Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

Three Strikes, You're Out: Supreme Court to Consider Limit on Prisoner Litigation

Updated June 8, 2020

UPDATE: The Supreme Court issued its opinion in Lomax v. Ortiz-Marquez on June 8, 2020. The full Court agreed that "[t]he text of Section 1915(g)'s three-strikes provision refers to any dismissal for failure to state a claim, whether with prejudice or without."

The original post from February 20, 2020, is below.

The Administrative Office of the United States Courts reports that in 2018, state and federal prisoners filed nearly 54,000 suits in federal district court. Such litigation, which often challenges the conditions of confinement in federal and state prisons, may allow prisoners to vindicate fundamental rights but can also place a heavy burden on the federal courts that hear the cases and the government officials who must defend against them. The Prison Litigation Reform Act (PLRA) seeks to balance those competing interests, "ensuring that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit." On February 26, 2020, the Supreme Court is scheduled to hear oral argument in the latest dispute over the PLRA, *Lomax v. Ortiz-Marquez*. The case concerns the scope of the PLRA's "three strikes" provision, which aims to limit meritless litigation by prisoners. This Sidebar outlines the applicable legal regime, explaining how the PLRA modified the law related to prisoner litigation. The Sidebar then summarizes the litigation in *Lomax* and presents key considerations for Congress.

Statutory Background

Proceedings In Forma Pauperis

By statute, a person who files suit in federal court must generally prepay a filing fee, which currently totals $400 for most civil actions brought in district court. Charging filing fees is understood to benefit the judiciary not only by helping to cover the courts' operating costs, but also by deterring excessive litigation: if litigants must pay hundreds of dollars every time they file a lawsuit, they may be less inclined to initiate time- and resource-consuming litigation with a low probability of success.

To ensure that filing fees do not prevent indigent litigants from bringing potentially meritorious lawsuits, in the late 19th century Congress enacted legislation allowing litigants who submit an affidavit of

indigence to proceed in forma pauperis (IFP) and commence suit without prepaying court fees. However, as the Supreme Court has noted, "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." The federal IFP statute thus contains provisions designed to discourage frivolous litigation and reduce the burden on the courts, such as a requirement that courts dismiss certain IFP suits that are futile or lack merit.

The PLRA and Indigent Prisoner Litigation

Prior to 1996, prisoners proceeding IFP were subject to the same rules as other indigent litigants. That year, however, Congress enacted the PLRA based on a finding that "prisoner suits . . . represented a disproportionate share of federal filings." The PLRA contains multiple provisions generally intended to "reduce the quantity and improve the quality of prisoner suits." For example, the PLRA limits the scope of prospective relief available in lawsuits concerning prison conditions, meaning that courts may only grant an injunction related to prison conditions if it "is narrowly drawn, extends no further than necessary . . . , and is the least intrusive means necessary to correct the violation of [a] Federal right." The statute also contains an exhaustion provision that bars prisoners from filing suits related to prison conditions before seeking all available remedies through the prison grievance system. Furthermore, the PLRA requires courts to dismiss any action related to prison conditions or any prisoner complaint against a governmental entity if the complaint is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune.

The PLRA also specifically modifies the IFP requirements for prisoners. First, the PLRA provides that prisoners proceeding IFP—unlike non-prisoners—generally remain liable for the full filing fee. While indigent prisoners need not prepay the full fee before pursuing litigation, they must pay the fee in installments based on the amount of funds in their prison trust account. A prisoner with no available assets can bring suit without paying a partial filing fee, but may be required to make installment payments later if funds become available. (The courts of appeals have split on the question of whether a prisoner remains liable for fees assessed under the PLRA after release.) In addition, as relevant in *Lomax*, 28 U.S.C. § 1915(g) (known as the PLRA's three strikes provision) provides:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Each time a prisoner has a suit dismissed on one of the enumerated grounds, the dismissal counts as a "strike." Prisoners who incur three strikes ordinarily may still file lawsuits, but must either prepay the full filing fee or demonstrate that they are in imminent danger of serious physical injury.

