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**Attorneys' Fees in Prisoners'  
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❖ **Introduction**

The general rules on awards of attorneys' fees to prevailing plaintiffs in federal civil rights lawsuits were previously discussed in two articles in this Journal. See [Attorneys' Fees in Federal Civil Rights Lawsuits: An Introduction - Part One](#), 2011 (4) AELE Mo. L. J. 101 and [Attorneys' Fees in Federal Civil Rights Lawsuits: An Introduction - Part Two](#), 2011 (5) AELE Mo. L. J. 101.

Special rules apply, however, to the issue of awarding attorneys' fees in federal civil rights lawsuits filed by prisoners while they are incarcerated as a result of the passage of the [Prison Litigation Reform Act](#) (PLRA) in 1996 and its interpretation by the courts.

This article takes a brief look at some of the issues that arise in this context. Prior to the passage of the PLRA, there were cases in which plaintiff prisoners were awarded thousands, and sometimes many thousands, of dollars in attorneys' fees in lawsuits in which they were only awarded nominal damages such as \$1 or relatively modest damages that were far smaller than the attorneys' fees awarded. Congress attempted in passing the PLRA to limit the amount of legal fees awarded relative to the amount of damages.

❖ **Prison Litigation Reform Act Provisions**

The Prison Litigation Reform Act, in pertinent part provides:

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that—

A. the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18 for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title. -- [42 U.S.C. Sec. 1997e\(d\)](#).

Courts have interpreted these provisions as limiting awards of attorneys' fees in damage cases to a maximum of 150% of the damages awarded, with up to 25% of the damages awarded to the prisoner being used to pay attorneys' fees.

In most instances, courts have held that the term "up to" allows the courts some discretion in determining how much of a winning prisoner-plaintiff's damage award must be given to attorneys' fees, but other courts have assumed that the twenty-five percent figure is mandatory. The focus of this article is on the 150% attorneys' fee cap.

### ❖ **How the 150% Cap Applies**

How does the 150% cap on attorneys' fees in the Prison Litigation Reform Act apply in specific cases? In [Shepherd v. Goord](#), #10-4821, 662 F.3d 603 (2nd Cir. 2011), a Rastafarian prisoner claimed that a corrections officer violated his religious rights by

touching his dreadlock hair without permission. While the jury held in favor of the prisoner, they only awarded nominal damages of \$1. Under 42 U.S.C. Sec. 1997e(d)(2) of the Prison Litigation Reform Act (PLRA), the court's award of attorney's fees to the prevailing plaintiff were limited to 150% of the damage award, or \$1.50.

The appeals court noted that Congress, in granting a statutory right for prevailing plaintiffs in federal civil rights lawsuits to be granted attorneys' fees, departed from the normal rule in U.S. courts that litigants all pay their own attorneys' fees. It was accordingly also free to put a cap on such fees in cases brought by prisoners.

Similarly, in [\*Royal v. Kautzky\*](#), #02-3446, 375 F.3d 720 (8th Cir. 2004), while a prisoner successfully proved that a prison security director improperly put him in segregation in retaliation for filing "too many" complaints and grievances, in violation of his First Amendment rights, under the Prison Litigation Reform Act, he was not entitled to an award of compensatory damages in the absence of physical injury, but only \$1 in nominal damages.

The appeals court also upheld the decision not to award punitive damages, since the defendant acted out of "frustration," rather than with an "evil motive," and ruled that the application of the PLRA section limited the attorneys' fee award in the case to \$1.50.

Also see [\*Boivin v. Black\*](#), #99-2085, 225 F.3d 36 (1st Cir. 2000), in which the court ruled that a prisoner who was awarded only \$1 in nominal damages in his lawsuit over his loss of consciousness while in restraint was only entitled to \$1.50 in attorneys' fees, not the \$3,892.50 awarded by the trial court, stating that the cap on attorneys' fees in Prison Litigation Reform Act applies to awards of nominal damages and does not violate prisoner's rights.

This principle also applies in cases in which prisoners are awarded more substantial damages too. In [\*Farella v. Hockaday\*](#), #00-cv-3021, 304 F. Supp. 2d 1076 (C.D. Ill. 2004), a prisoner awarded \$1,000 against one of two defendant correctional officers on his claim for excessive use of force against him was only entitled to \$1,500 in attorneys' fees as a prevailing party under 42 U.S.C. Sec. 1997e(d) (2) limiting awards against defendants for attorneys' fees to 150% of award for damages.

