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Recommended Citation

86 Iowa L. Rev. 1209 (2001)

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Should Juries Be Informed that Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?

Martin A. Schwartz

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A police officer shot and killed a suspect who was attempting to flee the scene of the crime. The suspect's estate filed suit under 42 U.S.C. § 1983,¹ seeking compensatory and punitive damages against the officer for the officer's unconstitutional use of deadly force. The city agreed to indemnify any compensatory and punitive damages awarded against the officer.² Should the jury be informed about this agreement to indemnify? The city's agreement is not unusual. States and municipalities throughout the country frequently indemnify their employees to protect them from liability for unlawful conduct within the scope of their employment. Indemnification commonly occurs in cases of unconstitutional conduct that is subject to § 1983 liability.

The role of governmental indemnification in § 1983 "constitutional tort" actions is comparable to the role of liability insurance in common law tort actions.³ Like liability insurance, government indemnification protects the defendant from having to satisfy a potentially substantial monetary judgment with personal finances. Also, like liability insurance, indemnification provides the claimant a mechanism with which to collect a judgment against a state or local official of modest means.

1. Section 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994).

A § 1983 claim may be asserted against a state or local official in the official's personal capacity. *Hafer v. Melo*, 502 U.S. 21, 29 (1991); *see infra* text accompanying notes 12-18 (discussing the absolute immunity defense and the qualified immunity defense). The great majority of § 1983 claims are claims for monetary relief against a state or local official in the official's personal capacity. Section 1983 claims are also assertable against municipalities, but only when the violation of federally protected rights can be attributed to enforcement of a municipal policy or practice. *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 690-91 (1978). State entities are generally shielded from monetary liability under § 1983, both because a state is not a "person" within the meaning of § 1983, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989), and because the Eleventh Amendment immunizes states from monetary liability in federal court, *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). For an analysis of the principles governing § 1983 actions, *see infra* Part I.

2. *See infra* Part II (discussing indemnification of compensatory and punitive damages in § 1983 actions).

3. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305-06 (1986) ("We have repeatedly noted that 42 U.S.C. § 1983 creates 'a species of tort liability.'" (quoting *Carey v. Piphus*, 435 U.S. 247, 253 (1978))); *accord City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709-10 (1999); *Heck v. Humphrey*, 512 U.S. 477, 483 (1994); *see also Monroe v. Pape*, 365 U.S. 167, 187 (1961) (noting that § 1983 should be read against the "background of tort liability"). This does not necessarily mean that private insurance and government indemnification are the same or even sufficiently similar or that the two should be treated the same for evidentiary purposes. *See infra* Part IV (discussing indemnification versus insurance).

Normally, plaintiff's counsel would like the jury to know about indemnification from the deeper pocket municipality so that, in determining damages, the jurors will not be concerned about the defendant officer's likely modest salary and limited resources. Understandably, defense counsel would want to keep this information from the jury. Similarly, in a case in which there is no indemnification, defense counsel typically would want the jury to take into account the officer's limited means. Of course, plaintiff's counsel would rather that the jury not have this information.

The rules of evidence generally prohibit informing the jury about a defendant's private liability insurance.⁴ The courts, however, have not resolved definitively whether the jury in a § 1983 action should be informed about governmental indemnification.⁵ There are policy considerations both in favor of and against disclosure. It is also possible that the rule should be different for compensatory and punitive damages. Finally, if the jury should be informed about indemnification of compensatory or punitive damages, it must be determined whether cautionary instructions should accompany the disclosure. The purpose of this Article is to analyze these issues.

Comprehensive evaluation of the indemnification disclosure issue requires consideration of an expansive range of legal issues. It is necessary, therefore, to lay a good deal of groundwork before confronting whether it is proper to inform the jury about indemnification. Part I introduces the basic principles of § 1983 litigation that are germane to the indemnification issue. Part II discusses indemnification of compensatory and punitive damages in § 1983 actions. Part III analyzes the evidentiary exclusionary rule pertaining to liability insurance and criticisms that rule has generated. Part IV evaluates whether indemnification is similar to liability insurance so that the evidentiary exclusionary rule should apply to indemnification. Part V reviews the decisional law concerning the propriety of informing the jury about indemnification of compensatory and punitive damages in § 1983 actions. Part VI sets forth conclusions and recommendations.

The Article concludes that, although federal courts generally treat government indemnification as similar to private liability insurance and exclude knowledge of it from jury consideration, the two devices are not the same. Although it is a close question, the jury should know about indemnification of compensatory damages so that it is not misled into believing that the officer will satisfy a monetary judgment out of personal finances. However, cautionary instructions should be given to prevent misuse of the information. If the government also chooses to indemnify officials' punitive damages, the jury should be informed of that indemnification so that it can determine the amount of punitive damages

4. FED. R. EVID. 411 & advisory committee's note; *see infra* Part V (discussing the decisional law governing disclosure indemnification in § 1983 actions).

5. *See infra* Part V.

necessary to punish and deter wrongdoing. In the case of both compensatory damages and punitive damages, excessive damages can be corrected through remittitur and appellate review.

I. SECTION 1983 ACTIONS: OVERVIEW OF PERTINENT PRINCIPLES

Section 1983 provides a cause of action against state and local officials who violate an individual's federally-protected rights.⁶ Section 1983 does not create or establish any federally-protected rights, but only gives a remedy when the claimant demonstrates a violation of rights guaranteed by the Federal Constitution or, in some instances, by a federal statute other than § 1983.⁷ For example, in *Graham v. Connor*,⁸ the Supreme Court rejected the existence of a "generic 'right' to be free from excessive force, grounded in 'basic principles of § 1983 jurisprudence.'"⁹ Thus, "[i]n addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force."¹⁰ Whether the § 1983 plaintiff suffered a violation of federally-protected rights depends upon an interpretation and analysis of the particular federal constitutional right at issue rather than upon an interpretation of § 1983 itself.

Section 1983 damages claims may be asserted against a state or local official in the official's personal capacity.¹¹ These officials may be able to

6. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Flagg Bros. v. Brooks*, 436 U.S. 149, 155 (1978).

7. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1979) (citing Senator Edmund's 1871 debate on an analogous act, "All civil suits . . . which this act authorizes, are not based upon it; they are based upon the right of the citizen. The act only gives a remedy.") (citation omitted); *accord Albright v. Oliver*, 510 U.S. 266, 271 (1994) (supporting the proposition that § 1983 is not a source of substantive rights); *Graham v. Connor*, 490 U.S. 386, 389 (1989) (same); *Baker v. McCollan*, 443 U.S. 137, 140 n.3 (1979) (same). On the issue of enforcing federal statutory rights under § 1983, see 1A MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES ch. 4 (3d ed. 1997 & Supp. 2000). In the author's experience, the overwhelming number of § 1983 damages actions are premised upon alleged constitutional rather than statutory violations.

8. 490 U.S. 386 (1989).

9. *Id.* at 393.

10. *Id.* at 394. The Court in *Graham* held that excessive force claims arising out of a law enforcement officer's use of force during an investigatory stop, arrest, or other seizure are governed by a Fourth Amendment objective reasonableness standard. *Id.*; *see also Tennessee v. Garner*, 471 U.S. 1, 7-22 (1985) (analyzing a deadly force claim using the Fourth Amendment). Under this standard, the constitutionality of the officer's use of force is evaluated in light of the particular circumstances "from the perspective of a reasonable officer on the scene." *Graham*, 490 U.S. at 396. The Court in *Graham* stated in dicta that excessive force claims asserted by detainees are governed by a due process punishment standard, *id.* at 395 n.10 (citing *Bell v. Wolfish*, 441 U.S. 520, 550-59 (1979)), and that prisoner excessive force claims are governed by the Eighth Amendment Cruel and Unusual Punishment Clause, *Graham*, 490 U.S. at 393; *accord Hudson v. McMillian*, 503 U.S. 1, 1-2 (1992) (supporting the same proposition); *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) (same).

11. *See Hafer v. Melo*, 502 U.S. 21, 22-23 (1991) (holding that "state officials sued in their

defeat monetary liability by asserting either an absolute immunity defense—which is generally available to judges,¹² prosecutors,¹³ witnesses,¹⁴ and legislators¹⁵—or, as is more common, by assertion of the qualified immunity defense.¹⁶ Qualified immunity protects officials who violate federal law that was not “clearly established” at the time they acted.¹⁷

States and state agencies may not be sued for monetary relief in § 1983 suits because they are not “persons” within the meaning of § 1983.¹⁸ In addition, Eleventh Amendment sovereign immunity generally shields the states from monetary liability in federal court, including in § 1983 actions.¹⁹

Municipal entities, on the other hand, may be sued under § 1983.²⁰

individual capacities are ‘persons’ for the purpose of § 1983”). Suing an official in an official capacity is tantamount to suing the governmental entity. *Id.*; see also *Ky. Bureau of State Police v. Graham*, 473 U.S. 159, 166 (1985) (explaining that in such a suit “the party in interest is the entity”); *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985) (holding a judgment against “a public servant ‘in his official capacity’ imposes liability on the entity he represents”). On the various distinctions between personal capacity and official capacity claims, see *Hafer*, 502 U.S. at 25-29.

12. *Mireles v. Waco*, 502 U.S. 9, 9-10 (1991); *Stump v. Sparkman*, 435 U.S. 349, 349-51 (1978); *Pierson v. Ray*, 386 U.S. 547, 553 (1967); *Bradley v. Fisher*, 80 U.S. 335, 346-48 (1871).

13. *Kalina v. Fletcher*, 522 U.S. 118, 131 (1997); *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993); *Burns v. Reed*, 500 U.S. 478, 494 (1991); *Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976).

14. *Briscoe v. LaHue*, 460 U.S. 325, 328 (1983).

15. See, e.g., *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (holding that local legislators are absolutely immune from suit under § 1983); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (holding that the civil rights statute did not create civil liability for legislators acting in the sphere of legitimate legislative activities).

16. See *Wilson v. Layne*, 526 U.S. 603 (1999) (holding that officers were entitled to defense of qualified immunity); *Anderson v. Creighton*, 483 U.S. 635 (1987) (finding that an agent was protected by qualified immunity from civil liability if the agent can establish that a reasonable officer could have believed that the search adhered to the Fourth Amendment); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (holding that presidential aides are entitled only to qualified immunity).

17. *Harlow*, 457 U.S. at 801.

18. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989). A state official sued in an official capacity is considered a § 1983 “person” when sued for prospective relief. *Id.* at 71 n.10.

19. See *Edelman v. Jordan*, 415 U.S. 651 (1974) (holding that the Eleventh Amendment prohibited the retroactive payment of benefits found to have been wrongfully withheld). Although a state may voluntarily waive its Eleventh Amendment immunity from federal court liability, states rarely choose to do so. See SCHWARTZ & KIRKLIN, *supra* note 7, § 8.11 (stating that the Eleventh Amendment protects states from monetary liability in federal court); see also ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 7.6 (3d ed. 1999) (stating that the test for voluntary waiver of the Eleventh Amendment is so stringent that few such waivers are found). In enacting the original version of § 1983, Congress did not intend to abrogate the states’ Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332, 345 (1979). Nevertheless, under an exception to Eleventh Amendment immunity, state officials may be sued in their official capacities for prospective relief under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *Will*, 491 U.S. at 71.

20. See *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658, 663 n.7, 685-86 (1978) (finding that municipalities are “persons” within meaning of § 1983, thereby overruling *Monroe v. Pape*, 365 U.S. 167 (1961), on this point).

However, since there is no respondeat superior liability under § 1983, a municipality may be held liable only when enforcement of a municipal policy or practice or the decision of a final municipal policymaker caused the violation of the plaintiff's federally-protected rights.²¹ In *Owen v. City of Independence*,²² the Supreme Court held that the good faith of municipal officers will not shield the municipality from liability for either compensatory damages or equitable relief. The Court concluded that "[a] municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983."²³

In *City of Newport v. Fact Concerts, Inc.*,²⁴ however, the Supreme Court held that municipal entities enjoy immunity from punitive damages under § 1983. The Court relied upon the fact that municipalities were immune from punitive damages under the common law when the original version of § 1983 was enacted in 1871.²⁵ Moreover, the Court reasoned that because punitive damages are designed to punish the tortfeasor and to deter him and others from similar unlawful conduct, requiring municipalities to pay punitive damages would unjustly punish only the "blameless" taxpayers.²⁶ The Court in *City of Newport* found that the punishment and deterrence goals of punitive damages are most effectively advanced by awarding punitive damages directly against the offending officer rather than against the municipality.²⁷ "By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, [§ 1983] directly advances the public's interest

21. *Id.* at 682. For a discussion about the issue of municipal liability based on the decision of a final policymaker, see *City of St. Louis v. Praaprotnik*, 485 U.S. 112, 137 (1988) (stating that only municipal officers having final policymaking authority may subject municipal government to § 1983 liability); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 470 (1986) (same). Municipal liability may be based upon deliberately indifferent training deficiencies, *City of Canton v. Harris*, 489 U.S. 378, 379 (1989), deliberately indifferent supervision, *Schwartz & Kirelin*, *supra* note 7, § 7.18, and, in extreme cases, deliberately indifferent hiring practices, *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 415 (1997).

22. 445 U.S. 622 (1980).

23. *Id.* at 638; see also *Leatherman v. Tarrant County*, 507 U.S. 163, 166 (1993) ("[U]nlike various government municipal officials, municipalities do not enjoy immunity from suit—either absolute or qualified under § 1983."); *Burge v. Parish of Tammany*, 187 F.3d 452, 466-67 (5th Cir. 1999) (holding that absolute prosecutorial immunity is not available in an official capacity suit); *Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 72-73 (2d Cir. 1992) (holding that a municipality may not assert legislative immunity).

24. 453 U.S. 247 (1981).

25. *Id.* at 258-60.

26. *Id.* at 267; see also *Vt. Agency of Natural Res. v. United States*, 120 S. Ct. 1853, 1869 n.15 (2000) (discussing the rationale of *Fact Concerts, Inc.*); *Ciraolo v. City of New York*, 216 F.3d 236 (2d Cir.), *cert. denied*, 121 S. Ct. 484 (2000) (same).

