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Deregulating Voluntary Dismissals

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Federal Rule of Civil Procedure 41(a) and its state law counterparts permit, under certain circumstances, a plaintiff to voluntarily dismiss her lawsuit without prejudice. Within certain windows of opportunity, plaintiffs can take this unilateral action without the permission of the defendant or of the court, and without any conditions attached. When those windows are closed, plaintiffs can still seek dismissal with the approval of the defendant or of the court. This regime is problematic: giving plaintiffs this unilateral power is an anachronism in an age of managerial judging, and can be considerably inconvenient for defendants. Likewise, the case law has developed an unwieldy set of factors to guide trial courts in attaching conditions to the plaintiff seeking dismissal of a case.

This article advances several ways to rationalize voluntary dismissals. While Federal Rule 41(a) and its state law counterparts need some refinement, this article endorses their allowing a small window of opportunity at the beginning of a suit for plaintiff to dismiss without prejudice, with no conditions attached. When that window closes, plaintiff can still obtain dismissal of her suit, either by obtaining the defendant's or the court's permission. With regard to the latter, the presumptive sole condition should be an award of reasonable attorneys' fees from plaintiff to defendant. Among the advantages of this condition is that it is much easier to administer than the current standards, fits comfortably within the language of Rule 41(a), avoids some of the pitfalls of loser pay proposals, and in part codifies the existing practice of many courts.

I. INTRODUCTION

When a lawsuit is filed, it is usually the defendant who considers ways to have the suit dismissed by motion. On occasion, however, and for a variety of reasons, the plaintiff may desire to discontinue the litigation by dismissing her own suit. Federal Rule of Civil

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An earlier version of this article was presented at the University of Cincinnati College of Law Summer Scholarship Series, and we benefited from the comments received there, as well as those by Bob Bone, Lonny Hoffman, Richard Myers, Tom Rowe, Gina Saelinger and David Skidmore, and U.S. District Judge Walter Rice and U.S. Magistrate Judge Michael Merz. We are responsible for any errors that remain.

Procedure 41(a)(1),[1] along with its state law counterparts permits the plaintiff to do this under certain circumstances. Even when the plaintiff has lost the opportunity to voluntarily dismiss the case, Rule 41(a)(2) allows the plaintiff to petition the court for such dismissal, subject to any conditions the court may attach.

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1. The entirety of Rule 41 reads as follows:

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) DISMISSAL OF COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) COSTS OF PREVIOUSLY-DISMISSED ACTION. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

So described, the various ways a plaintiff may voluntarily dismiss her case may not seem a particularly cutting-edge topic in civil procedure. Many civil procedure casebooks either do not mention the topic at all,[2] or devote but a handful of pages to the issue.[3] Evidently, the issue is underappreciated. Firm numbers are difficult to come by, but it appears that plaintiffs use, or seek to use, this option in an appreciable number of cases.[4] This is not surprising, because plaintiffs can use the option strategically. If the case appears weak after filing, or for other reasons the forum is not favorable, the plaintiff can dismiss and possibly refile elsewhere. Likewise, the voluntary dismissal option can encourage litigation by increasing the value of the suit to the plaintiff. The option arguably makes it easier to file suit; it thus in effect enhances the value of the suit.[5]

Voluntary dismissals can arise in high-profile litigation. Consider the recent defamation suit filed in the federal district court for the District of Columbia by Sidney Blumenthal, then a presidential aide, against cybergossip columnist Matt Drudge during the Clinton impeachment controversy.[6] The suit was filed late in 1997, and was followed by several years of seemingly interminable settlement discussions, disputes, and motions over personal jurisdiction, discovery, and other issues, as well as a long string of rulings by the district judge. Late in 2000, the trial court rendered a decision on a discovery motion that in effect would have required

2. *See* BARBARA ALAN BABCOCK & TONI M. MASSARO, CIVIL PROCEDURE: CASES AND PROBLEMS (2d ed. 2001); A. LEO LEVIN ET AL., CIVIL PROCEDURE (2d ed. 2000); LINDA J. SILBERMAN & ALLAN R. STEIN, CIVIL PROCEDURE: THEORY AND PRACTICE (2001).

3. *See* JOHN J. COUND ET AL., CIVIL PROCEDURE 943–44 (8th ed. 2001); DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE 509–10 (4th ed. 2001); RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 332–34 (3d ed. 2001); GEOFFREY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE: STATE AND FEDERAL 1002–03 (8th ed. 1999); ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE: CASES AND PROBLEMS 922–24 (2003); FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 703 (5th ed. 2001); RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 204–06 (3d ed. 2000); JEFFREY A. PARNESS, CIVIL PROCEDURE FOR FEDERAL AND STATE COURTS 669–70 (2001); STEPHEN N. SUBRIN ET AL., CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 504 (2000); LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 816–18 (2d ed. 2000).

One leading case book reduced its coverage of the topic from six pages (including a reprinted case) to three pages in the most recent edition. *Cf.* MARCUS, *supra*, at 204–06, *with* RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 196–201 (2d ed. 1995).

4. *See infra* Part II.C.

5. *See* Bradford Cornell, *The Incentive to Sue: An Option Pricing Approach*, 19 J. LEGAL STUD. 173 (1990).

6. For an extensive discussion and analysis of the case, see Roger Parloff, *If This Ain't Libel . . .*, 4 BRILL'S CONTENT 94 (Fall 2001).

the plaintiffs-Blumenthal and his wife, Jacqueline-to take numerous other depositions before deposing the defendant.[7] Early in 2001, having spent tens of thousands of dollars in attorneys'fees up to that point and facing the prospect of paying still more, "the Blumenthals just wanted out."[8] In other words, they wanted to voluntarily dismiss this suit, but they couldn't do so unilaterally, because that opportunity had long since passed under Rule 41(a)(1). They could have approached the judge under Rule 41(a)(2). Apparently uncertain of the conditions the district judge may have attached to such a dismissal (including the possible payment of attorneys' fees to defendant), plaintiffs stipulated with defendant for a dismissal, with $2500 being paid to Drudge per Rule 41(a)(1)(ii).[9]

As the *Blumenthal* litigation illustrates, plaintiffs may wish to dismiss their lawsuits in lieu of settlement or a resolution on the merits. Early in a suit, for example, a plaintiff might be on the losing end of a court decision, such as the denial of a motion for a preliminary injunction. Later on in a suit, mounting expenses or unfavorable prospects for obtaining relief might convince the plaintiff abandon the action. The current civil procedure regime in federal courts, and in most states, presents a complex set of options to the plaintiff who simply wants out of the suit. The balance of this Article describes the current regime, discusses its problematic aspects, and suggests avenues for reform.

The Article proceeds as follows: Part II outlines the current regulation of voluntary dismissal. It begins with a brief history of the right of voluntary dismissal, noting that both federal and state rules have retreated from the expansive right plaintiffs enjoyed at common law. Federal Rule 41(a)(1)(i) gives the plaintiff a small window at the beginning of the suit to dismiss unconditionally, without prejudice. Most states do the same, though about a dozen provide for wider windows than does the federal system. Whatever

7. *Id.* at 111.

8. *Id.* at 112.

9. *Id.* at 112–13. For another high-profile defamation case involving Rule 41(a) in the same judicial district as *Blumenthal*, see *Robertson v. McCloskey*, 121 F.R.D. 131 (D.D.C. 1988) (in which a suit by television minister and Presidential candidate Pat Robertson against a member of Congress was dismissed under Rule 41(a)(2) on the condition of payment of almost $30,000 in attorneys' fees and costs to defendant). Indeed, perhaps the Blumenthals considered the result in *Robertson* as they pondered their options under Rule 41(a). Presumably Drudge did too, and in theory he could have held out for a Rule 41(a)(2) dismissal. We can only speculate why he did not do so. There was no guarantee that the plaintiffs would enjoy the same result as the defendant in *Robertson*, and perhaps Drudge, too, had simply grown tired of the case, and was willing to settle for a virtually nominal amount.

the window is, once it closes, the plaintiff (absent settling with the defendant) needs the permission of the court to dismiss her case, per Federal Rule 41(a)(2), as well as its state counterparts. Those rules typically do not specify under what circumstances, and with what conditions, courts should grant such permission. Part II concludes with a survey of cases that have interpreted those rules.

Part III of the Article turns to the problematic aspects of current procedure. Initially, it addresses whether there should be any right of unconditional, voluntary dismissal at all. Such a broad right seems a vestige of common law civil practice and out of step with modern notions of managerial judging. It then addresses the complex and sometimes bewildering set of factors courts have developed to determine when a plaintiff should be able to dismiss her case.

In a parallel fashion, Part IV of the article suggests reforms for Rule 41(a). On the right of voluntary dismissal itself, the current federal rule gets it mostly right. A very limited right of unconditional dismissal is better than a very broad right, or no such option at all. As for the conditions courts attach to plaintiffs' requests for dismissal, the complicated set of factors most courts apply is suboptimal. A better approach is to automatically grant requests for dismissal without prejudice, subject to only one condition: that plaintiffs pay the reasonable attorneys' fees incurred up to that point by the defendant. This approach is better than the current plethora of factors because it is easier for courts to administer, is fairer to both plaintiffs and defendants, and reflects an emerging consensus in cases interpreting Rule 41(a)(2).

II. VOLUNTARY DISMISSALS: THE STATUS QUO

A. Plaintiff's Unilateral Right to Voluntarily Dismiss

1. History—In common law civil practice, a plaintiff had a broad right to dismiss her case without prejudice, thereby retaining the option to bring another suit on the same grounds. Early on, it appears, the plaintiff could take a dismissal even after a verdict had been rendered.[10] The right to dismiss was later limited to the time

10. Neil C. Head, *The History and Development of Nonsuit*, 27 W. VA. L.Q. 20, 23 (1920).

before a verdict was rendered.[11] Either way, the plaintiff was placed at a decided advantage over the defendant. To state the obvious, the plaintiff could simply abandon the suit, and perhaps try again later, if things did not go well. The defendant had no such option. The distinction did not trouble common law lawyers, for "plaintiff was viewed as the master of his case until a judgment was rendered, and therefore was permitted to dismiss the case voluntarily and without prejudice anytime prior to judgment."[12]

Typically by statute or rule, states have codified a plaintiff's right to voluntarily dismiss, but have subjected it to varying conditions. Some states remove the right only when a judgment or verdict is entered, very much like common law practice.[13] Other states set the cut-off time at earlier points in the litigation, such as before the jury retired to deliberate, before the case went to trial, or before an answer was filed.[14]

2. *Federal Practice*—Prior to the promulgation of the Federal Rules of Civil Procedure, federal courts, pursuant to the Conformity Act,[15] generally followed the state practice regarding voluntary dismissal found in the forum state in actions at law. In actions in equity, by contrast, "the plaintiff had a qualified right to dismiss at any time before an interlocutory or final decree was entered unless the defendant would suffer some prejudice beyond the threat of another suit."[16]

The Federal Rules promulgated in 1938 retained a dismissal option for plaintiffs but narrowly restricted its scope. Rule 41(a)(1)(i) stated that the option to dismiss "without order of court" could be exercised "by filing a notice of dismissal at any time before service by an adverse party of an answer."[17] Rule 41(a)(1)(ii) permits "a stipulation of dismissal signed by all parties who have appeared in the action."[18] When exercised, the latter option typically reflects a

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11. *See id.*; Paul M. Lipkin, Note, *The Right of a Plaintiff to Take a Voluntary Nonsuit or to Dismiss His Action Without Prejudice*, 37 VA. L. REV. 969, 969–70 (1951) (hereinafter Lipkin).

12. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 468 (3d ed. 1999) (footnote omitted).

13. Lipkin, *supra* note 11, at 971–72.

14. *Id.* at 971–86.

15. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197, Rev. Stat. § 914, *repealed by* Act of June 25, 1948, ch. 646, § 39, 62 Stat. 992 (codified as amended at 28 U.S.C. § 724 (1994)).

16. 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2363, at 253 (2d ed. 1994) (footnote omitted) [hereinafter WRIGHT & MILLER].

17. FED. R. CIV. P. 41(a)(1)(i).

18. FED. R. CIV. P. 41(a)(1)(ii).

settlement among all of the parties.[19] Rule 41(a)(1) goes on to state that any dismissal is "without prejudice," unless otherwise stated in the notice of dismissal.[20] This means that the plaintiff can in theory file one more lawsuit. This point is confirmed by the Rule's affirmation that a second dismissal will be considered an adjudication on the merits, thus barring any further lawsuits, in federal court at least, due to res judicata.[21] Finally, the Rule is made subject to the provisions of Rule 23(e).[22] That provision makes "dismissal[s] or compromise[s]" of class actions subject to court approval.[23] So an otherwise unilateral voluntary dismissal in class action cases under Rule 41(a)(1)(i) needs court approval.[24]

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19. *See* McCall-Bey v. Franzen, 777 F.2d 1178, 1184 (7th Cir. 1985); Michael E. Solimine, *Enforcement and Interpretation of Settlements of Federal Civil Rights Actions*, 19 RUTGERS L.J. 295, 302 (1988).

20. FED. R. CIV. P. 41(a)(1).

21. ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 97 (2001); WRIGHT & MILLER, *supra* note 16, § 2368. Our observation is limited to actions refiled in federal court, for it is possible that the plaintiff might be able to refile a suit in *state* court, free of preclusion problems. This possibility is suggested by *Semtek International, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), which held that the claim-preclusive effect of a federal judgment in the first case, dismissing a diversity action on statute of limitations grounds, is determined by law of the state where the federal court sits in an action refiled in state court.

22. FED. R. CIV. P. 41(a)(1).

23. FED. R. CIV. P. 23(e).

24. WRIGHT & MILLER, *supra* note 16, § 2363, at 256. Given the lack of discussion in the Advisory Committee Note, see note 25 *infra*, it may not be entirely clear why the exception was made for class action cases. Presumably it is due in large part for the same reasons that Rule 23(e) exists in the first instance, namely, to enable the court to protect the interests of the members of the class. *See* Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55, 56 (1999). Rule 41(a) and class actions can intersect in various ways. A putative class representative may, for example, seek to dismiss a case where the class has not yet been certified, WRIGHT & MILLER, *supra* note 16, § 2363, at 256 n.8 (summarizing examples), or a member of a certified class may seek to use Rule 41(a)(2) in an attempt to opt out, *see In re* Painewebber Limited Partnerships Litigation, 147 F.3d 132 (2d Cir. 1998) (refusing to permit such a dismissal). We have not uncovered an instance of a class representative seeking to dismiss, under Rule 41(a)(1)(i) or (a)(2), a *certified* class. So while Rule 23(e) mandates that "dismissals" or "compromises" of class actions are subject to court approval, it appears that most times courts are asked to approve the latter, not the former. This phenomenon is not surprising, since it is rarely in the plaintiffs' interests to voluntarily dismiss a certified class action, either unilaterally or by motion. A certified class action gives enormous bargaining power to the plaintiff, evidenced by the fact that many class actions settle soon after certification. *See* Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1546 & n.74 (2000); Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 142–46 (1996).