- ***Injunctive relief***

Attorneys' fees beyond the 150% cap may be awarded in cases where injunctive relief is granted. The 150 percent limit does not apply to cases in which the plaintiff seeks and receives an injunction as well as damages. [\*Walker v. Bain\*](#), #99-2001, 257 F.3d 660, 667 (6th Cir.2001) (noting that §1997e (d)(2) does not apply if non-monetary relief is granted).

In [\*Keup v. Hopkins\*](#), #09-1079, 596 F.3d 899 (8th Cir. 2010), a Nebraska prisoner attempted to send drawings of a marijuana leaf and a bare-breasted woman to his mother and to a communist group, the “Maoist Internationalist Movement.”

When prison officials prevented him from doing so, he sued, claiming a violation of his First Amendment rights. The trial court directed a verdict in the prisoner’s favor, awarded him nominal damages of \$1, and ordered two defendants to pay approximately \$25,000 in attorneys’ fees.

It also upheld a determination that the prisoner, since he was awarded nominal damages, was a prevailing plaintiff, entitled to an award of attorneys’ fees. But the appeals court also held that 42 U.S.C. Sec. 1997e(d)(2) of the Prison Litigation Reform Act limited the award of attorney’s fees to 150% of the damages awarded, or \$1.50, since no injunctive or declaratory relief was awarded.

- ***Hourly rate limitation***

Even in cases involving injunctive relief, where the cap of 150% of the damage award does not apply, there is a limitation to the hourly rate of the attorneys’ fees awarded. In [\*Skinner v. Uphoff\*](#), #02-cv-033, 324 F. Supp. 2d 1278 (D. Wyo.. 2004), a plaintiff who obtained injunctive and declaratory relief in class action lawsuit claiming that correctional officials failed to adequately train and supervise its employees, thereby subjecting prisoners to a risk of assaults by other inmates, but who received no monetary relief was entitled to an award of \$427,158.73 in attorneys’ fees and expenses.

The maximum hourly rate for the attorneys in the case was limited, under the Prison Litigation Reform Act, 1997e(d)(3) to 150% of the hourly fee for appointed lawyers paid in the federal circuit where the lawsuit was brought, rather than 150% of the rate established by the Judicial Conference.

This resulted in a maximum hourly fee of \$135 per hour, rather than \$169.50 per hour, in this case. The court also ruled that plaintiff’s attorney was entitled to a fee multiplier in the case because of “excellent work” enabling case to be resolved through summary judgment and settlement, avoiding a costly trial and saving defendant officials higher attorneys’ fees and costs.

- ***Cases involving former prisoners***

In [\*Perez v. Westchester Cty. Dep’t of Corr.\*](#), #08-4245, 587 F.3d 143 (2nd Cir. 2009), Muslim inmates complained that they were only provided with Halal meat, produced in

accordance with the requirements of their religion, twice a year, while Jewish prisoners received kosher meat four to five times a week. Prison officials agreed to provide Halal meat with the same frequency in exchange for the dismissal of the lawsuit, which the trial court approved.

A federal appeals court ruled that the prisoners were prevailing parties, entitled to an award of attorneys' fees under 42 U.S.C. Sec. 1988, since they accomplished a "material alteration" on the complained of issue, and that the caps on attorneys' fees in the Prison Litigation Reform Act, 42 U.S.C. 1997e(d), applied to the case despite the fact that some of the plaintiffs were released from prison after they filed the lawsuit, but before it was settled. Fees of \$99,658.48 were awarded.

On remand, the trial court was instructed to determine a reasonable attorneys' fee award for the time spent on the appeal.

The result is different in lawsuits filed by prisoners after their release, even if they relate to events that occurred during their incarceration. In such cases, the fee cap does not apply. See [\*Greig v. Goord\*](#), #97-9340, 169 F.3d 165 (2nd Cir. 1999) and [\*Doe v. Washington County\*](#), #97-3969, 150 F.3d 830 (8th Cir. 1998).

- ***Cap not limited to prison condition lawsuits***

In [\*Jackson v. State Board of Pardons and Paroles\*](#), #02-15545, 331 F.3d 790 (11th Cir. 2003), the court held that the attorneys' fee restrictions imposed by the Prison Litigation Reform Act apply to all lawsuits filed by a prisoner, not just those that challenge prison conditions. They also applied to a civil rights lawsuit challenging the denial of parole or otherwise challenging the length of confinement.

