial of their constitutional rights. The Court noted: “Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests....”¹⁰ Where no injury was

⁴ 2 F. Harper, F. James, & O. Gray, *Law of Torts* §25.1, at 490 (2d ed. 1986) (emphasis in original); see also *Carey*, 435 U.S. at 255; *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 395, 397 (1971).

⁵ *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986).

⁶ See *Stachura*, 477 U.S. at 307; *Carey*, 435 U.S. at 264 (mental and emotional distress constitute compensable injury in §1983 cases); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Akouri v. Fla. Dept. of Transp.*, 408 F.3d 1338, 1345 (11th Cir. 2005); *Randall v. Prince George’s County*, 302 F.3d 188, 208 (4th Cir. 2002); *Coleman v. Rahija*, 114 F.3d 778, 786 (8th Cir. 1997).

⁷ *Carey*, 435 U.S. at 266–67.

⁸ *Id.* at 264.

⁹ *Id.* at 264 n.20.

¹⁰ *Carey*, 435 U.S. at 254.

present, no “compensatory” damages could be awarded.¹¹ The Court further held that in the absence of proof of actual injury, the students were entitled to receive only nominal damages, not to exceed one dollar, from the school officials.¹²

When a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish, some form of presumed damages may possibly be appropriate.¹³ “In those circumstances, presumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure.”¹⁴

However, there is a split of authority as to when compensatory damages are available in a §1983 claim for a violation of a constitutional right. As discussed *supra*, the Supreme Court has recognized that common-law tort principles protect interests that are parallel to the interests protected by the Constitution.¹⁵ As such, the Court has agreed that an appropriate starting point for an inquiry under §1983 are the common-law tort principles.¹⁶ Nevertheless, “[i]t is not clear... that common-law tort rules of damages will provide a complete solution to the damages issue in every §1983 case.”¹⁷ In cases where the interest protected by a particular constitutional right is not also protected by analogous common-law tort principle, the judiciary is tasked with adapting the common-law rules of damages to “provide fair compensation for injuries caused by the deprivation of a constitutional right.”¹⁸

The split of authority rests on how broadly a court is to interpret the interests protected by a constitutional right.¹⁹ For example, the Tenth Circuit has held that the Fourth Amendment protects a person’s liberty, property, and privacy interests.²⁰ The Tenth Circuit takes the broad view that “any damage award available for a Fourth-Amendment violation under 42 U.S.C. §1983 should be tailored to compensating losses of liberty, property, privacy, and a person’s sense of security and individual dignity.”²¹

In *Train v. City of Albuquerque*, plaintiff was incarcerated for ten months in a federal facility after a handgun was discovered in an apartment, allegedly belonging to plaintiff, after an illegal search and seizure in violation of plaintiff’s Fourth Amendment right.²² Plaintiff sought compensatory damages stemming from his criminal defense fees, ten months of lost income due to his incarceration and emotional distress damages resulting from defending himself against the criminal charges and from residing in a federal prison.²³

¹¹ *Id.* at 254–55.

¹² *Id.* at 266–67.

¹³ *Carey*, 435 U.S. at 262; *see also* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760–61 (1985) (opinion of Powell, J.); *Gertz*, 418 U.S. at 349.

¹⁴ *Stachura*, 477 U.S. at 311.

¹⁵ *Carey*, 435 U.S. at 257–58.

¹⁶ *Id.* at 258.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Train v. City of Albuquerque*, 629 F. Supp. 2d 1243, 1251 (D. N.M. 2009) (observing that the Third Circuit adopted a narrow interpretation of *Carey* and of the Fourth Amendment.).

²⁰ *Id.* at 1252; *see also* *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1196 (10th Cir. 2001).

²¹ *Id.* at 1252.

²² *Id.* at 1244–46.

²³ *Id.* at 1246.

