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## Controlling and Deterring Frivolous In Forma Pauperis Complaints

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# CONTROLLING AND DETERRING FRIVOLOUS IN FORMA PAUPERIS COMPLAINTS

## INTRODUCTION

Each year the courts are flooded with growing numbers of meritless complaints,<sup>1</sup> many of which are brought by plaintiffs proceeding in forma pauperis<sup>2</sup> (IFP) under 28 U.S.C. § 1915.<sup>3</sup> Meritless suits clog the courts and reduce the capacity of the entire system to deal with meritorious claims.<sup>4</sup> Some courts attempt to deter non-indigent frivolous lawsuits by assessing monetary sanctions against plaintiffs or their attorneys.<sup>5</sup> Such measures, however, cannot be applied practically against either indigents

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1. See generally Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 Duke L.J. 845, 845-49 (1984) (survey of response to frivolous appeals from decisions of the federal courts of appeals); Partridge, *A Complaint Based on Rumors: Countering Frivolous Litigation*, 31 Loy. L. Rev. 221, 222, 226-27 (1985) (noting the rise of unfounded legal action).

2. There are two aspects to the problem of frivolous IFP litigation. The first consists of egregious cases of IFP litigants filing multiple frivolous suits and motions. See, e.g., *In re Martin-Trigona*, 737 F.2d 1254, 1259 (2d Cir. 1984), *cert. denied*, 106 S. Ct. 807 (1986) (plaintiff filed over 250 frivolous complaints against "bankruptcy judges, trustees, attorneys and their families and associates" connected with his bankruptcy proceedings); *In re Green*, 669 F.2d 779, 781-82 (D.C. Cir. 1981) (inmate filed over 600 complaints most of which were dismissed as frivolous). The second aspect of frivolous IFP litigation is the problem of numerous plaintiffs proceeding in forma pauperis who each file one or two frivolous complaints. Actions brought in forma pauperis consist predominantly of prisoner civil rights actions that have increased dramatically in recent years from 218 petitions filed in 1966 to 18,034 such suits filed in 1984. See *Procup v. Strickland*, 792 F.2d 1069, 1071 (11th Cir. 1986) (citing Administrative Office of the United States Courts, Annual Report of the Director 142-43 (1984)); see also Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 617 (1979) (survey of prisoner section 1983 actions showed that 85% to 95% of suits were filed in forma pauperis). Courts find the majority of these prisoner in forma pauperis actions to be without merit. See *Green v. McKaskle*, 788 F.2d 1116, 1118 (5th Cir. 1986); *Weller v. Dickson*, 314 F.2d 598, 602 (9th Cir.) (Duniway, J., concurring), *cert. denied*, 375 U.S. 845 (1963); *Cotner v. Campbell*, 618 F. Supp. 1091, 1095 (E.D. Okla. 1985), *aff'd in part sub nom. Cotner v. Hopkins*, 795 F.2d 900 (10th Cir. 1986) (per curiam); *Johnson v. Baskerville*, 568 F. Supp. 853, 855 (E.D. Va. 1983) (quoting *Grouchulski v. New York*, 481 F. Supp. 1294, 1296 (N.D.N.Y. 1980)); Federal Judicial Center Prisoner Civil Rights Committee Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts 9 (1980) [hereinafter *Federal Judicial Center*]; *Duniway, The Poor Man in the Federal Courts*, 18 Stan. L. Rev. 1270, 1285 (1966). Although many of the cases cited in this Note are prisoner IFP proceedings, the procedures discussed are intended to apply in non-prisoner proceedings as well.

3. 28 U.S.C. § 1915 (1982). Section 1915 authorizes the maintenance of an action in federal courts without prepayment of fees.

4. See *Green v. McKaskle*, 788 F.2d 1116, 1120 (5th Cir. 1986); *Jones v. Morris*, 777 F.2d 1277, 1279 (7th Cir. 1985); *Anderson v. Coughlin*, 700 F.2d 37, 42 (2d Cir. 1983).

5. See, e.g., *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (per curiam) (attorney's fees incurred in opposing action may be recovered from plaintiff when "'plaintiff's action was frivolous, unreasonable, or without foundation'") (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)); *Martin v. Commissioner*, 756 F.2d 38, 41 (6th Cir. 1985) (court assessed not only double costs, but also damages incurred by government for frivolous appeal). Courts also may assess fees and costs against a plaintiff's attorney under Fed. R. Civ. P. 11. See *Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1166

or many pro se plaintiffs.<sup>6</sup> Courts recognize a need to curb the abuses associated with IFP litigation, yet wish to ensure that IFP plaintiffs with legitimate complaints are not barred in the process.<sup>7</sup> Thus, they have sought a balance between managing their dockets and safeguarding access to the courts.<sup>8</sup>

This Note examines the provisions contained in 28 U.S.C. § 1915 that may be used to control IFP litigation. Part I focuses on sections 1915(a) and 1915(d) and argues that these sections authorize the district courts to implement procedures that streamline the processing of IFP applications through prefiling dismissal. Part II focuses on section 1915(a) in conjunction with 1915(e). These sections grant the courts the authority to require IFP plaintiffs to pay certain costs to deter frivolous suits. These payments may be obtained through partial payment plans,<sup>9</sup> step-by-step payment plans,<sup>10</sup> and monetary sanctions.<sup>11</sup> This Note argues that courts should adopt procedures for prefiling review that facilitate the

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(7th Cir. 1983); *Anderson v. Allstate Insur. Co.*, 630 F.2d 677, 684 (9th Cir. 1980) (same).

Although a court may apply Rule 11 sanctions to pro se indigents, *see* Fed. R. Civ. P. 11, this Note will not address its application to the processing of in forma pauperis applications for two reasons. First, none of the cases concerning dismissal of in forma pauperis complaints consider Rule 11 as an alternative. Second, the Rule 11 advisory committee notes state that before Rule 11 sanctions may be imposed, a plaintiff must be given an opportunity to oppose the motion. *See* Fed. R. Civ. P. 348 advisory committee's notes. This procedure would defeat the objective of providing courts with a more efficient process for managing in forma pauperis complaints.

6. Courts have characterized the grant of IFP status as a shield of immunity. *See* *Boyce v. Alizaduh*, 595 F.2d 948, 951 n.6 (4th Cir. 1979) ("Persons proceeding in forma pauperis are immune from imposition of costs . . .") (quoting *Jones v. Bales*, 58 F.R.D. 453, 463 (N.D. Ga. 1972), *aff'd without opinion per curiam*, 480 F.2d 805 (5th Cir. 1973)). Rather than suggesting that the grant of IFP status renders persons proceeding in forma pauperis immune from any costs, the better inference is that a court or prevailing party might be unable to enforce a judgment against IFP plaintiffs because of their poverty. *Flint v. Haynes*, 651 F.2d 970, 972-73 nn.5 & 6 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982). *See In re American President Lines, Ltd.*, 804 F.2d 1307, 1310 nn.5 & 6 (D.C. Cir. 1986) (*per curiam*) (court did not award attorneys' fees to prevailing defendant because it recognized that such order would be futile in light of plaintiff's indigent status); *In re Martin-Trigona*, 737 F.2d 1254, 1262 (2d Cir. 1984) (assessment of costs against IFP plaintiff futile in light of his alleged poverty resulting from bankruptcy proceedings), *cert. denied*, 106 S. Ct. 807 (1986).

7. *See* *Horseley v. Asher*, 741 F.2d 209, 212 (8th Cir. 1984); *Anderson v. Coughlin*, 700 F.2d 37, 41-42 (2d Cir. 1982); *cf. Procup v. Strickland*, 760 F.2d 1107, 1110-11 (11th Cir.) (en banc) (overbroad injunction impermissibly barred plaintiff's access to courts), *vacated on other grounds and remanded*, 792 F.2d 1069 (11th Cir. 1986); *Demos v. Kincheloe*, 563 F. Supp. 30, 33 (E.D. Wash. 1982) (courts tailor sanctions to maintain balance between preservation of right to access and protection of judicial process).

8. *See* *Green v. McKaskle*, 788 F.2d 1116, 1120 (5th Cir. 1986); *Jones v. Morris*, 777 F.2d 1277, 1280 (7th Cir. 1985); *Phillips v. Mashburn*, 746 F.2d 782, 784 (11th Cir. 1984) (*per curiam*); *Horseley v. Asher*, 741 F.2d 209, 212 (8th Cir. 1984); *Green v. Warden*, 699 F.2d 364, 369-70 (7th Cir.), *cert. denied*, 461 U.S. 960 (1983).

9. *See, e.g., In re Williamson*, 786 F.2d 1336, 1338 (8th Cir. 1986); *see infra* notes 100-20 and accompanying text.

10. *See, e.g., Braden v. Estelle*, 428 F. Supp. 595, 599 (S.D. Tex. 1977); *see infra* notes 121-36 and accompanying text.

screening of IFP applications in addition to procedures for assessing costs against IFP plaintiffs in order to reduce the number of frivolous complaints initially presented to the court.

### I. REVIEW AND DISMISSAL OF IFP APPLICATIONS

Congress enacted 28 U.S.C. § 1915(a)<sup>12</sup> to enable plaintiffs who could not afford the costs of litigation to bring civil lawsuits in federal courts without prepayment of fees.<sup>13</sup> At the same time, Congress, apparently concerned about the potential for abuse, vested the courts with discretionary powers of dismissal under section 1915(d).<sup>14</sup> An IFP complaint can be dismissed *sua sponte* under section 1915(d) on grounds of frivo-

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11. *See, e.g.*, Cotner v. Hopkins, 795 F.2d 900, 902 (10th Cir. 1986) (per curiam); *see infra* notes 137-53 and accompanying text.

12. 28 U.S.C. § 1915(a) (1982) provides in part:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

13. H.R. Rep. No. 1079, 52d Cong., 1st Sess. 2 (1892); *see also* Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 342 (1948) (section 1915 guaranteed "that no citizen shall be denied an opportunity to commence, prosecute, or defend an action . . . solely because his poverty makes it impossible for him to pay or secure the costs [of litigation]").

14. 28 U.S.C. § 1915(d) (1982) provides: "The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious."

Congress included section 1915(d), which authorizes dismissal, to prevent the possibility of court congestion and the expenditure of public funds arising from frivolous lawsuits:

The proposed law will not admit of vexatious litigation. It is well guarded . . .

The court may dismiss the [complaint] at any time if it be made to appear that the allegation of poverty is untrue, or if he be satisfied that the alleged cause of action is frivolous or malicious.

H.R. Rep. No. 1079, 52d Cong., 1st Sess. 2 (1892) (statement of Mr. Stockdale); *see* McTeague v. Sosnowski, 617 F.2d 1016, 1019 (3d Cir. 1980) ("When Congress opened the door to *in forma pauperis* petitions, it was concerned that the removal of the cost barrier might result in a tidalwave of frivolous or malicious motions . . ."). *Sua sponte* dismissal of a suit may be a court's only recourse against an abusive IFP plaintiff. Because of their poverty, plaintiffs proceeding in *forma pauperis* often are immune from assignment of costs of unsuccessful actions. *See* Jones v. Bales, 58 F.R.D. 453, 463 (N.D. Ga. 1972), *aff'd without opinion per curiam*, 480 F.2d 805 (5th Cir. 1973); *but see supra* note 6 (discussing liability of IFP plaintiffs for court costs). In addition, defendants who are subject to vexatious suits are unlikely to seek monetary satisfaction through tort actions, such as abuse of process or malicious prosecution, because it is often pointless to sue an indigent. *See* Jones, 58 F.R.D. at 463; *accord* Cay v. Estelle, 789 F.2d 318, 325 (5th Cir. 1986); Phillips v. Mashburn, 746 F.2d 782, 784 (11th Cir. 1984) (per curiam). Courts, therefore, conclude that broad powers of dismissal are necessary because IFP plaintiffs do not have these disincentives to deter them from bringing meritless actions. *See* Cay, 789 F.2d at 325; Franklin v. Murphy, 745 F.2d 1221, 1226 (9th Cir. 1984); Anderson v. Coughlin, 700 F.2d 37, 42 (2d Cir. 1983).

lousness<sup>15</sup> or maliciousness.<sup>16</sup> The statute, however, does not outline a procedure for dismissal.<sup>17</sup> The lack of clarity has resulted in confusion among the courts as to the proper time to dismiss a frivolous IFP application.<sup>18</sup> Three approaches have emerged that stem primarily from different interpretations of sections 1915(a) and 1915(d): postfiling immediate dismissal,<sup>19</sup> postfiling delayed dismissal<sup>20</sup> and prefiling dismis-

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15. 28 U.S.C. § 1915(d) (1982). There is confusion among the circuits as to the proper standard for frivolousness. See *Jones v. Morris*, 777 F.2d 1277, 1279-80 (7th Cir. 1985) (dismissal appropriate if there is "no rational argument in law or facts to support [the] claim for relief") (quoting *Corgain v. Miller*, 708 F.2d 1241, 1247 (7th Cir. 1983)); *Anderson v. Coughlin*, 700 F.2d 37, 40 (2d Cir. 1983) (dismissal appropriate only if it appears "beyond doubt that plaintiff can prove no set of facts that would entitle him to relief") (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Courts also consider factors beyond the face of the complaint. See, e.g., *Cruz v. Beto*, 405 U.S. 319, 329 (1972) (Rehnquist, J., dissenting) (looking at whether facially non-frivolous complaint was barred under doctrine of *res judicata*); *In re Green*, 598 F.2d 1126, 1128 (8th Cir. 1979) (complaint viewed in light of plaintiff's past history); *Gast v. Daily*, 577 F. Supp. 14, 15 (E.D. Wis. 1984) (looking at whether plaintiff already has case pending before the court); see also *WSM, Inc. v. Tennessee Sales Co.*, 709 F.2d 1084, 1088 (6th Cir. 1983) ("Frivolity, like obscenity, is often difficult to define."). The proper standard for defining the term "frivolous" as used in section 1915(d) is not discussed in this Note. For a discussion of the issue of frivolousness, see *Catz & Guyer, Federal In Forma Pauperis Litigation: In Search of Judicial Standards*, 31 Rutgers L. Rev. 655, 672-79 (1978); *Feldman, Indigents in the Federal Courts: The In Forma Pauperis Statute—Equality and Frivolity*, 54 Fordham L. Rev. 413, 415-23 (1985).

