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## FOREWORD

### PRO SE PRISONER LITIGATION: LOOKING FOR NEEDLES IN HAYSTACKS\*

*Hon. Jon O. Newman*<sup>†</sup>

In recent years, the fastest growing category of civil litigation in federal district courts has been prisoner lawsuits. Though some of these suits are habeas corpus challenges to convictions, the vast majority are challenges to various aspects of the conditions of confinement. In 1995, what the Administrative Office of the United States Courts categorizes as "civil rights" petitions by prisoners totaled 41,679, thirteen percent of all civil cases in district courts.<sup>1</sup>

Prisoner lawsuits challenging prison conditions share two characteristics. Nearly all of these lawsuits are filed pro se, and the vast majority are dismissed as frivolous. However, among this growing number of frivolous lawsuits are a small number of serious matters that pose substantial issues, and a few of these serious lawsuits have resulted in significant victories.<sup>2</sup>

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<sup>†</sup> Chief Judge, United States Court of Appeals, Second Circuit. This article is an expanded version of a commencement address delivered at the 1995 commencement of Brooklyn Law School.

<sup>1</sup> LEONIDAS RALPH MECHAM, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, REPORT OF THE DIRECTOR 139 (1995).

<sup>2</sup> See, e.g., *Helling v. McKinney*, 509 U.S. 25 (1993) (upholding right of prisoner not to be deliberately subjected to second-hand tobacco smoke); *Hudson v.*

It should come as no surprise that the burden of the vast number of frivolous prisoner suits has created hostility to the entire category of lawsuits—opposition that has the potential of obscuring the few meritorious prisoner lawsuits which are about as scarce as the proverbial needle in the haystack. I propose to consider (1) the often exaggerated responses of the state attorneys general to prisoner lawsuits, (2) the more sensible congressional approach of limiting prisoner lawsuits by imposing obligations to pay filing fees, and (3) the initial appellate decisions of the Second Circuit applying the fee provision of the new statute.

## I. EXAGGERATIONS FROM THE STATE ATTORNEYS GENERAL

Laboring under the burdens of having to respond to thousands of lawsuits, most of which are frivolous, the attorneys general of the states adopted the tactic of condemning all prisoner litigation as frivolous. Their national association canvassed the attorneys general for their lists of top ten frivolous prisoner lawsuits and widely disseminated to the press the lists the association collected.<sup>3</sup>

Unfortunately, the lists included some accounts that were at best highly misleading and, sometimes, simply false. Three examples were cited in a letter by four attorneys general that was published in the *New York Times* on March 3, 1995.<sup>4</sup> Three cases, described as "typical," were reported in the following words:

- \* the inmate who sued because there were no salad bars or brunches on weekends and holidays;
- \* the case where a prisoner is suing New York because his prison towels are white instead of his preferred beige; and
- \* the case where an inmate sued, claiming cruel and unusual pun-

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McMillian, 503 U.S. 1 (1992) (upholding prisoner's claim of use of excessive force); *Vitek v. Jones*, 445 U.S. 480 (1980) (barring involuntary transfer of prisoner to mental hospital without procedural due process); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (requiring procedural due process protections for prison disciplinary proceedings); *Fisher v. Koehler*, 902 F.2d 2 (2d Cir. 1990) (unconstitutional conditions at local jail); *Rhem v. Malcolm*, 507 F.2d 333 (2d Cir. 1974) (unconstitutional conditions at local jail); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) (in banc) (unlawful to impose segregated confinement because of political beliefs), *cert. denied*, 404 U.S. 1049 (1972), and 405 U.S. 978 (1972); see generally Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639 (1993).

<sup>3</sup> *Attorneys General Seek to Curtail Frivolous Inmate Lawsuits; Call Upon U.S. Congress, States Legislatures to Respond*, NEWS RELEASE (Nat'l Ass'n of Att'ys Gen., Washington, D.C.), Aug. 1, 1995.

<sup>4</sup> Dennis C. Vacco et al., Letter to the Editor, *Free the Courts from Frivolous Prisoner Suits*, N.Y. TIMES, Mar. 3, 1995, at A3.

ishment because he received one jar of chunky and one jar of creamy peanut butter after ordering two jars of chunky from the prison canteen.

I was skeptical of the description of these three cases because it has not been my experience in twenty-four years as a federal judge that what the attorneys general described was at all "typical" of prisoner litigation. I obtained the court documents on these three cases and learned the following. In the "salad bar" case, forty-three prisoners filed a twenty-seven page complaint alleging major prison deficiencies including overcrowding, forced confinement of prisoners with contagious diseases, lack of proper ventilation, lack of sufficient food, and food contaminated by rodents.<sup>5</sup> The prisoners' reference to salads was part of an allegation that their basic nutritional needs were not being met, and they mentioned, in passing, that at their prison a salad bar is available to prison guards and, at other state prisons, is available to prisoners. The complaint concerned dangerously unhealthy prison conditions, not the lack of a salad bar.

