Fleecing America, A Discourse on Libertarian Litigation Principles

Libertarianism is a political theory that advocates the maximization of individual liberty in thought and action and the minimization or even abolition of the state.[4][5] Libertarians embrace viewpoints across a political spectrum, ranging from pro-property to anti-property (sometimes phrased as "right" versus "left") and from minimal state (or minarchist) to openly anarchist. (Wiki)

The notion of advancing libertarian principles through litigation – particularly federal civil rights litigation – has a design flaw that's rarely acknowledged: Lawyers are agents of the state. That applies equally to lawyers who happen to be libertarians. Unlike other regulated professions, attorneys are "officers of the court" in name and fact. Ultimately, their professional self-interest lies in expanding the size and scope of the state's court system, not in protecting individual rights.

Last year, I criticized Cato Institute chairman Robert Levy, an attorney, for joining a motion seeking $3.5 million in attorney fees related to the Supreme Court's five-to-four decision in Heller v. District of Columbia, a ruling that affirmed the state's authority to restrict the right of individual self-defense while preserving only a limited Second Amendment privilege to possess firearms.

Levy and his co-counsel claimed they were entitled not just to regular fees but certain "enhancements" based on their level of skill, success in winning a rhetorical victory over the meaning of the Second Amendment, and the risks to their public reputations – even among fellow libertarians – for bringing an unpopular case. This petition for attorney fees remains stalled before a District of Columbia judge.

The delay arises from the Supreme Court's decision to hear a case involving a similar request for attorney fees. The Heller lawyers can't collect until the Gang of Nine decides Perdue v. Kenny A. Oral arguments were heard in October, and a ruling can come at any time.

In Perdue, a legal advocacy group, Children's Rights, Inc., sued the State of Georgia (Sonny Perdue is the governor) over abuses in the state's foster care system; the class action complaint alleged federal constitutional and civil rights statute violations. Following mediation, the federal court overseeing the case

entered a consent decree favoring the CRI plaintiffs. Federal statute permits the plaintiff's attorneys to recover "reasonable" fees.

The district court reduced the billable time to just over $6 million but "enhanced" that amount 75%, for a total award of over $10.5 million. The court justified the $4.5 million enhancement by citing the "far superior" quality of counsel's legal services, and the "truly exceptional" relief obtained for their clients in the consent decree. On appeal, the Eleventh Circuit Court of Appeals in Atlanta affirmed the decision and award; one of the judges, however, noted that the $4.5 million "enhancement" appeared inconsistent with Supreme Court precedent, although more recent Eleventh Circuit precedent supported it.

The question now before the Supreme Court is whether

a reasonable attorney's fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and results obtained when these factors already are included in the lodestar calculation?

The "lodestar calculation" simply refers to hours-times-rate. The key word is "reasonable," since the federal statute (42 U.S.C. § 1988) that authorizes fee awards states:

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs… (Italics added)

So are fee enhancements ever "reasonable"? At first impression, the answer is "no," because in a normal attorney-client relationship, the attorney is not permitted to arbitrarily multiply a final fee based on the quality or outcome of the work. A client agrees to pay a certain hourly rate and that's that. Some lawyers, of course, work on contingency, but even there, it's a previously agreed-upon percentage of the final award.

But nothing is ever that simple, especially when you're dealing with attorneys and their fees. A number of lawyer-based groups filed "friend of the court" briefs in support of the lower courts' decisions in Perdue. One such brief came from a coalition of seven libertarian-leaning legal groups*, including the Institute for

Justice and the Cato Institute. (The Liberty Legal Institute is listed as “counsel of record,” so for simplicity’s sake, I’ll refer to this filing as the “Liberty Brief.”)

The Liberty Brief maintains that fee enhancements are essential “to enforce civil rights guaranteed by the Constitution and by statute,” because it creates a “free market” to attract skilled attorneys:

As the representatives of the American taxpayers, Congress could authorize a massive expansion of the Department of Justice to cover all civil rights cases. It could, alternatively, privatize the system and allow free market principles to encourage private attorneys to undertake the massive effort of private attorneys general, holding government power accountable to the citizen-taxpayers…

…Congress chose to privatize the system, provide market incentives to private attorneys to enforce civil rights, and subject government to the proverbial “invisible hand” of local taxpayers to hold elected representatives responsible for the waste of taxpayer dollars lost in defense of legitimate civil rights violations. See Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 456 (Roy Hutcheson Campbell et al. eds., Liberty Fund Glasgow 1981) (1776). In short, Congress, by enacting Section 1988, harnessed free market principles to incentivize lawful government behavior, and justifiably so.

