From: Lopez, Scott
Sent: Friday, March 15, 2024 4:52 PM
To: RulesCommittee Secretary
Subject: Suggestion to Amend FRCP Rule41(d)
Attachments: Rule 41(d) Amendment Proposal.docx

Secretary Byron,

Please find my attached proposal to amend FRCP Rule 41(d) to include attorneys' fees

Rule 41 Voluntary Dismissal

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs, **including attorneys' fees**, of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

Thank you for your time and attention.

Scott Lopez
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A Proposed Amendment to Federal Rules of Civil Procedure Rule 41(d) to Include Attorneys' Fees

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TABLE OF AUTHORITIES

Cases

Alyeska Pipeline Serv. v. Wilderness Soc'y, 421 U.S. 240 (1975).

Anders v. FPA Corp., 164 F.R.D. 383 (D.N.J. 1995), *and aff'd*, No. Civ. 93-2830, 1995 WL 785109 (D.N.J. Apr. 24, 1995).

Andrews v. America's Living Ctrs., LLC, 827 F.3d 306 (4th Cir. 2016).

Arcambel v. Wiseman, 3 Dall. 306 (1796).

Baker Botts L.L.P. v. Asarco, 576 U.S. 121 (2015).

Baum v. Blue Moon Ventures, 513 F.3d 181 (5th Cir. 2008).

Burlington Northern R. Co. v. Woods, 480 U.S. 1, 6 (1987).

Chien v. Hathaway, 17 F.3d 393 (9th Cir. 1994).

Christianburg Garment Co. v. Equal Emp. Opportunity Comm'n, 434 U.S. 412 (1978).

Crear v. JPMorgan Chase Bank, 491 F.Supp.3d 207 (N.D. Tex. Sep. 20, 2020).

Cromer v. Kraft Foods, 390 F.3d 812 (4th Cir. 2004).

Def.'s Br., Varsity Gay League, LLC v. Nichols, No. 22-2711, 2023 WL 2938238, at 1 (N.D. Tex. Apr. 13, 2023).

Esposito v. Piatrowski, 223 F.3d 497 (7th Cir. 2000).

Esquivel v. Arau, 913 F. Supp. 1382 (C.D. Cal 1996).

Evans v. Safeway Stores, Inc., 623 F.2d 121 (8th Cir. 1980).

Fox v. Vice, 563 U.S. 826 (2011).

Garza v. Citigroup Inc., 881 F.3d 277 (3rd Cir. 2018).

Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242 (2010).

Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13 (2d Cir. 2018).

Johnson v. Cartwright, 355 F.2d 32 (8th Cir. 1966).

Koloff v. Metropolitan Life Ins., No. 1:13-CV-02060, 2014 WL 3420990 5 (E.D. Cal. Jul. 11, 2014).

Marek v. Chesny, 473 U.S. 1 (1985).

Meredith v. Stovall, No. 99-3350, 2000 WL 807355 (10th Cir. Jun. 25, 2000).

Molski v. Evergreen Dynasty Corp., 500 F.3d 1047 (9th Cir. 2007).

Moskowitz v. Am. Sav. Bank, F.S.B., 37 F.4th 538 (9th Cir. 2022).

Newman v. Piggies Park Enter., 390 U.S. 400 (1968).

Octane Fitness, LLC v. ICIN Health & Fitness, Inc., 572 U.S. 545 (2014).

Peter v. Nantkwest, 140 S.Ct. 365 (2019).

Pledger v. Lynch, 5 F.4th 511, 521 (4th Cir. 2021).

Portillo v. Cunningham, 872 F.3d 728 (5th Cir. 2017).

Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868 (6th Cir. 2000).

Safir v. U.S. Lines, Inc., 792 F.2d 19 (2d Cir. 1985).

Sibbach v. Wison & Co., Inc., 312 U.S. 1, 10 (1941).

U.S. v. Williams, 809 F.2d 1072 (5th Cir. 1987).

Varsity Gay League, LLC v. Nichols, No. 22-2711, 2023 WL 2938238 (N.D. Tex. Apr. 13, 2023).

Walkaway Canada, Inc. v. You Walk Away, LLC, 3:10-CV-2657-L BF, 2011 WL 2455734 (N.D. Tex. May 12, 2011) *and aff'd*, No. 3:10-CV-2657-L, 2011 WL 2455716 (N.D. Tex. June 20, 2011).

Walker v. U.S. Dep't Hous. and Urb. Dev., 99 F.3d 761 (5th Cir. 1996).

Statutes

28 U.S.C. § 1821.

28 U.S.C. § 1920.

28 U.S.C. § 1927.

28 U.S.C. § 2071.

28 U.S.C. § 2072.

28 U.S.C. § 2073.

28 U.S.C. § 2074.

28 U.S.C. § 2075.

28 U.S.C. § 2077.

CAL. CIV. PROC. CODE § 391 (West 2023).

Fed. R. Civ. P. 11(c).

Fed. R. Civ. P. 35.

Fed. R. Civ. P. 37.

Fed. R. Civ. P. 41.

Fed. R. Civ. P. 54.

Tex. H.B. 274, 82nd Leg., R.S. (2011).

Books

Bad Faith, BLACK'S LAW DICTIONARY (11th ed. 2019).

Discretion, BLACK'S LAW DICTIONARY (11th ed. 2019).

Frivolous, BLACK'S LAW DICTIONARY (11th ed. 2019).

Judicial Discretion, BLACK'S LAW DICTIONARY (11th ed. 2019).

Vexatious, BLACK'S LAW DICTIONARY (11th ed. 2019).

Periodicals

8 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE: CIVIL § 41.70 (3d ed. 2023).

Adam N. Steinman, 4 FED. PRAC. & PROC. CIV. § 1004 (4th ed. 2023).

Arthur R. Miller, *§ 4508 The Erie Doctrine, Rules Enabling Act, and Federal Rules of Civil Procedure—Matters Covered by the Civil Rules*, 19 Fed. Prac. & Proc. Juris. 4508 (3d ed.) (2023).

Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 Hastings L.J. 231 (1989).

Donald J. Savery, Frank C. Corso, Edward P. Harrington, *A History of the Federal Rules of Civil Procedure*, 46 MAPRAC § 2:4 (2023).

John Leubsdorf, *Does the American Rule Promote Access to Justice? Was That Why it was Adopted?*, 67 Duke L.J. 257 (2019).