16. 28 U.S.C. § 1915(d) (1982). Courts are concerned primarily with frivolousness and rarely dismiss a complaint for maliciousness. They merely comment on the malicious intent of the plaintiff. See, e.g., *Horsey v. Asher*, 741 F.2d 209, 213 (8th Cir. 1984) ("[T]hat plaintiff hates the defendant . . . does not justify dismissal of the complaint as malicious."); *In re Green*, 669 F.2d 779, 781-82 (D.C. Cir. 1981) (out of hundreds of filings only "some" found by courts to be malicious); *Cotner v. Campbell*, 618 F. Supp. 1091, 1095 (E.D. Okla. 1985) (although plaintiff clearly demonstrated that he filed complaints with "malicious intent to disrupt the courts," court dismissed complaints as frivolous), *aff'd in part sub nom. Cotner v. Hopkins*, 795 F.2d 900 (10th Cir. 1986) (*per curiam*).

17. *Franklin v. Murphy*, 745 F.2d 1221, 1226 (9th Cir. 1984) (section 1915(d) "does not indicate whether any procedural protections are required before . . . dismissal"); *Jones v. Bales*, 58 F.R.D. 453, 463 (N.D. Ga. 1972) (statute does not state how a court becomes satisfied that a case is frivolous), *aff'd without opinion per curiam*, 480 F.2d 805 (5th Cir. 1973).

18. See *Franklin v. Murphy*, 745 F.2d 1221, 1226 n.4 (9th Cir. 1984) (discussing two contradictory procedures used in the Ninth Circuit); *Wartman v. Branch 7, Civil Div., County Court*, 510 F.2d 130, 133 (7th Cir. 1975) (discussing different approaches among the circuits); *Lyszaj v. AT&T*, 554 F. Supp. 218, 219-21 (E.D. Va. 1982) (discussing two approaches used in the Fourth Circuit), *aff'd*, 714 F.2d 131 (4th Cir. 1983); see also *Turner, supra* note 2, at 618 (screening practices vary from district to district).

19. Under the procedure of immediate postfiling review, a motion to proceed in forma pauperis is granted if the applicant meets the financial criteria. The court then docketes the complaint and subsequently may dismiss it sua sponte upon a finding that the action is frivolous or that the allegation of poverty is untrue. E.g., *Cay v. Estelle*, 789 F.2d 318, 322 (5th Cir. 1986); see *infra* notes 25-39 and accompanying text.

20. Under the procedure of postfiling delayed review, a complaint is docketed and the motion to proceed in forma pauperis is granted, if the plaintiff meets the financial criteria. A court, however, cannot dismiss the complaint on grounds of frivolousness until the issuance of process and the responsive pleadings. E.g., *Bayron v. Trudeau*, 702 F.2d 43, 45 (2d Cir. 1983); see *infra* notes 40-52 and accompanying text.

sal.<sup>21</sup> The former two procedures condition filing solely on the applicant's economic status.<sup>22</sup> Once the suit is filed, a court may dismiss the complaint thereafter on a finding of frivolousness.<sup>23</sup> Prefiling dismissal, by contrast, simultaneously considers both issues of poverty and frivolousness in the initial review of an IFP application.<sup>24</sup> The following section compares the different approaches and concludes that the statutory language, early judicial analysis of legislative history, and policy considerations favor prefiling dismissal.

#### A. *Postfiling Review: Immediate Dismissal*

Most courts condition filing solely on the IFP applicant's economic status and, after filing, immediately dismiss frivolous complaints.<sup>25</sup> Courts adopting this procedure of postfiling immediate dismissal reason that Congress vested the judiciary with broad discretion to dismiss under section 1915(d)<sup>26</sup> and that this discretion is necessary to protect the courts against the potential for abuse inherent in a statute allowing cost-free lawsuits.<sup>27</sup>

Courts adopting postfiling immediate dismissal note that the liberal pleading policies of the Federal Rules of Civil Procedure do not supply

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21. Under the procedure of prefiling dismissal, a court considers not only the financial eligibility of an applicant, but the merits of the complaint as well. If the motion to proceed in forma pauperis is denied, the complaint is dismissed before it is ever docketed. *E.g.*, *Wartman v. Branch 7*, Civil Div., County Court, 510 F.2d 130, 132 (7th Cir. 1975); see *infra* notes 53-75 and accompanying text.

22. See *Cay v. Estelle*, 789 F.2d 318, 322 (5th Cir. 1986); *Franklin v. Murphy*, 745 F.2d 1221, 1226 (9th Cir. 1984); *Brandon v. District of Columbia Bd. of Parole*, 734 F.2d 56, 57-58 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985); *Anderson v. Coughlin*, 700 F.2d 37, 41 (2d Cir. 1983); *Green v. White*, 616 F.2d 1054, 1055-56 (8th Cir. 1980) (*per curiam*); *Boyce v. Alizaduh*, 595 F.2d 948, 950-51 (4th Cir. 1979); see also *Jones v. Bales*, 58 F.R.D. 453, 464 (N.D. Ga. 1972) (although section 1915 vests courts with broad discretion to dismiss frivolous suits, courts should not infer "that such suits should not be allowed [to be] filed"), *aff'd without opinion per curiam*, 480 F.2d 805 (5th Cir. 1973); Federal Judicial Center, *supra* note 2, at 54 (immediate postfiling dismissal preferred).

23. See *supra* note 22.

24. See *Wartman v. Branch 7*, Civil Div., County Court, 510 F.2d 130, 132 (7th Cir. 1975).

25. *Anderson v. Coughlin*, 700 F.2d 37, 41 (2d Cir. 1983) (preferred practice is to first consider "petitioner's economic status") (citing Federal Judicial Center, *supra* note 2, at 54, 57-58); *Collins v. Cundy*, 603 F.2d 825, 827 (10th Cir. 1979) (*per curiam*) (generally accepted principle that IFP pleadings entitled to be filed if the "affidavit of property is facially sufficient"); *Boyce v. Alizaduh*, 595 F.2d 948, 950 (4th Cir. 1979) ("The practice observed by most courts is to consider only the petitioner's economic status in making the decision whether to grant leave to proceed in forma pauperis.") (quoting Federal Judicial Center, *supra* note 2, at 54).

26. See *Green v. McKaskle*, 788 F.2d 1116, 1119 (5th Cir. 1986); *Anderson v. Coughlin*, 700 F.2d 37, 42 (2d Cir. 1983); *Holloway v. Gunnell*, 685 F.2d 150, 155 (5th Cir. 1982); *Collins v. Cundy*, 603 F.2d 825, 827 (10th Cir. 1979) (*per curiam*); *Conway v. Fugge*, 439 F.2d 1397, 1397 (9th Cir. 1971) (*per curiam*).

27. See *Jones v. Morris*, 777 F.2d 1277, 1279 (7th Cir. 1985); *Phillips v. Mashburn*, 746 F.2d 782, 784-85 (11th Cir. 1984) (*per curiam*); *Anderson v. Coughlin*, 700 F.2d 37, 42 (2d Cir. 1983). See *supra* note 14 and accompanying text.

sufficient controls to handle IFP applications.<sup>28</sup> Under the Rules, a plaintiff is given an opportunity to develop his claim by amending the complaint, instituting discovery proceedings, or filing an opposition to a motion to dismiss.<sup>29</sup> The Rules, however, do not give the district courts general *sua sponte* powers of dismissal except for want of prosecution.<sup>30</sup> Non-indigent plaintiffs, constrained by limitations of time and money, usually do not misuse these liberal pleading procedures.<sup>31</sup> Postfiling immediate dismissal courts have found that IFP plaintiffs, who are not bound by such limitations, often abuse these procedures.<sup>32</sup> Several courts find that some IFP applicants actually have an incentive to file frivolous suits.<sup>33</sup>

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28. See *Cay v. Estelle*, 789 F.2d 318, 325 (5th Cir. 1986) (the Rules "are inadequate to protect the courts and defendants . . . from frivolous litigation") (quoting *Jones v. Bales*, 58 F.R.D. 453, 463 (N.D. Ga. 1972), *aff'd without opinion per curiam*, 480 F.2d 805 (5th Cir. 1973)); *Green v. McKaskle*, 788 F.2d 1116, 1120 (5th Cir. 1986) (liberal pleading system is inappropriate for plaintiffs who are not restricted by considerations of time and money); *Anderson v. Coughlin*, 700 F.2d 37, 43 (2d Cir. 1983) (liberal notice pleading "contemplates litigants whose time and funds are limited"); *Harvey v. Clay County Sheriff's Dep't*, 473 F. Supp. 741, 744 (W.D. Mo. 1979) (courts may establish pleading standards stricter than those established by the Rules to "vindicate the principles underlying § 1915"); see also *Jones*, 58 F.R.D. at 463-64 (a court rarely grants Rule 12(b) motions to dismiss as the Rules are designed "so that most cases will actually go to trial if the parties so desire").

29. See *Green v. McKaskle*, 788 F.2d 1116, 1120 (5th Cir. 1986) (a "liberal opportunity for discovery" permits plaintiffs "to disclose more precisely the basis of both a claim and a defense and to define more narrowly the disputed facts and issues"); *Brandon v. District of Columbia Bd. of Parole*, 734 F.2d 56, 59 (D.C. Cir. 1984) (12(b)(6) motion to dismiss puts plaintiff "on notice that the legal sufficiency of the complaint is being challenged" and gives plaintiff "insight into the theory upon which that challenge is made"), *cert. denied*, 469 U.S. 1127 (1985); *Anderson v. Coughlin*, 700 F.2d 37, 43 (2d Cir. 1983) ("[N]otice pleading principles embodied in Rules 8 and 12 are intended to remove technical obstacles impeding access to the federal courts."); *Harvey v. Clay County Sheriff's Dep't*, 473 F. Supp. 741, 745 (W.D. Mo. 1979) (Rules provide devices to enable plaintiffs to cure deficiencies by amending the original complaint); see also *Conley v. Gibson*, 355 U.S. 41, 47-48 & n.9 (1957) (noting that the Rules simplified pleading procedures through liberal discovery and other pretrial procedures).

30. See Fed. R. Civ. P. 41(b). At best, Rule 12(f) authorizes the court to strike redundant or immaterial matter. See *Catz and Guyer*, *supra* note 15, at 672 n.109 ("No [R]ule gives district courts general *sua sponte* powers directly to dismiss a pleading. . .").

31. See *Cay v. Estelle*, 789 F.2d 318, 325 (5th Cir. 1986); *Green v. McKaskle*, 788 F.2d 1116, 1119 (5th Cir. 1986); *Anderson v. Coughlin*, 700 F.2d 37, 42 (2d Cir. 1983); *Jones v. Bales*, 58 F.R.D. 453, 463 (N.D. Ga. 1972), *aff'd without opinion per curiam*, 480 F.2d 805 (5th Cir. 1973).

32. See *supra* note 31 and accompanying text.

33. See *Green v. McKaskle*, 788 F.2d 1116, 1119 (5th Cir. 1986) (although action unsuccessful prisoner has gained temporary relief from the tedium of prison life); *Phillips v. Mashburn*, 746 F.2d 782, 785 (11th Cir. 1984) (*per curiam*) ("[M]eritless actions offer inmates an unrestricted method of harassing prison and law enforcement officials."). That some IFP applicants actually have an incentive to file frivolous actions has been found to be particularly true of pro se prisoners whose complaints, the majority of which are deemed frivolous, comprise a large portion of all IFP proceedings. See *supra* note 2. Inmates often file complaints merely as a diversion or with the intention of harassing defendants. See *Cruz v. Beto*, 405 U.S. 319, 327 (1972) (Rehnquist, J., dissenting)

In contrast to the Rules, section 1915(d) restricts potential plaintiffs by creating affirmative conditions that must be satisfied.<sup>34</sup> Thus, the district courts may take a more active role at the pleading stage. The power to act as more than a neutral arbiter is necessary to protect the courts' jurisdiction<sup>35</sup> and to prevent the harassment of defendants.<sup>36</sup>

("Though [an inmate] may be denied legal relief, he will nonetheless have obtained a short sabbatical in the nearest federal courthouse."); *accord* Cay v. Estelle, 789 F.2d 318, 325 (5th Cir. 1986); Green v. McKaskle, 788 F.2d 1116, 1119 (5th Cir. 1986); Phillips v. Mashburn, 746 F.2d 782, 784 (11th Cir. 1984) (per curiam). One prolific filer documented his intention to harass the courts with numerous frivolous complaints in order to obtain a release and calculated the costs to the taxpayers:

[O]ver 15 federal law suits . . . cost tax-payers *another* \$100.00 each (totalling \$1,500.00) just to file them, and *another* \$100.00 pr. month, *each* just for the state attorneys to answer each one, *each* month, which is a total of *another* \$1,200.00 of tax-payers money, *pr. year, pr. case* (totalling \$18,000.00 per year) *and* if that is multiplied over the intire [sic] 10 years that that one prisoner is to be kept in prison, it comes to a total cost to *the tax-payers* of about \$363,500.00 just to punish that one prisoner . . . for \$45.00 worth of marijuana! *is it worth it?*

Cotner v. Campbell, 618 F. Supp. 1091, 1094 (E.D. Okla. 1985) (emphasis in original), *aff'd in part sub nom.* Cotner v. Hopkins, 795 F.2d 900 (10th Cir. 1986) (per curiam). Courts have noted that experienced IFP filers may misrepresent facts so as to avoid either a 12(b) dismissal or summary judgment. See Jones v. Bales, 58 F.R.D. 453, 464 (N.D. Ga. 1972), *aff'd without opinion per curiam*, 480 F.2d 805 (5th Cir. 1973).

