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Supreme Court Confirms Dismissal for Failure to State a Claim Without Prejudice is a "Strike" Under the PLRA's Three-Strikes Rule

The Supreme Court of the United States issued a succinct and nearly unanimous opinion interpreting the Prison Litigation Reform Act of 1995 (PLRA) on June 8, 2020. *Lomax v. Ortiz-Marquez*, No. 18-8369, 2020 U.S. LEXIS 3145 (June 8, 2020). At issue was Section 1915(g) of the PLRA, which is commonly referred to as the "three-strikes rule." The three-strikes rule bars a prisoner plaintiff from bringing suit *in forma pauperis* (without paying the filing fee) if the prisoner previously filed three or more suits that were dismissed on the grounds that they were "frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g).

For a number of years, the Federal Courts of Appeals were divided over whether a dismissal for failure to state a claim "without prejudice" qualified as a strike under Section 1915(g). The Seventh Circuit, for example, believed that it did. *Lomax*, 2020 U.S. LEXIS 3145, at *5 n.3 (citing *Paul v. Marberry*, 658 F.3d 702, 704 (7th Cir. 2011) ("A dismissal is a dismissal, and provided that it is on one of the grounds specified in section 1915(g) it counts as a strike . . . whether or not it's with prejudice.")) In light of the plain language of the statute, the Supreme Court clarified the issue for the nation.

The *pro se* plaintiff, Arthur Lomax, was incarcerated in a Colorado prison. *Lomax*, 2020 U.S. LEXIS 3145, at *4. He filed the underlying action to challenge his expulsion from the prison's sex-offender treatment program. As he did on multiple prior occasions, he petitioned the district court for *in forma pauperis* status to allow his case to proceed before he paid the $400 filing fee. The district court noted that Lomax had, in three earlier instances, brought lawsuits against corrections officers, prosecutors, and judges that were dismissed for failing to state a claim. *Id.* at *4-5. One of the prior dismissals was "with prejudice" while the other two were "without prejudice." The district court and Court of Appeals for the Tenth Circuit agreed that, regardless of the label attached to the dismissals, Lomax had struck out and was not eligible to proceed with his new action *in forma pauperis*. *Id.* at *5. On a practical level, this likely meant he would not have the means to pursue his newest action.

"In line with [its] duty to call balls and strikes," the Supreme Court granted certiorari to address the split among the circuits. It was not a difficult call for the justices, because the "case begins, and pretty much ends, with the text of Section 1915(g)." *Id.* According to the plain language of the provision, a prisoner accrues a strike for any lawsuit "dismissed on the ground [ ] that it . . . fails to state a claim upon which relief may be granted." *Id.* The statute makes no mention of the prejudicial effect of the dismissal, and to read in the inference that "dismissed" means "dismissed with prejudice" would violate rules of statutory construction. *Id.* at *6-7.

Lomax nevertheless argued that the phrase "dismissed [for] fail[ure] to state a claim" within Section 1915(g) is a "legal term of art" that should be applied in light of Federal Rule of Civil Procedure 41(b). *Id.* at *7. Rule 41(b) instructs courts to treat general dismissals (when neither "with prejudice" nor "without prejudice" is specified) "as an adjudication on the merits" (and so, "with prejudice"). *Id.* According to Lomax, this should mean that the general language of the

three-strike rule must be read to refer exclusively to "with prejudice" dismissals. *Id.* at *7-8. The court rejected this argument as backwards. It found instead that the very existence of Rule 41(b) helps prove that the language used in Section 1915(g) covers dismissals of both types. *Id.* at *8. Lomax further argued that, since the other two grounds for dismissal under Section 1915(g) (pleading that is "frivolous" or "malicious") "reflect a judicial determination that a claim is irremediably defective," then the same must be true for the failure to state a claim. In other words, Lomax reasoned, the statute must refer to dismissals with prejudice because this is the only way to "harmonize [all] three grounds for strikes." *Id*. at *9. The court found the premise of this argument to be mistaken, and pointed out that courts sometimes dismiss "frivolous" claims without prejudice, particularly when the action can be made non-frivolous through more specific pleading. Thus, the court asked, "[i]f dismissals without prejudice for frivolousness count as a strike under Section 1915(g), then why not for failure to state a claim too?" The court also saw no basis for the suggestion that all dismissed actions included in Section 1915(g) "must closely resemble frivolous or malicious ones." *Id*. at *10.

The Supreme Court concluded its analysis by recounting the objective of the PLRA. Before its enactment, a predecessor statute sought to reduce frivolous and malicious lawsuits, but no others. *Id.* at *10-11. In the wake of what Congress found to be a "flood" of non-meritorious—but not necessarily abusive—claims, it chose to add as a target actions that failed to state a viable cause of action. Lomax's invitation to interpret the three-strikes rule "based on the pre-existing terms 'frivolous' and 'malicious' . . . . would defeat the PLRA's *expansion* of the statute beyond what was already there." *Id.* at *11 (emphasis in original). Having found that a dismissal of a suit for failure to state a claim, whether with or without prejudice, counts as a strike, the court affirmed the ruling of the court below.

Although the Supreme Court's ruling was nearly unanimous, Justice Thomas joined all but Footnote 4, which states pertinent part:

> Note, however, that [Section 1915(g)] does not apply when a court gives a plaintiff leave to amend his complaint. Courts often take that path if there is a chance that amendment can cure a deficient complaint. . . . In that event, because the suit continues, the court's action falls outside of Section 1915(g) and no strike occurs.

Id. at *6 n.4. Thus, according to the court's opinion, a ruling on a motion to dismiss that grants leave to amend avoids operation of the three-strike rule. Notwithstanding Justice Thomas' objection, courts may still provide this lifeline to would-be *in forma pauperis* prisoner plaintiffs and not run afoul of Section 1915(g).

About the Author

John P. Heil, Jr. is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.*, where he chairs the firm's drone law practice group and is vice-chair of the business and commercial litigation practice group. He also regularly defends complex civil rights cases, *qui tam* actions and catastrophic tort suits in state and federal court. Prior to joining *Heyl Royster* in 2007, Mr. Heil was an Assistant State's Attorney in Cook County for eleven years. He received his undergraduate degree from Bradley University in 1993 and his law degree from Chicago-Kent College of Law, with honors, in 1996. He is a member of the Illinois Defense Counsel, the Federal Bar Association, the Illinois State Bar Association, the Peoria County Bar Association, and the Abraham Lincoln American Inn of Court.

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