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Voluntary Dismissal of Time-Barred Claims

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NOTES

VOLUNTARY DISMISSAL OF TIME-BARRED CLAIMS

*Danielle Calamari**

Both state and federal courts have procedural rules that allow a plaintiff to voluntarily dismiss a claim without prejudice and then to refile it within the applicable statute-of-limitations period. However, a plaintiff's right to this procedural avenue is not absolute, and courts maintain broad discretion in deciding whether to dismiss a claim with or without prejudice. If a court allows a plaintiff to voluntarily dismiss a time-barred claim without prejudice, the plaintiff may be able to refile the claim in a jurisdiction with a longer statute of limitations. As a result, the defendant loses the ability to assert a statute-of-limitations defense in subsequent litigation. Courts disagree about whether the defendant's loss of a statute-of-limitations defense constitutes "clear legal prejudice" sufficient to bar voluntary dismissal without prejudice.

This Note explores this disagreement. First, it examines the two ways courts currently decide motions for voluntary dismissal of time-barred claims. Next, it argues that both approaches overlook a fundamental factor: res judicata (claim preclusion). Specifically, courts do not consider that statute-of-limitations dismissals are not claim preclusive in every jurisdiction. To account for the differences in preclusion law, this Note proposes that, as a threshold inquiry, courts should determine what the claim-preclusive effect of a statute-of-limitations dismissal would be. Based on this determination, a court can decide whether the loss of a statute-of-limitations defense results in "clear legal prejudice" to the defendant and whether a dismissal without prejudice is warranted.

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INTRODUCTION

When a plaintiff files a lawsuit in a jurisdiction where the applicable statute of limitations has expired, the case is not necessarily over. The plaintiff may be able to voluntarily dismiss the action and then refile it in a jurisdiction with a longer statute of limitations.¹ Courts have broad discretion to dismiss an action with or without prejudice.² A plaintiff can only refile a claim in another jurisdiction if the court dismisses the first claim without prejudice.³ Courts generally will allow a plaintiff to dismiss a claim without prejudice so long as the defendant will not suffer “clear legal prejudice” as a result.⁴

If a plaintiff’s claim is time barred and a court dismisses it without prejudice, the defendant loses the ability to assert a statute-of-limitations defense in a subsequent lawsuit in another jurisdiction.⁵ Courts disagree about whether a defendant’s loss of a statute-of-limitations defense

1. See FED. R. CIV. P. 41(a); *infra* note 67 and accompanying text.

2. See FED. R. CIV. P. 41(a)(2); *see also, e.g.*, *Metro. Fed. Bank of Iowa, F.S.B. v. W.R. Grace & Co.*, 999 F.2d 1257, 1262–63 (8th Cir. 1993).

3. See *infra* notes 16–18 and accompanying text.

4. See, *e.g.*, *Metro. Fed. Bank*, 999 F.2d at 1262; *see also infra* Part I.B.

5. See, *e.g.*, *Metro. Fed. Bank*, 999 F.2d at 1262–63.

constitutes clear legal prejudice to the defendant.⁶ For this reason, courts are similarly divided on whether to allow a plaintiff to voluntarily dismiss a time-barred claim without prejudice.⁷

Defendants vigorously oppose plaintiffs' use of voluntary dismissal to save time-barred claims. Instead, they typically ask courts to dismiss the claim with prejudice or on statute-of-limitations grounds.⁸ A defendant's goal through either procedure is to achieve finality through *res judicata*⁹—i.e., a final judgment on the merits that precludes the plaintiff from refileing the same claim against the defendant in a subsequent lawsuit.¹⁰ A plaintiff's goal is precisely the opposite. A plaintiff wants the claim dismissed without prejudice so she can refile it in another jurisdiction with a longer statute of limitations.¹¹

There are two dominant approaches to resolving these competing interests. Some courts apply a bright-line rule that a plaintiff may not voluntarily dismiss a time-barred claim without prejudice and refile it in another jurisdiction.¹² Under this approach, a defendant's loss of a statute-of-limitations defense constitutes "per se legal prejudice" sufficient to bar voluntary dismissal without prejudice.¹³ Other courts apply a balancing test and purport to consider the defendant's loss of the statute-of-limitations defense as one of many factors.¹⁴

This Note assesses how courts analyze voluntary dismissals of time-barred claims. It considers whether courts should allow a plaintiff to voluntarily dismiss a time-barred claim without prejudice and then refile it in a jurisdiction with a longer statute of limitations. It concludes that the answer is "sometimes" and that courts should analyze this question as a claim-preclusion problem to determine when dismissal without prejudice is warranted and when it is not.

Part I of this Note provides background information on the voluntary dismissal rule and statutes of limitations. Part II analyzes the two approaches courts use to decide motions for voluntary dismissal of time-barred claims. Finally, Part III argues that the current approaches are flawed because neither accounts for the fact that statute-of-limitations dismissals are not always claim preclusive. Consequently, courts reach inefficient and misleading results. To resolve this issue, this Note proposes that, as a threshold inquiry, courts should determine what the claim-preclusive effect of a statute-of-limitations dismissal would be. Based on

6. *See, e.g.,* *Arias v. Cameron*, 776 F.3d 1262, 1274 (11th Cir. 2015) (noting disagreement among courts).

7. *See id.*

8. *See, e.g., id.* at 1266; *Metro Fed. Bank of Iowa, F.S.B. v. W.R. Grace & Co.*, 793 F. Supp 205, 206 (D. Minn. 1992), *aff'd*, 999 F.2d 1257.

9. *See, e.g., Metro. Fed. Bank*, 999 F.2d at 1262.

10. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980).

11. *See, e.g., id.*

12. *See infra* Part II.A.

13. *See infra* Part II.A.

14. *See infra* Part II.B.

the answer, a court can determine whether a bright-line rule or a balancing test is appropriate in that jurisdiction.

I. A BRIEF OVERVIEW OF VOLUNTARY DISMISSAL AND STATUTES OF LIMITATIONS

Understanding this issue requires basic background knowledge on voluntary dismissal and statutes of limitations. Part I.A provides an overview of the voluntary dismissal rule. Next, Part I.B discusses the legal standard courts apply in deciding motions for voluntary dismissal without prejudice. Part I.C then turns to an overview of the purpose and policy behind statutes of limitations. Part I.D concludes with a discussion of the choice-of-law rules that determine which statute of limitations governs a particular claim.

A. *An Overview of Voluntary Dismissal*

When a plaintiff chooses to dismiss a lawsuit, the court has broad discretion to dismiss the claim(s) either with or without prejudice.¹⁵ A dismissal with prejudice bars the plaintiff from bringing the same claim in a subsequent lawsuit.¹⁶ A dismissal without prejudice puts the plaintiff in the same legal position as if she never filed the action.¹⁷ The plaintiff may thus refile the same lawsuit within the applicable statute-of-limitations period.¹⁸

At common law, a plaintiff had an absolute right to voluntarily dismiss a claim without prejudice any time prior to judgment or verdict.¹⁹ Courts developed this rule to protect plaintiffs from losing meritorious claims on technical grounds under the strict common law pleading regime.²⁰ There was, however, an important limitation on this absolute right: a plaintiff could not voluntarily dismiss a claim without prejudice when doing so would be “manifestly prejudicial” to the defendant.²¹ Courts found such prejudice in cases where a defendant was reasonably entitled to a judgment on the merits, or when a defendant sought affirmative relief and a dismissal would bar the defendant’s pending counterclaim or cross-claim.²²

15. See FED. R. CIV. P. 41(a)(2) (“Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.”); see also, e.g., *Arias v. Cameron*, 776 F.3d 1262, 1268 (11th Cir. 2015).

16. E.g., *Lawlor v. Nat’l Screen Serv. Corp.*, 349 U.S. 322, 327 (1955); *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986).

17. E.g., *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 603 (5th Cir. 1976).

18. See *id.*

19. *In re Skinner & Eddy Corp.*, 265 U.S. 86, 92–93 (1924).

20. See Note, *Absolute Dismissal Under Federal Rule 41(a): The Disappearing Right of Voluntary Nonsuit*, 63 YALE L.J. 738, 738 (1954). This rule reflected the notion that a plaintiff was the “master of his case until a judgment was rendered.” JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 463 (5th ed. 2015).