Using Tenth Circuit precedent, the District Court of New Mexico found that “[f]ederal criminal charges, federal detention, and all of the negative consequences of those charges and attendant to federal custody implicated [plaintiff’s] interest in liberty and his sense of security and individual dignity.”²⁴ The district court reasoned that the losses to plaintiff’s sense of security and individual dignity “should be compensable, given that they implicate the interests that the Tenth Circuit has explained the Fourth Amendment protects.”²⁵

The Second and Third Circuits have both interpreted the interests protected by the Fourth Amendment, and the holding in *Carey*, more narrowly than the Tenth Circuit.²⁶ The Third Circuit found that damages for post-indictment legal processes subsequent to an unlawful search are “too unrelated to the Fourth Amendment’s privacy concerns.”²⁷ Both circuit courts reasoned that

[v]ictims of unreasonable searches or seizures may recover damages directly related to the invasion of their privacy—including (where appropriate) damages for physical injury, property damage, injury to reputation, etc.; but such victims cannot be compensated for injuries that result from the discovery of incriminating evidence and consequent criminal prosecution.²⁸ Essentially, the courts argue that damages should be proportionate to the interests protected by a constitutional right and not all damages sustained will flow from the violation of a plaintiff’s constitutional right.²⁹

In *Hector v. Watt*, plaintiff initiated a §1983 action after 80 pounds of hallucinogenic mushrooms were seized in violation of his Fourth Amendment rights.³⁰ Plaintiff sought compensatory damages for costs incurred during his criminal prosecution.³¹ The Third Circuit affirmed the district court’s decision to deny plaintiff’s compensatory damages.³² The court concluded that plaintiff was unable to establish a common law tort claim for his Fourth Amendment violation.³³ Moreover, the court found that the “liability [plaintiff] seeks under §1983 could often have little relation to the seriousness of the Fourth Amendment violation.”³⁴ The court explained that police officers are not free from liability for the invasion of privacy in a Fourth Amendment violation but allowing recovery for costs incurred after the invasion of privacy is complete would be disproportionate to the interests protected by the Fourth Amendment.³⁵

The split of authority suggests that the amount of compensatory damages a plaintiff may recover for a constitutional violation is determined by how broadly or narrowly a court is willing to view the interests pro-

²⁴ *Id.* at 1252.

²⁵ *Id.*

²⁶ *Townes v. City of New York*, 176 F.3d 138, 148 (2d Cir. 1999) (holding that “[t]he evil of an unreasonable search or seizure is that it invades privacy, not that it uncovers crime, which is no evil at all.”); *see also Hector v. Watt*, 235 F.3d 154, 157 (3d Cir. 2000) (“When we reflect on the interests protected by the Fourth Amendment, we believe that it follows that a plaintiff cannot recover the litigation expenses incurred because police officers discovered criminal conduct during an unconstitutional search.”),

²⁷ *Hector*, 235 F.3d at 157.

²⁸ *Id.* (quoting *Townes*, 176 F.3d at 148).

²⁹ *Id.* at 160.

³⁰ *Id.* at 155.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 159.

³⁴ *Id.* at 160.

³⁵ *Id.*

ted by the Constitution. Even if a plaintiff were to be in a jurisdiction in which the precedent establishes broad protection of the scope of interests, the plaintiff must still establish that the constitutional violation was the proximate cause of their harm. Proximate cause is similarly interpreted differently amongst district and circuit courts across the country.

Proximate cause “is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability.”³⁶ Proximate cause is not just any cause of the injury, but a cause “with a sufficient connection to the result.”³⁷ The Supreme Court has held that a proximate cause inquiry is a “flexible concept” with a basic requirement that there is a direct relation between the harm and the conduct alleged.³⁸ Proximate cause is often explained in terms of “foreseeability or the scope of risk created by the predicate conduct.”³⁹ Thus, proximate cause severs liability in situations “where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity.”⁴⁰

Using the Fourth Amendment example, courts are divided as to whether a Fourth Amendment violation can be the proximate cause for a plaintiff’s damages for the events that occur after the violation.⁴¹ The standard used by different jurisdictions depends on how flexible they are willing to be with proximate causation. Some courts find that independent acts of the judicial process are enough to be an intervening cause, severing the causal link between the alleged damages and the constitutional violation.⁴² Other courts have found that the constitutional violation itself is sufficient to establish proximate cause for a plaintiff’s compensatory damages.⁴³

Compensatory damages can be tricky to establish, and without clear direction from the Supreme Court, what a plaintiff can recover for compensatory damages largely depends on the jurisdiction in which the constitutional violation occurs.

³⁶ *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011).