Why the rulemakers created this type of voluntary dismissal option is unclear.[25] While some authorities suggest that Rule 41(a)(1)(i) codified the aforementioned, pre-1938 equity practice,[26] the initial Advisory Committee Note barely says anything.[27]

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25. Charles Clark, while Dean at Yale Law School, was the initial Reporter to the Rules Advisory Committee and wrote voluminously on the Federal Rules of Civil Procedure during and after their adoption, and later when he served on the U.S. Court of Appeals for the Second Circuit. But a review of many of his considerable writings on the Federal Rules (summarized in Peter Charles Hoffer, *Judge Charles Edward Clark*, 15 CARDOZO L. REV. 767 (1993) (book review)) reveals that Judge Clark barely makes any reference to, much less discusses, Rule 41(a). For example, there is no mention of Rule 41(a) in one of his best-known books, CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING (2d ed. 1947). Likewise, Judge Clark did not author any opinion that discussed Rule 41(a). For an extensive study of Judge Clark's judicial rulings regarding civil procedure, which has no mention of Rule 41(a), see Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914 (1976). Due to a lack of access, Clark's personal papers and the unpublished notes and working papers of the original Advisory Committee were not directly examined for this Article, though possibly relevant. For discussion of those sources, see Peter Charles Hoffer, *Text, Translation, Context, Conversation, Preliminary Notes for Decoding the Deliberations of the Advisory Committee that Wrote the Federal Rules of Civil Procedure*, 37 AM. J. LEGAL HIST. 409 (1993); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 935–41 (2000).

One recent article has discussed the intent of the framers of Rule 41 by drawing on, among other things, the unpublished proceedings of the Advisory Committee in the 1930s. *See* Stephan B. Burbank, Semtek, *Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1042–46 (2002). While there is some discussion of Rule 41(a), *id.* at 1042–43, the bulk of that article concerns what the framers meant by the language in Rule 41(b) over what types of dismissals would be considered "upon the merits."

26. *See* Lipkin, *supra* note 11, at 985 ("the former equity practice has been codified"). This characterization is a stretch because the pre-1938 equity practice gave discretion to the court, as opposed to imposing a bright-line rule.

27. The 1937 Advisory Committee Note, with respect to Rule 41(a), states in its entirety as follows:

> Compare Ill. Rev. Stat. (1937) ch. 110, § 176, and English Rules Under the Judicature Act (The Annual Practice, 1937) O. 26.
>
> Provisions regarding dismissal in such statutes as U.S.C., Title 8, § 164 (Jurisdiction of district courts in immigration cases) and U.S.C., Title 31, § 232 (Liability of persons making false claims against United States; suits) are preserved by paragraph (1).

FED. R. CIV. P. 41(a) Advisory Committee's Note.

The reference to the Illinois statute is curious because it was unlike Rule 41(a)(1)(i), as it permitted a voluntary dismissal before a "trial or hearing." For a discussion of the Illinois statute as it existed at the time of the adoption of the Federal Rules, see Cary S. Fleischer, Comment, *The Vanishing Right of the Plaintiff to Voluntarily Dismiss His Action*, 9 J. MAR. J. PRAC. & PROC. 853, 855–56 (1976). The then Illinois provision is not dissimilar to the current provision. *See* 735 ILL. COMP. STAT. 5/2-1009 (1993). "The Advisory Committee Notes that accompanied the original Rules were often terse, and the Advisory Committee itself apparently did not intend that they be given binding effect." Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1112 (2002) (footnote omitted). Thus, one should not be too critical of the brevity of the Note in question.

From the language of the Rule itself, the drafters presumably desired to limit the plaintiff's unilateral right to dismiss "to the early stages of the proceedings, thus curbing the abuses of this right that commonly had occurred under state procedures."[28] While the overall ethos of the rulemakers was to simplify arcane and technical procedural requirements, and hence "lower barriers to entry"[29] to the federal courts, the adoption of Rule 41(a)(1)(i) is arguably a partial counterexample to that trend in that it somewhat reflects old procedural practice.[30] Also, it probably reflects in part the lack of uniformity among relevant state practices in the 1930s. The federal rulemakers were free to choose what they considered the most optimal rule among several options.

Why was a modest voluntary dismissal option (different both from the broad common law rule and from having no such option at all) adopted? Perhaps the rulemakers, generally hostile to common law procedure, thought the common law rule excessively formalistic and wasteful. On the other hand, perhaps they thought it too radical of a change to abandon the common law rule entirely. The window of opportunity they provided at the outset of suit corresponded in some ways to other parts of Rule 41, which state that dismissals for jurisdictional, venue, and Rule 19 reasons would, unless otherwise stated, not be on the merits.[31] Those suits could be refiled again. A dismissal pursuant to a Rule 12(b) motion leads essentially to the same result.

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28. WRIGHT & MILLER, *supra* note 16, § 2363, at 253–54 (footnote omitted). This inference is supported by some contemporary expressions by the rulemakers. *See* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 397 (1990):

> Prior to the promulgation of the Federal Rules, liberal state and federal procedural rules often allowed dismissals or nonsuits as a matter of right until the entry of the verdict, *see, e.g.*, N.C. Code § 1-224(1943), or judgment, *see, e.g.*, La. Code Prac.Ann., Art. 491 (1942) .... Rule 41(a)(1) was designed to curb abuses of these nonsuit rules. See 2 American Bar Association, Proceedings of the Institute on Federal Rules, Cleveland, Ohio, 350 (1938) (Rule 41(a)(1) was intended to eliminate "the annoying of a defendant by being summoned into court in successive actions and then, if no settlement is arrived at, requiring him to permit the action to be dismissed and another one commenced at leisure") (remarks of Judge George Donworth, member of the Advisory Committee on Rules of Civil Procedure)...

29. Resnik, *supra* note 25, at 935. For further discussion of the general intent of the drafters of the Rules promulgated in 1938, see 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1004–05 (3d ed. 2002); Resnik, *supra* note 25, at 934–37.

30. *See, supra* notes 10-14 and accompanying text.

31. FED. R. CIV. P. 41(b). For a general discussion of the ethos of the drafters of the 1938 Rules, see Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure From the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1 (1989).

Rule 41(a)(1) has only undergone modest change since its inception. The most significant amendment took place in 1948, when language was added that cut off the right to dismiss unilaterally in the event that a motion for summary judgment was filed. The drafters thought it was anomalous not to have a reference to a summary judgment motion, when such a motion can be filed at the same time as, or even before, an answer.[32] Furthermore, federal courts have for the most part not subjected Rule 41(a)(1) to conflicting interpretation. Read literally, Rule 41(a)(1)(i) bestows an unconditional right on the plaintiff to dismiss, as long as an answer or a summary judgment motion has not been served. It does not matter that considerable other activity has occurred, such as hearings or rulings on injunctive relief, the filing of Rule 12 motions, discovery, and the like. A few cases that have suggested that such other activity might be a bar to the exercise of plaintiff's right have been marginalized as precedent.[33]

3. State Practice—Since their promulgation, the Federal Rules have enjoyed success as a model for implementation by the states. According to John Oakley's seminal article,[34] twenty-two states, plus the District of Columbia, essentially replicate the Federal Rules (with usually only minor exceptions), while another ten states have, by rule or statute, substantially followed the federal model.[35] With regard to the plaintiff's right of voluntary dismissal, the federal model has been as successful. Thirty-seven states follow the federal model, or something very close to it, curtailing though not

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32. FED. R. CIV. P. 41(a) Advisory Committee's Note, *reprinted in* 5 F.R.D. 433, 465–66 (1948); WRIGHT & MILLER, *supra* note 16, § 2363, at 254.

33. The leading case of this sort is *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105 (2d Cir. 1953). That case involved a preliminary injunction hearing that lasted several days. Thereafter the court refused to let the plaintiff voluntarily dismiss as of right, reasoning that "a literal application of Rule 41(a) 1 . . ." to the present controversy would not be in accord with its essential purpose of preventing arbitrary dismissals after an advanced stage of a suit has been reached." *Id.* at 108. A handful of other cases seem to have made similar holdings. *See* WRIGHT & MILLER, *supra* note 16, § 2363, at 263–64. Most courts, however, have expressly rejected *Harvey*, ruling that Rule 41(a)(1)(i) must be read literally. *See, e.g.*, D.C. Electronics, Inc. v. Nartron Corp., 511 F.2d 294 (6th Cir. 1975). *See generally* WRIGHT & MILLER, *supra* note 16, § 2363, at 264–65. While not expressly overruling *Harvey*, later Second Circuit cases have "limited it to its facts." WRIGHT & MILLER, *supra* note 16, § 2363, at 264 (footnote omitted); *see also* Santiago v. Victim Servs. Agency, 753 F.2d 219, 222 (2d Cir. 1985) (discussing these cases).

34. John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

35. *Id.* at 1377–78. The study identified those jurisdictions that replicate the Federal Rules by utilizing nine criteria, including whether the numbering and ordering of state rules conform to the federal model, and the extent to which the state rules have replicated important amendments to the Federal Rules. *Id.* at 1374–75.

eliminating the common law prerogative. That leaves thirteen states which do not follow Federal Rule of Civil Procedure 41(a)(1)(i).[36]

Much as state practice prior to 1938 differed, the same is true for the thirteen states. Most permit dismissals up to the time the trial starts,[37] or later.[38] Ohio is an example of a departure from the federal model. That state adopted its version of the Federal Rules in 1970, but expressly declined to adopt the federal rule on voluntary dismissal. The reasons for this departure are hardly clear. The official drafting history of Ohio rulemakers notes the difference but offers no reasons for the departure.[39] A later appellate court decision written by a judge privy to the drafting observed that initially the federal rule was to be utilized.[40] But it was objected that the federal language would depart from what was described as Ohio's tradition of encouraging voluntary dismissal, so the current language, cutting off the right to dismissal when the trial commences,[41] was substituted.[42]

Cases interpreting this provision demonstrate that plaintiffs in Ohio courts enjoy a dismissal right similar to the common law privilege. For example, Ohio cases have held that the voluntary dismissal option can be exercised even when the trial court has rendered an adverse decision—but before the decision has been

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36. The thirteen states are Arkansas, California, Connecticut, Georgia, Illinois, Missouri, Nebraska, North Carolina, Ohio, Texas, Virginia, and Washington. The relevant provisions of all of the states are found in an Appendix to this Article.

37. *See, e.g,*, 735 ILL. COMP. STAT. 5/2-1009 (1993); OHIO R. CIV. P. 41(A)(1)(a).

38. *See, e.g.*, ARK. R. CIV. P. 41(a) (allowing plaintiff to dismiss before final submission of case to jury or judge); GA. CODE ANN. § 9-11-41 (1993) (allowing plaintiff to dismiss at any time before plaintiff rests); MO. REV. STAT. § 510.130 (1952) (allowing plaintiff to dismiss at any time before case is finally submitted to judge or jury); NEB. REV. STAT. § 25-601(1) (1995) (same); N.C. R. CIV P. 41(a)(1)(i) (allowing plaintiff to dismiss at any time before plaintiff rests); OKLA. STAT. tit. 12, § 683 (2000) (allowing plaintiff to dismiss before final submission of case to jury or judge); WASH. R. CIV. P. 41(a)(1)(B) (allowing plaintiff to dismiss at any time before plaintiff rests at conclusion of his opening case).

39. OHIO R. CIV. P. 41 staff note (1970).

40. Standard Oil Co. v. Grice, 345 N.E.2d 458, 460 (Ohio Ct. App. 1975).

41. OHIO R. CIV. P. 41(A)(1)(a).

42. *Grice*, 345 N.E.2d at 460-61. The court observed:

> Minutes of the meetings [concerning whether or not to adopt the federal rule] indicate that objections to the federal rule were advanced. Refusal of the court on the day of trial to grant a necessary continuance is the only example reported in the minutes for the use of a voluntary dismissal without prejudice. Other examples resulting from adverse decisions on preliminary matters were mentioned.

Id.

journalized.[43] The Rule has been read literally, so that any inquiry into plaintiff's motives for dismissing, at the eleventh hour or otherwise, and into hardships suffered by the defendant, is inappropriate.[44]

B. Dismissal with Permission of the Court

If the plaintiff does not or cannot voluntarily dismiss unilaterally or with the agreement of the defendant, her other option is to seek the court's permission. Under Federal Rule 41(a)(2), the court can order a dismissal, "upon such terms and conditions as the court deems proper."[45] What the drafters had in mind is not clear,[46] but

43. Conley v. Jenkins, 602 N.E.2d 1187, 1190 (Ohio Ct. App. 1991); *Grice*, 345 N.E.2d at 460–61. Under Ohio law, "[a] judgment is effective only when entered by the clerk upon the journal." OHIO R. CIV. P. 58(A).

44. State *ex rel.* Hunt v. Thompson, 586 N.E.2d 107 (Ohio 1992). *Cf.* Denham v. New Carlisle, 716 N.E.2d 184 (Ohio 1999) (voluntary dismissal may designate claims against less than all of several named defendants). For further discussion of the application of the Ohio rule, see 5 MICHAEL E. SOLIMINE, ANDERSON'S OHIO CIVIL PRACTICE § 168.02 (1994 & 2002 Supp.).

Two other aspects of Ohio practice are worth mentioning, one of which further expands the plaintiff's option, while the other reduces the advantage to plaintiff. On the former, the Ohio "savings statute", OHIO REV. CODE ANN. § 2305.19 (Anderson 2002), permits, under certain circumstances, a case to be refiled for up to one year after it has been dismissed for reasons unrelated to the merits. A plaintiff's dismissal under OHIO R. CIV. P. 41(A)(1)(a) has been held to be such a dismissal. *See* Frysinger v. Leech, 512 N.E.2d 337 (Ohio 1987). If the dismissal took place before any statute of limitations ran, the additional year can extend beyond the nominal running of the limitations period. *See* 4 STANLEY E. HARPER, JR. & MICHAEL E. SOLIMINE, ANDERSON'S OHIO CIVIL PRACTICE § 148.13 (2d ed. 1996) (discussing Ohio law). *But see* Parrish v. HBO & Co., 85 F. Supp. 2d 792 (S.D. Ohio 1999) (Ohio savings statute cannot be used when first suit was dismissed from federal court via Rule 41(a)(1)(i), and second suit was refiled in federal court). One source reports that thirty states other than Ohio have savings statutes. WILLIAM D. FERGUSON, THE STATUTES OF LIMITATION SAVING STATUTES 2 & n.1 (1978) (listing states). Among those thirty states, however, there is a split of authority on whether a savings statute applies to a voluntarily dismissed case. *Id.* at 287–89.

