

FROM "ENTITLED FEDERAL PRACTICE AID FOR LEGAL AID ATTORNEYS" —  
THESE SECTIONS FOCUS ON ENFORCING FEDERAL RIGHTS AGAINST STATES,  
STATE GOVERNING OFFICIALS, DIRECTORS , SUPERVISORS, AND OFFICERS.  
They can be held liable and are not immune.  
Highlighted for your benefit.

Chapter 8:

LIMITATIONS ON RELIEF AGAINST A GOVERNMENT ENTITY OR BODY

### III. **Damage Claims Against Cities and Counties Under Section 1983**

Most Section 1983 claims for damages involve suits against government employees who have violated the Constitution, statutes, or their employer's own stated policies. The boundaries of such claims are discussed in this subchapter.

#### III.A. The Requirement of a Custom, Policy or Practice

It is well established that allegedly unlawful actions by governmental employees acting solely on their own for their own purposes cannot be imputed to the agency, and do not give rise to agency liability under Section 1983, because a city, county, or similar governmental agency is only liable for the deprivation of federal rights caused by its own "custom, policy or practice." /223/ Monell establishes the principle that the government should only be liable for actions for which it is directly responsible, establishing the parameters of the exception to the common law rule that government should be immune from suit.

##### III.A.1. No Governmental "Respondeat Superior" Liability

The fact that the state actor was a government employee acting within the scope of his or her employment does not make the government liable for all actions of the employee. Monell clearly rejects respondeat superior liability for government agencies, reasoning that "the touchstone of § 1983 action against a government body is an allegation that official policy is responsible for a deprivation." /224/ It further held that a governmental "strict liability" rule would run counter to the statutory intent that the agency be held accountable only when official policy is to blame. Hence, the government entity – as opposed to the individual government employee or agent – is liable only for acts of its employee or agent that stem from a "custom, policy or practice" of the entity, and not from an individual aberration or isolated act, even one committed "under color of law." /225/

This is generally not an issue when the deprivation of federal rights results from enforcement of a regulation or policy formally adopted by the agency. The problems arise when the source of the policy, or the authority under which it is enforced, is uncertain.

##### III.A.2. Establishing a "Custom, Policy or Practice" in the Absence of Written Guidelines or Repeated Acts: **The Role of the "Final Policy-Making Authority"**

Under Section 1983, an unwritten "standard operating procedure" can amount to a "custom, policy or practice" if carried out with the acquiescence of the agency heads./226/ Thus, in *Jett v. Dallas Independent School District*, which involved an alleged unwritten custom of racial discrimination, the plaintiff could only establish such a policy or practice by proving that agency policy-makers "caused the deprivation of rights at issue by ... acquiescence in a long-standing practice or custom ..."/227/ Under this principle, for example, a housing authority's custom of permitting friends of its employees to leapfrog the waiting list for vacant units can be actionable under Section 1983 if shown to be so blatant that one can infer that the agency had no objection to it.

To establish a "policy or practice" in the absence of a formal agency rule or guideline will usually require proof of repeated incidents suggesting a pattern or practice. "[T]he scope of § 1983 liability does not permit such liability to be imposed merely on evidence of the wrongful action of a single city employee not authorized to make city policy." /228/ Nonetheless, a single decision made by the "final policy making authority," such as the governing body of an agency or one having the power to finally decide on its behalf, can constitute a "policy" under Section 1983. This is because "[t]he 'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." /229/

Other cases have similarly held that a decision made by the authority to whom the power to decide has been delegated by a governing body is also "policy." /230/ State law determines whether a particular person or entity is the "final policy-making authority." /231/ As a practical matter, this rule means that an unlawful particular policy or practice adopted by a mid-level supervisor in the agency will not make the agency liable. A routine established by a General Assistance unit supervisor or a Section 8 chief housing inspector will not, absent evidence of knowing acquiescence by the highest levels of the agency, constitute a custom, policy or practice sufficient to hold the agency liable.

### III.B. Liability for Inadequate Training

Often, however, the problem is with not the "policy" of the agency, but that agency employees are ignorant of the policy. In some circumstances, the agency's failure to train its employees to comply with agency policy can lead to liability if, as a result of employee ignorance or inadequate training, a plaintiff is deprived of federal rights.

For example, the Supreme Court has ruled that the failure to adequately train police officers to identify prisoners who are injured, or who have serious medical conditions or mental impairments, can result in the deprivation of the prisoner's Fourteenth Amendment liberty interest in receiving adequate treatment while incarcerated. In *City of Canton v. Harris*, the court wrote that inadequate training could give rise to liability if:

... in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy-makers can reasonably be said to have been deliberately indifferent to the need. /232/

While this issue most often arises in the context of damage suits involving incarceration, inadequate training is also relevant to the average legal services practice which routinely encounters chronic problems related to the avoidable ineptitude of social services or housing authority employees. For instance, payment of aid pending an administrative appeal might be the formally adopted policy of the agency, but not afforded in practice. An aggrieved party may be able to challenge the chronic failure of agency employees to provide "aid paid pending" by asserting that the agency has inadequately trained its staff. The result of this inadequacy, after all, has been the temporary deprivation of benefits -- a property interest -- from those entitled to receive them. /233/ If incidents of this type are fairly pervasive, it suggests a de facto "custom or policy" which systematically results in the deprivation of due process. An injured party should accordingly be able to frame her claim in a manner consistent with the parameters set by City of Canton. /234/

Such a claim may also be brought in the education context. In Davis v. Monroe County Board of Education, the Supreme Court applied the "deliberate indifference" standard to a gender discrimination claim under Title IX of the Civil Rights Act and ruled that a primary or secondary school student could hold a school district liable for student on student sexual harassment which continued as a result of the district's refusal to address the issue despite notice of the persistent problem. /235/

### III.C. Good Faith Defenses and the Availability of Punitive Damages

To what extent can a municipality escape liability on the ground that its officials acted in "good faith?" Owen v. City of Independence rejected a claim that an agency -- as opposed to an agency employee sued in his or her individual capacity -- could claim qualified immunity based on the good faith of its officials. /236/ Owen involved the firing of a chief police without notice of the reasons for this action, or a hearing, allegedly in violation of due process. The claim was initially dismissed on the ground that, because the applicability of due process in these circumstances was still "unclear" at the time, and because any government employee defendants sued in their personal capacity would have been entitled to claim qualified immunity, the same should apply to the city. The Supreme Court reversed and ruled that granting a qualified or good faith immunity to a municipality was not compatible with Section 1983's fundamental purpose of remedying violations of federal rights.

The Court reasoned that the danger of intimidation or inhibition -- lurking when an individual employee has to act under threat of possible suit -- is not present when a municipality or local government agency is sued because these entities can act only through their employees or agents. Hence, granting immunities to government, or to government agents sued in their official capacity for actions resulting from the agency's custom, policy, or practice, would only undercut the government's incentive to conform their operational procedures to federal law, or to control its employees. /237/ For this reason, in an official capacity suit, damages can be awarded against a government agency for actions that caused the deprivation of plaintiff's rights even if these actions were "objectively reasonable." In the Court's words:

By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and

represent it in some capacity, whether they act in accordance with their authority or misuse it." How "uniquely amiss" it would be, therefore, if the government itself ... were permitted to disavow liability for the injury it has begotten. ... Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. ... The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. /238/

In short, if the employee is sued in his or her official capacity and the actions at issue are the result of a custom, policy, or practice, this rule effectively creates a "strict liability" standard for the governmental employer.

On the other hand, governmental defendants are immune from a claim of punitive damages. Punitive damages are available in a Section 1983 action against an individual defendant on a showing of subjective ill will or malice. /239/ However, because the government -- already lacking immunity from awards of actual damages -- should not be punished for the actions of rogue employees, punitive damages cannot be awarded against a government agency or municipality under Section 1983. In *City of Newport v. Fact Concerts, Inc.*, the court stated:

Punitive damages ... 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 ... Regarding retribution, ... an award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort ... /240/

The Court reasoned that it was unclear that an award of punitive damages would deter municipal officials who would not themselves pay the award. Similarly, it was unclear that punitive damages were the most effective method for correcting or deterring similar violations of federal law. /241/

#### III.D. Municipal Liability for Employees Sued in Official Capacities

Generally, a governmental agency can only act through its employees. Unless they are acting as renegades in violation of agency policy, these employees are merely implementing the entity's custom, policy, and practice. If the result of these actions is a deprivation of federal rights, both the employee and the agency can be sued. As discussed earlier in this chapter, while an employee may be able to invoke qualified immunity so long as the contours of the federal right were not "clearly established," /242/ the governmental employer has no such defense. Even if the entity is being sued as a result of a custom, policy, or practice, tactical reasons or pleading rules may require that the individual employee be named as the defendant, rather than the agency itself. For example, a claim for an injunction might name the head of the agency as a defendant in order to hold her or his successor responsible for future compliance with a court order. Nevertheless, as a practical matter, so long as the employee is sued

in his or her official capacity, the action lies against the governmental agency. To avoid confusion, it may be useful to contrast "personal capacity" liability with that based on "official capacity."

A government employee can be sued in his or her personal or official capacity, or both, the distinction being the person or entity that the plaintiff is ultimately holding responsible. The Supreme Court has stated: "Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. ... Official-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" /243/ The Court explained "[T]he phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." /244/ For example, in *Hafer v. Melo*, involving a state official who had fired state employees because of their political affiliations after taking over a state agency, the actions of the new head of the agency were quintessentially "official." Nevertheless, after the plaintiffs' original "official capacity" claim had been dismissed on the ground that any award of damages would, contrary to the Eleventh Amendment, have been paid by the state, the Supreme Court ruled that the official could also be sued in her personal capacity. /245/

In "official capacity" suits, the government agency must comply with the injunction or pay the damage award. In personal capacity suits, the employee is liable, although agency indemnification is the usual practice. However, the fact that the official was on the job when he or she deprived the plaintiff of federal rights does not shield the government agent from personal liability and convert the action into an "official capacity" suit. A welfare worker who unilaterally discontinues the benefits of a Food Stamp recipient without the authority of agency regulations is acting on his own – in his "personal capacity," and not in an official capacity. By the same token, an employee who terminated a recipient's benefits by implementing a state regulation can theoretically be sued in his official capacity as well as personal capacity, although it would be better practice to sue the agency and/or the head of the agency, particularly if prospective equitable relief were sought.

223. *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 690-91, 692 (1978).

224. *Id.* at 690.

225. The policy or practice, moreover, must be that of the entity sued. If the local agency is carrying out a state policy which results in a deprivation, the local entity may escape liability. See, e.g., *Surplus Store & Exch. v. City of Delphi*, 928 F.2d 788 (7th Cir. 1991).

226. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989).

227. *Id.* at 737.

228. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 833 (1985) (Brennan, J., concurring).

229. See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986) (plurality opinion holding that a prosecutor who, having the power to do so, authorizes a forcible entry in violation of the Fourth Amendment creates a "policy", citing as examples of the principle, *Owen v. City of Independence*, 445 U.S. 622 (1980) (firing by city counsel allegedly without due process); and *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981) (cancellation of jazz concert by city council because rock group was booked, in violation of First Amendment)).

230. See *Monell*, 436 U.S. at 694-95 (policy which required pregnant teachers to take unpaid leaves without affording teachers due process).

231. Thus, in *City of St. Louis v. Prapotnik*, 485 U.S. 112 (1988) (plurality opinion), the delegation of power to a lower official did not make the official a "policy maker" if final authority still lay elsewhere. In *Jett*, 491 U.S. at 701, a school principal was found not to necessarily be the final decision maker as to render the district responsible for alleged racial discrimination. Moreover, inaction on the part of the "final policy-maker" in the face of decisions made by subordinates has been found to be an insufficient delegation of decision-making authority. *Gillette v. Delaware*, 979 F.2d 1342, 1348 (9th Cir. 1992). This situation, involving acquiescence to decisions made by subordinates, can be distinguished from those involving inaction at all levels, which can constitute "policy."

232. *City of Canton v. Harris*, 489 U.S. 378, 390 (1989).

233. The advocate should be aware, however, that where a deprivation of property without procedural due process is alleged, other procedural hurdles can arise. See Part III(A)(4), *infra*. In essence, to overcome the rule that a tort suit couched as a deprivation of due process is not actionable under Section 1983, the plaintiff must show that her injuries evidence a systemic problem which could have been avoided had procedural safeguards been in place. Compare *Parratt v. Taylor*, 451 U.S. 527 (1981), with *Zinermon v. Burch*, 494 U.S. 113 (1990).

234. In her concurring opinion in *City of Canton*, Justice O'Connor wrote that a plaintiff must prove the need for training in one of two ways. "First, a municipality could fail to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face. . . . Second, . . . municipal liability for failure to train may be proper where it can be shown that policy-makers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion. In such cases, the need for training may not be obvious from the outset, but a pattern of constitutional violations could put the municipality on notice that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements." 489 U.S. at 396-97. In *Bryan County v. Brown*, 520 U.S. 397 (1997), Justice O'Connor's majority opinion reiterated that liability could not be based on a single incident without effectively undermining the *Monell* rule barring governmental respondeat superior liability.

Several courts of appeal, in part based on the *City of Canton* analysis, have found that an agency's failure to address a problem is a "policy" actionable under Section 1983. Thus, in *Oviatt v. Pearce*, 954 F.2d 1470, 1477 (9th Cir. 1992), involving the 114-day detention of a prisoner because the sheriff somehow lost his file, liability was based on

the failure to have adequate safeguards to avoid the situation. See also *Rivas v. Freeman*, 940 F.2d 1491, 1495 (11th Cir. 1991); *Bigford v. Taylor*, 834 F.2d 1213, 1222 (5th Cir. 1988) and *Ezekwo v. N.Y. City Health & Hosp. Corp.*, 940 F.2d 775, 784 (2d Cir. 1991) (“standardless grant of authority” or “essentially unrestricted” discretion as “policies” actionable under Section 1983).

235. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

236. *Owen v. City of Independence*, 445 U.S. 622 (1980).

237. *Id.* at 655-56.

238. *Id.* at 651-52 (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961) (other citations omitted)).

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

240. *Fact Concerts*, 453 U.S. at 266-67 (addressing a punitive damages claim in a First Amendment freedom of expression suit challenging a city’s revocation of permits for a music festival because the promoters invited the rock group “Blood, Sweat and Tears.”)

241. *Id.* at 268-69.

242. See *Saucier*, 533 U.S. at 201-02. If the governing law was clearly established, the plaintiff would theoretically be entitled to damages from the employee, since the employee would not have qualified immunity. If suit against the government is permissible under the circumstances, it may be unproductive to sue the employee in her personal capacity since (1) the employer is the “deep pocket,” and (2) additional damages, such as punitive damages, are likely to be unavailable from the employee. That the employee was following agency rules probably undermines a claim that the employee possessed the requisite malice or ill will.

243. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (quoting *Monell*, 436 U.S. at 690, n.55).

244. *Hafer v. Melo*, 502 U.S. 21 (1991).

245. *Id.* at 26.

## Chapter 9:

### Relief

#### I. Damages

#### II. Negotiated Settlements and Injunctive Relief

#### III. Declaratory Judgment Act

#### IV. Attorney Fees

#### V. Costs and Interest

This chapter addresses issues related to the recovery of relief in federal litigation. Section I of this chapter discusses the general rules governing the recovery of

compensatory and punitive damages, focusing primarily on litigation under 42 U.S.C. § 1983. Because the law governing proof of damages under Section 1983 closely parallels proof of damages in common-law tort actions, no attempt is made to repeat the suggestions of many commonly available sources on how to prove damages of a particular type.

Generalizations about injunctive relief are more difficult. The scope and nature of injunctive relief typically are functions of the underlying substantive law and the scope of the violation of that law. Because many claims for injunctive relief are resolved by settlement, Section II focuses on issues that arise in the context of negotiating settlements and consent decrees, and discusses in some detail the kinds of provisions that should be included in those agreements. These same factors should be considered when drafting a proposed final judgment submitted when a claim for injunctive relief proceeds to trial.

Section III discusses declaratory relief and the ways that it can be used to obtain relief that has an impact beyond the specific needs of the individual plaintiffs. This is a form of relief that is useful in a wide variety of contexts, but is especially important in cases that cannot be brought as class actions.

Section IV reviews the law and practice governing the award of attorney fees in federal litigation. This section discusses the major issues that arise concerning entitlement to fees and calculating the amount of the fee award. This chapter also suggests practical ways of dealing with these issues.

#### I. Damages

Given the reluctance of the private bar to represent poor clients, it may be surprising that public interest lawyers who are not barred from doing so do not bring more litigation seeking compensatory and punitive damages. Legal services attorneys often fail to appreciate the importance of seeking and proving monetary damages because we are focused on the critical importance of obtaining broad injunctive relief. It is also easy to underestimate the monetary damages to which our clients may be entitled because they are often computed based on lost income and out-of-pocket expenses, which, by necessity, are low for poor people. However, we have a duty to seek for our clients all the relief to which they are entitled. Indeed, from a systemic perspective, the payment of monetary damages is often a significant deterrent of future bad acts and may prompt others to seek similar relief in future cases. At the very least we need to ensure that we are not perpetuating the generalized belief that our clients' lives are insignificant and should be "discounted" as compared to other litigants.

Chapters 5 and 8 of this Manual address the circumstances in which a claim for damages may lie under 42 U.S.C. § 1983 and the defenses to such a claim. This section reviews the law governing the recovery of compensatory and punitive damages. Although the focus here is on Section 1983 claims for damages, the rules applicable to those claims are typical of most compensatory and punitive damage litigation. There are, however, specific federal statutes such as the Truth in Lending Act/1/, the Fair Labor Standards Act/2/, and the Migrant and Seasonal Agricultural Worker Protection Act/3/ that authorize more limited damage claims for violation of their substantive provisions. Those statutes often limit the injuries for which compensatory damages/4/ are available or provide for the recovery of liquidated damages in lieu of, or in addition

to, statutorily authorized compensatory damages. The key point to remember is to check the specific act under which you are suing to see if it contains any special damage provisions.

