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Fixing Rule 41: A Balanced Approach To Voluntary Dismissal

By **Adam Gershenson, Bill O'Connor and Elizabeth Wright** (August 20, 2018, 1:41 PM EDT)

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As written and often applied, Federal Rule of Civil Procedure 41 — governing voluntary dismissal — allows claimants to aggressively pursue baseless claims, essentially risk-free. The rule should be recalibrated to allocate risk more rationally, properly align incentives and better protect parties responding to meritless suits.

Consider this scenario, which arises frequently in trade secret cases. The plaintiff files a complaint, swiftly followed by a motion for preliminary injunction to exert maximum pressure. The defendant must mobilize at once, interview employees, perform forensic investigations, prepare opposition briefs and affidavits, perhaps respond to expedited discovery demands and appear at an injunction hearing, all of which costs a substantial sum.

If the defendant is successful at the injunction stage, and especially when the defendant resoundingly demonstrates that the claim was ill-founded, then the plaintiff will often voluntarily dismiss the case under Rule 41(a)(1). But there is no uniform approach to a request for fees following an opponent's voluntary dismissal, and some courts read the provision as precluding any chance for a defendant to recover fees. As a result, the defendant is often left with a costly victory in a case that should never have been brought.

This loophole exists because Rule 41(a)(1) allows for voluntary dismissal any time "before the opposing party serves either an answer or a motion for summary judgment." A simple, practical fix would be to more carefully limit voluntary dismissals. Rule 41(a) could be amended to allow for voluntary dismissals only "before the opposing party serves an answer; a motion to dismiss; a motion for judgment on the pleadings; a filing opposing a temporary restraining order or preliminary injunction; or a motion for summary judgment." This fix would have at least the following five salutary effects.

First, such an approach would more faithfully fulfill the policy behind the rule. The adjustment would "facilitate the voluntary dismissal of an action" but "safeguard abuse by limiting its application to an early stage of the proceedings."[1] In many cases, such as trade secret matters, mentioned above, the preliminary injunction phase can be the most

important stage of the proceedings. In such matters, plaintiffs opting for a voluntary dismissal after that stage is complete have hardly made an "early" exit.

Second, in complex matters such as multidistrict product liability cases, courts have already found that Rule 41 fails to impose sufficient checks and balances. For example, the Eastern District of Louisiana currently oversees MDL 2740, In re Taxotere (Docetaxel) Products Liability Litigation. The litigation consolidates hundreds of lawsuits involving allegations that a chemotherapy drug led to total, permanent hair loss. In a 2017 pretrial order, the court determined it needed to implement a procedure outside of Rule 41 to control the flood of notices filed by plaintiffs under Rule 41(a)(1). As "[o]ther MDL courts ... have recognized ... it is sometimes necessary to put certain restrictions on the exercise of Rule 41 dismissals in order to effectively and fairly manage complex, consolidated MDL Litigation."[2]

Indeed, in the product liability and mass tort realm, it is common for cases pending in several jurisdictions to be transferred by the Judicial Panel on Multidistrict Litigation to a single MDL court for coordinated proceedings. Many plaintiffs are swept into MDL proceedings against their will, when their counsel would prefer to be in another venue, such as the state or federal court where their client is domiciled. However, MDL litigation is a proven mechanism for resolving large and complex product liability cases involving hundreds of plaintiffs.

Master complaints and answers are common, and it is typical for MDL judges to allow long lead times, in order for counsel to coordinate their efforts to settle the pleadings, typically in the first year that the MDL is constituted. Defendants often file motions to dismiss, which may eliminate certain claims or even an entire class of plaintiffs. As a result, cases are often voluntarily dismissed as a stratagem designed to avoid the broad reach of the MDL — undermining the efficiency and consistency of rulings it provides.

Third, the fix would cure the problem that as of now, parties who answer a complaint are protected from a plaintiff seeking a voluntary dismissal, but parties who move to dismiss are not. This makes little sense. The weakest claims invite motions to dismiss. The Federal Rules should not reward claimants whose allegations are ripe for challenge on a motion to dismiss, while punishing respondents who move to dismiss such vulnerable claims. Under the proposed revised rule, a defendant who moved for dismissal would be in no worse position than a defendant who filed an answer.

Fourth, as currently written, parties with claims that have been eviscerated at an injunction hearing can voluntarily dismiss their case under Rule 41(a)(1). But claims under Rule 41(a)(1) are dismissed without the need for any approval by the court, and without prejudice. So defendants who have beaten back an unworthy claim do not even secure complete peace of mind, as they can readily be sued again.

The revised rule would remove from 41(a)(1) claims that were met with motions to dismiss or opposition to preliminary relief. Such claims would then rightly fall under 41(a)(2), which requires court approval, and allows the court to decide, in its discretion, whether the dismissal should be with prejudice or conditioned in some way. This change improves the court's ability to control its docket, and provides that defendants who defeat such claims can at least have an opportunity to convince the court to dismiss the case with prejudice.

Fifth and finally, this adjustment to Rule 41(a)(1) could be twinned with a new provision, a hypothetical "41(e)." This provision would state explicitly that defendants can seek fees after any dismissal under Rule 41: (1) if permitted by another rule or a statute at issue in the litigation; or (2) at the court's discretion in exceptional cases.

This adjustment would ensure plaintiffs would think twice before pressing forward with specious claims. Some courts already recognize that, even in the face of a voluntary dismissal, a defendant can seek fees where, for example, a party prevails at an injunction on the grounds that the claimant fails to show a likelihood of success on the merits.[3] But others have taken the opposite approach, adhering to a view that voluntary dismissal forecloses any chance of obtaining fees. See, e.g., Williams v. Ezell[4] (holding that notice of voluntary dismissal "effectively terminated" the case, leaving the court with "no power or discretion" to grant fees and rendering an order granting fees "a nullity"); see also Physician's Surrogacy Inc. v. German[5] (denying fees under various statutes in part because a voluntary dismissal without prejudice is not a preclusive judgment on the merits). An explicit rule would encourage federal courts to adopt a more uniform approach.

This proposal is not a sea change from the American Rule that parties bear their own costs and fees. Rather, the approach simply acknowledges that litigants should have at least the opportunity to ask courts to consider whether granting fees is appropriate where a party has pursued an especially weak claim and the defendant has expended resources in mounting a defense. To deny them that opportunity encourages gamesmanship, and rewards those who would abuse the escape hatch of voluntary dismissal.

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[1] Hamilton v. Shearson-Lehman American Express Inc., 813 F.2d 1532 (9th Cir. 1987).

[2] In re Taxotere (Docetaxel) Products Liability Litigation, 7/21/2017 Pretrial Order No. 54, Dkt. 671, at 2 (E.D. La. 2:16-md-02740-KDE-MBN) (citations omitted).

[3] Me. Sch. Admin. Dis. No. 35 v. Mr. R., 321 F.3d 9, 16-17 (1st Cir. 2003).

[4] Williams v. Ezell, 531 F.2d 1261, 1263–64 (5th Cir. 1976).

[5] Physician's Surrogacy Inc. v. German, 2018 WL 1876187, at *2-5 (S.D. Cal. 2018).