On the latter, many of the Common Pleas courts (the trial court of general jurisdiction) in Ohio have local rules which direct that if a case, previously dismissed by plaintiff in the same court, is refiled, then it will be assigned to the judge assigned to the original case. *See, e.g.*, HAMILTON COUNTY, OHIO, CT. COMMON PLEAS R. 7(J); MONTGOMERY COUNTY, OHIO, CT. COMMON PLEAS R. 1.19, III.A.3.; FRANKLIN COUNTY, OHIO, CT. COMMON PLEAS R. 31.01. Presumably these rules are intended to increase judicial efficiency, as the first judge should already be familiar with the case, and may be able to ensure that matters undertaken in the first round (e.g., discovery) can be applied to the second round.

45. FED. R. CIV. P. 41(a)(2)

46. Rule 41(a)(2) was probably intended as a safety valve, given that the common law practice was considerably restricted by Rule 41(a)(1)(i). Contemporary accounts do not shed much light on the content of the factors found in the former. *See, e.g.*, Cone v. W. Va.

the purpose of the Rule has come to be considered to be "'primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions.'"[47] This, in turn, usually means that "dismissal should be allowed unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second lawsuit."[48]

Much of the case law focuses on the requisite degree of prejudice. To generalize, it is not unduly prejudicial if plaintiff obtains "some tactical advantage"[49] due to the dismissal by, for example, refiling suit under circumstances more favorable to the plaintiff, but the details are important. Courts differ on whether dismissal is appropriate when plaintiff wants to refile in a forum where a statute of limitations has not run[50] or for other reasons.[51] Dismissal to permit refiling in a forum that will apply different (and presumably more favorable) substantive law has been disfavored,[52] while dismissal has been permitted so that a plaintiff can obtain a jury trial.[53]

Rather than focusing on one factor, most courts rely on a multifactor test. As one court recently summarized, "the analysis is considerably more complex" than simply considering whether plaintiff might file another lawsuit.[54] Instead, the court continued:

> Four factors should be examined to determine whether the defendant would suffer plain legal prejudice if a case were dismissed without prejudice: the defendant's effort and expense of preparation for trial, excessive delay and lack of

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Pulp & Paper Co., 330 U.S. 212, 217 (1947) (suggesting that the trial court might grant dismissal, even during a trial, if the court were satisfied "that the ends of justice would best be served by allowing [plaintiff] another chance."). Nonetheless, the grant of authority found in Rule 41(a)(2) is not surprising, given that the 1938 rulemakers valued trial judge expertise and discretion. *See generally* Bone, *supra* note 31, at 98–103.

47. WRIGHT & MILLER, *supra* note 16, § 2364, at 279 (quoting Alamance Indus. Inc. v. Filene's, 291 F.2d 142 (1st Cir. 1961)). *See, e.g.*, Elbaor v. Tripath Imaging, Inc., 279 F.3d 314, 317 (5th Cir. 2002) (quoting WRIGHT & MILLER, *supra*).

48. WRIGHT & MILLER, *supra* note 16, § 2364, at 280 (footnote omitted). *See, e.g.*, *Elbaor*, 279 F.3d at 317.

49. WRIGHT & MILLER, *supra* note 16, § 2364, at 283.

50. *Id.* at 285 (summarizing cases). *Compare* McCants v. Ford Motor Co., 781 F.2d 855, 859 (11th Cir. 1986) (loss of dispositive statute of limitations defense not a bar to unconditional Rule 41(a)(2) dismissal) *with Elbaor*, 279 F.3d at 318 (holding to the contrary).

51. WRIGHT & MILLER, *supra* note 16, § 2364, at 287–88 (discussing cases involving removal from state court, where plaintiff desires to refile).

52. *Id.* at 298 (summarizing cases).

53. *Id.* at 285–86 (summarizing cases).

54. *In re* Bridgestone/Firestone, Inc., ATX, ATXII, and Wilderness Tires Products Liability Litigation, 199 F.R.D. 304, 306 (S.D. Ind. 2001).

> diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and the fact that a motion for summary judgment has been filed by the defendant.[55]

Other courts consider a similar list of factors.[56]

Closely related to the issue of prejudice visited on the defendant is what "terms and conditions," if any, ought to be attached to a grant of dismissal.[57] Typically, and understandably, plaintiffs will move for dismissal without mentioning any conditions. Then perhaps aided by briefing by the defendant, the trial court will specify conditions. The plaintiff can accept or reject the conditions; if the plaintiff rejects, the dismissal request is withdrawn and the case proceeds.[58] The most common condition, it appears, is for the court to order plaintiff to pay the defendant's *costs* incurred up to that point.[59]

Some courts have gone a step further, ordering that plaintiffs pay the *attorneys' fees* incurred by defendant up to the point of dismissal.[60] While the award of attorneys' fees in these circumstances is said by some to be "commonplace,"[61] they are not automatic. District court judges enjoy discretion in awarding such fees. Indeed, many courts appear to rely explicitly or implicitly on the same set of factors that guides them in deciding whether to permit a volun-

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55. *Id.* (quoting FDIC v. Knostman, 966 F.2d 1133, 1142 (7th Cir. 1992)).

56. For example, the Second Circuit has held that:

> Voluntary dismissal without prejudice is thus not a matter of right. Factors relevant to the consideration of a motion to dismiss without prejudice include the plaintiff's diligence in bringing the motion; any "undue vexatiousness" on plaintiff's part; the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; the duplicative expense of relitigation; and the adequacy of plaintiff's explanation for the need to dismiss.

Zagano v. Fordham Univ., 900 F.2d 12, 14 (2d Cir. 1989). For other cases, see Wright & Miller, *supra* note 16, § 2364.4.

57. Fed. R. Civ. P. 41(a)(2).

58. Wright & Miller, *supra* note 16, § 2366, at 303.

59. *Id.* at 306–08.

60. *Id.* at 309–10.

61. *In re* Tutu Wells Contamination Litig., 994 F.Supp. 638, 654 (D.V.I. 1998). *See, e.g.*, Hinfin Realty Corp. v. Pittston Co., 206 F.R.D. 350, 357 (E.D.N.Y. 2002) ("Where a plaintiff successfully dismisses a suit without prejudice under Rule 41(a)(2), courts often grant the defendant an award of costs or fees."). *See also* Ides & May, *supra* note 3, at 923 ("If the dismissal is to be without prejudice so that plaintiff can sue again, courts will often condition the dismissal on plaintiff's agreeing to reimburse defendant for some or all of the costs and attorney's fees incurred in litigating the first case.")

tary dismissal in the first instance.[62] Similarly, some courts find such an award inappropriate if plaintiff is requesting a dismissal with prejudice.[63] If the primary purpose of conditions is to protect the defendant, these courts argue, then less protection is necessary because a dismissal with prejudice will prevent plaintiff from suing the defendant again.[64] Other conditions may be imposed in addition to or in lieu of costs or fees. For example, a court could order that the "plaintiff produce documents or otherwise reduce the inconvenience to the defendant,"[65] or condition dismissal on the parties' agreement to maintain jurisdiction to enforce a settlement agreement.[66]

Rule 41 contains one more provision relevant to the aforementioned provisions. Rule 41(d) states that if a plaintiff refiles an action, previously dismissed without prejudice, the court may order that the costs of the previous action be paid to defendant.[67] In some ways this provision resembles Rule 41(a)(2), especially regarding the condition of an award of costs. Here, though, there is a circuit split over whether attorneys' fees can be awarded under Rule 41(d), in addition to costs. Some courts argue that the purpose of Rule 41(d) is to discourage forum shopping by plaintiffs, and, taken with the Rule's asserted parallelism to Rule 41(a)(2), attorneys' fees ought to be awardable.[68] Other courts observe that Rule 41(d), unlike Rule 41(a)(2), explicitly refers to "costs," and that suggests that attorneys'fees shouldn't be awardable.[69]

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62. WRIGHT & MILLER, *supra* note 16, § 2366, at 311; *In re Tutu Wells*, 994 F.Supp. at 653.

63. AeroTech, Inc. v. Estes, 110 F.3d 1523, 1528 (10th Cir. 1997) ("[A] defendant may not recover attorneys' fees when a plaintiff dismisses an action with prejudice absent exceptional circumstances.") (footnote omitted).

64. WRIGHT & MILLER, *supra* note 16, § 2366, at 311–12; *AeroTech*, 110 F.3d at 1527. Even in these circumstances, the court might award attorneys' fees if "the case is of a kind in which attorney's fees otherwise might be ordered after termination on the merits." WRIGHT & MILLER, *supra* note 16, § 2366, at 311–12 (footnote omitted).

65. WRIGHT & MILLER, *supra* note 16, § 2366, at 312 (footnote omitted).

66. *Id.* at 313–15. The Supreme Court held in Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375 (1994) that federal courts do not automatically have jurisdiction to enforce settlements formerly on their docket. Several exceptions to this rule were set out, one of which was an agreement embodied in a dismissal under Rule 41(a)(2).

67. FED. R. CIV. P. 41(d); *see generally* WRIGHT & MILLER, *supra* note 16, § 2375.

68. Behrle v. Olshansky, 139 F.R.D. 370, 372–73 (W.D. Ark. 1991).

69. For an excellent summary of the dispute, with references to cases on both sides, see Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 874–75 (6th Cir. 2000). *See generally* Edward X. Clinton, Jr., *Does Rule 41(d) Authorize an Award of Attorney's Fees?*, 71 ST. JOHN'S L. REV. 81 (1997); Thomas Southard, *Increasing the "Costs" of Nonsuit: A Proposed Clarifying Amendment to Federal Rule of Civil Procedure 41(d)*, 32 SETON HALL L. REV. 367 (2002).

There are several other aspects of Rule 41 and its state law counterparts that this Article does not address in depth, as they are tangential to its principal focus. Thus, this Article

C. Who Cares?

Before setting out our critique of the voluntary dismissal regime, we pause to consider the significance of that regime in the day-to-day life of civil litigation. The critique may carry less qualitative force if, say, plaintiffs (relatively speaking) rarely seek to unilaterally dismiss under Rule 41(a)(1)(i), or rarely seek court approval under Rule 41(a)(2). Unfortunately, there appears to be little hard data that can be brought to bear on the use of Rule 41(a). Official statistics kept for the federal court keep track of dismissals in a generic fashion, and thus do not differentiate between or among dismissals founded on Rules 12 or 41.[70] Likewise, most states do not keep close track of the numbers of dismissals in their courts under their counterparts to Rule 41(a).[71] As of the writing of this Article, there are no empirical studies of the use of Rule 41(a).[72]

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does not address Rule 41(c), concerning the dismissal of counterclaims, cross-claims, or third-party claims. For a discussion of Rule 41(c), *see* WRIGHT & MILLER, *supra* note 16, § 2365. Likewise, this Article does not address whether an adverse partial judgment can become an appealable final judgment if the plaintiff voluntarily dismisses the remainder of the claims without prejudice. For a discussion of this issue, see James v. Price Stern Sloan Inc., 283 F.3d 1064 (9th Cir. 2002); Rebecca A. Cochran, *Gaining Appellate Review by "Manufacturing" a Final Judgment Through Voluntary Dismissal of Peripheral Claims*, 48 MERCER L. REV. 979 (1997). Finally, this Article considers together both federal question and diversity cases. While no doubt Rule 41(a) would apply in federal court in the former cases, it is perhaps not so crystal clear that a differing state version of Rule 41(a) would not apply in diversity. To be sure, the conventional wisdom is that Rule 41(a) would apply in diversity, *see* WRIGHT & MILLER, *supra* note 16, § 2361, at 248 (referring to Rule 41 as a whole); *see, e.g.*, Kahn v. Sturgil, 66 F.R.D. 487, 489–91 (M.D.N.C. 1975) (holding in a diversity action that Fed. R. Civ. P. 41(d) controlled over state law voluntary dismissal provision). It is perhaps not inconceivable though that, under some circumstances, a state provision different from Federal Rule 41(a) might control in diversity, given the complexity of the *Erie* doctrine. *Cf.* Yarber v. Allstate Ins. Co., 674 F.2d 232 (4th Cir. 1982) (in which a state saving statute, as part of a state voluntary dismissal provision, was considered part of the statute of limitations and applicable in diversity). Extended discussion of the point is unnecessary here, as Rule 41(a) presumptively applies to all cases in federal court.

70. *See* Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 46. More specifically, the data compiled by the Administrative Office of the United States Courts, published in its Annual Report, and some of which is available on line, *see* Theodore Eisenberg & Kevin M. Clermont, *Courts in Cyperspace*, 46 J. LEGAL EDUC. 94 (1996), does not break down statistics on dismissals by type.

71. In Ohio, for example, an annual report containing much data on the filing and termination of civil cases in Ohio trial courts does not indicate which dismissals were under OHIO R. CIV. P. 41(A)(1) or (2). *See* The 2000 Ohio Court Summary, *available at* http://www.sconet.state.oh.us/publications (last visited Jan. 6, 2003).

72. For example, an otherwise estimable empirical discussion of civil litigation in federal and state courts briefly discussed voluntary dismissal, but did not provide further data on different types of such dismissals. Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 163 (1986).

But there is nonetheless some evidence that such dismissals are sought or obtained with some frequency in both federal and state courts. With regard to unilateral voluntary dismissals, attorneys report that such dismissals are not uncommon, especially in a state like Ohio with a plaintiff-friendly rule.[73] A recent study of civil rights actions filed in federal court indicated that up to twelve percent of such cases were voluntarily dismissed (as opposed to other types of terminations and dismissals).[74]

Finally, this Article notes the failed effort to change the rule in Ohio. In 1992, the Ohio Supreme Court proposed that Ohio change its rule (which, as described above, says that the plaintiff can dismiss up to the beginning of trial) to one that cuts off the right of dismissal at "five days before the then-scheduled trial date."[75] The primary reason for the proposal was to preserve the plaintiff's right, but limit the possibility of eleventh hour dismissals.[76] Dismissals on the literal eve of trial were thought to be disruptive of a trial judge's management of her docket, and particularly prejudicial to the defendant's preparation for trial, much of which typically takes place in the week before that event.[77] So the

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73. This concededly very anecdotal account is mirrored by other anecdotal accounts. *See, e.g.*, ROGER S. HAYDOCK ET AL., FUNDAMENTALS OF PRETRIAL LITIGATION 541 (5th ed. 2001) (noting that "voluntary dismissals are frequently sought," but citing no authority for that proposition).