³⁷ *Paroline v. U.S.*, 134 S. Ct. 1710, 1719 (2014).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Compare* *Martin v. Marinez*, 934 F.3d 594, 605–06 (7th Cir. 2019) (holding that a violation of the plaintiff’s Fourth Amendment right was certainly the actual cause of the plaintiff’s imprisonment, but other superseding, intervening events, such as the discovery of the contraband or the independent decision to deny the plaintiff bail, broke the chain of causation.) *with* *Train*, 629 F.Supp.2d at 1252–53 (holding that “a reasonable jury may infer from the evidence that the constitutional deprivation proximately caused [a plaintiff’s] asserted losses”).

⁴² *See* *Townes*, 176 F.3d at 147 (holding “[i]t is well settled that the chain of causation between a police officer’s unlawful arrest and a subsequent conviction and incarceration is broken by the intervening exercise of independent judgment.”); *see also* *Barts v. Joyner*, 865 F.2d 1187, 1195 (11th Cir. 1989) (finding the decisions of the prosecutor, grand jury, judge, and jury intervene).

⁴³ *See* *Borunda v. Richmond*, 885 F.2d 1384 (9th Cir. 1988) (en banc) (stating that a “plaintiff who establishes liability for deprivations of constitutional rights actionable under 42 U.S.C. §1983 is entitled to recover compensatory damages for all injuries suffered as a consequence of those deprivations” and holding that the decision to prosecute was not an intervening cause); *Kerr v. City of Chicago*, 424 F.2d 1134, 1142 (7th Cir. 1970) (finding that a “plaintiff in a civil rights action should be allowed to recover the attorneys’ fees in a... criminal action where the expenditure is a foreseeable result of the acts of the defendant”).

Nominal Damages

Sometimes a plaintiff can establish constitutional liability but is unable to establish actual injury. The redressing of a constitutional wrong is vital to both the plaintiff and to society even when the plaintiff suffered no real articulable injury or monetary damages. In such cases, “nominal damages” are available to the plaintiff who is successful at trial. Nominal damages are defined as “[a] trifling sum awarded when a legal injury is suffered but there is no substantial loss or injury to be compensated.”⁴⁴ A typical nominal damages award is one dollar, and rarely ever exceeds two dollars.⁴⁵

The United States Supreme Court has approved the award of nominal damages and has even emphasized the importance of the ability to recover nominal damages:

Common-law courts traditionally have vindicated deprivations of certain “absolute” rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.⁴⁶

While nominal damages may seem *de minimis*, they must still be thoroughly analyzed because they might allow for both punitive damages and attorneys’ fees.

Punitive Damages

Punitive damages are “[d]amages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit.”⁴⁷ In *City of Newport v. Fact Concerts, Inc.*, the Supreme Court held that “[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct.”⁴⁸ In *Smith v. Wade*, the Supreme Court held that Section 1983 authorizes the award of punitive damages against state or local officials in their individual capacity.⁴⁹ Specifically, the Supreme Court held that “[a] jury [is] permitted to assess punitive damages in an action under Section 1983 when the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.”⁵⁰

Although punitive damages are available to a Section 1983 plaintiff, punitive damages can only be assessed against the individual responsible for constitutional deprivation and cannot be awarded against the

⁴⁴ *Black’s Law Dictionary* 472 (10th ed. 2014).

⁴⁵ See *Moore v. Liszewski*, 838 F.3d 877, 878 (7th Cir. 2016) (“It’s a considerable mystery why nominal damages, which rarely exceed \$2 and more commonly are as in this case only \$1, are ever awarded.”).

⁴⁶ *Carey*, 435 U.S. at 266.

⁴⁷ *Black’s Law Dictionary* 474 (10th ed. 2014).

⁴⁸ *City of Newport v. Fact Concerts*, 453 U.S. 247, 266–67, (1981); see also Restatement (Second) of Torts §908 (1979); W. Prosser, *Law of Torts*, at 9–10 (4th ed. 1971).

⁴⁹ *Smith v. Wade*, 461 U.S. 30 (1983).

