Prisoner-Plaintiffs and the Frontiers of Frivolousness: Why Claim Value Should Play No Role in *In Forma Pauperis* Frivolousness Determinations

Kevin Bennardo

Upon a showing of indigence, a federal district court may authorize a prisoner to proceed with a non-frivolous civil action *in forma pauperis*. 28 U.S.C. § 1915(a), (e) (2006). The federal courts agree that the *likelihood* of recovery plays an important role in assessing frivolousness, but, in some circuits, so does the *size* of the potential recovery. In those circuits, *in forma pauperis* prisoner tort claims are dismissed for frivolousness, regardless of the merits of the claim, based on the court’s assessment that the claimed economic damages are insignificant. Although the law may not concern itself with trifles (“*de minimis non curat lex*”), this is no trifling matter. Basing frivolousness determinations on the size of the potential recovery lacks statutory grounding, ignores the economic disincentives for *in forma pauperis* prisoners to file spurious civil lawsuits, and insulates prison staff from recourse for visiting small economic harms on prisoners.

Before 1996, obtaining *in forma pauperis* status wholly exempted an indigent prisoner-plaintiff from the burden of paying any of the filing fee. Since an amendment in 1996, however, a prisoner-plaintiff proceeding *in forma pauperis* is required to pay the full amount of the filing fee. The benefit of the current *in forma pauperis* status is that the fee is payable on a deferred basis through monthly deductions from the prisoner’s trust account. 28 U.S.C. § 1915(b) (2006). Under the revised statute, the *in forma pauperis* plaintiff no longer escapes the responsibility to pay the filing fee, only the duty to *prepay* the filing fee. The district court must dismiss the case at any time—and often *sua sponte* before the filing of a responsive pleading—if it determines that the prisoner’s allegation of poverty was untrue, or that the action is frivolous or malicious, fails to state a claim, or seeks monetary relief against an immune defendant. *Id.* § 1915(e); see also 28 U.S.C. § 1915A (2006).

Thus, the contours of the frivolousness determination is of great importance to the large number of prisoners who rely on *in forma pauperis* status to press their civil claims in the federal courts. Construing an earlier iteration of the statute, the Supreme Court stated that “a complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact.” *Nietzke v. Williams*, 490 U.S. 319, 325 (1989) (holding that a complaint that fails to state a claim upon which relief could be granted under Fed. R. Civ. P. 12(b)(6) is not necessarily frivolous within the meaning of the *in forma pauperis* statute); see *Denton v. Hernandez*, 504 U.S. 25, 31–33 (1992). Although the purpose of the *in forma pauperis* statute is “to ensure that indigent litigants have meaningful access to the federal courts,” Congress recognized “that a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits.” *Nietzke*, 490 U.S. at 324. Thus, Congress equipped the district courts with a mechanism to dismiss such suits at the earliest juncture “to

---

∗Teaching Fellow and Assistant Professor of Professional Practice, Louisiana State University Paul M. Hebert Law Center; J.D., The Ohio State University Moritz College of Law.
discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits.” *Id.* at 327 (emphasis added).

Many subsequent federal courts of appeals have respected the boundaries meted out by *Nietzke* and dismiss in forma pauperis actions for frivolousness only upon a finding that the claim is indisputably meritless. See *Milligan v. Archuleta*, 659 F.3d 1294, 1296 (10th Cir. 2011); *Alejo v. Heller*, 328 F.3d 930, 935–36 (7th Cir. 2003); *Johnson v. Gibson*, 14 F.3d 61, 63 (D.C. Cir. 1994) (per curiam); *Wesson v. Oglesby*, 910 F.2d 278, 281 (5th Cir. 1990); *Guti v. U.S. I.N.S.*, 908 F.2d 495, 496 (9th Cir. 1990) (per curiam). Both the Third and Fourth Circuits, however, view the *Nietzke* merits-based analysis as but one non-exhaustive test for frivolousness. *See Deutsch v. United States*, 67 F.3d 1080, 1085 (3d Cir. 1995); *Nagy v. FMC Butner*, 376 F.3d 252, 256 (4th Cir. 2004). These two circuits have exercised a perceived license to expand the frontiers of frivolousness beyond a merits-based analysis.

The Third Circuit has construed “frivolous” in the in forma pauperis statute to include claims that are: “(1) of little or no weight, value, or importance; (2) not worthy of serious attention; or (3) trivial.” *Deutsch*, 67 F.3d at 1082 (holding that a prisoner’s claim seeking $4.20 in recompense for the allegedly improper confiscation of his pens was trivial and thus properly dismissed as frivolous under the in forma pauperis statute). The Third Circuit expressed concern that the in forma pauperis statute actually conferred greater access to indigent prisoner-plaintiffs by removing the economic disincentive to file claims valued less than the cost of filing the action (then $120). *Id.* at 1087–88. By expanding the definition of frivolous to include such economically trivial claims, the court sought to re-level the playing field. *Id.* at 1090 (to determine whether an in forma pauperis plaintiff’s claim is frivolous based on triviality, “[t]he relevant guidepost for a district court is whether a reasonable paying litigant would have paid the court costs and filing fees to bring the same claim”). Thus, the Third Circuit outlined a two-step procedure to test for frivolousness based on triviality: (1) determine whether the actual amount of controversy exceeds the expense of court costs and filing fees, and (2) determine whether the plaintiff has a non-economic interest at stake that would justify the litigation notwithstanding its economic insignificance. *Id.* at 1089–90; see also *Hornes v. United States*, 2007 WL 1463028, at *9–10 (N.D. W.Va. May 17, 2007) (applying *Deutsch*’s “cost/recovery differential” and finding that claim for approximately $200 of property loss was frivolous because damages would not exceed the filing fee); *Teal v. United States*, 2007 WL 542243, at *13–14 (N.D. W.Va. Feb. 16, 2007) (same; claim valued at less than $150); *Oriakhi v. Wood*, 2006 WL 859543, at *8–9 (M.D. Pa. Mar. 31, 2006) (finding claim for $5.20 of property loss to be frivolous).

