

Are Governments Overcharged for Procedural Due Process Damages?

by Pete Haskel

Do local governments sometimes pay too high a price in damages under 42 U.S.C. § 1983 when they are found liable for depriving a plaintiff of procedural due process because some courts use the wrong measure of damages? I think so.

Limit Damages to Value of Loss Caused by Failure to Notify and Provide Hearing.

We should assert that the proper measure of damages is limited to the actual harm done by the deprivation of notice and opportunity to be heard. Local governments should not be liable under Section 1983 for the total harm suffered by the owner due to our substantive conduct if the underlying conduct was justified and the only lapse was failure to give notice and an opportunity to be heard. In other words, a plaintiff should not get a windfall merely because his or her property or liberty was infringed without notice and an opportunity to be heard if the notice and hearing would not have changed the result because the underlying deprivation was lawful. A good example: A city demolished a valuable but dangerous structure without giving the owner adequate notice and opportunity to be heard before the demolition. The structure was a menace to public health and safety, and demolition was the only safe remedy. No opportunity to be heard before the demolition could have established otherwise and the local government proved this in defending a civil rights action for damages for denial of due process. Proper measure of damages: One dollar for nominal damages; not the appraised value of the demolished structure.[1]

Procedural Due Process is the right to notice and an opportunity to be heard within a meaningful time and in a meaningful manner that are adequate under the circumstances before a government deprives a person of life, liberty or property.[2] In emergency situations requiring immediate action, the courts will sometimes permit a post-deprivation notice and hearing where pre-deprivation due process was not practical.[3] However, "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement."[4] Thus, absent injury to or loss of a substantive federally-protected right, there should be no allowable consequential damages beyond nominal damages for deprivation of procedural due process in a vacuum. As the Supreme Court reasoned in *Carey v. Piphus*, 435 U.S. 247 (1978), the leading case on the subject:

> [T]the Court of Appeals held that if petitioners can prove on remand that "[respondents] would have been suspended even if a proper hearing had been held," then respondents will not be entitled to recover damages to compensate them for injuries caused by the suspensions. The court thought that in such a case, the failure to accord procedural due process could not properly be viewed as the cause of the suspensions. The court suggested that in such circumstances, an award of damages for injuries caused by the suspensions would constitute a windfall, rather than compensation, to respondents. We do not understand the parties to disagree with this conclusion. Nor do we.[5]

Measure of Damages for Deprivation of Procedural Due Process.

There is no doubt that a person can seek and recover nominal damages to vindicate a denial of procedural due process:

> . . . "the denial of procedural due process should be actionable for nominal damages without proof of actual injury." Carey, supra, at 266. The awarding of nominal damages for the "absolute" right to procedural due process "recognizes the importance to organized society that [this] righ[t] be scrupulously observed" while "remain[ing] true to the principle that substantial damages should be awarded only to compensate actual injury." 435 U.S. at 266. Thus, Carey obligates a court to award nominal damages when a plaintiff establishes the violation of his right to procedural due process but cannot prove actual injury.

Farrar v. Hobby, 506 U.S. 103, 112 (1992).

But that should not give the plaintiff the "windfall rather than compensation" against which *Carey* warned.[6]

Nominal Damages Usually Will Not Support Attorney's Fees under 42 U.S.C. § 1988.

Where a plaintiff has sued under Section 1983 for compensatory relief and obtains only nomi-

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nal damages, usually this will be insufficient to support an award of attorney's fees under 42 U.S.C. § 1988.

