Federal Courts and the Poor: Lack of Standards and Uniformity in Civil *In Forma Pauperis* Pleadings

Author : Ezra Rosser

Tagged as : Poverty Law

Date : February 1, 2019

Andrew Hammond, *Pleading Poverty in Federal Court*, **Yale L. J.** (forthcoming). Available at SSRN.

In *United States v. Kras*, the Court rejected the argument that a poor person petitioning for protection from creditors should not have to pay a filing fee in order to access the bankruptcy system. The majority held that an able-bodied person could make the payment because the $50 fee was only $1.92 per week if spread over six months and $1.28 if spread over nine months. Justice Blackburn noted that such a fee at the time was "less than the price of a movie and little more than the cost of a pack or two of cigarettes." Justice Thurgood Marshall's dissented, observing:

> It may be easy for some people to think that weekly savings of less than $2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are.…A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have.…

For the poor, fees, even supposedly "nominal" fees, matter. In the civil law context, Congress has established a $350 filing fee to access the federal courts and the Judicial Conference tagged an additional $50 administrative fee onto that. (P. 12.) While the non-poor may be able to treat the combined $400 fee as a mere inconvenience, such an amount can serve to bar poor civil litigants from the federal courts.

Andrew Hammond's article, *Pleading Poverty in Federal Court*, shows that there is considerable variation in how federal courts consider requests by the poor for fee waivers in civil litigation. Courts not only use different forms to collect ability-to-pay information but they also apply different standards when determining whether fees should be waived. By focusing attention on federal court *in forma pauperis* motion practices, Hammond's article sheds light on how the poor can be negatively impacted by routine court practices that might ordinarily be treated as merely administrative. Hammond makes a convincing argument that federal courts should have uniform standards for what information is collected and for the level of need that is associated with a fee waiver. Blending empirical work—a significant contribution of the article is that it catalogues the *in forma pauperis* forms used by all 94 federal district courts—with an appreciation for the struggles faced by poor litigants, *Pleading Poverty in Federal Court* is a well-written, targeted intervention that hopefully will improve the ability of the poor to access the federal courts.

The article includes a number of eye-opening details. The Southern District of Alabama asks litigants to provide the makes and models for their "automobiles, boats, [and] motorhomes." (P. 18.) Puerto Rico's district court asks movants if they have income from horse racing and gambling. (P. 21.) These variations are arguably less striking than the fact that different judges in the same federal district court

can have different standards and practices when it comes to their review of *in forma pauperis* motions. As Hammond notes, "Some judges might use 100% of the federal poverty guidelines (FPL) as their threshold. Others will use 200%. Some will simply have their law clerk review the form and make a determination based on the information provided." (P. 27.) Even putting aside the problem of variation across districts, there are many problems with leaving *in forma pauperis* discretion to each judge in *the same district court*. It can make the question of whether a poor litigant can get into the courtroom wholly arbitrary, tied to whether the assigned judge is someone who gives waivers easily or someone who rarely gives a waiver. Moreover, review of *in forma pauperis* motions forces judges to "make complicated, arcane poverty determinations—often reconciling a dozen categories of income with a dozen categories of expenses," which Hammond argues is not a good use of the scarce time of an Article III judge. (P. 28.) (While I appreciate Hammond's point, part of me is glad that this process forces judges to confront the poverty of some of the litigants, to look at the details of their lives. Such examinations may often be technically irrelevant to the proceeding but they may nevertheless help judges see both trends and the full person before them.)

In addition to the complications for federal judges associated with variation in the standards used by district courts when it comes to *in forma pauperis* motions, *Pleading Poverty in Federal Court* highlights the impact overly detailed information collection can have on poor litigants. Though Hammond's article focuses on federal court practices, it includes a similarly impressive catalogue and overview of how state courts consider *in forma pauperis* motions. Just as in the federal courts, variation abounds across state courts. But Hammond also observes that states have adopted a number of practices that simplify the process of applying for a fee waiver, including establishing presumptive eligibility for fees to be waived based on: (a) a pre-determined multiple of the federal poverty line, (b) receipt of particular means-tested welfare benefits, or (c) representation by legal aid attorneys. (P. 40.) Moving away from overly intrusive information collection towards a system that partly piggybacks on the means-testing work of other entities, supplemented by a simpler form, would help judges *and* poor litigants. Khiara Bridges shows in The Poverty of Privacy Rights that the law strips the poor (but not the middle and upper class) of their privacy—often as a condition of receiving means-tested benefits—in ways that use information as a means of control. Although looking at a particular area of civil procedure as it relates to the poor and not the entire legal landscape, Hammond's argument that "a streamlined, shorter form makes the process more sophisticated and more accurate, while preserving the dignity of poor people" (P. 57) fits nicely alongside Bridges' work.

Some of the best poverty law articles—for example, Lucie E. White's *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.* and Barbara Bezdek's Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process—get their strength from qualitative observations of the courtroom experiences of the poor. *Pleading Poverty in Federal Court* adds an empirical dimension to such participant-centered works. By pulling back the curtain on federal court practice and the high level of variation in what courts require of poor litigants, as well as their different standards for granting fee waivers, the article provides a valuable contribution to the literature on how the poor experience the law. Hammond shows how reforming a single element of civil procedure, standardizing federal *in forma pauperis* practice, can help open federal courthouse doors to the poor a bit more.

Cite as: Ezra Rosser, *Federal Courts and the Poor: Lack of Standards and Uniformity in Civil In Forma Pauperis Pleadings*, JOTWELL (February 1, 2019) (reviewing Andrew Hammond, *Pleading Poverty in Federal Court*, **Yale L. J.** (forthcoming). Available at SSRN), https://lex.jotwell.com/federal-courts-and-the-poor-lack-of-standards-and-uniformity-in-civil-in-forma-pauperis-pleadings/.