*Over Half of Americans Disapprove of Supreme Court as Trust Plummet*s, ANNENBERG PUB. POL'Y CTR., (Oct. 10, 2022) https://www.asc.upenn.edu/news-events/news/over-half-americans-disapprove-supreme-court-trust-plummet [https://perma.cc/G93P-UNLU].

Marshal S. Willick, Esq., *Vexatious Litigants: The Evolution of What to do About Them*, NEV. LAW. (Mar. 2022).

Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561 (1989).

Robert L. Rossi, § 10:1. General rule, 1 Attorneys' Fees § 10:1 (3d ed.).

Robert L. Rossi, § 6:1. General rule of no recovery, 1 Attorneys' Fees § 6:1 (3d ed.).

Robin Miller, Annotation, *Validity, Construction, and Application of State Vexatious* Litigant Statutes, 45 A.L.R. 6th 493 (2009).

Stephen Sugarman, *United States Tort Reform Wars*, 25 UNSWLJ 849 (2002).

William S. Brewbaker III, *Found Law, Made Law and Creation: Reconsidering Blackstone's Declaratory Theory*, 22 J. L. & RELIGION 255 (2006).

Websites

2015 Year-End Report on the Federal Judiciary, SUP. CT., https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf [https://perma.cc/776P-Z9WS].

Frivolous Litigation, TEXANS FOR LAWSUIT REFORM, https://www.tortreform.com/issue/frivolous-litigation/ [https://perma.cc/5XJV-MAPN].

Laws and Procedures Governing the Work of the Rules Committee, UNITED STATES COURTS, https://www.uscourts.gov/rules-policies/about-rulemaking-process/laws-and-procedures-governing-work-rules-committees#:~:text=The%20Rules%20Enabling%20Act%2C%2028,evidence%20for%20the%20federal%20courts [https://perma.cc/4ELT-4HPJ].

Vexatious Litigant List, CAL. CTS. (2023) https://www.courts.ca.gov/12272.htm [https://perma.cc/MJE7-RVAX].

I. Introduction

FRCP Rule 41(d) allows for a defendant's recovery of costs when a plaintiff who previously dismissed an action in court files the same claim against the defendant.[1] By its text, specifically referencing the "costs of a previously dismissed action"[2] the purpose of the subsection of the rule is to deter vexatious litigants from filing frivolous lawsuits, a noble goal and indicative of genuine issues in the courts system.[3] Curiously, the rule is written ambiguously to the overall purpose by limiting the recovery to costs and requiring that a request for costs may only be filed once the action is filed a second time.[4] This requirement severely handicaps courts from furthering the purpose of the law when they encounter bad-faith litigants. The law's language provides workarounds for ill-intentioned plaintiffs and ties the court's hands when frivolous litigation is identified. The drafters evinced a clear desire to stamp out bad-faith, vexatious litigation that

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[1] *See* Fed. R. Civ. P. 41 (defining the rules of voluntary dismissals by a plaintiff in a civil action).

[2] *See* Fed. R. Civ. P. 41(d) (establishing the right of a defendant against whom an action is commenced for a second time to have the costs of a previous action paid and have the secondary proceedings stayed until the order is complied with).

[3] *See Vexatious*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining vexatious as harassing or annoying conduct); *See Frivolous*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining frivolous as lacking a legal basis).

4 *See* 28 U.S.C. § 1821 (exemplifying costs in some contexts, including amounts for witness fees to include per diem and mileage).

wastes the court's time and creates undue burdens of costs and time for defendants, so it stands to reason that FRCP Rule 41(d) should be amended to free up courts to accomplish that goal.[5]

Simply enough, the confusion and roadblocks stemming from the rule can be cured by the addition of three simple words: "and attorneys' fees." Those words have the effect of preventing ill-intentioned plaintiffs from taxing the courts with frivolous litigation and put the discussion about how to navigate Rule 41(d) to rest. In amending the rule, efficiency, fairness, and justice can prevail.

II. Background/History

A. History of the Rule

The Federal Rules of Civil Procedure developed out of the need for "a unified system of general rules for cases in equity and actions at law."[6] Prior to the enactment of the rules, Congress delegated the authority to "make and establish all necessary rules for the orderly conducting of business in the said courts" through the Judiciary Act of 1789.[7] Additionally, the Process Act of 1792 authorized the United States Supreme Court to create the rules of federal court practice and

[5] *See Bad Faith*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining bad faith as a plain language term of "dishonesty of belief, purpose, or motive").

[6] Donald J. Savery, Frank C. Corso, Edward P. Harrington, *A History of the Federal Rules of Civil Procedure*, 46 MAPRAC § 2:4 (2023).

[7] Donald J. Savery, Frank C. Corso, Edward P. Harrington, *A History of the Federal Rules of Civil Procedure*, 46 MAPRAC § 2:4 (2023).

procedures for actions in admiralty and equity.[8] Further, statutes known as Conformity acts were passed, requiring federal courts to apply state procedural rules for actions in law.[9] The resulting landscape was confusing, and as courts began to merge law and equity, the cries for uniformity were too loud to ignore.[10] The Rules Enabling Act of 1934 permitted the Supreme Court to adopt a uniform set of procedural rules for districts courts.[11] In 1935, with its new found charge, the Supreme Court appointed an advisory committee to prepare a unified system of general rules.[12] The original purpose of the rules were to merge law and equity, but importantly, they were intended

[8] Donald J. Savery, Frank C. Corso, Edward P. Harrington, *A History of the Federal Rules of Civil Procedure*, 46 MAPRAC § 2:4 (2023).

[9] Donald J. Savery, Frank C. Corso, Edward P. Harrington, *A History of the Federal Rules of Civil Procedure*, 46 MAPRAC § 2:4 (2023).

[10] Donald J. Savery, Frank C. Corso, Edward P. Harrington, *A History of the Federal Rules of Civil Procedure*, 46 MAPRAC § 2:4 (2023).

[11] Donald J. Savery, Frank C. Corso, Edward P. Harrington, *A History of the Federal Rules of Civil Procedure*, 46 MAPRAC § 2:4 (2023); *See* 28 U.S.C. § 2071 (authorizing the Supreme Court to create rules for practices and procedures in federal courts; *See* 28 U.S.C. § 2072 (granting the power to prescribe rules); *See* 28 U.S.C. § 2073 (describing the method of prescribing); *See* 28 U.S.C. § 2074 (describing the submission of rules to Congress); *See* 28 U.S.C. § 2075 (expanding the power to prescribe rules to the bankruptcy courts); *See* 28 U.S.C. § 2077 (describing the publication of rules and the processes for advisory committees).