27. See *Smith v. Wade*, 461 U.S. 30, 35 (1983) (holding that punitive damages may be awarded under § 1983 against an official who acted with evil intent or callous disregard for the plaintiff's federally-protected rights); see also *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999) (same).

in preventing repeated constitutional deprivations.”²⁸ *City of Newport* protects municipalities from judicial awards of punitive damages under § 1983, but does not prevent municipalities from voluntarily undertaking to indemnify an officer’s § 1983 punitive damages liability.²⁹

II. INDEMNIFICATION OF COMPENSATORY AND PUNITIVE DAMAGES IN § 1983 ACTIONS

A. INDEMNIFICATION OF COMPENSATORY DAMAGES

Governmental indemnification is a vital aspect of § 1983 actions in which money damages are sought against a state or local official in the official’s personal capacity. Nevertheless, § 1983 does not address the question of indemnification.³⁰ Federal courts hold that “[t]here is no federal right to indemnification provided in 42 U.S.C. § 1983,”³¹ and that a claim for indemnification in a § 1983 action must be based upon state law.³² Thus,

28. *Fact Concerts, Inc.*, 453 U.S. at 269.

29. *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) (discussing punitive damage liability); *see also* *Haile v. Village of Sag Harbor*, 639 F. Supp. 718, 723-24 (E.D.N.Y. 1986) (holding that indemnification of punitive damages does not make the municipality a real party in interest); *see also infra* Part II (discussing punitive damages).

30. This is not particularly surprising since § 1983 does not address a host of other important issues that may arise in § 1983 actions, such as immunities, statute of limitations, survivorship of claims, wrongful death actions, and damages. 42 U.S.C. § 1988(a) provides that when the federal law in a § 1983 action is “deficient,” federal courts should employ the state law of the forum as long as the state law is not inconsistent with the policies of § 1983. There is no clear dichotomy between issues that should be resolved on the basis of uniform federal principles and those that should be resolved pursuant to § 1988 on the basis of state law. *See* SCHWARTZ & KIRKLIN, *supra* note 7, § 12.1 (discussing the dichotomy between federal and state law). For example, the U.S. Supreme Court has held that state law governs such questions as the limitations period and survivorship, but that federal law governs questions of immunity. *Id.* at vol. 1B, ch. 9, vol. 1C, chs. 12, 13, 16.

31. *Allen v. City of Los Angeles*, 92 F.3d 842, 845 n.1 (9th Cir. 1996) (citing *Banks v. City of Emeryville*, 109 F.R.D. 535 (N.D. Cal. 1985)).

32. *See Allen*, 92 F.3d at 845; *Graham v. Sauk Prairie Police Comm’n*, 915 F.2d 1085, 1093 (7th Cir. 1990); *Coleman v. Smith*, 814 F.2d 1142, 1147 (7th Cir. 1987); *Hibma v. Odegaard*, 769 F.2d 1147, 1155 (7th Cir. 1985); *Turk v. McCarthy*, 661 F. Supp. 1526, 1535 (E.D.N.Y. 1987); *Holman v. Walls*, 648 F. Supp. 947, 955-56 (D. Del. 1986); *Banks v. City of Emeryville*, 109 F.R.D. 535, 539, 541 (N.D. Cal. 1985); *Wiehagen v. Borough of N. Braddock*, 594 A.2d 303 (Pa. 1991); *Williams v. Horvath*, 548 P.2d 1125, 1131-32 (Cal. 1976) (all indicating that a claim for indemnification in a § 1983 action must be based upon state law). *But see Oladeinde v. City of Birmingham*, 118 F. Supp. 2d 1200, 1207-08, 1211, 1214 n.8 (N.D. Ala. 1999) (holding indemnification in § 1983 actions is a matter of federal law). Federal court cross-claims or impleader claims for indemnification may come within what was formerly called jurisdiction, which is now subsumed under the statutory rubric “supplemental jurisdiction.” *See Allen*, 92 F.3d at 845 (holding that the district court did not abuse its discretion in exercising supplemental jurisdiction over police officers’ cross-claim for indemnification of attorneys’ fees and costs); *Jocks v. Tavernier*, 97 F. Supp. 2d 303, 310 (E.D.N.Y. 2000) (supplemental jurisdiction exercised over police officers’ cross-claims for indemnification); *Harris v. Rivera*, 921 F. Supp. 1058, 1062 (S.D.N.Y. 1995) (supplemental jurisdiction exercised over cross-claim for indemnification);

courts faced with claims by state and local officials that they are entitled to indemnification of § 1983 liability must interpret applicable state and local indemnification provisions.³³

States and municipalities often indemnify officers found personally liable for compensatory damages under § 1983.³⁴ State indemnification statutes commonly require that to be entitled to indemnification, the employee must (1) have acted within the scope of employment,³⁵ and (2) not have engaged in intentional, reckless, or malicious wrongdoing.³⁶ Courts must interpret and apply these limitations in order to determine the validity of an officer's claim for indemnification. For example, in *Hibma v. Odegaard*,³⁷ the Seventh Circuit held that under Wisconsin indemnification law, an employee can act within the scope of employment even if the employee did not intend to benefit the employer, so long as her conduct in fact furthered the objective of the employment.³⁸ In a follow-up case, the circuit court in *Graham v. Sauk Prairie Police Commission*³⁹ held that to satisfy Wisconsin's scope of employment requirement, the employee's conduct must be reasonably connected to employment duties.⁴⁰ The court ruled that the defendant police officer's use of deadly force was within the scope of his employment even though he misused his official authority.⁴¹

Legislatures enact indemnification statutes for the financial protection

Turk v. McCarthy, 661 F. Supp. 1526, 1535-36 (E.D.N.Y. 1987) ("pendent jurisdiction" exercised over cross-claims for indemnification).

33. Interpretation of state indemnification law often involves multiple statutory provisions, resolution of the relationship between state statutes and local ordinances, and consideration of state court interpretations of these provisions. For an example of the potential complexities involved in deciphering state indemnification law, see *Oladeinde v. City of Birmingham*, 118 F. Supp. 2d 1200, 1214 (N.D. Ga. 1999).

34. See Nicole G. Tell, *Representing Police Officers and Municipalities: A Conflict of Interest for a Municipal Attorney in a Section 1983 Police Misconduct Suit*, 65 FORDHAM L. REV. 2825, 2836 (1997) (discussing municipalities' decisions to indemnify police officers).

35. See, e.g., N.Y. PUB. OFF. LAW § 18(4)(a) (McKinney 1983); N.Y. GEN. MUN. LAW § 50-K(3) (McKinney 2000); WIS. STAT. § 895.46 (1993); see also KEETON ET AL., PROSSER AND KEETON ON TORTS § 132 (5th ed. 1984) (stating that all state indemnification statutes authorize indemnification "only for acts committed within the scope of official duties"); Tell, *supra* note 34, at 2836.

36. See, e.g., N.Y. GEN. MUN. LAW § 50-K(3) (McKinney 2000); see also *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269 n.30 (1981) (observing that a number of state statutes authorizing indemnification of punitive damages "specifically exclude indemnification for malicious or willful misconduct by the employees").

37. 769 F.2d 1147 (7th Cir. 1985).

38. See *id.* at 1152 (relying upon state law interpretations of the Wisconsin indemnification statute including *Cameron v. City of Milwaukee*, 307 N.W.2d 164 (Wis. 1981), and *Scott v. Min-Aqua Bats Water Ski Club, Inc.*, 255 N.W.2d 536 (Wis. 1977)).

39. 915 F.2d 1085 (7th Cir. 1990).

40. *Id.* at 1093 (finding that the Wisconsin scope of employment requirement was narrower than § 1983's "color of state law requirement").

41. *Id.* at 1095.

of public officials sued for conduct within the scope of their employment, not for the benefit of the injured parties.⁴² One potentially important question of state statutory interpretation in determining whether the jury should be instructed on indemnification is when the government entity must decide whether the defendant officer will be indemnified. Courts do not always agree as to when the decision to indemnify must be made.⁴³ If the decision to indemnify is not made before the case goes to the jury, the most that the jury could be told is that the defendant officer may be indemnified.

Indemnification of a public official's monetary liability does not violate the policies or purposes of § 1983. The California Supreme Court in *Williams v. Horvath*⁴⁴ held that indemnification in § 1983 actions is a matter of state law and is not forbidden by § 1983.⁴⁵ The court found that state

42. *Galvani v. Nassau County Police Indemnification Review Bd.*, 674 N.Y.S.2d 690, 691 (N.Y. App. Div. 1998) (concluding that the injured party has no standing to challenge the county's decision not to indemnify the police officer). In coming to its conclusion, the court quoted *Blood v. Board of Education*, 509 N.Y.S.2d 530, 533 (N.Y. App. Div. 1986) (stating that the New York indemnification statute was "primarily directed at saving imperfect and, therefore, fallible public employees from the potentially ruinous legal consequences following from unintentional lapses in the daily discharge of their duties").

43. The City of New York has "represent[ed] that it does not make a decision whether to indemnify an employee until the jury has returned a verdict in the action in which the employee is named as a defendant." *Nevares v. Morrissey*, No. 95 Civ. 1135 (JCK), 1998 WL 265119, at *7 (S.D.N.Y. May 22, 1998); Tell, *supra* note 34, at 2836 n.74 ("In New York City, . . . the decision whether to indemnify is made subsequent to litigation when the municipality can better evaluate the police officer's actions and calculate how much public money has already been spent on the defense."). Although some courts have agreed with the City that it need not make the indemnification decision until the final judgment, *Nevares*, 1998 WL 265119, at *7-10; *Bolusi v. City of New York*, 671 N.Y.S.2d 478, 478 (N.Y. App. Div. 1998), other courts, although acknowledging the general principle that indemnification claims do not ripen until the judgment in the underlying action is entered, "have applied an exception to this principle pursuant to which supplemental jurisdiction has been exercised over cross-claims for indemnification in the interests of judicial economy so that all parties may establish their rights and liabilities in one action." *Jocks v. Tavernier*, 97 F. Supp. 2d 303, 312 (E.D.N.Y. 2000); *Woo v. City of New York*, 1996 WL 457337, at *13 (S.D.N.Y. Sept. 6, 1996); *Harris v. Rivera*, 921 F. Supp. 1058, 1062 (S.D.N.Y. 1995). In Nassau County, New York, indemnification is determined prior to the County's provision of representation. Tell, *supra* note 34, at 2836 n.74 (citing N.Y. GEN. MUN. LAW § 50-1 (McKinney 1986)).

The timing issue could arise in the private insurance context as well. "In some states, statutory provisions affirmatively require that carriers notify insureds promptly of any basis they intend to assert in denying coverage." TORTS & INS. PRACTICE SECTION OF A.B.A., LITIGATING THE COVERAGE CLAIM 16 (1991). For example, New York Insurance Law § 3420(d) requires an insurer disclaiming liability to give written notice of the disclaimer "as soon as reasonably possible" to the insured, the injured person, and any other claimant. Whether an insurer has given such notice as soon as "reasonably possible" is a question of fact that depends on all the facts and circumstances. *Hartford Ins. Co. v. County of Nassau*, 389 N.E.2d 1061, 1062-63 (N.Y. 1979). Failure to give effective notice of disclaimer precludes denial of coverage. *Id.*; accord *Frazier v. Royal Ins. Co. of Am.*, 110 F. Supp. 2d 110, 116 (N.D.N.Y. 2000); *Albert J. Schiff Assoc., Inc. v. Flack*, 417 N.E.2d 84, 87 (N.Y. 1980).

44. 548 P.2d 1125 (Cal. 1976).

45. Most decisions concerning indemnification in § 1983 actions look to state law

indemnification policies do not frustrate the enforcement of federal rights under § 1983. On the contrary, indemnification enhances enforcement by insuring that the defendant officer is able to compensate the § 1983 claimant.⁴⁶ Furthermore, a "rule forbidding indemnification in section 1983 actions would subject police officers to unlimited and unforeseeable personal liability for acts committed in the course and scope of employment."⁴⁷ This could "lead to demands by the employees for higher wages as a substitute for insurance" and could even make it difficult for the state "to recruit talented employees or to induce them to perform their public protective duties zealously."⁴⁸ In sum, case law strongly supports the conclusions that indemnification of § 1983 damages is a matter of state prerogative, and that states that choose to indemnify an officer's compensatory damages do not violate the policies underlying § 1983.

B. INDEMNIFICATION OF PUNITIVE DAMAGES

Some state and local indemnification policies authorize indemnification of an officer's punitive damages.⁴⁹ Some of these policies exclude

indemnification policies and assume that indemnification of an officer's monetary liability is not forbidden by § 1983. *See* cases cited *supra* note 32. As discussed in the text below, the Ninth Circuit held that even municipal indemnification of punitive damages does not violate § 1983. *Cornwell v. City of Riverside*, 896 F.2d 398 (9th Cir. 1990); *see also* *Cunningham v. Gates*, 229 F.3d 1271, 1292-93 (9th Cir. 2000) (finding that indemnification of a police officer did not violate plaintiff's § 1983 rights); *Trevino v. Gates*, 99 F.3d 911 (9th Cir. 1996) (holding that the indemnification of municipal officers against liability did not violate plaintiff's civil rights in a § 1983 claim).

46. *Williams*, 548 P.2d at 1134. Although compensating the § 1983 plaintiff for the actual injuries suffered is the prime purpose of a § 1983 compensatory claim, a secondary purpose is deterring future violations. SCHWARTZ & KIRKLIN, *supra* note 7, § 16.7. Although indemnification does not frustrate the compensation goal, it may frustrate the deterrence.

47. *Williams*, 548 P.2d at 1134.

48. *Id.* at 1133.

49. The petition for writ of certiorari in *Trevino v. Gates*, 99 F.3d 911 (9th Cir. 1996), contains the following summary:

Of the 15 states and one United States territory who [sic] have legislated on the issue of whether or not a local governmental entity (or a state) may opt to indemnify government officials for punitive damages, nine states permit such indemnification, four states and one territory prohibit it, one state permits legislation to permit it, and one state permits the purchase of liability insurance to provide such indemnification.