74. U.S. Department of Justice, Bureau of Justice Statistics, Civil Rights Complaints in U.S. District Courts, 1990–98, tbl. 5, at 6 (2000) (between 1990 and 1998 voluntary dismissals by plaintiffs ranged between 8.0% and 12.5%). The study does not appear to differentiate between dismissals brought under Rule 41(a)(1)(i) or (a)(2). However, the study clearly has separate data for cases that were "settled," *id.*, which indicates that the data cited does *not* include voluntary settlements reflected in dismissals under Rule 41(a)(1)(ii).

75. *See* Proposed Staff Note to 1992 Amendment to CIV. R. 41, reprinted in Ohio State Bar Association Report, Feb. 17, 1992, at lxxvi–lxxvii.

76. *Id.*

77. One federal judge commented on the proposal to amend Ohio Rule 41(a) as follows:

> When Ohio adopted the Civil Rules in 1970, it compromised and moved the cut-off time back to the commencement of trial. This timing gives plaintiffs a decided strategic advantage in Ohio practice: since defendants have no corollary right, a plaintiff can force a defendant to be fully prepared for trial without itself preparing and then dismiss on the morning of trial if the case does not settle, thereby gaining at least an additional year to prepare, because of [the Ohio savings statute] . . . .
>
> That Ohio R. Civ. P. 41(A)(1) grants plaintiffs a particular procedural right does not mean that the right is grounded in fairness and justice. Under current federal practice in this and most district courts, parties agree on a comprehensive scheduling order early in the case which requires timely disclosure of witnesses and trial preparation. Modification of a Rule 16 scheduling order requires some showing of good cause, as indeed does a voluntary dismissal under Fed. R. Civ. P. 41(a)(2). There is no

proposal was not, by a long shot, an adoption of the federal model. Despite its apparently modest scope, the proposal was vociferously opposed by the plaintiff's bar in Ohio.[78] The opposition was so intense that the Ohio Supreme Court eventually withdrew the proposal, and it has not been resubmitted since then.[79] A lesson drawn from this story is that, in Ohio at least, the plaintiff bar often uses, or contemplates the use of, unilateral voluntary dismissal.

The use of that dismissal option is of course not reflected in any decision by a court, in either state or federal systems. In contrast, a plaintiff's request for the court's permission to dismiss under Rule 41(a)(2), and its state counterparts, will ostensibly generate a court decision, granting or denying the request. While great caution must be exercised in drawing conclusions based on published

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> fairness or justice in permitting a plaintiff unilaterally to tear up a scheduling order and start over.

Naragon v. Dayton Power & Light Co., 934 F. Supp. 899, 903 (S.D. Ohio 1996) (footnotes omitted).

78. Various plaintiffs attorneys argued

> that the new rule would be much too restrictive because plaintiff's attorneys are faced, in the last five days before trial, with "lying clients," expert witnesses with unforeseen emergencies, and other "unforseen [sic] matters which are beyond the control of counsel." (2/20/92 letter by Paul Scott and James Dennis on behalf of the Ohio Academy of Trial Lawyers). Other arguments are that this new rule hurts only the poor or is intended only to assist defendants. Another common theme is that most cases dismissed under present Rule 41(A)(1) are never refiled, but no empirical evidence is cited.

Report of the Civil Rules Subcommittee, Re: Proposals Submitted by the Supreme Court in January, 1992, at 2 (March 21, 1992)[hereinafter Subcommittee Report] (on file with authors).

79. For a brief discussion of the rise and fall of this proposal, see Solimine, *supra* note 44, at 114–15. The first of the listed authors of the Article served as counsel (i.e., the reporter) to the Civil Rules Subcommittee of the Rules Advisory Committee of the Ohio Supreme Court, and was involved in the drafting of the proposal. The discussion of the proposal in this Article is that of the authors and does not necessarily reflect the views of the Rules Advisory Committee or of the Ohio Supreme Court.

A federal judge familiar with the rulemaking process described in the text observed:

> The organized plaintiffs' bar is well aware of this strategic advantage and has defended it vigorously: When the Ohio Supreme Court proposed in 1992 to move the cut-off back to a mere five days before trial, the Ohio Academy of Trial Lawyers threatened to use its considerable political power to have the General Assembly veto the entire package of Rules proposals for that year unless the 41(A)(1) amendment were withdrawn.

Naragon, 934 F.Supp. at 903.

opinions,[80] there are nonetheless scores of such opinions by federal judges ruling on dismissal requests under Rule 41(a)(2).[81] While no exact figure could be obtained, the lesson drawn is that, in federal courts at least, Rule 41(a)(2) dismissals are used, or sought to be used, with some frequency.

Questions concerning the use of dismissals under Rule 41(a) would benefit from greater empirical study. In the absence of such study, it is clear that significant numbers of cases in federal and state courts are terminated by voluntary dismissals, either unilaterally or with the court's permission. In any event, whatever precise statistics may show, any litigation takes place in the shadow of the law.[82] Even if a plaintiff in a particular case never dismisses unilaterally or never seeks the court's permission to dismiss, the option is still there. It may affect her strategy in filing suit in the first instance, in litigating the case once filed, or while engaging in settlement discussions. The actual and potential use of voluntary dismissals, then, makes it a topic worthy of and ripe for reconsideration.

III. THE PROBLEM

A. *Why Have Voluntary Dismissals at All?*

Strictly from the standpoint of the litigants, it seems incongruous for a plaintiff to simply abandon her suit via a unilateral

80. A considerable literature discusses the possible shortcomings of relying on officially published opinions to study the workings of civil litigation. *See, e.g.*, Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUST. SYS. J. 782 (1992); Peter Siegelman & John J. Donohue, III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC'Y REV. 1133 (1990). This is not to say that empirical studies based on published opinions are useless. Such studies based on large numbers of published dispositions are surely reflective, to some degree, of both judicial and litigant behavior. Moreover, published opinions are of course the principal source of guidance to judges and attorneys in subsequent cases. *See* Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 39–41 (1998).

81. A Lexis search conducted in January 2003 indicated that federal courts, in opinions found on that database, cited or discussed Rule 41(a)(2) well over 800 times since January 1, 1990.

82. Cases will be settled before disposition on the merits, or not filed in the first instance, depending in part on the existing procedural and substantive law that governs the case. Those cases that are eventually decided by a judge or jury are often those where the result is uncertain given the law, or more precisely where the litigants' predictions of the likely result do not coincide. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). *See generally* Solimine, *supra* note 80, at 11–12, 44–45 (discussing the Priest & Klein article and related literature).

voluntary dismissal. If the plaintiff does that, why did she file suit in the first instance? But as discussed above, there are a host of motivations for the plaintiff to so act.[83] Plaintiff may simply come to the conclusion that she will not prevail, and wants to end the suit without further expending time or money.[84] That conclusion may be the result of changed circumstances, based on discovery, unfavorable court rulings, or other factors.[85] In addition, the plaintiff may wish to refile the suit in another forum, where a more favorable outcome is more likely.[86] The plaintiff may have also initially filed simultaneous litigation in multiple fora, and may eventually wish to proceed in only one forum, while dismissing the rest.[87] The list of reasons would seem to be as long as the reasons driving forum shopping in the first instance.

Whatever the justifications used by modern plaintiffs, the existence of some voluntary dismissal is not entirely surprising as a matter of historical practice. Civil procedure in the common law era afforded plaintiffs considerably fewer advantages than those enjoyed by plaintiffs today. For example, there were virtually no opportunities to engage in discovery or to amend pleadings.[88] The pleadings themselves were governed by the rigid writ system. Of course, these and other aspects of common law pleading could cut against both sides in a suit. That said, perhaps it was the perception that common law procedure disadvantaged plaintiffs more often than defendants, coupled with the notion that plaintiffs were the masters of their own lawsuits, that supported the existence of a voluntary dismissal option.[89]

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83. See *supra* notes 4–5 and accompanying text.

84. MARCUS, *supra* note 3, at 204.

85. HAYDOCK, *supra* note 73, at 541.

86. R. LAWRENCE DESSEM, PRETRIAL LITIGATION: LAW, POLICY & PRACTICE 439 (3d ed. 2001); MARCUS, *supra* note 3, at 204. As one federal judge colorfully put it, a plaintiff in this instance is "obviously heeding the words of Oliver Goldsmith:

> For he who fights and runs away
> May live to fight another day;
> But he who is in battle slain
> Can never rise to fight again."

Merit Ins. Co. v. Leatherby Ins. Co., 581 F.2d 137, 144 (7th Cir. 1978) (Swygert, J., dissenting).

87. HAYDOCK, *supra* note 73, at 541.

88. JAMES, *supra* note 3, at 273 (discussing amendment of pleadings at common law); MARCUS, *supra* note 3, at 320 (discussing discovery at common law).

89. Explicit discussion of the point was not discovered in the literature researched for this Article, but much of the discussion of common law procedure, as compared to modern procedure, seems to at least implicitly suggest that it was typically plaintiffs who were more

Modern civil procedure, of course, differs radically from its common law ancestors. It differs in many ways that seem to considerably undermine justifications for retaining a broad right of voluntary dismissal. Pleading requirements have been relaxed and discovery is available, both of which empower plaintiffs. Moreover, the notion that plaintiffs are masters of their suit is no longer tenable in an era of managerial judging. For the past three decades, if not longer, judges have abandoned their heretofore relatively passive roles in civil litigation, and aggressively managed discovery, settlements, and many other aspects of a case, especially at various pretrial stages.[90] Some argue that much modern litigation is better characterized as a series of transactions or negotiations among the parties, counsel, and the court.[91] The ability of a plaintiff to simply abandon the suit in the midst of court management empowers the plaintiff in a way that the court management model does not contemplate.[92] But one does not have to embrace that model, either as normatively preferable, or as empirically reflective of what judges do in most cases, to be wary of the voluntary dismissal option. Even before the ascent of managerial judging, commentators were calling for the abandonment or curtailment of voluntary dismissal.[93]

In addition to the argument that voluntary dismissal is in considerable tension with modern, adversarial, and often court-managed litigation, a host of other reasons also argue against voluntary dismissals.

First, some of the reasons advanced by modern plaintiffs are to us not always persuasive, as many are predictable or within the control of counsel. For example, unfavorable court rulings cannot be completely unexpected. Other problems that truly are unexpected, such as an important witness being unavailable at the last moment, or an unexpected turn in the case calling for a new witness, could be dealt with by asking the trial court for a continuance. Indeed, it

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victimized by the former. *See, e.g.*, JAMES, *supra* note 3, at 21–22; MARCUS, *supra* note 3, at 121.

90. For discussions of managerial judging, see MARCUS, *supra* note 3, at 444–50; Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 790–94 (1993). For a useful overview of managerial judging, together with a skeptical assessment of its ability to constrain lawyers, see Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 1019–26 (1998).

91. *See* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371 (2001).

92. *See* Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 836–37 (1989).

93. *See, e.g*, Lipkin, *supra* note 11, at 987–88; Note, *Absolute Dismissal Under Federal Rule 41(a): The Disappearing Right of Voluntary Nonsuit*, 63 YALE L.J. 738, 742–43 (1954); Comment, *Federal Civil Procedure: Voluntary Dismissal Under Rule 41(a)(1)*, 1962 DUKE L.J. 285, 289–90.

would seem to be an abuse of discretion for a trial judge *not* to grant a continuance in such a situation.

Second, a broad voluntary dismissal option can exacerbate agency costs in civil litigation. Clients of course may have difficulty in many settings in effectively monitoring their nominal agents—their attorneys.[94] But it is no less true for voluntary dismissals. Many of the posited reasons for the existence of the option pertain to the actions or inactions of the attorney, not of the plaintiff. Thus, the attorney may be juggling several cases or otherwise be taking actions not necessarily advantageous to a particular client. A voluntary dismissal may delay or complicate litigation of a case that might, in some situations, dismay the plaintiff.[95]

Third, the use of voluntary dismissal is apt to be costly to the defendant. Not knowing if or when the option will be used, the defendant must respond to the complaint, engage in discovery, file or respond to motions, and the like—costs that are wasted if the plaintiff abandons the suit.[96] Moreover, in many cases it would

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94. There is a considerable literature on the problem of agency costs in civil litigation, much of it focusing on class actions. *See, e.g.*, Jill E. Fisch, *Aggregation, Auctions, and Other Developments in the Selection of Lead Counsel Under the PSLRA*, 64 LAW & CONTEMP. PROBS. 53, 56–58 (Spring/Summer 2001). The problem arises of course in the non-class action setting, too. *See* Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189 (1987); Thomas J. Miceli, *Do Contingent Fees Promote Excessive Litigation?*, 23 J. LEGAL STUD. 211 (1994).

95. Our research revealed no empirical evidence that might support or refute the assertions made in this paragraph. Nor do we claim that plaintiffs habitually fail to monitor their attorneys, with regard to Rule 41 motions or anything else. To the extent the problem exists, it may be reflected in Rule 41(a)(1) dismissals. Some suggestive evidence comes from the debate in Ohio in 1991–1992 over amending the Ohio voluntary dismissal rule. *See supra* notes 75–79 and accompanying text. One member of the Civil Rules Subcommittee observed that sometimes motions for continuances of trial by local rule, for example FRANKLIN COUNTY, OHIO, CT. COMMON PLEAS R. 45.01, need to be signed by both the attorney and client, while Ohio Rule 41(A)(1) dismissals need not be. It was suggested that the latter were more prevalent than the former for that reason. Subcommittee Report, *supra* note 78, at 3.

The possible course of action by a plaintiff's attorney outlined in the text poses agency costs, but is not necessarily, or always, injurious to the client. Many plaintiffs will enter into contingency fee arrangements with attorneys, see *Symposium: Contingency Fee Financing of Litigation in America*, 47 DEPAUL L. REV. 227 (1998), and the client will typically not have to pay out-of-pocket costs. Those will usually be absorbed by the attorney when she voluntarily dismisses. Furthermore, the plaintiff only suffers delay if suit is refiled.