[12] Donald J. Savery, Frank C. Corso, Edward P. Harrington, *A History of the Federal Rules of Civil Procedure*, 46 MAPRAC § 2:4 (2023).

to be simple and effective.[13] The ends of unity and simplification indicates that the legal thinkers involved in proposing the system and drafting the rules valued accessible courts which are unmarred by distinct jurisdictional variance and red tape.[14] A review of the original intent of the rules gives perspective and a point of comparison as to whether the rules still uphold those original objectives.

The Federal Rules of Civil Procedure Rule 41 was adopted in 1937 along with the first rules submitted to the Supreme Court for adoption, and it addresses the dismissal of actions in a federal civil setting.[15] The three possible scenarios for dismissal under Rule 41 include: voluntary dismissal by the plaintiff, dismissal by court order, and involuntary dismissal.[16] Rule 41(d) addresses the payment of costs of a previously dismissed action.[17] The rule states "If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the defendant, the court: (1) may order the plaintiff to pay all or part of the costs of that previous action."[18] Although Rule 41 was amended in 1946, 1963, 1991, and 2007, the section

[13] Adam N. Steinman, 4 FED. PRAC. & PROC. CIV. § 1004 (4th ed. 2023).

[14] *See* Adam N. Steinman, 4 FED. PRAC. & PROC. CIV. § 1004 (4th ed. 2023) (explaining the extensive efforts taken by attorneys and judges in contributing to the promulgation of the Federal Rules of Civil Procedure).

[15] Fed. R. Civ. P. 41.

[16] Fed. R. Civ. P. 41.

[17] Fed. R. Civ. P. 41(d).

[18] Fed. R. Civ. P. 41(d); Fed. R. Civ. P. 41(d)(1).

pertaining to costs, Rule 41(d) was left unchanged.[19] Whether by oversight or intent, the failure to take a periodic review of the rule has led to some adverse consequences.

B. The Circuit Split

While Rule 41 (d) has a straightforward history in terms of its drafting and ratification, its application has been the subject of much discussion in Federal Court. Rule 41 (d) is brief in text, but confusion has reigned in the courts' attempts to work the interplay of its purpose and language. Interestingly, the purpose of the rule does not seem to be in question, even across the spectrum of its application.[20] The circuit split breaks down the rule into three schools of thought. First, the Second, Eighth, and Tenth Circuits have been in concert allowing courts to have unfettered discretion to award attorneys' fees as a part of costs under Rule 41 (d).[21] Conversely, the Sixth Circuit has said that the plain meaning of the text is such that no court may award attorneys' fees as a part of the costs.[22] Finally, the Third, Fourth, Fifth, and Seventh Circuits have all held that

[19] Fed. R. Civ. P. 41.

[20] *See* Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13 (2d Cir. 2018) (observing the purpose of the rule is to deter vexatious litigation and states that courts should have unfettered discretion to award attorneys' fees as a part of costs); *See* Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868 (6th Cir. 2000) (acknowledging the rule serves to deter vexatious litigation, but concludes that the plain language does not allow for recovery of attorneys' fees); *See* Portillo v. Cunningham, 872 F.3d 728 (5th Cir. 2017) (Explaining the circuit split on Rule 41(d) and holding that attorneys' fees should only be included when the underlying statute allows).

[21] 8 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE: CIVIL § 41.70 (3d ed. 2023).

[22] 8 James WM. Moore, *Moore's Federal Practice: Civil* § 41.70 (3d ed. 2023).

courts may award attorneys' fees as costs under Rule 41 (d) so long as the statute underlying the action allows for it.[23]

C. Problems at the District Level

The mixed application of Rule 41 (d) among the circuits has left district courts, which most often bear the responsibility of applying the rule, with an uneasy sense of frustration at times, as evinced in the Northern District of Texas's district court in deciding *Varsity Gay League v. Nichols*.[24] In this case, the plaintiff filed an action in state court, alleging breach of contract, breach of fiduciary duty, tortious interference with contract, tortious interference with prospective business opportunity, declaratory judgment, civil conspiracy, and aiding and abetting.[25]

The discovery process in the state case lasted for sixteen months, during which time the plaintiff failed to disclose the amount of damages it sought or how the damages would be

[23] 8 James WM. Moore, *Moore's Federal Practice: Civil* § 41.70 (3d ed. 2023).

[24] Varsity Gay League, LLC v. Nichols, No. 22-2711, 2023 WL 2938238 (N.D. Tex. Apr. 13, 2023); *See* Anders v. FPA Corp., 164 F.R.D. 383, 390 (D.N.J. 1995), *and aff'd*, No. Civ. 93-2830, 1995 WL 785109 (D.N.J. Apr. 24, 1995) (stating "the arguments and factors that weighed heavily in this Court's decision to include attorney's fees as costs in its Rule 41(d) award are significantly overshadowed by the applicability of *Marek v. Chesny* to this situation"); *See* Walkaway Canada, Inc. v. You Walk Away, LLC, 3:10-CV-2657-L BF, 2011 WL 2455734, at 2 (N.D. Tex. May 12, 2011) *and aff'd*, No. 3:10-CV-2657-L, 2011 WL 2455716 (N.D. Tex. June 20, 2011) (awarding attorneys' fees upon finding a successful Rule 41(d) motion).

[25] Varsity Gay League, LLC v. Nichols, No. 22-2711, 2023 WL 2938238, at 1 (N.D. Tex. Apr. 13, 2023).

calculated.[26]After discovery closed, the plaintiffs attempted to admit 700 pages of exhibits into the record, but none of the pages were authenticated, rendering the documents inadmissible.[27] Roughly three hours before the summary judgment hearing, the plaintiff dismissed its claims without prejudice.[28]

Seven months later, the plaintiff filed the same claims with the addition of one more, this time in federal court.[29] The filing in federal court triggered Rule 41 (d) and the defendants moved to recover their costs from the state court action.[30] The defendants calculated costs and attorneys' fees in the amount of $55,923.61 over the course of the sixteen month discovery process and requested that 90% of the costs and fees be paid, with a 10% deduction based on the applicability of the attorneys' work from the state case to the federal case.[31]

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[26] Def.'s Br., Varsity Gay League, LLC v. Nichols, No. 22-2711, 2023 WL 2938238, at 1 (N.D. Tex. Apr. 13, 2023).