In [\*Robbins v. Chronister\*](#), #02-3115, 435 F.3d 1238 (10th Cir. en banc, 2006), a federal appeals court ruled that the statute restricting attorneys' fees awards in prisoner lawsuits to 150% of the damage award even applies to lawsuits filed by prisoners over incidents that *occurred before their incarceration*, provided that they are prisoners at the time of filing.

The plaintiff prisoner awarded \$1 in nominal damages in an excessive force case was therefore only entitled to \$1.50 in attorneys' fees, rather than the \$9,680 awarded by the trial judge. The court rejected the argument that this result, following the "plain language" of the statute, caused an "absurd" result.

- ***Paralegal fees***

In [\*Perez v. Cate\*](#), #09-17185, 632 F.3d 553 (9th Cir. 2011), the court held that prisoners who prevailed in a settlement of a lawsuit over prison conditions, specifically dental care, were entitled to an award of attorneys' fees and paralegal fees under 42 U.S.C. Sec. 1988, and they were limited by the Prison Litigation Reform Act to 150% of the hourly rate established for court appointed counsel under 18 U.S.C. Sec. 3006A.

The court held that the same cap applicable to attorneys' fees applies to separately billed paralegal fees. It therefore upheld a trial court order requiring the defendants to pay the plaintiffs' paralegal expenses at a rate of \$169.50 per hour, rather than the \$82.50 per hour prison officials had argued they should pay.

- ***Joint and Several Liability?***

In one lawsuit, a pretrial detainee received a jury verdict against four deputy sheriffs on excessive force claims arising from separate incidents when he was in the county jail. The jury only awarded \$1 in damages against one of the defendants.

The other three deputies were liable, respectively, for \$5,000 in compensatory and \$10,000 in punitive damage, \$50,000 in compensatory and \$50,000 in punitive damages, and \$100,000 in compensatory and \$150,000 in punitive damages, for a total award of \$365,001. The trial court awarded \$505,671.40 in attorneys' fees and \$24,549.94 in costs, ordering the plaintiff to pay \$5,000 of the fee award.

The court ordered that all four defendants (including the defendant only held liable for \$1 in nominal damages) be jointly and severally liable for the remaining \$500,671.40, to ensure that the attorneys' fees were paid. This action was taken, in part, because the county indicated that it might not indemnify the defendant against whom the largest award was made because he was in prison and thought to be judgment-proof.

An appeal of the judgment on liability was affirmed, [\*Jimenez v. Franklin\*](#), #07-56149, 333 Fed. Appx. 299, 2009 U.S. App. Lexis 21564 (Unpub. 9th Cir.) but that appeal did not raise the issue of joint and several liability for the attorneys' fees. An additional \$41,830.10 in fees were awarded for that appeal, bringing the fee award to \$547,501.50, or 150% of the total damage award, the fee limit under the Prison Litigation Reform Act, 42 U.S.C. Sec. 1997e(d)(2).

The county did not pay \$225,000 of the attorneys' fee award. A federal appeals court rejected an argument by the deputy found liable for \$1 that he could not be held jointly and severally liable for the unpaid fees because of the statute's attorneys' fee cap of 150% of

damages, as he had not raised the issue in the earlier appeal. [\*Jimenez v. Franklin\*](#), #10-56199, 680 F. 3d 1096 (9th Cir. 2012).

- ***Fee Cap and Consent Decrees***

The court in [\*Batchelder v. Geary\*](#), #C-71-02017, 2007 U.S. Dist. Lexis 64893 (N.D. Cal.) ruled that the cap on attorneys' fees imposed by the Prison Litigation Reform Act applied both to the time the plaintiffs' attorney spent in any underlying lawsuit and in monitoring whether a county was in compliance with consent decrees entered into during the litigation. The court reduced a total attorneys' fee request of \$363,000 to \$138,213.83.

- ***Settlement Agreements***

In cases in which the parties settle a lawsuit privately, they are free to include awards of attorneys' fees that would otherwise violate the 150% cap. See [\*Torres v. Walker\*](#), #03-102, 356 F.3d 238 (2nd Cir. 2004), holding that the Prison Litigation Reform Act's cap on attorneys' fees at 150% of a damage award does not apply in cases where the parties privately settle the lawsuit, and subsequently enter a stipulation of dismissal of the claim in the trial court.

In accord is [\*LaPlante v. Pepe\*](#), #01-10186-NG, 307 F. Supp. 2d 219 (D. Mass. 2004), stating that a prisoner who prevailed on his claim that his right of access to the courts was unconstitutionally interfered with by denial of physical access to the prison's law library (allowing him only to request particular materials be brought to him in his cell by providing their precise citation) was entitled to an award of \$99,981.43 in attorneys' fees and costs. The amount of the attorneys' fees award in case was not limited by the Prison Litigation Reform Act, 42 U.S.C. Sec. 1997e(d)(1)(A) when a settlement agreement provided that fees would be awarded under 42 U.S.C. Sec. 1988 and did not make reference to the cap.

- ***Juvenile facilities***

A state training school for juveniles constituted a "correctional facility" under provisions of the Prison Litigation Reform Act, limiting the awards of attorneys' fees in cases challenging prison conditions of confinement to those directly and reasonably incurred in "proving an actual violation" of protected rights. A class of juvenile inmates was not a "prevailing party" entitled to a \$376,637.48 award of attorneys' fees and costs under 42 U.S.C. Sec. 1988 when the court order approving a settlement of the claims incorporated none of the specific terms and conditions agreed upon by the parties. [\*Christina A. v. Bloomberg\*](#), #01-3698, 315 F.3d 990 (8th Cir. 2003).



- ***Prisoners' obligations***

A prisoner can be ordered by a trial court to use up to 25% of the damage award to pay attorneys' fees. In [Jackson v. Austin](#), 267 F. Supp. 2d 1059 (D. Kan. 2003), a prisoner who was awarded compensatory damages of \$15,000 and punitive damages of \$30,000 for alleged excessive force and inadequate medical care was required to use 25% of his damage award to pay his lawyer attorneys' fees, reducing the amount to be paid by the defendants from \$40,654.75 to \$29,404.75

- ***Fees authorized by other statutes***

The fee cap does not apply in cases filed by prisoners asserting disability discrimination claims. See [Armstrong v. Davis](#), #01-15779, 318 F.3d 965 (9th Cir. 2003), ruling that the attorneys' fee award limitations contained in Prison Litigation Reform Act did not apply to a fee award to prevailing plaintiff prisoners under the attorneys' fee sections of the Americans with Disabilities Act (ADA) and the Rehabilitation Act.

Prevailing plaintiffs in a disability discrimination lawsuit against California correctional officials were also entitled to fees for work their lawyers did in separate litigation defending a judgment on a similar issue from another federal appeals court on review before the U.S. Supreme Court.

### ❖ **Equal Protection Arguments**

A number of prisoners have argued that the attorneys' fee cap imposed by the PLRA violates their right to equal protection of the law, since that cap does not apply to non-prisoner plaintiffs in federal civil rights litigation. Courts have rejected this argument.

In [Wilkins v. Gaddy](#), #08-10914, 559 U.S. 34 (2010), the U.S. Supreme Court rejected the argument that a prisoner, to impose liability on a correctional officer for excessive use of force, must show more than a "de minimus" (minimal) injury. On remand, the prisoner was awarded \$0.99 in damages by the jury, which was rounded up to \$1. The trial court awarded attorneys' fees limited to \$1.40, based on the limit of attorneys' fees in the Prison Litigation Reform Act of no more than 150% of the money damages awarded, rather than the over \$92,000 in attorneys' fees requested.

A federal appeals court rejected an argument that this limitation on attorneys' fees was unconstitutional. The court applied rational basis scrutiny and stated that Congress could have believed that this limit would help deter frivolous, marginal and trivial claims.

[Wilkins v. Gaddy](#), #12-8148, 734 F.3d 344 (4th Cir. 2013).



In [\*Parker v. Conway\*](#), #08-2764, 581 F.3d 198 (3rd Cir. 2009), after a jury awarded a prisoner \$17,500 in damages on a federal civil rights claim against a prison guard, the trial court awarded him \$26,250 in attorneys' fees. The appeals court upheld the attorneys' fee caps in the Prison Litigation Reform Act, 42 U.S.C. Sec. 1997e(d), rejecting an argument that they denied prisoners equal protection of the law as compared to non-incarcerated persons. The limitations on attorneys' fee awards contained in 42 U.S.C. Sec. 1997e of the Prison Litigation Reform Act are constitutional because they are based on legitimate governmental objectives, including achieving uniformity in such awards.

In another case, a federal appeals court, by a 6-5 vote, upheld the constitutionality of the attorneys' fees limits in prisoner lawsuits imposed by the Prison Litigation Reform Act, overturning a trial judge's finding of an equal protection violation in a case where a prisoner was awarded damages for alleged deliberate indifference to his need to be evaluated for a liver transplant. [\*Johnson v. Daley\*](#), #00-3981, 339 F.3d 582 (7th Cir. 2003).

