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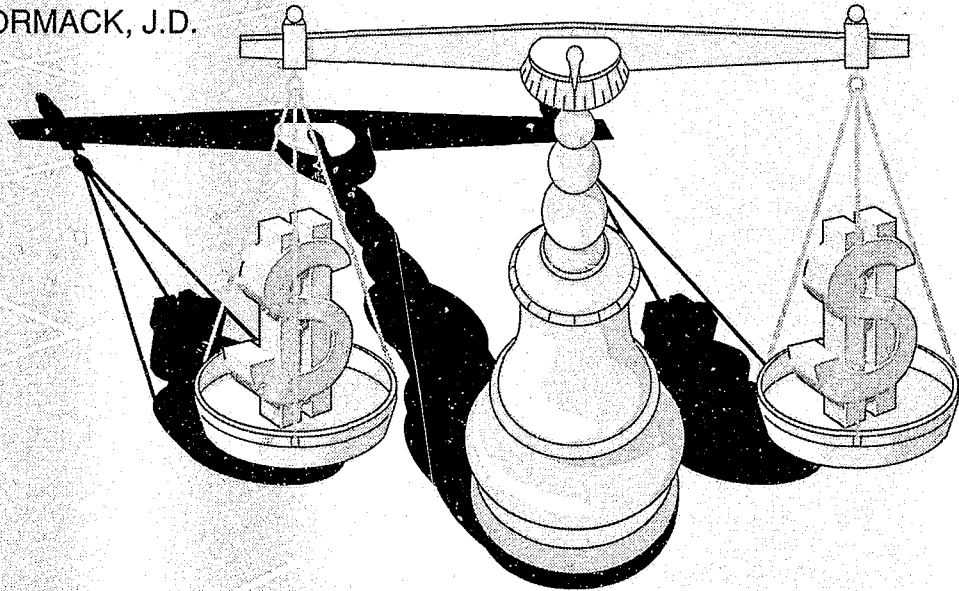
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Attorney's Fees in Civil Litigation Controlling the Costs

By
WILLIAM U. McCORMACK, J.D.



One of the most significant aspects of many civil suits filed against law enforcement defendants for alleged violations of constitutional rights¹ is the associated attorney's fees in the case. Often, the prospect of incurring high attorney's fees determines whether a law enforcement officer or a government entity vigorously defends a civil suit by asserting all possible defenses and immunities or instead settles the suit. This article examines recent developments concerning the important issue of attorney's fees in civil litigation and suggests strategies for law enforcement defendants to better control potential civil liability.

Methods of Compensation

To understand the impact of attorney's fees on civil liability, it is first necessary to understand the ways in which an attorney receives compensation for representing a plaintiff and whether the plaintiff is reimbursed for those fees. In a common law tort suit, such as a car accident, in which the claim is negligence, courts follow the so-called "American Rule," where each side bears the costs for its own attorney's fees.² Thus, if the plaintiff prevails, the plaintiff is not reimbursed by the defendant for the plaintiff's attorney fees, which are typically calculated on either an hourly rate or a contingency fee basis. With a contingency

fee, the plaintiff's attorney takes a certain percentage of the damage award, usually 30 to 50 percent, but receives no monetary compensation if the plaintiff loses.

After concluding the "American Rule" insufficiently encouraged civil suits alleging constitutional violations, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988.³ This act authorizes Federal district courts to award reasonable attorney's fees to prevailing parties in civil rights litigation brought under 42 U.S.C. §1983.⁴

Under §1988, a person who sues under §1983 and prevails in the lawsuit is entitled not only to

damages but also to an award for attorney's fees.⁵ These fees are typically calculated by multiplying the reasonable number of hours the attorney expended by a reasonable hourly rate.⁶ Thus, the attorney's fees that law enforcement defendants may have to pay to the plaintiff continually increase as a §1983 lawsuit progresses through the normal stages of pretrial motions, discovery, trial, and appeals.