[27] Varsity Gay League, LLC v. Nichols, No. 22-2711, 2023 WL 2938238, at 1 (N.D. Tex. Apr. 13, 2023).

[28] Varsity Gay League, LLC v. Nichols, No. 22-2711, 2023 WL 2938238, at 1 (N.D. Tex. Apr. 13, 2023).

[29] Varsity Gay League, LLC v. Nichols, No. 22-2711, 2023 WL 2938238, at 2 (N.D. Tex. Apr. 13, 2023).

[30] Varsity Gay League, LLC v. Nichols, No. 22-2711, 2023 WL 2938238 2 (N.D. Tex. Apr. 13, 2023).

[31] Def.'s Br., Varsity Gay League, LLC v. Nichols, No. 22-2711, 2023 WL 2938238, at 1 (N.D. Tex. Apr. 13, 2023).

The court reluctantly awarded only court costs in this matter.[32] It was bound to Fifth Circuit precedent which only allowed for the recovery of attorneys' fees if the underlying statute permitted, and its analysis, the court encouraged reconsideration of the *Portillo* holding, which is the controlling Fifth Circuit authority on the matter, as well as Rule 41(d) in general.[33] The identified issues with the prior holdings came to a head in *Varsity Gay League v. Nichols* as the court identified vexatious litigants who were not deterred from filing repeated litigation to the same claims.[34] As long as the rule is not amended, courts will continue to have their hands tied and the purpose of the rule will not be fully effectuated.

D. Attorneys' Fees in Civil Actions

In establishing the importance of attorneys' fees to Rule 41(d) applications, it is prudent to explore the parameters of awarding attorneys' fees generally as they apply to federal civil actions. The mere concept of attorneys' fees can be bewildering at times for the sake of when they are

[32] Varsity Gay League, LLC v. Nichols, No. 22-2711, 2023 WL 2938238 5 (N.D. Tex. Apr. 13, 2023).

[33] Varsity Gay League, LLC v. Nichols, No. 22-2711, 2023 WL 2938238 5 (N.D. Tex. Apr. 13, 2023).

[34] Varsity Gay League, LLC v. Nichols, No. 22-2711, 2023 WL 2938238 4 (N.D. Tex. Apr. 13, 2023).

permitted and what can constitute a recoverable fee.[35] The difficulty in determining attorneys' fees' recoverability stems from the long-standing traditions and application of the "bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise."[36] The American Rule's application reaches back to the 18th century.[37] The tradition of paying one's own attorneys' fees has noble roots as it stands

[35] Koloff v. Metropolitan Life Ins., No. 1:13-CV-02060, 2014 WL 3420990, at 5 (E.D. Cal. Jul. 11, 2014) (Detailing attorneys' fees from researching phrases such as "attorneys' fees on remand" and "whether attorneys' fees can be recovered after dismissal with prejudice," resulting in nearly 60 hours of work for a total cost of more than $20,000).

[36] Baker Botts L.L.P. v. Asarco LLC, 576 U.S. 121, 126 (2015) (Citing *Hardt v. Reliance Standard Life Ins. Co.,* 560 U.S. 242, 252–253 (2010); *See* Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 252–253 (2010) (describing the American Rule as "Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise"); *See generally* Robert L. Rossi, § 10:1. General rule, 1 Attorneys' Fees § 10:1 (3d ed.) (describing the American Rule); *See generally* Robert L. Rossi, § 6:1. General rule of no recovery, 1 Attorneys' Fees § 6:1 (3d ed.) (explaining the history of the American Rule).

[37] Baker Botts L.L.P. v. Asarco, 576 U.S. 121, 126 (2015) (Citing Arcambel v. Wiseman, 3 Dall. 306 (1796)); *See* Arcambel v. Wiseman, 3 Dall. 306 (1796) (concluding in its decision not to include attorneys' fees in an award for costs, "even if that practice were not strictly correct in principle, it is entitled to the respect of the Court, till it is changed or modified by statute").

in contrast to the English rule, which allows for the prevailing party collect attorneys' fees.[38] To some end, much of same fear and distrust of the judiciary held by early Americans still exists today, so it is understandable that lawmakers would be wary of fundamental changes to the system, but an amendment to Rule 41(d) is unlikely to create such an effect if implemented correctly.[39]

III. Analysis

The history of the Federal Rules of Civil Procedure, the pervasiveness of the American Rule for attorneys' fees,[40] difficulties in categorically identifying vexatious litigants, and concerns for expanding judicial discretion are factors that have possibly inhibited the amendment of Rule 41(d). Cautiousness is understandable, but reluctance to settle the issues presented by Rule 41(d)'s by amendment is hindering the federal courts and the lack of certainty will continue to be a greater threat than any negative outcomes that could be derived from creating another exception to the American Rule.

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[38] Conte v. Flota Mercante Del Estado, 277 F.2d 644, 672 (2d Cir. 1960) (Asserting that the English practice was departed from because of the colonies' distrust of lawyers and that the English system favored wealthy litigants).

[39] *See generally Over Half of Americans Disapprove of Supreme Court as Trust Plummet*s, ANNENBERG PUBLIC POLICY CENTER (Oct. 10, 2022), https://www.asc.upenn.edu/news-events/news/over-half-americans-disapprove-supreme-court-trust-plummets (Explaining that 53% of U.S. adults disapprove of how the Supreme Court functions in a general perceptive sense).

[40] *See* Fed. R. Civ. P. 54 (defining costs in a judgment as being amounts other than attorneys' fees).

While the purpose of Rule 41(d) is largely agreed upon and its ends deemed important, the ends have not met the purpose of the rule in deterring vexatious litigation. In turn, Rule 41(d)'s weakness bogs down courts, creates distrust in the civil judicial system, and fails to impose on ill-intentioned plaintiffs a needed disincentive to file frivolous claims.

A. Identifying Vexatious Litigants

The idea of 'vexatious litigant' does not stem directly from Rule 41(d). As a legal concept, the term has roots in England going back to 1896 in England.[41] California was the first in the United States to create a vexatious litigation law.[42] The California law defines a "vexatious litigant" as a person who meets several specific standards relating to the number of unjustifiable actions filed.[43] Several other states like Florida, Hawaii, Ohio, and Texas have enacted vexatious litigation statues as well.[44] The problem with these statutory definitions of vexatious litigants in

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[41] *See* Marshal S. Willick, *Vexatious Litigants: The Evolution of What to do About Them*, NEV. LAW. (Mar. 2022) (describing the Vexatious Actions Act in England which was enacted in response to a man who filed numerous actions against "leading members of Victorian society").