⁵⁰ *Id.* at 56.

municipality or government entity.⁵¹ The Supreme Court has held that punitive damages against municipal entities do not serve the retributive purpose of punitive damages:

Regarding retribution, it remains true that an award of punitive damages against a municipality “punishes” only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party. Thus, there is no question here of equitably distributing the losses resulting from official misconduct. Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.⁵²

A plaintiff can obtain punitive damages even when nominal damages are awarded if it is established that the deprivation of rights were malicious.⁵³

Attorneys’ Fees

Once a plaintiff has established liability under Section 1983, he or she may recover reasonable attorneys’ fees.⁵⁴ Specifically, 42 U.S.C. Section 1988(b) states in pertinent part:

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title... 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.⁵⁵

Moreover, in addition to awarding attorneys’ fees under Section 1988(b), the court, in its discretion, may include expert fees as part of the attorneys’ fee.⁵⁶ Generally, “[t]he appropriate fee under Section 1988 is the market rate for the legal services reasonably devoted to the successful portion of the litigation.”⁵⁷

Even when a jury awards only nominal damages, the plaintiff is a “prevailing party” under Section 1988.⁵⁸ Nevertheless, “a reasonable attorney’s fee for a nominal victor is usually zero.”⁵⁹ This is in line with the Supreme Court’s “admonition that fee awards under §1988 were never intended to ‘produce windfalls to attorneys.’”⁶⁰ To determine whether a prevailing party is entitled to attorneys’ fees after receiving nom-

⁵¹ Newport, 453 U.S. at 267.

⁵² *Id.* at 267 (citations omitted).

⁵³ *See* Carey, 435 U.S. at 267.

⁵⁴ *See* 42 U.S.C. §1988(b).

⁵⁵ *Id.*

⁵⁶ 42 U.S.C. §1988(c).

⁵⁷ Richardson v. City of Chi., 740 F.3d 1099, 1103 (7th Cir. 2014).

⁵⁸ Farrar v. Hobby, 506 U.S. 103, 112 (1992); *see also* Aponte v. City of Chi., 728 F.3d 724, 726 (7th Cir. 2013).

⁵⁹ Aponte, 728 F.3d at 727; *see also* Farrar, 506 U.S. at 115 (“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.”) (internal citations omitted).

⁶⁰ Farrar, 506 U.S. at 115 (quoting City of Riverside v. Rivera, 477 U.S. 561, 580 (1986) (plurality)).

inal damages in a Section 1983 action, the United States Supreme Court in *Farrar v. Hobby* established a three-factor test. Those factors are:

1. The difference between the amounts sought and recovered;
2. The significance of the issue on which the plaintiff prevailed relative to the issues litigated; and
3. Whether the case accomplished some public goal.⁶¹

The first factor is the difference between the amounts sought and recovered. “In deciding whether to award attorney’s fees to a nominally prevailing party, the most significant of the three factors is the difference between the judgment recovered and the recovery sought.”⁶² In *Briggs v. Marshall*, the Seventh Circuit upheld the district court’s determination that the first factor was not met when “during closing arguments, the plaintiffs requested \$75,000 in compensatory damages plus significant punitive damages, yet the jury awarded a total of four dollars.”⁶³

The second factor is the significance of the issue on which the plaintiff prevailed relative to the issues litigated. This is considered the “least significant” factor.⁶⁴ In *Aponte v. City of Chicago*, the plaintiff brought two claims—one for unreasonably executing a warrant and one for “failing to prevent an unreasonable search”—against each of the four officers.⁶⁵ The plaintiff “lost seven of his eight Fourth Amendment claims and three of the four defendants were victorious.”⁶⁶ The Seventh Circuit concluded that this victory was “not significant.”⁶⁷

Lastly, the third factor is whether the case accomplished some public goal. “The more important the right at stake and the more egregious the violation the more likely it is that the victory serves a public purpose. An award of punitive damages, therefore, is strong evidence that the victory served a public purpose.”⁶⁸

Even if the plaintiff is a prevailing party and is entitled to attorneys’ fees, the party seeking costs carries the burden of proving “that the requested costs were necessarily incurred and reasonable.”⁶⁹ Typically, parties file a Form AO 133 “Bill of Costs,” which includes a sworn affidavit, and both an itemization and documentation of the requested costs. 28 U.S.C. Section 1924 requires all bills of costs to be supported by a sworn affidavit. Courts analyze costs based on category and review corresponding documentation.⁷⁰

⁶¹ *Id.* at 120–22 (O’Connor, J., concurring).

