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Locking in the Lie
CHRISTOPHER B. DOLAN

Medicare and MediCal Billing in Governmental Lien Claims
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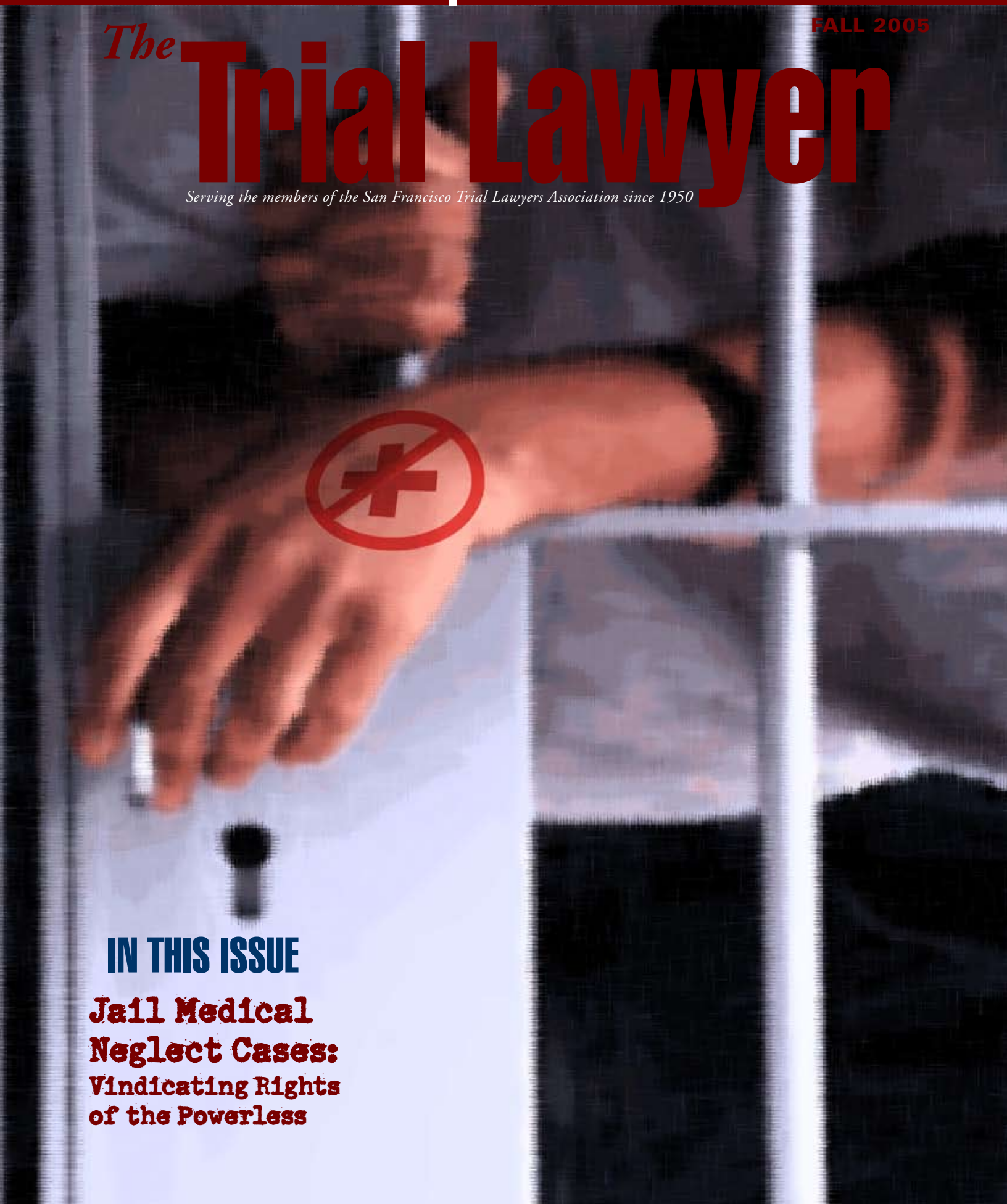

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Jail Medical Neglect Cases: Vindicating Rights of the Powerless

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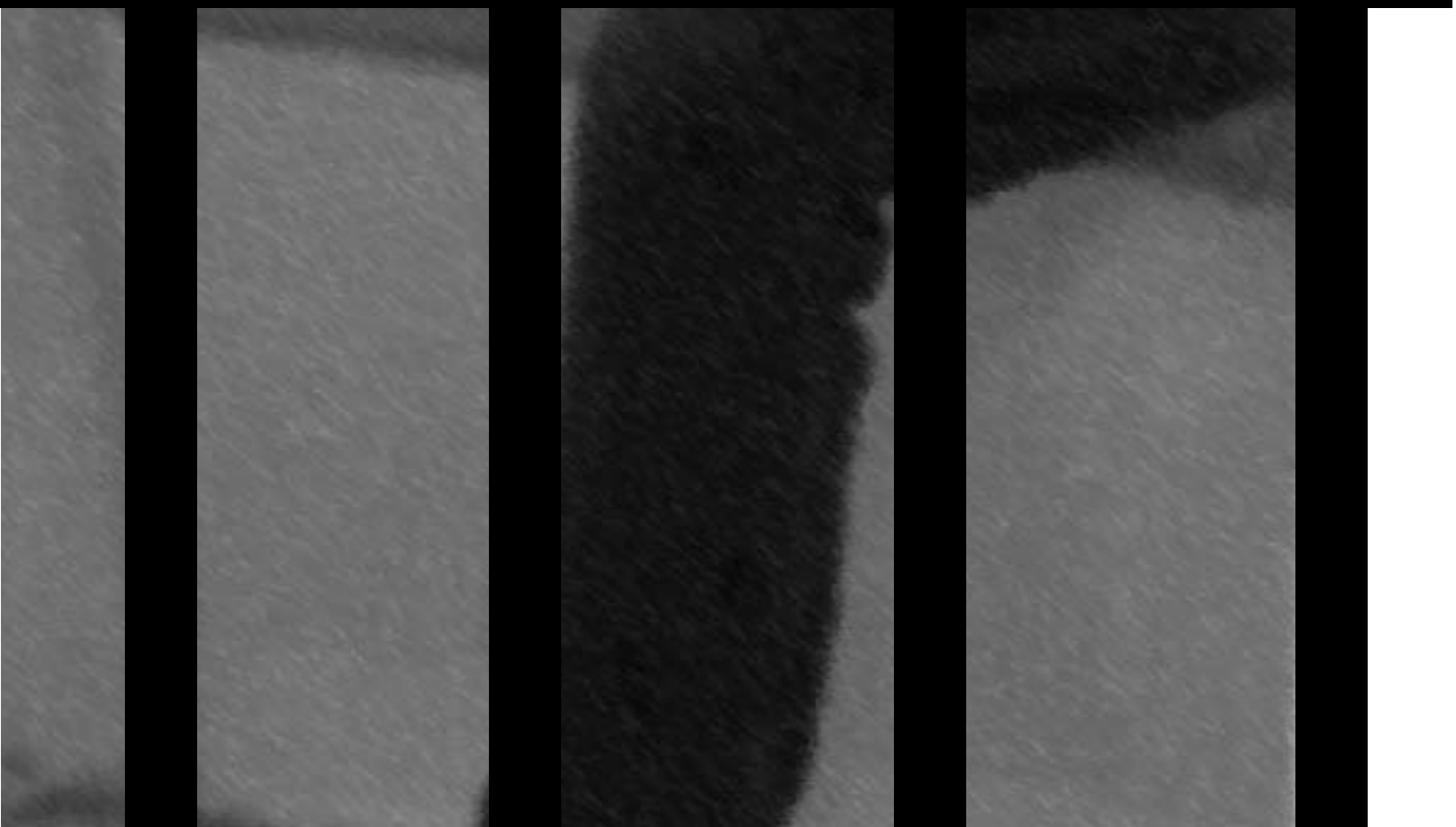
Vindicating Rights of the Powerless

BY CHUCK GEERHART



A prospective client calls your office and reports that he was repeatedly denied medical care by his health care provider despite his ongoing complaints, resulting in his undergoing a major surgery with severe permanent damage to his body. The only problem: he was in the county jail because he had just been arrested for felony drug possession.

Many lawyers would pass on a case like this, for several reasons. The client is caught up in the criminal justice system. A public entity (the county) is involved, and all counties are known for fighting these cases ferociously. You may well wind up in Federal Court, with its less than favorable attitude toward personal injury cases. And, last but not least, it's a MICRA case, with limits on non-economic damages of $250,000.

But there is a powerful reason to take this case: there may be a violation of the federal civil rights statute (42 U.S.C. § 1983), which, if proven, allows the plaintiff to recover not only compensatory damages, but also his reasonable attorney and expert fees. The kicker: the 9th Circuit has held that a federal civil rights claim takes the case outside of the damages limitations of MICRA.

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Are these still difficult cases? Yes. But they are also potentially quite valuable monetarily, and they vindicate important social justice issues. We read every day about the deplorable health care system inside our jails and prisons. Medical neglect litigation can help remedy these conditions by forcing the public entity involved to wake up and spend the resources necessary to deliver decent health care to inmates who would be otherwise powerless.