[42] Marshal S. Willick, *Vexatious Litigants: The Evolution of What to do About Them*, Nevada Lawyer, Mar. 2022 (describing the California law enacted "to address problems 'created by the persistent and obsessive litigant, who has constantly pending a number of groundless actions'").

[43] *See* CAL. CIV. PROC. CODE § 391(b) (West 2023) ("In the immediately preceding seven-year period has commenced . . . at least five litigations other than in small claims court that have been (i) finally determined adversely to the person.").

Nevada Lawyer, Mar. 2022; *See* Tex. H.B. 274, 82nd Leg., R.S. (2011) (permitting attorneys' fees to be awarded in Texas state courts for "abusive civil actions").

attempting to reconcile them with Rule 41(d) is their tendency to establish standards for litigants who create problems for the legal system generally.[45] California evinces this notion within the language of its vexatious litigation statute by requiring the court clerks to maintain a record of vexatious litigants.[46] By viewing the tendency to bring vexatious litigation over a series of multiple filings and maintaining a list of such litigants, California primarily makes an effort to protect the courts. While state statutes are like Rule 41(d) because they also serve to protect the courts by deterring vexatious litigants, Rule 41(d)'s deterrence rests in its mechanical tendency to protect innocent defendants.

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[45] *See* Robin Miller, Annotation, *Validity, Construction, and Application of State Vexatious Litigant Statutes*, 45 A.L.R. 6th 493 (2009) ("The purpose of such a statute is to prevent abuse of the judicial system by those persons who persistently and habitually file lawsuits without reasonable grounds, or who otherwise engage in frivolous conduct in the courts).

[46] *See* CAL. CIV. PROC. CODE § 391.7(f) (West 2023) (instructing that the Judicial Council shall maintain a record of vexatious litigants subject to prefiling orders and disseminate the list to state courts annually); *See Vexatious Litigant List*, CAL. CTS. (2023) https://www.courts.ca.gov/12272.htm [https://perma.cc/MJE7-RVAX] (listing the vexatious litigants).

Federal courts have delved into analyses of vexatious litigation like states have done in the creation of vexatious litigation statutes.[47] In such cases, the litigants being evaluated for their vexatiousness tend to be serial filers. In a district court case, *Crear v. JPMorgan Chase Bank*,[48] the court adopted the magistrate's recommendation and recognized its inherent power to levy sanctions to protect efficient and orderly administration of justice.[49] There, the plaintiff was pro se and filing his sixth lawsuit against the defendant.[50] The court found the plaintiff to be vexatious, following a standard established in a Fifth Circuit case.[51] Specifically, the court weighed the following factors: (1) the party's history of litigation and whether it was vexatious; (2) whether the party had a good-faith basis in pursuing litigation; (3) the burden on the courts resulting from the party's filings; and (4) the adequacy of alternative sanctions.[52] While the district court used these factors to determine that the plaintiff was vexatious, the factors came from a case where the Fifth

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[47] *See* Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1057 (9th Cir. 2007) (discussing the factors of frivolousness and vexatiousness in the behavior of litigants); See Safir v. U.S. Lines, Inc., 792 F.2d 19, 24 (2d Cir. 1985) (describing factors for consideration to restrict a vexatious litigant's access to the court).

[48] Crear v. JPMorgan Chase Bank, 491 F.Supp.3d 207 (N.D. Tex. Sep. 20, 2020).

[49] Crear v. JPMorgan Chase Bank, 491 F.Supp.3d 207, 218 (N.D. Tex. Sep. 20, 2020).

[50] Crear v. JPMorgan Chase Bank, 491 F.Supp.3d 207, 211 (N.D. Tex. Sep. 20, 2020)

[51] Crear v. JPMorgan Chase Bank, 491 F.Supp.3d 207 (N.D. Tex. Sep. 20, 2020) (citing *Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 189 (5th Cir. 2008) (quoting *Cromer v. Kraft Foods N. Am., Inc.*, 390 F.3d 812, 818 (4th Cir. 2004)).

[52] Crear v. JPMorgan Chase Bank, 491 F.Supp.3d 207, 219 (N.D. Tex. Sep. 20, 2020).

Circuit was analyzing its position about imposing a pre-filing injunction to deter further vexatious filings.[53]

The factors stated by the court are not a comprehensive list of what constitutes a vexatious litigant, nor do they necessarily seek to be comprehensive or create a prima facie standard for vexatiousness. Rather, the federal courts have asserted their inherent power to levy sanctions upon a sua sponte finding that a litigant has filed vexatiously.[54] In light of precedent determining what constitutes a vexatious litigant, federal courts have largely viewed their roles through the lens of Rule 11.[55] This makes good sense in the case of sanctions motions which state a grievance against the other party under Rule 11(b).[56] While the Rule 11 handling of vexatious litigants is workable in cases of pro se litigants filing repetitive actions without merit, it is an incomplete solution.

State lawmakers and federal courts adhering to Rule 11 have done a fine job of identifying vexatious litigants and disposing of their cases properly in situations where bad-faith plaintiffs

[53] Baum v. Blue Moon Ventures, 513 F.3d 181, 189 (5th Cir. 2008) (quoting) ("In determining whether it should impose a pre-filing injunction or should modify an existing injunction to deter vexatious filings, a court must weigh all the relevant circumstances").

[54] Baum v. Blue Moon Ventures, 513 F.3d 181, 189 (5th Cir. 2008).

[55] *See* Fed. R. Civ. P. 11(c) (permitting courts to grant motions for sanctions or issue show-cause orders for violations of Rule 11(b)).

[56] *See* Fed. R. Civ. P. 11(b) (requiring litigants for file pleadings which are not presented for improper purpose, are nonfrivolous, and have evidentiary support).

make serial filings without merit.[57] Yet, these schemes exist primarily to protect the courts from the hazards brought by such litigants. While these concerns are entirely valid, the vexatious litigant problem needs to be solved in cases invoking Rule 41(d), where frivolous action is less of a serial nature, but just as serious.