⁶² *Briggs v. Marshall*, 93 F.3d 355, 361 (7th Cir. 1996).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Aponte*, 728 F.3d at 725 (7th Cir. 2013).

⁶⁶ *Id.* at 727.

⁶⁷ *Id.* at 731.

⁶⁸ *Cartwright v. Stamper*, 7 F.3d 106, 110 (7th Cir. 1993); *see also* *Estate of Borst v. O’Brien*, 979 F.2d 511, 517 (7th Cir. 1992) (punitive damage award reflects “both the value of the victory in finding a violation of constitutional rights and the deterrence value of the suit”); *Ustrak v. Fairman*, 851 F.2d 983, 989 (7th Cir. 1988) (“A judicial decision that finds a violation of constitutional rights and punishes the perpetrator with an award of punitive damages not only vindicates constitutional principles but is a deterrent to future violations, to the benefit not only of the plaintiff but of others in similar situations.”).

⁶⁹ *Trs. of the Chi. Plastering Inst. Pension Tr. v. Cork Plastering Co.*, 570 F.3d 890, 906 (7th Cir. 2009); *see also* *Little v. Mitsubishi Motors N. Am., Inc.*, 514 F.3d 699, 702 (7th Cir. 2008).

⁷⁰ *See, e.g., Northbrook Excess & Surplus Ins. Co. v. Proctor & Gamble, Co.*, 924 F.2d 633, 643 (7th Cir. 1991) (requiring a bill of costs that provides “the best breakdown obtainable from retained records”).

The Rule 68 Offer

As stated above, sometimes the recovery for a constitutional rights violation can be small, but the attorneys' fees can be the main motivation for plaintiff's counsel's pursuit of the case. Rule 68 of the Federal Rules of Civil Procedure can be a powerful mechanism for curtailing litigation and motivating a plaintiff to a reasonable settlement. Rule 68 states:

Rule 68. Offer of Judgment

- (a) *Making an Offer; Judgment on an Accepted Offer.* At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.
- (b) *Unaccepted Offer.* An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.
- (c) *Offer After Liability Is Determined.* When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.
- (d) *Paying Costs After an Unaccepted Offer.* If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

Accordingly, when a Rule 68 offer is made to the plaintiff, and the plaintiff accepts the offer, the clerk enters judgment according to the offer's terms.⁷¹ However, if the judgment that the offeree finally obtains is not more favorable than an unaccepted offer, the offeree must pay the costs incurred after the offer was made.⁷²

While attorneys' fees are sometimes considered separate from costs, in an action for attorneys' fees under 42 U.S.C. Section 1988, "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.*..."⁷³ Therefore, attorneys' fees qualify as "costs" for purposes of a motion for attorneys' fees under Section 1988.⁷⁴ The logical question defense counsel will have is "if my client makes a Rule 68 offer that is rejected, and a plaintiff obtains a judgment that is not more favorable than the unaccepted offer, must the plaintiff pay my attorneys' fees?" The Supreme Court in *Marek v. Chesny*, 473 U.S. 1 (1985), the above-cited case that discussed Rule 68 and Section 1983 actions, did not address this question. However, a Southern District of New York case analyzed the issue in the negative:

[A]lthough fees are generally awarded to a prevailing plaintiff under §1988, a prevailing defendant may only recover such fees if the action was "frivolous, unreasonable, or groundless, or... the plaintiff continued to litigate after it clearly became so." Thus, aside from the fact that a defendant eligible to receive costs under Rule 68 cannot be considered prevailing—since a defendant may recover costs under Rule

⁷¹ Fed. R. Civ. P. 68(a).

⁷² Fed. R. Civ. P. 68(d).

⁷³ 42 U.S.C. §1988(b) (emphasis added).

⁷⁴ See, e.g., *Marek v. Chesny*, 473 U.S. 1, 9 (1985) ("Since Congress expressly included attorney's fees as 'costs' available to a plaintiff in a §1983 suit, such fees are subject to the cost-shifting provision of Rule 68.") (superseded by 42 U.S.C. §1981(c) on other grounds).

68 only if the plaintiff obtains a judgment in his favor—a defendant entitled to costs under Rule 68 would only be able to recover attorneys’ fees if the action were “frivolous, unreasonable, or groundless.” If the action were not “frivolous, unreasonable, or groundless,” the defendant would not be entitled to attorneys’ fees under §1988 and thus there would be no fees to shift to the plaintiff as part of the “costs” under Rule 68.⁷⁵

Although it has not directly addressed the issue in the Section 1983 Rule 68 context, the Supreme Court declined to award a “prevailing defendant” attorneys’ fees absent a finding that the matter was “frivolous, unreasonable, without foundation, or brought in bad faith” in a case brought under Title VII of the Civil Rights Act of 1964:

That §706(k) allows fee awards only to *prevailing* private plaintiffs should assure that this statutory provision will not in itself operate as an incentive to the bringing of claims that have little chance of success. To take the further step of assessing attorney’s fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, a plaintiff should not be assessed his opponent’s attorney’s fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. And, needless to say, if a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney’s fees incurred by the defense.⁷⁶

A fair reading of the Supreme Court’s holding in *Christiansburg* leads one to believe that if presented with the issue of “prevailing defendant” attorneys’ fees in a Section 1983 case, it is unlikely that the Supreme Court would award a defendant its attorneys’ fees following a rejected Rule 68 offer.

Should defense counsel desire to formulate a Rule 68 offer to plaintiff’s counsel, defense counsel should review their circuit’s analysis regarding Rule 68 offers and be specific as to what the offer entails with regards to relief. Although all circuits are different, the Seventh Circuit has held that specificity is key to determining the enforceability of a Rule 68 offer:

Because Rule 68 puts plaintiffs at their peril whether or not they accept the offer, the defendant must make clear whether the offer is inclusive of fees when the underlying statute provides fees for the prevailing party. As with costs, the plaintiff should not be left in the position of guessing what a court will later hold the offer means. This holding is consistent with the rule of contract construction requiring that ambiguities in a contract be construed against the drafter. The defendant is always free to offer a lump sum in settlement of liability, costs and fees, but that is not what [defendant] did here. [Defendant]’s offer was silent as to fees and costs, and under these circumstances, the court may then award an additional amount to cover costs and fees.⁷⁷

⁷⁵ Jolly v. Coughlin, No. 92 Civ. 9026 (JGK), 1999 WL 20895, at 12 (S.D.N.Y. Jan. 19, 1999).

⁷⁶ Christiansburg Garment Co. v. Equal Emp’t Opportunity Comm’n, 434 U.S. 412, 422 (1978) (emphasis in original) (footnotes omitted).

⁷⁷ Webb v. James, 147 F.3d 617, 623 (7th Cir. 1998) (internal citations omitted); *see also* Sanchez v. Prudential Pizza, Inc., 709 F.3d 689, 692–93 (7th Cir. 2013):

[Defendant] argues that its offer was not silent regarding fees... [Defendant] points out that its offer referred to plaintiff’s “claims for relief,” and that [plaintiff] requested attorney fees and costs in her amended complaint. Thus, [defendant] contends, it would be “illogical” to conclude that attorney fees were not included in the defendant’s Rule 68 offer.

The danger of a non-compliant Rule 68 offer could potentially mean hundreds of thousands of dollars in unanticipated costs.

Conclusion

At the beginning of a suit, defense counsel must determine what, if any, constitutional deprivation occurred. Once the constitutional deprivation and liability have been analyzed, defense counsel will need to review what, if any, remedies are available, and remember that under Section 1988, a plaintiff might be entitled to punitive damages and attorneys' fees even if nominal damages are awarded. Lastly, defense counsel should always review whether a Rule 68 offer is warranted under the circumstances.

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We reject this argument. [Defendant's] logic would allow a defendant to force a plaintiff to guess the meaning of the offer, which the Rule and *Webb* do not permit. Rule 68(a) requires the offer to include "specified terms." If [defendant's] offer was meant to include attorney fees and costs, the offer was not specific. It simply did not refer to [plaintiff's] attorney fees or costs. It referred to [plaintiff's] "claims" but failed to specify what those claims were, such as whether they included her claim against the other defendant.