96. There might be no, or at least less, waste if the plaintiff refiles the suit after a voluntary dismissal. Presumably, then, the work done in the prior suit need not be totally duplicated in the second suit. And some costs or even attorneys' fees might be recouped under Rule 41(d). Relatedly, even without implicating Rule 41(d), a judge could impose as a condition on a dismissal without prejudice that the plaintiff pay any duplicative expenses in the second case if it is refiled. Similarly, if dismissal was sought after, say, a summary judgment motion was filed, a condition for refiling could be that the plaintiff agree to file a response to the motion. (Thanks to Judge Walter Rice for these and other insights on Rule 41 practice.) But of course there is no guarantee that the suit will be refiled, or that there

appear that defendants spend considerable time and energy in preparing a case for trial, shortly before the trial starts.[97] That work can be for naught, and will usually be duplicated, if a plaintiff is permitted to voluntarily dismiss up to the eve of trial.

Fourth, the voluntary dismissal option can increase the costs to the court in that the trial judge might spend time and effort managing a case, ruling on motions, and the like—time that in effect is wasted if the plaintiff dismisses. That time could have been devoted to other cases. Similarly, the judge might expect a case to go to trial, postponing trial of other cases set for the same week. That plan can be disrupted if the case set for trial is abruptly dismissed on the eve (say, the morning) of trial.[98]

Finally, law and economics literature suggests that the voluntary dismissal option gives unusual advantages to the plaintiff. Much of that literature focuses on the filing of lawsuits and the pursuit of settlement by more-or-less rational maximizer litigants.[99] The literature seeks to model and evaluate both litigation behavior and procedural rules. Although there has been no discussion on this

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won't be any duplication of effort by the defendant, even if there is a refiling. Furthermore, the suit might be refiled in a different federal court, or in a state forum that doesn't follow Rule 41(d).

97. For some evidence supporting this point, see David M. Trubek, et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 100–04 (1983). This Article acknowledges that the voluntary dismissal option may not always be as prejudicial to defendants as we suggest in the text. If for whatever reason a settlement cannot be achieved, the option permits the plaintiff to quickly dismiss a case, perhaps to the relief of the defendant. The relief may be well-founded if the suit is weak and unlikely to be refiled, which is the functional equivalent of a settlement or of a dismissal with prejudice. Another example, suggested to us by an attorney, is that the option permits the plaintiff's attorney to dismiss, leaving open the possibility, however remote, of refiling suit. That possibility might forestall a malpractice claim by unhappy clients. Absent that possibility, plaintiff's counsel might feel obliged to grind on with the suit.

98. *See, e.g.*, Naragon v. Dayton Power & Light Co., 934 F. Supp. 899, 902 (S.D. Ohio 1996) (which, in discussing why Rule 41(a) dismissal was inappropriate, observes that "this Court and the parties have already invested substantial time in preparing this case for trial.") As acknowledged in Part II.C., empirical evidence of the use or effect of the voluntary dismissal option is relatively scarce. For that reason, no firm evidence is cited to support the analysis in this paragraph. But it is supported by anecdotal evidence, gained from conversations with Ohio lawyers and judges. The disruption to the court's docket was also referenced by the proponents of the failed proposal in 1991–1992 to change Ohio's rule. *See, supra* note 77 & accompanying text. Any overstatement of the waste point from the court's perspective is unintended. Court rulings on motions, especially if they are reflected in accessible opinions, are public goods and may provide useful precedent in *other* cases. *See* United States Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 26 (1994) (making this point with respect to case that had settled).

99. For overviews, see generally ROBERT G. BONE, CIVIL PROCEDURE: ECONOMICS OF CIVIL PROCEDURE (2003); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW ch. 21 (5th ed. 1998).

point other than passing references[100] to the voluntary dismissal option, that literature can be drawn upon, inasmuch as it addresses information asymmetry between the parties.[101] In that regard, a voluntary dismissal option, especially one broadly defined, in effect creates an informed plaintiff and uninformed defendant—the latter because defendant does not know if, or when, plaintiff will use the option. The informed plaintiff model suggests that plaintiffs will try to take advantage of defendants' ignorance in various ways.[102]

In our situation, the model predicts that, for example, the defendant may be apt to settle, not wanting to pour resources into a case that the plaintiff may abruptly dismiss. A defendant might refuse to settle to thwart such a strategy. Much will depend on how likely each party believes the other side will pursue the alternative strategies.[103] Likewise, much will depend on how costly this strategy is to the plaintiff, for it seems that the voluntary dismissal option is not "cost-free"[104] to plaintiff. As a plaintiff ponders when and if to use the option, presumably she too must expend time and money (in discovery, for example) to prepare the case for trial. Then again, a plaintiff can delay some such costs (such as those associated with the final preparation for trial), secure in the knowledge that she can dismiss if the defendant does not advance an acceptable settlement figure.[105]

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100. *See, e.g.*, Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 538, 544, 548, 551, 574 (1997) (briefly referring to plaintiff "dropping" a suit as one of several options).

101. Much of the literature critiquing the Priest & Klein selection thesis, *supra* note 82, focuses on the effect of various informational asymmetries between the parties.

102. Bone, *supra* note 100, at 542–50.

103. *Id.* at 545.

104. *Id.* at 539 n.73 (discussing "cost-free" stages of litigation, where "the plaintiff can force the defendant to invest without having to invest himself"). While this Article draws on the literature, as exemplified by Bone's article, it does not engage in all of the methodological rigor found in that article and others.

105. *Naragon*, 934 F. Supp. at 903. The court added:

> During 1991 testimony on a proposal to adopt Fed.R.Civ.P. 41(a)(1) in place of the present Ohio rule, the Ohio Supreme Court's Rule Advisory Committee heard from a Common Pleas judge that a prominent Toledo plaintiffs' medical malpractice firm had never gone to trial in his court on the first-set trial date; in the absence of settlement they had always dismissed on the morning of trial.

Id. at 903 n.8.

B. The Judicial Role in Conditioning Plaintiff's Dismissal

As previously discussed, courts utilize a long list of factors in determining whether, and under what conditions, to grant a plaintiff's request to voluntarily dismiss a case.[106] Much of that inquiry focuses on the prejudice that may be visited on the defendant by permitting a dismissal. The inquiry will be highly contextual and fact-specific. As one court succinctly put it:

> Although the courts talk about "legal prejudice," the governing Federal Rule of Civil Procedure lays down no specific test, and the precedents could be read as saying that everything depends on the particular circumstances and that a range of factors could be taken into account.[107]

In other words, courts are utilizing a balancing test, a standard, not a bright-line rule. To put the distinction simply, a legal principle that is characterized as a standard is broad and vague and requires the decision maker to ponder and weigh the facts to reach a result. Rules, by contrast, are narrow and precise, and in theory yield an answer quickly and easily once applied to the facts of a case.[108]

The purpose of this Article is not to enter the normative jurisprudential debate between rules and standards. To be sure, simply labeling a legal principle as a standard (or a rule, for that matter) is hardly dispositive. Standards are legion in civil procedure[109] and of course in other areas of law. Rather, the focus is on the *content* of the standard. Two aspects of the standard typically used by courts to gauge motions under Rule 41(a)(2) are particularly problematic. First, some of the criteria seem to call for

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106. *See, supra* Part II. B.

107. Doe v. Urohealth Sys., Inc., 216 F.3d 157, 163 (1st Cir. 2000) (citation omitted). One writer three decades ago aptly characterized the application of the multiple-factor test under Rule 41(a)(2) as a "laborious balancing process." Lawrence Mentz, Note, *Voluntary Dismissal by Order of Court – Federal Rules of Civil Procedure 41(a)(2) and Judicial Discretion*, 48 NOTRE DAME L. REV. 446, 459 (1972). The characterization is no less true today.

108. For general discussions of rules and standards, *see* Posner, *supra* note 99, at 592–95; CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 121–35 (1996); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62–69 (1992).

109. As just one example, consider the Supreme Court's multi-factor approach to determining whether a forum state has personal jurisdiction over an out-of-state defendant. Solimine, *supra* note 80, at 42 (discussing how that approach is best characterized as a standard).

an examination of the motivations of plaintiff's attorney—for example, the reasons for the need to take a dismissal.[110] This borders on a subjective inquiry that is not easy to document or determine under any circumstances.[111]

In addition, it is a determination that courts are understandably reluctant to make. Consider one, not atypical recent case. In *Pontenberg v. Boston Scientific Corp.*,[112] plaintiff filed a products liability action. For over seven months, the parties engaged in discovery, under the aegis of a case management and scheduling order. Eventually, the district court upon motion struck plaintiff's list of expert witnesses, and defendant moved for summary judgment. Plaintiff did not respond to the motion, and instead moved for a voluntary dismissal without prejudice.[113] Defendant opposed the motion, in part because it

> claimed that a dismissal without prejudice was inappropriate at this juncture in the litigation because it had invested considerable resources, financial and otherwise, in defending the action, including by preparing the then pending summary judgment motion.[114]

In addition, defendant asserted that plaintiff had not diligently prosecuted the action.[115] The court rejected these arguments and

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110. *See, supra* note 55 & accompanying text. *See, e.g*,, Elbaor v. Tripath Imaging, Inc., 279 F.3d 314, 319 (5th Cir. 2002) (In deciding whether to grant or deny a Rule 41(a)(2) dismissal, "'a court should consider factors such as whether the party has presented a proper explanation for its desire to dismiss. . . .'" (quoting Hamm v. Rhone-Poulenc Rorer Pharm., Inc., 187 F.3d 941, 950 (8th Cir. 1999))).

The Supreme Court recently reiterated the point in an analogous setting. In *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613(2002), the Court unanimously held that a state waives its Eleventh Amendment immunity when it removes a case from state to federal court. In arguing that there was no waiver, the state contended, among other things, that "its motive for removal was benign," *id.* at 621, in that it was meant to protect the interests of co-defendants. But the Court was unpersuaded: "A benign motive, however, cannot make the critical difference for which [the state] hopes. Motives are difficult to evaluate, while jurisdictional rules should be clear." *Id.*

111. This problem has been recognized and responded to in other areas of civil procedure. For example, Rule 11 was amended in part in 1983 largely to eliminate the focus on a purely subjective inquiry. *See* MARCUS, *supra* note 3, at 139. Rule 11, as further amended in 1993, mainly focuses on a reasonableness test, but still has a provision that in certain circumstances calls for the court to analyze whether actions were taken "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation[.]" FED. R. CIV. P. 11(b)(1).

112. 252 F.3d 1253 (11th Cir. 2001) (per curiam).

113. *Id.* at 1255.

114. *Id.* at 1256.

115. *Id.*

granted the motion.[116] On the diligence point, defendant emphasized that plaintiff apparently failed to engage in any discovery, failed to properly disclose expert witnesses, and only moved for a voluntary dismissal after the summary judgment motion was filed.[117] The Eleventh Circuit did not discuss these points in detail, instead mentioning briefly that there was evidence in the record that Plaintiff's counsel had not acted in "bad faith," and that the failure to properly exchange expert witness lists was due to "inaction" rather than "design."[118] *Pontenberg* was not necessarily wrongly decided. The case illustrates that it is difficult, even on arguably compelling facts, to demonstrate bad faith by an attorney. Indeed, it appears that it is quite rare for a court to make such a finding in the context of a Rule 41(a)(2) motion.[119] The practical utility of that factor, then, seems comparatively little.

The second criticism of the criteria typically used in Rule 41(a)(2) motions focuses on forum shopping. Recall that courts in general frown upon plaintiffs seeking dismissal to be able to file suit in a different, more favorable forum.[120] This discomfort is misplaced. Forum shopping is a ubiquitous phenomenon in American civil litigation. Plaintiffs shop for favorable fora for a long list of reasons, including cost, convenience, sympathetic judges and juries, procedural differences, different applicable law, and others.[121] Similarly, defendants can attempt to forum shop for

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116. The grant was made with the caveat that costs should be assessed against plaintiff under Rule 41(d) should she refile the suit. *Id.*

117. *Id.* at 1257.

118. *Id.* at 1257–58. The appellate court observed that while the lower court had struck plaintiff's list of experts as inadequate, at a hearing it had *not* concluded that plaintiff's counsel "had been dilatory or acted in bad faith." *Id.* at 1257 n.3. The district court stated that plaintiff's failure was not a "tactical decision," but was due to "inaction." *Id.* at 1258 n.3. At the hearing, plaintiff's counsel explained that "both she and her client were having difficulty financially affording expert witnesses," and that "she had been involved in a race for office in the state legislature . . . and had not properly attended to the case." *Id.* at 1257 n.3.

119. Research for this Article failed to uncover a published case where the court squarely held that a plaintiff was acting in bad faith in seeking a voluntary dismissal. There probably are such cases, but surely the number is not large, or it would be reflected in published opinions.

120. *See supra* notes 49–53 and accompanying text.

121. For overviews of forum shopping focusing mostly on the plaintiff's perspective, see ROBERT C. CASAD, JURISDICTION AND FORUM SELECTION §§ 2.01–2.28 (2d ed. 1999); Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79 (1999); Gita F. Rothschild, *Forum Shopping*, 24 LITIG. 40 (Spring 1998); Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167 (2000); Solimine, *supra* note 80, at 18–19.

Most of the literature discusses forum shopping in the abstract or relies on mostly anecdotal accounts. There has been some empirical work, principally surveys of attorneys. For an overview of that work by a contributor to it, see Victor E. Flango, *Litigant Choice Between State*

similar reasons by, for example, seeking dismissal on jurisdictional grounds, or by removing a case from state to federal court.[122] It thus seems odd to sanction a plaintiff for doing what comes naturally. Indeed, the very existence of a voluntary dismissal option is itself a potential avenue of forum shopping, no matter what the ostensible reasons. Even if a plaintiff refiles in the same court, she may draw a different judge, or otherwise litigate the case under circumstances more favorable to her. So, efforts to avoid rewarding forum shopping in this context are misguided as well.[123]

The Rule 41(a)(2) factors are complex because the list of factors is long, and a court is not obliged to address or apply each one.[124] Furthermore, even if the court grants the motion, the court must decide if the dismissal is with or without prejudice and what conditions if any must attach to the dismissal. There ought to be a better and easier way.

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and Federal Courts, 46 S.C. L. REV. 961 (1995). *See also* Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 121–29 (2002).

122. For discussions of forum shopping focusing on the defendant's perspective, see Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507 (1995); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369 (1992); Solimine, *supra* note 80, at 20.