B. Other Recovery Mechanisms for Victims of Bad-Faith Litigation

Because vexatious litigants can be identified outside the context of Rule 41 dismissals, there are other mechanisms for recovery. Even if the attorneys' fees were never found to be available under Rule 41(d), a defendant may have a claim for them under 28 U.S. Code § 1927.[58] Under this provision, a person "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."[59] The importance of this rule and any other that may come into publication do not undermine or stand in contrast to the need for an amendment to Rule 41(d). The inclusion of attorneys' fees in Rule 41(d) adds a necessary tool to the court's toolbox in the more effective and efficient administration of justice.

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[57] *See Frivolous Litigation*, TEXANS FOR LAWSUIT REFORM, https://www.tortreform.com/issue/frivolous-litigation/ [https://perma.cc/5XJV-MAPN] (explaining the process by which Texas has made strides to prevent frivolous litigation).

[58] Garza v. Citigroup Inc., 881 F.3d 277, 284 (3rd Cir. 2018).

[59] *See* 28 U.S.C. § 1927 (defining counsel's liability for costs, expenses, and attorneys' fees when an attorney or person conducting cases multiplies the proceedings unreasonably and vexatiously).

C. A Primer on Judicial Discretion

Judicial discretion is paramount to the effectiveness of an amendment to Rule 41(d). As with the awarding of attorneys' fees, judicial discretion can be an uncomfortable vehicle of jurisprudence to the onlooking public. Judicial discretion is "the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law."[60] The definition, while innocuous in its text, embraces the reality that comes with being a judge. Some situations arise where a judge must view the totality of the circumstances and decide on their understanding of facts, law, and the goals associated with justice. Judicial discretion rejects legal formalism, which means that the only viable option outside of sticking to rigid structure in judicial decision-making is to embrace judicial intuition that is associated with Legal Realism.[61] Put plainly and applied to allowing for the award of attorneys' fees, a foreseeable criticism of an amendment to Rule 41(d) could be a fear of widening the latitude for judges to label a plaintiff as vexatious at their discretion.

An apt comparison for how the discretion to award attorney's fees would play out under an amendment to Rule 41(d) is a review of the trial judge's well-established authority to impose contempt sanctions. A trial judge may impose sanctions on parties or even witnesses during a

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[60] *Judicial Discretion*, BLACK'S LAW DICTIONARY (11th ed. 2019); *See also Discretion*, BLACK'S LAW DICTIONARY (11th ed. 2019) (providing the associated definition of "judicial discretion" as "wise conduct and management exercised without constraint").

[61] *See* Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 Hastings L.J. 231, 235 (1989) (describing legal Realist's fascination with judicial intuition and its growth from the rejection of legal formalism).

trial.[62] In such cases where a judge determines a party or witness has acted in a manner which warrants sanctions, they may be imposed in a criminal or civil context.[63] Civil contempt sanctions enforce compliance with a court order and compensate injured parties, while imposition of criminal contempt sanctions vindicate the court's authority.[64] When criminal contempt sanctions are appropriate, Rule 42(a) of the Federal Rules of Criminal Procedure allows a federal judge to impose sentences and fines when a contemnor's misconduct is perceived.[65] Like orders stemming from Rule 41(d), criminal contempt judgments are appealable, and in such cases, the appellate court reviews the decision under the standard of whether the exercise of judicial power constitutes an abuse of discretion.[66]

In a perhaps dissatisfying revelation to critics of judicial discretion, the inquiry regarding its abuse at the appellate level tends to be yet another discretionary decision. In a Fifth Circuit case, *U.S. v. Williams*[67], the appellant contended that the district court judge's conduct and comments during trial deprived them of their right to a fair trial, due process, and the effective representation of counsel.[68] There, the court recognized its role as determining "whether the judge's behavior was so prejudicial that it denied [the appellants] a fair, as opposed to perfect,

[62] D. Alana Leaphart, *Authority of the Trial Judge*, 77 Geo. L.J. 1009, 1022 (1989).

[63] D. Alana Leaphart, *Authority of the Trial Judge*, 77 Geo. L.J. 1009, 1022 (1989).

[64] D. Alana Leaphart, *Authority of the Trial Judge*, 77 Geo. L.J. 1009, 1024–26 (1989).

[65] D. Alana Leaphart, *Authority of the Trial Judge*, 77 Geo. L.J. 1009, 1026–27 (1989).

[66] D. Alana Leaphart, *Authority of the Trial Judge*, 77 Geo. L.J. 1009, 1028 (1989).

[67] U.S. v. Williams, 809 F.2d 1072 (5th Cir. 1987).

[68] U.S. v. Williams, 809 F.2d 1072, 1086 (5th Cir. 1987).

trial."[69] The court reviewed the trial court record and found that the judge's 900 interruptions in the course of the eight-week trial; remarks from the bench that resulted in the jury's collective laughter at the expense of an appellant's witness; and the judge's decision to fine a lawyer in front of the jury for contempt were not errors of such prejudice that the appellant was denied a fair trial.[70]

The conclusion underlines the principle that judicial discretion is important, if not inevitable in law. Particularly in procedural discretion, judges are charged with identifying the intricacies of the parties' behavior and determining the best course of action to handle various acts. There are appropriate safeguards in place in the form of appellate review, and while some may contest the mechanics of the process out of a desire to return to formalism, allowing for judicial discretion is simply not a novel concept that should cause additional worry when considering an amendment of Rule 41(d).

D. No Authority to Award Attorneys' Fees

The Sixth Circuit is the only court to completely disallow the award of attorneys' fees for a successful motion under Rule 41(d). In doing so, it presents the strongest case for an amendment or overhaul of the rule. In *Rogers v. Wal-Mart Stores, Inc.*, the court held that attorneys' fees are not available under Rule 41(d) because the rule is unambiguous in only allowing for costs.[71]

The action arose from injuries sustained by the plaintiff when she tripped and fell on a wooden pallet in the aisle of a Wal-Mart store.[72] A complaint was filed for negligence over the

[69] U.S. v. Williams, 809 F.2d 1072, 1086 (5th Cir. 1987).

[70] U.S. v. Williams, 809 F.2d 1072, 1086–91 (5th Cir. 1987).

[71] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 875 (6th Cir. 2000).

