An Exception to the Prison Litigation Reform Act’s Exhaustion Requirement Where Justice Demands It

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Honors Scholars Senior Seminar

December 15, 2004
I. Introduction and Background to the PLRA Exhaustion Requirement

The Prison Litigation Reform Act of 1995 (PLRA) greatly changed how suits by prisoners proceed through federal courts. Although some controls existed on prisoner suits prior to the enactment of the PLRA, the PLRA sets out in very specific terms how prisoners must proceed if they want to bring a lawsuit in federal court. Probably the most limiting aspect of the PLRA is its exhaustion requirement. This provision of the PLRA has been the subject of a great deal of suits and is likely the most litigated of the PLRA’s provisions. This paper examines the changes in the exhaustion requirement from the previous exhaustion requirement contained in section 1997e of the Civil Rights of Institutionalized Person Act (CRIPA) to the changes mandated by the PLRA and given teeth by decisions in two Supreme Court cases, and it argues that equitable estoppel should be available as an exception to the exhaustion requirement of the PLRA where justice requires.

A. CRIPA Exhaustion Requirement

An exhaustion requirement first appeared in 1980 with the enactment of CRIPA. The exhaustion requirement read in part:

(a)(1) Subject to the provisions of paragraph (2), in any action brought pursuant to [42 U.S.C. 1983] by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

(a)(2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b).

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1. PLRA
2. This provision
3. CRIPA
4. CRIPA
Looking at the language of this exhaustion provision, it is readily apparent that the provision had several limitations on exhaustion. First, it applied only to actions brought under Section 1983. It did not apply to actions brought pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*\(^5\) or other actions brought under federal laws. Second, it applied only to adults convicted of crimes. It did not apply to juveniles or pretrial detainees. Third, the exhaustion provision was discretionary. The decision on whether to require exhaustion was up to the judge based on whether exhaustion was “appropriate and in the interests of justice.”\(^6\) Fourth, a case would simply be continued for up to ninety days. After that time, the litigant could come back to court on the case. Fifth, it applied to “plain, speedy, and effective remedies.”\(^7\) A prisoner could bypass the exhaustion requirement by showing that the remedy process was not “plain, speedy, and effective.” Finally, the court could not require exhaustion unless the United States Attorney General certified that the administrative remedies available in the given system complied with certain minimum standards.

Subsections of the 1980 CRIPA exhaustion requirement set out the standards for certification of a prison administrative grievance system.\(^8\) Among the minimum standards for certification were maximum time limits for the prison administrators to reply to a grievance\(^9\), priority processing for emergency grievances\(^10\), protections to prevent reprisals against grievants\(^11\), and independent review of decisions by a person or entity not under control or supervision of the institution.\(^12\) Although this was an exhaustion requirement that could limit litigation by prisoners, it also provided some protections to prisoners which did not stack the deck in favor of prison administrators

B. *McCarthy v. Madigan*
The United States Supreme Court explained the exhaustion provision of CRIPA in *McCarthy v. Madigan.*[13] In this case, a prisoner incarcerated in federal prison brought a *Bivens* action against medical personnel and administrators at the where prison he was incarcerated.[14] The Court generally explained why exhaustion may be useful in certain administrative settings and pointed out two particular reasons why exhaustion is useful. The Court stated that agencies that have the chance to address errors can often provide relief and, by doing so, prevent the need for further litigation.[15] The Court also stated that even if the suit continues following exhaustion of the administrative process, a record of the administrative proceedings can be extremely useful in aiding fact finding when the litigation continues.[16]

The Supreme Court also examined the balance between the individual and institutional interests in requiring exhaustion. The Court pointed out three situations when the interest of the individual outweighs the interests of the institution. These three were: situations when requiring administrative exhaustion would create undue prejudice against a later court action, situations where the administrative agency could not grant the requested relief, and situations where the administrative agency is biased.[17]

The Court held that the exhaustion requirement did not apply to McCarthy because it did not apply to actions brought under *Bivens* and because McCarthy could not get any of the requested money damages through the litigation.[18] This holding further limited what was already a very limited exhaustion requirement under CRIPA.

C. 1994 CRIPA Amendments

In 1994, Congress amended the exhaustion requirement under CRIPA. First, Congress doubled the length of the stay from 90 days to 180 days.[19] Second,
Congress lowered the requirements for certification of an effective administrative relief program by adding the words, “or otherwise fair and effective,” in the subsections relating to requirements of certifiable administrative programs. A remedy process established by a state prison system could forgo certification within the strict requirements set out by 42 U.S.C. 1997e(b)(2) by simply showing that its system was “fair and effective.” Although these changes increased the power of the exhaustion requirement, it was still a very limited requirement. It still only resulted in a stay, and it provided some direction for how a prison administrative forum should operate. These amendments were the precursor to the much more extensive changes that resulted with the PLRA.