It is permitted in California (Cal. Govt. Code § 825[b] [West 1996]); Colorado (Colo. Rev. Stat. § 24-10-114, 24-10-118[5] [1996]); Maine (Me. Rev. Stat. Ann. tit. 14 § 8112 [1996]); Maryland (Md. Cts. and Jud. Proc. § 5-403 [1984]); Minnesota (Minn. Stat. § 466.07 [1996]); New Jersey (N.J. Rev. Stat. § 59:10-1 [1966] [state], 59:10-4 [political subdivisions]); New York, but only for police (N.Y. Gen. Mun. Law § 50-j [McKinney 1996] [enabling statute], 50-1 [requiring Nassau County to indemnify police], 50-m [same for Suffolk County], 50-n same for other police in Nassau County), and prohibits it otherwise (N.Y. Pub. Off. Law [West 1996] § 18); Ohio (Ohio Rev. Code Ann. § 9.87 [Baldwin 1996] [state], § 277.44.07 [political

indemnification if the officer acted maliciously or willfully.⁵⁰ A municipality's obligation to indemnify an officer's liability for punitive damages does not make the municipality the real party in interest and thus does not violate the holding in *City of Newport* that municipalities are immune from punitive damages under § 1983.⁵¹ Nevertheless, indemnification of § 1983 punitive damages is controversial and clearly deserving of special treatment.⁵²

In the private insurance context, the majority view is that insuring for punitive damages is against public policy because the insurance "totally" defeats the punishment and deterrence purposes of punitive damages by passing the cost of punitive damages to the premium-paying insurance customers.⁵³ Like private insurance of punitive damages, government indemnification can thwart the punishment and deterrence goals of punitive damages. In his dissenting opinion in *Kennan v. Philadelphia*,⁵⁴ Judge Higginbotham forcefully argued that government indemnification of punitive damages defeats the punishment and deterrence purposes of those damages by shifting the sanction from the offending official to the

subdivisions]); and, Oklahoma (Okla. Stat. § 162 [1996]).

It is prohibited in Illinois to political subdivisions (Ill. Rev. Stat. ch. 745 § 10/2-302 [West 1996]); Kansas (Kan. Stat. Ann. § 75-6109 [1996]); North Dakota (N.D. Cent. § 32-12.1-03 [1996]); and Virgin Islands (V.I. Code Ann. tit. 10 § 102 [1996]).

Nebraska permits it for state employees with the approval of the state legislature (Neb. Rev. Stat. § 81-8.239.05 [1996]); and, Iowa permits the purchase of insurance to provide indemnification (Iowa Code § 670.8 [1996]).

50. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269 n.30 (1981) (providing references to state statutes).

51. *Haile v. Village of Sag Harbor*, 639 F. Supp. 718, 723 (E.D.N.Y. 1986); see also *Bell v. City of Milwaukee*, 746 F.2d 1205, 1271 (7th Cir. 1984) (holding that municipalities may voluntarily indemnify an officer for punitive damages liability). For a full discussion of *Fact Concerts, Inc.*, see *supra* notes 24-28 and accompanying text.

52. See *supra* notes 43-47 and accompanying text (analyzing the issue of indemnification of § 1983 actions generally).

53. See *Hartford Accident & Indem. Co. v. Village of Hempstead*, 397 N.E.2d 737, 742 (N.Y. 1979) (finding that the deterrence purpose of punitive damages would be lost if insurance would cover a damage award); see also *Biondi v. Beekman Hill House Apartment Corp.*, 731 N.E.2d 577, 580 (N.Y. 2000) (finding that "bad faith" justifies a "public policy limitation on indemnification"); *Home Ins. Co. v. Am. Home Prods. Corp.*, 550 N.E.2d 930, 935 (N.Y. 1990) (finding that insurance indemnification for punitive damages is against state public policy); *Pub. Serv. Mut. Ins. v. Goldfarb*, 425 N.E.2d 810, 814 (N.Y. 1981) (stating that an insurer could not be compelled to indemnify for damages resulting from an intentional tort).

In *Derechin v. State University of New York*, 963 F.2d 513, 519 (2d Cir. 1992), the court, in upholding a district court's prohibition against state reimbursement of a sanction imposed upon the state's attorney, observed that "eighteen states . . . have held that insurance policies covering punitive damages . . . are void as against public policy." The court cited to R. L. BLATT ET AL., PUNITIVE DAMAGES: A STATE BY STATE GUIDE TO LAW AND PRACTICE § 5.3 (1991). Legislative bodies, however, can overturn or modify public policy. *Hartford Accident & Indem. Co.*, 397 N.E.2d, at 742 ("[P]ublic policy is generally determined by the Legislature.").

54. 983 F.2d 459 (3d Cir. 1992).

taxpayers.⁵⁵ Although a municipality that has indemnified a punitive damages award against one of its officials might respond "with preventive policies and procedures, such generalized deterrence is simply too attenuated to warrant ignoring the perverse effects indemnification agreements have on individualized punishment and deterrence."⁵⁶ Likewise, Judge Newman in *Mathie v. Fries*⁵⁷ stated that "even when an indemnity agreement covering punitive damages for intentional torts is not void as against public policy, the existence of such an agreement eliminates the effect of such damages serving as punishment for a tortfeasor; only the effect of deterring others remains."⁵⁸ It is even questionable, however, how much "others" will be deterred if they know that if they engage in egregious misconduct their municipal employer may reimburse them for punitive damages.

Given the persuasive policy reasons against indemnification of punitive damages, why have so many states nevertheless chosen to indemnify?⁵⁹ First, indemnification does not totally destroy the value of punitive damages, because the offending official may be subject to shame and humiliation, and because the municipality might choose to take corrective action, such as changing its policies or discharging or demoting the official.⁶⁰ Second, indemnification of punitive damages might also be thought necessary to recruit competent officers, to enable them to perform their duties zealously, and to avoid having to pay higher wages as a substitute for insurance.⁶¹ Third, a municipality might want to retain the power to make its own evaluation of its officer's conduct, despite a judicial determination that the officer's conduct was sufficiently egregious to call for an award of punitive damages.⁶² Finally, a state or municipality may indemnify its police officers' punitive damages to further the police department's esprit de corps by showing that the government stands behind its police officers.

The little authority that exists holds that municipal indemnification of

55. *Id.* at 477-84 (Higginbothan, J., dissenting).

56. *Id.* at 480 (Higginbothan, J., dissenting).

57. 121 F.3d 808 (2d Cir. 1997).

58. *Id.* at 816 n.6.

59. See *supra* note 49 (noting that nine states have passed legislation which allows the government to indemnify governmental officials for punitive damages).

60. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269 (1981) (suggesting that a responsible official may be deterred by shame and humiliation); see also R. Emery & I. Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 590 (2000) (referring to the "public humiliation" from a jury finding that a police officer violated the Constitution).

61. See *Williams v. Horvath*, 548 P.2d 1125, 1133 (Cal. 1976) (analyzing § 1983 indemnification generally, rather than with specific regard to punitive damages).

62. See *Cornwell v. City of Riverside*, 896 F.2d 398, 399 (9th Cir. 1990) (holding that a city is not bound by a jury's finding of lack of good faith justifying an award of punitive damages in a civil rights action when the city makes its decision to indemnify its employee); *infra* text accompanying notes 68-69 (discussing *Cornwell* in more detail).

an official's liability for punitive damages does not violate the policies of § 1983. In *City of Newport v. Fact Concerts, Inc.*,⁶³ the Supreme Court, in the course of holding municipalities immune from punitive damages under § 1983, acknowledged that some state statutes authorize indemnification of punitive damages, but that a number of these statutes "specifically exclude indemnification for malicious or willful misconduct by the employees."⁶⁴ The Court, however, did not pass on the validity of state punitive damages indemnification policies.⁶⁵

In *Bell v. City of Milwaukee*,⁶⁶ the Seventh Circuit held that municipal indemnification of punitive damages does not conflict with *City of Newport's* grant of municipal immunity from punitive damages, because a municipality's decision to indemnify an officer's punitive damages constitutes a waiver of the municipality's immunity from punitive damages.⁶⁷ Viewed differently, there is a vital difference between payment of punitive damages under compulsion of court decree and a voluntary undertaking to assume an employee's punitive damages liability.

In *Cornwell v. City of Riverside*,⁶⁸ the Ninth Circuit held that municipal indemnification of punitive damages awarded against an official does not violate the policies of § 1983.⁶⁹ The court reasoned that the jury's verdict and the city's indemnity decisions are distinct.⁷⁰ Although a jury may have found that the officer acted maliciously, the city, in deciding whether to

63. 453 U.S. 247 (1981).

64. *Id.* at 269 n.30.

65. See *Keenan v. Philadelphia*, 983 F.2d 459, 479 n.3 (3d Cir. 1992) (Higginbotham, J., dissenting) (noting that the Supreme Court, in *Fact Concerts, Inc.*, "only implicitly and with qualifications approved municipal indemnification agreements").

66. 746 F.2d 1205 (7th Cir. 1984).

67. *Id.* at 1279; see also *Haile v. Village of Sag Harbor*, 639 F. Supp. 718, 723 (E.D.N.Y. 1986) (holding that the municipal obligation to indemnify officer's liability for punitive damages does not make the municipality the real party in interest in violation of the Supreme Court's decision in *Fact Concerts, Inc.*).

68. 896 F.2d 398 (9th Cir. 1990).

69. *Id.* at 400; see *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) ("A city council does not violate section 1983 if it indemnifies officers against punitive damages awards on a discretionary, case by case basis, and complies in good faith with the requirements of Cal. Gov. Code § 825(b)."); accord *Cunningham v. Gates*, 229 F.3d 1271, 1292-93 (9th Cir. 2000) (reflecting the *Trevino* view of city council's discretion). California Government Code § 825(b) authorizes municipalities to indemnify punitive damages if the municipality finds that the employee acted within the course of employment, in good faith, and "in the apparent best interests of the public entity," and payment would be "in the best interests of the public entity." CAL. GOV'T CODE § 825(b) (West 1996). The circuit court in *Trevino* also held that a city's discretionary decisions to indemnify police officers for punitive damages when it finds that doing so "would be in the best interest" of the city does not constitute ratification of unconstitutional police conduct. *Trevino*, 99 F.3d at 920. Courts which hold similarly to the *Trevino* court on this point include *Freeman v. Santa Ana*, 68 F.3d 1180, 1188 (9th Cir. 1995), *Brown v. City of Chicago*, 573 F. Supp. 1375, 1379 (N.D. Ill. 1983), and *Ekergren v. City of Chicago*, 538 F. Supp. 770, 773 (N.D. Ill. 1982).

70. *Cornwell*, 896 F.2d at 399.

indemnify, is not bound by the jury's finding.⁷¹ The city may find that the officer acted in good faith, and that it is in the best interests of the city to indemnify the officer.⁷² Additionally, the circuit court reasoned that even if the city indemnifies punitive damages, "there is still a substantial sting to punitive damages awarded against the individuals."⁷³ Although the court did not explain what this "sting" was, it presumably meant the employee's knowledge that the employee's conduct caused the municipality to incur a substantial financial obligation, possible disciplinary action by the municipality against the employee, and perhaps the employee's shame and humiliation from having been found liable for punitive damages.⁷⁴ The court also reasoned that without indemnification, judgments in favor of some civil rights plaintiffs would go unsatisfied because the defendant lacked the means to pay the judgment.⁷⁵

In short, states and municipalities commonly have policies authorizing indemnification of compensatory damages, with some even authorizing indemnification of punitive damages. In order to evaluate how the availability of governmental indemnification should be treated in a jury trial, it is helpful to analyze (1) the exclusionary rule for evidence of liability insurance, and (2) whether that rule or its policies encompasses indemnification of compensatory and punitive damages. These issues are the subjects of the next two sections.

III. LIABILITY INSURANCE EXCLUSIONARY RULE

Government indemnification and private liability insurance are similar in nature in that each device can protect a wrongdoer from monetary liability. Therefore, whether it is proper for the jury to be informed about indemnification requires consideration of the well-established exclusionary rule for evidence of liability insurance.⁷⁶

71. *Id.*

72. *Id.*

73. *Id.* at 400.

74. *See supra* text accompanying note 60 (discussing the rationale for indemnification of punitive damages).

75. *Cornwell*, 896 F.2d at 399. This argument was not applicable in *Cornwell*, however, because the plaintiff in that case refused to accept the city's indemnification of punitive damages. *See Keenan v. City of Philadelphia*, 983 F.2d 459, 480 n.4 (3d Cir. 1992) (Higginbotham, J., dissenting) (noting that while the plaintiff in *Cornwell* insisted that the officers pay the punitive damages and rejected the city's offer to pay, the plaintiff in *Keenan* was "quite content" to accept the city's offer). The court in *Cornwell* observed that if § 1983 plaintiffs had the option to accept or reject the city's indemnification of punitive damages, they "would have an extraordinary weapon with which to negotiate with individual defendants." *Cornwell*, 896 F.2d at 400. The circuit court refused to add this "weapon" to the range of existing § 1983 remedies.

76. On the issue of whether indemnification and insurance should be treated the same way for evidentiary purposes, see *infra* Part IV.

A. *THE EXCLUSIONARY RULE*

The common law has long recognized that evidence of liability insurance should not be admitted into evidence as proof of a party's wrongdoing.⁷⁷ Courts premised the rule partly on the rationale that evidence of liability insurance is "marginally relevant" at best, because having liability insurance does not make it more likely that a person will engage in negligent or other wrongful conduct.⁷⁸ The more important justification is that the jury's knowledge that the defendant is covered by liability insurance may lead it to either return an unwarranted verdict for the plaintiff or award exaggerated damages.⁷⁹ This rationale assumes that knowledge of liability insurance "will motivate the jury to be reckless in awarding damages to be paid, not by the defendant, but by a supposedly well-pursued and heartless insurance company that has already been paid for taking the risk."⁸⁰

The Federal Rules of Evidence incorporated the common law exclusionary rule for liability insurance when the rules were adopted in 1975.⁸¹ Rule 411 of the Federal Rules provides:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of the evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.⁸²

The adoption of Rule 411 "was entirely noncontroversial."⁸³ Congress's

77. 1 M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 4.11.1 (4th ed. 1996); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.30 (1999); J.W. STRONG, MCCORMICK ON EVIDENCE § 201 (5th ed. 1999); 2 WIGMORE ON EVIDENCE § 282a (James H. Chadburn rev., 1976); 23 C. WRIGHT & M. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5361 (1980).

78. GRAHAM, *supra* note 77, § 4.11.1, at 585-86; 2 WIGMORE, *supra* note 77, § 282a.

79. See FED. R. EVID. 411 advisory committee's note ("More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds."); see also *Eichel v. N.Y. Cent. R.R. Co.*, 375 U.S. 253, 255 (1963) ("It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse."); *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977) (stating that consideration of insurance coverage "injects into the damage determination a foreign, diverting, and distracting issue which may effectuate a prejudicial result").

80. 2 WIGMORE, *supra* note 77, § 282a(3), at 148.

81. Pub. L. No. 93-595, 88 Stat. 1926 (1975).

82. FED. R. EVID. 411.

83. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 152 (2d ed. 1994). Rule 411 "underwent no substantive changes during the rule-making process, and was enacted by Congress in the form proposed by the Advisory Committee and the Supreme Court, attracting no attention during the committee hearings." *Id.* (citation omitted).

consideration of the rule "was perfunctory to say the least,"⁸⁴ and its legislative history is "quite uneventful."⁸⁵

The advisory committee note to Rule 411 reflects this lack of fanfare. The note states that "[t]he courts have with substantial unanimity rejected evidence of liability insurance as proof of lack of fault."⁸⁶ It reiterates the two traditional rationales for the exclusionary rule: (1) "[a]t best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse"; (2) "knowledge of liability insurance would induce juries to decide cases on 'improper grounds.'"⁸⁷

Rule 411 encompasses evidence "that a person was or was not insured against liability"⁸⁸ Thus, just as evidence that the defendant was covered by liability insurance is not admissible to prove a party's fault, evidence that a party was not covered by liability insurance is not admissible to support an inference that the party was not at fault.⁸⁹ The exclusionary rule, however, applies only when evidence of liability insurance is sought to be introduced to prove "whether the person acted negligently or otherwise wrongfully" and not when the evidence is "offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness."⁹⁰ Rule 411's

84. *Id.* § 153.

85. WRIGHT & GRAHAM, *supra* note 77, § 5361. For a review of the rulemaking process that led to the congressional adoption of the Federal Rules of Evidence, see Paul R. Rice & Neals-Erik Deiker, *A Short History of Too Little Consequence*, 191 F.R.D. 678, 682-84 (2000).

86. FED. R. EVID. 411 advisory committee's note.

87. *Id.*

88. FED. R. EVID. 411.

89. An inadvertent disclosure by counsel or a witness that a party is insured rarely results in a mistrial; the usual remedy is for the trial judge to strike the reference to insurance and ask the jury to disregard it. *Rios v. Bigler*, 67 F.3d 1543, 1550 (10th Cir. 1995) ("Inadvertent references to insurance, however, 'are not generally grounds for mistrial or reversal.'" (quoting *Zanetti Bus Lines v. Hurd*, 320 F.2d 123, 129 (10th Cir. 1969))); GRAHAM, *supra* note 77, § 411.1; MUELLER & KIRKPATRICK, *supra* note 83, § 153; STRONG, *supra* note 77, § 201. The reluctance to grant a mistrial is supported partly by the assumption that in many types of actions, jurors probably believe the defendant is covered by liability insurance. GRAHAM, *supra* note 77, § 411.1. Reversal is required only when the disclosure of liability insurance was deliberate. *Id.* § 411.1; see also *Raybestos Prods. Co. v. Younger*, 54 F.3d 1234, 1240 (7th Cir. 1995); *Pickwick Stage Lines, Inc. v. Edwards*, 64 F.2d 758, 762-63 (10th Cir. 1933); *James Stewart & Co. v. Newby*, 266 F. 287, 295-96 (4th Cir. 1920); MUELLER & KIRKPATRICK, *supra* note 83, § 153.

90. Most of the litigation under the enumerated "exceptions" has centered on the admissibility of liability insurance to show a witness's bias. See *Charter v. Chleboard*, 551 F.2d 246, 248-49 (8th Cir. 1997) (holding that it was reversible error to exclude evidence that the witness was employed by defendant's insurer); *Conde v. Starlight 1, Inc.*, 103 F.3d 210, 213-14 (1st Cir. 1997) (finding no problem with repeated reference to the witness as an "adjuster"); *Palmer v. Kruger*, 897 F.2d 1529, 1537-38 (10th Cir. 1990) (affirming cross-examination references to insurance policy to show witness bias); *Granberry v. O'Barr*, 866 F.2d 112, 114 (5th Cir. 1988) (finding no abuse of discretion for failure to allow evidence of insurance policy on cross-examination of eyewitness who worked for insurance company); *Varlack v. SWC Caribbean, Inc.*, 550 F.2d 171, 176-77 (3d Cir. 1977) (finding no error in asking witness whether

use of "such as" shows that the enumerated exceptions are intended to be illustrative rather than exclusive.⁹¹ Evidence of liability insurance offered for a potentially permissible purpose, such as a bias, is not automatically admissible, but is subject to Rule 403 which requires consideration, *inter alia*, of the danger of unfair prejudice.⁹²

There is authority that Rule 411 does not require exclusion of evidence of liability insurance when the evidence is relevant on the issue of compensatory or punitive damages.⁹³ This position is supported by the language of Rule 411, which requires exclusion only when evidence of liability insurance is offered to show that a party "acted negligently or otherwise wrongfully[.]" Admission of evidence of liability insurance on the issue of damages, however, seems inconsistent with Rule 411's dominant purpose of attempting to prevent inflated jury verdicts stemming from juror knowledge that an insurance company will be paying the defendant's monetary liability.

B. CRITICISMS OF THE EXCLUSIONARY RULE

Although the adoption of Rule 411 was noncontroversial, the exclusionary rule for liability insurance has generated a tremendous amount of scholarly criticism.⁹⁴ Critics have urged that jurors should know the real

he had prepared a written statement for the insurance company). In the same vein, counsel are allowed to question and challenge prospective jurors about their employment by or interest in insurance companies. STRONG, *supra* note 77, § 201; 2 WIGMORE, *supra* note 77, § 282a(3). For other examples of permissible purposes for evidence of liability insurance coverage see *Morrissey v. Welsh Co.*, 821 F.2d 1294, 1305 (8th Cir. 1987) (upholding evidence of liability insurance admitted to show reason safety inspections were made), and *Posttape Assocs. v. Eastman Kodak Co.*, 537 F.2d 751, 757-58 (3d Cir. 1976) (finding the fact that plaintiff had liability insurance relevant to show plaintiff knew of alleged trade custom of limiting liability of entities like defendant).

91. FED. R. EVID. 411.; MUELLER & KIRKPATRICK, *supra* note 83, § 154; 1 M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 411.1 (5th ed. 2001).

92. *Pinkham v. Burgess*, 933 F.2d 1066, 1072 (1st Cir. 1991); *Granberry*, 866 F.2d at 114; *Morrissey*, 821 F.2d at 1306; *Charter*, 551 F.2d at 249. Rule 403 provides that: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." FED. R. EVID. 403. When evidence, like a party's liability insurance, may be admissible for one purpose though not for another purpose, the trial judge in making the Rule 403 evaluation must consider the likely effectiveness of a limiting instruction. FED. R. EVID. 403 advisory committee's note; GRAHAM, *supra* note 77, § 411.1.

93. *Larez v. Holcomb*, 16 F.3d 1513, 1524 n.3 (9th Cir. 1994); *DSC Communications Corp. v. Next Level Communications*, 929 F. Supp. 239, 246-47 (E.D. Tex. 1996); 23 WRIGHT & GRAHAM, *supra* note 77, § 5364; *see infra* Part V.B (discussing the approach of the *Larez* court regarding the punitive damages issue).

94. *See* STRONG, *supra* note 77, § 201; 2 WIGMORE, *supra* note 77, § 282a (criticizing the exclusionary rule for liability insurance); 23 WRIGHT & GRAHAM, *supra* note 77, § 5362 (stating that scholars "almost without exception, have been critical of the 'archaic legal principal' upon which Rule 411 is based"); Leon Green, *Blindfolding the Jury*, 33 TEX. L. REV. 157, 164 (1954)

party in interest and probably do. For instance, *McCormick on Evidence* argues that because jurors likely understand that the defendant is covered by liability insurance, the exclusionary rule is "a hollow shell, expensive to maintain and of doubtful utility."⁹⁵ *Wigmore on Evidence* argues that for the law to forbid any disclosure of liability insurance "seems to be merely a piece of hypocritical futility."⁹⁶

Evidence scholars have concluded that "other methods can be designed which would be far more effective than the blindfolding of the jury."⁹⁷ *McCormick on Evidence* proposes that a better solution would allow the district court and the parties to inform the jury about defendant's liability insurance, while issuing cautionary instructions explaining that the jury has a "duty to decide according to the facts and substantive law, rather than upon sympathy, ability to pay, or concern about proliferating litigation and rising insurance premiums."⁹⁸ Wright and Graham suggest that procedural rules like remittitur are better suited to preventing excessive verdicts "than a rule of evidence barring a party from proving what the jury already knows or suspects."⁹⁹ Despite the ongoing criticisms, the exclusionary rule for liability insurance lives on. The next question, then, is whether government

(stating that scholars "almost without exception" have been critical of the liability insurance exclusionary rule that is subject to an "avalanche" of scholarly criticism).

95. STRONG, *supra* note 77, § 201.

96. 2 WIGMORE, *supra* note 77, § 282a; *see also* Ede v. Atrium S. OB-GYN 642 N.E.2d 365, 368 (1994) (stating that it is "naïve" to think that jurors do not know doctors in malpractice cases are covered by liability insurance: "The legal charade protecting juries from information they already know keeps hidden from them relevant information that could assist them in making their determinations."). The court also states that given the "sophistication" of jurors, the Rule 411 exclusionary rule "does not merit the enhanced protection it has been given[.]" and that the "second sentence of Evid. R. 411, which allows courts to operate in a world free from truth-stifling fictions, ought to be embraced." *Id.*; Young v. Carter, 173 S.E.2d 259, 260 (1970) (Hall, J., concurring):

The time has come to end this continuing charade over whether or not a defendant has liability insurance. It holds the law up to ridicule by laymen and thereby contributes to an unfortunate disrespect for law, order, courts and justice Any juror who doesn't know that there is liability insurance in the case by this time should probably be excused by virtue of the fact that he or she is an idiot.

It has also been argued that there is no empirical support for the view that juries will award higher damages if they know the defendant is protected by liability insurance. STRONG, *supra* note 77, § 201.

97. Green, *supra* note 94, at 164.

98. STRONG, *supra* note 77, § 201.

99. WRIGHT & GRAHAM, *supra* note 77, § 5364; *see also* Green, *supra* note 94, at 164 n.22 (discussing alternate methods including remittitur). Wright and Graham characterize the justifications for the exclusionary rule set forth in the advisory committee note to Rule 411 as "shabby." WRIGHT & GRAHAM, *supra* note 77, § 5364. On the issue of remittitur, *see infra* note 220.

indemnification is or should be governed by the exclusionary rule for liability insurance.

IV. INDEMNIFICATION COMPARED TO INSURANCE

Is governmental indemnification a form of insurance within the meaning of the exclusionary rule for liability insurance? There are few decisions on this issue under either common law¹⁰⁰ or Rule 411, and the issue remains unsettled.¹⁰¹

Because both private liability insurance and government indemnification provide potential protection against monetary liability, most courts have equated the two. The Eighth Circuit, in condemning plaintiff's counsel's statement in his closing argument that the government will pay any damages awarded against the defendant police officers, said it saw "no distinction between [indemnification] and the injection of testimony or argument concerning insurance"¹⁰² The Second Circuit said that a New York indemnification statute "operates as a form of insurance for New York's public officers" and that "New York acts as an insurer through the indemnity provision"¹⁰³

Other authorities, however, have not embraced the analogy between liability insurance and statutory indemnification. Wright and Graham argue that although devices shifting financial responsibility for a judgment, such as "bonding arrangements, contracts of indemnification, 'hold-harmless clauses,' and voucher[s] to warranty" may present the same problems of relevance and unfair prejudice as proof of liability insurance, it is "difficult to characterize these [devices] as 'liability insurance.'"¹⁰⁴ They thus conclude that it is better to evaluate the admissibility of these devices under general principles of relevance and Rule 403 than under the liability insurance exclusionary rule.¹⁰⁵ One critical distinction between liability insurance and

100. See WRIGHT & GRAHAM, *supra* note 77, § 5363 (stating that "there are a few common law decisions applying the insurance rule by analogy to these arrangements").

101. See *Larez v. Holcomb*, 16 F.3d 1513, 1519 n.6 (9th Cir. 1994) (Pregerson, J., concurring in part and dissenting in part) (stating that it is unclear whether Rule 411 "reaches jury instructions concerning indemnification by the government").

102. *Griffin v. Hilke*, 804 F.2d 1052, 1058 n.3 (8th Cir. 1986); see *infra* notes 109-16 and accompanying text (discussing *Griffin v. Hilke*).

103. *Derechin v. State Univ. of N.Y.* 963 F.2d 513, 518 (2d Cir. 1992). New York courts have also analogized statutory indemnification of governmental officers to private insurance contracts. *Polak v. City of Schenectady*, 585 N.Y.S.2d 844, 846 (1992); *Giordano v. O'Neill*, 517 N.Y.S.2d 41, 42 (1987); *Garcia v. Abrams*, 471 N.Y.S.2d 161, 163 (1984); see *Oladeinde v. City of Birmingham*, 118 F. Supp. 2d 1200 (N.D. Ala. 1999) (relying on insurance principles to decide indemnification issues).

104. WRIGHT & GRAHAM, *supra* note 77, § 5363, at 445. Wright and Graham note that "Liability insurance" is the title of Rule 411. *Id.* at 445 n.60. Rule 403 is set forth in *supra* note 92.

105. WRIGHT & GRAHAM, *supra* note 77, § 5363, at 445; see *DSC Communications Corp. v. Next Level Communications*, 929 F. Supp. 239 (E.D. Tex. 1996) (noting that admissibility of an

government indemnification is that, unlike insurance companies, municipalities that agree to indemnify their employees "have not been paid to assume risks; they are unable to spread such risks among 'policy holders.'"¹⁰⁶ Of course, municipal taxpayers are not akin to insurance policy holders. Policy holders make a voluntary choice to obtain insurance for which they agree to pay premiums. Taxpayers, by contrast, are mandated by government to pay taxes most would prefer not to pay. In addition, because insurance companies operate for profit, but municipalities do not, insurance companies have greater financial capacity to bear the costs of indemnification.

The balance of similarities and differences makes it unclear whether it is appropriate to equate government indemnification with liability insurance for purposes of Rule 411. Therefore, the critical question is not whether government indemnification technically falls within Rule 411, but whether the competing policy considerations favor disclosure or nondisclosure.¹⁰⁷ Before making this evaluation, it is necessary to analyze the decisional law governing the disclosure indemnification issue in § 1983 actions.

V. DECISIONAL LAW GOVERNING DISCLOSURE OF INDEMNIFICATION IN § 1983 ACTIONS

A. COMPENSATORY DAMAGES

The weight of authority in the federal courts of appeals treats government indemnification of employee § 1983 liability in the same manner as private liability insurance, and thus generally excludes this

indemnification agreement should be evaluated under Rule 403, not Rule 411).

106. *Larez v. Holcomb*, 16 F.3d 1513, 1524 (9th Cir. 1994) (Pregerson, J., concurring in part and dissenting in part). In *DSC Communications Corp.*, 929 F. Supp. at 243, the district court, citing Judge Pregerson's opinion in *Larez*, 16 F.3d at 1524, listed the following characteristics of liability insurance:

1. The insurer is paid to take the risk in question;
2. the insurer is well able to pay;
3. the insurer has agreed to indemnify the insured from liability to third persons as contrasted with coverage from losses sustained by the insured;
4. the insurer will spread the loss among its policy holders;
5. the insured will be disinclined to take an action which might cause the insurer to pay on a liability claim since the insured's premiums will rise; and
6. the insured is insuring a future risk.

The district court in *DSC Communications Corp.* found that the indemnification agreement at issue satisfied the first two characteristics, but not any of the remaining ones. The court thus concluded that the jury's possible misuse of the indemnification agreement should be evaluated under Rule 403 rather than under Rule 411. *Id.* at 245 n.4.

107. See *infra* Part VI (discussing whether the jury should be informed of indemnification).

information from the jury.¹⁰⁸ The Eighth Circuit was the first circuit court to consider the issue in a § 1983 action. In *Griffin v. Hilke*,¹⁰⁹ police officer Hilke shot Griffin in the leg while attempting to arrest him. Griffin brought suit in federal court asserting § 1983 excessive force claims against officer Hilke and another officer. During the closing argument, plaintiff's counsel told the jury that:

When the police officer makes a careless, unprofessional judgment using his weapon, *he is the representative of the government and the government owes* Eric Griffin suffers mutilation. That is his punishment and we say when that happens, it deserves to be compensated When the thin blue line crosses over the line and they go into your house . . . and they tear a house apart because they think there's narcotics in there and it proves that they didn't think hard enough and they didn't find any, *by God the government owes those people to replace their house.* Or when they stop your car and rip out your dashboard because, well, they think but they haven't thought hard enough about it, *by God they owe you for that. They're obligated to repay that.* And nowhere is it more important, ladies and gentlemen, that when they think that they need to shoot, they have . . . good reason to shoot but they don't know the actual rules and regulations about shooting, when they make a mistake, *by God, they owe for it.*¹¹⁰

The jury awarded the plaintiff \$750,000, and the officers appealed. They argued that the district court erred in allowing these statements during closing argument because they "explicitly stated and implied that the government would be responsible for paying any judgment."¹¹¹ The Eighth Circuit held that the district court committed prejudicial error in allowing the closing remarks without special admonition or instruction to the jury.¹¹²

The circuit court relied upon decisions holding "that interjection of the fact that the defendant is protected by insurance or other indemnity may be prejudicial error requiring reversal."¹¹³ The court said that the policy behind

108. *Lawson v. Trowbridge*, 153 F.3d 368, 379 (7th Cir. 1998) (dictum); *Larez*, 16 F.3d at 1519-20; *Green v. Baron*, 879 F.2d 305, 310 (8th Cir. 1989); *Griffin v. Hilke*, 804 F.2d 1052, 1057 (8th Cir. 1986); *Joseph v. Brierton*, 739 F.2d 1244, 1249-50 (7th Cir. 1984) (implicit holding).

109. 804 F.2d 1052 (8th Cir. 1986).

110. *Id.* at 1056-57.

111. *Id.* at 1056.

112. *Id.* at 1057.

113. *Id.* at 1057. One of the decisions relied upon in *Griffin* was decided under Rule 411. See *Higgins v. Hicks Co.*, 756 F.2d 681, 684-85 (8th Cir. 1985) (noting that evidence of state's liability insurance was not admissible under Rule 411 to eliminate any bias of jurors as taxpayers of defendant state). The other decisions relied upon in *Griffin* were decided prior to the adoption of the Federal Rules of Evidence, namely *Transit Casualty Co. v. Transamerica Insurance Co.*, 387 F.2d 1011 (8th Cir. 1967), and *Halladay v. Verschoor*, 381 F.2d 100 (8th Cir. 1967).

these decisions, as well as Rule 411, is that the jury's knowledge of insurance or indemnity protection could result in "an unduly generous award of damages by the jury."¹¹⁴ Although the police officer defendants cited no authorities specifically dealing with the question of indemnification in § 1983 actions, the circuit court saw no distinction between the plaintiff counsel's closing argument and testimony or argument concerning liability insurance.¹¹⁵ The court held that because the jury's knowledge that the government would be responsible for paying the damages could result in an overly generous award of damages, the error was prejudicial and required reversal.¹¹⁶

The Ninth Circuit's decision in *Larez v. Holcomb*¹¹⁷ contains the most extensive analysis of the indemnification disclosure issue. The plaintiff in *Larez* alleged that defendant, Detective Holcomb, stopped, arrested, and detained her without probable cause in violation of the Fourth Amendment.¹¹⁸ She sought compensatory and punitive damages against Holcomb in his individual capacity.¹¹⁹ The jury returned a verdict in plaintiff's favor awarding her \$5,000 compensatory damages and \$50,000 punitive damages.¹²⁰ On appeal, Detective Holcomb argued, inter alia, that the district court committed reversible error in both instructing the jury that the City of Los Angeles would indemnify Holcomb for any compensatory damages awarded against him, and in allowing plaintiff's counsel to inform the jury during closing argument that the city was authorized to indemnify Holcomb for punitive damages.¹²¹ The circuit court agreed with the defendant.¹²²

At the trial, the district court instructed the jury that the City would indemnify Detective Holcomb for any compensatory damages that it might award to *Larez*. The instruction stated:

If an employee of a public entity requests the public entity to defend him against any claim arising out of an act made within the scope of his employment, and gives the entity sufficient notice, and

114. *Griffin*, 804 F.2d at 1057.

115. *Id.* at 1058.

116. *Id.* In a follow up case to *Griffin*, the Eighth Circuit directed the district court that at the new trial, it "should not instruct the jury that the State of Iowa will indemnify the defendants" because such an "instruction is extremely prejudicial." *Green v. Baron*, 879 F.2d 305, 310 (8th Cir. 1989). The Eighth Circuit is thus strongly opposed to the jury learning about governmental indemnification. In its view, instructing the jury about indemnification is not just error, but "extremely prejudicial" error. *Id.*

117. 16 F.3d 1513 (9th Cir. 1994).

118. *Id.* at 1515.

119. *Id.* at 1516.

120. *Id.*

121. *Id.* at 1518, 1520; see *infra* text accompanying notes 163-79 (discussing punitive damages).

122. *Larez*, 16 F.3d at 1519-20.

reasonably cooperates in good faith in the defense of the claim, the public entity shall pay any compensatory damages awarded.¹²³

The circuit court acknowledged that the district court apparently had a legitimate motive in giving this instruction—namely, its concern that because jurors were likely to feel sympathy for Detective Holcomb, a public servant earning a relatively modest salary, “they might decide not to compensate Larez fully so as not to place an undue financial burden on Holcomb.”¹²⁴ The circuit court nevertheless held that the indemnification instruction was reversible error because it violated the long-standing principle “that evidence of insurance or other indemnification is not admissible on the issue of damages”¹²⁵ The court followed the Eighth Circuit decisions in *Griffin v. Hilke*¹²⁶ and *Green v. Baron*.¹²⁷ It opined that its decision was consistent with Rule 411, but did not rest its decision on that basis both because it was unclear whether Rule 411 encompasses government indemnification, and because the parties did not brief the issue.¹²⁸

The circuit court shared the district court’s concern that juror sympathies for Detective Holcomb’s financial circumstances might distract the jury from a dispassionate determination of an appropriate damages award, but found that this concern did not justify the indemnification instruction.¹²⁹ Rather, the district court should have addressed this concern with a “firm abomination” that if the jury determined that plaintiff’s constitutional rights had been violated, it “should calculate damages based solely on the injuries actually suffered by Larez, without regard for Holcomb’s finances or the jury’s personal likes and dislikes.”¹³⁰

At the same time, the court acknowledged that in assessing

123. *Id.* at 1519.

124. *Id.* The district court had explained:

It’s because the jury in these civil rights cases sometimes [is] concerned that the officer might have to pay damages that they award, and if he does, they are concerned that maybe he won’t have the ability to do so just because of the salary that they assume that officers make. . . . [S]o the reason that the instruction is given is because if the jury is worried about who is going to pay, this instruction tells them that the City may pay.

Id. at 1519 n.5.

125. *Id.* at 1518.

126. 804 F.2d 1052, 1057 (8th Cir. 1986).

127. 879 F.2d 305, 310 (8th Cir. 1989); *see supra* note 116 (discussing the court’s opposition to informing juries of governmental indemnification). For a discussion of the two Eighth Circuit decisions, *see supra* notes 109–13 and accompanying text.

128. *Larez*, 16 F.3d at 1520 n.6 (“Rule 411 expressly covers the admissibility of evidence of insurance for purposes of determining liability, but it is unclear whether it reaches jury instructions concerning indemnification by the government.”).

129. *Id.* at 1519.

130. *Id.*

compensatory damages there is no way to ensure that jurors will "focus exclusively" on the injuries suffered by the plaintiff.¹³¹ The *Larez* majority was especially concerned that an instruction informing the jury about indemnification could distract the jury from awarding damages based solely on the plaintiff's injuries. Having been told that Detective Holcomb would not pay the compensatory damages, "the jury might have been tempted, out of sympathy for *Larez*, to inflate the award beyond the amount necessary to compensate her."¹³² Furthermore, if jurors can be told that the government will indemnify the officer, presumably the officer would be allowed to explain that the government indemnification will come from tax revenues. "Instead of focusing the jury's attention on the injury actually suffered by the plaintiff, we would be subjecting the jury to a flurry of largely irrelevant assertions and counter-assertions concerning who may or may not be financially harmed by [the compensatory] award."¹³³ Because there was no indication that the improper indemnification instruction infected the jury's determination of liability, the circuit court upheld that determination, but reversed the award of damages and remanded for a new trial on damages.¹³⁴

Judge Pregerson, dissenting on this point, found the indemnification instruction was not erroneous because "the jury is entitled to hear the truth."¹³⁵ He found that any danger of jury inflation of a compensatory award because of its knowledge of indemnification does not "outweigh the danger of allowing a deflated award by omitting the instruction."¹³⁶ Therefore, in his view, the district court properly concluded that the indemnification instruction was necessary to ensure that the jury would fairly compensate *Larez*. Judge Pregerson also found that the indemnification instruction did not violate Rule 411 because indemnification is not the same as insurance; a municipality is not an insurance company; it has "not been paid to assume risks" and is "unable to spread such risks among 'policy holders . . .'"¹³⁷

131. *Id.*

132. *Id.*

133. *Larez*, 16 F.3d at 1519.

134. *Id.* at 1520.

135. *Id.* at 1525 (Pregerson, J., concurring in part and dissenting in part). Judge Pregerson quoted Mark Twain by stating "when in doubt, tell the truth." *Id.* Judge Pregerson opined, without supporting authority, that "jurors very likely already know that a government employee in a civil rights case personally will not pay any damage award against him or her." *Id.* For a discussion of why this conclusion by Judge Pregerson is problematic, see *infra* text accompanying notes 215-16.

136. *Larez*, 16 F.3d at 1524 (Pregerson, J., concurring in part and dissenting in part).

137. *Id.* Judge Pregerson opined that even if Rule 411 were applicable, it would not bar the indemnification instruction because the instruction went only to the issue of damages. He also noted that Rule 411 "does not prohibit the use of evidence of insurance where it is relevant to the issue of damages or punitive damages." *Id.* at 1524 n.3 (citing 23 WRIGHT & GRAHAM, *supra* note 77, § 5364, at 449 n.20, for the proposition that the common law exclusionary rule for liability insurance was not applicable when evidence was sought to be introduced to prove

Thus, while the *Larez* majority's greatest concern was that an indemnification instruction might result in a larger compensatory award, the primary concern of the dissent and the district court was that the absence of such an instruction might result in a deflated compensatory award. Since both the *Larez* majority and dissent articulate the identical goal that a compensatory award reflect the actual injuries the plaintiff suffered, the differences between the majority and dissent could be viewed as essentially reflecting pro-defendant (majority) versus pro-plaintiff (dissent) attitudes.¹³⁸

The Seventh Circuit has indicated that it supports a general prohibition against informing the jury about government indemnification of public officials in § 1983 actions.¹³⁹ In *Joseph v. Brierton*,¹⁴⁰ a § 1983 action against prison officials arising from the death of a prisoner, defense counsel was "very concerned to keep from the jury the fact that the State of Illinois indemnifies its employees for any judgments entered against them in suits growing out of their employment."¹⁴¹ Defense counsel thus asked the district court to order plaintiff's counsel not to mention that the defendants would be indemnified if they lost, and the district court issued the order.¹⁴² Although plaintiff's counsel scrupulously obeyed the order, defense counsel in his closing argument misled the jury by insinuating "that a large judgment would ruin his clients, though he knew that it would not cost them a cent."¹⁴³ The jury returned a verdict for the defendants and plaintiff appealed.¹⁴⁴ The Seventh Circuit held that the defense counsel's argument was improper because it misled the jury and took unfair advantage of the order he himself had procured.¹⁴⁵

The district court had attempted to cure the problem by instructing the jury not to concern itself with the defendants' ability to pay.¹⁴⁶ The circuit court held that this curative instruction was inadequate to cure the defendant's misleading closing argument, in part because its efficacy was

damages). For further discussion of indemnification versus insurance, see *supra* Part IV.