123. The explicit or implicit hostility to forum shopping in the Rule 41(a)(2) context, or other contexts, probably derives from long-standing notions that such shopping undermines ideals of having even-handed, uniform justice meted out, no matter what the forum. For useful discussion of the point, see George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 666–68 (1993); Note, *Forum-Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990).

This is not to say that especially blatant forms of forum-shopping are not, or should not be curtailed. Thus, for example, 28 U.S.C. § 1359 (2000) places limits on the manipulation of joinder of parties to achieve diversity jurisdiction. More generally, the existence of a minimum contacts hurdle places limits on where plaintiffs can sue out-of-state defendants. The unavoidable existence of forum shopping in the United States can be acknowledged without necessarily abandoning all efforts to regulate those forms of shopping that seem particularly egregious or unfair. That said, the use of Rule 41(a)(2) litigation to monitor forum shopping on a case by case basis is not a particularly efficient example of such regulation. Put another way, allowing a plaintiff to choose one of several available fora as an initial matter is not particularly objectionable, but allowing a plaintiff to litigate and then dismiss, perhaps refiling later in a different court, may be problematic. The latter actions raise different fairness and efficiency concerns beyond that of simple forum shopping.

124. Doe v. Urohealth Sys., Inc., 216 F.3d 157, 160 (1st Cir. 2000) ("[C]ourts need not analyze each factor or limit their consideration to these factors.").

IV. SOLVING THE PROBLEM

A. *The Optimal Scope of the Plaintiff's Right to Voluntarily Dismiss*

The previous Part questioned the wisdom of a unilateral voluntary dismissal option, and further questioned the factors courts use when considering whether to grant permission to so dismiss. This Part suggests alternatives to the present regime on each score.

There is, in theory, a dizzying array of potential reforms. The voluntary dismissal option could simply be abolished (though even then, some form of Rule 41(a)(2) type motion would need to exist, lest unwilling plaintiffs be forced to litigate).[125] Or, akin to the current federal rule, plaintiffs could be permitted a small window of opportunity to unilaterally dismiss at the beginning of the case. After that, plaintiffs would need the court's permission absent agreement of the defendant. Or, akin to the common law pleading rule, still in place in several states, the plaintiff could have a very wide window of opportunity to dismiss, up to or even beyond the beginning of a trial. Under that option, a Rule 41(a)(2) type motion could still be available, though it would seem to be less necessary. To add to the complexity, reformers would need to consider whether the unilateral voluntary dismissal option, when provided, is with or without prejudice. To make matters more complicated still, reformers would also need to take into account how courts should exercise their authority under Rule 41(a)(2). That is, for example, if courts only grant such motions with onerous conditions, this should affect the scope of any unilateral right afforded the plaintiff.

The best option is to choose the middle path and permit the plaintiff a small window of opportunity at the beginning of the case to voluntarily dismiss once without prejudice. The window should close when defendant formally responds to the suit, by way of motion or answer. Thereafter, the plaintiff would need the court's permission—a matter addressed below. This proposal, then, is very similar, but not identical to, current Federal Rule 41.[126]

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125. Of course, plaintiffs can always settle with defendants under Rule 41(a)(1)(ii), but we are assuming that no such settlement can be worked out. If it could, plaintiffs would not need to utilize a unilateral dismissal. On the other hand, presumably a plaintiff could simply stop litigating and be subject to dismissal for want of prosecution under Rule 41(b).

126. It is not identical to the current federal rule, which closes the window only when the defendant files an answer or moves for summary judgment. What goes unmentioned is a very common response by a defendant, namely a Rule 12(b) motion to dismiss. It is not clear why the original drafters left that out. It is thus included in our discussion, coupled

Why not eliminate all unilateral dismissals, and require all dismissals to be routed through Rule 41(a)(2) motions? This approach is too draconian. The primary justification for limiting voluntary dismissals is to lessen prejudice to the defendant and to the court system itself.[127] Both types of prejudice are apt to be relatively little at the very beginning of a case before defendant answers. It is doubtful that the trial judge will have spent any time toiling on the case. Likewise, the defendant in most instances will not have devoted much time or money preparing a defense early on. There will be a few exceptions to these generalizations. For example, there might be considerable activity by the parties and the court during a preliminary injunction hearing—very early on in the case. Then the plaintiff might drop the case if the court refuses to grant an injunction.[128] But the defendant, if he desires, can easily protect himself by filing an answer during this process.[129]

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with the recognition that the rulemakers have not seen fit to adopt it, even though Rule 41 has been amended several times in other respects. *See* WRIGHT & MILLER, *supra* note 16, § 2363, at 261–62 & n.19.

Bob Bone has suggested a reason for not permitting the filing of a Rule 12 motion to cut off the voluntary dismissal option. A modest option should be available, in part to counteract information advantages that defendant may possess. *See infra* notes 134–35 and accompanying text. Indeed, a defendant would seem to have an incentive to reveal information voluntarily to the plaintiff that demonstrates the weakness of the claim. In lieu of that, the plaintiff might also learn about the defects in her case from the defendant filing a Rule 12 motion. The formal motion may lend credibility to the defendant's assertions that the case is weak. These arguments are not without force, but they are not conclusive against the proposed reform. Having parties voluntarily exchange information before, during, or after the filing of a Rule 12 motion is not objectionable, but extending the plaintiff's option to dismiss beyond a very early stage gives the plaintiff too many options. The Rule 12 motion, and accompanying memorandum, can indeed convey useful information to the plaintiff, which may convince her (or her counsel) to abandon the suit. The same is true, however, of other actions by the defendant, such as the filing of a summary judgment motion or the making of opening statements at trial. If the plaintiff's voluntary dismissal option is extended to encompass all of these points, then the common law standard would effectively be reinstated. A Rule 12 motion, unlike these other actions, is almost always made early on in this case.

127. *See supra* Part III.A. Some authorities suggest that "'prejudice to the opposing party, rather than the convenience of the court,'" is the primary or exclusive factor for a court to consider in ruling upon a Rule 41(a)(2) motion. County of Santa Fe v. Pub. Serv. Co. of N. M., 311 F.3d 1031, 1047 (10th Cir. 2002) (quoting Clark v. Tansy, 13 F.3d 1407, 1411 (10th Cir. 1993) (alterations omitted) (quoting 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2364, at 161 (1971))). This would appear to be in some tension with our view, and those of others, that *both* factors are relevant for a court to consider. Regardless, the proposed reform focuses primarily on the prejudice to the opposing party by reimbursing the defendant for the costs and fees incurred before the dismissal is granted (if it is granted).

128. This is apparently a not uncommon occurrence, as it is reflected in the fact patterns of some cases that read Rule 41(a)(1) non-literally. *See supra* note 33.

129. *See* D.C. Electronics, Inc. v. Nartron Corp., 511 F.2d 294, 298 (6th Cir. 1975) (involving same fact pattern as described in text).

For a variety of reasons, a plaintiff may simply change her mind shortly after filing suit, and may wish to abandon the suit. Given the lessened or nonexistent prejudice, it seems unnecessary to engage the Rule 41(a)(2) process if the dismissal is early. The solution is not perfect; it can be underinclusive or overinclusive. Some very early dismissals can be prejudicial; some later dismissals, when Rule 41(a)(2) comes into effect, will generate little prejudice. But those instances are presumably marginal, and on balance not worth adjudicating under an expanded Rule 41(a)(2).

For the reasons outlined earlier in this Article,[130] expanded voluntary dismissal options create excessive prejudice. Yet in light of our earlier comments, it is perhaps surprising that this Article endorses even a modest role for unilateral voluntary dismissal. Although it preserves an option available to the plaintiff and not to the defendant, "[t]he existence of an option afforded plaintiff and denied defendant . . . is a commonly accepted litigation phenomenon."[131] Although parties should, generally speaking, be on equal footing when it comes to procedure,[132] modest exceptions to the general rule, like the one we suggest, can do more good than harm.[133]

Informational asymmetries often operate in favor of *defendants*,[134] but such asymmetries do not necessarily characterize all or most civil litigation.[135] That sort of generalization sweeps far too wide,

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130. *See, supra* Part III A.

131. Martin H. Redish & Carter G. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 375 (1977). For some examples in both directions, consider the Rule 12(b)(6) motion, and the Rule 68 offer of judgment, which only defendants can use, and one-way attorney-fee shifting statutes, which almost always operate in favor of plaintiffs.

132. *See generally* William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002).

133. *Cf.* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 860 (5th ed. 2003):

> Isn't the underlying difficulty that litigants do not come labeled as "plaintiffs" and "defendants" as a matter of preexisting Platonic reality? Whether one is a plaintiff or a defendant (when is the law a sword? when a shield?) is itself contingent, a product of our remedial and substantive rules.

134. *See* Bone, *supra* note 100, at 550–58; Keith N. Hylton, *An Asymmetric-Information Model of Litigation*, 22 INT'L REV. L. & ECON. 153 (2002).

135. Some writers emphasize that defendants who are repeat players in litigation may have strategic incentives, not enjoyed by one-shot plaintiffs, to aggressively defend cases beyond that which might be thought rational or, conversely, to quickly settle cases that one might think would not easily settle. The effect may or may not favor a particular plaintiff, depending on the circumstances of a case, but either way it may hamper the development of law by warping the diet of cases that are actually adjudicated on the merits. *See* Catherine

but it does suggest that a modest voluntary dismissal option is a way to correct for those asymmetries. Again, the point cuts bluntly. Ideally, the proposed reform could provide an option for those bodies of law or litigation where asymmetry in favor of the defendant is especially pronounced, but micromanagement of Rule 41 is inefficient.

B. Awarding Attorneys' Fees as the Sole Condition

Courts undertake to review a long list of factors when considering a motion to voluntarily dismiss under Rule 41(a)(2).[136] The complexity of these factors and at least some of their content is criticized in this Article.[137] The proposed reform makes resolution of Rule 41(a)(2) motions both simpler and more coherent: courts should automatically grant the motion, permitting the suit to be dismissed without prejudice, upon payment to a requesting defendant of a reasonable amount of costs and attorneys'fees incurred up to that point in the litigation.[138]

Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869 (1999); Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1 (2000).

136. *See supra* Part II.B.

137. *See, supra* Part III B.

138. Caveats to our proposed reform would include that, if the case had previously been dismissed and refiled, the dismissal should normally be *with* prejudice, which tracks the last sentence of Rule 41(a)(1). Likewise, if in an initial dismissal the plaintiff seeks it with prejudice, normally that should be granted as well. *See* Century Mfg. Co. v. Cent. Transp. Int'l, Inc., 209 F.R.D. 647, 648 (D. Mass. 2002) ("[I]t is difficult, both practically and logistically, to image [sic] a court denying a plaintiff's motion to dismiss her own action with prejudice.") (quoting Shepard v. Egan, 767 F.Supp. 1158, 1165 (D. Mass. 1990)). *But cf.* County of Santa Fe v. Public Serv. Co. of N.M., 311 F.3d 1031, 1049 (10th Cir. 2002) (declining to adopt an automatic rule that a court must grant a Rule 41(a)(2) motion when dismissal with prejudice may adversely affect the defendant or, more likely, other parties to the litigation.). In that circumstance, there should *not* be an automatic award of attorneys' fees to the defendant. The reason is that a dismissal with prejudice is normally a complete surrender by the plaintiff and, absent the application of a rare statute that shifts fees in favor of a prevailing defendant, see *infra* note 147, a defendant who prevails at trial or otherwise on the merits does not recover fees. Awarding fees would be a disincentive for the plaintiff to dismiss with prejudice. A dismissal *without* prejudice can be a complete surrender if it is extremely unlikely that plaintiff will refile that particular suit. But that possibility is always there. How often such refilings take place is an important question on which there is no available data, and which would benefit from further study. (Thanks to Judge Michael Merz for his insights on this point.)

Courts should award *reasonable* costs and attorneys' fees, and not simply blindly award the amount requested by the defendant. Defendant should be required to document both amounts. Courts can and do draw on the case law interpreting FED. R. CIV. P. 54(d) and 28 U.S.C. § 1920 with respect to costs, and on the case law interpreting fee-shifting statutes, *see*

The advantages of this model are straightforward: courts would no longer need to engage in a balancing of factors. Plaintiffs would not need to explain or justify their course of action. The real prejudice visited upon defendants—the money they expended in responding to the suit and preparing for trial—would be compensated. Currently, courts ponder whether a potentially refiled suit by plaintiff will be "legally" (as opposed to "merely") prejudicial to the defendant. Courts differ on this issue.[139] The issue is largely metaphysical: *anything* a plaintiff does subsequently will prejudice the defendant to some degree. Rather than parsing out levels of acceptable or unacceptable prejudice, prejudice is simply presumed and defendants are thereby compensated.

At first blush, this proposed reform might seem quite problematic, for it in effect adopts a form of the English Rule on attorneys' fees. That rule requires the losing party to pay the winning party's attorneys'fees.[140] In contrast, the American Rule requires that, absent exception, each side pays its own attorneys'fees, no matter who wins, or if the case settles.[141] Debate between the proponents of these respective rules has been extremely controversial, to put it mildly. Proponents of the English Rule argue that it properly reimburses a winning party for all of its costs and discourages the bringing of non-meritorious claims.[142] Proponents of the American Rule argue that it encourages socially desirable conduct or, put another way, that the English Rule deters the filing of both meritless and meritorious suits.[143] The arguments have been the subject of an enormous contested literature[144] and

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10 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2675.1 (1998), with respect to fees. *See, e.g.*, Hinfin Realty Corp. v. Pittston Co., 206 F.R.D. 350, 358 (E.D.N.Y. 2002) (After plaintiff was granted a Rule 41(a)(2) dismissal without prejudice, defendant was required to renew request for attorneys' fees and costs with proper documentation through billing time sheets or affidavits; the court "will reduce the defendant's fee application by the amount of work the defendant will be able to use in a subsequent litigation."); Mercer Tool Corp. v. Friedr. Dick GmbH, 179 F.R.D. 391 (E.D.N.Y. 1998) (carefully evaluating and reducing defendant's request for attorneys' fees in context of Rule 41(a)(2) dismissal); Robertson v. McCloskey, 121 F.R.D. 131 (D.D.C. 1988) (evaluating and reducing defendant's request for costs in context of Rule 41(a)(2) dismissal).

139. *See supra* notes 49–55, 107 and accompanying text.