Lomax v. Ortiz-Marquez

The question presented in *Lomax* is whether *all* dismissals for failure to state a claim constitute strikes under the PLRA. As background, a court faced with a defective complaint may dismiss the complaint either with or without prejudice. If a complaint suffers from potentially curable defects, the court may dismiss *without prejudice*, allowing the plaintiff to remedy the issues and attempt to bring the same claims again in a new complaint. For example, under *Heck v. Humphrey*, a person may not sue for damages for unconstitutional conviction or imprisonment unless the challenged conviction has already been reversed on appeal or otherwise invalidated. If a person whose conviction has not been invalidated brings a civil suit challenging the conviction, the court will generally dismiss without prejudice under *Heck*, leaving the plaintiff the opportunity to bring suit again if and when the conviction is overturned. By contrast, if a complaint suffers from incurable defects or a plaintiff repeatedly fails to remedy potentially curable defects, the court may dismiss *with prejudice*. For instance, dismissal with prejudice may be appropriate if a complaint is frivolous—containing allegations that are "clearly baseless," "fanciful," or "delusional"—and could not be "remedied through more specific pleading." Dismissal with prejudice bars the plaintiff from attempting to bring the same claims again in the future.

While there appears to be no dispute that dismissal *with* prejudice for failure to state a claim counts as a strike under the PLRA, the courts of appeals have split on whether dismissal *without* prejudice for failure to state a claim counts as a strike.

Petitioner Arthur James Lomax is incarcerated in Colorado. In 2018, he sued several corrections officials, raising constitutional claims arising from his expulsion from a sex offender treatment program. The district court ordered Lomax to show cause why he should not be required to prepay the full filing fee because he previously had three suits dismissed for failure to state a claim. One of Lomax's prior complaints was dismissed with prejudice; Lomax did not contest that that dismissal was a strike. However, his two other complaints were dismissed without prejudice for failure to state a claim under *Heck*. Lomax contended that the two dismissals without prejudice did not constitute strikes. The district court disagreed and denied Lomax leave to proceed IFP. On appeal, the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) affirmed the denial. Lomax also argued before both the district court and the Tenth Circuit that he was eligible for IFP status because he faced imminent danger of serious physical injury. However, both courts rejected that argument, and the Supreme Court granted certiorari only as to the question of whether "a dismissal without prejudice for failure to state a claim count[s] as a strike" under the three strikes provision.

Before the Supreme Court, Lomax argues that his two complaints that were dismissed without prejudice for failure to state a claim do not count as strikes because the PLRA's three strikes provision mirrors the language in Federal Rule of Civil Procedure 12(b)(6) governing "failure to state a claim upon which relief can be granted." Courts presume that a dismissal under Rule 12(b)(6) is with prejudice unless the issuing court specifies otherwise. Likewise, Lomax contends, Congress's use of the phrase "fails to state a claim upon which relief may be granted" in the PLRA implicitly applies only to the default form of dismissal—dismissal with prejudice.

Lomax also asserts that the PLRA's broader structure supports his position because the other grounds for dismissal that count as strikes "apply to actions that cannot succeed," rather than complaints suffering from curable defects. Similarly, Lomax claims that the PLRA's legislative history supports his position because the Congress that enacted the PLRA "sought to weed out and deter only truly meritless and frivolous actions," rather than "potentially 'legitimate claims' that were dismissed without prejudice because of some pleading error or procedural barrier." Lomax argues that interpreting the three strikes provision to include dismissals without prejudice would improperly restrict prisoners' right of access to federal court by imposing strikes for legitimate claims that suffer from curable flaws. He also contends

that the Court should not adopt such an interpretation because it would raise constitutional questions involving the right of access to court by prisoners and indigent litigants.