II. The Prison Litigation Reform Act

A. Statutory Text and Changes from the CRIPA Exhaustion Requirement

While the 1994 amendments made some changes that aided the state prison grievance systems, the Prison Litigation Reform Act made vast changes to the exhaustion provisions of CRIPA. The exhaustion provision enacted by the PLRA reads as follows: “No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”

The plain language of this subsection clearly contains several changes from the original exhaustion requirement enacted under CRIPA. First, it makes exhaustion mandatory. A case cannot be brought in federal court until exhaustion is completed in the administrative forum. Second, it includes actions brought under section 1983, but it added “or any other Federal law” which increased the reach of the exhaustion requirement. These words made the exhaustion requirement applicable to Federal
prisoners, as opposed to just prisoners in state prisons as had previously been subject to the provision, and also made exhaustion mandatory with respect to actions brought under other federal causes of action (including *Bivens* actions and actions under the Federal Tort Claims Act). Third, it dispensed with the words, “an adult convicted of a crime.” This made the exhaustion requirement applicable also to juveniles and pretrial detainees. Fourth, it took out the “plain, speedy, and effective administrative remedies” language contained in the former CRIPA exhaustion requirement. Fifth, the PLRA eliminated any requirements for a certifiable administrative relief program. It simply referred to “available” administrative remedies. The plain language of the PLRA exhaustion requirement dramatically changed how prisoners can proceed in federal court.

**B. The United States Supreme Court and the PLRA Exhaustion Requirement**

The plain language of the PLRA exhaustion requirement is much clearer than the language of the previous CRIPA exhaustion requirement. Exhaustion is mandatory and the statute does not suggest that there are any exceptions to the exhaustion requirement. Nonetheless, a great deal of litigation still arose with regard to the exhaustion requirement. Nonetheless, a great deal of litigation still arose with regard to the exhaustion requirement. The chief questions that appeared over and over again were:

- Must a prisoner exhaust where the administrative grievance procedure cannot provide the type of relief, particularly money damages, that the prisoner is requesting?\(^{[22]}\)
- Do single incidents come under the umbrella of suits about “prison conditions” which must be pursued to exhaustion in the administrative forum prior to bringing suit in federal court?\(^{[23]}\)
The Supreme Court answered these two questions in separate unanimous decisions on the two issues within a year of each other.\cite{24}

1. **Booth v. Churner**

   In *Booth v. Churner*, the Supreme Court concluded that the exhaustion requirement mandates that prisoners exhaust regardless of whether money damages are available in the administrative forum.\cite{25}\cite{26} The opinion focused on the words “remedies” and “available” within the PLRA, and concluded that as those words are used to describe exhaustion, they take on a procedural spin.\cite{26} In addition to looking at the language of the PLRA, the opinion relied on statutory history and the result in *McCarthy* to suggest that Congress, in enacting the PLRA, sought to eliminate the situation where the prisoner could forgo exhaustion by simply requesting money damages in the federal suit where they were not available in the administrative forum.\cite{27}\cite{28} The opinion noted that the PLRA removed the words “plain, speedy, and effective” and opined that this meant that Congress wished to compel exhaustion even where the particular relief requested was unavailable through the administrative forum.\cite{28} The Court concluded, “Congress’s imposition of an obviously broader exhaustion requirement makes it highly implausible that it meant to give prisoners a strong inducement to skip the administrative process simply by limiting prayers for relief to money damages not offered through administrative grievance mechanisms.”\cite{29} *Booth* definitively answered the question about whether exhaustion is required where the administrative forum cannot provide the relief requested by the prisoner.

2. **Porter v. Nussle**
In *Porter v. Nussle*, the Supreme Court held that suits based on single incidents were subject to the exhaustion requirement in the same way that suits about general conditions were subject to the requirement. The opinion focused on the words “prison conditions” within the exhaustion requirement. Nussle contended that the presence of the words “prison conditions” within the exhaustion requirement limited exhaustion to suits involving claims of ongoing problems with prison conditions and did not include suits about isolated excessive force claims. The Court relied on *McCarthy v. Bronson*, a pre-PLRA case in which the Court held that isolated excessive force claims are within the phrase “ongoing prison conditions”, to compel exhaustion in cases where the prisoner is only alleging an isolated excessive force claim. The Court noted that generally prisoner lawsuits either involve challenges to the confinement itself or the conditions of confinement; if the Court had construed the statutes at issue in *McCarthy* or in *Porter* as applying the statutes differently in isolated excessive force actions as compared to suits about general prison conditions, the statutes would lose effect. The Court noted how odd it would be for a prisoner to get into federal court immediately if the incident was isolated but not if assaults were ongoing stating, “[w]hy should a prisoner have immediate access to court when a guard assaults him on one occasion, but not when beatings are widespread or routine?” *Porter* made it clear that suits brought by prisoners about prison conditions, whether they deal with a single excessive force claim or with a pattern of problems with prison conditions, are subject to the PLRA’s exhaustion requirement.