This threat of an ever-escalating award of attorney's fees presumably causes many law enforcement defendants to settle suits before trial, even when the validity of the suit is questionable because of viable defenses or immunities. The concern over the cost to a law enforcement defendant or agency for attorney's fees is further heightened by the need to pay the lawyers who are defending the suit. As a result, it is not uncommon for the attorney's fees to be the most significant monetary aspect in civil litigation. In many instances, the attorney's fees of the plaintiff awarded under §1983 exceed the damages awarded to the plaintiff.⁷

Settlement Considerations

Quickly settling a lawsuit that a plaintiff is likely to win can be an extremely advantageous tactic for a law enforcement defendant. By using Rule 68 of the Federal Rules of Civil Procedure (FRCP) to settle a case, a law enforcement defendant may limit attorney's fees and other costs of litigation, such as expert witness fees.

Rule 68 provides that a defendant in a lawsuit may offer to allow judgment to be taken against him or

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Special Agent McCormack is a legal instructor at the FBI Academy.

her “with costs then accrued.” If the offer of judgment is rejected by the plaintiff and the judgment finally obtained by the plaintiff is less favorable than the offer, the plaintiff “must pay the costs incurred after the making of the offer.”

In *Marek v. Chesney*,⁸ the Supreme Court determined that Rule 68 “costs” include §1988 attorney's fees. *Marek* is a good example of how a quick Rule 68 offer of judgment can limit attorney's fees and costs.

In *Marek*, three police officers, in answering a domestic disturbance call, shot and killed the plaintiff's son. Prior to trial, the defendant officers made a Rule 68 settlement offer of \$100,000, including attorney's fees, which the plaintiff rejected. The case went to trial, and the plaintiff was awarded \$60,000 in damages. Thereafter, the plaintiff's attorney filed a request for attorney's fees and costs under §1988 for \$171,692. The parties agreed that \$32,000 fairly represented the costs, including attorneys fees,

accrued prior to the defendants' offer under Rule 68.

Because the \$32,000 in attorney's fees and costs, when added to the \$60,000 damage award, was less than the \$100,000 offer of judgment, the plaintiff's attorney's fees and costs were properly limited to \$32,000 rather than \$171,692. The Court noted that the application of Rule 68 to §1983 cases will require plaintiffs to think very hard about whether continued litigation is worthwhile and that the purpose behind the rule is to encourage early settlements.⁹ In addition, the Supreme Court, in *Evans v. Jeff D.*,¹⁰ held that a defendant sued under §1983 may properly request the plaintiff to waive all attorney's fees as part of a settlement offer.¹¹

Courts have unanimously held that the award of attorney's fees under §1988 is to the plaintiff and not the plaintiff's attorney.¹² Therefore, it is the plaintiff's prerogative to negotiate the amount of attorney's fees as part of a settlement agreement.

As one court noted, the right to settle a civil suit under §1983, including the amount of attorney's fees, rightfully belongs to the plaintiff. If the attorney's fees and the right to settle belonged to the attorney, the attorney would have a clear interest in refusing to settle in order to increase the attorney's fees under §1988.¹³

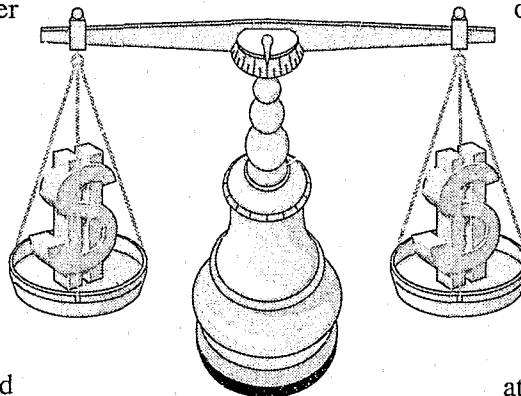
Prevailing Parties and Monetary Damages

The Supreme Court recently decided two important cases that may significantly lessen the impact of attorney's fees under §1988, even when the plaintiff prevails in the lawsuit. In *Farrar v. Hobby*,¹⁴ the Supreme Court ruled that a plaintiff who received only nominal damages of \$1 in a §1983 lawsuit was entitled to no attorney's fees under §1988.

In *Farrar*, the plaintiff owned a school for delinquent and disabled teens, and one of the students died. When a State grand jury returned a murder indictment against the plaintiff, the State temporarily closed the school. After criminal charges were dismissed, the plaintiff filed a §1983 suit seeking \$17 million from the government officials involved in the criminal investigation. The civil case was tried before a jury, which determined that the plaintiff's constitutional rights had been violated, but only \$1 in nominal damages were eventually awarded. The plaintiff then petitioned for attorney's fees, and the district court awarded \$280,000.