### I.A. Compensatory Damages

The U.S. Supreme Court established the law governing the recovery of compensatory damages under 42 U.S.C. § 1983 in *Carey v. Phipps*<sup>5/</sup> and *Memphis Community School District v. Stachura*<sup>6/</sup>.

In *Carey*, a principal who observed students passing marijuana cigarettes back and forth suspended the students for twenty days without a hearing, in violation of their right to procedural due process. The students sued for damages but offered no evidence of emotional distress or other injury resulting from the suspension that would have been avoided had a hearing been granted before the suspension. Rather, drawing an analogy to defamation law, they argued that they were entitled to substantial presumed general damages for the denial of their right to due process independent of any proved injury.

The Court rejected this argument and allowed the plaintiffs to recover actual damages only if they produced evidence of injury. Reasoning that the students would have been suspended even after a *Goss v. Lopez* hearing, the Court held that proof that the suspension was justified would defeat recovery of damages for loss of educational services<sup>7/</sup>. However, because the right to due process is independent of the merits of the suspension, the Court allowed the students to recover nominal damages even where the suspension was justified<sup>8/</sup>.

Although the Court rejected presumed general damages in *Carey*, it held that mental and emotional distress were compensable injuries under Section 1983. *Carey* simply established that a plaintiff seeking recovery for mental and emotional distress must offer proof of those injuries. The Court noted that: "Although 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."<sup>9/</sup>

In *Memphis Community School District v. Stachura*, a teacher who was suspended with pay for showing seventh-grade students pictures of his pregnant wife and two films concerning human growth and sexuality sued for damages under Section 1983. He claimed that his suspension denied him both liberty and property without due process of law and violated his First Amendment right to academic freedom. The district court instructed that, if the jury found for the teacher, the jury should consider any lost earnings, loss of earning capacity, out-of-pocket expenses, and any mental anguish or emotional distress that the plaintiff might have suffered as a result of the conduct by the defendants depriving him of his civil rights.<sup>10/</sup>

The district court also instructed the jury to award damages based on the value or importance of the constitutional rights that were violated and to consider that the "precise value you place upon any constitutional right which you find was denied to plaintiff is within your discretion" and the "importance of the right in our system of Government, the role which this right has played in the history of our Republic and the

significance of the right in the context of the activities which the plaintiff was engaged in."/11/ The jury found for the teacher and awarded a total of \$275,000 in compensatory damages and \$46,000 in punitive damages.

The Supreme Court, however, held that the instruction authorizing the jury to award damages based upon the value of the right at issue was erroneous. The Court reiterated that Section 1983 created a "species of tort liability."/12/ Section 1983 authorizes compensatory damages not only for "out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation . . . personal humiliation, and mental anguish and suffering."/13/ Nevertheless, the "value of rights" instruction was flawed because it caused the jury to focus "not on compensation for provable injury, but on the jury's subjective perception of the importance of constitutional rights as an abstract matter."/14/

Therefore, proof of damages in Section 1983 litigation is analogous to proof of damages in a common-law tort action. To be compensated plaintiffs must prove out-of-pocket expenses, such as loss of wages or future earning capacity, medical expenses, and property damages. Compensable damages may also include distress, humiliation, personal indignity as well as loss of reputation or status, provided that evidence is offered to establish the extent and duration of these injuries.

Neither Carey nor Stachura flatly ruled out presumed general damages in Section 1983 litigation. In both cases, however, the Supreme Court stated that presumed damages would be proper only when the nature of the right was such that proof of injury resulting from its deprivation would be unusually difficult to provide. The only right that the Court identified as falling within that category is the right to vote./15/

Stachura teaches that the Section 1983 plaintiff's attorney must think like a tort lawyer when proving damages. The attorney must allow the jury to see a case through the client's eyes and present detailed testimony from the client, the client's family, coworkers and friends, and any professionals whom the client may have consulted to document emotional distress, humiliation, or pain and suffering. Rather than focus on the abstract value or the historical importance of a right, the plaintiff's attorney must show the importance of the right within the client's life by showing the injuries caused by its loss. This can be done by demonstrating the impact of the injury on family associations, on the ability to live in dignified surroundings, and on the prospect of holding a job or pursuing an education. Injury is a personal experience and must be shown through the specific effect that the violation has on the specific client.

The common-law doctrine of avoidable consequences, or the duty to mitigate, applies in all damages litigation. A party may not recover for damages reasonably avoidable under the circumstances through mitigation. Thus, a fired plaintiff must look with reasonable diligence for other substantially comparable work and must accept such employment pending the outcome of litigation./16/ The defendant bears the burden of establishing a breach of the duty to mitigate./17/

Whether the collateral source rule, which precludes reduction of the plaintiff's recovery due to receipt of payments from a third party, applies in Section 1983 damage actions is not yet clearly established. Some courts hold that it does./18/ Others hold that its application is discretionary./19/ Examples of common collateral source payments are

insurance proceeds, unemployment benefits, workers' compensation awards, social security benefits, and other public assistance benefits. Defendants routinely argue that receiving such benefits without a corresponding offset in the damages awarded would result in a windfall to the plaintiff. However, the rationale for the rule is that the wrongdoer should not profit from benefits that the plaintiff receives from a third party. In any case where collateral source payments are in issue, you should argue strenuously that the rule applies if the law in your circuit permits it, and that the defendant's liability may not be reduced because of them.

Because many low-income clients receive need-based public assistance benefits, you must check the specific program rules governing the receipt of damage awards and their treatment. Many cash assistance programs continue to include a lump-sum rule patterned after the rule in the now-repealed Aid to Families with Dependent Children program.<sup>20</sup> Others have transfer-of-assets or other rules that must be considered when a client receives a damage award.<sup>21</sup> You must be aware of the rules that may apply to receipt of a damage award well before it is received. Only by doing so can you structure your client's recovery, including the timing and manner in which the award is paid, to maximize the ultimate benefit. Failing to engage in such planning has been held to constitute malpractice.<sup>22</sup>

#### I.B. Punitive Damages

**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.<sup>23</sup> The Court suggested that punitive damages may be awarded when an official's conduct is malicious, intentional, or recklessly or callously indifferent to protected rights.<sup>24</sup> This test focuses on the state of mind of the defendant.<sup>25</sup> While outrageous or egregious conduct may provide evidence of the requisite state of mind, the conduct need not be egregious or outrageous to justify an award of punitive damages.<sup>26</sup> The determination of whether to award punitive damages once a showing of malicious or recklessly indifferent conduct is made rests within the discretion of the jury or judge (in a jury-waived case).<sup>27</sup> When jury instructions properly require the plaintiff to prove reckless or callously indifferent conduct, they need not require a finding of "outrageous" or "extraordinary" conduct at the same time.<sup>28</sup>**

**Courts repeatedly have upheld punitive damage awards against public officials for racially discriminatory employment practices,<sup>29</sup> police brutality,<sup>30</sup> and unlawful searches and seizures.<sup>31</sup> Courts have also upheld awards for prisoner mistreatment,<sup>32</sup> including deliberate indifference to medical needs,<sup>33</sup> violations of the right to procedural due process,<sup>34</sup> and violations of First Amendment rights.<sup>35</sup> Punitive damages may be awarded even when the plaintiff suffers only nominal damages from a deprivation of federal rights.<sup>36</sup> However, if a punitive damage award is "grossly excessive" in relationship to the state's legitimate interest in punishing and deterring unlawful conduct, it runs afoul of substantive due process and may be reduced or reversed on appeal.<sup>37</sup>**

1. Truth in Lending Act, 15 U.S.C. §§ 1601-1667f.
2. Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq.

3. Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1802, 1813, 1816, 1851.

4. The Fair Labor Standards Act limits compensatory damages to unpaid minimum wages and overtime, excluding consequential damages; however, the Act authorizes liquidated damages equal to double the unpaid minimum wages and overtime unless an employer establishes that it acted in good faith and with a reasonable basis for believing that its conduct was lawful. See 29 U.S.C. §§ 216(b), 260. The Truth in Lending Act authorizes in finance charge cases damages equal to double the finance charge, with a minimum recovery of \$100 and a maximum recovery of \$1,000 and any actual damages. See 15 U.S.C. § 1640(a) (different standards and limits apply to other transactions or class actions). Neither statute authorizes an award of punitive damages.

5. *Carey v. Piphus*, 435 U.S. 247 (1978).

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

7. In *Goss v. Lopez*, 419 U.S. 565 (1977), the Supreme Court established the general rule that students who are subject to a short-term suspension are entitled to due process protection.

8. In *Carey* the Court also indicated that the plaintiffs would be entitled to fees under 42 U.S.C. § 1988. It pointed to the defendant's liability for fees as a "by no means inconsequential" deterrent to unconstitutional conduct. *Carey*, 435 U.S. at 257, n.11. However, in *Farrar v. Hobby*, 506 U.S. 103 (1992), the Court, while holding that a nominal damage award made the plaintiff a "prevailing party" for purposes of attorney fees, nonetheless allowed fees to be denied on the basis of limited success. See Section IV *infra* for a further discussion of the *Farrar* decision.

9. *Carey*, 435 U.S. at 264 n.20. There are limits on a jury's discretion in awarding damages for emotional distress. A "compensatory damages award [for emotional distress] must bear a reasonable relationship to actual injury sustained; it may not be punitive in nature." *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989).

10. *Stachura*, 477 U.S. at 302.

11. *Id.* at 303.

12. *Id.* at 305-06.

13. *Id.* at 307 (internal citations omitted).

14. *Id.* at 308. See also *Makis v. Colorado Dep't of Corr.*, 183 F.3d 1205, 1214-15 (10th Cir. 1999) (reversing First Amendment damage award which was "based ... on the abstract value of the constitutional right"); *Silor v. Romero*, 868 F.2d 1419 (5th Cir. 1989) (holding that the giving of a similar instruction was plain error, entitling the defendant to a new trial even if no objection was made below).

15. *Stachura*, 477 U.S. at 311 n.14; *Carey*, 435 U.S. at 265 n.22.

16. In a false arrest case, the plaintiff was not obligated to mitigate his damages by posting bail out of his own funds, *Lawson v. Trowbridge*, 153 F.3d 368, 376-78 (7th Cir. 1998), but refusing a friend's offer to post bail violates the duty to mitigate. *Gladden v. Roach*, 864 F.2d 1196, 1200 (5th Cir. 1989). In the Title VII context, a victim breaches the duty to mitigate only by refusing a job substantially equal to the job from which the victim was fired or for which the victim was not hired. See *Ford Motor Co. v. Equal Employment Opportunity Comm'n*, 458 U.S. 219 (1982). A victim is required to seek work in another field only after the unavailability of work in the victim's chosen field is apparent. See *Walters v. City of Atlanta*, 803 F.2d 1135 (11th Cir. 1986). Attending trade school after diligently but unsuccessfully seeking work does not breach the duty to mitigate, *Smith v. Am. Serv. Co. of Atlanta*, 796 F.2d 1430 (11th Cir. 1986), but giving up the search for a job to enroll in law school does. *Miller v. Marsh*, 766 F.2d 490 (11th Cir. 1985).

17. *McClure v. Indep. Sch. Dist. No. 16*, 228 F.3d 1205, 1214 (10th Cir. 2000); *Tri County Indus. v. District of Columbia*, 200 F.3d 836, 376-78 (D.C. Cir. 2000); *Smith*, 796 F.2d at 1431.

18. *Starrett v. Wadley*, 876 F.2d 808, 823 (10th Cir. 1989); *Perry v. Larson*, 794 F.2d 279, 286 (7th Cir. 1986); *Rasimas v. Mich. Dep't of Mental Health*, 714 F.2d 614, 627-28 & n.13 (6th Cir. 1983) (Title VII). Although rendered in a different context, *Nat'l Labor Relations Bd. v. Gullett Gin Co.*, 340 U.S. 361, 363-65 (1951), is strong authority in support of application of the collateral source rule to Section 1983 actions.

19. *Dailey v. Societe Generale*, 108 F.3d 451, 460-61 (2d Cir. 1997); *Matherne v. Wilson*, 851 F.2d 752, 762 (5th Cir. 1988); *Daniel v. Loveridge*, 32 F.3d 1472, 1477 & n.4 (10th Cir. 1994) (Title VII claim).

20. See *Lukhard v. Reed*, 481 U.S. 368 (1987) for a description of the Aid to Families with Dependent Children (AFDC) lump-sum rule.

21. See, e.g., 42 U.S.C. § 1396p(c) (Medicaid); Mass. Regs. Code tit. 106, § 204.135 (Transitional Aid to Families with Dependent Children).

22. See *In re X*, No. CVCL 93000L866 (Cal. Mun. Ct., Shasta County, Sept. 2, 1993) (failure to structure personal injury award to minimize impact of AFDC lump-sum rule is malpractice).

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

24. *Id.* at 36 n.5; *Newport v. Fact Concerts*, 453 U.S. 247, 269-70 (1981) (holding that punitive damages under Section 1983 are not available against a governmental entity but only against the responsible officials sued in their individual capacity). See also *Kolstad v. Am. Dental Ass'n.*, 527 U.S. 526, 535-36 (1999).

25. *Kolstad*, 527 U.S. at 535-39.

26. *Id.* at 538.

27. *Fairley v. Jones*, 824 F.2d 440 (5th Cir. 1987).

28. Kolstad, 527 U.S. at 535-39. Although Kolstad arose under Title VII, the standard for punitive damages under Title VII (and Title I of the Americans with Disabilities Act) is, pursuant to 42 U.S.C. § 1981a(b)(1), identical to the Section 1983 standard.

29. See, e.g., Zhang v. Am. Gem Seafoods, 339 F.3d 1020, 1041-44 (9th Cir. 2003); Rodriguez-Torres v. Caribbean Forms Mfr., Inc., 399 F.3d 52 (1st Cir. 2005); Romano v. U-Haul Int'l, 233 F.3d 655 (1st Cir. 2000); Hardeman v. City of Albuquerque, 377 F.3d 1106 (10th Cir. 2004).

30. See, e.g., DiSorba v. Hoy, 343 F.3d 172 (2d Cir. 2003); Mathie v. Fries, 121 F.3d 808 (2d Cir. 1997) (collecting cases); McKinley v. Trattles, 732 F.2d 1320 (7th Cir. 1984); Garrick v. City & County of Denver, 652 F.2d 959 (10th Cir. 1981).

31. Morgan v. Woessner, 997 F.2d 1244 (9th Cir. 1993) (unlawful service); Creamer v. Porter, 754 F.2d 1311 (5th Cir. 1985) (unlawful search); Clark v. Beville, 730 F.2d 739 (11th Cir. 1984) (arrest without probable cause); Smith v. Heath, 691 F.2d 220 (6th Cir. 1982) (unlawful arrest).

32. See, e.g., Wade, 461 U.S. 30; Stokes v. Delcambre, 710 F.2d 1120 (5th Cir. 1983); Furtado v. Bishop, 604 F.2d 80 (5th Cir. 1979).

33. Cooper v. Dyke, 814 F.2d 941 (4th Cir. 1987).

34. See, e.g., Washington v. Kirksey, 811 F.2d 561 (11th Cir. 1987); Busche v. Burkee, 649 F.2d 509 (7th Cir. 1981).

35. See cases compiled in Jones v. Key West, 679 F. Supp. 1547 (S.D. Fla. 1988).

36. Romanski v. Detroit Entm't, 428 F.3d 629, 645-50 (6th Cir. 2005) (approving punitive damages of \$600,000 where only \$279.05 in compensatory damages were awarded); Williams v. Kaufman County, 352 F.3d 994, 1016 (5th Cir. 2003) (approving \$15,000 in punitive damages on a nominal damages award of \$100); Cush Crawford v. Adchem Corp., 271 F.3d 352, 359 (2d Cir. 2001) (Title VII); Alexander v. Riga, 208 F.3d 419, 430-31 (3d Cir. 2000) (Fair Housing Act); Green v. McKaskle, 788 F.2d 1116, 1124 (5th Cir. 1986).

37. Philip Morris USA v. Williams, 127 S. Ct. 1057, 1060, 1063 (2007) (punitive damages based in part on harm to non-parties are takings without due process); BMW of N. Am. v. Gore, 517 U.S. 559 (1986); Honda Motor Co. v. Oberg, 512 U.S. 415, 430-32 (1994). Recently, in State Farm Mutual v. Campbell, 538 U.S. 408, 425 (2003), the Court suggested that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." The Court did, however, recognize that where the compensatory damages were very small, a higher ratio might be necessary. See, e.g., Romanski, 426 F.3d at 645-50; Williams, 352 F.3d at 1016.

## II. Negotiated Settlement and Injunctive Relief >

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Chapter 9:

Relief

II. Negotiated Settlements and Injunctive Relief

A case concludes in the district court by entry of judgment on a separate document pursuant to Federal Rule of Civil Procedure 58. The judgment generally includes whatever relief is ordered by the court. It usually refers to any prior or contemporaneous decision adjudicating liability and any ruling on relief where appropriate relief is disputed.

II.A. Judgments

Judgments may be entered solely on the basis of litigated decisions, by agreement, or by some combination of the two. For example, courts commonly decide whether defendants violated a legal duty to plaintiffs and urge the parties to agree on a remedial order. In the absence of agreement, both parties may submit their proposed orders. The remedial order itself may also be partially agreed upon and partially litigated, with unresolved issues submitted to the court for determination.

The legal force, effect, and enforceability of litigated judgments are relatively well defined. However, resolutions by agreement, depending upon their form, content, and entry by the court, can have vastly different legal import. For this reason, this section focuses on such agreements.