See also, [\*Jackson v. State Board of Pardons and Paroles\*](#), #02-15545, 331 F.3d 790 (11th Cir. 2003) (rejecting an equal protection challenge to the attorney fee cap), [\*Foulk v. Charrier\*](#), #00-1132, 262 F.3d 687(8th Cir. 2001) (rejecting an equal protection argument against an award of \$1.50 in attorneys' fees to a prisoner who was only awarded \$1 in nominal damages in his excessive force lawsuit against a correctional officer).

[\*Wolff v. Moore\*](#), #00-3959, 2000 U.S. App. Lexis 28054 (Unpub. 6th Cir.) (Prisoner awarded a total of \$83,250 in lawsuit asserting excessive use of force by correctional officer was not entitled to \$30,550.90 in attorneys' fees; such fees must be recalculated, based on cap on hourly fees in the Prison Litigation Reform Act after a federal appeals court rejected a trial court's ruling that the cap violated the prisoner's right to equal protection), and [\*Hadix v. Johnson\*](#), #96-2387, 230 F.3d 840 (6th Cir. 2000). ("Sec. 803(d)(3) of the PLRA, 42 U.S.C. Sec. 1997e(d)(3), does not violate plaintiff's rights under the implied equal protection provision of the Fifth Amendment.").

### ❖ Fees for Work Done Seeking Fees

What about work done by a prisoner's attorney preparing a fee petition and litigating it? In [\*Hernandez v. Kalinowski\*](#), #97-1734, 146 F.3d 196 (3rd Cir. 1998), a prisoner who was awarded \$17,500 in damages for a correctional officer's failure to protect him from being stabbed by his cellmate was held not only entitled to \$10,131.64 in attorneys' fees, but also to attorneys' fees for the time his lawyer spent preparing a fee petition seeking the attorneys' fee award. The court ruled that the Prison Litigation Reform Act did not bar an award of "fees on fees."

See also [\*Jackson v. State Board of Pardons and Paroles\*](#), #02-15545, 331 F.3d 790 (11th Cir. 2003), holding that the Prison Litigation Reform Act allows for the awarding of attorneys' fees on work done litigating attorneys' fees issues (so-called "fees on fees").

### ❖ Fees on Appeal

The cap may not apply to work done on appeal defending a damage award in the court below. In [\*Woods v. Carey\*](#), #09-16113, 722 F.3d 1177 (9th Cir. 2013), a prisoner was awarded \$1,500 in compensatory and punitive damages against a prison employee in a lawsuit over alleged interference with his needed dental treatment.

After the prisoner successfully defended the judgment on appeal, he moved for an award of \$16,800 in attorneys' fees. The employee claimed that he only should have to pay, at most, attorneys' fees of up to 150% of the amount of damages awarded (or \$2,250), because of the cap on attorneys' fees in the Prison Litigation Reform Act.

A federal appeals court rejected this argument, holding that the cap only applies to fees awarded for obtaining the award in the trial court and did not limit the amount of fees that could be awarded after successfully defending such a judgment on appeal. Further proceedings would determine the exact amount of fees to be awarded, but the cap would not apply to the fees for work done on the appeal.

### ❖ Resources

The following are some useful resources related to the subject of this article.

- [Attorneys' Fees](#). AELE Case Summaries.
- [Prison Litigation Reform Act: Attorneys' Fees](#). AELE Case Summaries.
- [Prison Litigation Reform Act](#). Wikipedia article.

### ❖ Prior Relevant Monthly Law Journal Articles

- [Attorneys' Fees in Federal Civil Rights Lawsuits: An Introduction - Part One](#), 2011 (4) AELE Mo. L. J. 101
- [Attorneys' Fees in Federal Civil Rights Lawsuits: An Introduction - Part Two](#), 2011 (5) AELE Mo. L. J. 101
- [Prison Litigation Reform Act: Exhaustion of Remedies - Part One](#), 2011 (4) AELE Mo. L. J. 301.

- [Prison Litigation Reform Act: Exhaustion of Remedies - Part Two](#), 2011 (5)  
AELE Mo. L. J. 301.

❖ **References:** (*Chronological*)

1. [Trends in Prisoner Litigation, as the PLRA Enters Adulthood](#), by Margo Schlanger,  
5 UC Irvine Law Review 153 (2015).
2. [A Jailhouse Lawyer's Manual, Chapter 14: The Prison Litigation Reform Act](#),  
Columbia Human Rights Law Review (Ninth Edition 2011).

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