The Supreme Court held that no attorney's fees should be awarded when only nominal damages are obtained in a §1983 lawsuit. Even

though the plaintiff was found by the Court to be technically a prevailing party in the litigation, the Court stated that the most critical factor in determining the reasonableness of a fee award is the degree of success obtained.¹⁵



Farrar is an important case for law enforcement defendants when deciding whether to go to trial or to settle a case before trial. The Court in *Farrar* stated that where recovery of private damages is the purpose of civil rights litigation, a court in awarding attorney's fees is obligated to give primary consideration to the amount of damages awarded, as compared to the amount sought, and that fee awards under §1988 were never intended to produce windfalls to attorneys.¹⁶ One predictable consequence of the *Farrar* decision is that attorneys will be deterred from filing cases where they can anticipate that the amount of attorney's fees incurred will be larger than the monetary damage award.¹⁷

The significant impact of *Farrar* can be seen in two recent Seventh Circuit Court of Appeals cases. In *Cartwright v. Stamper*,¹⁸ a law enforcement

officer was successfully sued for an unconstitutional entry into the plaintiff's home, but the jury awarded only nominal damages. The plaintiff then petitioned for \$111,851 in attorney's fees and was awarded \$79,312 by the district court. The Seventh Circuit overturned the fee award and held that the plaintiff was entitled to no fees at all.¹⁹

Similarly, in *Willis v. City of Chicago*,²⁰ the plaintiff prevailed in his lawsuit alleging that he was unconstitutionally detained for over 48 hours without a judicial probable cause hearing, but the jury awarded him only nominal damages. The district court awarded the plaintiff \$139,350 in attorney's fees, which the Seventh Circuit Court of Appeals reduced to zero based on *Farrar*.²¹

Contingency Fee Arrangements and §1988

A second attorney's fees issue that the Supreme Court has recently resolved concerns the effect of a contingency fee arrangement on the amount of attorney's fees awarded under §1988. In *City of Burlington v. Dague*,²² the Court ruled that a contingency fee arrangement between plaintiffs and their attorneys cannot be used to increase the amount of attorney's fees awarded under §1988.²³

The effect of the *Dague* case can be seen in *Gates v. Deukmejian*,²⁴ where prisoners in California brought a large class action lawsuit challenging the conditions of their confinement. After the prisoners prevailed, the district court awarded over \$6 million in §1988 attorney's fees. However, the U.S. Court of

Appeals for the Ninth Circuit, citing *Dague*, reduced that figure by one-half, because the district court had doubled the fee awarded to compensate for a contingency fee risk factor.

Severability of Claims

Another strategy successfully used to reduce the amount of attorney's fees in §1983 litigation is to demonstrate that a plaintiff has alleged several separate claims based on different facts and legal theories. When a plaintiff does not prevail on one or more of these separate claims, the plaintiff's attorney is not entitled to a fee award for work on such unsuccessful claims.²⁵ In addition, if a plaintiff achieves only partial or limited success, even with interrelated claims, the degree of success may be properly considered in the overall attorney's fees award.²⁶

An example of the severability of claims strategy can be seen in *Lenard v. Argento*,²⁷ in which the plaintiff sued the police under §1983 alleging an unconstitutional use of excessive force, an equal protection violation, and malicious prosecution. The plaintiff prevailed only on the equal protection claim and was awarded \$267,000 in damages and \$377,000 in attorney's fees under §1988.

The Seventh Circuit Court of Appeals reversed the attorney's fee award, finding that the equal protection claim and the malicious prosecution claim were not related. Because the fee award was based on the total number of hours the attorney expended on the litigation, the Seventh Circuit remanded the case for a lowering of the attorney's fees.

Requests for Excessive and Unsubstantiated Fees

Law enforcement defendants should also be prepared to challenge any fee claim by a plaintiff's attorney that is either poorly documented or extremely excessive. If the plaintiff does not submit reliable and detailed documentation to support the hours allegedly spent on the case by the attorney, it is within the district court's discretion to deny a fee award.²⁸

For example, in *Pontarelli v. Stone*,²⁹ five State troopers sued the State police and various government officials alleging, among other claims, sex discrimination. Eventually, after lengthy litigation, one of the plaintiffs prevailed and was awarded \$15,000 in damages.

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The plaintiff then requested \$511,951 in attorney's fees and \$203,268 in costs pursuant to §1988. The plaintiff was, however, delinquent in filing supporting documentation which, when filed, was characterized by the district court as "questionable." For instance, the court noted that the plaintiff's attorney submitted a claim for 25.7 hours work for one day and 26.6 hours for

the following day. The court remarked that it may be possible to work around the clock for 2 consecutive days, but it is clearly impossible to do so for more than 24 hours in any one day.

Because of the excessive and unsubstantiated fee claim, the court determined that the plaintiff was entitled to no attorney's fees or costs. In addition, the court ordered the plaintiff to pay one of the defendant's \$54,168 to cover the defendant's attorney's fees, because the court determined the claim against this defendant was frivolous and was brought to harass and embarrass.

Conclusion

When Congress determined that individuals should be encouraged to vindicate violations of their constitutional rights, 42 U.S.C. §1988 was passed, which provided for the awarding of attorney's fees to a prevailing party in §1983 litigation. As a result, law enforcement defendants sued under §1983 often face tough choices in deciding whether to settle or litigate.

To aid in their decision, law enforcement defendants should carefully consider the following litigation strategies discussed in this article:

- 1) Assess quickly the validity of the plaintiff's claim and use Rule 68, FRCP, to settle when the claim appears valid
- 2) Recognize that courts are less likely after the *Farrar* and *Dague* decisions to award attorney's fees under §1988 that exceed potential monetary damages

3) Make certain that plaintiffs do not receive an attorney's fee award for separate unsuccessful §1983 claims, even when the plaintiff prevails on another claim, and

4) Scrutinize an attorney's fee claim to determine if it is excessive or unsubstantiated and consider a request for denial of the fee claim when the claim appears inflated.

With guidance from these strategies, law enforcement defendants will be better able to control the costs of litigation and to make informed decisions about potential civil liability exposure. ♦

Endnotes

¹ Although this article explores the awarding of attorney's fees in civil suits alleging constitutional violations, the same principles apply to a wide variety of lawsuits in which Congress has provided for attorney's fees, including suits alleging illegal discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(K).

² The "American Rule" is distinguished from the rule in Great Britain, where the losing party normally assumes the burden of paying the attorney's fees of the winning party. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Many people interested in tort reform in the United States have advocated legislation mandating the "British Rule," believing it will discourage meritless or frivolous lawsuits from being instituted.

³ *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

⁴ This fee-shifting scheme does not apply to lawsuits alleging constitutional violations brought against Federal law enforcement officers pursuant to *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). However, if a Federal agent is considered to be a conspirator with State officers under 42 U.S.C. §1985(3), or acting as a State or local law enforcement officer, the provisions of §1988 may apply.

⁵ A prevailing law enforcement defendant or agency may recover attorney's fees only where the suit was vexatious, frivolous, or brought to

harass or embarrass the defendant. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978), and *Hughes v. Rowe*, 449 U.S. 5 (1980). A similar standard applies when sanctions against a plaintiff's attorney under Rule 11 of the Federal Rules of Civil Procedure are sought. Under Rule 11, a civil suit must be "well grounded in fact" and warranted by existing law. See, e.g., *In Re Kunstler*, 914 F.2d 505 (4th Cir. 1991), cert. denied, 111 S.Ct. 1607 (1991) (Rule 11 sanctions imposed on attorneys representing plaintiffs in a suit against law enforcement officials).

⁶ *Hensley* at 433.

⁷ See, e.g., *Riverside v. Rivera*, 477 U.S. 561 (1986) (\$33,350 in damages and \$245,456.25 in attorney's fees); *Gomez v. Gates*, 804 F.Supp. 69 (C.D. Cal. 1992) (\$44,000 in damages and \$378,175 in attorney's fees); *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (\$33,000 damages and \$160,000 in attorney's fees).

⁸ 473 U.S. 1 (1985).

⁹ *Id.* at 11.

¹⁰ 475 U.S. 717 (1986).

¹¹ See also, *Willard v. City of Los Angeles*, 803 F.2d 526 (9th Cir. 1986) and *Phillips v. Allegheny County, Pa.*, 869 F.2d 234 (3d Cir. 1989). Note, however, that in both *Phillips* and *Willard*, the courts cautioned against using this tactic consistently in a vindictive effort to deter attorneys from representing civil rights plaintiffs.

¹² *Benitez v. Collazo-Collazo*, 888 F.2d 930, 933 (1st Cir. 1989) and *Turner v. Secretary of the Air Force*, 944 F.2d 804, 807 (11th Cir. 1991).

¹³ *Darby v. City of Torrance*, 810 F.Supp. 271, 274 (C.D. Cal. 1992)

¹⁴ 113 S.Ct. 566 (1992).

¹⁵ *Id.* at 575.

¹⁶ *Id.* at 575. Note, however, that *Farrar* does not affect the award of attorney's fees where the plaintiff only seeks or obtains equitable relief in the form of an injunction or a court order, such as a consent decree. When equitable relief is obtained or the plaintiff's suit acts as a "catalyst" causing a law enforcement defendant to change policy or procedures, the plaintiff may be entitled to §1988 attorney's fees, even though no monetary damages are awarded. See, e.g., *Craig v. Gregg County Tex.*, 988 F.2d 18 (5th Cir. 1993) and *Dawson v. Scurr*, 986 F.2d 257 (8th Cir. 1993).

¹⁷ See, e.g., *Romberg v. Nichols*, 970 F.2d 512 (9th Cir. 1992) (in a police misconduct case, the plaintiff prevailed but was awarded only nominal damages. The attorney's fee award of \$29,137 was vacated and remanded in

light of *Farrar*, 993 F.2d 1453 (9th Cir. 1993) and *Domegon v. Ponte*, 972 F.2d 401 (1st Cir. 1992) (award of \$41,441 in attorney's fees when plaintiff received \$1 nominal damages vacated in light of *Farrar*, 113 S.Ct. 1378 [1993]).

¹⁸ 7 F.3d 106 (7th Cir. 1993).

¹⁹ *Id.* at 110.

²⁰ 999 F.2d 284 (7th Cir. 1993), cert. denied, ___ S.Ct. ___ (1994).

²¹ See also *Wilkes v. Reyes*, 5 F.3d 412 (9th Cir. 1993) (plaintiff appealed a jury award of zero damages because the jury found that a police officer defendant had used excessive force. The Ninth Circuit noted that even though the plaintiff is entitled to \$1 nominal damages because of the constitutional injury, this may not entitle the plaintiff to attorney's fees under *Farrar*).

²² 112 S.Ct. 2638 (1992).

²³ See also, *Blanchard v. Bergeron*, 489 U.S. 87 (1989), in which the Court held that a contingency fee contract did not limit the amount of attorney's fees under §1988 and *Venegas v. Mitchell*, 110 S.Ct. 1679 (1990), in which the Court ruled that a contingency fee arrangement between plaintiffs and their attorneys is a private contract between the parties and may be enforceable, even when the §1988 award is less than the contingency fee.

²⁴ 987 F.2d 1392 (9th Cir. 1992).

²⁵ *Hensley* at 435. See also, *Loranger v. Stierham*, 10 F.3d 776 (11th Cir. 1994).

²⁶ *Hensley* at 436.

²⁷ 808 F.2d 1242 (7th Cir. 1987).

²⁸ See, e.g., *Fair Housing Council v. Landow*, 999 F.2d 92 (4th Cir. 1993) (prevailing party in suit to prevent discrimination in housing opportunities sought \$537,113 in attorney's fees but was given zero due to the outrageously excessive fee claim) and *Lewis v. Kendrick*, 944 F.2d 949 (1st Cir. 1991) (plaintiff prevailed in an excessive force lawsuit and was awarded \$5,608 in damages. The plaintiff then sought \$137,000 in attorney's fees, which the court denied in total, stating, "To turn a single wrongful arrest into a half year's work...is to use a benign word, inexcusable.")

²⁹ 978 F.2d 773 (1st Cir. 1992).

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.