21. See *Pullman’s Palace Car Co. v. Cent. Transp. Co.*, 171 U.S. 138, 146 (1898).

22. See, e.g., *id.*

The enactment of Federal Rule of Civil Procedure 41(a) and comparable state rules²³ significantly limited a plaintiff's absolute right to voluntarily dismiss a claim without prejudice. Rule 41(a)(1) allows a plaintiff to voluntarily dismiss a claim without prejudice at any time before the defendant serves an answer or a motion for summary judgment.²⁴ While Rule 41(a)(1) appears to preserve a plaintiff's absolute right, it limits that right to a relatively early stage in the litigation.²⁵ After a defendant has served an answer or a motion for summary judgment, Rule 41(a)(2) allows a plaintiff to voluntarily dismiss a claim without prejudice only by court order and on conditions the court deems fair.²⁶ Unlike a dismissal under Rule 41(a)(1), a dismissal under Rule 41(a)(2) requires the plaintiff to file a motion and allows the court to attach conditions to the dismissal order.²⁷

Courts have broad discretion in crafting Rule 41(a)(2) dismissal conditions.²⁸ For example, courts have conditioned dismissals without prejudice on the plaintiff's payment of the defendant's attorney's costs and fees from the first litigation,²⁹ refiling a subsequent action in a particular forum,³⁰ excluding a particular claim from a future complaint,³¹ and producing existing discovery in a subsequent action on the same claim.³² If a plaintiff fails to comply with the conditions, she may not refile the claim.³³

23. A majority of state courts have adopted versions of Federal Rule of Civil Procedure 41(a). See Michael E. Solimine & Amy E. Lippert, *Deregulating Voluntary Dismissals*, 36 U. MICH. J.L. REFORM 367, app. at 406–18 (2003) (surveying the fifty states' voluntary dismissal rules and statutes). Seventeen states still follow some version of the common law rule. *Id.*

24. FED. R. CIV. P. 41(a)(1); see also, e.g., ARIZ. R. CIV. P. 41(a)(1) (2016); MASS. R. CIV. P. 41(a)(1) (2016); UTAH R. CIV. P. 41(a)(1) (2016).

25. See FED. R. CIV. P. 41(a)(1); see also *Marques v. Fed. Reserve Bank*, 286 F.3d 1014, 1017 (7th Cir. 2002) (collecting cases interpreting Rule 41(a)(1) as giving the plaintiff an absolute right to voluntarily dismiss an action before a defendant serves an answer or a motion for summary judgment); *In re Piper Aircraft Distrib. Sys. Antitrust Litig.*, 551 F.2d 213, 220 (8th Cir. 1977).

26. See FED. R. CIV. P. 41(a)(2); see also, e.g., ALASKA R. CIV. P. 41(a)(2) (2016); COLO. R. CIV. P. 41(a)(2) (2016); KY. R. CIV. P. 41.02 (2016).

27. See *infra* text accompanying notes 29–33.

28. See, e.g., *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 603 (5th Cir. 1976).

29. See, e.g., *Marlow v. Winston & Strawn*, 19 F.3d 300, 306 (7th Cir. 1994) (holding that an award of reasonable attorney's fees incurred during the first litigation is an appropriate condition to dismissal without prejudice); *McCants v. Ford Motor Co.*, 781 F.2d 855, 859–60 (11th Cir. 1986) (“Costs may include all litigation-related expenses incurred by the defendant, including reasonable attorneys’ fees.”).

30. See, e.g., *Am. Nat'l Bank & Tr. Co. of Sapulpa v. Bic Corp.*, 931 F.2d 1411, 1413 (10th Cir. 1991).

31. See, e.g., *Johnson v. Dollar Tree Stores, Inc.*, No. 2:11-cv-4217-NKL, 2011 WL 6339830, at *2–3 (W.D. Mo. Dec. 19, 2011) (allowing the plaintiff to voluntarily dismiss his action without prejudice on the condition that he does not include a federal discrimination claim in a subsequent complaint).

32. See, e.g., *Lang v. DirecTV, Inc.*, No. 10-1085 “G”(1), 2012 WL 733866, at *3–4 (E.D. La. Mar. 6, 2012) (imposing the condition that plaintiff produces “all previously ordered discovery material” within ten days of refiling the lawsuit).

33. See FED. R. CIV. P. 41(b).

*B. Common Factors Courts Consider When Deciding Motions
for Voluntary Dismissal Without Prejudice*

Whether, and on what conditions, to grant a motion for voluntary dismissal without prejudice is within the “sound discretion of the trial court.”³⁴ Courts use a “clear legal prejudice” standard to decide Rule 41(a)(2) motions.³⁵ Under this standard, courts will allow a plaintiff to voluntarily dismiss a claim without prejudice unless the defendant will suffer undue prejudice as a result.³⁶ The goal of this analysis is to balance the interests of both parties.³⁷

There is no bright-line rule for what constitutes undue prejudice under this standard. Instead, courts use a balancing test that considers the totality of the circumstances of each case.³⁸ At minimum, the defendant must show that she will suffer prejudice beyond the mere prospect of a subsequent lawsuit on the same set of facts.³⁹

Courts consider various factors in the clear legal prejudice analysis. Some common factors include the defendant’s effort and expense in preparing for trial, any excessive delay or lack of diligence by the plaintiff, the adequacy of the plaintiff’s explanation for dismissal, and the extent to which the lawsuit has progressed.⁴⁰ These factors are only guidelines and are not exhaustive.⁴¹ But the analysis must focus on the potential prejudice to the defendant, not on the convenience of the court, witnesses, or jurors.⁴²

34. *Phillips v. Ill. Cent. Gulf R.R.*, 874 F.2d 984, 986 (5th Cir. 1989); *accord Tucker v. Tucker*, 434 N.E.2d 1050, 1052 (N.Y. 1982); *Bradshaw v. Ewing*, 376 S.E.2d 264, 267 (S.C. 1989).

35. *E.g.*, *Metro. Fed. Bank of Iowa, F.S.B. v. W.R. Grace & Co.*, 999 F.2d 1257, 1262 (8th Cir. 1993); *Phillips*, 874 F.2d at 986. Some courts use the phrase “plain legal prejudice” to describe the same standard. *See, e.g.*, *Wojtas v. Capital Guardian Tr. Co.*, 477 F.3d 924, 927 (7th Cir. 2007); *Draper v. Paul N. Gardner Defined Plan Tr.*, 625 A.2d 859, 863–64 (Del. 1993); *Smith v. Graham*, 147 P.3d 859, 868 (Kan. 2006).

36. *See, e.g.*, *GAF Corp. v. Transamerica Ins.*, 665 F.2d 364, 369 (D.C. Cir. 1981).

37. *See Arias v. Cameron*, 776 F.3d 1262, 1269 (11th Cir. 2015) (“While the district court should keep in mind the interests of the defendant, . . . the court should also weigh the relevant equities and do justice between the parties in each case.” (quoting *McCants v. Ford Motor Co.*, 781 F.2d 855, 857 (11th Cir. 1986))).

38. *See infra* notes 40–42 and accompanying text.

39. *E.g.*, *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 217 (1947); *Goodman v. Gordon*, 447 P.2d 230, 232–33 (Ariz. 1968).

40. *See, e.g.*, *Bridgeport Music, Inc. v. Universal-MCA Music Publ’g, Inc.*, 583 F.3d 948, 953 (6th Cir. 2009); *Brown v. Baeke*, 413 F.3d 1121, 1124 (10th Cir. 2005); *Witzman v. Gross*, 148 F.3d 988, 992 (8th Cir. 1998); *Draper*, 625 A.2d at 863–64; *Aventis Pasteur, Inc. v. Skevofilax*, 914 A.2d 113, 122 (Md. 2007) (collecting cases applying various factors); *see also* 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2364 (3d ed. 2008) (collecting cases describing the different factors each federal court of appeals considers).

41. *E.g.*, *Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354, 358 (10th Cir. 1996).

42. *See, e.g.*, *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997); *Durham v. Fla. E. Coast Ry. Co.*, 385 F.2d 366, 368 (5th Cir. 1967) (“Courts exist to serve the parties, and not to serve themselves, or to present a record with respect to dispatch of business.”).

C. Purpose and Policy of Statutes of Limitations

Statutes of limitations are legislative public policy decisions about the time period within which a plaintiff may pursue a particular claim.⁴³ They provide defendants with a defense to liability in untimely lawsuits.⁴⁴ However, these time limitations vary considerably among jurisdictions.⁴⁵

Statutes of limitations serve three principal objectives. First, they provide defendants with repose by eliminating the possibility of litigation after a reasonable period of time⁴⁶ and by protecting settled expectations.⁴⁷ Second, they ensure that claims will be resolved while sufficient evidence is still available for the accurate disposition of cases.⁴⁸ Third, they encourage plaintiffs to pursue claims diligently.⁴⁹

D. Choice of Law: Which Statute of Limitations Governs?

As discussed in Part I.C, statutes of limitations vary considerably among jurisdictions.⁵⁰ To understand when a plaintiff can dismiss a time-barred claim in one jurisdiction and refile it in another, this Note turns to a discussion on how courts determine which statute of limitations governs a particular claim.