> Where recovery of private damages is the purpose of ... civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Riverside v. Rivera*, 477 U.S. 561, 585 (1986) (Powell, J., concurring in judgment). Such a comparison promotes the court's "central" responsibility to "make the assessment of what is a reasonable fee under the circumstances of the case." *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989). Having considered the amount and nature of damages awarded, the court may lawfully award low fees or no fees without reciting the 12 factors bearing on reasonableness, see *Hensley*, 461 U.S., at 430, n. 3, or multiplying "the number of hours reasonably expended ... by a reasonable hourly rate," id., at 433.[7]

But Watch Out. *Farrar* leaves open the possibility that in some instances an award of nominal damages *might* support an attorney's fee award under 42 U.S.C. § 1988. Possible examples of such situations could include a successful suit for injunctive relief in which the plaintiff obtained only nominal damages or a suit for a small amount of damages, so that a one-dollar award could be characterized as a "prevailing."[8]

In addition, while courts hesitate to award punitive damages in civil rights cases against governments or public officials, they have done so in egregious cases.[9] When that happens, the proper measure of compensatory damages often fades into relative unimportance.

Notes

1. One example, among many, of what I believe to be an incorrect approach to damages calculation that gives property owners a windfall is *Superior Savings Association v. City of Cleveland*, 501 F. Supp. 1244, 1250 (N.D. Ohio 1980) (mortgage holder gets difference between value of collateral before and after demolition).
2. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).
3. *Gilbert v. Homar*, 520 U.S. 924, 930 (1997).
4. *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983).
5. *Carey v. Piphus*, 435 U.S. 247, 260 (1978) (citations and footnotes omitted).
6. *See* text accompanying n. 5.
7. *Farrar v. Hobby*, 506 U.S. 103, at 114-15.
8. *See Boraks v. Wilson*, 383 F. Supp. 195, 197 (D.D.C. 1974), for how a court might handle a jurisdictional minimum requirement in the context of a civil rights claim for a small amount of compensatory damages. For a recent in-depth discussion of calculating damages in civil rights cases, *see generally,* Michael L. Wells, *Civil Recourse, Damages-as-redress, And Constitutional Torts*, 46 Ga. L. Rev. 1003 (2012).
9. *See Smith v. Wade*, 461 U.S. 30 (1983). ML

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ditions, or alterations cost prohibitive or otherwise impossible to meet.

Noting the possible difficulties in dealing with historic preservation above, the goal of code enforcement and historic preservation are the same and are positive ones for any community. They both seek compliance and the continued viability of our structures and neighborhoods through the proper maintenance and care for properties and structures. Therefore, both are important to the enhancement and sustainability of our communities. What we see as traditional code enforcement and historic preservation can, and should, work together. While some municipalities may think that historic preservation doesn't fit their community, I think every community should take a good look and truly determine if any particular area is worthy of keeping a level of historic significance to that area. While the design standards add an additional layer of compliance to code enforcement, preserving a community's history is a positive goal and could lead to other positive impacts, such as tourism or simply other owners making improvements in order to keep their property looking as good as their neighbor's.

I didn't appreciate history until I was well out of college. And, our current younger generation seems to be lost in their i-pods, i-phones, x-boxes, facebook, and twitter. While they may not appreciate it now, we should always consider preserving history for future generations. ML

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our capabilities and our capacities and to be mindful that there are still real world consequences to our actions. The books might be virtual, the messages might be instant, but the impact on our cities and ourselves as people changes things in a real way and those changes play out over time.

It is an old story being retold in a new and different context, I suppose. Paul Bunyan was replaced by the chain saw, John Henry lost out to the steam hammer, and Casey Jones pushed the locomotive a little too hard.

While more information can be helpful, it may not lead us to better results or more long-lasting solutions. While the forest is bigger, the path is no wider or straighter than it ever was. It is still people who help us find our way and it is still people that we serve. ML

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unimproved portion of the same waterway did not constitute a discharge of pollutants under the CWA. Furthermore, the Ninth Circuit's result did not square with the definitions in the CWA itself, which defines "discharge of pollutant" to mean "any *addition* of any pollutant." The case was reversed and remanded. *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, No. 11-460 (Jan. 08, 2013).

IMLA participated in an amicus brief in support of petitioner Los Angeles County Flood Control District. ML

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