[72] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 870 (6th Cir. 2000).

placement of the pallet in the store and the plaintiff sought $950,000 in damages.[73] Within weeks, the defendant removed the case to federal court and the parties stipulated to dismissal less than a year later.[74] Almost four months after the dismissal was entered by the district court, the plaintiff filed a new complaint in state court, alleging the same facts as the first action, and again, defendant Wal-Mart removed the action to federal court.[75] The plaintiff attempted to remand the action to state court, claiming that the amount in controversy did not meet statutory requirements for diversity jurisdiction because her total damages did not exceed $75,000.[76] The district court denied the plaintiff's motion to remand and granted costs to defendant upon filing a Rule 41(d) motion.[77] The plaintiff then appealed the granting of costs under Rule 41(d) among other orders the court had entered.[78]

In its opinion, the Sixth Circuit reviewed the district court's order pertaining to the motion for costs of a previously dismissed action for abuse of discretion.[79] The court did not find an abuse of discretion because the standard for awarding costs does not hinge on a finding of bad faith.[80] While bad faith could be a rationale for awarding costs, Rule 41(d) also serves to protect against

[73] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 870 (6th Cir. 2000).

[74] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 870 (6th Cir. 2000).

[75] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 870 (6th Cir. 2000).

[76] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 870 (6th Cir. 2000).

[77] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 871 (6th Cir. 2000).

[78] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 871 (6th Cir. 2000).

[79] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 874 (6th Cir. 2000).

[80] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 874 (6th Cir. 2000).

forum shopping, where plaintiffs who have suffered setbacks in one court may dismiss to "try their luck somewhere else."[81] In this case, the court points out that the plaintiff Rogers's behavior was more in line with forum-shopping behavior, attempting to "wipe the slate clean" and have her case heard before a new judge after failing to disclose an expert witness in a timely manner in the federal court.[82] Following this analysis, the court agreed with the lower court, ultimately deciding the requirements to trigger Rule 41(d) had been met.[83] The court then moved on to address whether attorneys' fees would be available as a part of costs.[84]

The court flatly denied the recovery of attorneys' fees as costs, acknowledging that its place is simply not to "essentially re-draft the rule" itself since Congress has the power to draft the rule as it sees fit.[85] The court held that the defendant was entitled to costs under Rule 41(d) and costs in the amount of $185 could stand, but the attorneys' fees in the amount of $1,581.55 could not.[86]

In shuttering hopes for an award of attorneys' fees in the Sixth Circuit, the court places the onus on Congress to settle the issue. The court acknowledges the circuit split, saying "we realize that an award of attorney fees may be authorized, even if not expressly provided for, 'if the statute

[81] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 874 (6th Cir. 2000).

[82] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 874 (6th Cir. 2000).

[83] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 874 (6th Cir. 2000).

[84] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 875 (6th Cir. 2000).

[85] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 875 (6th Cir. 2000).

[86] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 875 (6th Cir. 2000).

otherwise evinces an intent to provide for such fees.'"[87] The court describes how an authorizing statute is still at odds with the Federal Rules of Civil Procedure because Rule 41(d) is ambiguous on attorneys' fees.[88] The court takes a broader view of the Federal Rules of Civil Procedure and notes multiple other rules which specifically provide for the recovery of attorneys' fees.[89] The court concludes its interpretation of congressional intent saying "in some contexts, Congress does not consider attorney fees to be a part of an award of "costs.""[90]

Perhaps the most interesting assertion by the court, made in a passing way, was that "the Federal Rules of Civil Procedure is not so clear on this issue that is overcomes the absence of an express provision for attorney fees in Rule 41(d)."[91] Given that the Federal Rules of Civil Procedure serve to ensure clarity and simplicity in order to avoid petty squabbling and achieve a

[87] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 875 (6th Cir. 2000). (citing Key Tronic Corp. v. United States, 511 U.S. 809, 815 (1994)).

[88] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 875 (6th Cir. 2000).

[89] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 875 (6th Cir. 2000) (citing Simeone v. First Bank Nat'l. Ass'n, 125 F.R.D. 150, 155 (D. Minn. 1989) (listing Fed. R. Civ. P. 30(g)(2), 37(a)(4), 37(c), 37(d) & 56(g)).

[90] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 875 (6th Cir. 2000).

[91] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 875 (6th Cir. 2000).

just result, the very fact that Rule 41(d) creates so much ambiguity is indicative that change must be made to forge a better way forward for justice in civil action.[92]

In *Rogers*, the Sixth Circuit went as far as it could under the language of the rule. The court seemingly takes no issue with the purpose behind Rule 41(d) or its application as it is written. This provides a practical nudge to Congress that if the intent is to truly deter vexatious litigants, it must amend the rule to explicitly meet that end. Without doing so, the apparently unambiguous drafting of the rule leads to ambiguity in meeting its purpose.

E. Unfettered Discretion to Award Attorney's Fees

The three circuits which have addressed Rule 41(d)'s allowance for attorneys' fees to be included in costs have determined the district courts have unfettered discretion to award them when it is reasonable to do so. The Second Circuit has extended costs to include experts' fees as well.[93] The Eighth Circuit and Tenth Circuits have explored the discretion courts have, and they plainly allowed for the inclusion of attorneys' fees with costs.[94] While the Ninth Circuit has not formally addressed the issue, it has allowed for attorneys' fees to be awarded under Rule 41(d) and a district

[92] *2015 Year-End Report on the Federal Judiciary*, SUP. CT., https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf [https://perma.cc/776P-Z9WS].

[93] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 24–25 (2d Cir. 2018).

[94] Evans v. Safeway Stores, Inc., 623 F.2d 121 (8th Cir. 1980); Meredith v. Stovall, 216 F.3d 1087 (10th Cir. 2000).

court falling under the purview of the Ninth Circuit has awarded attorneys' fees without being disallowed to do so in appellate review.[95]

The Eighth Circuit has previously kept the matter of attorneys' fees as costs under Rule 41(d) incredibly simple. In a per curiam opinion in *Evans v. Safeway Stores*, the court reviewed an issue of whether the district court abused its discretion in awarding $200 in attorneys' fees pursuant to Rule 41(d).[96] The plaintiff-appellant filed an action in tort for injuries sustained upon the defendant's premises and filed a voluntary dismissal without prejudice soon thereafter.[97] Within a few months of the dismissal, the plaintiff-appellant re-filed the complaint and the defendant moved for attorneys' fees and costs incurred on the first complaint.[98] The district court awarded the attorneys' fees and costs and the plaintiff-appellant filed her appeal to the order.[99] Without any analysis in its opinion, the circuit court recounted the case history and concluded saying, "we are satisfied the district court did not abuse its discretion in awarding defendant-appellee $200 attorney fees."[100] The court then cited to Fed. R. Civ. P 41(d) itself and a precedent

[95] Chien v. Hathaway, 17 F.3d 393 (9th Cir. 1994); Esquivel v. Arau, 913 F. Supp. 1382 (C.D. Cal 1996); *See* Moskowitz v. Am. Sav. Bank, F.S.B., 37 F.4th 538 (9th Cir. 2022) (declining to answer the question pertaining to Rule 41(d), saying "we do not here decide one way or the other if attorney's fees are available under Rule 41(d) if the underlying statute so provides").