The respondent corrections officials and the United States as amicus curiae assert that dismissal for failure to state a claim is a strike, whether the dismissal is with or without prejudice. The corrections officials argue that the plain meaning of the word "dismissed" as used in the three strikes provision embraces all dismissals, whether with or without prejudice. They note that Congress has enacted other statutes that apply only to dismissals with (or without) prejudice, and assert that the Court should not imply such a limitation if Congress did not expressly impose it in the PLRA. The corrections officials also contend that the PLRA's legislative history supports their interpretation of the statute because the Congress that enacted the PLRA hoped to relieve courts from "the crushing burden of . . . frivolous suits." Finally, they argue that their interpretation of the three strikes provision would not unduly limit prisoners' access to court, either as a matter of public policy or constitutional law.

Possible Outcomes and Considerations for Congress

As noted above, the federal appellate courts have split with respect to the issue presented in *Lomax*. The Third and Fourth Circuits have construed the three strikes provision to encompass dismissals for failure to state a claim only if entered with prejudice. Those courts reasoned that a dismissal for failure to state a claim under Rule 12(b)(6) is presumed to be rendered with prejudice, so "a dismissal without prejudice for failure to state a claim does not fall within the plain and unambiguous meaning" of the three strikes provision. By contrast, a majority of appellate courts that have considered the issue held that dismissal without prejudice counts as a strike under the PLRA. Those courts generally relied on the fact that the text of the three strikes provision does not expressly limit its effects to dismissals without prejudice.

In deciding *Lomax*, the Supreme Court may consider whether the three strikes provision—particularly an interpretation of the provision that would place more stringent limits on prisoner litigation—raises constitutional concerns. However, federal courts have generally recognized few constitutional constraints on civil filing fees. The Supreme Court has emphasized that "a constitutional requirement to waive court fees in civil cases is the exception, not the general rule," and exists only when a "fundamental interest" is at stake. Moreover, while the Supreme Court has not previously considered the constitutionality of the three strikes provision, numerous federal appellate courts have concluded the provision is constitutional.

To the extent *Lomax* hinges on a pure question of statutory interpretation, Congress could amend the PLRA (before or after the Supreme Court rules) to clarify how the three strikes provision should apply. The parties' arguments in *Lomax* invoking competing canons of statutory interpretation—such as presumptions about the three strikes provision's plain meaning or the invitation to construe the word "dismissed" in light of its meaning in Rule 12(b)(6)—suggest key considerations Congress could take into account if it sought to amend the statute. Ultimately, though, the interpretive arguments that both sides raise with respect to the three strikes provision could be overcome with express language specifying whether a dismissal without prejudice constitutes a strike.

Lomax takes place against a background of broader policy debates about the PLRA. Some commentators object that the PLRA places too many limits on prisoner litigation and contend that Congress should reform the law or repeal the statute altogether. Others counter that prisoners continue to file high volumes of meritless cases and suggest that ongoing burden may warrant more rigorous controls on prisoner litigation. While the Supreme Court has not previously taken up the issue presented in *Lomax*, it has considered the PLRA in other contexts, with varying results for each side of the policy debate. The Court previously invoked the three strikes provision's plain text and the statute's purpose "to filter out the bad claims and facilitate consideration of the good" in holding that a covered dismissal counts as a strike even while any appeal from the dismissal remains pending. That decision disagreed with a majority of courts of appeals and adopted an interpretation of the three strikes provision that imposed more stringent limits on

prisoner litigation. On the other hand, the Supreme Court has invalidated court rules requiring prisoners to demonstrate compliance with the PLRA's exhaustion requirement in their complaints, explaining that "the policy and purpose underlying the PLRA" did not justify "adopting different and more onerous pleading rules" than those required by the statute. The differing results in these cases and the ongoing disputes over the meaning of the PLRA may suggest a role for Congress in resolving many of the legal and policy debates surrounding prisoner litigation.

The Supreme Court will likely issue a decision in *Lomax* by June 2020.

Author Information

Joanna R. Lampe
Legislative Attorney

Disclaimer