II.B. Negotiated Settlements

Judgments arrived at, in whole or in part, by negotiation have the potential advantage of far greater specificity than a court might otherwise order.<sup>38/</sup> When an effective remedy requires major changes in an agency's mode of operation, such as promulgating new rules, establishing new practices, and monitoring results, truly workable results can be more effectively obtained through negotiation than a court-fashioned decree.<sup>39/</sup> Courts generally are reluctant to get involved in the details of agency processes and are likely to be excessively deferential to an agency's judgment of how best to carry out its legal duties. Furthermore, plaintiffs may have suggestions for relief grounded more in practical reality than in law to flesh out the types of detailed

orders necessary for effective relief; a deferential court may be reluctant to enter such orders over defendants' objection. Negotiating the decree—and perhaps the joint announcement of its entry—may commit the defendants to assuring compliance. Similarly, from the defendants' perspective, a negotiated settlement protects them from the uncertainty inherent in a judicially crafted remedial order. Concerns about the need for administrative flexibility to respond to new or unforeseen problems and situations can be addressed. Relief can be structured to ensure compatibility with existing agency systems and resources. For these reasons and more, resolving complex remedial orders by consent holds many potential advantages./40/

As in any negotiation, the strength of your case dictates your bottom line. Institutional defendants, especially those represented by state attorneys general, have become increasingly resistant to formal consent decrees./41/ However, despite assertions that entering into consent decrees is against official policy, attorney generals and other government officials regularly enter into complex, detailed, enforceable remedial decrees when their other options are less attractive. If you have solid claims and exude a willingness, even enthusiasm, to litigate them to judgment, the defendant is likely to agree to a detailed, enforceable consent decree. As your bargaining strength decreases, the likelihood of having to settle for something less than a consent decree increases. Common alternatives to judicially ordered and enforceable consent decrees are private settlements or conditional stipulations of dismissal. The legal ramifications of each of these forms of settlement are different and must be understood and evaluated before entering into settlement discussions.

#### II.B.1. Consent Decrees

A consent decree is an agreement of the parties and is embodied in an injunctive order of the court, signed by the judge, and entered as the judgment of the court. As such, it has "attributes of both contracts and judicial decrees", a dual character that has resulted in different treatment for different purposes."/42/ The decree stands as a judgment of the court for purposes of enforcement and modification./43/ The decree's interpretation is governed by general principles of contract law./44/ Because its interpretation and scope are discerned by general contract principles, a consent decree's preclusive effect is governed by the intent of the parties./45/ In most cases the parties intend the consent decree to preclude re-litigation of the claims raised in the litigation. However, because settlements by definition do not involve an actual judicial adjudication of the legal issues, consent decrees and other forms of settlements do not generally support issue preclusion./46/ Significantly, a party who obtained a formal consent decree "prevailed" for purposes of attorney-fee entitlement./47/

#### II.B.2. Private Settlements

A settlement whose terms are not incorporated into a decree entered by the court stands on a very different legal footing from a consent decree. Most commonly, when cases are resolved by such an agreement, the parties terminate the litigation by a stipulation of dismissal which may or may not refer to the agreement. In *Kokkonen v. Guardian Life Insurance Company*, the Supreme Court addressed the question of a federal court's jurisdiction to enforce an agreement that settled a case when the dismissal order neither incorporated the terms of the settlement in the body of the order nor reserved enforcement power in the court./48/ Viewing dismissal of the lawsuit as essentially part of the consideration for the agreement, the *Kokkonen* Court considered the enforcement action not as a renewal or continuation of the original case, but as an entirely new contract action./49/ As such, the alleged breach of the settlement agreement had to be brought as a new action, one that the *Kokkonen* Court observed would have to be brought in state court./50/

The Kokkonen Court did note that if the explicit terms of the settlement agreement had been incorporated into the order of dismissal or if the order had provided for continued jurisdiction over the settlement, then the lower court would have had the authority to enforce the agreement./51/ For purposes of attorney fees, a case that is resolved by a settlement agreement that is not incorporated into the dismissal order does not generally qualify the plaintiff as a prevailing party."/52/ Where the agreement is incorporated into the dismissal order and the court retains jurisdiction to enforce the terms of the agreement in the order of dismissal, the court's order of dismissal is the legal equivalent of a consent decree, and the party should be entitled to fees./53/ It is unclear whether "prevailing party" status is obtained when the court does not incorporate the terms of the settlement into the dismissal order but does retain jurisdiction to enforce the settlement./54/ Because the law regarding the application of *Buckhannon v. West Virginia Department of Health and Human Resources* to various hybrid settlement arrangements is evolving, you need to research recent case law, particularly within your circuit./55/

### II.B.3. Conditional Stipulations of Dismissal

Basing a settlement on the defendant's compliance with certain conditions is not uncommon. Such conditional stipulations of dismissal can be simple, with full compliance anticipated almost immediately, or complex, involving detailed structural changes in agency practices requiring phased compliance over several years. Such stipulations often contain specific provisions for monitoring and enforcement.

Because stipulations of dismissal are governed by Federal Rule of Civil Procedure 41(a)(1)(ii) and are self-effectuating without necessity of court order, you must, when drafting such a stipulation, be very specific about when and under what conditions the dismissal becomes operative./56/ Failure to do so can leave the court without jurisdiction to act despite the clear intent of the parties./57/ Be sure to have the stipulation provide for judicial endorsement./58/

The best course of action is to provide specifically that the dismissal becomes operative after all the conditions are completed and that the court retains jurisdiction in the interim to enforce compliance. Defendants, especially those represented by state attorneys general or U.S. Department of Justice lawyers, are increasingly seeking provisions in such stipulations stating that the remedy for a breach is not specific enforcement but restoring the case to the court's active docket for litigation on the merits. Depending upon the strength of your case, the scope of relief agreed to by the defendant, and your assessment of the likelihood that the defendant will not comply, you may or may not be willing to accept such a provision./59/

Whether a conditional stipulation of dismissal establishes the plaintiff as a "prevailing party" for purposes of attorney fees depends upon how much the stipulation looks like a consent decree. Certainly, after *Buckhannon*, it must be signed by the judge./60/ Other factors that weigh in favor of prevailing party status include continuing court power to enforce compliance, specific monitoring requirements over an extended period of time, or an admission of liability by the defendant.

### II.C. Drafting Consent Decrees or Other Remedial Orders

Other issues and factors need to be considered when preparing to negotiate a settlement designed to implement systemic change in the defendant's policies or

practices.<sup>61/</sup> Some of the more common issues are (1) defining the class and choosing defendants, (2) statement of facts and goals, (3) declaratory relief, (4) admission of liability, (5) implementation plan, (6) regulations, (7) defining compliance, (8) monitoring compliance, (9) funding, (10) duration of the decree, (11) retention of jurisdiction, (12) specifying grounds for modification, (13) specifying noncompliance procedures and remedies, and (14) attorney fees.<sup>62/</sup> Each of these topics is briefly discussed below.

At the time of publication, no settlement agreement or consent decree was available for the *Lightfoot v. District of Columbia* case, featured in the Documentary Supplement. Document 21 of the Documentary Supplement, however, is an excellent example of a settlement agreement and consent order in the case of *United States of America, et al., v. City of Agawam*, et al.. The case, initially brought by the United States in which private plaintiffs subsequently intervened, alleged that the City had violated the Fair Housing Act by discriminating on the basis of race, color and national origin. Plaintiffs alleged that the City **unlawfully denied a farmer permission to construct a residence for black and Hispanic seasonal workers** hired through the H-2A program. Document 21 is a comprehensive settlement of these claims, **requiring defendants to adhere prospectively to non-discrimination provisions, to issue a housing permit, to modify its zoning code and policies, to attend fair housing trainings, to designate a city official to receive housing discrimination complaints, to report on compliance with the agreement and to pay monetary damages.**

In addition to several cases listed in the accompanying chart identifying useful litigation files available in the Shriver Center's Poverty Law Library, another example of complex consent decrees drafted to settle a fair housing lawsuit against HUD and a municipality alleging violations of Title VI, Title VII and the Housing and Community Development Act of 1974 is *Ramos v. Proulx*.<sup>63/</sup>

### II.C.1. Defining the Class and Choosing Defendants

If the case is brought as a class action, but the class was never certified by the court, certifying the class in the order may be helpful, particularly to minimize future disputes over any retroactive relief or future enforcement.<sup>64/</sup> However, class certification may not be as significant if the scope of declaratory or injunctive relief or both is specific and comprehensive. Class certification can have adverse effects, such as barring others similarly situated from seeking other relief,<sup>65/</sup> and interfering with the flexible adaptation of the judgment to changed circumstances. If a class is certified, Federal Rule of Civil Procedure 23(c)(3) requires the final judgment to define the class. Thus, you must include in a consent decree whatever class definition is adopted by the court or agreed to by the parties.

With respect to defendants, you must specify that the agents and successors of the defendants are bound by the terms of the decree to avoid any possible ambiguity as to whether Federal Rule of Civil Procedure 25(d) would apply.<sup>66/</sup> Having all parties necessary for relief joined as defendants facilitates implementation. Having the defendants personally sign the decree may also promote its strict enforcement.<sup>67/</sup>

### II.C.2. Statement of Facts and Goals

To make express the basis of the parties' agreement and to guide resolution of any future disputes, a recitation in the decree of the critical facts and the goals that the parties seek to further by entering into the decree may be helpful. Such a statement is

especially appropriate in a proposed decree in a class action as a predicate to a fairness hearing to establish that the decree fairly and adequately resolves class claims. This may be set forth in an introductory section or in detail. Agreed facts may not be necessary if the liability phase of the case is resolved by litigation.

### II.C.3. Declaratory Relief

Declaring plaintiffs' rights under specified provisions of law serves plaintiffs' interests by setting out the legal standard against which future compliance and unanticipated changes can be assessed. Even if the declaration is by agreement rather than based on a prior adjudication of liability, a stated declaration of law may have some precedential effect, at least of a persuasive nature, in subsequent related cases against the same or a similar agency.

However, specifying declaratory relief has two potential risks to plaintiffs. First, the underlying law may change and if the decree is clearly based on the changed law, rather than on an unstated group of claims and considerations, a court is more likely to grant a subsequent motion to vacate the decree.<sup>68</sup> Second, federal court jurisdiction to enforce relief based on specified legal grounds may be limited in the future. After *Pennhurst State School and Hospital v. Halderman*, for example, a federal court would probably decline to enforce a decree specifically grounded solely in state law.<sup>69</sup> In contrast, *Pennhurst* might not be implicated if the case had been brought on federal as well as state grounds, the federal claim had not been adversely determined, and no legal basis for the decree was specified.<sup>70</sup>

### II.C.4. Admission of Liability

Defendants almost always balk at an admission of liability. They may agree to a declaration that plaintiffs have certain rights or that their own procedures should be improved or both, without admitting that they had ever done anything illegal. If there is neither a declaration of rights nor an admission of liability, a court in a future enforcement proceeding may read the terms of the decree more narrowly than plaintiffs may wish.<sup>71</sup> While an admission of liability is preferable, a declaration standing alone is likely to give plaintiffs reasonable protection regarding the future interpretation and application of the decree if the risks identified above can be surmounted.

Although an admission of liability is helpful, it is rarely forthcoming. Insistence upon an admission may kill otherwise productive negotiations. The more comprehensive and specific the terms of the decree, the less necessary an admission becomes, because a comprehensive and specific decree leaves little room for potentially harmful judicial interpretation. Therefore, if the defendants insist on a nonadmission-of-liability clause, plaintiffs' counsel should insist in return on more specific language defining and implementing relief.

### II.C.5. Implementation Plan

The decree itself should specify the details of who will do what, and by when, to accomplish the desired changes in institutional behavior, or the decree should contain a blueprint for the process of developing such an implementation plan. For example, in a more straightforward case, where the parties are able to agree in advance on what steps are necessary to accomplish the agreed-upon performance changes, such as issuance of new procedures, and training of staff, the decree can simply specify the

timetable for such actions. In a case involving more complex implementation measures, the parties may prefer to leave the details to be worked out subsequently. However, if plaintiffs wish to continue to have a role in helping ensure successful implementation, the decree should specify what part plaintiffs will play in the implementation process, such as in the review of draft regulations or in the design of a monitoring plan. When developing the necessary implementation steps is thought to be beyond the expertise of the parties, the decree may provide for involving third parties, such as a panel of experts, in the design of the implementation plan.<sup>72/</sup>

The parties may wish to specify when they may later resort to the court (or, perhaps, to a special master under Federal Rule of Civil Procedure 53) if they cannot agree on the nature of the implementation tasks. Resort to the court is possible anyway.<sup>73/</sup> Nonetheless, the court may be more willing to continue to be involved in implementation details if its role is clearly specified.<sup>74/</sup>

One of the distinct advantages of a detailed implementation plan is that it will often obligate the defendant to undertake remedial action that exceeds the bare requirements of the federal statute at issue. As a result, the plaintiffs will obtain some relief that may exceed what a court might have ordered, while the defendant avoids the risk of court-ordered relief that it may find difficult to implement. In *Frew v. Hawkins*,<sup>75/</sup> the Supreme Court recently considered whether a federal court could, consonant with the principles underlying the Eleventh Amendment,<sup>76/</sup> enforce against a state provisions of a consent decree that exceeded specific federal statutory requirements. While accepting the state's characterization of numerous provisions of the consent decree as exceeding the bare requirements of federal law (in this case the Medicaid Act's Early Periodic Screening Diagnostic & Treatment requirements), the Court, nevertheless, concluded that the district court retained jurisdiction to enforce all of the consent decree's detailed provisions. Noting that "[t]he decree is a federal court order that springs from a federal dispute and furthers the objectives of a federal law", the Court held that "enforcing the decree vindicates an agreement that the state officials reached to comply with federal law."<sup>77/</sup>

#### II.C.6. Regulations

An appropriate remedy often requires the agency to promulgate new regulations to correct or replace an invalid policy or practice. Incorporating the actual text of the new regulation(s) in the decree has the advantages of certainty, because the parties know exactly what they are agreeing to, and security, because the defendants cannot alter the regulation without a court-granted modification under Federal Rule of Civil Procedure 60. By contrast, the inflexibility that may result from including regulation language in a decree may be problematic for plaintiffs as well as defendants, depending on the nature of future circumstances.

If the decree does not include the regulation language, plaintiffs should consider having the decree specify the issues on which the defendants must, may, or cannot promulgate regulations.<sup>78/</sup> Plaintiffs should advocate that the decree also specify the legal standards to be used to determine the adequacy of the regulations (these standards may be implicit in a declaration, an adjudication, or an admission of liability), the role of the plaintiffs and any third parties in developing and promulgating the regulations, and the timing for issuing the regulations.

### II.C.7. Defining Compliance

If at all possible, the decree itself should define, in objectively measurable terms, what constitutes compliance. The decree should not state merely that persons are entitled to timely services, or to treatment in the least restrictive setting, but actually define what "timely" and "least restrictive" mean in a manner not subject to reasonable dispute. A court may refuse to enforce an overly vague decree.<sup>/79/</sup>

To avoid potentially frustrating and time-consuming litigation in any future enforcement action, a specific statement of what degree of compliance is required is also highly desirable. If the decree is silent on this issue, and merely requires, for example, service delivery within fifteen days, different courts may apply different standards in a contempt action to determine whether the defendant is in substantial noncompliance. In light of this problem, some decrees specify the percentage of cases that must come within the specified time limit, perhaps increasing the percentage over the life of the decree. Furthermore, if plaintiffs want to avoid giving the defendants substantial leeway on compliance, they should not agree to any language that precludes an enforcement action for de minimis noncompliance.

### II.C.8. Monitoring Compliance

In any case where ongoing compliance is at issue, plaintiffs must ensure that a formal monitoring process will inform them whether there are compliance problems. Although relying on anecdotal case information, statistics or reports obtained through another method, such as Freedom of Information Act requests, or formal discovery is possible, it is more desirable for the decree itself to detail an effective monitoring system.

The goal of such a system is twofold—to ensure self-regulation by the defendant and to give the plaintiffs, as well as the defendant, accurate, usable, relevant, and timely compliance information. Thus, for a monitoring system to help achieve the desired permanent change in the defendant's activities, it should be integrated into the defendant's usual data-gathering or other performance-evaluation systems, rather than grafted on as a separate operation. The information generated should not be too voluminous to use. The parties should either pare down the required information or develop relevant, reliable measures to ensure that the information is delivered in a manner that enables plaintiffs to extract the needed information easily.<sup>/80/</sup>

Depending on the nature of the activity governed by the decree, different types of monitoring systems may be most appropriate. Statistical data gathering, with specified reports furnished to the plaintiffs' counsel, and/or to the court or a designated third party, such as a monitor, is the usual method. Where the activity is too qualitative in nature for using a statistical method, such as in certain education or treatment cases, other systems, such as visits and assessments by evaluation teams of designated professionals, may be designed.<sup>/81/</sup> Combining statistical and qualitative methods may be appropriate in some cases.

The decree or implementation plan should specify the plaintiffs' role, if any, in assisting in the design of the monitoring system.<sup>/82/</sup> It may be helpful for plaintiffs to retain expert consultants to design and/or review the monitoring system. Given the importance of the system and the weight that a court is likely to give to officially generated data, plaintiffs must ensure that the monitoring system is likely to function in the desired manner. To this end, it may be helpful to require the defendants to submit more frequent reports in the initial stages of implementation, both to confirm that the

monitoring system is functioning and to assist the defendants in expediting any necessary performance improvements. In any event, the decree should specify the timing of steps in the monitoring process.

In addition to taking a role in the design of the system, plaintiffs should be able to obtain the court's intervention if they believe that the monitoring system is operating deficiently. In some cases, having a designated decree monitor with authority to oversee the monitoring system and compliance with the decree may be appropriate. This may be an agency staff member or an outsider appointed by the court pursuant to its power under Federal Rule of Civil Procedure 53 to appoint masters.<sup>/83/</sup> Such an outside force may appear to be an attractive means to achieve compliance from a recalcitrant or inept defendant without enormous expenditure of resources by plaintiffs' counsel.<sup>/84/</sup> However, using outside monitors or masters (as opposed to designated agency staff) also has drawbacks. By definition, they are outside of the defendant's ordinary processes and not likely to further the goal of self regulation; they may interfere with, rather than facilitate, the plaintiffs' access to information and to the court as they are technically agents of the court; they can be effective only if they have adequate funding to do their job.<sup>/85/</sup> Given the extraordinary nature of an outside monitor, a court may be unwilling to impose one on a defendant in the initial stage of compliance and may wait until plaintiffs can show that such an intrusive remedy is justified.

#### II.C.9. Funding

In virtually all cases, the defendant's ability to comply with the mandates of an institutional reform decree depends on having adequate funds. Executive officials alone do not control appropriations, and legislators are extremely unlikely to be parties to a decree.<sup>/86/</sup> Thus, consider whether specifying what steps or types of actions the defendants must take to obtain sufficient appropriations is helpful. (Private parties may, of course, be required to provide the necessary funds.) For example, decree provisions requiring the defendant to seek appropriations for adequate staff within a particular time period may provide a concrete benchmark against a recalcitrant defendant. However, a provision that the executive use "best efforts" to obtain funding may be used as a defense if the legislature refuses to appropriate the funds, and may be viewed by a court as a limit on the court's power to order any further relief.<sup>/87/</sup> However, regardless of what the decree specifies, a court may be able only to order executive officials to use their best efforts to obtain necessary funds.<sup>/88/</sup>

#### II.C.10. Duration of the Decree

The parties can determine, through negotiations, whether an injunction is intended to be permanent. For example, a defendant may agree to be subject to court order only for a specified period or until the vestiges of the illegal action are remedied. At the expiration of such a period, the decree may be vacated and the action dismissed. Obviously, it is preferable, if possible, to obtain a permanent injunction concerning the defendant's overall legal obligations, even if other provisions in the decree, such as reporting to plaintiffs, expire after a designated time or achievement of specified events. As long as the decree specifies that it is a permanent order, the defendant has a very heavy burden to meet before the order may be vacated.

#### II.C.11. Retention of Jurisdiction

If the order is designated as a permanent injunction and signed by the court, a party to the original action (including a class member) may bring an enforcement action by filing an appropriate motion in the "old" case rather than by instituting a new action. Nonetheless, specifying that the court retains jurisdiction to ensure the court's power to

hear the enforcement action is necessary./89/ The period during which the court retains jurisdiction should at least be commensurate with any required reporting./90/

#### II.C.12. Specifying Grounds for Modification

Not uncommonly, when settling institutional reform litigation, one or both of the parties are concerned about the impact of a possible change in facts or law upon the efficacy or viability of the agreement. For example, in a due process notice case, plaintiffs may be willing to agree to a notice containing a certain level of factual detail based upon the defendant's current computer system capabilities but may want to incorporate the right to a modification if future technological advances make it possible for the defendant to add information without undue financial or administrative burden. Similarly defendants may want to include language giving them the ability to modify the decree if legal requirements change. In addition, if there is uncertainty as to how a particular monitoring methodology may work, it may be helpful to state that modification be made in the system under certain circumstances.

If the language in a consent decree regarding modification, or similar agreement over which the court retains ongoing enforcement jurisdiction, is absent,/91/ the criteria set forth in Federal Rule of Civil Procedure 60(b) controls./92/ In *Rufo v. Inmates of Suffolk County Jail*, the Court retreated from the previously strict standard of *U.S. v. Swift and Co.*, which provided that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen circumstances should lead us to change what was decreed after years of litigation with the consent of all concerned."/93/ As for consent decrees in institutional reform litigation, the *Rufo* Court held that the "grievous wrong" standard was too strict and adopted a "more flexible" approach./94/ Emphasizing that the public interest was a critical component in such litigation, the Court held that the "no longer equitable" standard of Rule 60(b)(5) permitted modification upon a showing of a significant change in the factual or legal circumstances that gave rise to the decree and a showing that the proposed modification was suitably tailored to the change of circumstances./95/ *Rufo* did provide that anticipated changes in fact or law when the decree was entered would not generally satisfy the "significant change in circumstances test."/96/ Nevertheless, *Rufo* gives defendants, especially governmental defendants, some leeway./97/ Defendants have substantially greater ability to modify or vacate consent decrees than they previously possessed./98/

#### II.C.13. Specifying Noncompliance Procedures and Remedies

While the absence of any specification of the consequences of noncompliance may not hurt in the case of a formal consent decree because plaintiffs retain the full panoply of enforcement remedies, such a specification may be critical in other contexts. Regardless of the form of settlement, specifying noncompliance remedies is often helpful in facilitating compliance. For example, when individual problems in the application of the decree are anticipated, particularly when they may involve lengthy factual disputes, such as in special education cases, specifying a hearing mechanism may be helpful. This could be a court-appointed magistrate, a Rule 53 master,/99/ or a person or group designated by the parties.

The defendant will typically seek provisions that require plaintiffs to exhaust certain preliminary steps, such as discussions, before seeking court intervention. Plaintiffs are best advised to advocate that these steps be short and clear and that an exception for specified emergencies be included. A decree may specify that certain penalties, such as fines, will be imposed on the defendant in certain circumstances of noncompliance. The certainty of consequences for noncompliance before any contempt action should help

**achieve compliance**. Such a provision could be the quid pro quo for the defendant's obtaining a grace period to seek to achieve compliance. In many cases, only the actual imposition of a penalty, or the real prospect of it, rather than the speculative prospect of time-consuming contempt litigation, will prompt the effort necessary to achieve compliance.

#### II.C.14. Attorneys Fees'

While obtaining a consent decree should be sufficient in itself to justify plaintiffs' entitlement to fees, other forms of settlement may be more problematic after *Buckhannon*.<sup>/100/</sup> **Obtaining an agreement that plaintiffs are the prevailing party and entitled to specified fees is often possible and should be pursued. Such an agreement will likely avoid litigation over the issue and establish the right to a fee award.**

If the parties cannot agree on fees and to avoid any problems of alleged waiver, plaintiffs should make clear in the consent decree or settlement that the issue of fees is outstanding. It should then specify the process by which the issue is to be resolved. Counsel should be careful about timing limits established by local rules.

#### II.D. Construction of Consent Decrees

Despite the care taken in negotiating a consent decree, **disputes may arise between the parties over its meaning in light of unanticipated circumstances.** If the parties cannot resolve their differences through negotiation, they can request the court to construe the decree. In construing consent decrees, courts are guided by their dual nature as contracts and as judgments.<sup>/101/</sup> Thus, if the court finds no ambiguity on the face of the decree, the court will not look beyond the "four corners" of the decree itself. <sup>/102/</sup>

To interpret the parties' intent if there is ambiguity, the court may refer to extrinsic aids, such as

- \* the negotiating history of the decree,<sup>/103/</sup>
- \* any writings associated with the decree,<sup>/104/</sup>
- \* events surrounding approval and entry of the decree,<sup>/105/</sup> and
- \* **the conduct of the parties subsequent to entry of the decree.**<sup>/106/</sup>

**If no relevant extrinsic aids exist, the court may be guided by the spirit or purpose of the decree in construing ambiguous provisions.**<sup>/107/</sup> While a court must be mindful that the legal violations that plaintiffs alleged have ordinarily not been adjudicated, it may, nonetheless, look to the decree's purpose in construing its terms.<sup>/108/</sup> Of course, the court's job is easier, and the court may be more willing to take a broad view if the parties agree explicitly in the decree as to its purposes<sup>/109/</sup> or if the decree follows a **litigated determination of liability.**<sup>/110/</sup>

#### II.E. Challenges to Consent Decrees

In *Martin v. Wilks* the Supreme Court held that a consent decree adjudicated only the rights of the parties to the decree.<sup>/111/</sup> The Court, therefore, allowed those persons who were adversely affected by the operation of the decree to challenge actions taken pursuant to the decree even though they failed to intervene in the litigation from which the decree arose. *Wilks* was an employment discrimination case in which white employees, bringing a collateral attack on the consent decree, asserted that it discriminated against them in violation of Title VII. The white employees were aware of the original case and did not intervene. Nevertheless, the Supreme Court held that they

were under no obligation to do so and were allowed collaterally to attack the decree.<sup>112</sup> The Wilks decision relies heavily upon Federal Rules of Civil Procedure 19 and 24, which address joinder and intervention, respectively. While Wilks was legislatively overruled by the Civil Rights Act of 1991 with respect to Title VII actions, its analysis continues to be applicable in other contexts.<sup>113</sup>

The lesson to be learned from Wilks is that if a remedial decree will have a direct adverse effect on an identifiable group of individuals, counsel for plaintiffs should seriously consider joining those individuals or else risk a collateral attack. Because anticipating and joining as parties every individual potentially adversely affected by the operation of a proposed consent decree is not always possible, such decrees will sometimes be at risk of collateral attack.<sup>114</sup> Nevertheless, a properly conducted Rule 23 fairness hearing establishing the evidentiary foundation for the claims may constitute some ammunition to fend off such a potential attack.

38. Of course, a negotiated decree also minimizes the risk of adverse decision.

39. This discussion is applicable to all defendants, but is particularly focused upon government defendants.

40. See, e.g., Eric Rosand, Consent Decrees in Welfare Litigation: The Obstacles to Compliance, 28 Colum. J.L. & Soc. Probs. 83, 100-103 (1994) (discussing the advantages of settlements over full adjudication, such as increased efficiency, reduced uncertainty, creativity in remedial approaches, and improved standards for enforcement.); Lloyd C. Anderson, The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation, 1983 U. Ill. L. Rev. 579, 580 (advantages to consent decrees in civil rights class actions include the prospect that "structural reform can begin immediately and the likelihood of compliance is greater than if a coercive judicial decree is entered"); Owen Fiss, The Supreme Court, 1978 Term Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 78 (1979) (stating that "[r]esolution of complex litigation through settlement enables the judge to avoid the difficult task of distilling and articulating detailed institutional standards from highly abstract constitutional or statutory principles and minimizes his involvement in the institution's internal administrative detail"); Robert E. Buckholz Jr. et al., Special Project, The Remedial Process in Institutional Reform Litigation, 78 Colum. L. Rev. 784 (1978) (stating that those responsible for implementation of the remedy will be more likely to cooperate in that process if they are included at the formulation stage);. See also *Armstrong v. Bd. of Sch. Dir.*, 616 F.2d 305, 318 (7th Cir. 1980), overruled on other grounds, *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 616 F.2d 1006, 1013-15 (7th Cir. 1980); *United States v. B.P. Exploration & Oil Co.*, 167 F. Supp. 2d 1045, 1050 (N.D. Ind. 2001); *United States v. Wallace*, 893 F. Supp. 627, 630-32 (N.D. Tex. 1995).

41. See John V. Cardone, Substantive Standards and NEPA: Mitigating Environmental Consequences with Consent Decrees, 18 B.C. Envtl. Aff. L. Rev. 159, 168 (1990) (discussing a critique of consent decrees as binding on successive administrations and thus intruding on executive discretion); Robert V. Percival, The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making, 1987 U. Chi. Legal F. 327, 337-38 (describing U.S. Department of Justice guidelines prohibiting settlement that interferes with future agency rule-making prerogatives, that commit to

the expenditure of funds that have not been budgeted, or that allow for judicial enforcement except by revival of the underlying claims).

42. *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986) (quoting *United States v. ITT Continental Baking*, 420 U.S. 223, 235 (1975)); see *Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (Clearinghouse No. 55,435); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992).

43. *Rufo*, 502 U.S. at 378-79; *Reynolds v. Roberts*, 207 F.3d 1288, 1298, 1300 n.22 (11th Cir. 2000).

44. *United States v. Armour & Co.*, 402 U.S. 673, 681-83 (1971); *ITT Continental Baking*, 420 U.S. at 236; *Reynolds*, 207 F.3d at 1300.

45. *Agrolinz Inc. v. Micro Flo Co.*, 202 F.3d 858, 861 (6th Cir. 2000); *United States v. Sherwin-Williams*, 165 F. Supp. 2d 797, 803-4 (C.D. Ill. 2001); 18A Charles A. Wright et al., *Federal Practice and Procedure* § 4443 at 262-64 (2d ed. 2002); Fleming James Jr., *Consent Judgments as Collateral Estoppel*, 108 U. Penn. L. Rev. 173 (1959).

46. *Arizona v. California*, 530 U.S. 392, 414 (2000); Wright et al., *supra* n.45, § 4443 at 265-66. See Chapter 3 of this Manual for a more detailed discussion of preclusion law.

47. *Buckhannon v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 578, 604 (2001) (Clearinghouse No. 53,373).

48. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994).

49. *Id.* at 378, 380.

50. *Id.* at 381.

51. *Id.* at 381-82; *Am. Disability Ass'n v. Chmielarz*, 289 F.3d 1315, 1319-21 (11th Cir. 2002) (observing that either by adopting the terms of the settlement in the court order or by expressly retaining jurisdiction, parties obtain the functional equivalents of consent decrees); *Bd. of Trs. of Hotel & Rest. Employees Local 25 v. Madison Hotel*, 97 F.3d 1479, 1483 (D.C. Cir. 1996) (indicating that whether a mere reference to the existence of a settlement in the dismissal order is sufficient to retain jurisdiction is unclear).

52. *Buckhannon*, 532 U.S. at 604 n.7. While the Ninth Circuit initially suggested that this aspect of *Buckhannon* was dicta and not binding, see, *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134-35 n.5 (9th Cir. 2002), cert. denied, 537 U.S. 820 (2002), more recent decisions indicate that the Ninth Circuit has taken a minority view. See *Doe v. Boston Pub. Sch.*, 358 F.3d 20, 25 (1st Cir. 2004); see also *Carbonell v. INS*, 429 F.3d 894, 898-902 (9th Cir. 2005) (discussing the requisite judicial imprimatur needed to convey prevailing party status).

53. *Smalbein ex rel. Smalbein v. City of Daytona*, 353 F.3d 901, 904-06 (11th Cir. 2003); *Utility Automation 2000 Inc. v. Choctawatchee Elec. Coop. Inc.*, 298 F.3d 1238, 1248 (11th Cir. 2002); *Rice Servs., Ltd. v. U.S.*, 59 Fed. Cl. 619, 622-23 (2004).

54. Compare *Roberson v. Giuliani*, 346 F.3d 75, 82-83 (2d Cir. 2003) (holding that retention of enforcement jurisdiction is sufficient to confer “prevailing party” status); *Chmielarz*, 289 F.3d at 1320-21 with *Christina A. v. Bloomberg*, 315 F.3d 990, 992-94 (8th Cir. 2003) (neither retention of enforcement jurisdiction nor approval under Rule 23 is sufficient).

55. See, e.g., *Smith v. Fitchburg Pub. Sch.*, 401 F.3d 16, 23-27 (1st Cir. 2005) (canvassing the case law and wrestling with the application of *Buckhannon* to a convoluted fact situation under the IDEA). See also Gill Deford, *The Prevailing Winds After Buckhannon*, 36 *Clearinghouse Rev.* 313 (Sept.-Oct. 2002).

56. 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*: § 2363, at 270-71 (2d ed. 1995); *Marques v. Fed. Reserve Bank*, 286 F.3d 1014, 1018 (7th Cir. 2002).

57. Compare *Metro-Goldwyn Mayer v. 007 Safety Prods.*, 183 F.3d 10, 14 (1st Cir. 1999) (where the stipulation expressly reserved jurisdiction over the terms of the settlement for sixty days), with *Hester Indus. v. Tyson Foods*, 160 F.3d 911, 913, 916 (2d Cir. 1998) (despite explicit settlement agreement provision that it was subject to enforcement by specific performance by the district court, where the stipulation of dismissal was immediately operative and did not provide for continuing jurisdiction, district court lacked power to enforce).

58. If the stipulation is not signed by the judge, it is unlikely to constitute a “judicially sanctioned change in the legal relationship of the parties” as required by *Buckhannon* to justify a fee award. *Buckhannon*, 532 U.S. at 605.

59. Such a provision may have implications regarding your entitlement to fees. The possibility that the settlement could fall apart and the case proceed to trial makes any success that the plaintiff obtains somewhat uncertain and tentative.

60. *Buckhannon*, 532 U.S. at 604-05 & n.7. If the case is certified as a class action, Rule 23(e) requires that the court must approve the settlement. Note that the 2003 amendments to Rule 23 eliminated the requirement of court approval of settlements in cases brought as class actions, but not certified as such.

61. Many of these considerations would apply as well in a fully litigated case if plaintiff submitted a proposed order on relief to the court.

62. Some of the following considerations are discussed in *Anderson*, supra n.40, at 725, 729-37. See also Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 *Duke L. J.* 1015, 1015-58 (2001). This list is intended to provoke counsel’s thinking; it is not exclusive, nor are all of the issues relevant in every case.

63. *Ramos v. Proulx*, No. 82-0422-F, 1987 WL 8395 (D. Mass. 1987) (*Clearinghouse No.* 39,544). The Editor-in-Chief thanks Pat Rae of Western Massachusetts Legal Services for bringing these cases to his attention.

64. If no class has been certified or described, there is no organizational plaintiff, and the claim of the plaintiff(s) becomes moot, the plaintiff may not be able to enforce the agreement. Compare *Hook v. Ariz. Dep't of Corr.*, 972 F.2d 1012, 1014-15 (9th Cir. 1992) (allowing non-parties who were intended beneficiaries of consent decree in uncertified class action to enforce decree) and *Berger v. Heckler*, 771 F.2d 1556, 1565-66 (2d Cir. 1985) (allowing original parties to enforce consent decree on behalf of non-parties whom it was intended to benefit) with *Rosen v. Tenn. Com'r of Fin.*, 288 F.3d 918, 930-31 (6th Cir. 2002) (holding that original parties to consent decree lacked standing to enforce provisions designed to protect the rights of third parties). For this reason, class certification is preferable whenever the decree provides classwide relief.

65. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) (“a judgment in any properly maintained class action is binding on class members in any subsequent litigation”).

66. See *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1356 n.37 (1st Cir. 1991) (finding decree inapplicable to a mental health facility housing patients transferred from a public mental health institution, the original signatory to the decree); *Newman v. Graddick*, 740 F.2d 1513, 1517 (11th Cir. 1984) (commissioner of corrections lacked standing to challenge consent decree signed by previous commissioner and governor since he was a defendant in his official capacity pursuant to Federal Rule of Civil Procedure 25(d)); *Cornelius v. Hogan*, 663 F.2d 330, 332-33 (1st Cir. 1981) (court relied in part on “agents” language in consent decree to rule that commissioner of newly created agency taking over responsibility for some of covered services was bound by decree, where new commissioner was an agent of one of the defendants, the secretary of human services).

67. See *J.G. v. Bd. of Educ. of Rochester*, 193 F. Supp. 2d 693, 699-701 (W.D.N.Y. 2002); *Ricci v. Okin*, 537 F. Supp. 817, 820 (D. Mass. 1982); cf. *Rutherford v. City of Cleveland*, 137 F.3d 905, 906, 908-10 (6th Cir. 1998) (reversing district court's conclusion that nonminority applicants lacked standing to challenge consent decree that they did not sign); *Newman*, 740 F.2d at 1517-18 (attorney general who neither agreed to nor signed consent decree approved by governor and commissioner of corrections had standing to challenge it).

68. Compare *Gilmore v. Hous. Auth. of Baltimore City*, 170 F.3d 428, 429-31 (4th Cir. 1999) (vacating consent decree requiring grievance hearings before lease terminations in light of changes in the National Housing Act), *Williams v. Atkins*, 786 F.2d 457, 461-63 (1st Cir. 1986) (ordering consent decree vacated where Food Stamp Act amendments substantially changed the legal foundation of the decree), and *Therault v. Smith*, 523 F.2d 601, 602-3 (1st Cir. 1975) (consent decree vacated where subsequent Supreme Court decision regarding AFDC benefits constituted “fundamental change in the legal predicates of the consent decree”), with *King v. Greenblatt*, 52 F.3d 1, 6 (1st Cir. 1995) (remanding Department of Corrections violations case out of concern for crafting modification that comports with new legislation and is constitutional), *W.L. Gore & Assocs. v. C.R. Bard Inc.*, 977 F.2d 558, 561-63 (Fed. Cir. 1992) (refusing to vacate judgment based on changed law where no hardship exists), *Williams v. Lesiak*, 822 F.2d 1223, 1227 (1st Cir. 1987) (where new state statute led to motion to vacate consent decree that was based on broad range of federal constitutional rights, a case-specific inquiry “sensitive to the goals of the decree and the legislation, as well as to the

values of federalism" must be conducted), and *Coal. of Black Leadership v. Cianci*, 570 F.2d 12, 14 (1st Cir. 1978) (motion to vacate consent decree based on recently enacted state law denied where decree's legal foundation was based on protection of the rights of citizens "to be free from 'racially discriminatory police conduct'").

69. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). *Pennhurst* is discussed in Chapter 8 of this MANUAL.

70. Compare *Saahir v. Estelle*, 47 F.3d 758, 761 (5th Cir. 1995) (finding jurisdiction to enforce decree where no state laws are implicated) with *Lelsz v. Kavanaugh*, 807 F.2d 1243, 1251 (5th Cir. 1987) (vacating district court order enforcing portion of consent decree grounded on state law).

71. See *United States v. Atlantic Ref. Co.*, 360 U.S. 19, 23 (1959). A statement of goals, however, may help.

72. See *N.Y. State Ass'n for Retarded Children v. Carey*, 596 F.2d 27, 32 (2d Cir.), cert. denied, 444 U.S. 836 (1979).

73. But see discussion above of private settlements and conditional stipulations of settlement.

74. See, e.g., *United States v. Boston Scientific Corp.*, 167 F. Supp. 2d 424, 434-35 (D. Mass. 2001) (finding that defendant violated the consent decree's express requirement to license a product within ten days after the order became final); *Ricci v. Okin*, 537 F. Supp. 817, 820, 830 (D.C. Mass. 1982) (consent decree requirement that disputes over staffing levels be brought to the court demonstrated an intention that personnel reductions be implemented only after a careful analysis by the court of the clinical, educational, and other needs of the individual clients).

75. *Frew v. Hawkins*, 540 U.S. 431 (2004).

76. The state in *Frew* based its Eleventh Amendment argument on the principle established in *Pennhurst State Sch. & Hosp.*, 465 U.S. at 106, that federal courts lack the authority to grant relief against state officials based upon alleged violations of state law. *Frew*, 540 U.S. at 439-40.

77. *Frew*, 540 U.S. at 439. The Court did point out that the state's remedy, if it believed that the continued operation of the decree as drafted was no longer equitable, was to move under Rule 60(b)(5) for modification. For a discussion of the standards governing modification of consent decrees, see *infra* at subsection 12.

78. For example, defendants may wish to have procedures that plaintiffs would prefer them not to have, such as extensions of timeliness standards for verification delays, but plaintiffs may be willing to agree to a compromise as long as such procedures are promulgated as regulations. Such a process at least gives plaintiffs leverage over the content of the rules and makes arbitrary, informal standards impermissible.

79. See, e.g., *Int'l Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967); *U.S. v. Saccoccia*, 433 F.3d. 19, 28-29 (1st Cir. 2005); *Equal*

Employment Opportunity Comm'n v. Am. Tel. & Tel. Co., 419 F. Supp. 1022, 1059 (E.D. Pa. 1976); Fed. R. Civ. P. 65(d). See Anderson, *supra* n.40, at 730. Additional definitions of technical terms may, of course, be helpful.

80. For example, the decree might specify data production in a particular format or on particular software that enables plaintiffs easily to generate reports or otherwise retrieve the information that they deem relevant.

81. See, e.g., *Hook v. Arizona*, 120 F.3d 921, 926 (9th Cir. 1997); *N.Y. State Ass'n for Retarded Children v. Carey*, 631 F.2d 162 (2d Cir. 1980); *Allen v. Board of Education*, 190 F.R.D. 601, 609-20 (M.D. Ala. 2000); *Goldskey v. Carnes*, 429 F. Supp. 370, 374 (W.D. Mo. 1977); *United States v. Wood, Wire & Metal Lathers Int'l Union, Local Union 46*, 328 F. Supp. 429, 433 (S.D.N.Y. 1971). See Anderson, *supra* n.40, at 735-36. Monitoring reports concluding that defendants are not in compliance with the decree can be used by plaintiffs to obtain an enforcement order from the court. See, e.g., *Duran v. Elrod*, 713 F.2d 292, 293 (7th Cir. 1983); *Rolland v. Cellucci Lynch v. Rowland*, 2000 WL 33119474, at \*1-4 (D. Conn. Dec. 22, 2000); *Suthrie v. Evans*, 93 F.R.D. 390, 392 (S.D. Ga. 1981).

82. Time spent by plaintiff's counsel in negotiating and implementing consent decrees is reimbursable by defendants if the plaintiffs are otherwise entitled to fees in the action under 42 U.S.C. § 1988. See *Maher v. Gagne*, 448 U.S. 122 (1980) (plaintiffs who prevail through settlement rather than litigation may be awarded attorney fees under Section 1988, subject to Buckhannon constraints). With regard to postjudgment efforts, plaintiffs need only show that the time was reasonably spent, not that the time necessarily achieved specified results. *Pennsylvania v. Del. Valley Citizens Council*, 478 U.S. 546, 558-60 (1986); see also *Beard v. Teska*, 31 F.3d 942, 945 (10th Cir. 1994) (awarding attorney fees to plaintiffs for efforts spent securing postjudgment compliance); *Turner v. Orr*, 785 F.2d 1498 (11th Cir. 1986) (counsel for plaintiffs' monitoring committee established under a Title VII consent judgment was entitled to attorney fees for postjudgment efforts and monitoring and enforcement); *Garrity v. Sununu*, 752 F.2d 727, 738 (1st Cir. 1984); *Bond v. Stanton*, 630 F.2d 1231, 1233-34 (7th Cir. 1980) (awarding fees for postjudgment time spent on discovery, filing comments, and objections to defendant's proposed remedial plan, as well as other implementation issues); *Northcross v. Bd. of Educ.*, 611 F.2d 624, 637 (6th Cir. 1979) ("Services devoted to reasonable monitoring of the court's decrees, both to insure full compliance and to ensure that the plan is indeed working ... are compensable services"); *Wilder v. Bernstein*, 975 F. Supp. 276, 280-81 (S.D.N.Y. 1997); *Alliance to End Repression v. City of Chicago*, No. 74 C 3268, 1994 WL 86690, \*5-8 (N.D. Ill. Mar. 15, 1994); *Rolland v. Cellucci*, 151 F. Supp. 2d 145, 151-56 (D. Mass. 2001) (awarding attorney fees for monitoring but denying fees for enforcement where the latter was not incorporated into the settlement agreement). Expert consulting could be paid from such fees if they are not available on a voluntary basis.

83. See, e.g., *Labor/Cmty. Strategy Center v. Los Angeles County Metro. Transp. Auth.*, 263 F.3d 1041, 1049-50 (9th Cir. 2001) (upholding special master's authority under consent decree to require the purchase of new buses under remedial plan); *In re Pearson*, 990 F.2d 653, 659 (1st Cir. 1993) (affirming district court's appointment of special master to monitor a treatment center for sex offenders consistent with consent decree); *Cronin v. Browner*, 90 F. Supp. 2d 364, 377-78 (S.D.N.Y. 2000) (appointing

special master to regulate cooling water intake structures pursuant to Federal Rule of Civil Procedure 53(b)); *N.Y. State Ass'n for Retarded Children v. Carey*, 551 F. Supp. 1165, 1178-81 (E.D.N.Y. 1982), *aff'd*, 706 F.2d 956 (2d Cir. 1983) (appointing special master after defendants refused to fund review panel of experts provided for in consent decree); *Armstrong v. Bd. of Sch. Directors of Milwaukee*, 471 F. Supp. 800, 809-10 (1980) (approving appointment of a five-member citizen monitoring board to ensure compliance), *aff'd*, 616 F.2d 305 (7th Cir. 1980); *Aspira of N.Y. v. Bd. of Educ.*, 423 F. Supp. 647, 658 (S.D.N.Y. 1976). See generally Ellen E. Deason, *Managing the Managerial Expert*, 1998 U. Ill. L. Rev. 341 (1998). For case studies on the use of special masters in developing remedial programs in the school desegregation context, see David Kirp & Gary Babcock, *Judge and Company: Court Appointed Masters, School Desegregation, and Institutional Reform*, 32 *Alab. L. Rev.* 313 (1981); *But cf. Brewster v. Dukakis*, 687 F.2d 495 (1st Cir. 1982) (holding that the decree did not provide the monitor with the authority to resolve disagreement over the establishment of a broad legal services program for community-based mental patients).

84. Defendants usually have to pay for Rule 53 appointments. See *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 743 (6th Cir. 1979); *Newman v. Alabama*, 559 F.2d 283, 290 (5th Cir. 1977); *St. Martin v. Mobil Exploration & Producing U.S.*, 2002 WL 1933720, \*1 (E.D. La. Aug. 21, 2002); *Woodson v. Sully*, 801 F. Supp. 466, 471 (D. Kan. 1992); *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1388, 1419 (N.D. Cal. 1984), reversed in part by 801 F.2d 1080 (9th Cir. 1986); *Halderman v. Pennhurst State Sch. & Hosp.*, 533 F. Supp. 631 (E.D. Pa. 1981), *aff'd*, 673 F.2d 620 (3d Cir. 1982), cert. denied, 465 U.S. 1038 (1984); *Valentine v. Englehardt*, 474 F. Supp. 294, 304 (D.N.J. 1979). *But see Atlantic Richfield Co. v. Am. Airlines Inc.*, 98 F.3d 564, 571-72 (10th Cir. 1996) (affirming the equal division of costs of special master to assist in settlement negotiation because both sides benefitted from his services).

85. See *Anderson*, *supra* n.40, at 732-35; Note, *Implementation Problems in Institutional Reform Litigation*, 91 *Harv. L. Rev.* 428, at 440-45, 450 (1978); *Buckholz Jr. et al.*, *supra* n. 40, at 828-30. Defendants may refuse to pay the cost. If the legislature absolutely refuses to appropriate the necessary funds, the court's hands may be tied. See *N.Y. State Ass'n for Retarded Children*, 631 F.2d at 163-66.

86. State and federal legislators are generally absolutely immune from suit concerning their official duties; this immunity does not apply to the same extent to lesser legislative-type officials such as county commissioners. See Chapter 8 of this Manual. Courts may seek to obtain the cooperation of key legislators by having them attend certain court hearings. See *Ricci*, 537 F. Supp. at 820-21.

87. See, e.g., *San Francisco Nat'l Ass'n for the Advancement of Colored People v. San Francisco Unified Sch. Dist.*, 896 F.2d 412, 413-16 (9th Cir. 1990) (declining to extend consent decree to require state to reimburse costs incurred in carrying out desegregation plan where state legislature reduced reimbursement funds after the decree was entered into); *Brewster v. Dukakis*, 675 F.2d 1 (1st Cir. 1982); *N.Y. State Ass'n for Retarded Children*, 631 F.2d at 164.

88. See Jason M. Hirschhorn, *Where the Money Is: Remedies to Finance Compliance with Strict Structural Injunctions*, 82 *Mich. L. Rev.* 1815 (1984), for an excellent discussion of the situations in which a federal court may require executive official

defendants to do more than just use best efforts to fund remedial decrees. In *Missouri v. Jenkins*, 495 U.S. 33, 51, 55-56 (1990), the Supreme Court, while holding that the trial court exceeded its equitable powers in imposing a tax increase on a locality to fund a school desegregation decree, did uphold an order requiring the local officials to levy a tax increase sufficient to fund the decree. See also *Rawlins v. Sawyer*, 105 F. Supp. 2d 1234, 1248 (M.D. Ala. 2000) (validating governor's duty to use "best efforts" to secure funding to fulfill consent decree provisions).

89. Especially if the settlement does not constitute a formal consent decree, retention of enforcement jurisdiction may be critical. *Kokkonen*, 511 U.S. at 381. See discussion in Section II.B supra.

90. See *Anderson*, supra n.40, at 736 (court has inherent power to enforce a consent decree regardless of retention of jurisdiction, but retention may be viewed otherwise by some courts, and is symbolically helpful). See also *Brown v. Neeb*, 644 F.2d 551, 558-59 (6th Cir. 1981) (court relied upon retention clause for authority to modify decree to achieve the decree's goals even absent violation of its terms by defendants).

91. In the event of a settlement agreement over which the court has no enforcement authority after *Kokkonen*, traditional contract law regarding modifications apparently would control, and the party seeking such a modification would have to file an independent action, most likely in state court to seek such relief.

92. *Rufo*, 502 U.S. at 378.

93. *Id.*, *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932).

94. *Rufo*, 502 U.S. at 381, 393.

95. *Id.* at 383, 393.

96. *Id.* at 385, 388.

97. *Rufo* was specifically limited to institutional reform litigation. Whether the more liberalized standard that it announced applies in other contexts is not definitively established. Jed Goldfarb, *Keeping Rufo in Its Cell: The Modification of Antitrust Consent Decrees After Rufo v. Inmates of Suffolk County Jail*, 72 N.Y. U. L. Rev. 625, 640-44 (1997) (collecting cases demonstrating split among the circuits on this issue); *In re Midlands Utility*, 253 B.R. 683, 689-90 (Bankr. D.S.C. 2000) (collecting cases on both sides of issue and applying *Rufo* in the noninstitutional context).

98. See *Bd. of Educ. v. Dowell*, 498 U.S. 237, 246-47 (1991) (rejecting Swift's "grievous wrong" test in case seeking to vacate a desegregation consent decree and holding that decree could be vacated by showing that its purposes had been fully achieved). *Dowell* was applied outside the school desegregation context. See, e.g., *Gonzales v. Galvin*, 151 F.3d 526, 531 (4th Cir. 1998); *Patterson v. Newspaper & Mail Deliverer's Union*, 13 F.3d 33, 37-38 (2d Cir. 1983).

99. See, e.g., *Halderman v. Pennhurst State Sch. & Hosp.*, 526 F. Supp. 428 (E.D. Pa. 1981) (special master authorized to review and approve treatment plan for each child).

100. See Section IV *infra*.

101. See *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *Bragg v. Robertson*, 83 F. Supp. 2d 713, 717 (S.D. W.Va. 2000). On the construction of consent decrees generally, see *Anderson*, *supra* n.40, at 579.

102. See *United States v. Armour & Co.*, 402 U.S. 673 (1971); *Langton v. Hogan*, 71 F.3d 930, 937-38 (1st Cir. 1995); *San Francisco NAACP*, 896 F.2d at 413; *Roberts v. St. Regis Paper Co.*, 653 F.2d 166, 171 (5th Cir. 1981). Even where the decree appears clear on its face, a court may find it ambiguous in light of changed circumstances. *Cornelius*, 663 F.2d at 333; *Escalera v. N.Y. Hous. Auth.*, 924 F. Supp. 1323, 1339-41 (S.D.N.Y. 1996) (relaxing procedural eviction safeguards under twenty-five year old consent decree due to increased drug trafficking in building). But see *Marlowe v. Botarelli*, 938 F.2d 807, 812-13 (7th Cir. 1991); *White v. Roughton*, 689 F.2d 118, 120 (7th Cir. 1982) (disregarding unambiguous language when it clearly contradicts the intent of the parties).

103. See, e.g., *In re Holocaust Victim Assets Litig.*, 282 F.3d 103, 111 (2d Cir. 2002); *Sportmart Inc. v. Wolverine World Wide Inc.*, 601 F.2d 313, 318 (7th Cir. 1979).

104. See, e.g., *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 237 (1975) (appendix to decree); *Holocaust Litig.*, 282 F.3d at 111; *N.Y. Ass'n for Retarded Children*, 631 F.2d at 163 (same).

105. See, e.g., *Armstrong v. Bd. of Sch. Directors*, 616 F.2d 305, 310 (7th Cir. 1980) (parties' statements at settlement hearing).

106. See, e.g., *Sanchez v. Maher*, 560 F.2d 1105, 1107-9 (2d Cir. 1977) (letter of defendant welfare official).

107. See *I.T.T. Cont'l Baking Co.*, 420 U.S. at 223. While the Court paid lip service to the "four corners" rule of *Armour*, it was clearly moving to a broader standard of construction in light of the nature of a consent decree as both a negotiated "contract" and a judicial order.

108. Numerous courts come to this conclusion, regardless of the words they use to formulate the contract versus judgment tension. See, e.g., *N.Y. State Ass'n for Retarded Children*, 596 F.2d at 37-38; *Sanchez*, 560 F.2d at 1108-9; *Mass. Ass'n for Retarded Citizens v. King*, 668 F.2d 602, 607-8 (1st Cir. 1981); *Sarabia v. Toledo Police Patrolman's Ass'n*, 601 F.2d 914, 918 (6th Cir. 1979). See also *Anderson*, *supra* n.40.

109. See, e.g., *Equal Employment Opportunity Comm'n v. Local Union No. 3*, 416 F. Supp. 728, 732-33 (N.D. Cal. 1975).

110. See, e.g., *Cornelius*, 633 F.2d at 330.

111. *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989).

112. *Id.* at 762-65.

113. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(n).

114. See *Wilson v. Minor*, 220 F.3d 1297, 1302 n.10 (11th Cir. 2000) (explaining that the Civil Rights Act of 1991 did not curtail the applicability of Wilks to Voting Rights Act violations); *United States v. City of New York*, 198 F.3d 360, 366 (2d Cir. 1999) (noting that the Civil Rights Act of 1991 eroded Wilks only in the narrow context of employment discrimination claims and did not affect environmental claims). The reasoning of Wilks applies equally to a fully litigated judgment entered by the court.

### III. Declaratory Judgment Act >

#### Chapter 9:

#### Relief

### III. Declaratory Judgment Act

The Declaratory Judgment Act offers a unique mechanism by which advocates may seek to remedy ongoing violations of statutory or constitutional law./115/ The Act may authorize broad, classwide declaratory and injunctive relief without resort to class action procedures./116/ Distinctive features of the Act:

- \* allow prospective defendants to sue to establish their nonliability./117/ and
- \* afford a party threatened with liability an opportunity for adjudication before its adversary commences litigation./118/

However, the statute on its face makes no express reference to, and creates no special preference for, the resolution of such “anticipatory” disputes. A party need not be a prospective defendant in order to bring an action under the Act./119/ Clearly, however, the unique declaratory form of relief created by the statute was intended to resolve pending or threatened controversies before the need for more coercive intervention was required./120/ Section 1 of the Act provides, in relevant part:

In a case of actual controversy within its jurisdiction ...any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment and shall be reviewable as such./121/

The availability of this “declaratory” relief was intended to offer a milder alternative to the general injunction remedy./122/ Yet Section 2 of the Act specifies that “[f]urther or necessary or proper relief based upon a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.”/123/ Such relief may include broad equitable or injunctive remedies, which are considered ancillary to the enforcement of the declaratory judgment./124/

#### III.A. “Case or Controversy” and Jurisdictional Requirements

A party seeking declaratory relief under the statute must present an “actual controversy” in order to satisfy the “case or controversy” requirement of Article

III./125/ The Declaratory Judgment Act was not intended as a device for rendering mere advisory opinions. The case must involve a controversy that is substantial and concrete, must touch the legal relations of parties with adverse interests, and must be subject to specific relief through a decree of conclusive character./126/ Like any other federal court plaintiff, a claimant seeking relief under the Act also must satisfy the three requirements for constitutional standing./127/

While the Act enlarges the range of remedies available to federal court litigants, it does not confer an independent basis for federal jurisdiction./128/ The Supreme Court describes the Act as “procedural” in its operation and as intending simply to place another remedial arrow in the district court’s quiver./129/ Accordingly any complaint seeking relief under the Act must invoke an independent basis for federal jurisdiction.

### III.B. Discretionary Nature of the Remedies

The Declaratory Judgment Act confers on the federal courts unusual and substantial discretion in determining whether to “declare” the rights of litigants. The Supreme Court emphasizes that the statute permits, but does not require, a federal court to issue a declaratory judgment./130/ Accordingly, “[i]n the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.”/131/

Not surprisingly, a substantial body of case law has developed in conjunction with disputes over whether the district court properly exercised its discretion in proceeding (or declining to proceed) upon a claim for relief brought under the Act./132/ Now it is well settled that the district court’s exercise of discretion should be informed by a number of prudential factors, including: (1) considerations of practicality and efficient judicial administration; (2) the functions and limitations of the federal judicial power; (3) traditional principles of equity, comity, and federalism; (4) Eleventh Amendment and other constitutional concerns; and (5) the public interest./133/ Notwithstanding these general principles, most disputes over the proper exercise of statutory discretion arise in cases where jurisdiction is founded upon diversity of citizenship, where the claims of the plaintiff (typically an insurance company) arise under state law, and where parallel or related state court proceedings are either pending, contemplated, or available./134/ In such circumstances the district court’s discretion is guided by the Supreme Court’s decision in *Brillhart v. Excess Insurance Co. of America* and its considerable progeny/135/. *Brillhart* evaluated whether the federal court should refrain from exercising its discretion under the Act in favor of actual or potential state court litigation involving the same parties and issues./136/ In contrast to the situation presented in cases like *Brillhart*, a district court should not hesitate to entertain a declaratory judgment action brought by legal aid advocates seeking to remedy ongoing violations of federal law./137/

### III.C. Remedies

The unique feature of the Declaratory Judgment Act is its authorization to “declare” the rights and legal relations of the parties to the controversy; such declarations have the force and effect of a final judgment./138/ Congress plainly intended declaratory relief to substitute, in appropriate cases, for the “strong medicine” of an injunction./139/ The

Supreme Court repeatedly observed that the issuance of declaratory relief should have a strong deterrent effect rendering more coercive remedies unnecessary./140/ However, if a declaration of rights alone does not deter parties or officials from proceeding (or continuing) to violate federal law, the Act specifically authorizes the party in whose favor the declaration is rendered to seek "further necessary or proper relief" to aid enforcement of the judgment./141/

The basis for any injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies./142/ Issuance of an injunction is an inherently equitable, and, therefore, discretionary exercise of power by the district court./143/ Historically a federal court injunction, particularly when directed at state or local officials, was considered to be a harsh and abrasive remedy./144/ However, as already noted, Congress specifically authorized courts to grant affirmative relief under the Act, including equitable and injunctive remedies, for purposes of enforcing or effectuating a declaratory judgment./145/

Generally, the potential reach of an injunctive remedy implicates the jurisdictional power of the court to bind parties and enforce judgments./146/ Arguably, absent a certified class, an injunctive order may not run affirmatively in favor of persons (or class of persons), other than the named plaintiffs./147/ However, a number of courts upheld the issuance, under the Declaratory Judgment Act, of broad injunctive relief directed against a defendant government agency or official to remedy an ongoing violation of federal law even in the absence of a certified class./148/ Under the reasoning of these decisions, an injunction issued to correct a defendant's policy or practice which is unlawful, not only as to the named plaintiff but also as to others, is not overbroad, notwithstanding the absence of a certified plaintiff class./149/

Over the years legal aid advocates have successfully obtained broad relief under the Declaratory Judgment Act for their clients in cases involving civil rights, public benefits, social security, health care, housing, and labor issues./150/ The remedies afforded by the Act are particularly suited for attacking and correcting illegal policies, practices, and rules that harm large numbers of persons.

115. Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

116. See Gary Smith & Nu Usaha, Dusting Off the Declaratory Judgment Act: A Broad Remedy for Classwide Violations of Federal Law, 32 Clearinghouse Review 112 (July-Aug. 1998).

117. *Beacon Theatres Inc. v. Westover*, 359 U.S. 500, 504 (1959).

118. 10B Charles A. Wright et al., *Federal Practice and Procedure* § 2751, at 457 (3d ed. 1998).

119. Nevertheless, clearly a major purpose behind the legislation was to help eliminate various uncertainties in legal and business relationships, and the Act has been heavily utilized by insurance companies to obtain declarations resolving disputed issues of coverage or liability before being subject to litigation by their insureds. See, e.g., *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937); Smith & Usaha, *supra* n.116, at 114.

120. Wright et al., supra n.118, at 568. See generally United States v. Doherty, 786 F.2d 491, 498-99 (2d Cir. 1986) (Friendly, J.) (collecting cases describing the various purposes behind the statute).

121. 28 U.S.C. § 2201(a).

122. Steffel v. Thompson, 415 U.S. 452, 466-67 (1974); Pratt v. Wilson, 770 F. Supp. 539, 545 (E.D. Cal. 1991).

123. 28 U.S.C. § 2202. Federal Rule of Civil Procedure 57, which was adopted pursuant to the Act, provides that (1) a jury trial is authorized if otherwise available for the claims presented and (2) an applicant for a declaratory judgment may seek a speedy hearing on the court's calendar.

124. Calderon v. Ashmus, 123 F.3d 1199, 1206 (9th Cir. 1997), rev'd on other grounds, 523 U.S. 740 (1998). See Section III.C. infra.

125. 28 U.S.C. § 2201(a). The most recent Supreme Court decision addressing this requirement in the context of a declaratory judgment action is MedImmune v. Genentech, 127 S. Ct. 764 (2007). In that patent case, the Court held that the district court had jurisdiction to hear a declaratory judgment action brought by a party who voluntarily paid patent royalty fees despite its belief that the underlying patent was invalid because the patent holder threatened to enforce the patent. See Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 325 (1936) (upholding constitutionality of the Act under Article III).

126. Aetna Life Ins. Co., 300 U.S. at 240-41.

127. Regarding standing, see Chapter 3, Section 1, of this Manual.

128. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 672 (1950).

129. Wilton v. Seven Falls Co., 515 U.S. 277, 288 (1995); Aetna Life Ins. Co., 300 U.S. at 247.

130. Wilton, 515 U.S. at 286-87; Pub. Affairs Assocs. v. Rickover, 369 U.S. 111, 112 (1962).

131. Wilton, 515 U.S. at 286, 288; compare Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 818-20 (1976) (federal courts generally have a "virtually unflagging obligation" to entertain and resolve disputes within their jurisdiction and may abstain from exercising that jurisdiction only under "exceptional circumstances").

132. Smith & Usaha, supra n.116, at 116; see Wilton, 515 U.S. at 289-90 (holding that the Act's discretion is vested in the district courts, not the courts of appeal, and that the district court's exercise of discretion is itself reviewable under the deferential abuse-of-discretion standard).

133. Smith & Usaha, supra n.116, at 116 (collecting cases).

134. *Id.* at 116-17.

135. *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942).

136. *Smith & Usaha*, *supra* n.116, at 117.

137. In such cases, the claims arise under federal law, no parallel state court proceedings typically exist, and the prudential, comity, and efficiency concerns of *Brillhart* are inapplicable.

138. 28 U.S.C. § 2201(a). Declaratory judgments are accorded *res judicata* effect. Restatement (Second) of Judgments § 33 (1982).

139. *Steffel*, 415 U.S. at 466-67.

140. See, e.g., *Doran v. Salem Inn Inc.*, 422 U.S. 922, 931 (1975); *Perez v. Ledesma*, 401 U.S. 82, 124-26 (1971) (Brennan, J., concurring); *Samuels v. Mackell*, 401 U.S. 66, 73 (1971).

141. 28 U.S.C. § 2202.

142. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Natural Res. Def. Council Inc. v. Texaco Refining & Marketing Inc.*, 2 F.3d 493, 506 (3d Cir. 1993). See also Chapter 6, Section III, of this Manual.

143. *Amoco Prods. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987); *Ctr. for Biological Diversity v. Pirie*, 201 F. Supp. 2d 113, 116 (D.D.C. 2002).

144. *Steffel*, 415 U.S. at 436.

145. See, e.g., *Powell v. McCormack*, 395 U.S. 486, 499 (1969); *Calderon*, 123 F.3d at 1206; *Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981).

146. *Smith & Usaha*, *supra* n.116, at 119; see Fed. R. Civ. P. 65(d).

147. *Smith & Usaha*, *supra* n.116, at 119-21.

148. See, e.g., *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-2 (9th Cir. 1996); *Bresgal v. Brock*, 843 F.2d 1163, 1770 (9th Cir. 1988); *Soto-Lopez v. N.Y. City Civil Serv. Comm'n*, 840 F.2d 162, 168 (2d Cir. 1988); *Gallinot*, 657 F.2d at 1025; *Galvin v. Levine*, 490 F.2d 1255, 1261 (2d Cir.), cert. denied, 417 U.S. 936 (1974).

149. *Smith & Usaha*, *supra* n.116, at 120-23 & n.106 (collecting cases).

150. *Id.* at 125 & n.118 (citing numerous examples).

#### IV. Attorney Fees >

Chapter 9:  
Relief

## IV. Attorney Fees

Court-awarded attorney fees are critical in preserving access to the courts for poor people. Recipients of Legal Services Corporation funds are prohibited from seeking attorney fees in most cases.<sup>/151/</sup> Other programs, however, depend on fees for their very survival. Without attorney fees, numerous federal laws protecting rights to housing, health care, and other necessities would remain unenforced. **The risk of having to pay plaintiffs' attorney fees frequently induces settlement and deters illegal governmental and corporate conduct.** Therefore, legal aid advocates in non-LSC programs need to have a working knowledge of fee issues.

The subject of court-awarded attorney fees has inspired books, even multivolume treatises.<sup>/152/</sup> This section instead focuses briefly on the major issues presented in fee litigation: how a plaintiff qualifies as a prevailing party; entitlement to fees; how to calculate a reasonable fee; timing of fee motions and the "Jeff D. problem" of defendants forcing plaintiffs' counsel to waive fees as a condition of achieving a settlement on the merits.

### IV.A. Prevailing Party Standard After Buckhannon

To qualify for a fee award under most federal fee-shifting statutes, a litigant must be a "prevailing party." Two issues that often arise are (1) how much the litigant has to win and (2) what form the victory must take.

**As for the first question, the Supreme Court has held that a plaintiff need not win every single issue or even the "central issue" in order to obtain prevailing party status. A prevailing party is "one who has succeeded on any significant claim affording it some of the relief sought . . . ."**<sup>/153/</sup> **Losing on some issues may or may not result in a reduced fee-award amount.**<sup>/154/</sup> **It does not affect "the availability of a fee award vel non."**<sup>/155/</sup>

The second question—what form the victory must take—became problematic after *Buckhannon Board v. West Virginia Department of Health and Human Resources*.<sup>/156/</sup> In *Buckhannon*, the Supreme Court held that voluntary change in behavior by a defendant caused by a pending lawsuit did not qualify the plaintiff as a prevailing party for fee purposes. After *Buckhannon*, whether a plaintiff who is victorious in a practical sense is a prevailing party for fee purposes depends roughly **on how much judicial involvement was involved in the victory.**

At one end of the spectrum, winning a judgment obviously qualifies a plaintiff as a prevailing party in most cases. **The major qualification is that the judgment must require "some action (or cessation of action) by the defendant."**<sup>/157/</sup> **A judicial declaration alone does not suffice.** The judgment may be for nominal relief, although in such cases a court may deny fees altogether to the prevailing plaintiff.<sup>/158/</sup>

At the other end of the spectrum, under *Buckhannon*, simply filing a lawsuit that prompts defendants to change illegal behavior voluntarily (i.e., acting as a "catalyst") does not qualify the plaintiffs as prevailing parties. The *Buckhannon* Court disapproved the catalyst theory of recovery because it permitted an award "where there is no

judicially sanctioned change in the legal relationship of the parties.”/159/ Even in such situations, however, plaintiffs’ counsel may still seek a final judgment if the interests and desires of the clients permit. Defendants are likely to claim that their voluntary changes in policy render the case moot. As the Buckhannon Court noted, however, mootness is to be found only when “it is clear that the allegedly wrongful behavior could not reasonably be expected to recur.”/160/

Somewhere in the middle of the spectrum are victories achieved either by interlocutory orders or by settlement. Even in pre-Buckhannon jurisprudence, winning an interlocutory order that merely kept a suit alive did not transform litigants into prevailing parties./161/ Nor are plaintiffs who obtain preliminary injunctions, but ultimately lose on the merits./162/ There is also disagreement in the circuits on how much “judicial imprimatur” is needed for a settlement agreement to qualify a plaintiff as a prevailing party./163/ Buckhannon states on one hand, that a plaintiff who secures a court-ordered consent decree is a prevailing party./164/ On the other hand, a litigant who achieves success through a “private settlement” is not./165/ Private settlements lack the “judicial approval and oversight involved in consent decrees” and often cannot be enforced in federal court./166/ The Ninth Circuit dismissed this portion of Buckhannon as “dictum” and has refused to follow it./167/ However, most courts will follow Buckhannon in its entirety./168/ These courts will have to determine whether a particular agreement is closer to a consent decree or to a private settlement./169/ The major factors that the courts have looked at are the extent to which the settlement terms are incorporated into the district court order, and whether the district court retains jurisdiction to enforce the agreement./170/

#### IV.B. Entitlement to Fees Under Major Fee-Shifting Statutes

Once a plaintiff demonstrates that she is a prevailing party, showing entitlement to fees is usually not difficult.