[96] Evans v. Safeway Stores, Inc., 623 F.2d 121 (8th Cir. 1980).

[97] Evans v. Safeway Stores, Inc., 623 F.2d 121 (8th Cir. 1980).

[98] Evans v. Safeway Stores, Inc., 623 F.2d 121, 122 (8th Cir. 1980).

[99] Evans v. Safeway Stores, Inc., 623 F.2d 121, 122 (8th Cir. 1980).

[100] Evans v. Safeway Stores, Inc., 623 F.2d 121, 122 (8th Cir. 1980).

case, *Johnston v. Cartwright*, effectively asserting that the rule itself speaks to the unfettered discretion to award attorneys' fees as costs in Rule 41(d) motions.[101]

The aforementioned case, *Johnston v. Cartwright*, did not answer the question of whether attorneys' fees are available as costs, but rather, provided a lengthy analysis of the discretionary nature of granting dismissals under Fed. R. Civ. P. 41(a)(2).[102] In the 1966 opinion, then-Judge Blackmun discussed whether the trial judge had erred in allowing the dismissal of a defamation action at the plaintiff's request.[103] The defendants' concerns were rooted in the perceived lack of protections which would have come along with a judgment if one were made.[104] However, the circuit court noted that although the defendants were not able to seek protective relief which comes with an appealable judgment on the matter, a dismissal pursuant to Rule 41(a)(2) makes protection available under Rule 41(d).[105] This ruling set the stage for the purposes of Rule 41(d) by its exploration of Rule 41(a). Voluntary dismissals are not intended to be an escape hatch for plaintiffs walk away from litigation upon meeting frivolous goals if they are being vexatious or upon realizing the futility of the efforts if they are genuine. Rule 41(d) goes hand in hand with the mechanism of voluntary dismissals to provide relief for aggrieved defendants, and Justice Blackmun's opinion while sitting as a circuit judge provides the necessary insight into this reality.

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[101] Evans v. Safeway Stores, Inc., 623 F.2d 121, 122 (8th Cir. 1980).

[102] Johnston v. Cartwright, 355 F.2d 32 (2d Cir. 1966).

[103] Johnston v. Cartwright, 355 F.2d 32, 38 (2d Cir. 1966).

[104] Johnston v. Cartwright, 355 F.2d 32, 38 (2d Cir. 1966).

[105] Johnston v. Cartwright, 355 F.2d 32,40 (2d Cir. 1966).

The Second Circuit has been more willing to answer to the varied views of awarding attorneys' fees as costs while maintaining the position that such fees are allowed in successful Rule 41(d) motions. In the case, *Horowitz v. 148 South Emerson Associates*, the court acknowledges the circuit split, but it begins the issue's analysis by discussing the lack of uniformity in federal authorities over including attorneys' fees in the definition of costs.[106] The case was the result of an intellectual property dispute over the rights to the name of a restaurant called The Sloppy Tuna, in Montauk, New York.[107] The parties had originally worked together in a Wall Street investment firm and birthed the idea for a restaurant.[108] Thanks to their sophistication from training and education in business, the partners established multiple entities to purchase property and open the restaurant.[109] During this time, one of the entities, by a single partner, registered several trademarks for use by the restaurant.[110] The trademarks were subsequently used by associates for the benefit of The Sloppy Tuna, subject to an oral licensing agreement.[111] The partners operated the restaurant successfully for several years until personal hostilities between the parties resulted in a termination of the business relationship with some of the partners.[112] This began a flurry of legal actions which were filed in Georgia state court, New York state court, and

[106] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 24–25 (2d Cir. 2018).

[107] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 16 (2d Cir. 2018).

[108] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 16 (2d Cir. 2018).

[109] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 16 (2d Cir. 2018).

[110] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 16 (2d Cir. 2018).

[111] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 16 (2d Cir. 2018).

[112] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 16 (2d Cir. 2018).

the Northern District of Georgia which was transferred to the Eastern District of New York.[113] The claims were as varied as the venues they were filed in, with causes being raised for breach of contract, unjust enrichment, quantum meriut, and rights to intellectual property to include trademark infringement, cybersquatting, and dilution.[114]

Amidst the suits, the defendants found their claim for costs and attorneys' fees by a Rule 41(d) motion stemming from the dismissal of the Georgia state action.[115] The rule was implicated due to the similarity of the allegations and relief sought in the filing in the Eastern District of New York court.[116] The district court concluded its analysis in awarding costs for the Georgia state action because the plaintiff there did not have a good reason to dismiss its claims.[117] The circuit court affirmed this conclusion in its review for abuse of discretion because the plaintiff filed the federal action based on the same claims as the state action.[118] The plaintiff failed to successfully argue that the claims between the state and federal courts were different because one was based in contract and the other was brought under the Lanham Act.[119] Despite the two having different theories of recovery, they were equally based on the same claims of ownership and use

[113] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 17 (2d Cir. 2018).

[114] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 17, 23 (2d Cir. 2018).

[115] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 22 (2d Cir. 2018).

[116] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 22 (2d Cir. 2018).

[117] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 23 (2d Cir. 2018).

[118] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 23 (2d Cir. 2018).

[119] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 23 (2d Cir. 2018).

rights of intellectual property.[120] The circuit court noted that having different theories of recovery among the separate actions is not dispositive for Rule 41(d) and it is sufficient for the actions to be compared for the similarities in their basis, consistent with the language of the rule.[121]

In its analysis of whether the district court erred in awarding attorneys' fees as part of costs, the court refers to various differences across differing federal authorities such as the Federal Rules of Appellate Procedure, the United States Code, and other rules within the Federal Rules of Civil Procedure.[122] The court, in providing examples of other authorities' varied inclusions of attorneys' fees in 'costs,' does not find a consistent rationale for doing so. