JAIL ISSUES: DEFENDING *PRO SE* § 1983 INMATE CASES

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Introductions

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Issues and Problems

- U.S. has one of the largest population of incarcerated individuals in the world – approximately 2.3 million inmates on a given day. *See* https://www.americanjail.org/jail-statistics.
  - 767,620 are pretrial detainees
  - 1.3 million are state inmates

Issues and Problems

- Overcrowding, understaffing, lack of resources, and lack of public incentive to support correctional institutions
- COVID-19
  - Added additional stresses to the challenges facing jail leadership
  - Reduced available staff due to quarantines
  - Reduced available housing options for inmates
  - Court slowdowns/shutdowns
  - Civil unrest

Volume of Litigation

- Total civil rights lawsuits filed by incarcerated persons
  - 2019 – 26,241 (25,244 non-federal)
  - 2020 – 26,217 (25, 080 non-federal)
  - 2021 – 24, 372 (23,326 non-federal)
  - Average of 12.3 lawsuits filed per 1,000 inmates
  - *See* Table A: Incarcerated Population and Prison/Jail Civil Rights Conditions Filings, FY 1970-2021, https://incarcerationlaw.com/resources/data-update/

Volume of Litigation

- *Pro se* litigation
  - Since 2000, over 90% of cases involving prisoner civil rights and/or prison conditions have been filed by *pro se* litigants
    - Table B: Pro Se Litigation in U.S. District Courts, https://incarcerationlaw.com/resources/data-update/

Viability of Lawsuits

- Almost 80% of prisoner civil rights lawsuits filed in federal district courts are dismissed in favor of defendant in pretrial decisions
  - Motions to dismiss
  - Motions for summary judgment
- In 2020, the median number of days from filing until disposition was 161 days

So what?

- *Pro se* prisoner litigation constitutes a substantial number of lawsuits which local jails must defend against
- The vast majority of these lawsuits are defensible in their entirety and can be resolved favorably
- Developing a framework to defend these suits can ease the burden on the municipal lawyer and ensure timely and favorable resolution of defensible suits

Special Considerations

- Your client controls the liberty of the plaintiff
  - They control the plaintiff's access to the Court
  - They control the plaintiff's access to legal materials
  - They control the plaintiff's access to the inmate accounts
  - They control the plaintiff's ability to appear at
    - Teleconferences
    - Depositions
    - Trial

In Forma Pauperis

- 28 U.S.C. § 1915 –Proceeding in forma pauperis
  - (a)(2)"A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined."

In Forma Pauperis, Pt. II

- 28 U.S. Code § 1915(b) – A prisoner must pay the full amount of a filing fee
  - The court shall assess a partial payment of 20% of the greater of –
    - Average monthly deposits into prisoner's account; or
    - Average monthly balance in the prisoner's account for the 6 months immediately preceding the filing of the complaint
- The facility is responsible for forwarding monthly payments to the clerk

In Forma Pauperis, Pt. III

- 28 U.S. Code § 1915(g)-
  - ”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.”

Initial Filing

- Court's initial screening - 42 U.S.C. § 1915A
  - Dismiss claims that are frivolous, malicious, fail to state a claim for relief, or seek monetary relief from an immune defendant
  - Claim by claim
    - Court may repackage some claims
  - Sidesteps FRCP 12(b)(6) MTD – Court not likely to grant one after finding the claims pass muster
  - Lenient treatment of *pro se* pleadings. *Haines v. Kerner*, 404 U.S. 519 (1972)

Initial Filing, Pt. II

- Service and Scheduling Order? (If claims proceed)
- Service – Courts use US Marshals in KY
  - Notice to your office once the suit is allowed?
  - Be careful! This can get tricky if official capacity claims are involved. This is a *Monell* claim
  - Each Court handles this step a little differently.
    - Substitute municipality for O.C. claims?
    - Service vs. notice
    - Are you an agent of service for municipality and/or named defendant(s)?
    - Courts will seek your assistance in effecting service.
    - Consider waiver?

Answering the Complaint

- You may be required to interpret the Complaint – likely handwritten on a form
  - The Court may order you to restate the claims as understood by the defendant. This often requires sifting through irrelevant facts to get to the root of the claim, if there is one.
  - Alternatively, the Court may state the claims in a Service and Scheduling Order or other similar order.
  - Be skeptical of the claims. Lenient pleading requirements do not absolve a *pro se* litigant from meeting the minimum requirements.

Initial Defense

- Service and Scheduling Order?
  - Discovery deadlines, briefing schedule
  - Ordered to provide discovery to Plaintiff and certify it's complete
    - Still subject to discovery requests under the Rules
    - Courts may interpret *pro se* filings differently than you do
    - Courts may also treat discovery leniently
      - Ex: Court might excuse "failure to confer" requirement of FRCP 37

Initial Defense, Pt. II

- Gathering records
  - Inmate file
  - GRIEVANCES (much more on this later)
  - Medical Records?
  - Video & other media? What is your institution's retention policy?
  - Investigations
  - Incident Reports
- Calendar everything
  - If you have a lot of these, they will run together
  - May even have the same pleading filed by multiple Plaintiffs

Prison Litigation Reform Act 42 U.S.C. § 1997(e)