1. State Court

In *Sun Oil Co. v. Wortman*,⁵¹ the U.S. Supreme Court held that each state must decide how to treat statutes of limitations for choice-of-law purposes.⁵² A state may choose to apply its own statute of limitations to claims that are otherwise governed by the substantive law of a foreign

43. *See* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945).

44. *See, e.g.*, Phillips v. Ill. Cent. Gulf R.R., 874 F.2d 984, 987 (5th Cir. 1989).

45. *Compare* N.C. GEN. STAT. ANN. § 1-52 (West 2016) (providing for a three year statute of limitations for a breach of a written contract claim), *and* TENN. CODE ANN. § 28-3-104 (West 2016) (providing for a one year statute of limitations for a personal injury claim), *with* WYO. STAT. ANN. § 1-3-105 (West 2016) (providing for a ten year statute of limitations for a breach of a written contract claim), *and* N.D. CENT. CODE. ANN. § 28-01-16 (West 2016) (providing for a six year statute of limitations for a personal injury claim).

46. *See, e.g.*, Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980) (“The statute of limitations establishes a deadline after which . . . it is unfair to require the defendant to attempt to piece together his defense to an old claim.”).

47. *See, e.g.*, Wm. Grayson Lambert, *Focusing on Fulfilling the Goals: Rethinking How Choice-of-Law Regimes Approach Statutes of Limitations*, 65 SYRACUSE L. REV. 491, 500 (2015) (“Such limitations allow society to move forward in its business, social, and political processes without fear of having dramatic upheavals based on judicial resolutions of old claims.”).

48. *See, e.g.*, Barrington v. A.H. Robins Co., 702 P.2d 563, 566 (Cal. 1985).

49. *See* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 490–91 (1997) (explaining that “punishing” some plaintiffs, by dismissing their suits as time barred, can benefit the legal system by encouraging other plaintiffs to act diligently).

50. *See supra* note 45 and accompanying text.

51. 486 U.S. 717 (1988).

52. *See id.* at 725–26.

state.⁵³ A state may do so regardless of whether its own limitations period is longer or shorter than that of the state where the substantive right arose.⁵⁴ While a majority of states apply their own statutes of limitations, several states take different approaches.⁵⁵ This Note is limited in scope to cases where courts will apply their own statutes of limitations.

There are several exceptions to this general rule. State courts will apply a foreign statute of limitations when a statute that creates a substantive right also provides a limitations period,⁵⁶ a statute of limitations extinguishes a substantive right under the law of the state where the claim arose,⁵⁷ or a borrowing statute applies.⁵⁸

2. Federal Court

In federal court, the applicable statute of limitations depends on whether the court is hearing a federal question claim or a diversity claim. A court hearing a federal question claim will apply a federal statute of limitations when Congress has provided one.⁵⁹ When there is no explicit limitation period, the applicable statute of limitations is a question of federal common law.⁶⁰ Federal common law directs courts to look to closely analogous state statutes of limitations, related federal statutes of limitations, and federal equity doctrines.⁶¹

A federal court hearing a diversity claim, however, will apply the same statute of limitations that a state court in its jurisdiction would apply. *Erie*

53. *See id.* at 725, 730.

54. *See id.* (explaining that each state has the right to decide to apply its own shorter statute of limitations to protect itself from wasting judicial resources on stale claims and that each state also has the right to decide to apply its own longer statute of limitations when a remedy is no longer available in the jurisdiction where a right arose).

55. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey*, 60 AM. J. COMP. L. 291, 340–42 (2012) (surveying the fifty states' choice-of-law rules for statutes of limitations). Some states have adopted the Uniform Conflict of Laws-Limitations Act of 1982, which applies the statute of limitations of the state whose substantive law governs the claim. *Id.* Other states use a balancing test to determine which state has a stronger interest in applying its limitation period. *Id.* Finally, several states follow section 142 of the Restatement (Second) of Conflict of Laws, which presumes that the forum state's limitations period applies but has a flexible approach for cases where the forum state does not have an interest in applying its own statute of limitations. *See id.*; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (AM. LAW INST. 2015).

56. *E.g.*, *Price v. Litton Sys., Inc.*, 784 F.2d 600, 605 (5th Cir. 1986).

57. *E.g.*, *Walls v. Gen. Motors, Inc.*, 906 F.2d 143, 146 (5th Cir. 1990).

58. *E.g.*, *Combs v. Int'l Ins.*, 354 F.3d 568, 578 (6th Cir. 2004). A borrowing statute is a legislative exception to the general rule that a forum may apply its own statute of limitations. *Id.* When the statute of limitations is shorter in the state where the substantive right arose, the forum state "borrows" the foreign state's statute of limitations instead of applying its own. *Id.*

59. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158–59 (1983). Congress has provided a general four-year statute of limitations for federal statutes enacted after December 1, 1990, that do not include a specific limitations period. *See* 28 U.S.C. § 1658(a) (2012).

60. *See DelCostello*, 462 U.S. at 158–59.

61. *Id.* at 158–62; *see also* *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 33–34 (1995) (collecting federal cases borrowing state and federal statutes of limitations).

*Railroad v. Tompkins*⁶² requires a federal court sitting in diversity jurisdiction to apply state substantive law and federal procedural law.⁶³ Statutes of limitations are “substantive” for *Erie* purposes.⁶⁴ To determine which state’s statute of limitations applies, the court must apply the forum state’s choice-of-law rules.⁶⁵

Accordingly, in both state cases and federal diversity cases, a plaintiff may be able to litigate a claim that is time barred in one jurisdiction by filing it in another jurisdiction with a longer statute of limitations.⁶⁶ To do this, the plaintiff must file the lawsuit in a court located in a state that satisfies the following requirements:

[I]ts statute of limitations has not yet run; it will . . . apply its own longer statute; it will interpret its “borrowing statute,” if any, as not covering most cases, and thus will not borrow the shorter statute of any of the states with some connection to the case; [and] the defendant is amenable to process there.⁶⁷

This procedure is not available in federal question cases because the applicable statute of limitations for federal question claims does not vary among jurisdictions.⁶⁸

II. THE CONFLICTING WAYS IN WHICH THE LOSS OF A STATUTE-OF-LIMITATIONS DEFENSE FACTORS INTO THE CLEAR LEGAL PREJUDICE ANALYSIS

As discussed in Part I.C, courts generally agree that a plaintiff should be able to voluntarily dismiss a claim without prejudice unless the defendant will suffer clear legal prejudice as a result.⁶⁹ Courts also agree that the mere prospect of a subsequent lawsuit on the same facts does not factor into the prejudice analysis⁷⁰ and that a plaintiff’s incidental gain of a tactical advantage in subsequent litigation does not constitute clear legal

62. 304 U.S. 64 (1938).

63. *See id.* at 78, 92.

64. *See Guar. Tr. Co. v. York*, 326 U.S. 99, 110–11 (1945) (holding that where a federal statute of limitations conflicts with a state statute of limitations, the court cannot treat the federal limitations period as “procedural” and thus apply it; the court must apply the state statute of limitations); Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. ILL. L. REV. 683, 693. Although statutes of limitations may be considered “procedural” for choice-of-law purposes, they are considered “substantive” for *Erie* purposes. *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 152 (2d Cir. 2013). Such distinction exists because the substance-procedure dichotomy has different meanings in the two contexts. *Id.* The purpose of the substance-procedure dichotomy in the *Erie* context is “to establish . . . substantial uniformity of predictable outcome between cases tried in a federal court and cases tried in the courts of the State in which the federal court sits.” *Id.* at 153. By contrast, the purpose of the substance-procedure dichotomy in the context of choice of law “is not to establish uniformity but to delimit spheres of state legislative competence.” *Id.*

65. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 494–97 (1941); *see also Liberty*, 718 F.3d at 151.

66. *See, e.g., Liberty*, 718 F.3d at 152.

67. *See Weinberg, supra* note 64, at 692.

68. *See supra* notes 59–61 and accompanying text.

69. *See supra* note 36 and accompanying text.

70. *See supra* note 39 and accompanying text.

prejudice.⁷¹ However, courts disagree about how a defendant's loss of a statute-of-limitations defense should factor into the clear legal prejudice analysis.

This disagreement stems from different analyses of four factors: (1) the primary purpose of voluntary dismissal, (2) whether the loss of a statute-of-limitations defense results in a subsequent lawsuit on the same facts, (3) whether a defendant's loss of a statute-of-limitations defense results in the plaintiff's incidental gain of a tactical advantage in subsequent litigation, and (4) whether curative conditions can adequately compensate a defendant for the loss of a statute-of-limitations defense.⁷² As a result, courts have developed two approaches to synthesize these factors. This part discusses these two approaches. Specifically, Part II.A discusses the bright-line rule and Part II.B discusses the balancing test.

