

July 24, 2022

Committee on Rules of Practice and Procedure
c/o Rules Committee Staff
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

We write to bring to the Committee’s attention a deficiency in Rule 41 of the Federal Rules of Civil Procedure. In regularly recurring circumstances, courts lack express authorization to dismiss one of several defendants at the plaintiff’s behest and without objection from the remaining parties. We identified this issue while clerking for Judge Benjamin Beaton¹ and decided to bring it to the Committee’s attention after seeing it repeatedly during our time with the court. And we’re not alone. As the Committee is aware, federal judges throughout the county have wrestled with and requested resolution of this issue.²

Federal Rule of Civil Procedure 41(a) allows a plaintiff to voluntarily dismiss an action (in some circumstances) or ask the court to do so (in other circumstances).³

But what happens when a plaintiff, without objection from the defendants, wishes to dismiss one (or fewer than all) of several defendants? By its plain language, Rule 41 doesn’t apply because it allows parties to dismiss only an “action”—a term that, read literally, “refers to the whole of the lawsuit.”⁴ There remain only two avenues under the Rules for a plaintiff seeking to dismiss against fewer than all defendants. First, she could amend her complaint under Federal Rule of Civil Procedure 15. Or second, in the case of misjoinder, a plaintiff could move for dismissal under Federal Rule of Civil Procedure 21.

¹ Judge Beaton sits on the United States District Court for the Western District of Kentucky.

² See Letter from Hon. Jesse Furman & Hon. Philip Halpern (21-CV-0), released on June 21, 2021, available at <https://www.uscourts.gov/rules-policies/archives/suggestions/hon-jesse-furman-and-hon-philip-halpern-21-cv-o>.

³ See Fed. R. Civ. P. 41(a).

⁴ *Brownback v. King*, 141 S. Ct. 740, 751 (2021) (Sotomayor, J., concurring). In full, Justice Sotomayor stated:

An “action” refers to the whole of the lawsuit. See Black’s Law Dictionary, at 37 (defining “action” as a “civil or criminal judicial proceeding”); Black’s Law Dictionary 43 (3d ed. 1933) (“The terms ‘action’ and ‘suit’ are now nearly, if not entirely, synonymous”). Individual demands for relief within a lawsuit, by contrast, are “claims.” See Black’s Law Dictionary, at 311 (2019) (defining a “claim” as “the part of a complaint in a civil action specifying what relief the plaintiff asks for”); Black’s Law Dictionary, at 333 (1933) (defining a “claim” as “any demand held or asserted as of right” or “cause of action”).

Id. (Sotomayor, J., concurring); see also *Columbia Gas Transmission, LLC v. Raven Co., Inc.*, No. 12-72-ART, 2014 WL 12650688, at *1 (E.D. Ky. March 6, 2014) (Thapar, J.) (“Rule 41(a)(1)(A) only permits voluntary dismissal of an “action,” which according to the Sixth Circuit means the *entire* controversy—all claims against all defendants, not individual claims or parties.”).

Somewhere along the line, however, the courts blurred any Rules-based distinctions in this context by using Rules 15, 21, and 41(a) interchangeably, though inconsistently, in cases where a plaintiff sought to dismiss one of several defendants in a case.⁵ According to Wright & Miller's *Federal Practice and Procedure*, "the net result is that there is a certain amount of inconsistency in the cases."⁶ An understatement, to be sure. In reality, there are inter- and intra-circuit splits leaving litigants without clear guidance on this issue.⁷ Another regrettable result of the widespread discrepancies is that district courts are left to do the best they can to muddle through "to secure the just, speedy, and inexpensive determination of every action and proceeding."⁸

With an eye toward practicality and judicial economy, we agree with Wright & Miller's assessment that it would "seem[] undesirable and unnecessary to invoke inherent power to avoid an artificial limit on Rule 41(a) that results from a highly literal reading of one word in that Rule."⁹ But fortunately, stretching the Rules beyond their plain meaning to cover these common circumstances isn't the only answer. The Committee can amend the Rules to resolve this inconsistency.

We ask the Committee to step in and help clear the confusion. We also propose an amendment to Rule 41(a)(1)(A)—simply adding the words "or a claim." The relevant part of the rule would then read: "Without a Court Order. Subject to Rules 23(e), 23.1(c), and 66 and any applicable federal statute, the plaintiff may dismiss an action or a claim without a court order"¹⁰ The addition of these three words would simply and efficiently resolve what has become an unnecessarily murky issue by allowing a plaintiff to dismiss her cause(s) of action against individual defendants.

A potential (and perhaps obvious) objection to this revision comes to mind. One might argue that the proposed revisions miss the mark because Rule 41 is titled "Dismissal of Actions," not "Dismissal of Actions and Claims." True. But the title misrepresents the Rule as it currently

⁵ 9 Fed. Prac. & Proc. Civ. § 2362 (4th ed.) (collecting cases that run the gamut).

⁶ *Id.*

⁷ See, e.g., *id.* (collecting cases from around the nation that take different approaches to this issue); *United States ex rel. Doe v. Preferred Care, Inc.*, 326 F.R.D. 462, 464 (E.D. Ky. 2018) (noting the inconsistency *within the Sixth Circuit* on this issue).

⁸ Fed. R. Civ. P. 1. In the Western District of Kentucky, for example, Judge Beaton settled on the following text order: "Plaintiff and Defendant Experian Information Solutions, Inc. have filed and signed a proposed agreed order of dismissal with prejudice (DN 11). The Court therefore acknowledges the dismissal of Experian Information Solutions, Inc. only from this case in accordance with Fed. R. Civ. P. 41, or, in the alternative, dismisses Experian Information Solutions, Inc. in accordance with Fed. R. Civ. P. 21." *Jones v. Edfinancial, et al.*, 3:21-cv-721, ECF No. 13. A game of legal twister if there ever were one.

⁹ 9 Fed. Prac. & Proc. Civ. § 2362 (4th ed.).

¹⁰ (emphasis added to suggested addition).

exists; Rule 41 already allows the dismissal of claims in some instances.¹¹ And if the Committee is concerned with this inconsistency, it can always amend the title accordingly.

On behalf of litigants, law clerks, and judges everywhere, we thank the Committee for its attention to this matter.

Sincerely,

David J. Wenthold & Zachary T. Reynolds.

¹¹ See Fed. R. Civ. P. 41(b) (allowing a defendant to “move to dismiss the action *or any claim* against it” where a “plaintiff fails to prosecute or to comply with these rules or a court order”) (emphasis added).