### III. Equitable Estoppel as an Exception to the Exhaustion Requirement

*Booth* and *Porter* answered questions that had come up again and again with respect to the exhaustion requirement of the PLRA. These decisions gave teeth to the
PLRA and gave power to Congress’s intent with respect to the PLRA. However, questions still exist about what courts can do in situations where prisoners seem to have equitable reasons to challenge the exhaustion requirement of the PLRA. For example, how should courts handle situations where requiring exhaustion will cause the prisoner to be unable to file suit before the statute of limitations has run? What can a prisoner do in case of emergency where utilizing the administrative grievance procedure could result in irreparable harm to the prisoner because of delay caused by the need to resort to the administrative procedure? What would be the remedy if the administrative forum purposefully delayed the prisoner’s grievance and essentially made it impossible for the prisoner to ever take a legitimate suit to federal court? What should be done if prisoners are intimidated and threatened by guards, administrators, or other inmates in an effort to keep the prisoner from continuing with the grievance procedure? One hope is that prison administrators can design and operate grievance systems that have mechanisms for handling these unique situations. However, these situations are novel because they are occurring within the confines of a prison.

A. The Need for an Equitable Estoppel Exception

Equitable estoppel should be available as an exception to the exhaustion requirement where justice requires. Given the nature of prisons and prison administrative grievance systems, justice may require equitable estoppel to apply more often than it might in other forums.

Prisons are unique in that they are basically closed societies, removed from the rest of society. The average member of society is not confined within a prison and typically does not have any sort of access to prisons. Things can take place behind closed doors in prisons that would be significantly more visible in other settings. While prisons are
regulated by the states and by the federal government, they are not nearly as physically visible as other government regulated agencies. For example, divisions of motor vehicles or the Social Security Administration are government regulated agencies which involve administrative decisions; however, they are fairly visible to members of society. It is much more difficult to conceive of a case worker threatening a Social Security applicant into not continuing with a Social Security application than it would be to conceive of a prison guard assaulting or urging an assault by another inmate on an inmate who files a grievance against the guard. The case worker likely is working in an open office where others would see the actions. This alone would almost always prevent a case worker from threatening or assaulting an applicant. Even if threats or an assault took place behind closed doors, in the Social Security office, the victim would quickly be visible to society.

This is quite different from what could happen in a prison or jail. To begin with, the guard stands to lose something greater if a prisoner files a grievance than if the applicant continues with the application. That alone gives the guard greater motivation to urge the inmate to cease grieving a wrong. Of greater consequence is the fact that the guard has a much better opportunity to assault or threaten an inmate to prevent further action. If that sort of assault or threat occurred in a prison, it would be far less likely for society to find out about it than it would if it took place in a Social Security office. After all, the prisoner will only be seen by guards and other prisoners and could even be sent to a segregation cell to further isolate the inmate until any injuries heal or the prisoner forgets about details of the threats or assault. A guard could also easily solicit the help of an inmate who does not like the person who is bringing the grievance to assault the inmate as a warning.
In addition to the problems caused by opportunities to threaten or assault an inmate, a prisoner’s assertions will almost always be given less weight than that of the average person applying for Social Security. After all, the person in prison has been convicted of a crime (although the PLRA applies to pretrial detainees as well) and likely will be seen as a less trustworthy person by virtue of his or her conviction. A prisoner’s version of the story will likely be given much less weight by the prison administrators than the words of their own employee, the prison guard. The guard knows this and knows that he or she is much more likely to get away with this kind of behavior than he or she might be able to get away with in a typical setting. Prisons are a closed society where threats and assaults can easily happen behind closed doors. Without an equitable estoppel exception to the failure to exhaust affirmative defense, tried by a fact finder, prison officials, guards, and even other inmates can prevent cases with merit from proceeding.

Additionally, prison administrative grievance systems are quite different from other administrative grievance systems in terms of how they are run. Again, because prisons are basically closed societies, administrators handle more of the process than they would in other administrative settings. The example of the person applying for Social Security is instructive again. A person who applies for Social Security may have several channels through which he or she may apply. The applicant may be able to apply over the phone, via the postal service, or even over the internet. These are all channels of communication that are operated by entities other than the Social Security Administration. On the other hand, all of the processing and delivery mechanisms at a prisoner’s disposal are operated by the prison officials. For example, in order to submit the grievance to the appropriate administrative body, the prisoner would likely have to rely on the prison’s internal mail delivery system. Even if the grievance was destined for an administrative body outside the walls of the prison, the inmate would
have to rely on a prison delivery channel to get the grievance to the proper outside delivery service. This need to rely on channels under the operation of prison officials again presents an opportunity for prison officials to delay or stop the grievance process. A grievance can more easily be “lost” by one of these channels, which may have an interest in seeing that the grievance does not go anywhere.

In addition to delay that can be caused by faulty handling of grievances, prison administrators have a greater opportunity to delay grievances once they are within the system. Grievance boards are almost always run by prison officials. These people are often closely related to the very people against whom the grievances are filed. They are coworkers of the guards and other staff members. They are essentially self-regulated bodies which have the opportunity to cause delay. Without a valid estoppel defense to failure to exhaust, prison administrators could drag out the grievance procedure ad infinitum.

Particularly in cases of delay or threats, the prison administrators seem to have unique power over prisoners who would like to exhaust the grievance procedures and possibly continue with a suit in federal court. For these reasons, equitable estoppel should operate as an exception to the PLRA’s exhaustion requirement where the prisoner can show that the prison administrative system caused delay to the grievance procedure or that the prisoner was threatened or coerced into not continuing with the grievance procedure where he or she otherwise could have.

B. Development of Equitable Estoppel in PLRA Cases in the Federal Circuits

Equitable estoppel has been recognized as an exception to the exhaustion requirement by the Second Circuit Court of Appeals. The Fifth Circuit, Seventh Circuit, and Tenth Circuit courts of appeals also have suggested that equitable estoppel would be a viable defense to failure to exhaust but have not specifically ruled
on the issue. Equitable estoppel also has been mentioned in passing as a possible defense in appeals courts in the First Circuit, the Third Circuit, and the Eighth Circuit. It has not been discussed in appeals courts in the Fourth Circuit, the Sixth Circuit, Ninth Circuit, Eleventh Circuit, and the District of Columbia Circuit.

Equitable estoppel was first mentioned as a possible exception to the PLRA exhaustion requirement in *Underwood v. Wilson*. Notably this case was decided before *Booth* and *Porter*. The issue in this case was whether failure to exhaust deprived the court of subject matter jurisdiction. The court held that section 1997e(a) does not require exhaustion as a prerequisite to the court exercising jurisdiction over the matter. This holding was based partly on analogizing to the requirement of filing a timely charge with the Equal Employment Opportunity Commission as a prerequisite to filing a federal suit under Title VII, which would not deprive the court of subject matter jurisdiction. The cite to the Title VII case acknowledged that the non-jurisdictional nature of the timely charge filing requirement made the requirement like a statute of limitations requirement which would be subject to waiver, estoppel, and equitable tolling. Obviously, this case did not actually hold that estoppel would be an exception to the exhaustion requirement of the PLRA, but it did open the door to the possibility of foregoing exhaustion where equitable estoppel required that result. The court stated, “a non-jurisdictional exhaustion requirement may, in certain rare instances, be excused, particularly where dismissal would be inefficient and would not further the interests of justice or the Congressional purposes behind the PLRA.”

In *Wendell v. Asher*, the court actually borrowed the language from the parenthetical in *Underwood*, and stated that exhaustion *may* be subject to the defense of estoppel. A number of other cases in the Fifth Circuit cited this possibility in the
following years. While these cases keep the door open to an estoppel exception, none of them explicitly addressed whether estoppel would be an available exception to failure to exhaust or what a plaintiff would need to show to have a viable estoppel exception.

The Seventh Circuit has addressed estoppel in somewhat greater detail, but also has not actually held that estoppel would be available as a defense to failure to exhaust. The court held that the Fifth Circuit’s suggestion that equitable estoppel could be raised as a defense to failure to exhaust was persuasive, but the court reserved ruling on the issue. It decided that the plaintiff could not fulfill the requirements for equitable estoppel, and therefore, it would be improper to decide the issue. The court stated that in order to show estoppel the party must show, “(1) a misrepresentation by the opposing party; (2) reasonable reliance on that misrepresentation; and (3) detriment.” The court further stated that a party asserting estoppel against the government would need to show affirmative misconduct on the part of the government. Failure to perform an affirmative obligation is different than actually engaging in affirmative misconduct.

Lewis filed multiple grievances following an attack on him by his cellmate. One grievance sought disciplinary action against his cellmate while the other grievance essentially alleged failure to protect against guards. Two months later, the Chief Administrative Officer at Lewis’s prison informed him that his grievance against guards was denied and gave him a notice of when to file appeal (within 30 days). This decision said nothing about disciplinary action against his cellmate so Lewis waited to appeal until he found out about the other grievance. Lewis filed numerous additional grievances and spoke with the warden to continue to assert his grievance against his cellmate. He never received a response. Eventually, Lewis
filed an appeal, but it was sent back as untimely filed.\textsuperscript{162} Shortly thereafter, Lewis filed suit in federal court raising a Section 1983 claim.\textsuperscript{163}

Lewis was unable to get past the affirmative misconduct element of the equitable estoppel defense.\textsuperscript{164} The court concluded that the failure of the prison officials to respond to numerous grievances did not rise to the level of affirmative misconduct.\textsuperscript{165} According to the panel, the prison officials did not actually make any false promises to Lewis about what would happen with his case.\textsuperscript{166}

The Tenth Circuit also addressed estoppel, but the court concluded that the plaintiff could not prove a successful estoppel exception.\textsuperscript{167} Jernigan filed a grievance with the Oklahoma Department of Corrections (ODOC) and claimed that it was lost or misfiled.\textsuperscript{168} He did not receive a response within the prescribed fifteen day period, and he sought to appeal.\textsuperscript{169} His appeal was rejected because he could not produce a ruling on which his appeal was based.\textsuperscript{170} Mr. Jernigan was given the opportunity to cure his defect, but he did not and instead filed suit in federal court.\textsuperscript{171}

Mr. Jernigan tried to make an equitable estoppel type argument, by asserting that ODOC regularly loses grievance paperwork and essentially prevents inmates from filing grievances.\textsuperscript{172} The panel concluded that a decision on whether equitable estoppel would be an exception to failure to exhaust would be reserved until a later case because Jernigan would not be able to prove detrimental reliance because he was given the opportunity to cure his defect.\textsuperscript{173}

The Eighth Circuit addressed equitable estoppel in passing in Lyon v. Vande Krol.\textsuperscript{174} The court stated, “Mr. Lyon was never told that there was not a procedure, moreover, so there is no basis for the application of an estoppel principle here, even if one might otherwise be available.\textsuperscript{175}” Again, the Eighth Circuit, like the Fifth,
Seventh, and Tenth Circuit, has not explicitly said that equitable estoppel would be a valid exception to failure to exhaust.

A dissent in *Lyon* pointed out some interesting facts about what may have happened and why it would be useful to have a fact finder make determinations rather than the court of appeals. Essentially, the prison grievance board said nothing could be done about Mr. Lyon’s complaint about not being able to attend the Jewish Services in his prison. They said that the Jewish consultants who ran the services were responsible for making the determination on who could attend the services. This led Mr. Lyon to believe that it would be useless for him to try to grieve and exhaust because he could not get any kind of relief from the board. The dissent suggested that the Iowa State Prison (ISP) officials may have prevented Mr. Lyon from exhausting by creating the impression that the ISP grievance system could do nothing. The dissent wanted the fact finder to look at this issue rather than to have the en banc court decide that there was no factual issue to be determined.

In 2004, the Second Circuit became the first circuit to hold outright that equitable estoppel is an exception to failure to exhaust. Ziemba’s case was dismissed at the district level for failure to exhaust, and on appeal he asserted an estoppel defense against the state. Interestingly, Ziemba did not actually use the term “estoppel,” but the panel reviewed the record from the district court and was satisfied that the argument was properly made even though it was not asserted specifically as estoppel. The court noted that deciding whether estoppel was a legitimate exception to failure to exhaust was a first impression issue in the Second Circuit. The panel adopted the holding of *Wright v. Hollingsworth*, which said that equitable estoppel may apply as an exception to failure to exhaust. The case was remanded to the
district court to determine whether, Mr. Ziemba properly proved equitable estoppel such that his failure to exhaust should be excused.\[87\]

The facts of Ziemba were particularly troublesome and likely led the court to hold that equitable estoppel was necessary to prevent prison administrators from abusing their power. Ziemba filed an emergency grievance to seek protection from his cellmate.\[88\] Shortly after filing his grievance, Ziemba was stabbed by his cellmate.\[89\] Despite being stabbed, he was placed in a segregation cell, given no medical attention, and threatened by an official.\[90\] The same official also told other prison officials not to put any mention of the stabbing in the prison administrative records.\[91\] Further, “Ziemba also alleges that prison officials escorted him to an empty shower room...threatened him, intimidated him with police dogs, beat him, and sprayed pepper spray in his eyes and mouth.”\[92\] Ziemba was transferred and received medical treatment at another prison, but his family sent a number of complaints to the Commissioner of the Connecticut Department of Corrections which went unanswered.\[93\] These alleged facts certainly portray the type of situation where justice would require that Ziemba be allowed to continue with his case despite his failure to exhaust.

Recently, the Second Circuit appointed counsel and subsequently decided cases on several possible exceptions to exhaustion under the PLRA.\[94\] This series of companion cases could possibly change a great deal how the circuits deal with exhaustion if they follow any of the logic the Second Circuit used in deciding these cases. Hemphill v. New York was one of these cases, and, like Ziemba, it remanded a matter to the District Court to look into whether the defendants would be estopped from asserting lack of exhaustion as a defense to the case.\[95\] The court concluded that a fact finder should decide if any of the number of defendants Hemphill brought suit
against should be estopped from raising exhaustion as an affirmative defense because of alleged threats and assaults against Hemphill.\textsuperscript{[96]}

The facts of \textit{Hemphill} demonstrate the need for an equitable estoppel exception to the PLRA’s exhaustion requirement. As Hemphill was returning to his cell, he was stopped by several correctional officers who told Hemphill that they wished to speak to him.\textsuperscript{[97]} The correctional officers pulled Hemphill into a private room where another officer was waiting for him.\textsuperscript{[98]} The officers slammed Hemphill into a chair, slapped him, kneed him in the groin, and pushed him around while they said to him, “You know what you did, admit it, you better drop it.”\textsuperscript{[99]} After the assault, the officers refused Hemphill medical attention and placed him on lockdown.\textsuperscript{[100]} On later occasions, officers further threatened Hemphill about what would happen if he continued with his suit, and they said that they would file charges saying Hemphill had sexually harassed a female officer if he did not drop the grievances.\textsuperscript{[101]} Hemphill eventually dropped his grievances out of fear about what would happen to him if he pursued his grievances any further than he already had.\textsuperscript{[102]} Like the alleged facts in \textit{Ziemba}, Hemphill’s assertions demonstrate why equitable estoppel is a necessary exception to the PLRA’s exhaustion requirement where justice demands its application.

\textbf{C. Elements of a Prima Facie Equitable Estoppel Argument and the Standard}

“Estoppel is an equitable doctrine which a court may invoke to avoid injustice in particular cases.”\textsuperscript{[103]} \textit{Ziemba} and \textit{Hemphill} both remanded the cases to the district courts to determine whether the prison officials should be estopped from raising exhaustion as an affirmative defense; however, neither opinion set out the elements for equitable estoppel. Nonetheless, the holdings of the cases suggest that where
physical assaults and threats take place which lead to an inmate ceasing the grievance procedure, equitable estoppel may prevent the defendants from asserting failure to exhaust as a defense. It is also instructive to look at the elements as set out in Lewis v. Washington, even though the Seventh Circuit did not explicitly hold that equitable estoppel is a valid exception to the PLRA’s exhaustion requirement. Lewis still sets out the elements as they would have applied had the panel held that equitable estoppel is a valid exception to failure to exhaust.

Lewis relied on Labonte v. United States[^104] to set out the elements accepted in the Seventh Circuit for equitable estoppel.[^105] The elements are: “(1) a misrepresentation by the opposing party; (2) reasonable reliance on that misrepresentation; and (3) detriment.”[^106] The satisfaction of these elements is not enough, however, when one asserts equitable estoppel against a government agency or agent. The government “may not be estopped on the same terms as any other litigant.”[^107] The party asserting estoppel must demonstrate “affirmative misconduct” by the government agency or agent.[^108] The Ninth Circuit defined affirmative misconduct in an en banc decision as “a deliberate lie” or “a pattern of false promises.”[^109] Affirmative misconduct is “more than mere negligence… It requires an affirmative act to misrepresent or mislead.”[^110] The Sixth Circuit has further elaborated on affirmative misconduct stating that, “[i]t is an act by the government that either intentionally or recklessly misleads [the opposing party].”[^111]

In cases where a prisoner can effectively plead facts which raise questions as to whether the prisoner was physically harassed, the affirmative misconduct standard does not seem to raise any sort of problem. For example, if a prisoner pleads facts stating that the prisoner was beaten and threatened by prison officials, a fact finder could easily find the elements of equitable estoppel and affirmative misconduct.
satisfied. Therefore, the affirmative misconduct standard is appropriate in situations where the prisoner can plead facts alleging physical assaults or outright threats.

This situation is quite different when a prison administrative system delays grievances by neglecting the grievances or losing grievances through delivery channels. The dissent in Lyon v. Vande Krol seemed to recognize the ability of prison administrators to frustrate attempts to properly exhaust. The dissent stated, “the [Iowa State Prison] officials...[prevented] Lyon from exhausting his administrative remedies by creating the impression that his claims were not grievable through the ISP grievance system.”[112] The problems presented by administrative control are stated clearly in Ray v. Kertes, “it appears that it is considerably easier for a prison administrator to show a failure to exhaust than it is for a prisoner to demonstrate exhaustion. ‘[P]rison officials are likely to have greater legal expertise and, as important, superior access to prison administrative records in comparison to prisoners’”[113] This ability to control the system so closely and completely justifies a gross negligence standard as opposed to affirmative misconduct when it comes to perpetual delay due to the administrative grievance system.

In a situation like the one in Lyon, or in a situation where grievances are either regularly lost or perpetually delayed, a standard of gross negligence is more appropriate than the affirmative misconduct standard. The standard of gross negligence should apply because of the nature of prison administrative systems. As mentioned, prisoners must rely on an internal prison delivery system for their grievances to reach prison administrative grievance boards. It is quite easy to conceive of how grievances could easily be delayed or lost to the point that the grievance becomes constructively unavailable.
The same standard should apply where a prisoner can show that he or she continually requested information on the status of his or her grievance or continued to supplement or file new grievances in order to get a response from the administrative review board without any kind of response from the administrative grievance system. Prison administrative boards are operated by prison administrators who, in certain circumstances, may have an interest in not seeing a grievance continue to exhaustion and a possible suit in federal court. Because of the amount of control that prison administrators have, the standard of gross negligence should apply where a prisoner can show that an administrative board simply is not responding or taking any action with respect to a grievance.