LIABILITY

Civil Rights Claims

Practical Pointers Regarding Pre-Trial Claim and Venue

This article does not purport to be a comprehensive substantive or procedural guide. You should consult a text such as Police Misconduct Law and Litigation (Clark, Boardman 2005) for more details. Briefly, since these cases always involve suing a governmental entity, you need to be aware of relevant claims statutes. If you intend to include state law claims, you must file a government tort claim within six months of the incident.

On the federal civil rights claims, there is no formal government claim requirement; suit must be filed within two years of the incident in California. However, in the jail/prison context, there is an extremely dangerous and pernicious law known as the Prison Litigation Reform Act (PLRA) 42 U.S.C. § 1997e, which requires currently incarcerated inmates to exhaust all administrative remedies before they can file suit. If the inmate has not exhausted all administrative remedies, suit will be barred. This means the inmate must submit a grievance form to the jail, and then appeal denial of the grievance as far as it can go. Note that if a person is out of custody (or is only civilly committed) at the time he files suit, the PLRA will not apply. *Page v. Torrey* 201 F.3d 1136 (9th Cir. 2000)

These cases are usually litigated in federal court. The public entity has a right to remove cases to federal court as federal questions are involved. The case may be field in state court, and sometimes the public entity will choose not to remove for its own reasons.

The Statute

The main civil rights statute, 42 U.S.C. § 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 . . .**

To make a civil rights claim, an injured person must allege a violation of some constitutional right. In the jail medical negligence context, the violations will involve either the 8th or 14th amendment depending on the inmate's status as either a pretrial detainee or a convicted inmate.

Standard of Proof For Medical Neglect Cases Under 42 U.S.C. 1983

To prevail on a civil rights claim, a convicted inmate must prove a violation of his rights under the 8th Amendment, which prohibits cruel and unusual punishment. The US Supreme Court has held that a plaintiff must prove the jail exhibited "deliberate indifference to [the inmate's] serious medical needs," a difficult standard. *Estelle v. Gamble* 429 U.S. 97, 104 (1976). Mere medical negligence will ordinarily not satisfy this standard. *Gibbs v. Grimmette* 254 F.3d 545 (2001), *cert. denied*

122 S.Ct. 1083 (2002). However, the federal courts have held that repeated instances of neglect of a medical condition can rise to the level of "deliberate indifference." *Brooks v. Celeste* 39 F.3d 125 (6th Cir. 1994); *Egeberghe v. Nicholson* 272 F.3d 925 (7th Cir. 2001).

An arrested, but not yet convicted, inmate (a "pre-trial detainee") has rights superior to those he would have as a convicted inmate. Case law holds that, because a pre-trial detainee has not been convicted of any crime (and therefore is not yet subject to *any punishment)*, the 8th amendment prohibition against cruel and unusual punishment ("deliberate indifference") is not the applicable standard. Rather, the 14th amendment standard, which does not require deliberate indifference, applies. See, e.g., *Bell v. Wolfish* 441 U.S. 520, 535, n. 16 (1979); *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004); *Nerren v. Livingston Police Department* 86 F.3d 469 (5th Cir. 1996).

In *Bell*, the Supreme Court stated:

> **The Court of Appeals properly relied on the Due Process Clause rather than the Eighth Amendment in considering the claims of pretrial detainees. Due process requires that a pretrial detainee not be punished. A sentenced inmate, on the other hand, may be punished, although that punishment may not be "cruel and unusual" under the Eighth Amendment [citations]. . . Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.** [citations]

Bell at n. 16.

In *City of Revere v. Massachusetts General Hospital* 463 U.S. 239 (1983), the Supreme Court held that, in the context of providing medical care to a pre-trial detainee, the Due Process Clause applies and requires the responsible governmental entity to provide medical care to injured persons in its custody. "In fact, the due process rights of a person in [plaintiff's] situation are at least as great as the Eight Amendment protections available to a convicted prisoner." *Id.* at 244-245, citing *Bell v. Wolfish*. The Supreme Court did not specifically define the governmental entity's due process obligation to pre-trial detainees, finding that, "Whatever the standard may be, Revere fulfilled its constitutional obligation by seeing that [the injured person] was taken promptly to a hospital that provided the treatment necessary for his injury." *Id.* at 245.

The defendant in a medical neglect case is likely to dispute that a pre-trial detainee is afforded substantially better constitutional protections than a convicted inmate. Don't fall for that claim. In the recent case of *Jones v. Blanas* 393 F.3d 918 (9th Cir.

2004), the 9th Circuit held:

> **"[T]he more protective fourteenth amendment standard applies to conditions of confinement when detainees . . . have not been convicted" of a crime. Gary H. v. Hegstrom, 831 F.2d 1430, 1432 (9th Cir. 1987) [citing Youngberg v. Romeo, 457 U.S. 307 (1982) and Bell v. Wolfish, 441 U.S. 520 (1979).] The Fourteenth Amendment requires the government to do more than provide the "minimal civilized measure of life's necessities," Rhodes, 452 U.S. at 347, for non-convicted detainees.**

Jones at 931.

Although the Supreme Court has not yet offered a definitive test on the quality of medical attention a pre-trial detainee is entitled, the 5th Circuit has adopted the "reasonable medical care" test under the 14th amendment (substantive due process). In the *Nerren* case, plaintiff was arrested for fleeing the scene following an automobile accident. He was denied medical attention despite reporting pain and asking for a doctor. He was later found to have a torn liver requiring surgery. The Court found that the rights of an arrestee and a pre-trial detainee are identical and are evaluated under the substantive due process standard under the 14th Amendment. In denying a qualified immunity defense, the Court held:

> **At least since 1987, it has been clear that pretrial detainees, a set that includes arrestees, are entitled to reasonable medical care unless the failure to supply that care is reasonably related to a legitimate governmental objective. A pretrial detainee's specific right to medical attention has evolved over time from his general right to be free from punishment. Pretrial detainees, as distinguished from convicted prisoners, are those individuals who have been charged with a crime but who have yet to be tried on the charge.**
>
> **We contrast pretrial detainees and convicted prisoners because the due process clause of the Fourteenth Amendment accords pretrial detainees rights not enjoyed by convicted inmates under the Eighth Amendment prohibition against cruel and unusual punishment. Specifically, "while a sentenced inmate may be punished in any fashion not cruel and unusual, the due process clause forbids punishment of a person held in custody awaiting trial but not yet adjudged guilty of any crime." This standard, applied to medical attention, "entitles pretrial detainees to reasonable medical care unless the failure to supply it is reasonably related to a legitimate governmental objective."**

Nerren at 474 [emphasis added].

Anyone handling a medical neglect case in California should argue that the *Revere*, *Nerren* and *Blanas* cases, read together, mean that the mere denial of reasonable medical care (without a showing of "deliberate indifference") can amount to a §1983 violation where a pre-trial detainee is involved.

MICRA APPLICATION

Every medical neglect case should also be pled as a medical malpractice case, because it is possible to lose on the civil rights theory but still have the jury find medical negligence. This raises the issue of whether the MICRA cap applies to a § 1983 claim. The defense will argue that MICRA (Civil Code § 3333.2) caps non-economic damages at $250,000. The Ninth Circuit has ruled MICRA does not apply in a §1983 action.

In *Ellis v. County of San Diego* (9th Cir. 1999) 176 F.3d 1183, 1191, the Ninth Circuit ruled1 that "MICRA simply has no application to suits for violations of federal constitutional rights pursuant to 42 U.S.C. § 1983." While Ellis was decided on different facts (plaintiff was injured by improper placement of a catheter and needle by medical staff seeking blood and urine to test for drugs), the Court's holding is obviously broad and appears to apply to all section 1983 civil rights actions. The Court also stated that "section 1983 exists to vindicate important federally created rights" and preempts state notice of claim statutes such as that contained in MICRA. *Id.* Ellis is the only case to discuss application of MICRA to section 1983 claims[2].

The U.S. Supreme Court has never had to interpret the interplay between the Civil Rights Act and a medical damages limitations statute, but, in analyzing the effect of section 42 U.S.C. 1988, has stated:

> **This means, as we read §1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired. We do not explore the problem further, as the issue of damages was not litigated below.**

Sullivan v. Little Hunting Park (1969) 396 U.S. 229, 240.

If the MICRA issue ever went to the Supreme Court, the plaintiff's argument would be that the importance of securing federal civil rights trumps whatever economic "principle" MICRA stands for.

Costs and Fees

42 U.S.C. section1988 allows the prevailing plaintiff to recover reasonable attorney fees and, in the discretion of the court, expert fees. You should keep track of your hours on these cases. Because the defense typically fights these cases and often attempts a summary judgment motion, the fee award can be substantial.

CONCLUSION

Although inmates are not a naturally sympathetic lot, there are important principles that can resonate with judges and juries. Some of these principles are:

When we as a society lock someone up, we have a basic obligation not to do further harm.

We have an obligation not to leave that person in worse medical condition than he was when he got to jail or prison.

We have higher standards than countries where prison torture is the norm, Abu Ghraib notwithstanding.

We have a Constitution that protects even the weakest and most powerless of all of our citizens.

Chuck Geerhart is a partner with Paoli & Geerhart in San Francisco.