According to the Liberty Brief, it’s not enough to simply pay attorneys their regular hours-times-rate:

[A]ttorney fees are not merely about compensating attorneys who undertake the representation of those oppressed and damaged by government, often at significant risk to their regular practice. Just as important, and possibly more so, they provide the incentive for governments, especially with the outcry of local taxpayers upon the media announcement of an attorney fee judgment, to reform their unlawful conduct and refrain from civil rights violations in the future.

Now, the statute only states attorney fees must be “reasonable”; there’s no language about compensating attorneys for “risk to their regular practice” or giving taxpayers “incentive” to rise up against local governments. But the Liberty Brief assures us that “the American taxpayers, through their elected representatives, clearly endorsed attorney fee enhancements when enacting Section 1988.” And to prove it, the brief cites the statement of a single senator – Ted Kennedy:

Even with the enactment of this bill, the lawyer who undertakes to represent a client will face more uncertainty of payment than one involved in a usual

contingency fee case. His fee is contingent not only upon his success, but also upon the discretion of the judge before whom he appears.

Even if he wins his case, and the judge decides he has won a fee as well, his rate of compensation is fixed not by a grateful client, but by a disinterested judge. Nothing in Kennedy's statement supports fee "enhancements"; furthermore, it contradicts the Liberty Brief's claim that the "invisible hand" of market forces will set attorney fees. Judges set the fees by fiat, not attorneys and clients entering into voluntary agreements.

Beyond Kennedy's statement, the Liberty Brief relies heavily on the "legislative history" of Section 1988 contained in the House and Senate committee reports on the original legislation, enacted in 1976. The Senate report is silent on how to define "reasonable." The House report cited a 1974 case from the Fifth Circuit where the court listed twelve guidelines in deciding attorney fees, including the "ability" of the attorneys and the "undesirability" of the case.

Of course, the Fifth Circuit didn't fabricate its "guidelines" arbitrarily or capriciously: "These guidelines are consistent with those recommended by the American Bar Association's Code of Professional Responsibility…" So the court simply adopted the recommendation of the professional bar on how its own members should be paid. Then the House and Senate judiciary committees – bodies generally composed entirely of attorneys – incorporated this self-serving analysis into their own legislation, which was heavily influenced by other professional attorney groups. This is what the Liberty Brief considers "the representatives of the American taxpayers."

Now let's pause here and consider a purely constitutional issue. The phrase "private attorney general" frequently describes the role of plaintiff's counsel in these type of cases. Indeed, the Alliance Defense Fund, one of the seven groups that signed the Liberty Brief, said that its attorneys "function as private attorneys general, representing clients to vindicate their constitutional rights."

But "private attorney general" is a contradiction. Attorneys are be officers of the court – the judicial branch – but the attorney general is an officer of the executive branch. The Constitution states the president must appoint and commission all "officers of the United States." Congress cannot simply deputize every attorney in the country as a "private attorney general."

Among other problems, the compensation for a "private attorney general" isn't fixed by Congress or the president but by the whim of a federal judge. All Justice Department employees are paid as part of the federal bureaucracy. It's an awful,

parasitic system, but at least the compensation of the attorney general and his deputies are subject to presidential and congressional oversight. Not so with these so-called free-market prosecutors.

Now, the counterargument is that even the government uses private lawyers when defending against civil rights lawsuits, and what's good for the goose is good for the gander. The Liberty Brief makes this exact point:

There are…thousands of professional civil rights defense attorneys whose firms make millions of dollars defending government entities, and many, if not most, government entities are represented by them. For these attorneys, their entire firm or practice group within the firm is dedicated to defending civil rights cases for government. The more protracted the litigation and the greater the girth of the docket, the greater their economic success. … [T]his has led to a substantial increase in the size of the dockets and records in civil rights cases.

The Liberty Brief argues the remedy is to allow plaintiff's attorneys the possibility of enhanced fees to discourage defense attorneys from protracting litigation. But there's an even better remedy: Limit the fees that all attorneys can collect in these cases. This sounds counterintuitive to free-market supporters, but let's remember, attorneys are agents of the state. Restricting even a "private" attorney's compensation is no different then fixing the salary of any other government bureaucrat.

Expanding the arms race, as the Liberty Brief recommends, will only lead to more litigation. That's exactly what the Liberty Brief's signatories want. They claim their objective is to reduce the cost of litigation by encouraging governments to settle cases quicker; the prospect of enhanced plaintiff's fees will somehow spur angry taxpayers to revolt and demand accountability:

Most Georgia taxpayers are probably unaware of the facts of this case or the conditions these children were forced to endure. They will, however, be made very aware of the size of the attorney fee award. They will demand answers. They will demand fiscal accountability and that the government behave responsibly. Georgia, in the future, will be somewhat leery of paying $2.4M to outside counsel plus an enhanced attorney fee judgment to defend known civil rights violations merely to avoid paying a fraction of that amount to reform and settle with the victims early on.

