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# PENAL INSTITUTIONS Prison Litigation Reform: Impose Court Costs on Prisoners Who File Lawsuits; Authorize Courts to Order Payment of Defendant's Attorney Fees Incurred in Defending Frivolous Lawsuits

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# PENAL INSTITUTIONS

## *Prison Litigation Reform: Impose Court Costs on Prisoners Who File Lawsuits; Authorize Courts to Order Payment of Defendant's Attorney Fees Incurred in Defending Frivolous Lawsuits*

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| CODE SECTIONS: | O.C.G.A. §§ 42-12-1 to -9 (new) |
| BILL NUMBER: | HB 1284 |
| ACT NUMBER: | 737 |
| GEORGIA LAWS: | 1996 Ga. Laws 400 |
| SUMMARY: | The Act requires prison superintendents to freeze the inmate account of prisoners who file lawsuits without sufficient funds to pay court fees for filing and service of the lawsuit. Subsequently, in order to pay those costs, the superintendent must forward to the court clerk future deposits made to the account. The Act specifies the required content of a prisoner's affidavit of *in forma pauperis*.[1] The Act also authorizes the court to order the prisoner to pay the defendant's attorney's fees if the lawsuit is malicious or frivolous, or if the prisoner's *in forma pauperis* affidavit is fraudulent. The Act further authorizes the court to deduct from the prisoner's inmate account for any of several litigation abuses specified in the Act. |
| EFFECTIVE DATE: | April 2, 1996[2] |

*History*

Litigation initiated by prisoners costs state and local governments millions of dollars annually, and the number and costs of these lawsuits continues to grow.[3] A substantial number of these lawsuits are without merit,[4] filed merely as a recreational exercise by prisoners.[5] The

1. *In forma pauperis* "[d]escribes permission given to a poor person (*i.e.*, indigent) to proceed without liability for court fees or costs." BLACK'S LAW DICTIONARY 779 (6th ed. 1990).

2. The Act became effective upon approval by the Governor.

3. *See* O.C.G.A. § 42-12-2 (Supp. 1996) (describing legislative intent); Telephone Interview with Rep. Bob Snelling, House District No. 99 (Apr. 23, 1996) [hereinafter Snelling Interview].

4. Telephone Interview with Laura Jones French, Assistant Attorney General, State of Georgia Department of Law (Apr. 23, 1996) [hereinafter French Interview I].

5. O.C.G.A. § 42-12-2 (Supp. 1996) (describing legislative intent).



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government must pay the filing fee and court costs for indigent prisoners, as well as significant indirect costs.[6] These other costs include providing prisoners with law libraries, paper, and other supplies needed to draft and file lawsuits; transporting prisoners and witnesses (often other prisoners) to and from the courthouse; and defending these lawsuits.[7]

The Georgia Department of Corrections estimated that it could save over $6 million by requiring prisoners to pay for their own lawsuits, thus discouraging the filing of frivolous ones.[8] Other states have enacted, or have pending, legislation to discourage frivolous prisoner lawsuits.[9] One of those states, Arizona, reported that the number of inmate lawsuit filings was reduced by 46.5% in the first year after that state's law was enacted.[10]

Representative Bob Snelling, with substantial research and drafting contributions by the Georgia Attorney General's Office, introduced HB 1284 to reduce the costs incurred by the state in processing and defending frivolous prisoner lawsuits.[11]

*HB 1284*

The Act amends title 42 of the Official Code of Georgia, Penal Institutions, by adding chapter 12: The Prison Litigation Reform Act of 1996.[12] Code section 42-12-2 describes the findings and purposes of the General Assembly in drafting HB 1284.[13] Specifically, the chapter attempts to reduce the tremendous financial burdens placed on state and local governments by meritless prisoner-filed lawsuits, while still providing prisoners the constitutional right to access the courts through the *in forma pauperis* status.[14]

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6. Snelling Interview, *supra* note 3.
7. *Id.*
8. *Id.*
9. French Interview I, *supra* note 4. These states include Arizona, Indiana, Iowa, Idaho, Missouri, and Virginia. *Id.; see, e.g.*, ARIZ. REV. STAT. ANN. §§ 12-302, 31-201.01 (1995); 1996 Idaho Sess. Laws 420 (S.B. 1394) (allowing, *inter alia*, disciplinary action for frivolous lawsuits); IDAHO CODE § 12-122 (1995) (providing attorney fees for frivolous habeas corpus actions); IOWA CODE § 610A.1 (Supp. 1996); MO. REV. STAT. § 217.262 (1995).
10. French Interview I, *supra* note 4 (quoting John MacDonald, Arizona Attorney General's Office, Director of Governmental Affairs).
11. Snelling Interview, *supra* note 3.
12. O.C.G.A. § 42-12-1 (Supp. 1996).
13. *Id.* § 42-12-2.
14. *Id.*


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*Definitions*

Code section 42-12-3 defines the terms "action," "court costs and fees," "indigent prisoner," and "prisoner," as used throughout the chapter.[15] Two important legal proceedings are expressly excluded from the definition of "action": petitions for writ of habeas corpus and appeals of criminal proceedings.[16] These exclusions were made so that the bill would not conflict with the United States Constitution and numerous federal statutes pertaining to writs of habeas corpus, and the right to appeal criminal convictions.[17]