- Exhaustion requirement - § 1997(e)(a)
  - Anyone here not at least somewhat familiar with this requirement?
  - Sixth Circuit used to treat this as an element Plaintiff had to plead and prove.
    - *Jones v. Bock*, 49 U.S. 199 (2007) rejected this practice – must treat failure to exhaust ("FTE") as an affirmative defense
    - Always plead in your answer

PLRA, Pt. II

- MSJ – FTE requires proof. Your burden.
  - Our Service & Scheduling Order invites us to file this early if we have grounds
    - Any SJ issue that does not require discovery can be filed at any time
  - Get your grievance records immediately
    - This disposes of many inmate lawsuits and is unrelated to the merits of the claim
  - Know your institution's grievance procedure forwards and backwards
  - Parameters of the grievance policy define exhaustion. *Jones*, 549 U.S. at 218.

PLRA, Pt. III

- Your Grievance Policy - Time limits?
  - Inmate's?
  - Yours?
    - Make sure your institution is following its own rules
  - Inmate escalation clause for unanswered grievances?
  - Waiver? *Reed-Bey v. Pramstaller*, 603 F.3d 322 (6th Cir. 2010) held that an untimely grievance answered on the merits waives the exhaustion requirement.
  - Check your Circuit!
  - Courts may be lenient here as well (Ex: Court may interpret multiple claims where you don't)

PLRA, Pt. IV

- Your Grievance Policy – Content?
  - Identify all staff involved?
  - Identify all aspects Grievant wants addressed?
    - Grievances that don't comply rejected?
    - Ex: vulgar or abusive language, inmate requests disciplinary action against staff
  - Grievable Issue under the policy?
    - Non-grievable issues may not be subject to exhaustion requirement
    - Ex: Disciplinary procedures, inmate classification, court orders

PLRA, Pt. V

- Evaluating Exhaustion
  - Was there a grievance filed?
  - When?
    - Timeliness? Waiver?
  - Content?
    - Named Defendant(s) listed in grievance?
    - Does grievance sufficiently track the claims filed?
    - Ex: “We need cleaning supplies” offered as the grievance in a deliberate indifference claim about being exposed to COVID

PLRA, Pt. VI

- Evaluating Exhaustion
  - Complaint filed before grievance or before grievance process completed?
    - Subject to dismissal. Exhaustion cannot be achieved during the suit. *Freeman v. Francis*, 196 F.3d 641 (6th Cir. 1999)
    - DWOP
    - But Sixth Circuit will allow amended complaint to add claims exhausted during suit if there is one exhausted claim prior to filing. *Mattox v. Edelman*, 851 F.3d 853 (6th Cir. 2017)
    - Check your Circuit!

PLRA, Pt. VII

- Evaluating Exhaustion
  - Appeal?
  - How many levels do you have?
  - Timeliness?
    - Beware of waiver
    - Educate your institution?

PLRA Pt. VIII

- Filing the MSJ – Your burden
  - Permitted to file before discovery?
  - Grievance Process does not need to be effective *Massey v. Helman,* 196 F.3d 727, 733 (7th Cir. 2000)
  - Does not need to be capable of granting relief sought *Laurel v. Napier County*, 636 F.3d 218, 222 (6th Cir. 2011)
  - Inmate's subjective awareness of/belief in grievance procedure does not excuse FTE *Id.*
  - BUT, the grievance process cannot be a sham. *Ross v. Blake* , 578 U.S. 632 (2016)

PLRA, Pt. IX

- Filing the MSJ
  - What to Include?
    - Inmate's Grievances
    - Institution's Grievance Policy
    - Affidavit from Records Custodian:
      - No grievances filed.
      - Grievance rejected because _____.
      - Grievance filed, but not escalated or appealed.
      - Therefore, not in compliance with the policy because _____.
    - Other Affidavits? (Ex: Grievance process functioning)
  - <u>This has been sufficient to prevail on SJ.</u>

Practical Considerations

- Our Courts are looking to screen these as much as they can, without looking like it.
  - That's why there is that language in our scheduling orders to file MSJ at any time.
  - Other reasons for dismissal:
    - Failure to update address (move institutions, released)
    - Failure to prosecute or comply with Court orders (i.e. respond to Motions).
    - Failure to file discovery? (Not tested)
    - Failure to file pre-trial memorandum? (Not tested)

Odds and Ends

- All these are general strategies applicable to most cases.
- Still might need to defend on the merits.
- Sixth Circuit does not treat *pro se* SJ proceedings with the same leniency as pleadings *See Johnson v. Stewart*, 2010 WL 8738105 (6th Cir. 2010)(routinely cited by Courts)
  - Leniency at pleading stage primarily rooted in liberal pleading requirements.
- Cannot raise new legal theories in a SJ Response *Bridgeport Music Inc. v. WM Music Corp.*, 508 F.3d 394, 400 (6th Cir. 2007)
  - The proper procedure is to amend the complaint, which is within the broad discretion of the Court
  - Courts can consider the fact that Plaintiff had long-standing knowledge of the facts making up the basis of the claim in denying a motion to amend.
- Hearsay inadmissible in SJ proceedings (Ex: newspapers) *Alpert v. U.S.*, 481 F.3d 404 (6th. Cir. 2007)

Questions?

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