A. The Bright-Line Rule

Some courts apply a bright-line rule that a plaintiff may not voluntarily dismiss a time-barred claim without prejudice and refile it in another jurisdiction.⁷³ Under this approach, a defendant's loss of a statute-of-limitations defense constitutes per se legal prejudice. It automatically precludes a dismissal without prejudice, and courts will not consider any additional factors in the clear legal prejudice analysis.⁷⁴

This rule is based on four principles. First, the primary purpose of the voluntary dismissal rule is to protect the defendant from clear legal prejudice.⁷⁵ The definition of "legal prejudice" includes material restrictions on a litigant's ability to pursue her claim or defense.⁷⁶ A defendant's position is substantially impaired when a dismissal causes her to lose a statute-of-limitations defense, i.e., an absolute defense to liability.⁷⁷ Second, the loss of a statute-of-limitations defense does not

71. See, e.g., *Phillips v. Ill. Cent. Gulf R.R.*, 874 F.2d 984, 991 (5th Cir. 1989); *McCants v. Ford Motor Co.*, 781 F.2d 855, 856-57 (11th Cir. 1986).

72. See *supra* Part II.A-B.

73. See, e.g., *Metro. Fed. Bank of Iowa, F.S.B. v. W.R. Grace & Co.*, 999 F.2d 1257, 1262 (8th Cir. 1993); *Phillips*, F.2d 984 at 987. Some courts have explicitly adopted a bright-line rule, while others have done so implicitly. In all of these cases, the defendant's loss of a statute-of-limitations defense mechanically outweighs consideration of all the other factors.

74. See, e.g., *Metro. Fed. Bank*, 999 F.2d at 1262; *Phillips*, 874 F.2d at 987.

75. E.g., *Grover ex rel. Grover v. Eli Lilly & Co.*, 33 F.3d 716, 718 (6th Cir. 1994) ("The primary purpose of [Rule 41(a)(2)] in interposing the requirement of court approval is to protect the nonmovant from unfair treatment."); *Fisher v. P.R. Marine Mgmt., Inc.*, 940 F.2d 1502, 1503 (11th Cir. 1991) ("[W]hen exercising its discretion in considering a dismissal without prejudice, the court should keep in mind the interests of the defendant, for Rule 41(a)(2) exists chiefly for protection of defendants."); *Phillips*, 874 F.2d at 987 ("When considering a dismissal without prejudice, the court should keep in mind the interests of the defendant, for it is his position which should be protected.")

76. See *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 603-04 (5th Cir. 1976).

77. See, e.g., *Phillips*, 874 F.2d at 987 ("If [stripping the defendant of an absolute defense] does not constitute clear legal prejudice to the defendant, it is hard to envision what would."); Brief for Appellants at 26, *Gross v. Spies*, 133 F.3d 914 (4th Cir. 1998) (Nos. 96-2146, 96-2203, 96-2150, 96-2149, 96-2147, 96-2204) (arguing that granting voluntary

merely result in a subsequent lawsuit on the same facts; it results in a subsequent lawsuit that is fundamentally different.⁷⁸ The second lawsuit involves a substantial new fact: a complete defense to liability is no longer available.⁷⁹ Third, a plaintiff's use of voluntary dismissal to avoid an adverse judgment on the merits does not result in a plaintiff's incidental gain of a tactical advantage—it is an abuse of a procedural rule.⁸⁰ A plaintiff should not be allowed to “maneuver” the litigation to strip a defendant of an existing advantage.⁸¹ Fourth, curative conditions do not adequately protect the defendant from the prejudice that results from the loss of a statute-of-limitations defense.⁸² There is no amount of costs that can reasonably compensate a defendant for the loss of an absolute defense to liability.⁸³ Courts that employ this approach routinely deny motions for voluntary dismissal without prejudice in the face of a valid statute-of-limitations defense.

Take the Fifth Circuit, for example. In *Phillips v. Illinois Central Gulf Railroad*,⁸⁴ the court adopted the bright-line rule and held that the loss of a statute-of-limitations defense constitutes per se legal prejudice sufficient to bar voluntary dismissal without prejudice.⁸⁵ The court reasoned that the voluntary dismissal analysis should focus on protecting the interests of the defendant.⁸⁶ Courts should not allow plaintiffs to use voluntary dismissal to “maneuver” the litigation and cause a defendant to lose an existing

dismissal in the face of a valid statute-of-limitations defense has the same effect as if the court kept the action in the original forum and impermissibly denied the defendant the right to assert an established defense).

78. See, e.g., *Butts ex rel. Iverson v. Evangelical Lutheran Good Samaritan Soc’y*, 802 N.W.2d 839, 843 (Minn. Ct. App. 2011) (“The mere prospect of a second lawsuit is not sufficiently prejudicial to justify denial of a [Rule 41(a)(2)] motion to dismiss. . . . [However,] a voluntary dismissal that strips a defendant of a defense that would otherwise be available may be sufficiently prejudicial to justify denial.”).

79. E.g., *Phillips* 874 F.2d at 987.

80. See, e.g., *Skinner v. First Am. Bank of Va.*, No. 93-2493, 1995 WL 507264, at *2 (4th Cir. Aug. 28, 1995) (“[V]oluntary dismissal without prejudice [is] improper with respect to claims ‘faced with imminent adverse determination in a federal action.’” (quoting *Davis v. USX Corp.*, 819 F.2d 1270, 1277 (4th Cir. 1987) (Phillips, J., dissenting))); *Davis*, 819 F.2d at 1277 (Phillips, J., dissenting) (explaining that it is unfair to a defendant to allow a plaintiff to chose her forum, then be allowed to “bail out scot-free” and refile her claim in another forum after “seeing the adverse handwriting on the wall in the first chosen forum”); *McCants v. Ford Motor Co.*, 781 F.2d 855, 858 (11th Cir. 1986) (denying voluntary dismissal because a plaintiff should not be able to avoid the “prescribed legal effect of his delays”).

81. E.g., *Placid Oil Co. v. Ashland Oil, Inc.*, 792 F.2d 1127, 1134–35 (Temp. Emer. Ct. App. 1986) (denying voluntary dismissal where the plaintiff was attempting to use Rule 41(a)(2) as a forum shopping tool to avoid the defendant’s statute-of-limitations defense); see also *Grover ex rel. Grover v. Eli Lilly & Co.*, 33 F.3d 716, 719 (6th Cir. 1994) (“At the point when the law clearly dictates a result for the defendant, it is unfair to subject him to continued exposure to potential liability by dismissing the case without prejudice.”).

82. See, e.g., *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 969–71 (8th Cir. 1984).

83. See *id.* (stating that where a defendant is entitled to a judgment on the merits, there is no amount of costs that can compensate the defendant for the risk of continuing liability).

84. 874 F.2d 984 (5th Cir. 1989).

85. See *id.* at 984.

86. *Id.* at 987.

advantage, such as a statute-of-limitations defense.⁸⁷ Further, the second lawsuit would not be the same lawsuit on the same set of facts.⁸⁸ The court explained that “the facts in the second lawsuit would differ in that the defendant would be stripped of an absolute defense to the suit—the difference between winning the case without a trial and abiding the unknown outcome of such a proceeding.”⁸⁹

The Eighth Circuit similarly followed this reasoning in *Metropolitan Federal Bank of Iowa, F.S.B. v. W.R. Grace & Co.*⁹⁰ There, the court stated in dicta that it “would consider it an abuse of discretion for a district court to find no legal prejudice, and thus to grant voluntary dismissal, where the nonmoving party has demonstrated a valid statute of limitations defense to the claims sought to be dismissed.”⁹¹

Likewise, in *Wojtas v. Capital Guardian Trust Co.*,⁹² the Seventh Circuit relied on *Phillips* and *Metropolitan Federal Bank* in holding it to be an abuse of discretion for a court to grant voluntary dismissal without prejudice when the defendant has demonstrated a valid statute-of-limitations defense.⁹³ Citing *Phillips* and *Metropolitan Federal Bank*, the court explained that a defendant acquires a legal right to assert a statute-of-limitations defense when a plaintiff files a time-barred claim.⁹⁴ Therefore, the defendant would suffer clear legal prejudice if the court dismissed the plaintiff’s claim without prejudice instead of dismissing the claim on statute-of-limitations grounds.⁹⁵

B. The Balancing Test

Other courts have rejected the bright-line rule and continue to apply their established balancing tests.⁹⁶ Under this approach, courts consider the defendant’s loss of a statute-of-limitations defense as an additional factor, but it does not automatically outweigh the other factors. In practice, these courts will allow a plaintiff to voluntarily dismiss a claim without prejudice as long as the established clear legal prejudice factors weigh in the plaintiff’s favor. While these courts purport to consider the defendant’s

87. *Id.*

88. *Id.*

89. *Id.*

90. 999 F.2d 1257 (8th Cir. 1993).

91. *Id.* at 1263. The court did not apply the rule in this case because the defendant did not prove the validity of his statute-of-limitations defense. *See id.* But this dicta has become strong precedent for subsequent cases. *See e.g.*, *Sutton-Price v. Daugherty Sys., Inc.*, 2012 WL 2282344, at *3 (E.D. Mo. June 18, 2012); *In re Prempro Prods. Liab. Litig.*, 2008 WL 5274338, at *1 (E.D. Ark. Dec. 18, 2008).

92. 477 F.3d 924 (7th Cir. 2007).

93. The court explained that under Wisconsin law, the expiration of a statute of limitations “extinguishes the cause of action of the potential plaintiff and it also creates a right enjoyed by the would-be defendant to insist on that statutory bar.” *Id.* at 927 (citing *Metro. Fed. Bank*, 999 F.2d at 1263, and *Phillips*, 874 F.2d at 987).

94. *Id.*

95. *See id.* at 927–28.

96. *See supra* Part I.B.

loss of a statute-of-limitations defense as an additional factor, it will never be the deciding factor.

Like the bright-line rule, this approach is also based on four principles. First, the primary purpose of the voluntary dismissal rule is to preserve plaintiffs' claims by allowing them to "start over" and to compensate the defendant for duplicative costs and efforts.⁹⁷ Forcing a plaintiff to suffer for her lawyer's error of filing a claim in a jurisdiction where the action is time barred contradicts strong public policy in favor of deciding cases on their merits.⁹⁸ Because a dismissal with prejudice ends a plaintiff's claim, it is considered a "sanction of last resort"⁹⁹ and is inappropriate in cases where the plaintiff has acted diligently and in good faith.¹⁰⁰ Second, while a defendant's loss of a statute-of-limitations defense may result in the inconvenience of a second lawsuit, it does not alter the underlying facts that give rise to the claim.¹⁰¹ Third, when a defendant loses a statute-of-limitations defense, she merely loses a tactical advantage while the plaintiff gains one incidentally.¹⁰² When a plaintiff's lawyer files a time-barred claim, the defendant does not acquire a vested interest in that jurisdiction;

97. See, e.g., *McCall-Bey v. Franzen*, 777 F.2d 1178, 1184 (7th Cir. 1985) ("As . . . the language and history of Rule 41(a) imply, the general purpose of the rule is to preserve the plaintiff's right to take a voluntary nonsuit and start over so long as the defendant is not hurt."); *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976) (explaining that the purpose of Rule 41(a)(2) is to "freely permit the plaintiff, with court approval, to voluntarily dismiss an action [without prejudice]" where dismissal will not result in injustice to the defendant).

98. See *Link v. Wabash R.R.*, 370 U.S. 626, 646–49 (1962) (Black, J., dissenting) (explaining that while penalizing a plaintiff for his lawyer's errors may reduce a court's docket, it "undercuts the very purposes for which courts were created—that is, to try cases on their merits and render judgments in accordance with the substantial rights of the parties"); see also *id.* ("[A plaintiff should not be] awakened to his lawyer's incapacity for the first time by a sudden brutal pronouncement of the court: 'Your lawyer has failed to perform his duty . . . and we are therefore throwing you out of court on your heels.'"); *Germain v. Semco Serv. Mach. Co.*, 79 F.R.D. 85, 86 (E.D.N.Y. 1978) ("[L]itigants generally ought not to be disadvantaged by such errors of counsel.").

99. See *Goforth v. Owens*, 766 F.2d 1533, 1535 (11th Cir. 1985). While *Goforth* is a case about a Rule 41(b) dismissal for failure to prosecute, see FED. R. CIV. P. 41(b), the same reasoning is applicable in the context of Rule 41(a) dismissals. In both contexts, the court exercises discretion about whether to dismiss the claim with or without prejudice. See FED. R. CIV. P. 41(a)–(b). Both inquiries ask whether the defendant will be unfairly prejudiced by a dismissal without prejudice. Compare *Rogers v. Kroger Co.*, 669 F.2d 317, 320 (5th Cir. 1982) (conducting a Rule 41(b) inquiry and citing cases that consider responsibility of the plaintiff, intentional conduct, and prejudice to the defendant), with *McCants v. Ford Motor Co.*, 781 F.2d 855, 858–59 (11th Cir. 1986) (conducting a Rule 41(a)(2) inquiry and considering factors such as responsibility of the plaintiff, intentional conduct, and prejudice to the defendant).

100. See, e.g., *McCants*, 781 F.2d at 859.

101. See, e.g., *Arias v. Cameron*, 776 F.3d 1262, 1274 (11th Cir. 2015) (noting that the loss of a statute-of-limitations does not change the subject matter of the lawsuit).

102. See *McCants*, 781 F.2d at 859 (holding that although "the plaintiff's untimeliness yielded the defendant a potentially great legal advantage" in the first forum that the defendant would presumably lose in a subsequent lawsuit on the same claim, the defendant did not suffer any clear legal prejudice as a result of such loss); see, e.g., *Arias*, 776 F.3d at 1271.

the defendant acquires a procedural advantage.¹⁰³ Finally, curative conditions adequately protect the defendant from the inconvenience of a subsequent lawsuit.¹⁰⁴ Courts have broad discretion in attaching conditions to voluntary dismissal orders.¹⁰⁵ The “extreme” sanction of dismissal with prejudice is appropriate only in cases where lesser protections would not serve the interests of justice.¹⁰⁶ Courts that follow this approach routinely grant motions for voluntary dismissal without prejudice even in the face of a valid statute-of-limitations defense.

The Eleventh Circuit, for example, has expressly rejected a bright-line rule in this context.¹⁰⁷ In *McCants v. Ford Motor Co.*,¹⁰⁸ the court held that the loss of a valid statute-of-limitations defense does not bar a dismissal without prejudice.¹⁰⁹ Instead, the court applied its established balancing test and reasoned that the loss of a valid statute-of-limitations defense merely results in “a second lawsuit on the same set of facts.”¹¹⁰ The court found it significant that the plaintiff had acted diligently and that there was no evidence of bad faith.¹¹¹ Under these circumstances, the court found that the defendant would not suffer clear legal prejudice as the result of a dismissal without prejudice.¹¹²

Similarly, the Southern District of New York granted the plaintiff’s motion for voluntary dismissal without prejudice in *Klar v. Firestone Tire & Rubber Co.*¹¹³ Here, the plaintiff moved for voluntary dismissal because he believed his claim was time-barred in New York, and he wanted to refile

103. See *Germain*, 79 F.R.D. at 86 (rejecting defendant’s claim of prejudice, stating that a defendant does not acquire a vested interest when plaintiff’s counsel files a lawsuit in a jurisdiction where the statute of limitations has expired).

104. See, e.g., *McCants*, 781 F.2d at 860 (explaining that ordinarily a court will not allow a plaintiff to dismiss an action without prejudice after the defendant has been put to considerable expense and effort, except on conditions that compensate the defendant for such time and effort).

105. See *Diamond v. United States*, 267 F.2d 23, 25 (5th Cir. 1959) (holding that a district court’s Rule 41(a)(2) dismissal order is only reviewable for abuse of discretion); *supra* note 15 and accompanying text.

106. See, e.g., *Goforth v. Owens*, 766 F.2d 1533, 1535 (11th Cir. 1985) (finding dismissal with prejudice was appropriate where the plaintiff “engaged in a pattern of delay and deliberately refused to comply with the directions of the court” because any lesser sanction would not have served the interests of justice).

107. See *Arias*, 776 F.3d at 1274–75 (“We recognize . . . that other circuits have found clear legal prejudice to exist when a Rule 41(a)(2) dismissal is granted in the face of a valid statute-of-limitations defense. . . . [However,] a *per se* rule prohibiting district courts from allowing dismissals without prejudice . . . could significantly undermine the district court’s ability to balance the equities in ruling on a motion for voluntary dismissal under Rule 41(a)(2).”); *McCants*, 781 F.2d at 858–59 (holding that the loss of a statute-of-limitations defense does not constitute clear legal prejudice and, without more, should not preclude dismissal without prejudice).

108. 781 F.2d 855 (11th Cir. 1986).

109. See *id.* at 859.

110. *Id.* In reaching its decision, the Eleventh Circuit assumed, without deciding, that the action was time barred in Alabama. See *id.* at 858.

111. *Id.*

112. *Id.* at 857–58.

113. 14 F.R.D. 176 (S.D.N.Y. 1953).

the action in Ohio, where a longer statute of limitations would apply.¹¹⁴ The court explained that Rule 41(a)(2) was enacted to protect defendants from abusive practices of plaintiffs who filed lawsuits with “no real object in mind” other than putting defendants to significant expenses.¹¹⁵ Absent a finding of abusive intent, the court granted voluntary dismissal conditioned on (1) the refiling of the action in Ohio and (2) the plaintiff’s payment of costs and attorney’s fees.¹¹⁶

*Germain v. Semco Service Machine Co.*¹¹⁷ provides another example of the balancing test approach. Here, the plaintiff moved for voluntary dismissal for the express purpose of refiling the action in New Jersey, where a longer statute of limitations would apply.¹¹⁸ In its prejudice analysis, the court focused on the aspect of duplicative effort rather than potential abusive intent.¹¹⁹ The court explained that “[t]he further along a case has proceeded, the more the prejudice to the defendant in granting the plaintiff’s motion to dismiss.”¹²⁰ Because the case was in the preliminary stages of discovery, the court found that little duplicative effort would result from the voluntary dismissal in New York and the refiling in New Jersey.¹²¹ The court granted voluntary dismissal conditioned on the plaintiff’s agreement to make available discovery from the first proceeding and to pay opposing counsel’s costs and attorney’s fees.¹²²

The court in *Ross v. Raymark Industries, Inc.*¹²³ also applied the balancing test approach but for different reasons. The Pennsylvania court explained that even if it granted the defendants’ motion for summary judgment, the plaintiff could still proceed with a subsequent New Jersey action because the doctrine of res judicata would not apply to a statute-of-limitations dismissal.¹²⁴ Further, the court explained that if it allowed a dismissal without prejudice, it could attach curative conditions to the dismissal order, thus the defendants would be protected from duplicative expenses.¹²⁵ If, however, the court granted the defendants’ motion for summary judgment, the defendants would bear the expenses for both the Pennsylvania action and the subsequent New Jersey action.¹²⁶

114. *Id.*

115. *Id.*

116. *Id.* at 176–77.

117. 79 F.R.D. 85 (E.D.N.Y. 1978).

118. *Id.* at 86.

119. *Id.* at 86–87.

120. *Id.*

121. *Id.* at 87.

122. *Id.*

123. No. 84-3663, 1985 WL 5035 (E.D. Pa. Dec. 30, 1985).

124. *See id.* at *2 (“Dismissal of an action on limitations grounds merely bars the remedy in the first system of courts, and leaves [a] second system of courts free to grant a remedy that is not barred by its own rules of limitations.”).

125. *See id.*

126. *See id.*

III. THE SOLUTION THROUGH PRECLUSION: RES JUDICATA AS A THRESHOLD INQUIRY

This part argues that courts overlook a fundamental factor in deciding whether to dismiss a time-barred claim without prejudice. Specifically, they do not consider what the claim-preclusive effect of a statute-of-limitations dismissal would be, which is a vital consideration to accurately balance the parties' interests in the clear legal prejudice analysis.

Part III.A explains how the claim-preclusive effect of a statute-of-limitations dismissal varies based on the jurisdiction that renders a judgment. Part III.B proposes that, as a threshold inquiry, courts should determine whether a statute-of-limitations dismissal would be claim preclusive. Based on this determination, courts can accurately assess how a dismissal without prejudice will affect the parties' interests and whether such dismissal is warranted.

A. *The Preclusive (or Nonpreclusive) Effect of Statute-of-Limitations Dismissals*

The doctrine of res judicata, also known as claim preclusion, provides that a "final judgment, rendered upon the merits by a court having jurisdiction . . . is a complete bar to a new suit between [the parties] on the same cause of action."¹²⁷ Courts disagree about whether statute-of-limitations dismissals are judgments "on the merits," and, therefore, in some jurisdictions such dismissals are claim preclusive while in others they are not.

In state court, the preclusion law of the state that renders a judgment governs the claim-preclusive effect of that judgment.¹²⁸ States are divided about whether statute-of-limitations dismissals are claim preclusive—some states preclude a plaintiff from refileing the claim elsewhere and other states do not.

In federal court, federal common law governs the claim-preclusive effect of a judgment.¹²⁹ In federal question cases, statute-of-limitations dismissals are claim preclusive.¹³⁰ But in diversity cases, the state law in the jurisdiction where the federal court sits governs the preclusive effect of a judgment.¹³¹

127. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 502 (2001).

128. The Full Faith and Credit Clause of the U.S. Constitution requires every state to give a foreign state's judgment the same preclusive effect it would be accorded by the state that rendered the judgment. *See* U.S. CONST. art. IV, § 1. The Full Faith and Credit Statute requires every federal court to give a state court judgment the same preclusive effect it would be accorded by the state that rendered the judgment. *See* 28 U.S.C. § 1738 (2012).

129. *Semtek*, 531 U.S. at 507 (explaining that under federal common law, both state and federal courts must give a federal court judgment the preclusive effect prescribed by federal law).

130. *See* FED. R. CIV. P. 41(b); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995).

131. *Semtek*, 531 U.S. at 508.

1. The Effect of Statute-of-Limitations Dismissals That Are Not Claim Preclusive

In states where statute-of-limitations dismissals are not claim preclusive, a statute-of-limitations dismissal does not bar a plaintiff from refiling her claim.¹³² In these states, statute-of-limitations dismissals are not claim preclusive because they are not judgments “on the merits.”¹³³ As a matter of issue preclusion, however, a statute-of-limitations dismissal will bar the plaintiff from refiling the lawsuit in any court in the state where the judgment was rendered.¹³⁴

This rule reflects the traditional view that statutes of limitations are procedural devices. They limit a plaintiff’s ability to obtain a remedy in a particular court system,¹³⁵ but they do not extinguish the underlying substantive claim.¹³⁶ In these jurisdictions, a dismissal on statute-of-limitations grounds is “a judgment on the procedural merits, not the substantive merits.”¹³⁷

2. The Effect of Statute-of-Limitations Dismissals That Are Claim Preclusive

In other states, statute-of-limitations dismissals are claim preclusive. In these jurisdictions, a statute-of-limitations dismissal bars the plaintiff from refiling the action anywhere.¹³⁸ These states treat statute-of-limitations dismissals as judgments “on the merits.”¹³⁹ Under this approach, the

132. *See id.* at 504–06.

133. *See, e.g.,* Ray & Sons Masonry Contractors, Inc. v. U.S. Fid. & Guar. Co., 114 S.W.3d 189, 197 (Ark. 2003); Advest Inc. v. Wachtel, 668 A.2d 367, 371 (Conn. 1995); Stewart *ex rel.* K.B. v. G.M., 490 N.W.2d 715, 717 (N.D. 1992); Green v. Siegel, Barnett & Schutz, 557 N.W.2d 396, 405 (S.D. 1996).

134. Issue preclusion “bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment.” Taylor v. Sturgell, 553 U.S. 880, 892 (2008) (quoting New Hampshire v. Maine, 532 U.S. 742, 748 (2001)). Unlike claim preclusion, issue preclusion does not require a judgment “on the merits.” *See id.* The issue that is resolved by a statute-of-limitations dismissal is that the statute of limitations in the state that rendered the judgment has expired. *See, e.g., Advest, Inc.*, 668 A.2d at 371 (“Although a judgment based on the running of the statute of limitations bars the plaintiff from bringing an action to relitigate the claim within that jurisdiction, it is not a judgment on the merits and does not erase the plaintiff’s claim.”).

135. For example, a judgment may preclude a plaintiff from obtaining a remedy from any court in one state’s court system, but it does not preclude the plaintiff from obtaining a remedy from a court in another state’s court system or a court in the federal court system.

136. *See, e.g.,* Gomez v. ITT Educ. Servs., Inc., 71 S.W.3d 542, 545 (Ark. 2002); Albrecht v. Gen. Motors Corp., 648 N.W.2d 87, 91 (Iowa 2002); Griffin v. BSFI W. E & P, Inc., 812 So. 2d 726, 732 (La. Ct. App. 2002).

137. *E.g., Griffin*, 812 So. 2d at 732.

138. *See e.g.,* Allie v. Ionata, 503 So. 2d 1237, 1241 (Fla. 1987) (“An adjudication based upon the running of a statute of limitation, as a bar to further action, is just such a judgment on the merits.” (quoting Creech v. Town of Walkerton, 472 N.E.2d 226, 228 (Ind. Ct. App. 1984))).

139. *See, e.g.,* Montañó v. Browning, 48 P.3d 494, 496 (Ariz. Ct. App. 2002); Towe v. Connors, 644 S.E.2d 176, 178 (Ga. Ct. App. 2007); Rein v. David A. Noyes & Co., 665 N.E.2d 1199, 1204–05 (Ill. 1996); N. Am. Specialty Ins. v. Bos. Med. Grp., 906 A.2d 1042, 1050 (Md. Ct. Spec. App. 2006).

dismissal extinguishes both the plaintiff's ability to obtain a remedy and the underlying substantive right.¹⁴⁰

States have departed from the traditional view and adopted this rule for various reasons. In some states, the rule is based on a narrow interpretation of state rules that parallel Federal Rule of Civil Procedure 41(b), which governs the effect of involuntary dismissals.¹⁴¹ Rule 41(b) provides that, "unless the dismissal order states otherwise," an involuntary dismissal operates as a judgment "on the merits," except if dismissed for (1) lack of jurisdiction, (2) lack of venue, or (3) failure to join a party under Rule 19.¹⁴² Because a statute-of-limitations dismissal is not one of the enumerated exceptions, some states have decided that it operates as a judgment on the merits.¹⁴³ In other states, the rule is written into the statute itself. These statutes explicitly state that the expiration of the limitations period extinguishes both the remedy and the right.¹⁴⁴

*B. The Missing Factor
in the Clear Legal Prejudice Analysis: Res Judicata*

The differences in state preclusion law create significant differences in what it means for a defendant to lose the ability to assert a statute-of-limitations defense. In jurisdictions where statute-of-limitations dismissals are not claim preclusive, a defendant will be subject to a subsequent lawsuit whether a court dismisses the plaintiff's initial claim without prejudice or on statute-of-limitations grounds.¹⁴⁵ Thus, the defendant's interests are not substantially impaired by the "loss" of a statute-of-limitations defense. But in jurisdictions where statute-of-limitations dismissals are claim preclusive, a court's decision to dismiss without prejudice can substantially impair a defendant's interests.¹⁴⁶ A defendant would not be subject to a subsequent lawsuit if the court dismissed the claim on statute-of-limitations grounds. But if the court dismisses without prejudice, the defendant can be haled into court upon the plaintiff's refiling in a different jurisdiction.

To fairly balance the interests of the parties, the clear legal prejudice analysis should reflect the totality of the circumstances.¹⁴⁷ Both the bright-line rule and the balancing test fail to do so as they are currently applied. The bright-line rule is based on the faulty premise that statute-of-limitations dismissals are always claim preclusive. As such, the bright-line rule is misleading and inefficient in jurisdictions where statute-of-limitations dismissals are not claim preclusive. The balancing test is equally problematic because it fails to consider the significance (or lack thereof) of

140. *See, e.g.*, WIS. STAT. ANN. § 893.05 (West 2015).

141. *Compare* FED. R. CIV. P. 41(b), *with* S.C. R. CIV. P. 41(b), *and* COLO. R. CIV. P. 41(b).

142. FED. R. CIV. P. 41(b).

143. *E.g.*, *Washington v. Sinai Hosp. of Greater Detroit*, 733 N.W.2d 755, 757 (Mich. 2007). This approach follows the federal court approach.

144. *E.g.*, WIS. STAT. ANN. § 893.05.

145. *See supra* note 132 and accompanying text.

146. *See supra* notes 138–40 and accompanying text.

147. *Arias v. Cameron*, 776 F.3d 1262, 1274–75 (11th Cir. 2015).

the loss of a statute-of-limitations defense. It does not resolve, and therefore cannot balance, how the loss of a statute-of-limitations defense would affect the defendant's interests. This approach is inefficient in jurisdictions where statute-of-limitations dismissals are claim preclusive.

Given the variations in preclusion law, neither approach should be uniformly applied.¹⁴⁸ Rather, courts should conduct a threshold inquiry into whether a statute-of-limitations dismissal would be claim preclusive.¹⁴⁹ When a statute-of-limitations dismissal would not be claim preclusive, courts should use their established balancing tests to decide whether to dismiss a claim without prejudice. A defendant's loss of a statute-of-limitations defense should not factor into the analysis. On the other hand, when a statute-of-limitations dismissal would be claim preclusive, courts should apply the bright-line rule and dismiss the claim on statute-of-limitations grounds.

1. When Courts Should Use the Bright-Line Rule

When a statute-of-limitations dismissal is claim preclusive, it has a fundamentally different effect than a dismissal without prejudice: the plaintiff cannot refile the lawsuit in another jurisdiction even if a longer statute of limitations would apply elsewhere. In these jurisdictions, a statute-of-limitations dismissal provides the defendant with an absolute defense to liability.¹⁵⁰ Thus, a defendant's interests are substantially impaired when she loses the ability to assert that defense. In these jurisdictions, the courts or the legislatures have decided that a defendant acquires a right to an absolute defense when a plaintiff files a time-barred claim. A defendant's right to assert a statute-of-limitations defense is equivalent to a plaintiff's right to assert a substantive claim.¹⁵¹ This leads to the question: Who should suffer, the plaintiff who mistakenly files a time-barred claim or the defendant who is forced into court against her will?

Even at common law, where plaintiffs had an absolute right to voluntarily dismiss their claims prior to judgment or verdict, courts denied voluntary dismissal in cases where the defendant was entitled to a judgment on the merits.¹⁵² In jurisdictions where statute-of-limitations dismissals are claim preclusive, the defendant is entitled to a judgment on the merits when a plaintiff files a time-barred claim. A plaintiff should not be able to use a

148. This issue is particularly problematic when a federal circuit court adopts one approach because it is binding on all of the district courts within that circuit. For example, the Fifth Circuit includes district courts in Louisiana, Mississippi, and Texas. In Louisiana, statute-of-limitations dismissals are not claim preclusive. *See Griffin v. BSFI W. E & P, Inc.*, 812 So. 2d 726, 732 (La. Ct. App. 2002).

149. *See Ross v. Raymark Indus., Inc.*, No. 84-3663, 1985 WL 5035 (E.D. Pa. Dec. 30, 1985). This approach assumes the defendant has a valid statute-of-limitations defense. If there is a dispute about whether a claim is time barred, that should be resolved before the voluntary dismissal issue.

150. *See supra* Part III.A.1.

151. *See* Brief for Appellants at 26, *Gross v. Spies*, 133 F.3d 914 (4th Cir. 1998) (Nos. 96-2146, 96-2203, 96-2150, 96-2149, 96-2147, 96-2204).

152. *See supra* note 22 and accompanying text.

procedural rule to avoid an adverse judgment on the merits. Further, there is no amount of costs that can adequately compensate a defendant for the loss of an absolute defense to liability.¹⁵³ Therefore, in these jurisdictions, there is no need to balance any factors; the loss of a statute-of-limitations defense constitutes per se legal prejudice sufficient to bar a dismissal without prejudice.

Recall in *McCants*, the Eleventh Circuit held that the loss of a statute-of-limitations defense alone does not constitute clear legal prejudice.¹⁵⁴ The court emphasized that the plaintiff had acted diligently and that there was no evidence of bad faith.¹⁵⁵ The court found that the loss of a valid statute-of-limitations defense would merely result in a subsequent lawsuit on the same facts, and therefore the defendant would not suffer clear legal prejudice as a result of a dismissal without prejudice.¹⁵⁶ This action, however, arose in Alabama and the court failed to consider that statute-of-limitations dismissals are claim preclusive in that state.¹⁵⁷ If the court dismissed the claim on statute-of-limitations grounds, the defendant would be completely absolved from liability.

Similarly in *Klar* and *Germain*, the district courts granted the plaintiffs' motions for voluntary dismissal without prejudice.¹⁵⁸ The courts based their decisions on the lack of evidence of abusive intent on the part of the plaintiffs and on the immaturity of the case.¹⁵⁹ Still, the courts failed to consider the claim-preclusive effect of statute-of-limitations dismissals in New York. While New York preclusion law may not have been settled when these cases were decided, the state now holds that statute-of-limitations dismissals are claim preclusive.¹⁶⁰ Nonetheless, courts in various jurisdictions continue to cite *Klar* and *Germain* for the proposition that the loss of a statute-of-limitations defense alone is not sufficient to bar voluntary dismissal without prejudice.¹⁶¹

These decisions have cemented bad precedent in jurisdictions where statute-of-limitations dismissals are not claim preclusive. These courts do

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

154. *McCants v. Ford Motor Co.*, 781 F.2d 855, 859 (11th Cir. 1986).