The Fourth Circuit followed with an opinion holding that “the amount sought in an in forma pauperis suit is a permissible factor to consider when making a frivolity determination” under the in forma pauperis statute. *Nagy v. FMC Butner*, 376 F.3d 252, 253 (4th Cir. 2004). In *Nagy*, the Fourth Circuit affirmed the district court’s finding that a prisoner’s claim alleging the negligent loss of the prisoner’s laundry was frivolous.
based in part on the $25 value of the missing sweat suit. *Id.* The claim in *Nagy* post-dated the amendment to the *in forma pauperis* statute requiring prisoner-plaintiffs to pay the full filing fee on a deferred basis. The Fourth Circuit, however, held that the amendment did not “assist the appellant” because “the introduction of a deferred payment mechanism [should not] be mistaken for an implied congressional intention that this mechanism would be a panacea for excessive in forma pauperis litigation.” *Id.* at 256. Thus, according to the Fourth Circuit, courts are still afforded “wide latitude” to dismiss *in forma pauperis* suits for frivolousness even after the 1996 amendment. *Id.*

The *Deutsch* test creates a *de facto* economic barrier—the price of the filing fee—that is entirely absent from the statutory language. Had Congress wished to avoid underwriting economically insignificant civil claims of indigent prisoners, it could have simply written a monetary floor into the *in forma pauperis* statute. Such a statutory floor would put prisoners on clear notice that *in forma pauperis* status will not be conferred to pursue certain claims. But for a federal court to read such a monetary floor into the term “frivolous,” dismiss a prisoner’s complaint for non-compliance with the *in forma pauperis* statute, and continue to debit the prisoner’s trust account to recoup the filing fee is simply unfair. To underscore the injustice, such dismissals are often accompanied by an invitation from the court for the prisoner to refile the action with the filing fee prepaid. See, e.g., *Nagy*, 376 F.3d at 258. Of course, should the prisoner accept the invitation she has effectively paid *double* the normal filing fee to maintain the action—once on a deferred basis for the dismissed “frivolous” suit and again through prepayment of the fee.

Even accepting the legitimacy of the *Deutsch* court’s expansion of the definition of “frivolous” to include economically “trivial” claims where prisoners were totally alleviated of the burden of paying the filing fee, the continued consideration of the economic value of the claim is no longer appropriate given the amendment requiring prisoners to pay the full filing fee on a deferred basis. The 1996 amendment requiring deferred payment of the filing fee disincentivizes prisoners from filing spurious or trivial claims in much the same way that prepayment of the filing fee does for non-indigent plaintiffs. The prisoner-plaintiff in *Nagy* paints a telling picture. After the Fourth Circuit affirmed the dismissal of his complaint in 2003, payments were deducted from his trust account as late as 2008 to offset the court costs of the litigation. See *Nagy* v. FMC-Butner, No. 5:02-ct-00922-BO (E.D. N.C. 2003). Although he was relieved of paying the filing fee up front, the *Nagy* plaintiff remained on the hook for the fee and ended up paying more than the $25 value of his misplaced sweat suit toward the costs of the litigation. *Id.* (over the course of five years, a total of $28.82 was paid to the court from his trust account). It simply no longer makes economic sense for *in forma pauperis* prisoner-plaintiffs to bring claims for small monetary damages.

Although prisoners face economic disincentives to file suits for monetarily trivial losses, most prisoners likely view the expenditure of time and effort required to pursue pro se litigation as less of a barrier than non-incarcerated persons. Prisoners simply have more time on their hands and fewer alternative productive endeavors on which to spend it. Based on this lesser valuation of time, prisoners are more likely to bring pro se civil claims that most non-incarcerated persons would forego. A district court should not
place itself in the position of judging the value of individual prisoners’ time and effort by applying a test that inquires whether a reasonable non-incarcerated person would bring the same claim. Not only is that standard totally absent from the in forma pauperis statute, but plaintiffs—including prisoner-plaintiffs—should be free to balance their subjective valuation of their own time against their perception of the magnitude of the civil wrong.

A negative byproduct of linking frivolousness to the monetary value of a claim is that it broadcasts to would-be tortfeasors that indigent prisoners will be unable to seek redress in the federal courts for economically small harms. Although the prison’s administrative grievance process may remain available to an aggrieved inmate, under the Deutsch test government employees are on notice that indigent prisoners generally cannot turn to the federal courts for recourse based on losses valued at less than the filing fee (currently $350, 28 U.S.C. § 1914 (2006)). Although, as explained above, a prisoner may lack an economic incentive to bring a claim valued less than the filing fee, the courts should remain open to her to press that claim if she elects to do so. Cf. Hessel v. O’Hearn, 977 F.2d 299, 303 (7th Cir. 1992) (“The size of the loss is relevant sometimes to jurisdiction, often to punishment, and always to damages, but rarely if ever to the existence of a legal wrong.”).

If indigent prisoners wish to expend their time and efforts in pursuing the righting of small wrongs, so be it. It is not the place of the judiciary to subject their claims to an “objective” valuation, especially in light of the absence of any hint of a statutory directive to do so. Rather, consistent with the Supreme Court’s interpretation, courts should confine review for frivolousness under the in forma pauperis statute to an analysis of the likely merits of the claim. Only claims that are “so defective that they should never have been brought at the outset,” Nietzke, 490 U.S. at 328, should suffer the fate of dismissal for frivolousness.