D. Situations Where Equitable Estoppel Should Apply

Cases like Ziemba and Hemphill are perfect examples of facts pled that may give rise to prison officials being estopped from asserting failure to exhaust under the PLRA as an affirmative defense. The physical nature of threats and assaults alleged in these cases require that fact finders look closely to see if prison officials acted wrongly to prevent grievances from going beyond the initial grievance. Clearly in cases like this, it would be reasonable to estop the prison officials from asserting the exhaustion affirmative defense. If prison officials were allowed to raise exhaustion as an affirmative defense in cases like Ziemba and Hemphill without being subject to estoppel, prison guard gangs could chill almost all attempts to grieve problems within the system. While the PLRA was enacted to prevent frivolous suits and to increase the quality of the suits with merit, it was not meant to completely eliminate a prisoner’s ability to fight legitimate civil rights violations.

Nonetheless, not all situations where equitable estoppel should apply are as obvious as the situations where physical acts take place to scare the prisoner into
backing off on grievances. For example, in *Lewis, Lyon*, and *Jernigan*, the prisoners probably all could have made solid arguments that the prison administrative systems were grossly negligent either by misrepresenting facts or by causing extreme delay in the processing of grievances which made exhaustion impossible. If a prisoner can plead facts that suggest that the prison administrative system either regularly lost or continually delayed grievances, the prisoner may also have an argument for equitable estoppel. If the prisoner can show that the administrative system was at least grossly negligent in losing or delaying grievances, equitable estoppel should be available as an exception the PLRA’s exhaustion requirement.

E. Does an Equitable Estoppel Exception Fly in the Face of the PLRA?

Unquestionably, the purpose of the PLRA’s exhaustion requirement is to allow the administrative system to try to solve prisoners’ problems without the need for the prisoner to resort to federal courts to solve problems. If this end is achieved, it is undoubtedly a positive one. Administrative review prior to a suit conserves judicial resources, prevents control of prisons by judicial agencies, and likely prevents frivolous suits from reaching federal courts. With these purposes well-known, courts have continually construed Congress’s intent liberally with respect to the exhaustion requirement, and they have not generally allowed exceptions to the exhaustion requirement.

Even given these purposes and liberal construction of the exhaustion requirement, certain situations require that the exhaustion requirement be lifted in the interests of justice. It seems hard to believe that by implementing the exhaustion requirement, Congress meant to give prison officials free reign to prevent any challenges in federal court to the ways that prisons are operated and to prevent civil rights violations that take place within prisons from being challenged in federal court. However, this very
condition could exist if equitable estoppel is not a viable exception to the PLRA’s exhaustion requirement where justice requires. Prison officials could either prevent grievances from getting anywhere by way of threats and assaults or by losing or perpetually delaying grievances.

Because of the strict requirements for equitable exhaustion, the purposes of the PLRA’s exhaustion requirement would not be frustrated by allowing equitable estoppel as an exception to the exhaustion requirement. The doctrine would only apply where the prisoner could plead specific facts which demonstrated affirmative misconduct with respect to physical acts or gross negligence on the part of the administrative officials with respect to misrepresentations or unreasonable delay. Looking at pleadings with these types of facts, it will quickly be obvious which claims have merit and which do not. The exhaustion requirement is not a blank check for prison officials to prevent any kind of suit in federal court, and by allowing an equitable estoppel exception where appropriate, courts can make sure that it does not become this type of tool.

IV. Conclusion

The Second Circuit took bold steps in remanding cases to determine whether prison officials should be estopped from raising the affirmative defense of failure to exhaust where there may have been wrongdoing on the part of the prison officials. Prisons are closed societies where assaults or threats will not be as visible and open as they otherwise might be. This environment provides prison officials with opportunities to coerce inmates into not pursuing legitimate claims to the highest administrative levels. Prison officials also have ample opportunities to delay or halt the administrative grievance process because of the way that prisons are set up and also because of how prison grievance systems typically operate. Prison administrative
systems are almost entirely self-operated and self-regulated and provide prison officials with ample opportunity to delay grievances to the point that they become unavailable. Because of the nature of prisons and their attendant administrative grievance systems, equitable estoppel should be available to as an exception to the PLRA’s exhaustion requirement where prisoner litigants can legitimately plead facts that raise questions as to whether prison officials acted improperly and prevented the prisoner from exhausting administrative remedies. Affirmative misconduct should be the standard of wrongdoing with respect to physical assaults and threats and gross negligence should be the standard with respect to misrepresentations or unreasonable delay caused by the prison administrative grievance board. The federal circuits should adopt the holdings of Ziemba and Hemphill in cases where a prisoner can make a legitimate claim based on threats or assaults or egregious delays in the administrative system.


[17] Id.


503 U.S. 140 (1992)

Id. at 142

Id. at 145

Id.