In the "beige towel" case, the suit was not brought because of a color preference. The prisoner's claim was that the prison had confiscated the towels and a jacket that the prisoner's family had sent him, and then disciplined him with loss of privileges for receipt of the package from his family. As he stated, the confiscation "cause[d] a burden on my family who work hard and had to make sacrifices to buy me the items mention[ed] in this claim."<sup>6</sup>

In the "chunky peanut butter" case, the prisoner did not sue because he received the wrong kind of peanut butter. He sued because the prison had incorrectly debited his prison account \$2.50 under the following circumstances. He had ordered two jars of peanut butter; one sent by the canteen was the wrong kind, and a guard had quite willingly taken back the wrong product and assured the prisoner that the item he had ordered and paid for would be sent the next day. Unfortunately, the authorities transferred the prisoner that night to another prison, and his prison account remained charged \$2.50 for the item that he had ordered but had never received.

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<sup>5</sup> Tyler v. Carnahan, No. 4 94 CV 0017WSB (E.D. Mo. filed Dec. 17, 1993).

<sup>6</sup> Rivera v. State of New York, No. 90811 (N.Y. Ct. CL filed Dec. 21, 1994).

The "chunky peanut butter" case has become the favorite canard of those who wish to ridicule prisoner litigation. Many journalists have reported it, using the inaccurate description of the case popularized by the attorneys general.<sup>7</sup> Their misleading characterization of the case was repeatedly cited during congressional consideration of proposals to limit prisoner litigation.<sup>8</sup>

I readily acknowledge that \$2.50 is not a large sum of money, and there is a substantial argument that lawsuits for such sums should be relegated to forums other than federal district courts. But such a sum is not trivial to the prisoner whose limited prison funds are improperly debited. The more important point is that those in positions of responsibility should not ridicule all prisoner lawsuits by perpetuating myths about some of them.

## II. THE CONGRESSIONAL RESPONSE

This year, Congress endeavored to curtail prisoner litigation by enacting the Prisoner Litigation Reform Act of 1995 ("PLRA"), signed into law on April 26, 1996.<sup>9</sup> The PLRA covers several topics, including prospective remedies in suits challenging prison conditions and exhaustion of administrative remedies, that are beyond the scope of this brief Article. My focus is on the provision concerning payment of filing fees, which Congress adopted in the expectation that prisoners would file fewer lawsuits if they had to pay filing fees out of their prison fund accounts.

Prior to the PLRA, most prisoners filing lawsuits accompanied their complaints with a motion for leave to proceed *in forma pauperis*.<sup>10</sup> Upon submission of an affidavit of poverty,

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<sup>7</sup> See, e.g., George F. Will, 1995: *Oh, A Revolution*, NEWSWEEK, Dec. 25, 1995/Jan. 1, 1996, at 136.

<sup>8</sup> See, e.g., 142 CONG. REC. S3, 703-01 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham); *id.* at S2, 219-03 (daily ed. Mar. 18, 1996) (statement of Sen. Reid); 141 CONG. REC. S14, 626-1 (daily ed. Sept. 29, 1995) (statement of Sen. Dole); *id.* at S14, 418-01 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl); *id.* at H1, 480-06 (daily ed. Feb. 9, 1995) (statement of Rep. Canady).

<sup>9</sup> The Prison Litigation Reform Act of 1995 is Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996).

<sup>10</sup> See 28 U.S.C. § 1915 (1994), as amended by Prisoner Litigation Reform Act

any litigant is entitled to file a lawsuit in a district court or an appeal in a court of appeals without prepayment of fees.<sup>11</sup> An action brought *in forma pauperis* is, by statute, subject to dismissal if determined to be frivolous.<sup>12</sup>

The PLRA amends the *in forma pauperis* provision with respect to any prisoner seeking "to bring a civil action" or "appeal a judgment in a civil action."<sup>13</sup> Such prisoners are now liable for filing fees, even though they have only the minimal financial resources that would qualify them for *in forma pauperis* status if they were not prisoners. The fees are to be debited from the prisoner's trust fund account.<sup>14</sup> The prisoner pays an initial partial filing fee equal to twenty percent of the greater of the average monthly deposits or the average monthly balance in the prison account for the six months prior to filing the complaint or notice of appeal.<sup>15</sup> Thereafter, twenty percent of the income credited to the account is debited in each month that the account balance exceeds \$10 until the balance of the filing fees is paid.<sup>16</sup> The PLRA exempts only those prisoners who have "no assets and no means by which to pay the initial partial filing fee."<sup>17</sup> To implement the filing fee payment obligation, the PLRA requires the prisoner to submit a certified copy of the prisoner's trust fund account statement (or institutional equivalent) for the six months preceding the complaint or appeal.<sup>18</sup>

### III. INITIAL SECOND CIRCUIT CONSIDERATION OF THE PLRA

In a series of cases decided in the summer of 1996, the Second Circuit resolved a number of issues arising under the fee provisions of the PLRA.<sup>19</sup> The first issue concerned the

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of 1995.

