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MEANING OF THE WORD "FRIVOLOUS"

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1 Introduction

Those corresponding with or litigating against the government frequently are faced with the prospect of having their pleadings or legal contentions identified as "frivolous". This tactic is most often employed by government counsel in an effort to avoid having to address any of the legal arguments raised by their opponent because they would be especially damaging to the government's position. A number of techniques are useful in defending oneself from such a charge or preventing it to begin with. This memorandum of law will:

1. Provide legal authorities that establish the meaning of the word "frivolous"
2. Describe methods by which the word is abused.
3. Describe authorities useful in proving that the word is being abused.
4. Provide techniques for preventing the abuse of the word by the government in protecting or covering-up illegal activities by the government.

2 Authorities on the word "frivolous"

The following subsections shall provide various authorities on the meaning of the word "frivolous".

2.1 Supreme Court on "frivolous": 28 U.S.C. §1915(d)

> *In enacting the federal in forma pauperis statute, Congress "intended to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, in any court of the United States, solely because ... poverty makes it* ****1733*** *impossible ... to pay or secure the costs" of litigation.* Adkins v. E.I. DuPont de Nemours & Co., *335 U.S. 331, 342, 69 S.Ct. 85, 90, 93 L.Ed. 43 (1948) (internal quotation marks omitted). At the same time that it sought to lower judicial access barriers to the indigent, however, 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."* Neitzke, supra, *490 U.S. at 324, 109 S.Ct., at 1831. In response to this concern, Congress included subsection (d) as part of the statute, which allows the courts to dismiss an in forma pauperis complaint "if satisfied that the action is frivolous or malicious."*
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> ***Neitzke v. Williams, supra, provided us with our first occasion to construe the meaning of "frivolous" under § 1915(d). In that case, we held 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." Id., at 325, 109 S.Ct., at 1831. In Neitzke, we were concerned with the proper standard for determining frivolousness of legal conclusions, and we determined that a complaint filed in forma pauperis* *32 *which fails to state a claim under Federal Rule of Civil Procedure 12(b)(6) may nonetheless have "an arguable basis in law" precluding dismissal under § 1915(d). 490 U.S., at 328-329, 109 S.Ct., at 1833. In so holding, we observed that the in forma pauperis statute, unlike Rule 12(b)(6), "accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." Id., at 327, 109 S.Ct., at 1833. "Examples of the latter class," we said, "are claims describing fantastic or delusional scenarios, claims with which federal district judges are all too familiar." Id., at 328, 109 S.Ct., at 1833.***
>
> *Petitioners contend that the decision below is inconsistent with the "unusual" dismissal power we recognized in Neitzke, and we agree. Contrary to the Ninth Circuit's assumption, our statement in Neitzke that § 1915(d) gives courts the authority to "pierce the veil of the complaint's factual allegations" means that a court is not bound, as it usually is when making a determination based solely on the pleadings, to accept without question the truth of the plaintiff's allegations. We therefore reject the notion that a court must accept as "having an arguable basis in fact", id., at 325, 109 S.Ct., at 1831, all allegations that cannot be rebutted by judicially noticeable facts. At the same time, in order to respect the congressional goal of "assur[ing] equality of consideration for all litigants," Coppedge v. United States, 369 U.S. 438, 447, 82 S.Ct. 917, 922, 8 L.Ed.2d 21 (1962), this initial assessment of the in forma pauperis plaintiff's factual allegations must be weighted in favor of the plaintiff. In other words, the § 1915(d) frivolousness determination, frequently made sua sponte before the defendant has even been asked to file an answer, cannot serve as a factfinding process for the resolution of disputed facts.*
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> ***As we stated in Neitzke, a court may dismiss a claim as factually frivolous only if the facts alleged are "clearly baseless," 490 U.S., at 327, 109 S.Ct., at 1833, a category encompassing allegations* *33 *that are "fanciful," id., at 325, 109 S.Ct., at 1831, "fantastic," id., at 328, 109 S.Ct., at 1833, and "delusional," ibid. As those words suggest, a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to***

contradict them. *An in forma pauperis complaint may not be dismissed, however, simply because the court finds the plaintiff's allegations unlikely. Some improbable allegations might properly be disposed of on summary judgment, but to dismiss them as frivolous without any factual development is to disregard the age-old insight* ****1734** *that many allegations might be "strange, but true; for truth is always strange, Stranger than fiction." Lord Byron, Don Juan, canto XIV, stanza 101 (T. Steffan, E. Steffan & W. Pratt eds. 1977).*

Although Hernandez urges that we define the "clearly baseless" quidepost with more precision, we are confident that the district courts, who are "all too familiar" with factually frivolous claims, Neitzke, supra, at 328, 109 S.Ct., at 1833, are in the best position to determine which cases fall into this category. *Indeed, the statute's instruction that an action may be dismissed if the court is "satisfied" that it is frivolous indicates that frivolousness is a decision entrusted to the discretion of the court entertaining the in forma pauperis petition. We therefore decline the invitation to reduce the "clearly baseless" inquiry to a monolithic standard.*

Because the frivolousness determination is a discretionary one, we further hold that a § 1915(d) dismissal is properly reviewed for an abuse of that discretion, and that it was error for the Court of Appeals to review the dismissal of Hernandez's claims de novo. Cf. Boag v. MacDougall, *454 U.S. 364, 365, n., 102 S.Ct. 700, 701, n., 70 L.Ed.2d 551 (1982) (per curiam) (reversing dismissal of an in forma pauperis petition when dismissal was based on an erroneous legal conclusion and not exercise of the "broad discretion" granted by § 1915(d)); Coppedge, supra, 369 U.S., at 446, 82 S.Ct., at 921 (district court's certification that in forma pauperis appellant is taking appeal in good faith, as required by § 1915(a),* ***34** *is "entitled to weight"). In reviewing a § 1915(d) dismissal for abuse of discretion, it would be appropriate for the Court of Appeals to consider, among other things, whether the plaintiff was proceeding pro se, see* Haines v. Kerner, *404 U.S. 519, 520-521, 92 S.Ct. 594, 596, 30 L.Ed.2d 652 (1972); whether the court inappropriately resolved genuine issues of disputed fact, see supra, at 1733-1734; whether the court applied erroneous legal conclusions, see* Boag, *454 U.S., at 365, n., 102 S.Ct., at 701, n.; whether the court has provided a statement explaining the dismissal that facilitates "intelligent appellate review,"* ibid.; *and whether the dismissal was with or without prejudice.*

With respect to this last factor: Because a § 1915(d) dismissal is not a dismissal on the merits, but rather an exercise of the court's discretion under the in forma pauperis statute, the dismissal does not prejudice the filing of a paid complaint making the same allegations. It could, however, have a res judicata effect on frivolousness determinations for future in forma pauperis petitions. See, e.g., Bryant v. Civiletti, *214 U.S.App.D.C. 109, 110-111, 663 F.2d 286, 287-288, n. 1 (1981) (§ 1915(d) dismissal for frivolousness is res judicata);* Warren v. McCall, *709 F.2d 1183, 1186, and n. 7 (CA7 1983) (same); cf.* Rogers v. Bruntrager, *841 F.2d 853, 855 (CA8 1988) (noting that application of res judicata principles after § 1915(d) dismissal can be "somewhat problematical"). Therefore, if it appears that frivolous factual allegations could be remedied through more specific pleading, a court of appeals reviewing a § 1915(d) disposition should consider whether the district court abused its discretion by dismissing the complaint with prejudice or without leave to amend. Because it is not properly before us, we express no opinion on the Ninth Circuit rule, applied below, that a pro se litigant bringing suit in forma pauperis is entitled to notice and an opportunity to amend the complaint to overcome any deficiency unless it is clear that no amendment can cure the defect. E.g.,* Potter v. McCall, *433 F.2d 1087, 1088 (CA9 1970);* Noll v. Carlson, *809 F.2d 1446 (CA9 1987).*
[Denton v. Hernandez, 504 U.S. 25, 112 S.Ct. 1728 (U.S.Cal.,1992)]

2.2 Connecticut Supreme Court

"[t]he action is frivolous if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law."
[Texaco, Inc. v. Golart, 206 Conn. 454, 463-464, 538 A.2d 1017 (1988)]

2.3 Legal Dictionary

Black's Law Dictionary defines the word "frivolous" as follows:

"***Frivolous.*** [1]

[1] *Of little weight or importance.*

[2] *A pleading is 'frivolous' when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purpose of delay or*

[3]*to embarrass the opponent.*

[4] *A claim or defense is frivolous if a proponent can present no rational argument based upon the evidence or law in support of that claim or defense.* Liebowitz v. Aimexco, Inc., *Colo.App. 701 P.2d 140, 142.* ***[5]*** *Frivolous*

[1] The definition of "frivolous" has been broken up into clauses for the purpose of a more complete analysis and breakdown its meaning.