155. *Id.*

156. *Id.*

157. See *Clothier v. Counseling, Inc.*, 875 So. 2d 1198, 1200 (Ala. Civ. App. 2003) (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995) (holding a dismissal on statute-of-limitations grounds is a dismissal on the merits for purposes of claim preclusion)).

158. See *Germain v. Semco Serv. Mach. Co.*, 79 F.R.D. 85, 87 (E.D.N.Y. 1978); *Klar v. Firestone Tire & Rubber Co.* 14 F.R.D. 176, 176 (S.D.N.Y. 1953).

159. See *Germain*, 79 F.R.D. at 87; *Klar*, 14 F.R.D. at 176.

160. *Smith v. Russell Sage Coll.*, 429 N.E.2d 746, 750 (N.Y. 1981) (holding that a dismissal on statute-of-limitations grounds is "sufficiently close to the merits for claim preclusion purposes to bar a second action").

161. See, e.g., *McCants*, 781 F.2d at 858; *Greguski v. Long Island R.R.*, 163 F.R.D. 221, 224 (S.D.N.Y. 1995) (citing *Klar* for the proposition that "the fact that the movant seeks a dismissal to take advantage of a more favorable limitations period by subsequently filing suit in a different court should not bar the dismissal"); *Bamdad Mech. Co. v. United Techs. Corp.*, 109 F.R.D. 128, 131-32 (D. Del. 1985).

not account for the substantial prejudice to the defendant that results from a dismissal without prejudice.¹⁶²

2. When Courts Should Use the Balancing Test

When a statute-of-limitations dismissal is not claim preclusive, it has largely the same effect as a dismissal without prejudice: the plaintiff can refile the claim in a jurisdiction with a longer statute of limitations. The only notable difference is that, as a matter of issue preclusion, a statute-of-limitations dismissal will bar the plaintiff from refiling the action in the original jurisdiction, while a dismissal without prejudice will not.¹⁶³ When a plaintiff seeks a dismissal without prejudice for the express purpose of refiling the action elsewhere, the only logical conclusion is that the plaintiff will not refile the action in the original forum. In fact, a court can ensure that the plaintiff will not refile the action in the original forum by imposing a curative condition to that effect.¹⁶⁴ When a court enters judgment for the defendant on statute-of-limitations grounds, the court cannot impose curative conditions to protect the defendant from duplicative costs and efforts.¹⁶⁵ The defendant is left subject to a second lawsuit at her own expense.¹⁶⁶

In these jurisdictions, courts should use their established clear legal prejudice balancing tests to determine whether a dismissal without prejudice is warranted. Courts should not consider a defendant's loss of a statute-of-limitations defense as an additional factor because the defendant's interests are not impaired as a result of a dismissal without prejudice.¹⁶⁷ The defendant will be subject to another lawsuit even if the court dismisses the claim on statute-of-limitations grounds.¹⁶⁸

162. The Seventh Circuit skirted around the *res judicata* factor in *Wojtas*. In *Wojtas*, the court noted that in Wisconsin the expiration of the statute of limitations extinguishes both the remedy and the right to bring the substantive claim. *See Wojtas v. Capital Guardian Tr. Co.*, 477 F.3d 924, 927 (7th Cir. 2007). The court therefore concluded that the defendant would suffer clear legal prejudice as a result of a dismissal without prejudice. *Id.* at 927–28. While this decision is sound, the court did not adequately explain its reasoning. The court cited *Phillips* and *Metropolitan Federal Bank* for the proposition that it is an abuse of discretion to allow voluntary dismissal without prejudice when the defendant would lose a statute-of-limitations defense. *Id.* Courts have interpreted this as a bright-line rule in the Seventh Circuit rather than a narrow decision based on Wisconsin's preclusion law. *See, e.g.,* *Arias v. Cameron*, 776 F.3d 1262, 1274 (11th Cir. 2015); *Butts ex rel. Iverson v. Evangelical Lutheran Good Samaritan Soc'y*, 802 N.W.2d 839, 843 (Minn. Ct. App. 2011).

163. *Compare, Advest, Inc. v. Wachtel*, 668 A.2d 367, 371 (Conn. 1995) (holding that as a matter of issue preclusion, a judgment on statute-of-limitations grounds in Connecticut is not on the merits and only precludes the plaintiff from relitigating the issue of whether the Connecticut statute of limitations has run; “[i]n other words, the prior action renders the issue of Connecticut’s statute of limitations subject to the doctrine of issue preclusion”), with *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 603 (5th Cir. 1976) (explaining that a dismissal without prejudice puts the plaintiff in the legal position as if he never filed the lawsuit).

164. *See Ross v. Raymark Indus., Inc.*, No. 84-3663, 1985 WL 5035, at *2 (E.D. Pa. Dec. 30, 1985).

165. *See id.*

166. *See id.*

167. *See, e.g., Durham v. Fla. E. Coast Ry. Co.*, 385 F.2d 366, 368–69 (5th Cir. 1967).

168. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 499 (2001).

When a dismissal without prejudice is warranted under the standard balancing test, these courts should allow the plaintiff to dismiss her claim without prejudice so she can refile it in a jurisdiction where a longer statute of limitations will apply. When a dismissal without prejudice is not warranted under the standard balancing test, courts should dismiss the action with prejudice, not on statute-of-limitations grounds.¹⁶⁹

Recall in *Phillips*, the Fifth Circuit held that a defendant's loss of a statute-of-limitations defense constitutes per se legal prejudice sufficient to bar dismissal without prejudice.¹⁷⁰ The court emphasized that a voluntary dismissal without prejudice would cause the defendant to lose an absolute defense.¹⁷¹ The court overlooked the fact that statute-of-limitations dismissals are not claim preclusive in Louisiana, where the action originated.¹⁷² In other words, a statute-of-limitations defense is not an absolute defense in Louisiana. This holding is misleading because it is based on the faulty premise that dismissals on statute-of-limitations grounds are always claim preclusive. It assumes that a statute-of-limitations defense provides defendants with an absolute defense to liability. The plaintiff could have refiled his claim in another jurisdiction despite the court's dismissal on statute-of-limitations grounds.¹⁷³ But the language and reasoning in the opinion misled the plaintiff to believe his claim was extinguished. This decision is similarly inefficient because if the plaintiff does refile the action in another jurisdiction, the defendant has no protection from duplicative costs and efforts.¹⁷⁴

This flawed reasoning has developed bad precedent in jurisdictions where statute-of-limitations dismissals are not claim preclusive. These courts fail to adequately balance the interests of the parties.

CONCLUSION

The voluntary dismissal analysis should account for the individual circumstances of each case. When a plaintiff seeks to voluntarily dismiss a time-barred claim without prejudice to refile it in another jurisdiction, a court must consider the impact such action would have on the defendant's interests. A court cannot do so without resolving what it means for a defendant to lose the ability to assert a statute-of-limitations defense in a subsequent lawsuit. Courts can make this determination by resolving whether a statute-of-limitations dismissal would be claim preclusive under the applicable state law. This determines whether the loss of a statute-of-limitations defense would substantially harm the defendant's interests and,

169. A dismissal with prejudice will preclude the plaintiff from refileing the action, while a statute-of-limitations dismissal will not.

170. See *Phillips v. Ill. Cent. Gulf R.R.*, 874 F.2d 984, 987 (5th Cir. 1989).

171. See *id.*

172. See *Griffin v. BSFI W. E & P, Inc.*, 812 So. 2d 726, 731–32 (La. Ct. App. 2002).

173. See *supra* Part III.A.1; see also *Semtek*, 531 U.S. at 499 (explaining that in a jurisdiction where statute-of-limitations dismissals are not claim preclusive, a defendant remains subject to liability in another jurisdiction even if the court purports to dismiss a claim on statute-of-limitations grounds “in [its] entirety on the merits and with prejudice”).

174. See *supra* notes 125–26 and accompanying text.

thus, whether the court should proceed with a bright-line rule or balancing test.

In jurisdictions where statute-of-limitations dismissals are not claim preclusive, the loss of a statute-of-limitations defense does not substantially impact the defendant's interests. In these jurisdictions, courts should allow a plaintiff to dismiss a claim without prejudice so long as other factors weigh in favor of doing so. By contrast, in jurisdictions where statute-of-limitations dismissals are claim preclusive, the loss of a statute-of-limitations defense substantially impairs a defendant's interests. In these jurisdictions, courts should not allow a plaintiff to dismiss a claim without prejudice. Instead, they should enter judgment for the defendant by either dismissing the action with prejudice or dismissing the claim on statute-of-limitations grounds. Such a framework would help to alleviate the inefficiencies perpetuated by the current approaches courts use to resolve motions for voluntary dismissal of time-barred claims.