Further, inmates who have been successful in filing frivolous complaints often school others to do so as well. See Cotner v. Campbell, 618 F. Supp. 1091, 1095 (E.D. Okla. 1985) (writ writer taught "other prisoners to file their frivolous lawsuits" modelled on his own successful petition), *aff'd in part sub nom.* Cotner v. Hopkins, 795 F.2d 900 (10th Cir. 1986) (per curiam); Procup v. Strickland, 567 F. Supp. 146, 160 n.13 (M.D. Fla. 1983) (prisoner avoided section 1915(d) dismissal by recycling a cognizable claim for relief by "repeat[ing] the allegation [but] changing the dates and the names of the defendants allegedly involved"), *rev'd on other grounds*, 760 F.2d 1107 (11th Cir. 1985), *vacated on other grounds and remanded*, 792 F.2d 1069 (11th Cir. 1986); Green v. Wyrick, 428 F. Supp. 732, 736 (W.D. Mo. 1976) (abusive IFP litigant filed hundreds of claims on his behalf and admitted to writing hundreds for other inmates); see also Raitport v. Chemical Bank, 74 F.R.D. 128, 133 (S.D.N.Y. 1977) (noting plaintiff's ability to present a facially acceptable complaint: "If there existed any viable cause of action against these defendants [plaintiff] is capable of discovering it and stating it.").

Moreover, since the prisons provide inmates with free materials, there is little cost to filing repeated frivolous lawsuits. See Procup, 792 F.2d at 1071; Green v. McKaskle, 788 F.2d 1116, 1119 (5th Cir. 1986); Cotner, 618 F. Supp. at 1095.

34. See Anderson v. Coughlin, 700 F.2d 37, 43 (2d Cir. 1983); Harvey v. Clay County Sheriff's Dep't, 473 F. Supp. 741, 743-44 (W.D. Mo. 1979). IFP plaintiffs are required to show indigency, see *supra* note 12, and are required to show that the complaint is not frivolous, see *supra* note 14.

35. See Procup, 792 F.2d at 1073 (federal courts have a "constitutional obligation to protect their jurisdiction from conduct which impairs their ability"); *In re Martin-Trigona*, 737 F.2d 1254, 1262 (2d Cir. 1984) (court must act as more than arbiter of disputes in defense of its constitutional function), *cert. denied*, 106 S. Ct. 807 (1986); Hartford Textile Corp. v. Shuffman, 659 F.2d 299, 305 (2d Cir. 1981) (court must protect its jurisdiction), *cert. denied*, 455 U.S. 1018 (1982); cf. Dickinson v. French, 416 F. Supp. 429, 434 (S.D. Ala. 1976) (witnesses may be reluctant to testify where defendants subject them to countless suits, thereby impeding the administration of justice). Cases illustrate that the Rules do not prevent numerous filings of frivolous complaints by IFP plaintiffs. See *In re Martin-Trigona*, 737 F.2d 1254, 1256 (2d Cir. 1984), *cert. denied*, 106 S. Ct. 807 (1986). Martin-Trigona was a law student, who after being denied admission to the bar, became a "persistent and calculating" litigator and was the source of hundreds of law-



Courts adopting a postfiling immediate dismissal procedure argue that allowing plaintiffs to continue with non-meritorious claims results in needless expenditure of public monies<sup>37</sup> and may obscure meritorious suits.<sup>38</sup> For these reasons of economy and efficiency, the majority of courts choose to permit postfiling immediate dismissal procedures.<sup>39</sup>

### B. *Postfiling Review: Delayed Dismissal*

A second approach to handling IFP applications is to permit an IFP applicant to file a complaint on a showing of indigency, and to delay dismissal for frivolousness until there has been service of process and responsive pleadings.<sup>40</sup> Although courts using this approach acknowl-

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suits and motions. *See id.* His abuse of legal processes was "exemplified not only by the number and variety of meritless actions" but by the use of pleadings "as a vehicle to launch vicious attacks upon persons of Jewish heritage." *Id.* *See also In re Green*, 669 F.2d 779, 781 (D.C. Cir. 1981) (plaintiff filed over 700 complaints during the course of 10 years, many of which were deliberately repetitive in an attempt to gain a release from prison); *Cotner v. Campbell*, 618 F. Supp. 1091, 1097 (E.D. Okla. 1985) (plaintiff clearly abused his in forma pauperis privilege by filing frivolous lawsuits, repetitive actions, and suing defendants he knew to be immune), *aff'd in part sub nom. Cotner v. Hopkins*, 795 F.2d 900 (10th Cir. 1986) (per curiam); *Demos v. Kincheloe*, 563 F. Supp. 30, 32 (E.D. Wash. 1982) (clear that plaintiff filing a complaint daily intended to abuse judicial process); *Carter v. Telectron, Inc.*, 452 F. Supp. 944, 952-53 (S.D. Tex. 1977) (plaintiff commenced over 178 actions, filed duplicative suits simultaneously in several courts, varied his citizenship allegations to invoke federal diversity jurisdiction and made untrue allegations of poverty).

36. *See Harrelson v. United States*, 613 F.2d 114, 116 (5th Cir. 1980) (frivolous claims filed by litigious plaintiffs, though rarely successful on the merits, can be extremely costly to defendants); *Raitport v. Chemical Bank*, 74 F.R.D. 128, 133 (S.D.N.Y. 1977) (frivolous IFP antitrust action "has cost the plaintiff nothing but some time and postage" but defendants collectively spent "tens of thousands of dollars retaining attorneys, opening files, filing answers and making motions"); *Dickinson v. French*, 416 F. Supp. 429, 434 (S.D. Ala. 1976) (although action dismissed, defendants incurred considerable legal expenses in seeking legal assistance); *cf. Haugen v. Sutherlin*, No. 86-5291, slip op. at 3 n.2 (8th Cir. Nov. 3, 1986) (because complaint not dismissed, court incurred expense of serving over sixty summonses to numerous members of Indiana Supreme Court).

37. *See Green v. McKaskle*, 788 F.2d 1116, 1120 (5th Cir. 1986); *Phillips v. Mashburn*, 746 F.2d 782, 784 (11th Cir. 1984) (per curiam); *Collins v. Cundy*, 603 F.2d 825, 828 (10th Cir. 1979); *Franklin v. Oregon*, 563 F. Supp. 1310, 1324 (D. Or. 1983), *aff'd in part and rev'd in part sub nom. Franklin v. Murphy*, 745 F.2d 1221 (9th Cir. 1984).

38. *See Procup v. Strickland*, 792 F.2d 1069, 1072 (11th Cir. 1986) ("No matter how efficient a court's administrative procedures may be, when one litigant files upwards of a lawsuit a day, the claims of other litigants necessarily suffer."); *Green v. Wyrick*, 428 F. Supp. 732, 735 & n.4 (W.D. Mo. 1976) (abusive writ-writing activities partially are responsible for substantive and procedural restrictions being placed on prisoners' rights).

39. *See, e.g., Cay v. Estelle*, 789 F.2d 318, 322 (5th Cir. 1986); *Harris v. Johnson*, 784 F.2d 222, 223 (6th Cir. 1986); *Phillips v. Mashburn*, 746 F.2d 782, 784-85 (11th Cir. 1984); *Franklin v. Murphy*, 745 F.2d 1221, 1227 (9th Cir. 1984); *Brandon v. District of Columbia Bd. of Parole*, 734 F.2d 56, 59 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985); *Smith v. Bacon*, 699 F.2d 434, 436 (8th Cir. 1983); *Fries v. Barnes*, 618 F.2d 988, 989 (2d Cir. 1980); *Collins v. Cundy*, 603 F.2d 825, 827 (10th Cir. 1979); *Boyce v. Alizaduh*, 595 F.2d 948, 950 (4th Cir. 1979); *Sinwell v. Shapp*, 536 F.2d 15, 19 (3d Cir. 1976); *Carollo-Gardner v. Diners Club*, 628 F. Supp. 1253, 1255 (E.D.N.Y. 1986); *Federal Judicial Center, supra* note 2, at 54, 59.

40. Only the Seventh Circuit requires responsive pleadings when an IFP complaint is

edge that frivolous suits waste judicial resources, they maintain that IFP plaintiffs should receive the same procedural protections afforded non-indigent plaintiffs.<sup>41</sup>

The procedure under delayed postfiling dismissal requires the issuance of a summons and complaint once the complaint has been filed.<sup>42</sup> If the defendant moves to dismiss, the IFP plaintiff is notified and given an opportunity to oppose the motion.<sup>43</sup> In the event of dismissal, the court must provide the plaintiff with a statement of the grounds for dismissal and afford the plaintiff an opportunity to cure by amending the complaint.<sup>44</sup>

Courts reason that responsive pleadings are essential to the preservation of the adversarial scheme. They point out that the traditional adversarial relationship is undermined when the court ceases to act as a neutral arbiter and actively participates at the pleading stage.<sup>45</sup> In these cases, a court may appear to be adopting an inquisitorial role<sup>46</sup> or acting as a proponent for the defendant.<sup>47</sup> Thus, courts find it inappropriate to

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filed. *See* *Wartman v. Branch 7, Civil Div., County Ct.*, 510 F.2d 130, 132, 134 (7th Cir. 1975). Other courts have expressed a preference for responsive pleadings but permit immediate dismissal in some cases. *See* *Tingler v. Marshall*, 716 F.2d 1109, 1110-11 (6th Cir. 1983); *Bayron v. Trudeau*, 702 F.2d 43, 45 (2d Cir. 1983); *Redwood v. Council of D.C.*, 679 F.2d 931, 934 (D.C. Cir. 1982); *McTeague v. Sosnowski*, 617 F.2d 1016, 1019 (3d Cir. 1980).

41. *See* *McTeague v. Sosnowski*, 617 F.2d 1016, 1019 (3d Cir. 1980) (despite concerns of court congestion and financial burden to public, IFP complaints cannot be dismissed summarily); *Dear v. Rathje*, 485 F.2d 558, 560 (7th Cir. 1973) (although court was "not unsympathetic" to problem of increasing numbers of "'professional litigants,'" it held that IFP plaintiffs were entitled to responsive pleadings).

The purpose of section 1915 is to afford indigents the same services of the courts as non-indigent litigants. *See* *Marks v. Calendine*, 80 F.R.D. 24, 27 (N.D. W. Va. 1978), *aff'd sub nom. Flint v. Haynes*, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982); *see also* *Coppedge v. United States*, 369 U.S. 438, 447 (1962) ("The point of equating the test for allowing a pauper's appeal to the test for dismissing paid cases, is to assure equality of consideration for all litigants."); *Horsev v. Asher*, 741 F.2d 209, 211 n.3 (8th Cir. 1984) (section 1915 must be interpreted to afford IFP complaints same standards applicable to paid complaints); *McTeague v. Sosnowski*, 617 F.2d 1016, 1019 (3d Cir. 1980) (Congress, in enacting section 1915, mandated that courts should apply same dismissal procedures to IFP plaintiffs as non-indigent plaintiffs, "[o]therwise the scales of justice will be tilted against [the] . . . poor").

42. *See* *Tingler v. Marshall*, 716 F.2d 1109, 1112 (6th Cir. 1983); *Nichols v. Schubert*, 499 F.2d 946, 947 (7th Cir. 1974).

43. *See supra* note 42.

44. *See* *Tingler v. Marshall*, 716 F.2d 1109, 1112 (6th Cir. 1983).

45. *See id.* at 1111 (holding dismissal on merits prior to responsive pleadings improper).

46. *Lewis v. New York*, 547 F.2d 4, 5 (2d Cir. 1976) (courts should "avoid an inquisitorial role").

47. *Nash v. Black*, 781 F.2d 665, 668 (8th Cir. 1986) (expressing disfavor with immediate dismissal procedures because "district court is cast in the role of a proponent for the defense, rather than an independent entity"); *accord* *Tingler v. Marshall*, 716 F.2d 1109, 1110-11 (6th Cir. 1983) (citing *Franklin v. Oregon*, 662 F.2d 1337, 1342 (9th Cir. 1981)). Reluctant to act as protectors for the defendant, these courts maintain that a defendant's remedies lie in civil actions for abuse of process, or in equity for injunctive relief. *See* *Dear v. Rathje*, 485 F.2d 558, 560 (7th Cir. 1973).

prevent defendants from making responsive pleadings.<sup>48</sup>

Moreover, under Rule 4(a) after the complaint is filed, a court clerk must issue a summons to a non-indigent plaintiff who becomes responsible for service thereafter on defendant parties.<sup>49</sup> Section 1915(c), how-

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48. See *Holloway v. Gunnell*, 685 F.2d 150, 152 n.2 (5th Cir. 1982). Courts should not presume to act for the defendant. A defendant's option to dismiss for lack of personal jurisdiction or venue illustrates the problem. The options to dismiss for lack of personal jurisdiction or venue are threshold matters subject to foreclosure absent timely objection by the defendant. See Fed. R. Civ. P. 12(h)(1). A defendant may elect not to raise these objections, however, in order to foster a substantive disposition on the action. Alternatively, the defendant, having been alerted to the problem, may dispose of the need for litigation altogether by choosing to settle or amend matters. See *Anger v. Revco Drug Co.*, 791 F.2d 956, 958 (D.C. Cir. 1986); see also *Sinwell v. Shapp*, 536 F.2d 15, 19 (3d Cir. 1976) (it is "inappropriate for the trial court to dispose of the case *sua sponte* on an objection to the complaint [i.e. venue] which would be waived if not raised by the defendant(s) in a timely manner"); *Holsey v. Bass*, 519 F. Supp. 395, 408 (D. Md. 1981) ("Generally, it is the duty of the defendant to plead affirmative defenses, and the court cannot raise such defenses . . ."), *aff'd*, 712 F.2d 70 (4th Cir. 1983).

Courts also argue that responsive pleadings prevent complications at the appellate level. If responsive pleadings are dispensed with, an appellate court may be confronted with a case in which the defendants are not required to participate because they were never served at the trial level. See *Franklin v. Oregon*, 662 F.2d 1337, 1341 (9th Cir. 1981) ("[D]efendants are not required to respond on appeal because they were not parties to the action below."), *on remand*, *Franklin v. Oregon*, 563 F. Supp. 1310 (D. Or. 1983), *aff'd in part and rev'd in part sub nom.* *Franklin v. Murphy*, 745 F.2d 1221 (9th Cir. 1984); *Wartman v. Branch 7, Civil Div., County Ct.*, 510 F.2d 130, 133 n.6 (7th Cir. 1975) (summons should issue to ensure having "two opposing parties at the appellate level"); *Bauers v. Heisel*, 361 F.2d 581, 584 n.3 (3d Cir. 1966) (in event of appeal defendant may not have been alerted), *cert. denied*, 386 U.S. 1021 (1967). Consequently, the courts of appeals will be unable to resolve the merits of the controversy. See *Bayron v. Trudeau*, 702 F.2d 43, 46 (2d Cir. 1983) (because district court dismissed complaint before responsive pleadings there was no record on appeal for court to determine whether state had acted properly in examining prisoner's documents); *Lewis v. New York*, 547 F.2d 4, 6 (2d Cir. 1976) (appellate courts were confronted with a controversy where defendants refused to appear because they were never served and could not resolve the controversy under such circumstances); *Bauers v. Heisel*, 361 F.2d 581, 584 n.3 (3d Cir. 1966) (appellant may have been foreclosed from obtaining review of the district court's determination because appellees were not served), *cert. denied*, 386 U.S. 1021 (1967). Issuance of a summons, however, would either assure that two parties would be present on appeal, or provide a more secure ground for disposition of the complaint on appeal. See *Jones v. Morris*, 777 F.2d 1277, 1280-81 (7th Cir. 1985) (by giving defendants opportunity to deny factual assertions through responsive pleadings, courts have a more secure ground for dismissing suit, thereby rendering further appeal unnecessary); *Phillips v. Mashburn*, 746 F.2d 782, 784 (11th Cir. 1984) (*per curiam*) (expansion of record through service of process allows a court to make a more informed decision); *Lewis v. New York*, 547 F.2d 4, 6 (2d Cir. 1976) (premature dismissal before responsive pleadings may lead to shuttling suits between appellate and district courts).

49. Fed. R. Civ. P. 4(a). See *Cameron v. Fogarty*, 705 F.2d 676, 678 (2d Cir. 1983) ("Procedurally, service of process of a filed complaint is not discretionary. [Rules] 3, 4(a)."), *aff'd*, 806 F.2d 380 (2d Cir. 1986); *Franklin v. Oregon*, 662 F.2d 1337, 1341 (9th Cir. 1981) ("[L]iteral reading of [Rule] 4(a) supports the proposition that a summons must be issued before a dismissal for failure to state a claim . . ."), *on remand*, *Franklin v. Oregon*, 563 F. Supp. 1310 (D. Or. 1983), *aff'd in part and rev'd in part sub nom.* *Franklin v. Murphy*, 745 F.2d 1221 (9th Cir. 1984); *Frankos v. LaVallee*, 535 F.2d 1346, 1347 n.1 (2d Cir.) (complaint dismissed erroneously "prior to service of summons as required by [Rule] 4(a)"), *cert. denied*, 429 U.S. 918 (1976); *Dear v. Rathje*, 485 F.2d 558,

ever, directs officers of the court to issue summons when an IFP complaint is filed, and to serve process for IFP plaintiffs.<sup>50</sup> Neither the Rules nor the IFP statute vests a judge with discretion to intervene at this stage of the pleadings to determine whether the clerk may issue a summons.<sup>51</sup> Thus, courts reason that under the postfiling delayed dismissal approach an IFP complaint may not be dismissed before issuance of process.<sup>52</sup>

### C. Prefiling Dismissal

Although the procedures for postfiling immediate or delayed dismissal raise important considerations, the procedure of prefiling dismissal is the best approach for handling frivolous IFP complaints. Moreover, prefiling dismissal is supported by the language of the statute and early judicial interpretation of congressional intent.

Under a prefiling approach, courts review the issues of poverty and frivolousness prior to the filing of the complaint.<sup>53</sup> If the IFP application

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560 (7th Cir. 1973) (practice of dismissal before issuance of process "is in clear conflict with Rule 4(a) . . . which imposes a duty on the Clerk to issue the summons 'forthwith'"); see also *Estelle v. Gamble*, 429 U.S. 97, 112 n.5 (1976) (Stevens, J., dissenting) (although complaint filed, "instead of causing it to be served on the defendants as required by [Rule] 4, the Clerk . . . dismissed [it]"); *Bauers v. Heisel*, 361 F.2d 581, 584 n.3 (3d Cir. 1966) (expressing disfavor with immediate postfiling dismissal because "the requirements of Rule 4(a) are explicit"), cert. denied, 386 U.S. 1021 (1967); Comment, *State Prisoners, Federal Courts, and Playing by the Rules: An Analysis of the Aldisert Committee's Recommended Procedures for Handling Prisoner Civil Rights Cases*, 5 U. Puget Sound L. Rev. 131, 147 (1981) [hereinafter *Playing by the Rules*] (under the Rules "service of process is not discretionary"). But see *Cay v. Estelle*, 789 F.2d 318, 323 (5th Cir. 1986) (IFP proceedings can be dismissed when it becomes clear merit is lacking); *Ron v. Wilkinson*, 565 F.2d 1254, 1258 (2d Cir. 1977) (automatic service of IFP complaints would place undue hardship on public).

One author argues, however, that the 1983 amendments to Rule 4 (specifically Rule 4(c)(2)(B)(i)) that authorize a court to serve process for IFP plaintiffs also give the court discretion to determine if summons should issue. See *Feldman*, *supra* note 15, at 428 & nn.100-01. These amendments, however, merely indicate that the court is responsible for delivery of service. They do not grant the court discretion to determine if process should issue. See *Franklin v. Oregon*, 563 F. Supp. 1310, 1317 (D. Or. 1983) (when proceeding in forma pauperis, procedure for issuance of summonses and service requires court to provide IFP plaintiff, or his attorney, with necessary forms; then plaintiff "forward[s] the completed forms to the U.S. Marshal, or a substitute, for service"), *aff'd in part and rev'd in part sub nom. Franklin v. Murphy*, 745 F.2d 1221 (9th Cir. 1984).

50. 28 U.S.C. § 1915(c) (1982). This section states: "The officers of the court shall issue and serve all process, and perform all duties in such cases."

51. See *Catz & Guyer*, *supra* note 15, at 672 n.109; *Playing by the Rules*, *supra* note 49, at 147-49.

52. See *Nichols v. Schubert*, 499 F.2d 946, 947 (7th Cir. 1974) (per curiam) (there is "no reason for circumventing the mandate of Rule 4(a) . . . simply because the matter proceeded in forma pauperis"); *supra* note 49 and accompanying text. Compare *Playing by the Rules*, *supra* note 49, at 146-49 (issuance of process mandatory) and *Catz & Guyer*, *supra* note 15, at 679 (courts should permit all IFP cases to proceed to disposition under the Rules) with *Feldman*, *supra* note 15, at 427-28 & nn.100-01 (1983 amendments to Rule 4(a) create exception to issuance of process requirement).

53. See *Graham v. Riddle*, 554 F.2d 133, 134-35 (4th Cir. 1977); *Wartman v. Branch*

fails to qualify on either ground, it may be dismissed.<sup>54</sup> Unlike dismissal after the filing of the complaint, dismissal before filing does not constitute a disposition on the substantive merits, but is merely a denial of the application.<sup>55</sup>

Although courts practicing postfiling dismissal observe that sections 1915(a) and (d) do not outline a procedure for dismissal,<sup>56</sup> they often conclude that filing the application must take place before a complaint can be dismissed as frivolous.<sup>57</sup> The explanation offered is that section 1915(a), which refers to the commencement of the suit, applies only to economic criteria and does not mention frivolousness.<sup>58</sup> Thus, these courts conclude that the district court may not consider frivolousness at this stage of the proceeding.<sup>59</sup>

The Court of Appeals for the Seventh Circuit offers an alternate interpretation.<sup>60</sup> Its approach centers on the discretion vested in the trial courts under section 1915(a). In *Wartman v. Branch 7, Civil Div., County Court*,<sup>61</sup> the court reasoned that the phrase "may authorize" in section 1915(a) implies that the district courts must use their discretion in the initial processing of the IFP application.<sup>62</sup> Because the review of financial eligibility is primarily a factual matter,<sup>63</sup> it can be inferred that this discretion involves the question of frivolousness.<sup>64</sup> In addition, sec-

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7, Civil Div., County Ct., 510 F.2d 130, 132, 134 (7th Cir. 1975); *Loum v. Underwood*, 262 F.2d 866, 867 (6th Cir. 1959); *Lyszaj v. AT&T*, 554 F. Supp. 218, 220 (E.D. Va. 1982), *aff'd*, 714 F.2d 131 (4th Cir. 1983).

54. See *Graham v. Riddle*, 554 F.2d 133, 134-35 (4th Cir. 1977); *Wartman v. Branch 7, Civil Div., County Ct.*, 510 F.2d 130, 133 (7th Cir. 1975).

55. See *Graham v. Riddle*, 554 F.2d 133, 134-35 (4th Cir. 1977); *Loum v. Underwood*, 262 F.2d 866, 867 (6th Cir. 1959); see also *Taylor v. Gibson*, 529 F.2d 709, 714 n.6 (5th Cir. 1976) (noting that once complaint is docketed "any further order in the case . . . constitute[s] an adjudication on the merits") (quoting *Campbell v. Beto*, 460 F.2d 765, 768 (5th Cir. 1972)). Because denial is not an adjudication on the merits, there is no res judicata effect.

56. See *supra* notes 17-24 and accompanying text.

57. See *Smith v. Bacon*, 699 F.2d 434, 436 (8th Cir. 1983) (proper procedure to allow an IFP filing when IFP papers formally are sufficient and then dismiss pursuant to section 1915(d) even where court previously determined that 1915(d) dismissal was warranted). See *supra* notes 19 & 22 and accompanying text.

58. See *Cay v. Estelle*, 789 F.2d 318, 322 (5th Cir. 1986) (stating that section 1915(a) indicated that leave to proceed in forma pauperis is conditioned solely on economic criteria); *Watson v. Ault*, 525 F.2d 886, 891 (5th Cir. 1976) (only consideration under section 1915(a) "is whether the statements in the affidavit satisfy the requirements of poverty"); *Lyszaj v. AT&T*, 554 F. Supp. 218, 220 (E.D. Va. 1982) (noting that other cases solely consider the issue of poverty under section 1915(a)), *aff'd*, 714 F.2d 131 (4th Cir. 1983).

59. *Flint v. Haynes*, 651 F.2d 970, 974 n.13 (4th Cir. 1981) (in determining whether to file a complaint, courts should consider only petitioner's "economic condition") (citing *Boyce v. Alizaduh*, 595 F.2d 948, 950-51 (4th Cir. 1979)), *cert. denied*, 454 U.S. 1151 (1982); see *supra* note 22.

60. See *Wartman v. Branch 7, Civil Div., County Ct.*, 510 F.2d 130, 132 (7th Cir. 1975).

61. 510 F.2d 130 (7th Cir. 1975).

62. See *id.* at 132.

63. See *infra* notes 113-16 and accompanying text.

64. *Wartman*, 510 F.2d at 132.

tion 1915(a) requires that the IFP plaintiff "state the nature of the action."<sup>65</sup> The *Wartman* court interpreted this demand as an indication that the legal merits necessarily were relevant to the inquiry at this stage.<sup>66</sup> Although the *Wartman* court conceded that the specific reference to the issue of frivolousness in section 1915(d) authorizing dismissal did imply that the case already had been filed, it did not construe this language as precluding earlier review of the issue of frivolousness.<sup>67</sup> It maintained instead that dismissal is mentioned in conjunction with frivolousness in order to catch complaints that may have passed initial review, but subsequently are discovered to be without merit.<sup>68</sup>

Early case law also supports the presumption that the frivolousness of an IFP application should be reviewed before filing. For six decades after the Statute's enactment in 1892,<sup>69</sup> the courts that reviewed IFP proceedings considered poverty and frivolousness simultaneously at the prefiling stage, and never questioned their authority or the necessity to do so.<sup>70</sup> Conditioning filing solely on the petitioner's economic status appears to be a modern development.<sup>71</sup>

Policy considerations of efficiency and fairness make prefiling dismissal

65. 28 U.S.C. § 1915(a) (1982).

66. See *Wartman*, 510 F.2d at 132.

67. See *id.*

68. See *id.*; see also *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 338 (1948) (powers of dismissal pursuant to section 1915(d) intended to safeguard against false or fraudulent invocation of statute's benefits).

69. Act of July 20, 1892, ch. 209, 27 Stat. 252.

70. See *Kinney v. Plymouth Rock Squab*, 236 U.S. 43, 45 (1915) (amendments adding IFP defendants and appeals to 28 U.S.C. § 1915 did not affect discretion of courts to consider merits of the suit at the initial stages of review); *Huffman v. Smith*, 172 F.2d 129, 130 (9th Cir. 1949) (construing the permissive words "may authorize" of section 1915(a), which replaced 28 U.S.C.A. § 832 (1948), as giving district courts same discretion they had formerly to deny commencement of IFP action where it appeared that applicant had no viable cause of action); *Gilmore v. United States*, 131 F.2d 873, 874 (8th Cir. 1943) (courts will not grant leave to proceed in forma pauperis if it is clear that proceeding is without merit); *O'Connell v. Mason*, 132 F. 245, 247 (1st Cir. 1904) (it is "extremely unwise . . . to defeat the manifest and salutary purpose of Congress by making this meritorious safeguard of power to dismiss apply only to proceedings where the affidavit of poverty was filed before the writ was filled out, thereby leaving at large frivolous cases"); *Brinkley v. Louisville & Nashville R.R. Co.*, 95 F. 345, 348-49 (C.C.W.D. Tenn. 1899) (courts "are not compelled always to accept every suit offered to be filed or begun . . . the remedy of initial rejection would have been better placed if this bill . . . had been refused a place on the files in the first instance"); *In re Collier*, 93 F. 191, 192 (D.C.W.D. Tenn. 1899) (courts did not grant IFP status merely upon a willingness to take the oath of poverty but required an inquiry into the facts to determine if it were a proper case); see also *Duniway*, *supra* note 2, at 1270-77 (historical analysis of in forma pauperis statutes).

71. The procedure of immediate postfiling dismissal did not emerge until the 1950's. See, e.g., *United States ex rel. Morris v. Radio Station WENR*, 209 F.2d 105, 107 (7th Cir. 1953) (holding that district court should have permitted IFP litigant to file complaint before dismissing it in order to have a proper court record), *overruled*, *Wartman v. Branch 7, Civil Div., County Ct.*, 510 F.2d 130, 134 (7th Cir. 1975); *Higgins v. Steele*, 195 F.2d 366, 369 (8th Cir. 1952) ("In the interest of orderly procedure and of keeping proper court records, it may be advisable to permit the petitioner to file his petition . . . and then to dismiss it . . .") (emphasis added).

the most effective method of processing frivolous IFP complaints. Both postfiling delayed dismissal and postfiling immediate dismissal overlook the waste of judicial resources involved in requiring filing when it is evident that the claim is without merit.<sup>72</sup> As one court has commented, the actions of a relatively small number of litigious IFP plaintiffs can tie up every court in the Country.<sup>73</sup> Moreover, defendants can incur substantial costs in maintaining a defense.<sup>74</sup> It is a senseless gesture and poor procedure to expend court resources to grant leave to proceed in forma pauperis, only to dismiss immediately after filing due to frivolousness.<sup>75</sup> Thus, dismissing clearly frivolous complaints prior to filing streamlines dismissal procedures and avoids burdening both courts and defendants with the costs of unnecessary litigation.

In order to preserve the right of access to the courts of IFP plaintiffs that section 1915 seeks to establish,<sup>76</sup> prefiling dismissal limits dismissal to complaints that clearly are frivolous.<sup>77</sup> Because IFP complaints should

72. See *Franklin v. Oregon*, 563 F. Supp. 1310, 1324 (D. Or. 1983) (frivolous suits "cost a lot of money. . . . It costs [the state] more than \$1 million a year to defend inmates' suits, the vast majority of which are frivolous"), *aff'd in part and rev'd in part sub nom. Franklin v. Murphy*, 745 F.2d 1221 (9th Cir. 1984). The determination of indigency is a costly process. The procedure involves a compilation of data regarding the applicant's funds over a six-month period. See, e.g., *Evans v. Croom*, 650 F.2d 521, 522 (4th Cir. 1981), *cert. denied*, 454 U.S. 1153 (1982); see also *Cotner v. Campbell*, 618 F. Supp. 1091, 1096 (E.D. Okla. 1985) ("[E]very document must be noted on the corresponding docket sheet, filed, indexed and stored in facilities already subjected to overcrowding by the proliferation of other lawsuits. . . . Courts are usually forced to order the preparation of special reports so that frivolous actions may be dismissed on the merits."), *aff'd in part sub nom. Cotner v. Hopkins*, 795 F.2d 900 (10th Cir. 1986) (per curiam); *Lyszaj v. AT&T*, 554 F. Supp. 218, 220 n.2 (E.D. Va. 1982) (determination of plaintiff's economic status time-consuming and wasteful if claim is frivolous), *aff'd*, 714 F.2d 131 (4th Cir. 1983); see *infra* notes 114-19 and accompanying text.

73. See *Franklin*, 563 F. Supp. at 1323; see *Green v. McKaskle*, 788 F.2d 1116, 1120 (5th Cir. 1986) (upsurge in IFP proceedings threatens "both efficient judicial administration and the achievement of justice in individual cases' ") (quoting *Turner*, *supra* note 2, at 611); *Urban v. United Nations*, 768 F.2d 1497, 1499-1500 (D.C. Cir. 1985) (per curiam) (court must protect itself from "[t]he burden on the system when '[f]aced with just one litigant who has a fanatical desire to flood the courts . . . armed with materials paid for by the state' ") (quoting *In re Green*, 669 F.2d 779, 786 (D.C. Cir. 1981)); *In re Martin-Trigona*, 737 F.2d 1254, 1259 (2d Cir. 1984) (court noted that "voluminous filings have . . . burdened judicial operations to the point of impairing the administration of justice"), *cert. denied*, 106 S. Ct. 807 (1986); see also *Green v. Camper*, 477 F. Supp. 758, 759-68 (W.D. Mo. 1979) (court devoted ten pages of its opinion to listing over 500 actions filed by Green in his attempt to render the court "unable to administer and process its docket").

74. See *supra* note 36.

75. See *Graham v. Riddle*, 554 F.2d 133, 134-35 (4th Cir. 1977); *Richardson v. Hatch*, 134 F. Supp. 110, 114 (W.D. Mich. 1955).

76. See *supra* notes 12-13 and accompanying text.

77. See, e.g., *Carollo-Gardner v. Diners Club*, 628 F. Supp. 1253, 1256 (E.D.N.Y. 1986) (alleging conspiracy and discrimination because Diners Club misspelled plaintiff's name and did not correspond promptly); *Demos v. Kincheloe*, 563 F. Supp. 30, 31 (E.D. Wash. 1982) (alleging government violated plaintiff's civil rights because it backed up treasury notes with gold instead of silver); *Lyszaj v. AT&T*, 554 F. Supp. 218, 221 (E.D. Va. 1982) (IFP plaintiff alleging that his constitutional rights were violated by AT&T

be construed liberally<sup>78</sup> in order to place IFP plaintiffs untrained in legal procedures on a fair and equal footing with non-indigent parties,<sup>79</sup> those complaints that are of marginal merit will be filed.

Once the IFP application has passed prefiling review, courts should allow IFP applicants to receive the benefits of the liberal pleading policies embodied in the Rules and permit plaintiffs to develop the facts of their case through service of process, the defendant's answer, and amendments.<sup>80</sup> Postfiling immediate dismissal, although stressing efficiency, appears to shortchange the rights of IFP plaintiffs by denying them responsive pleading procedures normally afforded to non-indigent plaintiffs.<sup>81</sup> Responsive pleadings should be required because they allow a court to expand the record, thereby enabling it to make a more informed decision regarding the proceedings.<sup>82</sup>

Because prefiling dismissal screens out clearly frivolous complaints, once the complaint is filed, concern over protecting the right of access to courts should take precedence over countervailing considerations of efficiency.<sup>83</sup> Thus, prefiling dismissal requires service of process and responsive pleadings to protect the rights of IFP plaintiffs in litigation.<sup>84</sup> By streamlining prefiling screening procedures and making responsive pleadings obligatory once the IFP plaintiff has passed prefiling review, prefiling dismissal achieves the interests of efficiency furthered by postfiling immediate dismissal, yet promotes the goals of fairness obtained through postfiling delayed dismissal.

## II. ASSESSMENT OF COSTS AGAINST AN IFP PLAINTIFF

Prefiling review streamlines dismissal and enables trial judges to screen IFP applications more effectively. To deter the initial institution of frivolous applications, courts also should consider procedures directing IFP plaintiffs to pay money, either as alternatives or supplements to prefiling review.<sup>85</sup> Despite the general consensus among courts as to the validity

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because company did not provide germ-free telephones, court noted that even presuming the facts stated in the complaint were true, "no constitutional deprivation exists"), *aff'd*, 714 F.2d 131 (4th Cir. 1983).

78. See *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

79. See *id.*

80. See *supra* note 29.

81. See *supra* notes 41 & 49.

82. See *Phillips v. Mashburn*, 746 F.2d 782, 784 (11th Cir. 1984) (per curiam); *Tingler v. Marshall*, 716 F.2d 1109, 1111 (6th Cir. 1983); *Anderson v. Coughlin*, 700 F.2d 37, 41 (2d Cir. 1983). Because prefiling review screens out IFP applicants intent on abusing judicial process, the predisposition of the courts, after the filing of a complaint, should lean in favor of aiding IFP plaintiffs who may be unskilled in pleading procedures. See *Tingler v. Marshall*, 716 F.2d 1109, 1111 (6th Cir. 1983).

83. See *supra* note 53 and accompanying text.

84. See *supra* note 82 and accompanying text.

85. For example, the Seventh Circuit, which uses prefiling review, also authorizes prepayment procedures. See, e.g., *Caldwell v. United States*, 682 F.2d 142, 143 (7th Cir. 1982) (per curiam); *Zaun v. Dobbin*, 628 F.2d 990, 993 (7th Cir. 1980) (per curiam). The



of different procedures demanding payment from IFP plaintiffs,<sup>86</sup> relatively few courts have instituted such measures.<sup>87</sup> This section recommends that courts adopt the three methods of payment discussed below, as a general practice, to limit the filing of frivolous IFP complaints.<sup>88</sup>

The initial dilemma facing non-indigent parties is whether their action is worth the cost of suit.<sup>89</sup> A non-indigent plaintiff can expect to pay initial filing fees and court costs.<sup>90</sup> Moreover, if the plaintiff is the losing party, he may be required to pay for the necessary court expenses of the prevailing party in addition to any litigation expenses he has incurred.<sup>91</sup>

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Third Circuit recommends postfiling delayed dismissal, *see* *McTeague v. Sosnowski*, 617 F.2d 1016, 1019 (3d Cir. 1980), yet it permits prepayment plans. *See, e.g.,* *Jones v. Zimmerman*, 752 F.2d 76, 79 (3d Cir. 1985); *Bullock v. Suomela*, 710 F.2d 102, 103 (3d Cir. 1983). The Fifth Circuit uses the procedure of postfiling immediate dismissal, *see* *Cay v. Estelle*, 789 F.2d 318, 324 (5th Cir. 1986), in conjunction with prepayment plans. *See, e.g.,* *Green v. Estelle*, 649 F.2d 298, 300 (5th Cir. Unit A 1981) (per curiam); *Braden v. Estelle*, 428 F. Supp. 595, 596 (S.D. Tex. 1977); *see also id.* at 597 (procedures of streamlining review, "standing alone, cannot solve the . . . problems" resulting from the volume of frivolous suits filed).

86. *See, e.g.,* *In re Williamson*, 786 F.2d 1336, 1338 (8th Cir. 1986) (section 1915(a) authorizes institution of partial payment plans); *Flint v. Haynes*, 651 F.2d 970, 972 (4th Cir. 1981) (section 1915(e) authorizes a court to assess costs against an IFP plaintiff), *cert. denied*, 454 U.S. 1151 (1982).

87. *See, e.g.,* *Braden v. Estelle*, 428 F. Supp. 595, 601 (S.D. Tex. 1977) (court adopted partial payment plans and step-by-step plans as "imaginative and innovative methods [to deal] with the flood of [IFP] complaints") (quoting *Taylor v. Gibson*, 529 F.2d 709, 717 (5th Cir. 1976)). Six years later, only a few federal district courts had adopted these innovative procedures to administer in forma pauperis petitions. T. Willging, *Partial Payment of Filing Fees in Prisoner IFP Cases in Federal Courts: A Preliminary Report*, vii (Federal Judicial Center 1984) [hereinafter *Willging Report*].

88. *See* *Collier v. Tatum*, 722 F.2d 653, 655 (11th Cir. 1983) (partial filing fees are necessary to deter IFP plaintiffs who, if they have nothing to lose, may file suits merely to harass defendants) (citing *Evans v. Croom*, 650 F.2d 521, 523 (4th Cir. 1981), *cert. denied*, 454 U.S. 1153 (1982)); *Flint v. Haynes*, 651 F.2d 970, 973 (4th Cir. 1981) (IFP plaintiffs have "virtually 'nothing to lose and everything to gain,'" if all costs of litigation are waived) (quoting *Jones v. Bales*, 58 F.R.D. 453, 463 (N.D. Ga. 1972), *aff'd without opinion per curiam*, 480 F.2d 805 (5th Cir. 1973)), *cert. denied*, 454 U.S. 1151 (1982); *Evans v. Croom*, 650 F.2d 521, 523 (4th Cir. 1981) (if IFP status can be acquired merely by filing affidavit of poverty, IFP plaintiffs will have no disincentive to institute vexatious litigation), *cert. denied*, 454 U.S. 1153 (1982); *In re Stump*, 449 F.2d 1297, 1298 (1st Cir. 1971) (per curiam) (requiring small payment in IFP proceedings because it is "all too easy to file suits . . . if it costs nothing whatever to do so"); *see also Willging Report, supra* note 87, at 1-2.

89. *See* *Evans*, 650 F.2d at 524 (by requiring partial payment fee, IFP plaintiff is forced "to 'confront the initial dilemma . . . fac[ing] . . . other potential civil litigants'") (quoting *Braden v. Estelle*, 428 F. Supp. 595, 596 (S.D. Tex. 1977)); *see also In re Stump*, 449 F.2d at 1297 ("[A]lthough the amount of money involved . . . is small, the principle is not.").

90. *See* *Marks v. Calendine*, 80 F.R.D. 24, 30-31 (N.D. W. Va. 1978) (non-indigent plaintiffs expect to pay filing and docketing fees, and issuance of process fees when they commence an action), *aff'd sub nom.* *Flint v. Haynes*, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982).

91. Fed. R. Civ. P. 54(d) states: "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." *See generally* *Bartell, Taxation of Costs and Awards of Expenses in Federal Court*, 101 F.R.D. 553, 563-65 (1984) (overview of the bases for awarding costs to the prevailing party); *Peck, Taxation of Costs in United States*

When the plaintiff has instituted an action in bad faith, courts also may require the non-prevailing party to pay the defendant's attorney fees.<sup>92</sup> The rationale behind requiring the non-indigent plaintiff to pay these costs has no less force in the case of an IFP plaintiff.<sup>93</sup> IFP plaintiffs should not be excused from the consequences of litigation.<sup>94</sup> Courts should impose costs<sup>95</sup> against IFP plaintiffs, such as filing fees,<sup>96</sup> court costs,<sup>97</sup> or monetary sanctions,<sup>98</sup> to force IFP plaintiffs to assess the merit of their claim.<sup>99</sup> Courts should consider alternative systems of partial payment of court costs, step-by-step payment, or monetary sanctions to effectuate this goal.

#### A. Partial Payment Plans

Several courts have adopted partial payment procedures to administer IFP petitions.<sup>100</sup> Under these plans, the IFP applicant is required to pay

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*District Courts*, 37 F.R.D. 481, 485-95 (1965) (overview of the categories and the mechanics involved in taxation of costs).

92. See *Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1165 (7th Cir. 1983); *Lipsig v. National Student Mktg. Corp.*, 663 F.2d 178, 182 (D.C. Cir. 1980) (per curiam); *Bartell*, *supra* note 91, at 555-56.

93. See *Flint v. Haynes*, 651 F.2d 970, 974 (4th Cir. 1981) (assessment of costs against IFP plaintiff as alternative "to make certain that meaningful access to the courts remains available and equal"), *cert. denied*, 454 U.S. 1151 (1982); *Chevrette v. Marks*, 558 F. Supp. 1133, 1135 (M.D. Pa. 1983) (IFP plaintiffs "must be made aware that it is patently unwise to barrage a court with groundless or repetitive matters").

94. See *supra* note 93.

95. Civil litigation generally requires a party to pay fees, court costs and other expenses. Fees typically include filing fees, marshal fees, trial fees, jury fees, subpoena fees, transcript and record fees, and judgment and execution fees. See *Marks v. Calendine*, 80 F.R.D. 24, 30-31 (N.D. W. Va. 1978), *aff'd sub nom. Flint v. Haynes*, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982); *Catz & Guyer*, *supra* note 15, at 659-60. These fees generally are classified as "taxable costs" after the final judgment when they become recoverable by the prevailing party. The fees that were paid by the prevailing party may then become the court costs that are taxed against the losing party. See *Marks*, 80 F.R.D. at 30-31; *Catz and Guyer*, *supra* note 15, at 659-60 & n.32. Other expenses involve such costs as attorneys' fees, reimbursement of witnesses, or expenditures resulting from discovery. Although these expenses also are incurred in litigation, they generally are not recoverable as taxable costs. See *id.* at 660; *Bartell*, *supra* note 91, at 589-98; *Peck*, *supra* note 91, at 485-96.

96. See *In re Williamson*, 786 F.2d 1336, 1338 (8th Cir. 1986) (courts have implemented plans requiring IFP plaintiffs to pay portion of the full filing fee based on estimate of ability to pay).

97. See *Flint v. Haynes*, 651 F.2d 970, 974 (4th Cir. 1981) (affirming district court's decision to assess costs against an unsuccessful IFP plaintiff), *cert. denied*, 454 U.S. 1151 (1982); see *supra* note 95.

98. See *Cotner v. Hopkins*, 795 F.2d 900, 903 (10th Cir. 1986) (per curiam). Plaintiff's economic condition, however, may restrict the amount assessed. See *In re American President Lines, Ltd.*, 804 F.2d 1307, 1310 n.5 (D.C. Cir. 1986) (per curiam) (limiting sanction to amount of \$500 bond due to appellant's allegedly indigent status); see *supra* note 6.

99. See *supra* note 87.

100. See, e.g., *In re Williamson*, 786 F.2d 1336, 1339-41 (8th Cir. 1986); *Jones v. Zimmerman*, 752 F.2d 76, 78 (3d Cir. 1985); *Collier v. Tatum*, 722 F.2d 653, 655 (11th Cir. 1983); *Smith v. Martinez*, 706 F.2d 572, 574 (5th Cir. 1983); *Evans v. Croom*, 650 F.2d

a portion of the filing fee based on an estimation of the party's ability to pay.<sup>101</sup> The purpose of partial payment systems is to require the IFP plaintiff to evaluate the worth of his claim.<sup>102</sup> Partial payment systems are intended to curb the indiscriminate filing of frivolous lawsuits by weeding out actions where the IFP plaintiff does not believe the case justifies even the payment of a reasonable filing fee.<sup>103</sup>

Authority to institute partial payment systems is derived from section 1915(a), which gives the court discretion to grant IFP status and enables an indigent to proceed without payment of litigation costs.<sup>104</sup> Courts have construed the language granting judicial discretion to waive costs entirely as also providing the authority to waive only a portion of those costs.<sup>105</sup>

Some courts also have found support for partial payment systems by reference to the Criminal Justice Act.<sup>106</sup> This statute provides for the appointment of counsel to represent indigent criminal defendants.<sup>107</sup> The Criminal Justice Act permits the court to demand partial payment for legal representation or terminate the appointment, if it finds that the defendant can afford a portion of the costs.<sup>108</sup> Referring to this statute

521, 522-23 (4th Cir. 1981), *cert. denied*, 454 U.S. 1153 (1982); *Zaun v. Dobbin*, 628 F.2d 990, 993 (7th Cir. 1980). *But see* *Caldwell v. United States*, 682 F.2d 142, 143 (7th Cir. 1982) (per curiam) (no authority to engraft additional requirement of payment of partial filing fee in installments onto section 1915); *cf.* *Tyler v. Milwaukee*, 740 F.2d 580, 582 (7th Cir. 1984) (court may not engraft an additional requirement on to statute before permitting filing of IFP complaint where court ordered plaintiff to swear to conduct himself properly before granting him leave to proceed in forma pauperis).

101. *See infra* notes 114-16.

102. *See supra* notes 88-90 and accompanying text.

103. *See* *Johnson v. Kemp*, 781 F.2d 1570, 1572 (11th Cir. 1986) (per curiam); *Evans v. Croom*, 650 F.2d 521, 524 (4th Cir. 1981) (quoting *In re Stump*, 449 F.2d 1297, 1298 (1st Cir. 1971) (per curiam)), *cert. denied*, 454 U.S. 1153 (1982); *Willing Report, supra* note 87, at 2 (partial payment plans in Northern District of Ohio intended to deter filings of complaints where plaintiff does not believe case justifies payment of a reasonable filing fee).

104. 28 U.S.C. § 1915(a) (1982). Although section 1915(a) contains no explicit provision requiring an IFP plaintiff to pay a portion of fees and costs, courts reason that the permissive language of the statute allows implementation of such plans. *See In re Williamson*, 786 F.2d 1336, 1338 (8th Cir. 1986); *see also* *Jones v. Zimmerman*, 752 F.2d 76, 78 (3d Cir. 1985) (court held implementation of partial filing fee plan to be within the authority conferred by section 1915(a)); *Braden v. Estelle*, 428 F. Supp. 595, 598 (S.D. Tex. 1977) (section 1915(a) vests district courts with discretion to assess costs); *Willing Report, supra* note 87, at 1 (courts have discretion pursuant to section 1915(a) to impose partial payment plans).

105. *In re Williamson*, 786 F.2d 1336, 1338 (8th Cir. 1986) ("[I]f the court may grant a waiver of 100 percent of the costs on . . . items, the court also is vested with the discretion to waive a lesser percentage of such costs.") (quoting *Braden v. Estelle*, 428 F. Supp. 595, 598-99 (S.D. Tex. 1977)).

106. 18 U.S.C. § 3006A (1982).

107. 18 U.S.C. § 3006A(a), (b) (1982).

108. 18 U.S.C. § 3006A(c) (1982) provides in part:

If at any time after the appointment of counsel . . . the court finds that the person is financially able to obtain counsel or to make partial payment for the

by analogy,<sup>109</sup> one court reasoned that if Congress did not adopt an "all or nothing"<sup>110</sup> approach in the context of indigent criminal defendants, then that approach is not required for indigent civil plaintiffs.<sup>111</sup> Accordingly, when it is economically feasible<sup>112</sup> for an IFP plaintiff to pay a portion of the court fees and costs, the court may demand that the plaintiff pay a reasonable sum.<sup>113</sup>

Partial payment systems must be structured carefully to prevent undue hardship to an IFP plaintiff.<sup>114</sup> Courts have adopted partial payment plans that reflect this concern.<sup>115</sup> Some courts audit the IFP applicant's

representation, it may terminate the appointment of counsel or authorize payment . . . .

109. See *Braden v. Estelle*, 428 F. Supp. 595, 598-99 (S.D. Tex. 1977) (analogizing to Criminal Justice Act in context of requiring partial payment of fees); *Carter v. Telectron, Inc.*, 452 F. Supp. 939, 942-43 (S.D. Tex. 1976) (analogizing to Criminal Justice Act in context of requiring reimbursement of prepaid fees).

110. *Braden v. Estelle*, 428 F. Supp. 595, 599 (S.D. Tex. 1977).

111. *Id.* ("[I]n the context of a court's obligation towards indigent criminal defendants, Congress has recognized that . . . the court can require partial payment. The same rationale should be applied to indigent[s] . . . .").

112. The determination of economic feasibility or hardship is within the discretion of the court. See *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 337 (1948) (there are "few more appropriate occasions for use of a court's discretion than [where a] litigant, asking that the public pay costs of his litigation, . . . endeavors to saddle the public with wholly uncalled-for expense"); *Johnson v. Kemp*, 781 F.2d 1570, 1571-72 (11th Cir. 1986) (per curiam) (district courts have wide discretion in determining whether fee is fair). The determination lends itself to a case-by-case approach. See *Adkins*, 335 U.S. at 339-40 (IFP applicant need not be destitute to benefit from § 1915); *In re Williamson*, 786 F.2d 1336, 1340 (8th Cir. 1986) (partial fees should be based on small fixed percentages of IFP applicant's assets or average monthly income); *In re Smith*, 600 F.2d 714, 716 (8th Cir. 1979) (inmates need not deprive themselves of the "small amenities of life" to proceed in forma pauperis) (quoting *Souder v. McGuire*, 516 F.2d 820, 824 (3d Cir. 1975)); *Temple v. Ellertorpe*, 586 F. Supp. 848, 851 (D.R.I. 1984) (there is "no bright-line demarcation").

113. *E.g.*, *Smith v. Martinez*, 706 F.2d 572, 573 (5th Cir. 1983) (court required partial payment of \$3); *Williams v. Estelle*, 681 F.2d 946, 947 (5th Cir. 1982) (court required partial fee of \$8 to cover filing and service fees), *aff'd sub nom. Williams v. Procnunier*, 735 F.2d 875 (5th Cir.), *cert. denied*, 469 U.S. 1075 (1984); *Evans v. Croom*, 650 F.2d 521, 523 n.1 (4th Cir. 1981) (court required amounts of \$1, \$8.70, \$24, \$33, and \$29, respectively, in five cases), *cert. denied*, 454 U.S. 1153 (1982).

Courts that use partial payment systems disagree only as to the amounts to be charged. See *Jones v. Zimmerman*, 752 F.2d 76, 78-79 (3d Cir. 1985) (abuse of discretion to require \$5 filing fee where prisoner monthly wage was \$15 and he only had \$17 in savings); *Bullock v. Suomela*, 710 F.2d 102, 103 (3d Cir. 1983) (abuse of discretion to apply \$4 filing fee to inmate with \$4.76 in account and average monthly wage of \$17.48); *Smith v. Martinez*, 706 F.2d 572, 574 (5th Cir. 1983) (not abuse of discretion to require \$3 filing fee to be paid out of next payment to inmate's trust account); *Ward v. Werner*, 61 F.R.D. 639, 640 (M.D. Pa. 1974) (not abuse of discretion to require filing fee amounting to 30% of inmate's savings where prisoner had \$50 in trust account).

114. See *In re Williamson*, 786 F.2d 1336, 1338, 1340 (8th Cir. 1986); see also *Souder v. McGuire*, 516 F.2d 820, 823 (3d Cir. 1975) (section 1915 is intended to act as an "entre, not a barrier, to . . . the federal court[s]"); accord *Jones v. Zimmerman*, 752 F.2d 76, 79 (3d Cir. 1985); *Bullock v. Suomela*, 710 F.2d 102, 103 (3d Cir. 1983); *Temple v. Ellertorpe*, 586 F. Supp. 848, 851 (D.R.I. 1984).

115. Courts also should ensure that IFP applicants are aware of the local partial payment procedures by attaching the information to IFP applications. *In re Williamson*, 786

bank balance over a certain period of time.<sup>116</sup> After this period, the court notifies the plaintiff of the assessed amount, if any. The applicant is then given an opportunity to object or to explain perceived miscalculations.<sup>117</sup> If the applicant refuses to pay after the final determination, the court may dismiss the complaint pursuant to section 1915(d).<sup>118</sup> If the applicant has a history of manipulating funds in an attempt to deceive the court, a court may dismiss with prejudice.<sup>119</sup>

Courts using partial payment systems find them helpful in screening out frivolous complaints. Dismissal of even a few cases for failure to pay a partial fee can represent a considerable savings of a court's resources.<sup>120</sup>

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F.2d 1336, 1340 (8th Cir. 1986); see *Willging Report, supra* note 87, at vii, ix (examining the procedures for partial payment of filing fees used by the Northern District of Ohio, Western Division).

116. See *In re Williamson*, 786 F.2d 1336, 1340 (8th Cir. 1986) (recommending 2 - 6 month period for review); *Collier v. Tatum*, 722 F.2d 653, 655 (11th Cir. 1983) (review of applicant's account extended from Sept. to Feb.); *Evans v. Croom*, 650 F.2d 521, 522 (4th Cir. 1981) (using 6 month period for review), *cert. denied*, 454 U.S. 1153 (1982); *Willging Report, supra* note 87, at 9 (noting 6 month period for review).

117. See *Jones v. Zimmerman*, 752 F.2d 76, 79 (3d Cir. 1985) (fairness requires that IFP applicant be given an opportunity to see court's findings and to correct any misinformation); *Evans v. Croom*, 650 F.2d 521, 526 (4th Cir. 1981) (partial payment plan must give IFP plaintiff the opportunity to justify payment of lower sum), *cert. denied*, 454 U.S. 1153 (1982); see also *Dawson v. Lennon*, 797 F.2d 934, 935-36 (11th Cir. 1986) (claimant's history of objecting in bad faith to assessed amount resulted in dismissal with prejudice). Although it may be argued that these procedures are counterproductive in that they expend court resources, the *Willging Report*, nonetheless, found prepayment plans to be a valuable method of conserving judicial resources. See *Willging Report, supra* note 87, at 21. Moreover, the Report noted that only a small percentage of plaintiffs objected to the amount assessed by courts: "Dealing with these few objections certainly takes less time than reviewing the entire pool of in forma pauperis petitions." *Id.*

118. See 28 U.S.C. § 1915(d) (1982). The fee required may be higher than an account balance where the timing or the nature of a withdrawal indicates that an IFP plaintiff withdrew funds solely to avoid paying a filing fee in whole or in part. See *Evans v. Croom*, 650 F.2d 521, 525-26 (4th Cir. 1981), *cert. denied*, 454 U.S. 1153 (1982); see also *United States v. Rubinson*, 543 F.2d 951, 964 (2d Cir.) (defendant cannot claim indigency by putting assets into relatives' accounts), *cert. denied*, 429 U.S. 850 (1976); *Brewster v. North Amer. Van Lines, Inc.*, 461 F.2d 649, 651 (7th Cir. 1972) (courts must not waste public funds by underwriting either frivolous claims or allegations of an IFP applicant who is financially able to pay, as in this case where plaintiff earned \$16,500 annually); *Levy v. Federated Dep't Stores*, 607 F. Supp. 32, 33-34 (S.D. Fla. 1984) (IFP negligence action claiming 12 million dollars in compensatory and punitive damages originating from beauty treatment dismissed where applicant had over \$40,000 in savings and assets).

119. Several courts hold that dismissal with prejudice is an appropriate sanction where an IFP applicant deliberately has filed a false affidavit of poverty or has a history of manipulating funds. See *Thompson v. Carlson*, 705 F.2d 868, 869 (6th Cir. 1983) (intentionally misrepresented financial statement); *Harris v. Cuyler*, 664 F.2d 388, 391 (3d Cir. 1981) ("conscious or intentional acts or omissions"); see also *Camp v. Oliver*, No. 85-8500, slip op. at 5026-27 (11th Cir. Sept. 2, 1986) (dismissal with prejudice inappropriate where no evidence of bad faith).

120. See *Braden v. Estelle*, 428 F. Supp. 595, 597 (S.D. Tex. 1977) (partial payment procedures undoubtedly have aided "in the identification and elimination of gross abuse"). Because partial payment procedures are a fairly recent innovation, the degree to which these plans are successful in weeding out potentially frivolous complaints has not yet been determined. See *Willging Report, supra* note 87, at 20 ("The current study can

Such findings substantiate that partial payments can be a valuable tool in deterring cases filed in bad faith.

### B. Step-by-Step Payment Plans

Another procedure intended to deter plaintiffs from proceeding in forma pauperis with non-meritorious actions is a system of step-by-step payment. Courts that adopt a step-by-step approach hold that the initial grant of IFP status does not continue automatically until the final judgment.<sup>121</sup> The court has authority at any time during the IFP proceedings to waive or to order payment of costs for any of the benefits that may arise under the statute.<sup>122</sup>

Statutory authority to institute such a procedure is derived from the provision in section 1915(a) that permits an IFP plaintiff to commence and maintain an action "without prepayment of fees and costs,"<sup>123</sup> in conjunction with section 1915(d) permitting dismissal if the allegation of poverty is untrue.<sup>124</sup> Section 1915(a) ensures indigents that they may initiate an action without prepayment of initial docketing or service of process fees, but it does not indicate that an IFP plaintiff is absolved of

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provide only a cursory overview of the success of the innovation."'). Courts using partial payment procedures, however, believe they deter frivolous filings by IFP applicants. A 1983 report from the Southern District of Texas indicates that approximately 20% of IFP cases were dismissed because IFP applicants failed to comply with a partial filing fee order. Based on those figures, the court planned to continue the usage of partial payment procedures. See *Willing Report*, *supra* note 87, at 44-45. The Report found that dismissal of eight cases for failure to pay the partial filing fee resulted in considerable savings of court resources that would have been used to decide those cases on their merits. See *id.* at 21; see also *Collier v. Tatum*, 722 F.2d 653, 655 (11th Cir. 1983) (affirming district court's decision to use partial filing fee plan to reduce number of frivolous IFP complaints filed); *Evans v. Croom*, 650 F.2d 521, 523, 526 (4th Cir. 1981) (same), *cert. denied*, 454 U.S. 1153 (1982).

121. A court is not bound by the decision to grant IFP status at the date of filing, and it should consider all relevant changes in a plaintiff's financial condition occurring prior to or subsequent to the filing of the application. See *Evans v. Croom*, 650 F.2d 521, 525 n.12 (4th Cir. 1981) (quoting *Carter v. Teletron, Inc.*, 452 F. Supp. 939, 942 (S.D. Tex. 1976)), *cert. denied*, 454 U.S. 1153 (1982) (per curiam); *Braden v. Estelle*, 428 F. Supp. 595, 599 (S.D. Tex. 1977) (quoting *Flowers v. Turbine Support Div.*, 507 F.2d 1242, 1245 (5th Cir. 1975)). Conversely, an IFP plaintiff who is ordered to pay a portion of the filing fee is not foreclosed from proceeding in forma pauperis as to other expenses incurred thereafter. See *Braden v. Estelle*, 428 F. Supp. 595, 599 (S.D. Tex. 1977) (court stated that "decisions relating to indigency can be made at any stage of the proceedings") (citing *Flowers*, 507 F.2d at 1245).

122. *Carter v. Teletron, Inc.*, 452 F. Supp. 939, 942 (S.D. Tex. 1976) (when allegation of poverty is no longer true due to subsequent improvement in the IFP plaintiff's financial condition, "it is within the authority of [the] Court to dismiss the proceeding" pursuant to section 1915(d)).

123. 28 U.S.C. § 1915(a) (1982).

124. *Id.* at § 1915(d). See *Carter v. Teletron, Inc.*, 452 F. Supp. 939, 943 (S.D. Tex. 1976) ("[§ 1915(a)] and [§ 1915(d)] of the statute [28 U.S.C. § 1915] provide that a court may exercise . . . discretion" to determine whether a plaintiff should be denied the benefits of the statute because of his financial status) (quoting *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 337 (1948); see *supra* note 112).

all responsibility from paying fees and costs.<sup>125</sup> Thus, if an IFP plaintiff prevails and collects a judgment, the court may demand that the plaintiff reimburse it for court fees incurred in the pending action(s) or in prior litigation.<sup>126</sup>

Similarly, courts hold that reimbursement of court costs and fees may be ordered before there has been a decision on the merits if they learn that a plaintiff's financial condition has improved since the original grant of IFP status.<sup>127</sup> Determination of IFP status is fluid and the status may be acquired or lost at any time during the course of the action.<sup>128</sup> There is no justification for requiring the grant of IFP status to continue throughout the course of the case, if the claimant becomes able to bear the costs.<sup>129</sup>

Support for step-by-step payment plans also is found in the Criminal Justice Act, which allows the court to recoup expenses previously incurred by the court or, in the alternative, to dismiss the case, if at any time during the course of litigation an indigent criminal defendant's financial condition improves.<sup>130</sup> By analogy, the rationale permitting recoupment of attorneys' fees from convicted defendants extends to civil plaintiffs.<sup>131</sup> The inference is that permission to proceed without "pre-

125. In *Marks v. Calendine*, 80 F.R.D. 24, 27 (N.D. W. Va. 1978), *aff'd sub nom. Flint v. Haynes*, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982), the court interpreted section 1915(a) as a derogation of sections 1914 and 1921, which require payment of certain court fees by non-indigent plaintiffs in order to commence a suit.

126. See *Holsey v. Bass*, 519 F. Supp. 395, 405 n.24 (D. Md. 1981), *aff'd*, 712 F.2d 70 (4th Cir. 1983); *Carter v. Telectron, Inc.*, 452 F. Supp. 944, 999 (S.D. Tex. 1977); *Braden v. Estelle*, 428 F. Supp. 595, 599 (S.D. Tex. 1977); *Bartell*, *supra* note 91, at 565-66.

127. See *Braden v. Estelle*, 428 F. Supp. 595, 599 (S.D. Tex. 1977); *Carter v. Telectron, Inc.*, 452 F. Supp. 939, 940-44 (S.D. Tex. 1976). For instance, in *Carter v. Telectron, Inc.*, the court learned that Carter had obtained a money judgment of approximately \$5,400 from another action. It declared that since he was no longer indigent, he would be required to reimburse the government for the prepaid filing fee in his 40 cases pending before the court or the actions would be dismissed. *See id.* at 942, 944. *But see Caldwell v. United States*, 682 F.2d 142, 143 (7th Cir. 1982) (per curiam) (no authority for "pay as you go approach").

128. See *supra* note 121.

129. See *Holsey v. Bass*, 519 F. Supp. 395, 405 n.24 (D. Md. 1981) (plaintiff has affirmative duty to inform court promptly if he receives any other money or assets), *aff'd*, 712 F.2d 70 (4th Cir. 1983); *Carter v. Telectron, Inc.*, 452 F. Supp. 944, 999 (S.D. Tex. 1977) (lack of disclosure on plaintiff's current financial condition might lead to contempt charges or dismissal).

130. 18 U.S.C. § 3006A(f) (1982) provides in part: "Whenever the . . . court finds that funds are available for payment from or on behalf of a person furnished representation, it may . . . direct that such funds be paid . . ." See *United States v. Bracewell*, 569 F.2d 1194, 1200 (2d Cir. 1978) (absent abuse of discretion, district court's finding of "availability" of funds will be upheld); *United States v. Wetzel*, 488 F.2d 153, 157 (8th Cir. 1973) (defendants' receipt of \$19,000 for sale of cattle and possession of real estate rendered them financially able to pay costs incurred in appeal, including attorneys' fees paid under the Criminal Justice Act); see also *Fuller v. Oregon*, 417 U.S. 40, 53-54 (1974) (Oregon state statute authorizing recoupment of counsel fees not unconstitutional where defendants have opportunity to show recovery would comprise undue hardship).

131. See *Braden v. Estelle*, 428 F. Supp. 595, 599 (S.D. Tex. 1977); *Carter v. Telectron, Inc.*, 452 F. Supp. 939, 943 (S.D. Tex. 1976).

payment" of costs does not preclude a court from requiring postfiling reimbursement in IFP proceedings.<sup>132</sup>

In sum, an IFP plaintiff has an affirmative duty to inform the court of any receipt of money or other assets.<sup>133</sup> Upon discovering that such funds exist, the court may require the party to pay fees prepaid by the court, or in the alternative, may dismiss the case pursuant to section 1915(d).<sup>134</sup> If the party deliberately has deceived the court, the court may elect to dismiss the case with prejudice.<sup>135</sup> A system of step-by-step payments does not have a chilling effect on indigent plaintiffs without funds, because payment is required only when it economically is feasible.<sup>136</sup> Only plaintiffs who are no longer indigent are affected. Consequently, IFP plaintiffs who have become financially solvent are deterred from abusing the privileges arising from the grant of IFP status.

### C. Assessment of Costs and Sanctions

In addition to demanding that a prevailing IFP party reimburse the government for prepaid court costs, courts also have decided that costs may be assessed against a non-prevailing IFP party.<sup>137</sup> Authority to assess costs in such cases is derived primarily from section 1915(e) that states that "judgment may be rendered for costs at the conclusion of the suit or action as in other cases."<sup>138</sup> Costs under this provision refer to the litigation expenses for which the prevailing party may bill the losing party.<sup>139</sup> By reading section 1915(e) in conjunction with section 1915(a), which postpones payment of litigation expenses, courts conclude that costs are not waived necessarily when an IFP plaintiff is a non-prevailing party.<sup>140</sup> Accordingly, a court may require the non-prevailing indigent

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132. See *Carter v. Telectron, Inc.*, 452 F. Supp. 939, 942 (S.D. Tex. 1976).

133. See *supra* notes 129-35 and accompanying text.

134. See *supra* notes 117-18 and accompanying text.

135. See *supra* note 119 and accompanying text.

136. See *supra* notes 127-30 and accompanying text. Cf. *Fuller v. Oregon*, 417 U.S. 40, 53-54 (1974) (indigent should not be deterred from exercising constitutional rights any more than marginally solvent defendant who incurs the cost of an attorney; therefore attorney recoupment statute did not have chilling effect).

137. See, e.g., *Flint v. Haynes*, 651 F.2d 970, 972 (4th Cir. 1981) (district court empowered to award costs to prevailing party even where it previously allowed litigant benefits of section 1915(a)), *cert. denied*, 454 U.S. 1151 (1982); *Pasquarella v. Santos*, 416 F.2d 436, 437 n.2 (1st Cir. 1969) (section 1915(a) merely permits party to proceed in forma pauperis, it does not waive costs permanently); *Perkins v. Cingliano*, 296 F.2d 567, 569 (4th Cir. 1961) ("Section 1915(e) is too plain to leave any room for doubt, and completely disposes of the petitioner's contention that costs may not be adjudged against him.").

138. 28 U.S.C. § 1915(e) (1982) provides in part: "Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred." See *Duniway*, *supra* note 2, at 1274 (section 1915(e) is designed to permit a judgment for costs at the conclusion of the suit as in other cases); *supra* note 137.

139. See *supra* note 95.

140. *Flint v. Haynes*, 651 F.2d 970, 973 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151



plaintiff to pay a portion of his wages,<sup>141</sup> money received from a previous transaction, or other assets received subsequent to the grant of IFP status,<sup>142</sup> until the assessed sums are paid in full.<sup>143</sup>

Some courts, however, are reluctant to impose such costs on an IFP plaintiff.<sup>144</sup> They find it improper to assess costs in cases when the complaint is dismissed merely because the allegations were insufficient to survive a motion to dismiss,<sup>145</sup> or when there is a wide disparity of economic resources between the parties.<sup>146</sup> These courts have refused to assess costs against an IFP plaintiff as a matter of course.<sup>147</sup>

Because the purpose of payment plans is to deter filings of frivolous

(1982); *Duhart v. Carlson*, 469 F.2d 471, 478 (10th Cir. 1972), *cert. denied*, 410 U.S. 958 (1973); *Pasquarella v. Santos*, 416 F.2d 436, 437 n.2 (1st Cir. 1969).

The purpose of section 1915 and other in forma pauperis statutes is merely to postpone payment to permit plaintiffs, whose poverty otherwise precludes them from litigating their claims, to commence and maintain an action. *See Marks v. Calendine*, 80 F.R.D. 24, 27 (N.D. W. Va. 1978), *aff'd sub nom. Flint v. Haynes*, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982). The legislation authorizing institution of suits by seamen, which is similar in language and purpose to section 1915, is another in forma pauperis statute allowing a court to assess costs after a final judgment is rendered. *See* 28 U.S.C. § 1916 (1982). Although the statute exempts seamen from prepayment of costs, it allows costs to be taxed against the seaman who has lost his suit. In interpreting the statutory language, courts hold that the statute does not abolish payment of all fees and costs, but merely postpones their payment. *See Hugney v. Consolidation Coal Co.*, 59 F.R.D. 258, 259 (W.D. Pa. 1973).

141. *See Chevrette v. Marks*, 558 F. Supp. 1133, 1135 (M.D. Pa. 1983) (court noted that plaintiff may be ordered to pay percentage of his wages to prevailing defendant, until assessed sum was fully paid) (citing *Ross v. Robinson*, No. 79-1210, slip op. at 2-3 (M.D. Pa. Oct. 8, 1982) (unpublished)); *see also Smith v. Martinez*, 706 F.2d 572, 574 (5th Cir. 1983) (court based its estimation of partial filing fee on inmate's anticipated wages).

142. *See United States v. Wetzel*, 488 F.2d 153, 156-57 (8th Cir. 1973) (costs assessed against IFP defendant out of profit made from sale of cattle); *Carter v. Teletron, Inc.*, 452 F. Supp. 939, 942 (S.D. Tex. 1976) (court assessed fees against IFP plaintiff out of judgment award he had received from another lawsuit).

143. *See supra* note 141.

144. *See Marks v. Calendine*, 80 F.R.D. 24, 31 (N.D. W. Va. 1978), *aff'd sub nom. Flint v. Haynes*, 651 F.2d 970, 973 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982). Although taxation of costs is left to the discretion of a district court, courts should exercise their power sparingly. *Cf. Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 235 (1964) (district court should exercise restraint in its exercise of discretion when assessing costs not specifically authorized by statute such as transporting witnesses).

145. *See Partee v. Lane*, 528 F. Supp. 1254, 1265 (N.D. Ill. 1981).

146. Indigency often is grounds for denying payment of court costs to the prevailing party. *See, e.g., Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1165 (7th Cir. 1983) (showing of indigency may overcome payment of award to prevailing party); *Maldonado v. Parosole*, 66 F.R.D. 388, 390 (E.D.N.Y. 1975) ("Indigency is a proper ground for denying costs . . . where there is a wide disparity of economic resources between the parties.").

147. The standard for assessing costs against IFP plaintiffs, however, is not confined to exceptional cases where a plaintiff litigates in bad faith or the court dismisses the complaint pursuant to section 1915(d). *See Flint v. Haynes*, 651 F.2d 970, 973 & n.6 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982). Nor is the fact of indigency a sufficient circumstance to excuse a non-prevailing party from payment of costs. *See Chevrette v. Marks*, 558 F. Supp. 1133, 1135 (M.D. Pa. 1983).

complaints, not to discourage IFP filings altogether,<sup>148</sup> courts generally should decline to assess costs against a losing party, except in cases of evident bad faith.<sup>149</sup> Thus, as a general rule, costs would be assessed only against a multiple filer of frivolous complaints.<sup>150</sup>

When IFP plaintiffs have commenced numerous frivolous complaints, courts should treat them as non-indigent plaintiffs, and assess monetary or injunctive sanctions against these abusive litigants in place of attorneys' fees.<sup>151</sup> Courts also may impose onerous sanctions on an IFP plaintiff, provided they are not so burdensome as to deny access to the courts.<sup>152</sup>

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148. See *supra* notes 89 & 114 and accompanying text.

149. See *Marks v. Calendine*, 80 F.R.D. 24, 31 (N.D. W. Va. 1978), *aff'd sub nom. Flint v. Haynes*, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982); see also *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 235 (1964) (discretion to assess costs against non-prevailing plaintiff should be used sparingly in order not to discourage plaintiffs from bringing civil action commenced in good faith); *Partee v. Lane*, 528 F. Supp. 1254, 1265 (N.D. Ill. 1981) (not proper to assess section 1915(e) fees and costs merely because allegations are insufficient to survive motion to dismiss); cf. *Hughes v. Rowe*, 449 U.S. 5, 14-15 (1980) (per curiam) (to assess attorneys' fees against section 1983 plaintiffs "simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII") (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978)).

150. See *Marks*, 80 F.R.D. at 31 (court reserved assessment of costs for cases where trial record shows a complete absence of merit coupled with an intent to use the court as a vehicle for harassment). Consistent with authority to assess costs pursuant to section 1915(e) is a district court's discretion to choose not to tax costs. See *Flint v. Haynes*, 651 F.2d 970, 972 n.5 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982). Thus, a court in the exercise of its discretion may consider a plaintiff's indigency in denying costs under Rule 54(d). See *Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1165 (7th Cir. 1983).

151. See *supra* note 5.

152. See *Cotner v. Hopkins*, 795 F.2d 900, 902 (10th Cir. 1986) (per curiam). The court held that the imposition of a \$1000.00 fine was not presumptively objectionable. The monetary sanction would only be impermissible if it were to preclude plaintiff's access to the courts. See *id.* at 902. See *Abdullah v. Gatto*, 773 F.2d 487, 488 (2d Cir. 1985) (a court may impose onerous conditions if they do not totally preclude plaintiff's access to the courts); *Carter v. United States*, 733 F.2d 735, 737 (10th Cir. 1984) (per curiam) ("Restrictive conditions, other than total preclusion, which are available include assessment of damages to the prevailing party and imposition of single or double costs."), *cert. denied*, 469 U.S. 1161 (1985); *In re Green*, 669 F.2d 779, 786 (D.C. Cir. 1981) (abuse of discretion to order full payment of filing fees in all future actions). A court may require, however, that an IFP plaintiff carry a stronger burden of proof that he is economically unable to pay filing fees. See *Cotner v. Hopkins*, 795 F.2d 900, 902-03 (10th Cir. 1986) (per curiam); *Carter v. Telectron, Inc.*, 452 F. Supp. 944, 999 (S.D. Tex. 1977).

Courts also employ a variety of injunctive devices to limit egregious filers of frivolous complaints. See, e.g., *Cotner v. Hopkins*, 795 F.2d 900, 902 (10th Cir. 1986) (court required that IFP plaintiff certify all future complaints as provided by Rule 11, accompany future actions with list of all previously filed actions, and provide court with proof that defendants had been served with process); *Urban v. United Nations*, 768 F.2d 1497, 1500 (D.C. Cir. 1985) (per curiam) (litigant required to accompany all future pleadings with affidavits certifying that claims were novel and he could be subject to contempt proceedings if affidavits proved false); *Franklin v. Murphy*, 745 F.2d 1221, 1232 (9th Cir. 1984) (court limited plaintiff to six IFP filings per year holding injunction did not impermissibly bar his right of access as long as court provided him with an opportunity to request

Thus, courts have the authority to apply partial payment systems and step-by-step plans to an IFP litigant as a general rule. Although assessment of costs and monetary sanctions also are permitted, they should not be applied as a general rule, but should be reserved for the exceptional case of the multiple filer, to promote the policy consideration of safeguarding the access of indigents to the courts.<sup>153</sup>

#### CONCLUSION

Courts are not powerless to curb the tide of frivolous complaints brought by IFP plaintiffs who choose to abuse the advantages conferred by 28 U.S.C. § 1915. The Statute vests the courts with broad discretionary powers to control potentially abusive IFP plaintiffs. Thus, courts may streamline dismissal by instituting prefiling review procedures. Prefiling review maximizes the efficient processing of IFP applications, yet simultaneously preserves the rights of an IFP plaintiff by requiring responsive pleadings.

In addition, the Statute grants a court discretion to institute procedures for assessing costs against an IFP plaintiff. The purpose of 28 U.S.C. § 1915 is to provide equal access to the court for rich and poor alike. This goal becomes distorted when the IFP plaintiff has nothing to lose and everything to gain by filing a complaint.<sup>154</sup> Since non-indigents routinely must decide if their claim is worth the costs of litigation, it is not unfair to force IFP plaintiffs to make comparable assessments. Courts should institute systems for partial payments, step-by-step plans, and sanctions in order to force IFP plaintiffs to evaluate the worth of their claims.

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additional filings beyond the prescribed number); *Green v. White*, 616 F.2d 1054, 1056 (8th Cir. 1980) (per curiam) (court required litigant to attach to future complaints list of all cases previously filed involving the same or similar claims, and to send extra copy to law clerk of chief judge of district). These injunctions are not unconstitutional because they do not totally preclude a plaintiff's access to the courts.

153. See *supra* note 149.

154. See *Flint v. Haynes*, 651 F.2d 970, 973 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982); *Temple v. Ellertorpe*, 586 F. Supp. 848, 853 (D.R.I. 1984) ("[R]ight of access is an equalizing device . . . [and] there is no logic in elevating an inmate's standing to sue above that of any other litigant.").