*Procedure for Payment of Court Costs and Fees by Prisoner*

Code section 42-12-4 establishes the procedure by which indigent prisoners will be required to pay for the lawsuits they file.[18] Upon filing an action, the prisoner who does not have sufficient funds in his inmate account at the time of filing to pay the appropriate filing fee must pay the balance of his or her inmate account.[19] The court clerk must notify the superintendent of the prison in which the prisoner is incarcerated that an action has been filed and the amount of unpaid fees and costs.[20] The superintendent is required to freeze the inmate's account and forward any future deposits to the clerk of the court until the amount due has been paid in full.[21]

In Forma Pauperis *Status Affidavit*

Code section 42-12-5 specifies the information to be contained in a prisoner's affidavit of *in forma pauperis* status.[22] The affidavit is required to list the sources and amounts of the prisoner's income, real and personal property owned by the prisoner, and cash and checking accounts held by the prisoner.[23] The bill originally required information on the prisoner's spouse's income to be included as well.[24] However, the House Judiciary Committee deleted that requirement, in

15. *Id.* § 42-12-3.
16. *Id.* § 42-12-3(1)(A)-(B).
17. Telephone Interview with Laura Jones French, Assistant Attorney General, State of Georgia Department of Law (June 24, 1996) [hereinafter French Interview II].
18. O.C.G.A. § 42-12-4 (Supp. 1996).
19. *Id.* § 42-12-4(1).
20. *Id.* § 42-12-4(2).
21. *Id.* § 42-12-4(3).
22. *Id.* § 42-12-5.
23. *Id.* § 42-12-5(a)(1).
24. HB 1284, as introduced, 1996 Ga. Gen. Assem.

part, because of constitutionality concerns raised by the American Civil Liberties Union (ACLU).[25]

The affidavit must contain an oath, in which the prisoner swears that the statements are true and that the purpose of the application is not to harass, delay, or needlessly increase litigation costs.[26] The affidavit must also include a copy of the prisoner's inmate account for the lesser of twelve months or the period of incarceration.[27] The House Judiciary Committee added a requirement that the institution "promptly provide said account information upon request,"[28] to prevent the institution from "stonewalling" the prisoner, delaying his affidavit.[29]

*Denial of Prisoner's* In Forma Pauperis *Status*

If the prisoner fails to comply with the affidavit requirements, the court must dismiss the prisoner's action without prejudice.[30] Judicial authorization for a prisoner to proceed *in forma pauperis* does not prevent the freezing of the prisoner's inmate account and forwarding of future deposits.[31] An inmate's necessities are provided by the state, while the inmate account pays only for luxuries; thus, an inmate is not harmed by the freezing of his or her account regardless of his or her *in forma pauperis* status.[32] However, if authorization to proceed *in forma pauperis* is denied, the court must give written notice to the prisoner that the filing fees must be paid within thirty days, or else the action will be dismissed.[33]

The court then determines whether the "*in forma pauperis* status was sought fraudulently, frivolously, or maliciously."[34] If so, the court must dismiss with prejudice and assess filing costs.[35] An action

25. Snelling Interview, *supra* note 3.
26. O.C.G.A. § 42-12-5(a)(2) (Supp. 1996).
27. *Id.* § 42-12-5(a)(3).
28. *Id.*; Snelling Interview, *supra* note 3.
29. Snelling Interview, *supra* note 3.
30. O.C.G.A. § 42-12-5 (Supp. 1996). The House Judiciary Committee added "without prejudice" to make the Code section internally consistent. *Compare id. with* HB 1284, as introduced, 1996 Ga. Gen. Assem.
31. O.C.G.A. § 42-12-5(b)(1) (Supp. 1996).
32. French Interview II, *supra* note 17.
33. O.C.G.A. § 42-12-5(b)(2) (Supp. 1996).
34. *Id.* § 42-12-5(b)(3).
35. *Id.* A House committee substitute amended the court's required response from mandatory award of respondent's reasonable attorney's fees to assessment of filing costs. *Compare id. with* HB 1284, as introduced, 1996 Ga. Gen. Assem. The award of attorney's fees is addressed separately in § 42-12-6. The purpose of this change was for overall organization and clarity of the chapter. Snelling Interview, *supra* note 3. Other procedural mechanisms, such as Rule 11 sanctions, are available for obtaining defendant's attorney's fees. French Interview I, *supra* note 4; French Interview II,


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dismissed without prejudice and refiled in substantially the same form is required to have all filing fees completely paid, and no credit is given for fees paid in earlier actions.[36]

*Attorney's Fees*

Upon the dismissal of a prisoner's action or entry of judgment in favor of respondent, the court is to determine whether the prisoner's action was frivolous.[37] The court may award reasonable costs and attorney's fees to the defending or responding party if it finds that material[38] allegations in the prisoner's *in forma pauperis* affidavit are false, or that any part of the action was malicious or frivolous.[39]

HB 1284 originally mandated the award of attorney's fees; however, it was amended by the House Judiciary Committee to provide courts with discretion on whether to award attorney's fees.[40] HB 1284, as introduced, also required an award of attorney's fees upon dismissal of all or part of the prisoner's action for failure to state a claim upon which relief can be granted.[41] However, that language was deleted because of concerns raised by the ACLU that this might unfairly subject prisoners to penalties for lawsuits dismissed for nonsubstantive reasons, such as improper jurisdiction.[42]

*Penalty for Litigation Abuses*

Code section 42-12-7 states that when a court finds that the prisoner has committed any one of several listed actions, it must deduct funds

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*supra* note 17.

36. O.C.G.A. § 42-12-5(b)(4) (Supp. 1996). The words "in substantially the same form" were added by House committee substitute for clarity and to prevent easy circumvention by slight modification of the action. Snelling Interview, *supra* note 3.

37. O.C.G.A. § 42-12-6 (Supp. 1996). This language was originally part of § 42-12-4 but was moved for organizational purposes. Snelling Interview, *supra* note 3. *Compare* O.C.G.A. §§ 42-12-4, -6 (Supp. 1996) *with* HB 1284, as introduced, 1996 Ga. Gen. Assem.

38. The word "material" was added by House committee substitute to avoid penalties triggered by insignificant errors or changes such as an incorrect or changed address. *Compare* HB 1284, as introduced, 1996 Ga. Gen. Assem. *with* HB 1284 (HCS), 1996 Ga. Gen. Assem.; Snelling Interview, *supra* note 3.

39. O.C.G.A. § 42-12-6 (Supp. 1996). "Malicious" and "frivolous" are defined in 1986 Ga. Laws 1591 § 1, at 1592 (codified at O.C.G.A. § 9-15-14 (Supp. 1996)). *Id.*

40. *Compare* HB 1284, as introduced, 1996 Ga. Gen. Assem. *with* HB 1284 (HCS), 1996 Ga. Gen. Assem.; Telephone Interview with Rep. Roy Barnes, House District No. 33 (May 5, 1996) [hereinafter Barnes Interview] (expressing belief that it is wrong to mandate judges' actions in such circumstances).

41. HB 1284, as introduced, 1996 Ga. Gen. Assem.

42. French Interview I, *supra* note 4. Representative Roy Barnes reasoned that the language was essentially superfluous, in light of the remaining chapter. Barnes Interview, *supra* note 40.


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from the prisoner's inmate account in an amount equal to fifty percent of the average monthly balance for the preceding twelve months during which the account had a positive balance.[43]

The payment of past due court costs and fees incurred by prisoners under this subsection may be made a condition of parole, at the discretion of the State Board of Pardons and Paroles.[44] Originally, HB 1284 mandated that payment be a condition of parole and probation.[45] The House Judiciary Committee amended that section to give the Board discretion, in order to help those parolees who are genuinely trying to obey the conditions of their parole, including the payment of past court fees assessed under this section, but who are under severe financial pressures, such as supporting a family with a low-wage job.[46] However, the Board also has discretion to return recidivist parolees to prison for failing to pay the costs imposed on them for filing frivolous lawsuits.[47]

*Proposed and Rejected Disciplinary Sanctions*

The bill originally contained a section authorizing prison disciplinary action against prisoners who are found by a court to have committed any of four specified frivolous, false, or harassing actions.[48] This section was deleted in the House Judiciary Committee because it was believed to be unfair to penalize a prisoner more than an ordinary citizen who files a frivolous lawsuit, and because it would be "too chilling on litigation."[49] Although the Attorney General's Office believed the original bill was constitutionally defensible, sponsors of the

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43. O.C.G.A. § 42-12-7(a) (Supp. 1996). The deduction must be made if the prisoner has:

> (1) Filed a false, frivolous, or malicious action or claim with the court;
> (2) Brought an action or claim with the court solely or primarily for delay or harassment;
> (3) Unreasonably expanded or delayed a judicial proceeding;
> (4) Testified falsely or otherwise submitted false evidence or information to the court;
> (5) Attempted to create or obtain a false affidavit, testimony, or evidence; or
> (6) Abused the discovery process in any judicial action or proceeding.

*Id.*

44. *Id.* § 42-12-7(b).
45. HB 1284, as introduced, 1996 Ga. Gen. Assem.
46. Snelling Interview, *supra* note 3.
47. *Id.*
48. HB 1284, as introduced, 1996 Ga. Gen. Assem. Disciplinary action could have been initiated upon a court's finding of any of the following: (1) The prisoner filed a claim that is frivolous or malicious; (2) The prisoner filed a claim to harass another individual; (3) The prisoner testified falsely or otherwise submitted false evidence or information to the court; or (4) The prisoner committed a fraud upon the court. *Id.*
49. Barnes Interview, *supra* note 40.


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Act believe its final version is less susceptible to a successful legal challenge.[50] Additionally, the other financial incentives in the Act are thought to be sufficient to achieve the legislative goal of deterring frivolous prisoner lawsuits.[51]

*Kevin W. King*

50. Snelling Interview, *supra* note 3.
51. *Id.*


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