138. The *Larez* court's analysis of disclosure of punitive damages is discussed *infra* Part VB.

139. *Lawson v. Trowbridge*, 153 F.3d 368, 380 (7th Cir. 1998); *Joseph v. Brierton*, 739 F.2d 1244, 1246-48 (7th Cir. 1984). These two decisions are discussed in the text *infra*.

140. 739 F.2d 1244 (7th Cir. 1984).

141. *Id.* at 1246.

142. *Id.*

143. *Id.* at 1247.

144. *Id.* at 1245.

145. *Joseph*, 739 F.2d at 1247.

146. *Id.* The instruction stated:

If you decide liability in this case and therefore turn to the question of damages, do not concern yourself with the defendants' ability to pay. If there is a judgement that problem will be addressed later. A judgement, if any, should reflect your decision as to the appropriate amount of damages to be awarded to the plaintiff. . . .

uncertain.¹⁴⁷ Although not confronting the issue directly, the circuit court seemed, at least implicitly, to acknowledge the validity of the district court order barring plaintiff's counsel from mentioning that defendants would be indemnified.

The Seventh Circuit's decision in *Lawson v. Trowbridge*¹⁴⁸ also acknowledged agreement with the general principle that evidence of government indemnification is not admissible, but held that defense counsel's argument about the defendant police officers' personal finances "opened the door" to disclosure of indemnification.¹⁴⁹

The testimony of the defendant police officers during the liability phase of the trial was "devoted almost exclusively" to demonstrating their limited net worths.¹⁵⁰ During the closing argument, defense counsel highlighted the fact that defendants' personal finances were at stake.¹⁵¹ Defendants' testimony and the closing argument let the jury know that the defendant officers could not afford to pay substantial damages for the violation of the plaintiff's constitutional rights.¹⁵²

The plaintiff attempted to counter defendant's testimony by showing that under Wisconsin's indemnification statute,¹⁵³ the defendant officers

147. *Id.* at 1247. Although the circuit court acknowledged that this instruction is given "all the time" because it may help a conscientious jury avoid being influenced by extraneous considerations, it was inadequate to cure the improper statements made by defense counsel because "the efficacy of such an instruction is always uncertain," in part because "[t]elling a jury not to think about something may simply rivet the jurors' attention to it." *Id.* at 1247. Judge Posner's assertion has been supported empirically. An experiment was conducted in which people were asked not to think of a white bear. Each person was then isolated in a laboratory room. The people who participated in the experiment had a hard time not thinking about a white bear. D.M. WEGNER, WHITE BEARS AND OTHER UNWANTED THOUGHTS 2-3 (V. King ed., 1989).

148. 153 F.3d 368 (7th Cir. 1998).

149. *Id.* at 379. The plaintiff in *Lawson* alleged under § 1983 that he was arrested without probable cause, that while in custody government officials failed to provide medical care for his disease, schizophrenia, and that they aggravated his condition by placing him in solitary confinement for long periods of time. *Id.* at 370.

150. *Id.* at 378.

151. Defense counsel stated:

They've been doing a good job that very few of us would want to do for very little pay and have accumulated very little assets for all their time in public service. And in making all of your award I ask you to keep in mind that they have received very little compensation for what they have done. *I ask you to keep in mind their situation, their financial situation and to make your award an award that keeps all of that firmly in perspective.*

Id. at 379.

152. *Id.* "The circuit court noted that although evidence of the officer's financial circumstances is inadmissible if the defendant will be indemnified, the district court allowed the defendant officers to highlight their financial circumstances, perhaps because [plaintiff] did not object." *Id.* at 379.

153. WIS. STAT. § 895.46 (1997).

"faced no personal responsibility to pay the jury's damages award so long as they were acting within the scope of their employment" ¹⁵⁴ The district court rejected plaintiff's proffer, "relying upon the general rule that evidence of payments received from collateral sources is inadmissible." ¹⁵⁵

After finding the defendant officers liable, the jury awarded the plaintiff only nominal damages. ¹⁵⁶ On appeal, the plaintiff argued, *inter alia*, that the district court's refusal to allow him to counter the officers' testimony of their limited means with evidence that the officers were protected by the indemnification statute was prejudicial error. ¹⁵⁷ The Seventh Circuit agreed. The circuit court found that without the evidence of indemnification, the officers' testimony and defense counsel's closing argument left the jury with an erroneous impression that the officers were personally responsible for any damages awarded against them. ¹⁵⁸ The circuit court acknowledged that it is generally improper to inform the jury about indemnification, ¹⁵⁹ but found that the police officers' testimony about their limited financial resources "opened the door" to the issue of indemnification. ¹⁶⁰ Because the only reasonable interpretation of defendants' testimony and argument was that the defendants could not afford to pay substantial compensatory damages, the district court's refusal to allow plaintiff's counsel to rebut by showing that the defendant officers were protected by state indemnification law, and thus "were not personally on the hook," was prejudicial error. ¹⁶¹

The circuit court provided a cogent explanation of why the general prohibition against disclosure of government indemnification did not apply in the instant case:

In the general case courts exclude evidence of indemnification out of a fear that it will encourage a jury to inflate its damages award because it knows that government—not the individual defendants—is footing the bill. Here the rationale for applying the general rule dissolved once the defendants made their financial weakness the centerpiece of their testimony in the damage phase of the trial. At that point, their direct testimony "opened the door"

154. *Lawson*, 153 F.3d at 379.

155. *Id.*

156. *Id.* at 372.

157. *Id.*

158. *Id.* at 379.

159. *Lawson*, 153 F.3d at 380 (referring to the "general rule" against admitting evidence of a "collateral source"); *see also id.* at 379 (explaining that courts generally exclude evidence of indemnification because of "fear that it will encourage a jury to inflate its damages because it knows the government—not the individual defendants—is footing the bill." (citing *Larez v. Holcomb*, 16 F.3d 1513, 1519 (9th Cir. 1994))).

160. *Lawson*, 153 F.3d at 379 (quoting *Kemezy v. Peters*, 79 F.3d 33, 37 (7th Cir. 1996) ("We have noted the inappropriateness of allowing the defendant to plead poverty if he will be indemnified."))

161. *Id.* at 379.

and the district court should have permitted [the plaintiff] to point to [the state] indemnification statute.¹⁶²

Lawson thus holds that if the trial court errs by allowing defendant official to introduce evidence of personal financial circumstances, the error should not be compounded by depriving plaintiff of the opportunity to rebut with evidence that the defendant officer will be indemnified.

In sum, sparse circuit court authority treats indemnification like private insurance and requires its exclusion on the issue of compensatory damages. The circuit courts also hold, however, that if the defendant officer will be indemnified, it is improper for defense counsel to mislead the jury into thinking that compensatory damages will be payable from the officer's funds. In these circumstances, decisional law holds that the trial judge should allow plaintiff's counsel to inform the jury about indemnification.

B. PUNITIVE DAMAGES

Federal courts do not agree whether it is appropriate for the jury to be informed that the government will indemnify the defendant officer's punitive damages.¹⁶³ In *Larez v. Holcomb*,¹⁶⁴ the district court indicated to counsel for the parties that it would instruct the jury that the city would indemnify Detective Holcomb for any punitive damages awarded.¹⁶⁵ However, the district court never gave the instruction.¹⁶⁵ Plaintiff's counsel, perhaps encouraged by the district court's intentions, told the jury in closing argument that the city was authorized to pay punitive damages awarded against Detective Holcomb.¹⁶⁷ The circuit court held that the district court erred in allowing this argument, and that the error necessitated a new trial

162. *Id.* (citation omitted); see also *Bernier v. Bd. of County Road Comm'rs*, 581 F. Supp. 71, 78 (W.D. Mich. 1983) (observing that, in a wrongful death suit, "should the nature of defendant's proofs be such that the jury might infer defendant's inability to pay a judgment, evidence that defendant has liability insurance may become admissible as an exception to the general prohibition of insurance contained in Fed. R. Evid. 411."). The circuit court in *Lawson* concluded that given the jury's decision to assess only nominal damages against the defendant officers, the district court's order "was not harmless." 153 F.3d at 380.

163. Compare *Larez v. Holcomb*, 16 F.3d 1513, 1521 (9th Cir. 1994) (concluding it is improper to inform a jury about indemnification of punitive damages), with *Perrin v. Anderson*, 784 F.2d 1040, 1047-48 (10th Cir. 1986) (holding that the district court did not err in allowing defense counsel to inform jury defendant officers will be personally liable for punitive damages). See *Lewis v. Parish of Terrebonne*, 894 F.2d 142, 146 (5th Cir. 1990) (finding that the district court did not err in excluding evidence that some defendant officers had insurance against punitive damages); *O'Neill v. Krzeminski*, 839 F.2d 9, 13 (2d Cir. 1988) (upholding the district court's refusal to instruct the jury that the city, which had an indemnification agreement with defendants, was not a defendant in the instant case and should not be considered in determining amount of punitive damages).

164. 16 F.3d 1513 (9th Cir. 1994).

165. *Id.* at 1520.

166. *Id.*

167. *Id.*

on punitive damages.¹⁶⁸ Applying the “same common law principles and equitable considerations” that it did for compensatory damages,¹⁶⁹ the majority concluded that the city’s authorization to indemnify Holcomb for punitive damages was not relevant to the jury’s calculation of punitive damages, and could only have distracted it from “arriving at a punitive award appropriate to the wrongdoing of Holcomb.”¹⁷⁰

The majority acknowledged that municipal indemnification of punitive damages considerably diminished the “sting” and deterrent effect of punitive damages, “but, from the perspective of the wrongdoer, who pays nothing regardless of the size of the award, this reduction in ‘sting’ occurs no matter what amount the jury assesses.”¹⁷¹ In the majority’s view, informing the jury about indemnification would provide a windfall to plaintiffs at the expense of the taxpayers, with little appreciable enhancement of deterrence.¹⁷²

Judge Pregerson, dissenting in part in *Larez*, argued that the jury should be informed about government indemnification of compensatory damages,¹⁷³ and took the same position with respect to punitive damages.¹⁷⁴ Although the majority was concerned about a possible windfall to civil rights plaintiffs, Judge Pregerson believed that it was just as arguable that jurors, being taxpayers, might award lower punitive damages if they knew that the city, rather than the official, would be footing the bill.¹⁷⁵ As with indemnification of compensatory damages, “the jurors are entitled to hear the *whole* truth.”¹⁷⁶ Given the trial court’s broad discretion in controlling closing arguments, Judge Pregerson concluded that allowing the closing

168. *Id.* at 1521.

169. *Larez*, 16 F.3d at 1521; *see supra* notes 117-38 and accompanying text (detailing the facts and disposition of the *Larez* case).

170. *Larez*, 16 F.3d at 1521.

171. *Id.*

172. *Id.* (discussing *Keenan v. City of Philadelphia*, 983 F.2d 459, 477-84 (3d Cir. 1992) (Higginbotham, J., dissenting), which “point[ed] out [the] tension between [the] deterrent rationale for punitive damages and taxpayer indemnification of punitive awards . . .”). The Ninth Circuit has also rejected attempts by § 1983 plaintiffs to introduce evidence of municipal indemnification of punitive damages in order to show municipal ratification of police misconduct. *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) (finding that a city’s discretionary decision to indemnify police officers for punitive damages is not a ratification of unconstitutional police conduct); *Freeman v. Santa Ana*, 68 F.3d 1180, 1190 (9th Cir. 1995) (upholding the district court’s determination that evidence of indemnification offered on the issue of municipal liability was more prejudicial than probative, especially since the police chief’s policymaking authority provided alternative basis for holding city liable); *see also supra* note 69 (describing *Trevino* and similar cases).

173. *Larez*, 16 F.3d at 1524-25 (Pregerson, J., concurring in part and dissenting in part); *see supra* notes 135-37 and accompanying text (detailing the dissent’s arguments).

174. *Larez*, 16 F.3d at 1525 (Pregerson, J., concurring in part and dissenting in part).

175. *Id.*

176. *Id.*; *see supra* text accompanying note 135 (citing the identical quotation).

argument on indemnification was not an abuse of discretion.¹⁷⁷

Interestingly, what divided the majority and dissent on punitive damages was the prognostication of how jurors who are given information about indemnification are likely to use that information. The majority's great fear was that jurors, armed with information that the city would be paying the punitive damages, would use that information to justify inflating punitive damages.¹⁷⁸ The dissent, however, believed that jurors who know that the taxpayers would in fact be paying the punitive damages might, out of self-interest, award lower punitive damages.¹⁷⁹

More fundamentally, the majority and dissent were in disagreement over whether it is appropriate to conceal from the jury information about who will ultimately be footing the bill for punitive damages. Judge Pregerson advocated a realistic jurisprudence in which jurors should know the truth. The majority, following the policies behind the rule generally excluding evidence of liability insurance, believed that more harm than good would result from instructing the jury about indemnification.

There is other circuit court authority that is consistent with the majority decision in *Larez* that the jury should not be informed about indemnification of punitive damages. In *Lewis v. Parish of Terrebonne*,¹⁸⁰ the complaint alleged that Lewis committed suicide while a detainee in solitary confinement. The jury determined that Lewis had been deliberately denied necessary medical care, yet awarded his estate no compensatory damages, and punitive damages of only \$6,279 to cover the funeral costs.¹⁸¹ On appeal, plaintiffs argued that the jury's "paltry punitive damage award" was attributable to the district court's exclusion of evidence that some defendants had insurance coverage against punitive damages.¹⁸² The circuit court concluded, with neither analysis nor authority, that exclusion of the evidence was not an abuse of discretion.¹⁸³ The circuit court found "no authority that evidence of insurance must be admitted when a claim for punitive damages has been made."¹⁸⁴

Lewis holds only that the law does not mandate admission of evidence of

177. *Id.* (citing *People v. Ignacio*, 825 F.2d 459, 462 (9th Cir. 1988)).

178. *Larez*, 16 F.3d at 1519.

179. *Id.* at 1524 (Pregerson, J., concurring in part and dissenting in part).

180. 894 F.2d 142 (5th Cir. 1990).