##### IV.B.1. Civil Rights Attorney’s Fees Awards Act and Other Statutes: Double Standard for Plaintiffs and Defendants

Some statutes, such as the Fair Labor Standards Act, provide that a prevailing plaintiff “shall” be entitled to fees./171/ Other statutes, such as the Civil Rights Attorney’s Fees Awards Act of 1976, specify that a court “may” award fees to the prevailing party./172/ Recognizing, however, that statutes such as Section 1988 are private attorney general measures intended to encourage litigation enforcing important rights, the courts employ a double standard. A “prevailing plaintiff ‘should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.’”/173/ By contrast, a “prevailing defendant may recover an attorney’s fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant.”/174/

Section 1988, the most widely used fee-shifting statute, authorizes fee awards in actions to enforce civil rights laws, including 42 U.S.C. § 1983. A lawsuit that redresses a state or local government violation of rights guaranteed by federal statute is a Section 1983 action within the meaning of Section 1988 and may thus qualify for a fee award./175/ State governments do not enjoy Eleventh Amendment immunity against Section 1988 fee awards./176/

#### IV.B.2. Equal Access to Justice Act—Substantial Justification Standard

The Equal Access to Justice Act (EAJA) presents different entitlement questions. Under the EAJA a party who prevails in litigation against the federal government “shall” be awarded fees “unless the court finds that the position of the United States was substantially justified . . .”/177/ The federal government has the burden of demonstrating substantial justification in both law and fact./178/ If either the government’s prelitigation position or its litigation position lacks substantial justification, the court shall award fees./179/

While the government is not automatically assessed fees merely because it loses a case, neither does it escape a fee award just because its position is not frivolous. To meet the substantial justification test, the government’s position must be “justified to a degree that could satisfy a reasonable person,” which requires the government to demonstrate “a reasonable basis both in law and fact.”/180/

Although parties often argue that EAJA motions should be controlled by “objective factors” such as the number of times the issue on the merits was litigated previously, the Supreme Court has stated that none of these factors is dispositive in itself./181/ Most district courts decide substantial justification questions on an “I know it when I see it” basis. Once the district court grants or denies a motion, the court of appeals is required to use a deferential abuse-of-discretion standard on appeal./182/

#### IV.C. Calculation of Reasonable Fees: The Lodestar Calculation

Under the leading case of *Hensley v. Eckerhart*, the amount of a statutory fee award is determined by the lodestar method: “the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.”/183/

##### IV.C.1. Reasonable Number of Hours

What constitutes “hours reasonably expended” is the most frequently debated question in fee litigation.

##### IV.C.1.a. Documentation Requirements

Courts and opposing counsel examine whether the hours are well documented. Some courts permit attorneys to reconstruct hours./184/ However, inadequate documentation may result in a reduced fee award./185/ Attorneys, paralegals, and law clerks should begin keeping contemporaneous time records as soon as they realize, erring on the side of over-inclusiveness, that a matter may become a case. They should record the date, the time spent to complete a task broken down into six-minute increments, and, most important, a sufficiently detailed description of what was done. As one court stated, records should give “enough information as to what hours were devoted to various activities and by whom for the district court to determine if the claimed fees are reasonable.”/186/ For example, “telephone call” or “research” are inadequate entries, but a court will approve “telephone call with Smith re failure to produce administrative record” or “research re summary judgment motion.”/187/ Ideally, there should be a separate entry for each telephone call, research project, or other activity. In the real

world, as most courts recognize, attorneys in the heat of litigation “bundle” several activities into one entry and are rarely penalized for such block billing./188/

#### IV.C.1.b. Overall Billing Judgment Decisions

Hensley states that, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation ....”/189/ However, attorneys seeking court-awarded fees are expected to exercise voluntary “billing judgment,” excluding from a fee request “hours that are excessive, redundant, or otherwise unnecessary ....”/190/ In lengthy, multi-counsel litigation, where justifying every time entry or use of personnel would be difficult, some plaintiffs’ attorneys propose a voluntary across-the-board billing judgment reduction, which courts often appreciate./191/ In other instances, where particular recorded activity seems vulnerable, plaintiffs’ counsel should consider making discrete reductions.

#### IV.C.1.c. Compensable Phases of Litigation

A court may award fees for work on all phases of a lawsuit from prelitigation work,/192/ through postjudgment monitoring,/193/ including time spent on the fee issue itself./194/ There are some limits, however, on awards for prelitigation services. Time spent “years before the complaint was filed” is unlikely to be compensated./195/ Time spent in administrative proceedings must be “both useful and of a type ordinarily necessary to advance the ...litigation ....”/196/ When a plaintiff can make that showing, however, a court may award fees for administrative advocacy even when that advocacy was directed at third parties./197/

#### IV.C.1.d. Compensable Activities

Space does not permit a discussion of which litigation activities are compensable and which are not. When a fee opponent challenges a particular activity, such as attorney travel time, a good place to start researching is one of the fee treatises./198/

Perhaps the most frequently occurring challenge is to time spent by co-counsel communicating with each other. The Supreme Court has held that district courts have discretion to include conferencing time in a fee award./199/ No court, to our knowledge, has denied compensation altogether for conferences./200/

A subsidiary issue in some cases is the number of hours spent on counsel communications. Plaintiffs may need to demonstrate to a district court, through copies of agendas or through lead counsel’s declarations, why the number of meetings held was necessary and how the meetings actually contributed to the efficiency of the litigation. When counsel do so, some courts award fully compensatory fees even when large numbers of conferencing hours are at issue./201/

#### IV.C.1.e. Compensation for Less than Complete Success

Fee opponents often seek reductions based on the argument that the plaintiffs were only partly successful. Plaintiffs rarely win all conceivable relief while prevailing along

the way at every stage on all legal theories advanced. Courts do not, however, require that level of success to award fully compensatory fees.

Less than Complete Relief. Frequently plaintiffs win some, but not all, of the equitable relief prayed for, or relatively small amounts of money in damage cases. In neither event is a reduction in fees necessarily warranted. The Hensley Court deemed it insignificant that a prevailing plaintiff did not receive all the relief requested. For example, a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time.<sup>202</sup> Lawsuits seeking only damages present different issues. The Supreme Court in *Farrar v. Hobby* held that if a plaintiff wins only nominal damages, a court “usually” denies fees altogether.<sup>203</sup> Even in nominal damage cases, however, as suggested by Justice O’Connor’s concurring opinion, a court may award higher fees. Whether it does depends on factors such as the difference between the damage amounts sought and awarded, the significance of the legal issue on which the plaintiff prevailed, and whether the litigation vindicated a public purpose.<sup>204</sup> Several circuit courts have adopted Justice O’Connor’s analysis as the rule for nominal-damages cases.<sup>205</sup>

The Court has rejected limiting the amount of fees in a civil rights damages suit to the same percentage that a personal injury lawyer would receive and affirmed a fee award that was nearly eight times the damages recovery.<sup>206</sup> Limiting fees to a percentage of the damages recovery would be inconsistent with the purpose of Section 1988, which “was enacted because existing fee arrangements were thought not to provide an adequate incentive to lawyers particularly to represent plaintiffs in unpopular civil rights cases.”<sup>207</sup>

Unsuccessful Proceedings. A prevailing plaintiff need not prevail at every stage in a suit to receive fully compensatory fees. As the Ninth Circuit recognized in refusing to reduce fees for time spent unsuccessfully defending against a writ of certiorari: “Rare, indeed, is the litigant who doesn’t lose some skirmishes on the way to winning the war.”<sup>208</sup> Relying on *Hensley*, the Ninth Circuit analogized unsuccessful claims to unsuccessful proceedings where the plaintiff ultimately prevailed.<sup>209</sup>

Unsuccessful Issues. Neither does a plaintiff need to win every issue raised in the complaint. Rather, fees for time spent litigating an unsuccessful claim are denied only where that claim “is distinct in all respects from . . . successful claims . . .”<sup>210</sup> By contrast, where “a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney’s fee reduced simply because the district court did not adopt each contention raised.”<sup>211</sup> Claims are “related” under this analysis when they arise from the same facts or related legal theories.<sup>212</sup>

#### IV.C.2. Reasonable Hourly Rates

In *Blum v. Stenson* the Supreme Court held that Section 1988 fees awarded to legal aid programs that do not charge their clients fees should be calculated at rates comparable to those charged by private attorneys in the community with comparable experience.<sup>213</sup> The Court rejected as inconsistent with the legislative history of Section 1988 the argument that fees should be limited to the internal costs of the relatively low salaries paid by legal aid programs.

#### IV.C.2.a. Market Rates and How to Prove Them

The Blum Court noted Congress' direction that "the amount of fees awarded under [Section 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases ...."/214/

The fee applicant has the burden of proving relevant market rates through evidence "in addition to the attorney's own affidavits ...."/215/ This evidence often includes:

declarations from attorneys in a range of private law firms in the relevant community reporting hourly rates charged by those firms for attorneys with the same law school graduation date as the fee applicant;/216/

- \* excerpts from hourly rate surveys;/217/

- \* fee award orders specifying past hourly rates awarded for the work of attorneys in the case; and

- \* other fee award orders in the jurisdiction stating hourly rates for attorneys of comparable experience.

#### IV.C.2.b. Frequently Occurring Hourly Rate Issues

Five frequently recurring issues concerning reasonable hourly rates follow:

First, the parties may disagree on which city's prevailing rates apply when plaintiff's counsel practices outside the forum jurisdiction. While this issue can cut both ways, it appears to occur most frequently when an out-of-town big-city lawyer wins in a jurisdiction where prevailing rates are relatively low. Generally the forum community's rates are applicable unless the plaintiff can show that "local counsel was unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case."/218/ A declaration from the director of the legal services program serving the forum community sometimes can help prove this point.

Second, in suits lasting many years, the defendants may argue that compensation must be limited to "historical rates": the market rates prevailing for each of the years the suit was litigated. The Supreme Court has held, however, that "an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise—is within the contemplation of [Section 1988]."/219/ Thus, in multiyear litigation against a defendant other than the federal government, a court should either award current rates for the entire case—the easiest solution—or award historical rates augmented by a multiplier to compensate for delay in payment./220/

Third, if the defendants are represented by law firms charging relatively low hourly rates, they may argue that plaintiffs' counsel should be limited to those same rates. Noting that firms representing large institutional defendants such as governments and insurance companies charge low rates to keep repeat business, the courts have rejected these arguments. These firms are "not in the same legal market as private plaintiff's attorneys who litigate civil rights cases."/221/

Fourth, defendants often seek reduction in hourly rates or an overall fee reduction by contending that too much of the work on behalf of the plaintiffs was done by

experienced attorneys at the high end of the hourly rate scale. Fee opponents often argue that plaintiffs' counsel should not be awarded "big firm rates" because a large firm would have litigated the case differently, assigning most of the work to associates. One or two courts have accepted this argument./222/ Most have rejected it for two reasons. First, small firms and legal aid programs do not have the same luxury as do big firms in choosing to throw armies of associates into the fray./223/ More important, the reason experienced attorneys command higher hourly rates, the courts have realized, is that they are often much more efficient: "Presumably, the skill and experience of the partners places them further along the learning curve and enhances their ability to operate efficiently so that the higher partner rate is likely to be offset, at least in part, by a reduction in the number of hours multiplying that rate."/224/

Fifth, defendants may argue that compensation for the work of paralegals and law clerks should be limited to the hourly rates that plaintiffs' counsel paid them rather than market rates. The Supreme Court, however, has held that courts should compensate paralegal and law clerk time at market rates if the prevailing practice in the relevant community was to bill that time separately./225/

#### IV.C.2.c. Equal Access to Justice Act Hourly Rate Issues—Statutory Cap and Exceptions

The Equal Access to Justice Act (EAJA) presents an entirely different framework for computing hourly rates. Under the EAJA attorney fees are limited to \$125 per hour, subject to certain exceptions./226/

**Inflation Adjustment.** Hourly rates may be adjusted to account for increases in the cost of living since March 1996, when Congress set the EAJA hourly rate limit at \$125./227/ Although an inflation increase is not automatic, in practice most courts award it, usually unopposed. The adjusted hourly rate equals \$125 per hour increased by the percentage increase in the consumer price index for urban consumers (CPI-U)./228/ Unlike with other fee statutes, courts must use historical rather than current rates in awarding EAJA fees because of sovereign immunity concerns./229/ Thus, in multiyear litigation the rate for each year is \$125 increased by the percentage CPI-U hike from March 1996 through that year./230/

**Market Rates for Special Expertise and in Other Situations.** An EAJA fee applicant may be awarded higher market rates if "the court determines that ...a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."/231/ This requires an extensive showing that (1) the prevailing attorneys possessed specialized expertise; (2) the expertise was needed in the litigation; and (3) the skills needed could not have been obtained at the normal EAJA rates./232/

As for the first factor, the Supreme Court held that possessing exceptional litigation skills is not good enough. The prevailing attorney must have "distinctive knowledge or specialized skill . . . ."/233/ The circuit courts have taken different approaches in construing the Underwood requirements. The Seventh, Ninth, and Eleventh Circuits have interpreted Underwood to allow an enhancement in situations where the attorneys had specialized expertise in a particular area of law./234/ By contrast, the D.C., Fourth, and Fifth Circuits have construed Underwood quite narrowly./235/ Most other circuit courts have not squarely addressed this issue.

Even when the prevailing attorney possesses specialized expertise, the attorney must make a strong factual showing that the case could not have been brought by a smart generalist. Lead counsel should demonstrate to the court how the suit could only have been litigated by attorneys with existing contacts in the field or knowledge of hard-to-access rules and authorities. Plaintiffs also need to submit a declaration from a knowledgeable attorney showing the absence of other qualified counsel to litigate such a case.

In addition to authorizing fees generally against the government when no substantial justification can be shown for the government's position, the EAJA subjects the federal government to fees "to the extent that any other party would be liable under the common law or under the terms of any statute which specially provides for such an award."<sup>236</sup> Under this provision, market rates are awarded under equitable fee doctrines such as when the government acts in bad faith, and under statutes other than the EAJA that both apply to the federal government and have fee-shifting provisions.<sup>237</sup>

#### IV.C.3. Multipliers

Earlier Supreme Court cases such as *Hensley* contemplated that the lodestar could be augmented by a multiplier in appropriate circumstances.<sup>238</sup> Later cases, however, rendered the multiplier virtually extinct in federal court. Most prominently, the Court in *City of Burlington v. Dague* held that courts may not award contingency multipliers to account for either the exceptional riskiness of a particular case or the riskiness of certain kinds of litigation.<sup>239</sup> Previously, the Court had discouraged the use of multipliers based on such factors as the novelty and difficulty of the litigation or the exceptional quality of the representation; the Court reasoned that these factors are generally subsumed within the lodestar.<sup>240</sup>

The only basis for a multiplier that the Supreme Court has approved is for delay in payment. In lengthy litigation a district court may compensate counsel for delay by a multiplier or by using current rather than historical rates.<sup>241</sup>

Post-*Dague* multipliers are rare as well in the lower courts, though there are exceptions. Two courts have approved multipliers based on the extreme unpopularity of a case.<sup>242</sup> Another court ordered a multiplier for exceptional results after a 36-year landmark desegregation lawsuit.<sup>243</sup> In addition, where a federal court exercises supplemental jurisdiction over state claims and state law permits multipliers, federal courts are free to augment the lodestar.<sup>244</sup>

#### IV.D. Timing of Fee Petitions

Neither Section 1988 nor most federal fee-shifting statutes specify when the fee motion must be filed.

##### IV.D.1. Civil Rights Act and Most Other Cases—Governed by Rule 54 and Local Rules

Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure requires fee motions to be filed no later than 14 days after entry of judgment "[u]nless otherwise provided by statute

or order of the court ....” For purposes of this rule, a local rule setting a different fee motion deadline is an “order of the court,” and the local rule governs./245/

Some local rules, however, also impose short deadlines for fee motions, which may require counsel to seek an order postponing the deadline or to postpone having a judgment entered until fee papers are prepared. Rule 54 requires only that the fee applicant state the basis for an award and either the amount or “fair estimate” of the amount; thus, the rule appears to permit counsel to file placeholder motions with details to be filled in later.

#### IV.D.2. Equal Access to Justice Act Timing Issues

The Equal Access to Justice Act (EAJA) requires fee motions to be filed within 30 days of “final judgment.”/246/ This in turn is defined as “a judgment that is final and not appealable, and includes an order of settlement.”/247/

Fee petitions may also be filed pending appeal; the EAJA merely precludes fee petitions after the 30-day limit./248/ Fee claimants and the government argued for years over what starts the EAJA clock running in Social Security Act cases until the Supreme Court decided the issue in *Shalala v. Schaeffer*./249/ A plaintiff is a prevailing party, the Court held, when she obtains a “sentence four remand” under the Social Security Act: “a judgment modifying or reversing the decision of the Secretary . . .”/250/ By contrast, a “sentence six remand,” which merely contemplates that new evidence will be introduced is not a judgment for attorney-fee purposes./251/ Thus, a sentence four remand has the potential to start the clock running for an EAJA fee motion.

The *Schaeffer* Court also held, however, that a sentence four remand order merely triggers the duty to enter judgment and is not a judgment itself. For the 30-day clock to begin running, the district court, pursuant to Rule 58, must enter a judgment “on a separate document.”/252/

#### IV.E. The “Jeff D.” Problem--Forced Fee Waivers

Ordinarily a non-federally funded legal services organization agrees to represent the client without charging a fee, except for recovering court-awarded fees. There are two potential problems with defense settlement offers in most cases handled by legal aid attorneys whose offices are able to obtain fees: (1) the offer is conditioned upon waiver of attorney fees or (2) in cases seeking monetary relief, the defendant offers a lump-sum inclusive of all damages and attorney fees and does not identify the amount of the award allocated to fees. Simultaneously negotiating the best settlement terms for the client and an award of fees for the legal work can create a conflict of interest between attorney and client.

The Supreme Court has acknowledged this problem, but has decided that encouraging settlements is a more important policy objective than helping plaintiff’s attorneys avoid an ethical challenge. In *Evans v. Jeff. D.*, the Court held that conditioning a settlement offer on the merits on plaintiffs waiving their claim for Section 1988 fees is permissible./253/ *Jeff D.* has made it very difficult to challenge attorney fee waiver settlement offers, but not impossible. At least two courts, relying upon dictum in *Jeff D.*, have held that suits may proceed challenging an alleged wholesale government policy of demanding fee waivers to deny counsel to disfavored classes of litigants./254/

Because such suits would not be easy to litigate and win, the goal should be to avoid Jeff D. offers in the first place. Some private attorneys have done so by including a provision in the client retainer agreement stating the attorney's hourly rate, and specifying that the client owes that amount if the client, against attorney's advice, accepts a settlement offer that precludes a fee recovery.