140. JAMES, *supra* note 3, at 50.

141. *Id.*

142. *Id.*

143. For a useful overview of the respective Rules and the debate between their proponents, *see id.* at 49–51.

144. For a sampling of the literature, see Posner, *supra* note 99, at 624–32; Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069 (1993); Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039 (1993); Thomas D. Rowe, Jr., *In-*

the object of some, albeit inconclusive, empirical study.[145] Despite the controversy, in the United States, "the American Rule is well entrenched"[146] subject to various statutory exceptions at the federal and state levels that usually operate in favor of the prevailing plaintiff only.[147]

It is unnecessary to enter or extend this debate, as the proposed reform avoids much of the controversy. This is because the operation of the proposed rule is in the hands of the plaintiff. Should the plaintiff not desire any award of fees to the defendant, she can dismiss during the initial window of opportunity. Even after that window closes, the plaintiff is still empowered to determine the amount of an award. The plaintiff alone determines when she will move to dismiss under Rule 41(a)(2), and thus cut off the accumulation of a fee award payable to the defendant. Contrast this to the usual operation of fee-shifting statutes, which of course usually depend on the resolution by the court of who is the prevailing party.

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demnity or Compensation? The Contract with America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative, 37 WASHBURN L.J. 317 (1998).

145. For a sampling of the empirical literature, see James H. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J. L. & ECON. 225 (1995); Brian G.M. Main & Andrew Park, *The British and American Rules: An Experimental Examination of Pre-Trial Bargaining in the Shadow of the Law*, 47 SCOTTISH J. POL. ECON. 37 (2000); A. Mitchell Polinsky & Daniel L. Rubinfeld, *Does the English Rule Discourage Low-Probability-of-Prevailing Plaintiffs?*, 27 J. LEGAL STUD. 519 (1998). For an overview of the literature, see James W. Hughes & Edward A. Snyder, *Allocation of Litigation Costs: American and English Rules*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 51–56 (Peter Newman ed., 1998); Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1948–60 (2002).

146. JAMES, *supra* note 3, at 50.

147. *Id.* at 51–52. At the federal level, Congress has passed scores of fee-shifting statutes, see Krent, *supra* note 144, at 2041–42, most of which, expressly or by judicial interpretation, are "one-way" in that they only award fees to a prevailing plaintiff, not a prevailing defendant. *See* Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994) (applying interpretative rule that fee-shifting statutes are presumed unless otherwise stated to be one-way in favor of prevailing plaintiff).

A further exception to the American Rule permits a prevailing defendant to recover if the plaintiff's suit was frivolous. Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978). This exception will usually not be of much aid to defendants responding to a Rule 41(a)(2) motion, as courts have held that a plaintiff merely dismissing under that rule, in and of itself, does not establish that plaintiff's action was frivolous. *E.g.*, Dean v. Riser, 240 F.3d 505 (5th Cir. 2001) (refusing to award fees). Moreover, use of this exception by defendants in this context could face an even more serious problem under the Supreme Court's recent decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598(2001), which held that under fee-shifting statutes, a "prevailing party" was not merely someone whose suit was a "catalyst" to achieving a desired result, but rather one who secured a judgment on the merits or through a consent decree or settlement. *Id.* at 600, 610. A defendant in the Rule 41(a)(2) context would not seem to fall into the latter categories.

It bears repeating that under the proposed reform, the plaintiff is free to refile the suit.[148]

Our proposed reform has the further advantage of largely codifying prevailing practice, or at least existing doctrine. As previously discussed,[149] courts will often eschew, explicitly or implicitly, an application of a complex array of factors, and simply award reasonable costs and fees to the defendant as the condition. Perhaps that trend is revealing, as it suggests judicial inclination toward a "rule" approach to Rule 41(a)(2) motions.[150] But whatever the reasons, the inclination should be made explicit and controlling.[151]

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148. In the refiled suit, a plaintiff could presumably recoup such a payment if *she* obtains an award of attorneys' fees, by way of prevailing on the merits, or by a settlement, assuming there is an exception to the American Rule available in that suit.

149. *See, supra* notes 59–64 and accompanying text.

150. *Compare* Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 631 (1994) (stating that, in interpreting the Federal Rules of Civil Procedure, "we would expect judges to opt for those procedural rules that maximize their ability to make discretionary decisions and those rules that enable a judge to make such decisions quickly and with a minimum of outside interference."), *with* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2140–42 (2000) (suggesting that one result of the rise of managerial judging is that courts are more willing to award fees). *But cf.* Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1214–16 (1996) (questioning whether judicial self-interest is explanatory of judicial behavior).

151. Generally speaking, exceptions to the American Rule must be evidenced by (among other things) "'explicit statutory authority.'" *Buckhannon*, 532 U.S. at 602 (quoting Key Tronic Corp. v. United States, 511 U.S. 809, 819 (1994)). Given that Rule 41(a)(2) does not explicitly mention attorneys' fees, the ability of a court to award fees under that prong of the rule might be questioned. *Cf.* Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 875 (6th Cir. 2000) (raising but not deciding issue in the context of holding that attorneys' fees are not awardable under Rule 41(d)); MARCUS, *supra* note 3, at 206 (also raising but not resolving issue). One response to this argument is that Rule 41(a)(2) is in effect a negotiation between the court and the plaintiff. *Rogers*, 230 F.3d at 875. The plaintiff is free to refuse any condition imposed and continue to litigate the case. *See* note 58 and accompanying text *supra*. Thus, the plaintiff and the court can be considered to be contracting around the interpretative rule.

Another response is to limit an award of attorneys' fees to those cases "where the underlying statute that is the basis of the original action permits the recovery of fees as costs." Esposito v. Piatrowski, 223 F.3d 497, 501 (7th Cir. 2000). This would encompass many federal question cases brought under statutes with fee shifting provisions, but would leave out some federal question cases and presumably many diversity actions. Yet another related problem in interpreting or amending Rule 41(a)(2) as suggested is that it might arguably run afoul of the substantive rights provision of the Rules Enabling Act. 28 U.S.C. § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right."). *Compare* Marek v. Chesny, 473 U.S. 1, 35–38 (1985) (Brennan, J., dissenting) (suggesting that Rule 68 should not be construed to cover attorneys' fees in light of proviso), *with* Business Guides, Inc. v. Chromatic Comm. Enters., Inc., 498 U.S. 533, 553 (1991) (attorneys' fees can be awarded as a sanction for violation of Rule 11).

Finally, an alternative would be to make the award of attorneys' fees a rebuttable presumption. This, too, reflects language in those cases that award attorneys' fees in this context.[152] The presumption could be rebutted by the plaintiff by relying on one or more of the factors that courts have employed to resolve Rule 41(a)(2) motions. It will be incumbent on the plaintiff to persuade the court that an award of attorneys'fees is inappropriate. The most persuasive factors here would be those peculiar to that suit (e.g., that there were unusual reasons for the plaintiff to wish to drop the suit now, or that the case took unexpected turns due in whole or in part to events beyond the control of the plaintiff), or of interest to the public (e.g., that the public interest in this type of litigation would be disserved by awarding fees). A corollary to the presumption would be the possibility of awarding only a partial amount of the reasonable attorneys' fee incurred by defendant.

This regime has obvious additional costs. To the extent that the parties cannot agree on the amount, courts will need to expend time holding hearings to award costs and attorneys' fees to the defendant. This should not generate much satellite litigation. Courts need only apply well-established guidelines developed for fee-shifting statutes.[153] Furthermore, the proposed reform will no doubt deter some filings of lawsuits. Some of those filings otherwise would have been dismissed within the window of opportunity (and hence no hearing would have occurred) or without (with a hearing on fees required unless the parties agreed). How much deterrence will take place overall will no doubt depend on a number of factors. To the extent that the plaintiff's lawyers strategically take the existence of the option into account *ex ante*, there might be fewer filings. In contrast, to the extent voluntary dismissals are

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The only comprehensive way to deal with all of these problems may be by statutory amendment.

152. *See, e.g.,* Marlow v. Winston & Strawn, 19 F.3d 300, 303 (7th Cir. 1994) ("*Typically*, a court imposes as a term and condition of dismissal that plaintiff pay the defendant the expenses he has incurred in defending the suit, which *usually* includes reasonable attorneys' fees.") (emphasis added).

153. *See, supra* Part IV B. As the Supreme Court recently emphasized, the lodestar approach has become the "guiding light" for fee-shifting determinations. Gisbrecht v. Barnhart, 535 U.S. 789, 802 (2002) (internal citation omitted). As the Court explained:

> 'ideally, ... litigants will settle the amount of a fee.' But where settlement between the parties is not possible, 'the most useful starting point for [court determination of] the amount of a reasonable fee [payable by the loser] is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.'

Id. (quoting Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)).

due to factors *ex post* the filing (for example change of mind or mistaken assumptions), there will be less deterrence.[154]

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The *Blumenthal v. Drudge* litigation described at the outset of this Article can be used as an illustration of the proposed reform. Recall that the parties settled the case by agreeing to a payment of $2500 from plaintiffs to defendant, a consensual arrangement permitted by Rule 41(a)(1)(ii). While the other prongs of Rule 41(a)(1) and (2) did not explicitly come into play, surely the settlement was influenced by the availability (or lack thereof) of other options. The case was in litigation for over three full years, and apparently both sides had spent tens of thousands of dollars in attorneys'fees.[155] With the prospect of still more depositions and fees, "the Blumenthals just wanted out,"[156] in the fourth year of litigation.

Under a broad voluntary dismissal option, like that still available in some states, the Blumenthals could have dropped the suit right then with no strings attached. On its face, this result does not seem particularly fair to the defendant or to the court. The acerbic Drudge is perhaps not the most sympathetic defendant to some, but he did apparently spend large sums in defending the suit. Likewise, the court must have devoted much time to the suit, as evidenced by its ruling on numerous motions in the case.[157] So, a unilateral dismissal would not have addressed the time and money spent by defendant and the court.

The plaintiffs were of course long past the window of opportunity to so dismiss under Rule 41(a)(1)(i), and under our proposed

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154. Thanks to Bob Bone for his helpful comments on the points explored in this paragraph, and elsewhere in this article.

155. The precise figures are not expressly mentioned in the otherwise comprehensive discussion of the case. *See* Parloff, *supra* note 6. The estimates in the text come from references to the Blumenthals incurring thousands of dollars in attorneys'fees. *Id.* at 111–12. It seems difficult to believe that Drudge did not spend similar amounts.

156. *Id.* at 112.

157. The district judge issued at least three rulings in the case. Blumenthal v. Drudge, 992 F.Supp. 44 (D.D.C. 1998) (denying motion to dismiss for lack of personal jurisdiction); Blumenthal v. Drudge, No. 97-1968(PLF), 186 F.R.D. 236 (D.D.C. 1999)(ruling on various discovery motions); Blumenthal v. Drudge, 2001 U.S. Dist. LEXIS 1749 (D.D.C. Feb. 13, 2001) (denying defendant's special motion to dismiss based on California's anti-SLAPP statute). The district court also rendered decisions on other motions not reflected in these three reported decisions. Parloff, *supra* note 6, at 109, 111. In addition, the parties met on at least one occasion at the suggestion of the district judge, with a U.S. Magistrate Judge to discuss discovery issues. *Id.* at 112.

reform, so they had to negotiate with the defendant or seek the court's permission. They chose the former. What if they had chosen the latter? Under the proposed reform, they could have obtained a dismissal, without prejudice, by paying the reasonable costs and attorneys'fees incurred by Drudge. If considered as a rebuttable presumption, did the Blumenthals have any good reasons not to pay costs and fees? Possibly. The case was unusual in ways beyond the high-profile nature of the parties. It raised several relatively unsettled issues of libel law,[158] and the case arguably took an unexpected twist in favor of Drudge in November 2000. It was at that point that the district judge, after "a long period of deliberation,"[159] ruled in favor of Drudge on his motion to delay his deposition. That meant that the Blumenthals would need to take "at least 10 and possibly as many as 25"[160] *other* depositions before deposing Drudge, which reportedly would alone add up to "$30,000 to $50,000 in additional expenses."[161] In these circumstances, the Blumenthals could have made a case that they should not pay any fees at all, or at least a reduced amount. Perhaps the $2500 they actually paid comes close to the appropriate reduced amount.

V. CONCLUSION

A plaintiff abandoning a suit she has initiated is surely an odd, though not particularly unusual, event. Various legal regimes have embraced various options to permit the plaintiff to so dismiss unilaterally. When those options are not unlimited, the plaintiff has been permitted to dismiss by permission of a court. Typically courts in those instances consider an array of factors, both to determine if the defendant would suffer "legal prejudice" by such a dismissal, and if conditions should be attached to the dismissal.

Parts of the current scheme, as reflected in practice in federal courts, ought to be left intact, or marginally modified. Other parts, however, should be deregulated. In particular, a court should automatically grant permission to a plaintiff to dismiss without prejudice, as long as plaintiff pays the reasonable costs and attor-

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158. Parloff, *supra* note 6, at 104–05 (discussing the application of the Communications Decency Act of 1996); *id.* at 106–08 (discussing defenses raised by Drudge).

159. *Id.* at 111.

160. *Id.*

161. *Id.*

neys' fees incurred by the defendant up to that point. Voluntary dismissals are helpful to a plaintiff, but often prejudicial to the defendant and the court system. The reforms outlined will better balance those interests.

Appendix

1. Alabama: Ala. R. Civ. P. 41(a)(1)(i) (2002):
Dismissal of Actions
(a) Voluntary dismissal: Effect Thereof.
(1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of this state, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .

2. Alaska: Alaska R. Civ. P. 41(a)(1)(a) (2002):
Dismissal of Actions.
(a) Voluntary Dismissal—Effect Thereof.
(1) *By Plaintiff—By Stipulation.* Subject to the provisions of Rule 23(c), of Rule 66 and of any statute of the state, an action may be dismissed by the plaintiff without an order of the court: [a] by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .

3. Arizona: Ariz. R. Civ. P. 41(a)(1)(A) (2003):
Dismissal of action
(a) Voluntary dismissal; by plaintiff or by order of court; effect
1. Subject to the provisions of Rule 23(c), or Rule 66(c), or of any statute, an action may be dismissed (A) by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .

4. Arkansas: Ark. R. Civ. P. 41(a)(1) (2002):
Dismissal of actions.
(a) *Voluntary Dismissal: Effect Thereof.*
(1) Subject to the provisions of Rule 23(d) and Rule 66, an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court. . . .