<sup>11</sup> *Id.* § 1915(a), as amended by Prisoner Litigation Reform Act of 1995.

<sup>12</sup> *Id.* § 1915(d), as amended by Prisoner Litigation Reform Act of 1995.

<sup>13</sup> *Id.* § 1915(a)(2), as amended by Prisoner Litigation Reform Act of 1995.

<sup>14</sup> *Id.* § 1915(b), as amended by Prisoner Litigation Reform Act of 1995.

<sup>15</sup> 28 U.S.C. § 1915(b)(1), as amended by Prisoner Litigation Reform Act of 1995.

<sup>16</sup> *Id.* § 1915(b)(2), as amended by Prisoner Litigation Reform Act of 1995.

<sup>17</sup> *Id.* § 1915(b)(4), as amended by Prisoner Litigation Reform Act of 1995.

<sup>18</sup> *Id.* § 1915(a)(2), as amended by Prisoner Litigation Reform Act of 1995.

<sup>19</sup> *Reyes v. Keane*, 90 F.3d 676 (2d Cir. 1996); *In re Nagy*, 89 F.3d 115 (2d Cir. 1996); *Covino v. Reoppel*, 89 F.3d 105 (2d Cir. 1996); *Leonard v. Lacy*, 88 F.3d

mechanics of complying with the new statute. The PLRA states that the *prisoner* shall file the certified copy of the prison trust fund account statement and that the *court* shall assess and collect the initial partial filing fee payment.<sup>20</sup> The subsequent payments are to be made by "[t]he agency having custody of the prisoner."<sup>21</sup> These provisions created essentially administrative choices as to how compliance should be achieved.

The Second Circuit devised an administrative arrangement that simplifies the tasks of the prisoner and the court of appeals, and shifts some functions to the prison authorities. In the first decision construing the PLRA, *Leonard v. Lacy*,<sup>22</sup> the Second Circuit created a prisoner authorization form to be used by every prisoner endeavoring to appeal *in forma pauperis*.<sup>23</sup> Using this form, the prisoner authorizes the prison authorities to send to the court of appeals the certified copy of the prisoner's prison account and all of the payments required by the PLRA. The court considered the use of the authorization form to be compliance with the statutory requirements on the theory that requiring the form "causes" submission of the account statement by the prisoner and collection by the court of the initial payment.<sup>24</sup>

The authorization form eliminates potential disputes between the prisoner and the prison concerning the availability of the prison account statement, and potential disputes between the court and the prison concerning the initial payment. The authorization form procedure centralizes all steps to implement the fee payment requirements in the prison authorities, once the prisoner has signed the required authorization. Submission of a signed authorization form is a requirement of proceeding with an appeal without prepayment of fees. If the form is not submitted within thirty days of filing the appeal, the appeal is dismissed.<sup>25</sup>

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181 (2d Cir. 1996).

<sup>20</sup> 28 U.S.C. § 1915(a)(2), (b)(1), as amended by Prisoner Litigation Reform Act of 1995.

<sup>21</sup> *Id.* § 1915(b)(2), as amended by Prisoner Litigation Reform Act of 1995.

<sup>22</sup> 88 F.3d 181 (2d Cir. 1996).

<sup>23</sup> *See id.* at 187 n.3.

<sup>24</sup> *Id.* at 187.

<sup>25</sup> *Id.*

*Leonard* also resolved an important issue concerning the time at which the prisoner becomes obligated for fee debits from the prison account. Prior to the PLRA, it had been the practice of the Second Circuit, upon consideration of any pro se litigant's motion for leave to appeal *in forma pauperis*, to make a threshold determination of whether the appeal surmounted the "frivolousness" standard of section 1915(d). In scores of cases, the court determined that the appeal was frivolous and for that reason denied the motion to appeal *in forma pauperis* and simultaneously dismissed the appeal. This procedure followed the Supreme Court's guidance in *Neitzke v. Williams*.<sup>26</sup>