Georgia, and other government entities, will begin to reconsider the…strategy of government delay and obfuscation and will engage instead in some cost-benefit analysis reminiscent of the private sector. In short, in any future civil rights

violations for which Georgia realizes it is responsible and must remedy, it will work to resolve the dispute as early as possible in the litigation to avoid the needless ballooning and possible enhancement of the attorney fee award. This possibility of enhancement will merely serve to realign the incentives for government to approach civil rights violations with the same desire for early resolution as the victims themselves.

This is the second prong of the “market incentives” argument at the Liberty Brief’s core. First we need the prospect of enhanced fees to attract competent plaintiff’s counsel; then we need them to discourage the government from spending money to defend its policies.

This argument is flawed on every level:

1.Since government officials are generally immune from any personal liability for their conduct, there’s no incentive for them not to engage in misconduct. Any costs are born by a third party, the nameless, faceless taxpayers.

2.Governments, at every level, waste taxpayer money every day on projects of dubious value. There’s no reason to believe taxpayers, en masse, will focus on an excessive attorney fee award in a single case and move to hold any particular official accountable. I think the Liberty Brief’s authors know this.

3.The Liberty Brief assumes that taxpayers won’t side with the government on the merits a particular case. Nobody supports abusing foster children, of course, but when a “civil rights” case involves constitutional interpretation, there are always multiple viewpoints. The Liberty Brief’s authors arrogantly assume everyone shares their specific interpretation of a two-century-old document.

4.Settlements – the Liberty Brief’s preferred outcome in all cases – often include high attorney fee awards. And settlements are often done behind closed doors with little, if any, public disclosure or oversight.

5.As the Perdue case itself demonstrates, the possibility of fee “enhancements” means a high probability of ancillary litigation to settle the question of how much to pay attorneys – even when the underlying litigation is settled.

6.The prospect of “enhanced” fees – higher prices – will attract more lawyers to file lawsuits irrespective of their merits, imposing additional costs on taxpayers.

7.Not to reiterate what should be an obvious point, but governments rarely perform true “cost-benefit” analysis, because their resources are acquired through violence or the threat of violence. There are no customers to serve, and government cannot fail like a private business.

What the Liberty Brief's signatories really seek are not incentives for governments to behave, but punitive damage awards – for lawyers, not clients – under the guise of "enhanced" attorney fees.

Now, that may appeal to some libertarians. After all, any defeat for the state is good for the individual. Well, maybe not. The Liberty Brief itself cites a not-so-hypothetical scenario that doesn't exactly help their cause:

Citizens raising families, working jobs and paying bills do not watch government as closely as shareholders or stakeholders in private enterprise. A local school district can spend a million dollars fighting a child who wants to hand a candy cane with a religious poem attached to his friends during Christmas, and then hold media events expressing a need for money for education. Few private enterprises would ever spend any amount of money fighting candy canes, and those that did would probably cease to exist. Not so for government.

What this example omits is the likely reason a school district would ban a child from distributing a religious-themed candy cane in the first place: Other lawyers, who also claim to be defenders of the Constitution and civil rights, threatened (or brought) legal action to prevent the school from violating the First Amendment's Establishment Clause. These attorneys promote the exact same legal philosophy as the Liberty Brief's signatories – the federal Constitution is a license for courts and "civil rights" attorneys to micromanage every state and local government activity. It's an expensive philosophy.

(As an aside, it's laughable that the Liberty Brief brings the example of a child being told not to hand out candy canes into a case rooted in the abuse of three thousand children by the State of Georgia; it demonstrates a lack of intellectual depth perception endemic among lawyers, even libertarian lawyers.)

It's also curious for the Liberty Brief to assert that "few private enterprises would ever spend any amount of money fighting candy canes, and those that did would probably cease to exist." Most of the private groups that signed the Liberty Brief are themselves in the business of litigation. And they represent just a fraction of the private, nonprofit groups that bring such litigation on a daily basis, some more meritorious than others. Generally, these groups are financed through private donations, which is much closer to a free-market system then the government welfare sought in the Perdue case and its ideological cousins.

And let's remember, not all of this litigation is against governments. If you look at the fee award statute at issue in Perdue, it authorizes fees in a wide range of cases including "unlawful intentional discrimination" by private parties – i.e.,

housing and employment – as well as the failure to provide “reasonable accommodations” under the Americans With Disabilities Act. If you allow “enhanced” attorney fees in cases against government entities, you also have to allow them in cases against private parties. Thus, it should be clear that the net effect of the Liberty Brief’s position will be an expansion of state power, not greater respect for the civil rights of individuals.

* The signatory groups are the Liberty Legal Institute, American Center for Law and Justice, Cato Institute, Institute for Justice, Liberty Counsel, Alliance Defend Fund, and the James Madison Center for Free Speech.

Story Contributed by Skip Oliva.