This is not a viable option for legal services programs. For legal services attorneys, the key to minimizing Jeff D. problems is appropriate communication with opposing counsel and with clients. Some opposing counsel, who would never think to make a Jeff D. offer to a private attorney, might make such an offer to a legal services attorney, seeking to take advantage of his or perceived idealism. Legal services attorneys need to convey to opposing counsel and the entire legal community, through consistent word and action, that of course, in addition to relief for their clients, they expect their programs to be paid no matter what. Consistently conveying this attitude will discourage Jeff D. offers. Client communication is also critical. Clients who are educated on the importance of the case and kept well informed throughout the litigation have been known to reject Jeff D. offers.

Even when there is no demand for waiver of fees, incorporating fees in a lump-sum settlement offer presents a serious challenge to the plaintiff's attorney. The attorney must negotiate the maximum monetary and non-monetary relief for the client while also trying to recover fees. Because law firms representing indigent civil rights plaintiffs typically limit their requirement for the client to pay attorney fees to what can be recovered from the defendant, there is also an ethical challenge when the lump-sum does not allocate the portion of the award that represents the amount included for the fees of the plaintiff's attorney. The legal aid programs addressing these challenges have concluded that the client retainer agreement needs to address specifically the possibility of a lump-sum settlement offer. The agreement needs to specify that the fees will be calculated in a certain way, and that an accounting of the total fees will be shown to the client at the time a settlement offer is made. Even with full disclosure and agreement from the client, negotiating these lump-sum settlement offers is challenging.

151. 45 C.F.R. § 1642.3.

152. See, e.g., Martin A. Schwartz & John E. Kirklin, 2 Section 1983 Litigation, Statutory Attorney's Fees (3d ed. 1997).

153. *Tex. Teachers Ass'n. v. Garland Sch. Dist.*, 489 U.S. 782, 791 (1989).

154. See Section IV.C.1 *infra*.

155. *Texas Teachers Ass'n*, 489 U.S. at 793.

156. *Buckhannon Bd. & Care Home, Inc. v. W. Va Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001) (Clearinghouse No. 53,373).

157. *Hewitt v. Helms*, 482 U.S. 755, 761 (1987).

158. *Farrar v. Hobby*, 506 U.S. 103, 115 (1992).

159. *Buckhannon*, 532 U.S. at 605.
160. *Id.* at 609 (quoting *Friends of Earth Inc. v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 189 (2000)). Mootness is discussed in detail in Chapter 3 of this Manual.
161. *Hanrahan v. Hampton*, 446 U.S. 754 (1980).
162. *Sole v. Wyner*, 127 S. Ct. 2188 (2007) (although declining to decide whether, without an adverse decision on the merits, a preliminary injunction winner may be a prevailing party).
163. *Buckhannon*, 532 U.S. at 605.
164. *Id.* at 604.
165. *Id.*
166. *Id.* at 604 n.7.
167. *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134-35 n.5 (9th Cir.), cert. denied, 537 U.S. 820 (2002) (Clearinghouse No. 54,396).
168. See, e.g., *Doe v. Boston Pub. Sch.*, 358 F.3d 20, 25 (1st Cir. 2004); *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 560 (3d Cir. 2003) (disagreeing with *Barrios*).
169. For a discussion on how to structure settlements in light of *Buckhannon*, see Section I *supra*.
170. See, e.g., *Doe v. Hogan*, 421 F. Supp. 2d 1051 (S.D. Ohio 2006); *Roberson v. Giuliani*, 346 F.3d 75 (2d Cir. 2003); *Am. Disability Ass'n v. Chmielarz*, 289 F.3d 1315, 1320 (11th Cir. 2002); *Smyth v. Rivero*, 282 F.3d 268, 278-81 (4th Cir. 2002) (Clearinghouse No. 51,346); *Barrios*, 277 F.3d at 1135 n.5; *Truesdell v. Philadelphia Hous. Auth.*, 290 F.3d 159, 165 (3d Cir. 2002). But see *Oil, Chem. & Atomic Workers Int'l Union v. Dep't of Energy*, 288 F.3d 452, 456-57 (D.C. Cir. 2002), where a divided court held that only a judgment or a consent decree would be sufficient to confer prevailing party status.
171. 29 U.S.C. § 216(b). For a list of other federal attorney-fee provisions, see Gary E. Smith, *Federal Statutory Attorney Fees: Common Issues and Recent Cases*, 28 *Clearinghouse Review* 744, 746 (Nov. 1994).
172. 42 U.S.C. § 1988.
173. *Hensley v. Eckerhart*, 461 U.S. 424, 428 (1983).
174. *Id.* at 428 n.2, citing *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421 (1978).
175. *Maine v. Thiboutot*, 448 U.S. 1, 9 (1980).

176. *Maier v. Gagne*, 448 U.S. 122, 130-33 (1980); *Hutto v. Finney*, 437 U.S. 678, 693-700 (1978).

177. 28 U.S.C. § 2412(d)(1)(A). The fee petition must, among other things, affirmatively allege that the government's litigation position was not substantially justified. *Scarborough v. Principi*, 541 U.S. 401, 408 (2004).

178. *Sampson v. Chater*, 103 F.3d 918, 921 (9th Cir. 1996); *Gutierrez v. Sullivan*, 953 F.2d 579, 584-85 (10th Cir. 1992).

179. 28 U.S.C. § 2412(d)(2)(D).

180. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

181. *Id.* at 568-69. In *Pierce* itself, for example, the Court did not find it dispositive that the government had lost 11 straight times on the same issue. *Id.* at 569. Neither did the Court agree with the government that a Supreme Court grant of certiorari and a stay on the same issue compelled a conclusion that the government's position must have been substantially justified. *Id.*

182. *Id.* at 559-63.

183. *Hensley*, 461 U.S. at 433.

184. See, e.g., *Davis v. City & County of San Francisco*, 976 F.2d 1536, 1542 (9th Cir. 1992), vacated in part on other grounds, 984 F.2d 345 (9th Cir. 1993).

185. *Hensley*, 461 U.S. at 433.

186. *Rode v. Dellarciprete*, 892 F.2d 1177, 1191 (3d Cir. 1990).

187. For a comparison of good and bad time records, see *Chrapliwy v. Uniroyal Inc.*, 583 F. Supp. 40, 47 (N.D. Ind. 1983).

188. *Rode*, 892 F.2d at 1191; *Marbled Murrelet v. Pac. Lumber Co.*, 63 F.R.D. 308, 321-22 (N.D. Cal. 1995).

189. *Hensley*, 461 U.S. at 435.

190. *Id.* at 434.

191. See, e.g., *Davis*, 976 F.2d at 1543.

192. *Webb v. County Bd. of Educ.*, 471 U.S. 234, 243 (1985).

193. *Pennsylvania v. Del. Valley Citizens' Council*, 478 U.S. 546, 559 (1986).

194. See, e.g., *Gagne v. Maier*, 594 F.2d 336, 344 (2d Cir. 1979), *aff'd* on other grounds, 448 U.S. 122 (1980), cited with approval, *Immigration & Naturalization Serv.*

v. Jean, 496 U.S. 154, 162 (1990). In Jean the Court held that, under the Equal Access to Justice Act (EAJA), fees for time spent on the fee issue should be awarded without a separate inquiry over whether the government's position on the fee issue was substantially justified.

195. Webb, 471 U.S. at 242.

196. *Id.* at 243.

197. Del. Valley Citizens' Council, 478 U.S. at 558-59.

198. See, e.g., Schwartz & Kirklin, *supra* n.152, § 4.6 at 197-98 n. 95-96 (collecting cases dealing with compensability of travel time).

199. Riverside v. Rivera, 477 U.S. 561, 573 n.6 (1986).

200. See, e.g., Cont'l Sec. Litig. v. Cont'l Sec. Corp. (In re Continental Securities Litigation), 962 F.2d 566, 570 (7th Cir. 1992) (holding that unjustified across-the-board cuts in attorney fees for time spent in conference was an abuse of discretion); Berberena v. Coler, 753 F.2d 629, 633 (7th Cir. 1985) (in "a difficult case with significant social effects ... the participation of [four] attorneys ... in ... strategy conferences and negotiations 'may indeed have been crucial .. .'"); Scelta v. Delicatessen Support Servs. Inc., 203 F. Supp. 2d 1328, 1333 (M.D. Fla. 2002); McKenzie v. Kennickell, 645 F. Supp. 437, 450 (D.D.C. 1986) ("conferences between attorneys to discuss strategy and prepare for oral argument are an essential part of effective litigation ... there is no reason or authority for allowing only one lawyer to charge for time that more than one lawyer justifiably spent").

201. See, e.g., United States v. City & County of San Francisco, 748 F. Supp. 1416, 1421 (N.D. Cal. 1990), *aff'd* in relevant part sub nom. Davis v. City & County of San Francisco, 976 F.2d 1536 (9th Cir. 1992) (counsel compensated for 3,500 hours in conferences with co-counsel and clients); Riverside, 477 U.S. at 573 n.6 (affirming compensation for 197 hours of conversation between two attorneys); Palmigiano v. Garrahy, 466 F. Supp. 732, 743 (D. R.I. 1979), *aff'd*, 616 F.2d 598 (1st Cir. 1980) (attorneys fully compensated for 208 hours spent in conference). Compare *In re Olson*, 884 F.2d 1415, 1429 (D.C. Cir. 1989) (limiting compensation for conferencing hours to 10 percent of total fee request).

202. Hensley, 461 U.S. at 436 n.11.

203. Farrar v. Hobby, 506 U.S. 103, 115 (1992).

204. *Id.* at 121-22 (O'Connor, J., concurring). See, e.g., O'Connor v. Huard, 117 F.3d 12, 17-18 (1st Cir. 1997) (affirming a lodestar fee award, where nominal damages award achieved individual plaintiff's goal and served as a deterrent).

205. See, e.g., Mercer v. Duke Univ., 401 F.3d 199, 204 (4th Cir. 2005), and cases cited there.

206. Riverside, 477 U.S. at 564-65, 581 (plurality opinion); *id.* at 581-86 (Powell, J., concurring in judgment and rejecting argument to limit fees to one-third of damages).

207. *Id.* at 586 (Powell, J., concurring).

208. *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991).

209. *Id.* (“Just as time spent on losing claims can contribute to the success of other claims, time spent on a losing stage of litigation contributes to success because it constitutes a step toward victory”).

210. *Hensley*, 461 U.S. at 440.

211. *Id.*

212. *Id.* at 435.

213. *Blum v. Stenson*, 465 U.S. 886, 892-96 (1984).

214. *Id.* at 893, citing S. Rep. No. 94-1011, at 6 (1976).

215. *Id.* at 896 n.11.

216. Specific hourly rate information is more persuasive than a declaration of a private attorney that merely says the attorney has looked over the rates sought and thinks they are “reasonable.” The latter type of declaration “might properly be characterized by a reviewing court as one given out of courtesy, but it provides little or no evidentiary support for an award.” *Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1304 (11th Cir. 1988).

217. See, e.g., *Salazar v. District of Columbia*, 123 F. Supp. 2d 8,14 (D.D.C. 2000) (relying upon National Survey Center and National Law Journal surveys to determine reasonable hourly rates in the District of Columbia). But see *Davis*, 976 F.2d at 1547 (rejecting reliance on a different survey because, among other reasons, the survey reported only statewide average rates rather than rates specific to San Francisco, where case was litigated).

218. *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997) (quoting *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992)).

219. *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989).

220. Because waivers of sovereign immunity are strictly construed, fee awards against the federal government after multiyear litigation may not include a multiplier for delay or be based on current hourly rates. *Library of Congress v. Shaw*, 478 U.S. 310, 317-20 (1986).

221. *Trevino v. Gates*, 99 F.3d 911, 925 (9th Cir. 1996). Accord *Malloy v. Monahan*, 73 F.3d 1012 (10th Cir. 1996); *Brooks v. Georgia Board of Elections*, 997 F.2d 857, 869-70 (11th Cir. 1993).

222. See, e.g., *Finkelstein v. Bergna*, 804 F. Supp. 1235, 1237-38 (N.D. Cal. 1992) (awarding \$300 per hour for some of the work by plaintiffs' lead counsel, and \$250 per hour (still a high rate for 1992) for less complex work).

223. See, e.g., *Hutchison v. Amateur Elec. Supply Inc.*, 42 F.3d 1037, 1048 (7th Cir. 1994) ("plaintiff asserts that her counsel was essentially a sole practitioner with only part-time associates and law clerks during much of this litigation. If true, the district court's reduction for what it saw as top-heavy staffing cannot be sustained.").

224. *American Petroleum Inst. v. Env'tl. Prot. Agency*, 72 F.3d 907, 916 (D.C. Cir. 1996) ("often, as audits reveal, there is so much senior time billed for reviewing, revising, and discussing the document that it usually would be cheaper to have the senior lawyer simply sit down and draft it"). *Accord Daggett v. Kimmelman*, 811 F.2d 793 (3d Cir. 1987); *Muehler v. Land O'Lakes Inc.*, 617 F. Supp. 1370, 1379 (D. Minn. 1985); *Laffey v. Northwest Airlines Inc.*, 572 F. Supp. 354, 366 (D.D.C. 1983), reversed on other grounds, 746 F.2d 4 (D.C. Cir. 1985). See also Gary Greenfield, *Efficient Litigation: An Ethical Imperative?* 20 *American Lawyer* 38 (Apr. 1994).

225. *Jenkins*, 491 U.S. at 284-89.

226. 28 U.S.C. § 2412(d)(2)(A).

227. *Id.*; *Sorenson v. Mink*, 239 F.3d 1140, 1148 (9th Cir. 2001). Before 1996, the limit was \$75 per hour, subject to the same statutory exceptions. *Id.*

228. *Sorenson*, 239 F.3d at 1148.

229. *Kerin v. United States Postal Serv.*, 218 F.3d 185, 194 (2d Cir. 2000); *Masonry Masters Inc. v. Nelson*, 105 F.3d 708, 711-13 (D.C. Cir. 1997).

230. *Sorenson*, 239 F.3d at 1148.

231. 28 U.S.C. § 2412(d)(2)(B).

232. *Rueda-Menicucci v. Immigration & Naturalization Serv.*, 132 F.3d 493, 496 (9th Cir. 1997) (denying rate increase where special expertise was unnecessary to successful result); *Raines v. Shalala*, 44 F.3d 1355, 1360-61 (7th Cir. 1995); *Pirus v. Bowen*, 869 F.2d 536, 541-42 (9th Cir. 1989).

233. *Underwood*, 487 U.S. at 572.

234. See *Raines*, 44 F.3d at 1361 ("an identifiable practice specialty not easily acquired by a reasonably competent attorney" can be considered a special factor warranting fee enhancement); *Pirus*, 869 F.2d at 541-42 (fee enhancement available for specialized expertise in social security class actions); *Jean v. Nelson*, 863 F.2d 759, 774 (11th Cir. 1988), *aff'd*, 496 U.S. 154 (199) (immigration law expertise may qualify).

235. *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 598 (D.C. Cir. 1996) (market rate fees "available only for lawyers whose specialty 'requir[es] technical or other education outside the field of American law'"); *Estate of Cervin v. Commissioner*, 200 F.3d 351, 354 (5th Cir. 2000); *Hyatt v. Comm'r*, 315 F.3d 239, 253 (4th Cir. 2002).

236. 28 U.S.C. § 2412(b).

237. See, e.g. *Hyatt v. Shalala*, 6 F.3d 250 (4th Cir. 1993) (refusal of federal government to follow binding circuit precedent in social security cases amounted to bad faith warranting market rate fees); *D & M Watch Corp. v. United States*, 795 F. Supp. 1172, 1177 (Ct. Int'l Trade 1992) (market rate fees when Customs Service acted in bad faith); *Library of Congress v. Shaw*, 478 U.S. 310, 319 (1986) (noting that Congress waived sovereign immunity to permit Title VII lawsuits and attorney-fee awards against the United States).

238. *Hensley*, 461 U.S. at 434.

239. *City of Burlington v. Dague*, 505 U.S. 557 (1992).

240. See, e.g. *Blum*, 465 U.S. at 898-99. Counsel may wish to use this discussion to support relatively high hourly rates.

241. *Jenkins*, 491 U.S. at 284. But see *Shaw*, 478 U.S. at 321-23 (no compensation for delay in suits against the federal government).

242. *Guam Soc'y of Obstetricians & Gynecologists v. Ado*, 100 F.3d 691, 697 (9th Cir. 1996); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907 (S.D. Ohio 2001).

243. *Geier v. Sundquist*, 372 F.3d 784, 795-96 (6th Cir. 2004).

244. *Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478-79 (9th Cir. 1995) (affirming 2.0 multiplier under California state law in discrimination case).

245. *Tire Kingdom Inc. v. Morgan Tire & Auto Inc.*, 253 F.3d 1332, 1335 (11th Cir. 2001).

246. 28 U.S.C. § 2412(d)(1)(B). The Supreme Court recently held that a timely fee petition could be amended after thirty days to cure a failure to allege that the government's litigation position was not substantially justified. *Scarborough v. Principi*, 541 U.S. 401 (2004).

247. 28 U.S.C. § 2412(d)(2)(G).

248. *McDonald v. Schweiker*, 726 F.2d 311, 314 (7th Cir. 1983); accord, *Cervantez v. Sullivan*, 739 F. Supp. 517, 519 (E.D. Cal. 1990), rev'd on other grounds, 963 F.2d 229 (9th Cir. 1992). See also *Adams v. Sec. & Exch. Comm'n*, 287 F.3d 183, 187-88 (D.C. Cir. 2002) (noting that Congress, in amending the EAJA, adopted the McDonald approach).

249. *Shalala v. Schaeffer*, 509 U.S. 292 (1993).

250. *Id.* at 300, citing 42 U.S.C. § 405(g), fourth sentence.

251. *Id.* at 298.

252. Id. at 302.

253. Evans v. Jeff D., 475 U.S. 717 (1986).

254. Bernhardt v. County of Los Angeles, 279 F.3d 862 (9th Cir. 2002) (Section 1988 suit); Johnson v. District of Columbia, 190 F. Supp. 2d 34, 42-44 (D.D.C. 2002) (provision in Individuals with Disabilities Education Act, court relied in part on IDEA's right to counsel provision to distinguish Jeff D.).

V. Costs and Interest >

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