181. *Id.* at 144. The circuit court remanded the case to have the district judge determine any damages suffered by Lewis prior to his self-induced death. *Id.* at 149-50.

182. *Id.* at 146.

183. *Id.*

184. *Id.*; see also *Carr v. City of Florence*, 729 F. Supp. 783, 787 (N.D. Ala. 1990) (excluding evidence of a city council resolution authorizing indemnification of punitive damages, allowing evidence of defendant officer's personal finances, and distinguishing between the two by noting that evidence of indemnification "very well might influence the jury to render a large punitive award, not accomplishing the purpose of punishing the tortfeasor but getting into the deep pockets of the indemnitor . . .").

insurance of punitive damage. The court did not address the bigger issue of whether the law mandates exclusion of that type of evidence. Thus, it remains unclear whether it would have been error of law or abuse of discretion if the district court in *Lewis* had admitted the evidence.

The Second Circuit's decision in *O'Neill v. Krzeminski*,¹⁸⁵ is also consistent with the majority approach of excluding evidence of indemnification of punitive damages. However, like *Lewis*, *O'Neill* is a very limited decision. The plaintiff alleged claims of excessive force during his arrest and denial of medical care in violation of his constitutional rights against three police officers.¹⁸⁶ The jury awarded him compensatory and punitive damages.¹⁸⁷

There was an indemnification agreement between the city and the officers pursuant to which the city agreed to accept responsibility for the compensatory and punitive damages. On appeal, the defendant officers argued that the district court erred in refusing to instruct the jury that the city was not a defendant in the lawsuit and, therefore, should not be considered in determining the amount of damages.¹⁸⁸

The Second Circuit in *O'Neill* rejected the officers' argument. The circuit court held that the requested instruction was not compelled by the Supreme Court's holding in *City of Newport v. Fact Concerts, Inc.*¹⁸⁹ that municipalities are immune from punitive damages under § 1983.¹⁹⁰ The court said that it was "particularly unwilling to extend *Fact Concerts* to the

185. 839 F.2d 9 (2nd Cir. 1988).

186. *Id.* at 10.

187. *Id.* Punitive damages of \$125,000 were assessed against one officer, \$60,000 against a second officer, and \$35,000 against the third. *Id.*

188. Note should be taken of the various ways in which the indemnification disclosure issue arises. Usually, it is plaintiff's counsel who would like the jury to know that the defendant will be indemnified, undoubtedly with the hope that this will prompt the jury to award greater damages. *See, e.g.,* *Larez v. Holcomb*, 16 F.3d 1513, 1518 (9th Cir. 1994) (requiring a new trial on the issue of damages when the jury learned of defendant's indemnification); *Lewis v. Parish of Terrebonne*, 894 F.2d 142, 146 (5th Cir. 1990) (excluding evidence of defendant's insurance over plaintiff's objection); *Griffin v. Hilke*, 804 F.2d 1052, 1508 (8th Cir. 1986) (district court committed prejudicial error in allowing plaintiff's counsel, during summation, to inform the jury about indemnification). There are also cases like *O'Neill* in which defense counsel would like the jury to know that the defendant officer will be paying any judgment from personal finances. *See, e.g.,* *Lawson v. Trowbridge*, 153 F.3d 368, 375 (7th Cir. 1998) (finding error when defendants entered evidence of limited financial resources while at the same time plaintiffs were not allowed to enter evidence of likely indemnification); *Perrin v. Anderson*, 784 F.2d 1040, 1045 (10th Cir. 1986) (finding no error when defense counsel stated that judgment against defendants would be paid by them and no one else); *Joseph v. Brierton*, 739 F.2d 1244, 1249 (7th Cir. 1984) (holding that defense counsel could not take advantage of an order against entering evidence of indemnification by claiming a large judgment would ruin defendants). In *O'Neill*, *Lawson*, and *Joseph*, defense counsel sought to mislead the jury into believing that the defendant officers would pay the judgment out of their personal funds.

189. 453 U.S. 247 (1981).

190. *See supra* text accompanying notes 24-28 (determining that municipalities are immune from punitive damages).

present setting, since the City of New Haven has by its indemnification agreement voluntarily waived its immunity from payment of punitive damages."¹⁹¹ *O'Neill* thus stands for the limited proposition that a district court's refusal to instruct the jury that the city is not a party and should not be considered in determining punitive damages is not erroneous.

On the other hand, in *Perrin v. Anderson*¹⁹² the Tenth Circuit held that the district court in a § 1983 deadly force case did not err in allowing defense counsel to inform the jury during his closing argument that his clients, patrol officers, would be personally liable for any damages awarded against them.¹⁹³ Defense counsel put it this way:

I think that there is one matter that I would like to leave you with. My clients are being asked to account in money damages. And incidentally, this is an action against them, personally, not against the State of Oklahoma, not against anyone else. A judgment against them is their individual judgment to be paid by them and no one else.¹⁹⁴

On appeal, the plaintiff argued that these remarks were improper because they were "equivalent to an assertion that defendants were uninsured."¹⁹⁵ The Tenth Circuit rejected plaintiff's argument. The circuit court acknowledged that informing the jury whether the defendant is insured or uninsured is usually forbidden because it is irrelevant to whether the defendant acted wrongfully.¹⁹⁶ However, the circuit court found that because the plaintiff sought punitive damages, the ultimate source of payment of those damages was relevant. The circuit court said: "The jury must know the impact an award [of punitive damages] will have on the defendant to properly assess punitive damages."¹⁹⁷ Under these circumstances, the court held that defense counsel's remarks were not improper.

Of course, informing the jury that the defendant official will be

191. *O'Neill*, 839 F.2d at 13.

192. 784 F.2d 1040 (10th Cir. 1986).

193. *Id.* at 1045.

194. *Id.* at 1047.

195. *Id.*

196. *Id.*

197. *Perrin*, 784 F.2d at 1048 (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269 (1980) (stating that punitive damages in § 1983 actions should be based upon official's "personal financial resources")); see *Mathie v. Fries*, 121 F.3d 808, 816 (2d Cir. 1997):

a fact-finder can properly consider the existence of such an [indemnification] agreement as obviating the need to determine whether a defendant's limited financial resources justifies some *reduction* in the amount that would otherwise be awarded. It would be entirely inappropriate for a defendant to raise the issue of his limited financial resources if there existed an indemnity agreement placing the burden of paying the award on someone else's shoulders.

personally liable for any punitive damages awarded is tantamount to letting the jury know that the defendant will not be indemnified. Therefore, *Perrin* seems to be at odds with the Second Circuit's decision in *O'Neill v. Krzeminski*¹⁹⁸ and the Fifth Circuit's decision in *Lewis v. Parish of Terrebonne*.¹⁹⁹ *Perrin* can be distinguished factually from *Larez v. Holcomb*²⁰⁰ on the ground that in *Perrin*, defense counsel informed the jury that defendants would be personally liable for any punitive damages awarded, thus effectively implying that they would not be indemnified, while in *Larez*, plaintiff's counsel told the jury that the defendants would be indemnified. Nevertheless, *Perrin* and *Larez* are at odds over whether it is proper to inform the jury that satisfaction of an award of punitive damages will come from the official's personal funds or from government funds through indemnification.

In sum, the great weight of circuit court authority supports the conclusion that normally, the jury should not be informed about governmental indemnification of an official's personal monetary liability for both compensatory and punitive damages. However, federal court judges are not unanimous as to the proper resolution, which is not surprising, given the competing considerations. On the issue of compensatory damages, the *Larez* majority was concerned that informing the jury about indemnification might distract it from the proper focus of assessing compensatory damages based solely on the injuries the plaintiff suffered, while the *Larez* dissent was concerned that not informing the jury about indemnification might mislead it into making a deflated award. Federal judges also disagree about the likely effectiveness of an instruction that compensatory damages be based solely upon an assessment of the plaintiff's injuries. On the issue of punitive damages the *Larez* majority thought that government indemnification was no more relevant for punitive damages than for compensatory damages, and that informing the jury about indemnification creates a risk of generating a windfall to plaintiffs at taxpayers' expense with little appreciable increase in deterrence. In contrast, the *Larez* dissent emphasized that, as with compensatory damages, the jury was entitled to know the truth about government indemnification of punitive damages, and that knowledge that the taxpayers would be footing the bill arguably might lead jurors to award lower punitive damages. Furthermore, the Tenth Circuit in *Perrin* held that to assess punitive damages properly, the jury should know the ultimate source of payment.

198. 839 F.2d 9 (2d Cir. 1988); see *supra* text accompanying notes 189-91 (refusing to instruct the jury that the defendants would be indemnified).

199. 894 F.2d 142 (5th Cir. 1990); see *supra* text accompanying notes 180-84 (stating that knowledge of indemnification is not relevant).

200. 16 F.3d 1513 (9th Cir. 1994); see *supra* text accompanying notes 117-38 (describing the case).

VI. RESOLUTION OF THE ISSUE: SHOULD THE JURY BE INFORMED ABOUT INDEMNIFICATION?

The great weight of circuit court decisional law discussed in Part V strongly supports the conclusion that normally the jury should not be informed about governmental indemnification of an official's personal monetary liability. Nevertheless, given the competing policy considerations, and the uncertainties in how jurors likely would behave if given this information, it is not entirely certain that this is the best solution. The ultimate question is whether informing jurors about indemnification likely would cause more good than harm. Because compensatory and punitive damages serve such different purposes, proper evaluation of the indemnification disclosure issue requires separate evaluation for each type of damages.²⁰¹ Whether the jury should know about indemnification appears to be a closer question for compensatory damages, for which there are strong competing arguments on both sides of the debate, than for punitive damages, for which the defendant official's financial circumstances and ultimate source of payment are highly pertinent to the question of the amount of punitive damages needed to punish and deter.²⁰²

A. COMPENSATORY DAMAGES

The purpose of compensatory damages in § 1983 actions is to award the plaintiff monetary damages in an amount that compensates her for the injuries she suffered as the result of the deprivation of her constitutional rights.²⁰³ Consistent with this goal, courts commonly instruct juries to establish the appropriate amount of compensatory damages without regard to the defendant's ability to pay.²⁰⁴ The majority in *Larez* stated that this type of instruction is appropriate.²⁰⁵ The hope in giving such an instruction is that a "conscientious jury" will be able to avoid being influenced by the extraneous factor of the defendant's wealth.²⁰⁶

Unfortunately, it is doubtful whether in reality a jury could truly ignore such information. As a matter of law, jurors are presumed to follow the trial

201. This was what the court did in *Larez v. Holcomb*, 16 F.3d 1513 (9th Cir. 1994). After analyzing the issues separately, the *Larez* court held that it is reversible error to inform the jury about either compensatory or punitive damages. *See supra* text accompanying notes 117-33, 163-76 (vacating the award of damages and remanding).

202. *See Perrin v. Anderson*, 784 F.2d 1040 (10th Cir. 1986) (noting that the ultimate source of payment of punitive damages is relevant); *see also supra* text accompanying notes 192-96 (explaining the decision in *Perrin*).

203. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986); *Carey v. Phipps*, 435 U.S. 247, 254 (1978); SCHWARTZ & KIRKLIN, *supra* note 7, § 16.7. Compensatory damages also have a secondary deterrence purpose. *See supra* note 46 (noting the dual purposes of a § 1983 compensatory claim).

204. *Joseph v. Brierton*, 739 F.2d 1244, 1247 (7th Cir. 1984).

205. *Larez*, 16 F.3d at 1519.

206. *Joseph*, 739 F.2d at 1247.

court's instructions.²⁰⁷ Nevertheless, strive as a jury might to follow the court's instructions, it may be unrealistic to think that jurors, in computing compensatory damages, do not consider the defendant's financial circumstances. Moreover, some authorities argue that "[t]elling a jury not to think about something may simply rivet the jurors' attention to it."²⁰⁸ While this is not to say that compensatory damages should be decided on the basis of the defendant's financial wherewithal,²⁰⁹ it cannot be doubted that in assessing compensatory damages, jurors, consciously or subconsciously, may sometimes factor this into the equation.

The major goal of the liability insurance exclusionary rule is to prevent unjust inflation of damages that could result from the jury's knowledge that the defendant was covered by liability insurance and that a well-to-do insurance company would be footing the bill.²¹⁰ However, as critics of the liability insurance rule have forcefully argued, that goal is most likely futile since jurors are very likely to be aware, or at least to strongly suspect, that the defendant in a damages action is covered by liability insurance.²¹¹

Judge Pregerson, in *Larez v. Holcomb*,²¹² argued that the same could be said about governmental indemnification. In his view, "jurors very likely already know that a government employee defendant in a civil rights case personally will not pay any damage award against him or her."²¹³ The difficulty is that Judge Pregerson offered no support for this conclusion. Furthermore, although the personal experiences of lay jurors and their world view may lead them to believe that there is a strong probability that a private defendant sued in tort is covered by some type of liability insurance, it is probably not as likely that the life experiences of lay jurors would lead them to assume that a public official sued under § 1983 is covered by governmental indemnification. Indeed, many lay jurors may have never heard about governmental indemnification.

The majority in *Larez* reasoned that government indemnification of compensatory damages should not be disclosed to the jury because

207. *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987); *City of Los Angeles v. Heller*, 475 U.S. 796, 798 (1986).

208. *Joseph*, 739 F.2d at 1247.

209. J.W. STRONG, MCCORMICK ON EVIDENCE § 201, p.717 (5th ed. 1999) (stating that a jury should be instructed to decide a case on the basis of "the facts and the substantive law, rather than upon sympathy, ability to pay, or concern about proliferating litigation and rising insurance premiums"). *But see Green*, *supra* note 94, at 161 ("[T]he identities of the parties to the litigation and such financial responsibility as their identities impart are of the highest relevancy, both to the issues of liability and to the issues of damages.").

210. *See supra* notes 77-85 and accompanying text (discussing the justifications for the liability insurance exclusionary rule).

211. *See supra* notes 94-99 and accompanying text (setting forth criticisms of the liability insurance exclusionary rule).

212. 16 F.3d 1513 (9th Cir. 1994).

213. *Id.* at 1525 (Pregerson, J., concurring in part and dissenting in part).

disclosure might tempt the jury to inflate compensatory damages, and because, if the jury is informed about indemnification, presumably the defendant would have to be allowed to explain that the indemnification ultimately will come out of taxpayer funds, injecting another extraneous factor into proper evaluation of compensatory damages.²¹⁴ Judge Pregerson, however, saw little danger of inflation of compensatory damages if the jury knows that the official's liability will be satisfied out of public funds, and believed that any danger of inflation is outweighed by the danger of a deflated award if the instruction is omitted because of juror sympathies for a public official's limited financial means.²¹⁵

A convincing argument could be made that the competing considerations advanced by the majority and dissent in *Larez* cancel each other out. If that is correct, then it would be better not to extend the much-maligned exclusionary rule for liability insurance and to follow Judge Pregerson's philosophy that, when in doubt, it is better to let the jurors know the truth than for the judicial system to hide the indemnification ball from them.

Of course, telling the truth is usually the right thing to do. We know from human experience that some of the biggest lies come from concealment of information. Judge Pregerson's philosophy that jurors should know the truth is based upon the premise that armed with truthful information, jurors will do the right thing.²¹⁶

214. *See id.* at 1519 ("Instead of focusing the jury's attention on the injury actually suffered by the plaintiff, we would be subjecting the jury to a flurry of largely irrelevant assertions and counter-assertions concerning who may or may not be financially harmed by a particular award.").

215. *See id.* at 1524 (Pregerson, J., concurring in part and dissenting in part) ("Any danger of award inflation . . . does not, in my opinion, outweigh the danger of allowing a deflated award by omitting the instruction.")

216. There is no guarantee that jurors who are given relevant evidence will not misuse it. After all, the law of evidence is filled with numerous exclusionary rules, like Rule 411, which exclude highly probative evidence largely for policy reasons, based upon the danger that jurors who are told the truth might misuse the information and not do the right thing. *See, e.g.*, FED. R. EVID. 404(a) (character evidence generally not admissible to show conduct in conformity therewith); FED. R. EVID. 404(b) (other act evidence generally not admissible to prove character to show conduct in conformity therewith); FED. R. EVID. 407 (evidence of subsequent remedial measures not admissible to prove negligence, wrongful conduct or products liability); FED. R. EVID. 408 (evidence of offers to settle, settlements, statements made in settlement negotiation not admissible to prove liability); FED. R. EVID. 409 (evidence of furnishing or offering to furnish medical expenses not admissible to prove liability); FED. R. EVID. 410 (evidence of plea bargaining generally not admissible); FED. R. EVID. 411 (evidence of liability insurance not admissible to prove wrongful conduct); FED. R. EVID. 412 (evidence of sexual conduct or character of victim of sex offense generally not admissible); FED. R. EVID. 704(b) (expert testimony on ultimate issue of mental state of criminal defendant that is element of crime or defense not admissible). In addition, highly probative evidence may be inadmissible because it is protected by an evidentiary privilege. FED. R. EVID. 501. So, while Judge Pregerson's goal of having the jury be told the whole truth may be noble, the law frequently finds that countervailing policy considerations outweigh this goal.

Informing the jury about government indemnification does create a danger of jury inflation, but that danger can be mitigated by the firm admonition suggested by the majority in *Larez* that compensatory damages should be based solely upon the injuries suffered by the plaintiff and without regard to sympathy for any party or the defendant's financial circumstances.²¹⁷ This instruction might not always be effective and in some cases might even be counterproductive, but it may help a "conscientious jury" not to be influenced by "extraneous" considerations.²¹⁸ As suggested by critics of the liability insurance rule,²¹⁹ excessive damages stemming from the jury's knowledge about indemnification can be remedied by remittitur or appellate review.²²⁰ Moreover, not informing the jury about indemnification creates a danger that the jury may engage in unwholesome speculation about whether or not the defendant is covered by indemnification.

It seems, therefore, that the best solution is to inform the jury that the defendant official will be indemnified, provided that (1) the court instructs the jury to base compensatory damages solely on the plaintiff's injuries, without sympathy for any party or the defendant's financial circumstances, and (2) the court uses remittitur to reduce excessive damages. This Article does not suggest that this is a perfect solution. Its efficacy depends in part upon the likelihood that jurors will follow the cautionary instruction. Nonetheless, given the competing considerations, it appears to be the best solution.

B. PUNITIVE DAMAGES

The majority and dissent in *Larez* essentially offered the same arguments advanced with respect to indemnification of compensatory damages and applied them to indemnification of punitive damages. The

217. This type of instruction has been suggested by eminent scholars who have criticized the exclusionary rule for liability insurance. See *supra* text accompanying notes 98-99 (discussing the possible alternatives to the exclusionary rule for liability insurance).

218. *Joseph v. Brierton*, 739 F.2d 1244, 1247 (7th Cir. 1984); see *supra* text accompanying notes 196-204 (noting the purpose of compensatory damages in § 1983 actions).

219. See *supra* text accompanying note 99 (describing alternate methods including remittitur).

220. A district court that finds damages excessive can order a new trial, a new trial limited to damages, or can give the plaintiff the option of accepting the damages the court considers justified. FED. R. CIV. P. 59; WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2815 (1995) (discussing Rule 59). For an example of the use of remittitur of compensatory damages in § 1983 actions, see *Williams v. Patel*, 104 F. Supp. 2d 984, 997 (C.D. Ill. 2000); *Mendoza v. City of Rome*, 872 F. Supp. 1110, 1126 (N.D.N.Y. 1994); and *Sanders v. City of Indianapolis*, 837 F. Supp. 959, 965 (S.D. Ind. 1992). For an example of the use of remittitur of punitive damages in § 1983 actions, see *infra* cases cited in note 228. Claims that compensatory damages are excessive are also subject to appellate review. See, e.g., *Wulf v. City of Wichita*, 883 F.2d 842, 870 (10th Cir. 1989). Federal appellate courts are increasingly overturning jury awards of damages. W. Glaberson, *Juries, Their Powers Under Siege, Find Their Role Is Being Eroded*, N.Y. TIMES, March 2, 2001, at A1.

majority reasoned that government indemnification of punitive damages was not relevant to the jury's calculation of an appropriate award and created a danger of inflated punitive damages.²²¹ Judge Pregerson discounted that probability, believing it possible that jurors might actually award lower punitive damages if they knew taxpayers were footing the bill, and again arguing that the jurors "are entitled to hear the whole truth."²²²

There are, however, other considerations that neither the *Larez* majority nor dissent took into account. In computing the amount of punitive damages necessary to punish and deter the offending official, the defendant's financial circumstances are a relevant consideration. Federal courts thus uniformly hold that an official who has been found liable for punitive damages under § 1983 has the right to introduce evidence of personal financial circumstances.²²³ If a defendant introduces evidence of

221. *Larez v. Holcomb*, 16 F.3d 1513, 1519 (9th Cir. 1994).

222. *Id.* at 1525 (Pregerson, J., concurring in part and dissenting in part).

223. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) ("[E]vidence of tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded."); *Mason v. Okla. Tpk. Auth.*, 182 F.3d 1212, 1214 (10th Cir. 1999) (holding that plaintiff is not obliged to present evidence of defendant's financial status); *Mathie v. Fries*, 121 F.3d 808, 816 (2d Cir. 1997) (holding that the factfinder in a bench trial may consider the existence of an indemnity agreement in determining whether punitive damages should be reduced in light of defendant's limited financial resources); *Kemezy v. Peters*, 79 F.3d 33, 34 (7th Cir. 1996) (holding that the defendant bears the burden of producing evidence of personal net worth); *King v. Macri*, 993 F.2d 294, 298 (2d Cir. 1993) (holding that the defendant may present evidence of financial status at trial, but the trial judge may decline to consider such evidence on a post-trial motion to reduce the award by remittitur); *Faison v. Nationwide Mortgage Corp.*, 839 F.2d 680, 691 (D.C. Cir. 1987) (holding that the punitive damages awarded should take into account defendant's ability to pay in order to carry out the "intended sanction"); *Hollins v. Powell*, 773 F.2d 191, 198 (8th Cir. 1985) ("[I]n assessing punitive damages, it is appropriate to consider the defendant's net worth."); *Harris v. Harvey*, 605 F.2d 330, 340 (7th Cir. 1979) (holding that although the circuit court may have considered the punitive damages "unduly high," defendant failed to show that personal financial circumstances warranted a lesser amount); *Zarcone v. Perry*, 572 F.2d 52, 56 (2d Cir. 1978) (noting that defendant's net worth is relevant in determining punitive damages because a \$60,000 award may bankrupt one person but be a minor annoyance to another); *see also* RESTATEMENT (SECOND) OF TORTS § 908(2) cmt. e (1965) (noting that a defendant's wealth is relevant in determining punitive damages).

The burden is on the defendant to introduce evidence of financial circumstances. *Mason*, 182 F.3d at 1214; *Mathie*, 121 F.3d at 816; *Kemezy*, 79 F.3d at 36; *Hutchinson v. Stuckey*, 952 F.2d 1418, 1422 n.4 (D.C. Cir. 1992); *Harris*, 605 F.2d at 340; *Zarcone*, 572 F.2d at 56 (holding that the defendant has the burden of showing his modest means because these facts are "peculiarly" within his power); *see also* *Davis v. Mason County*, 927 F.2d 1473, 1485 (9th Cir. 1991) (although plaintiffs conceded that evidence of defendant deputy sheriff's net worth would have been relevant, deputies neither offered this evidence before the jury nor objected when the jury was not instructed on this issue; circuit court refused to consider deputies' argument that the jury should have been instructed that their net worth should be considered in assessing punitive damages"). *But see* *Keenan v. City of Philadelphia*, 983 F.2d 459, 479-84 (3rd Cir. 1992) (Higginbotham, J. dissenting) (arguing that plaintiff should bear burden of introducing evidence of defendant's net economic worth when municipal indemnification is involved).

personal financial circumstances in order to persuade the jury to award low punitive damages, when in fact the defendant's punitive damages will be indemnified, failure to inform the jury about indemnification seriously misleads the jury.²²⁴

On the other hand, if the defendant's punitive damages will not be indemnified but the jury does not know this, the jury also may be misled because it might erroneously presume that the defendant will be indemnified. As the Tenth Circuit held in *Perrin v. Anderson*,²²⁵ the ultimate source of the payment of punitive damages is relevant—the jury must know the impact of its punitive damage award in order to determine its appropriate amount.²²⁶ As a result, the *Perrin* court held that the defendant officials had the right to inform the jury that they would be personally liable for punitive damages, thereby effectively informing the jury that the defendant would not be indemnified.²²⁷

The indemnification disclosure issue is more difficult if the defendant does not introduce evidence of personal financial circumstances. However, even in those circumstances, it seems better that the jury be informed that the government will be indemnifying the punitive damages awarded so that it may consider the ultimate source of payment in computing punitive damages. As with compensatory damages, the court can correct excessive awards of punitive damages by remittitur, or by appellate review.²²⁸

Informing the jury about government indemnification of punitive damages would not seem to necessitate any cautionary instruction. A standard punitive damages instruction in a § 1983 action would inform the jury that the purpose of punitive damages is to punish the defendant and deter the defendant and others from engaging in the particular wrongful

224. See *Kemezy*, 79 F.3d at 36 (dictum) (noting that when the defendant will be fully indemnified for punitive damages, evidence of her net worth is inadmissible); see also *Mathie*, 121 F.3d at 816 (offering a similar proposition).

225. 784 F.2d 1040 (10th Cir. 1986).

226. *Id.* at 1048.

227. See *supra* notes 192-96 and accompanying text (discussing the implications of the *Perrin* decision).

228. See *supra* note 220 (describing other appropriate measures of correction). For examples of the use of remittitur of punitive damages in § 1983 actions, see generally *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996) (using concept); *King v. Macri*, 993 F.2d 294 (2d Cir. 1993) (same); *Leather v. Ten Eyck*, 97 F. Supp. 2d 482 (S.D.N.Y. 2000) (same); *Fall v. Indiana University Board of Trustees*, 33 F. Supp. 2d 729 (N.D. Ind. 1998) (same); *Blissett v. Eisensmidt*, 940 F. Supp. 449 (N.D.N.Y. 1996) (same); and *Niemann v. Whalen*, 928 F. Supp. 296 (S.D.N.Y. 1996) (same). Appellate review of punitive damages is an aspect of constitutionally adequate process. *Morgan v. Woessner*, 997 F.2d 1244 (9th Cir. 1993) (applying standard in § 1983 action); see *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996) (addressing appellate review of § 1983 punitive damages). While this Article was in its final stage of production, the United States Supreme Court held that constitutional challenges to punitive damages claimed to be excessive are subject to de novo review. *Cooper Indus., Inc. v. Leatherman Tool Group*, 2001 WL 501732 (May 14, 2001)

conduct.²²⁹ Instructing the jury about indemnification only gives the jury evidence that is relevant to its evaluation of the amount of punitive damages necessary to punish and deter. In making this decision it is best that the jury know the whole truth.

C. RECOMMENDATION

Given the recurring nature of the indemnification issue, and the uncertainty over whether it is covered by Federal Rule of Evidence 411's exclusionary rule for liability insurance,²³⁰ it would be best for all concerned if Rule 411 were amended to define the meaning of "insured against liability," and, specifically, to spell out whether the exclusionary rule was intended to encompass government indemnification of public employee liability. The rulemakers should take into account the various concerns discussed in this Article, as well as the fact that the exclusionary rule for liability insurance itself has been subjected to a tremendous amount of criticism.²³¹ It is possible that, from a legislative perspective, there is insufficient basis for altering the Rule 411 exclusionary rule for liability insurance which, after all, has long common-law roots. This Article argues that there is insufficient justification for extending the liability insurance exclusionary to governmental indemnification, especially given the criticism the rule has engendered. Rule 411 should be amended to make clear that it does not apply to government indemnification of a public official's monetary liability. In the end, it is better that the jurors know the truth.

229. See 4 M. SCHWARTZ & G. PRATT, SECTION 1983 LITIGATION: JURY INSTRUCTIONS, Instruction § 18.07.1 (2000) (outlining the elements of such instructions); see also *McKinley v. Trattles*, 732 F.2d 1320, 1326 n.2 (7th Cir. 1984) (setting forth "accurate and complete" punitive damages instruction).

230. See *supra* Part IV (discussing evidentiary exclusionary provisions).

231. See *supra* Part III (providing overview of numerous critiques).

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