Id. at 146-48

Id. at 150 and 153


Id. (codified as amended at 42 U.S.C. 1997e(a)(2))


See, e.g., Booth v. Churner, 206 F.3d 289 (3d Cir. 2000); Whitley v. Hunt, 158 F.3d 882 (5th Cir. 1998); Freeman v. Francis, 196 F.3d 641 (6th Cir. 1999); Lunsford v. Jumao-As, 155 F.3d 1178 (9th Cir. 1998); Garrett v. Hawk, 127 F.3d 1263 (10th Cir. 1997); Alexander v. Hawk, 159 F.3d 1321 (11th Cir. 1998)

See, e.g., Nussle v. Willette, 224 F.3d 95 (2d Cir. 2000); Booth v. Churner, 206 F.3d 289 (3d Cir. 2000); Freeman v. Francis, 196 F.3d 641 (6th Cir. 1999); Smith v. Zachary, 255 F.3d 446 (7th Cir. 2001); Higginbottom v. Carter, 223 F.3d 1259 (11th Cir. 2000)

Booth v. Churner, 532 U.S. 731 (2001) (Prisoner must exhaust regardless of whether money damages are available in the administrative forum); Porter v. Nussle, 534 U.S. 516 (2002) (Prisoner must exhaust even if suit is based on a single incident rather than ongoing “prison conditions”)

Booth, 532 U.S. at 741

Id. at 738-39

Id. at 739

Id.
[29] Id. at 741

[30] 534 U.S. at 532

[31] Id. at 521


[33] Id. at 526

[34] Id. at 527 (citing Preiser v. Rodriguez, 411 U.S. 475 (1973))

[35] Id. at 531


[37] Underwood v. Wilson, 151 F.3d 292 (5th Cir. 1998); Wendell v. Asher, 162 F.3d 887 (5th Cir. 1998); Wright v. Hollingsworth, 260 F.3d 357 (5th Cir. 2001); Clifford v. Gibbs, 298 F.3d 328 (5th Cir. 2002); Days v. Johnson, 322 F.3d 863 (5th Cir. 2003); Gates v. Cook, 376 F.3d 323 (5th Cir. 2004)

[38] Lewis v. Washington, 300 F.3d 829 (7th Cir. 2002)


[40] Casanova v. DuBois, 304 F.3d 75 (1st Cir. 2002)


[42] Lyon v. Vande Krol, 305 F.3d 806 (8th Cir. 2002) (en banc)

[43] 151 F.3d at 294

[44] Id.

[45] Id. at 295

[46] Id. at 294

[47] Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982) (holding that failure to file timely charge does not have a fatal jurisdictional effect)

[48] Id.

[49] Id. at 296
162 F.3d at 890 (emphasis added)

See Wright, 260 F.3d at 358; Clifford, 298 F.3d at 333; Days, 322 F.3d at 866; Gates, 376 F.3d at 331

See Lewis, 300 F.3d at 834

Id.

Id.

Id. (citing LaBonte v. United States, 233 F.3d 1049, 1053 (7th Cir. 2000))

Id. (citing Gibson v. West, 201 F.3d 990, 994 (7th Cir. 2000))

Id. (citing Edgewater Hosp., Inc. v. Bowen, 857 F.2d 1123, 1138 n. 8 (7th Cir. 1988)).

Id. at 831

Id.

Id.

Id. at 832

Id.

Id.

Id. at 834-35

Id. at 835

Id.

Jernigan, 304 F.3d at 1033

Id. at 1032

Id.

Id.

Id.

Id. at 1033
Id. at 162

[93] Id.

[94] Ortiz v. McBride, 380 F.3d 649 (2d Cir. 2004) (exhausted claims filed with unexhausted claims need not be dismissed as the unexhausted claims must); Abney v. McGinnis, 860 F.3d 663 (2d Cir. 2004) (behavior of defendants may make administrative remedies unavailable); Giano v. Goord, 380 F.3d 670 (2d Cir. 2004) (special circumstances may apply that justify a prisoner’s
failure to comply with the administrative procedural requirements even where remedies may have been available and the government is not estopped); *Hemphill v. New York*, 380 F.3d 680 (2d Cir. 2004) (remedies can be considered exhausted where prison officials do not submit grievances on time or prevent an inmate from grieving further); *Johnson v. Testman*, 380 F.3d 691 (2d Cir. 2004) (remedies can be considered exhausted if the defendants have failed to raise or preserve exhaustion as an affirmative defense)

[95] 380 F.3d at 682

[96] Id. at 689

[97] Id. at 683

[98] Id.

[99] Id.

[100] Id.

[101] Id. at 683-84

[102] Id. at 684

[103] *Fisher v. Peters*, 249 F.3d 433, 444 (6th Cir. 2001)

[104] 233 F.3d 1049 (7th Cir. 2000)

[105] 300 F.3d at 834

[106] Id. (citing *LaBonte*, 233 F.3d at 1053)


[108] *Lewis*, 300 F.3d at 834

[109] *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1184 (9th Cir. 2001) (en banc)

[110] *LaBonte*, 233 F.3d at 1053


[112] 305 F.3d at 810

[113] 285 F.3d at 295 (quoting *Wyatt v. Terhune*, 280 F.3d 1238, 1246 (9th Cir. 2002))