With enactment of the PLRA, the Second Circuit faced the choice of whether to impose the fee payment obligation as soon as the notice of appeal is received or only after the threshold determination that the appeal surmounts the "frivolousness" standard. If "frivolousness" were determined first and frivolous appeals were dismissed before the fee obligation was imposed, the PLRA would have the perverse effect of letting prisoners with frivolous appeals avoid the fee payment obligation and imposing the obligation only on those whose appeals were not frivolous. The court therefore concluded that the fee payment obligation must be imposed at the outset of the appeal, thereby implementing the congressional objective of making prisoners feel the deterrent effect of liability for fees.<sup>27</sup>

The court also resolved issues concerning the application of the PLRA to pending appeals. In *Covino v. Reopel*,<sup>28</sup> the court ruled that the PLRA fee requirements applied to prisoners who, before the effective date of the Act, had filed notices of appeal,<sup>29</sup> had moved for leave to appeal *in forma pauperis*,<sup>30</sup> or had acquired *in forma pauperis* status on appeal by virtue of having such status unrevoked in the district court.<sup>31</sup> The PLRA fee requirements do not apply to such cases, however, if

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<sup>26</sup> 490 U.S. 319 (1989).

<sup>27</sup> *Leonard*, 88 F.3d at 185.

<sup>28</sup> 89 F.3d 105 (2d Cir. 1996).

<sup>29</sup> *Id.* at 108 (Covino and Vann).

<sup>30</sup> *Id.* (Kellams).

<sup>31</sup> *Id.* (David); see Fed. R. App. P. 24(a).

the court has already invested substantial resources in the appeal,<sup>32</sup> or if the appeal was submitted before the effective date of the PLRA.<sup>33</sup>

The court also determined the amount of appellate fees to which the fee payment obligation applies. Though the only fee denominated by statute as an appellate filing fee is the \$5 fee imposed by 28 U.S.C. § 1917, the court ruled in *Leonard* that the fee obligation applied to both the \$5 fee and the \$100 docketing fee required by resolution of the Judicial Conference of the United States,<sup>34</sup> acting pursuant to its authority to determine "[t]he fees and costs to be charged and collected in each court of appeals."<sup>35</sup>

Finally, the court resolved two issues concerning the applicability of the fee payment obligation. In *In re Nagy*,<sup>36</sup> the court ruled that the PLRA requirements apply to mandamus petitions that seek relief from prison officials comparable to the relief usually sought in civil rights actions under 42 U.S.C. § 1983, but did not apply to mandamus petitions seeking relief against judges in the course of criminal proceedings. Of more significance was the ruling in *Reyes v. Keane*,<sup>37</sup> that the PLRA fee requirements do not apply to appeals from the denial of habeas corpus petitions.

## CONCLUSION

Pro se prisoner lawsuits and appeals will very likely continue to impose significant burdens on federal district courts and courts of appeals. Prisoners who are subject to governmental authority twenty-four hours a day will inevitably encounter some actions they consider worthy of legal redress, and they have ample time to devote to the task of preparing their court

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<sup>32</sup> *Covino*, 89 F.3d at 106.

<sup>33</sup> *Ramsey v. Coughlin*, 94 F.3d 71 (2d Cir. 1996); see *Duamutef v. O'Keefe*, No. 96-2238, slip op. at 105, 108 (2d Cir. Oct. 18, 1996) (PLRA inapplicable where notice of appeal filed before effective date of PLRA, briefs filed after effective date but before decision in *Covino*.)

<sup>34</sup> See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12 (March 17, 1987).

<sup>35</sup> 28 U.S.C. § 1913 (1994), as amended by Prisoner Litigation Reform Act of 1995; see *Leonard v. Lacy*, 88 F.3d 181, 186 (2d Cir. 1994).

<sup>36</sup> 89 F.3d 115 (2d Cir. 1996).

<sup>37</sup> 90 F.3d 676 (2d Cir. 1996).

papers. The challenge for courts is to avoid letting the large number of frivolous complaints and appeals impair their conscientious consideration of the few meritorious cases that are filed.

Whether the new fee obligations of the PLRA will deter some prisoners from filing complaints and appeals remains to be seen. My guess is that some prisoners will think twice before subjecting the limited funds in their prison accounts to debiting of the \$120 fee for filing a complaint and the \$105 aggregate fee for filing an appeal, and some prisoners will decide not to file.<sup>38</sup> Whatever the deterrent effect of the PLRA, courts will continue to have the important task of looking through the "haystacks" of prisoner lawsuits for the "needles" of meritorious prisoner claims.

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<sup>38</sup> Of the first 38 prisoners to whom the Second Circuit sent notices of intent to dismiss unless the authorization form for fee payments was filed within 30 days, 10 decided not to authorize fees to be debited from their prison accounts, and their appeals were dismissed.