5. California: CAL. CIV. PROC. CODE § 581(b)(1) (West 1976 & Supp. 2003):

(b) An action may be dismissed in any of the following instances:

(1) With or without prejudice, upon written request of the plaintiff to the clerk, filed with papers in the case, or by oral or written request to the court at any time before the actual commencement of the trial, upon payment of the costs, if any.

6. Colorado: COLO. R. CIV. P. 41(a)(1)(A) (2003):

Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute, an action may be dismissed by the plaintiff without order of court upon payment of costs: (A) By filing a notice of dismissal at any time before filing or service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .

7. Connecticut: CONN. GEN. STAT. § 52-80 (1991 & Supp. 2003):

Nonsuits and withdrawals; costs

If the plaintiff, in any action returned to the court and entered in the docket, does not, on or before the opening of the court on the second day thereof, appear by himself or attorney to prosecute such action, he shall be nonsuited, in which case the defendant, if he appears, shall recover costs from the plaintiff. The plaintiff may withdraw any action so returned to and entered in the docket of any court, before the commencement of a hearing on the merits thereof. . . .

8. Delaware: DEL. R. CIV. P. 41(a)(1)(I) (2003):

Dismissal of actions.

(a) *Voluntary dismissal:* (1) By plaintiff; by stipulation. Except as otherwise provided by statute, an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before trial or before the service by the defendant of a demand for bill of particulars or other discovery or by filing a stipulation of dismissal signed by all the parties who appeared in the action. . . .

9. District of Columbia: D.C. R. CIV. P. 41(a)(1)(i) (2002):
Dismissal of actions.
(a) Voluntary dismissal: Effect thereof.
(1) By plaintiff; by stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any applicable statute, an action may be dismissed by the plaintiff without order of Court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .

10. Florida: FLA. R. CIV. P. 1.420(a)(1)(A) (2003):
Dismissal of Actions
(a) Voluntary Dismissal
(1) *By Parties.* Except in actions in which property has been seized or is in the custody of the court, an action may be dismissed by plaintiff without order of court (A) before trial by serving, or during trial by stating on the record, a notice of dismissal at any time before a hearing on motion for summary judgment . . . .

11. Georgia: GA. CODE ANN. § 9-11-41(a) (2003):
Dismissal of actions
(a) *Voluntary dismissal; effect thereof.* Subject to the provisions of subsection (c) of Code Section 9-11-23, of Code Section 9-11-66, and of any statute, an action may be dismissed by the plaintiff, without order or permission of the court, by filing a written notice of dismissal at any time before the plaintiff rests his case. . . .

12. Hawaii: HAW. R. CIV. P. 41(a)(1)(A) (2003):
Dismissal of actions.
(a) *Voluntary dismissal: Effect thereof.*
(1) By plaintiff; by stipulation. An action may be dismissed by the plaintiff without order of court (A) by filing a notice of dismissal at any time before the return date as provided in Rule 12(a) or service by the adverse party of an answer or of a motion for summary judgment . . . .

13. Idaho: IDAHO R. CIV. P. 41(a)(1)(i) (2002):

Dismissal of Actions—Voluntary Dismissal—Effect thereof—By plaintiff—By stipulation.

Subject to the provisions of Rule 23(e), of Rule 73, and of any statute of the state of Idaho an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever occurs first . . . .

14. Illinois: 735 ILL. COMP. STAT. 5/2-1009(a) (2002):

Voluntary dismissal. (a) The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause.

15. Indiana: IND. R. TRIAL P. 41(A)(1)(a) (2003):

Dismissal of actions

(A) Voluntary dismissal: Effect thereof.

(1) *By plaintiff—By stipulation.* Subject to contrary provisions of these rules or of any statute, an action may be dismissed by the plaintiff without order of court:

(a) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .

16. Iowa: IOWA R. CIV. P. 1.943 (2003):

Voluntary dismissal

A party may, without order of court, dismiss that party's own petition, counter-claim, cross-claim, cross-petition or petition of intervention, at any time up until ten days before the trial is scheduled to begin. . . . .

17. Kansas: KAN. STAT. ANN. § 60-241(a)(1)(i) (2003):

Dismissal of Actions

(a) Voluntary Dismissal; Effect Thereof. (1) *By Plaintiff; by Stipulation.* Subject to the provisions of subsection (e) of K.S.A. 60-223 and amendments thereto and of any statute of the state, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .

18. Kentucky: Ky. R. Civ. P. 41.01(1) (2002):
Voluntary Dismissal; Effect Thereof
(1) By plaintiff; by stipulation.
Subject to the provisions of Rule 23.05, of Rule 66, and of any statute, an action, or any claim therein, may be dismissed by the plaintiff without order of court, by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .

19. Louisiana: La. Code Civ. Proc. Ann. art. 1671 (West 1990 & Supp. 2003):
Voluntary dismissal.
A judgment dismissing an action without prejudice shall be rendered upon application of the plaintiff and upon his payment of all costs, if the application is made prior to any appearance of record by the defendant. . . .

20. Maine: Me. R. Civ. P. 41(a)(1)(i) (2002):
Dismissal of Actions
(a) Voluntary Dismissal: Effect Thereof.
(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(e) and of any statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of any motion for summary judgment, whichever first occurs . . . .

21. Maryland: Md. R. Civ. P. 2-506(a) (2003):
Voluntary dismissal.
(a) By notice of dismissal or stipulation. Except as otherwise provided in these rules or by statute, a plaintiff may dismiss an action without leave of court (1) by filing a notice of dismissal at any time before the adverse party files an answer or a motion for summary judgment . . . .

22. Massachusetts: MASS. R. CIV. P. 41(a)(1)(i) (2003):
Dismissal of Actions
(a) Voluntary Dismissal: Effect Thereof.
(1) *By Plaintiff; By Stipulation.* Subject to the provisions of these rules and of any statute of this Commonwealth, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .

23. Michigan: MICH. R. CIV. P. 2.504(A)(1)(a) (2003):
Dismissal of Actions
(A) Voluntary Dismissal; Effect.
(1) *By Plaintiff; by Stipulation.* Subject to the provisions of MCR 2.420 and MCR 3.501(E), an action may be dismissed by the plaintiff without an order of the court and on the payment of costs
(a) by filing a notice of dismissal before service by the adverse party of an answer or of a motion under MCR 2.116, whichever first occurs . . . .

24. Minnesota: MINN. R. CIV. P. 41.01(a)(1) (2003):
Dismissal of Actions
Voluntary Dismissal; Effect Thereof
(a) By Plaintiff by Stipulation. Subject to the provisions of Rules 23.05, 23.06 and 66, an action may be dismissed by the plaintiff without order of court (1) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .

25. Mississippi: MISS. R. CIV. P. 41(a)(1)(i) (2002):
Dismissal of Actions
(a) *Voluntary Dismissal: Effect Thereof.*
(1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 66, or of any statute of the State of Mississippi, and upon the payment of all costs, an action may be dismissed by the plaintiff without order of court:
(i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .

26. Missouri: MO. R. CIV. P. 67.02 (2002):
Voluntary Dismissal—Effect of
(a) Except as provided in Rule 52, a civil action may be dismissed by the plaintiff without order of the court anytime:
(1) Prior to the swearing of the jury panel for the voir dire examination, or
(2) In cases tried without a jury, prior to the introduction of evidence. . . .

27. Montana: MONT. R. CIV. P. 41(a)(1)(i) (2002):
Dismissal of Actions
(a) Voluntary Dismissal—Effect Thereof.
(1) *By Plaintiff—By Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the state of Montana, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, which ever first occurs . . . .

28. Nebraska: NEB. REV. STAT. § 25-601(1) (2003):
Dismissal without prejudice.
An action may be dismissed without prejudice to a future action (1) by the plaintiff, before the final submission of the case to the jury, or to the court where the trial is by the court.

29. Nevada: NEV. R. CIV. P. 41(a)(1)(i) (2001):
Dismissal of Actions
a) Voluntary dismissal: Effect thereof.
(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute, an action may be dismissed by the plaintiff upon repayment of defendants' filing fees, without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .

30. New Hampshire: *Total Service, Inc. v. Promotional Printers, Inc.*, 525 A.2d 273, 275 (N.H. 1987) (no statute):
"[A] plaintiff could be granted a nonsuit prior to the onset of the trial on the merits, but that the granting of the motion was subject to the discretion of the court."

31. New Jersey: N.J. R. CIV. PRAC. 4:37-1(a) (2003):

(a) By Plaintiff; By Stipulation. Subject to the provisions of R. 4:32-4 (class actions), R. 4:53-1 (receivership actions) and R. 4:60-18 (attachment actions), an action may be dismissed by the plaintiff without court order by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .

32. New Mexico: N.M. R. CIV. P. 1-041(A)(1)(a) (2003):

A. Voluntary dismissal; effect thereof.

(1) Subject to the provisions of Paragraph E of Rule 1-023 NMRA and of any statute, an action may be dismissed by the plaintiff without order of the court:

(a) by filing a notice of dismissal at any time before service by the adverse party of an answer or other responsive pleading . . . .

33. New York: N.Y. C.P.L.R. 3217(a)(1) (Mc Kinney 2003):

Voluntary discontinuance.

(a) Without an order. Any party asserting a claim may discontinue it without an order.

1. by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or within twenty days after service of the pleading asserting the claim, whichever is earlier, and filing the notice with proof of service with the clerk of the court . . . .

34. North Carolina: N.C. R. CIV. P. 41(a)(1)(i) (2003):

Dismissal of Actions

(a) Voluntary Dismissal; Effect Thereof.

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case . . . .

35. North Dakota: N.D. R. CIV. P. 41(a)(1)(i) (2002):
Dismissal of actions.
(a) Voluntary dismissal—Effect thereof.
(1) *By plaintiff; By stipulation.* Subject to the provisions of Rule 23(1), of Rule 66, and of any statute of this state, an action may be dismissed by the plaintiff without order of court, unless a provisional remedy has been allowed, (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .

36. Ohio: OHIO R. CIV. P. 41(A)(1)(a) (2002):
Dismissal of actions
(A) Voluntary dismissal: effect thereof.
(1) By plaintiff; by stipulation. Subject to the provisions of Civ. R. 23(E), Civ. R. 23.1, and Civ. R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:
(a) by filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant . . . .

37. Oklahoma: OKLA. STAT. tit. 12, § 683 (2001):
Dismissal of action—Grounds and time
An action may be dismissed, without prejudice to a future action:
First, By the plaintiff, before the final submission of the case to the jury, or to the court, where the trial is by the court. . . .

38. Oregon: OR. R. CIV. P. 54 (2003):
Dismissal of Actions; Compromise
A. Voluntary Dismissal; Effect Thereof.
A(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 32 D and of any statute of this state, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal with the court and serving such notice on the defendant not less than five days prior to the day of trial if no counterclaim has been pleaded . . . .

39. Pennsylvania: PA. R. CIV. P. 229(a) (2003):
Discontinuance
(a) A discontinuance shall be the exclusive method of voluntary termination of an action, in whole or in part, by the plaintiff before commencement of the trial.

40. Rhode Island: R.I. R. CIV. P. 41(a)(1)(i) (2003):
Dismissal of actions.
(a) *Voluntary Dismissal; Effect Thereof.*
(1)By Plaintiff; By Stipulation. Subject to the provisions of Rule 23(e), of Rule 66(j), and of any statute of this state, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .

41. South Carolina: S.C. R. CIV. P. 41(a)(1)(i) (1976):
(a) Voluntary Dismissal; Effect Thereof.
(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(c), of Rule 66(a), and of any statute, an action may be dismissed by the plaintiff without order of court (i) by filing and serving a notice of dismissal at any time before service by the adverse party of an answer or motion for summary judgment, whichever first occurs . . . .

42. South Dakota: S.D. R. CIV. P. § 15-6-41(a) (2002):
(a) Voluntary dismissal—Effect thereof.
(1) By Plaintiff; by Stipulation. Subject to the provisions of § 15-6-23(e), of § 15-6-66, and of any statute of this state, an action may be dismissed by the plaintiff without order of the court
(a) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .

43. Tennessee: TENN. R. CIV. P. 41.01(1) (2002):
Voluntary Dismissal—Effect Thereof
(1) Subject to the provisions of Rule 23.05, Rule 23.06, or Rule 66 or of any statute, and except when a motion for summary judgment made by an adverse party is pending, the plaintiff shall have the right to take a voluntary nonsuit to dismiss an action without prejudice by filing a written notice of dismissal at any time before the trial of a cause and serving a copy of the notice upon all parties, and if a party has not already been served with a summons and complaint, the plaintiff shall also serve a copy of the complaint on that party . . . .

44. Texas: TEX. R. CIV. P. 162 (2002):
Dismissal or Non-suit
At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes. . . .

45. Utah: UTAH R. CIV. P. 41(a)(1) (2002):
Dismissal of actions.
(a) *Voluntary dismissal; effect thereof.*
(1) *By plaintiff.* Subject to the provisions of Rule 23(e), of Rule 66(i), and of any applicable statute, an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or other response to the complaint permitted under these rules. . . .

46. Vermont: VT. R. CIV. P. 41(a)(1)(i) (2002):
Dismissal of Actions
(a) Voluntary Dismissal: Effect Thereof.
(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .

47. Virginia: VA. CODE ANN. § 8.01-380 (Michie 2000 & Supp. 2002):

Dismissal of action by nonsuit.—A. A party shall not be allowed to suffer a nonsuit as to any cause of action or claim, or any other party to the proceeding, unless he does so before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision. . . .

48. Washington: WASH. R. CIV. P. 41(a)(1)(B) (2003):

Dismissal of Actions

(a) Voluntary Dismissal.

(1) *Mandatory.* Subject to the provisions of rules 23(e) and 23.1, any action shall be dismissed by the court:

. . .

(B) By Plaintiff Before Resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of his opening case.

49. West Virginia: W. VA. R. CIV. P. 41(a)(1)(i) (1998):

Dismissal of actions.

(a) *Voluntary dismissal; effect thereof.*—(1) By plaintiff; by stipulation.—Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the State, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .

50. Wisconsin: WIS. R. CIV. P. 805.04(1) (2003):

Voluntary dismissal: effect thereof

(1) By plaintiff; by stipulation. An action may be dismissed by the plaintiff without order of court by serving and filing a notice of dismissal at any time before service by an adverse party of responsive pleading or motion . . . .

51. Wyoming: WYO. R. CIV. P. 41(a)(1)(i) (2002):
Dismissal of actions.
(a) *Voluntary dismissal; effect thereof.*
(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(c), of Rule 66, and of any statute, an action may be dismissed by the plaintiff without order of court: (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .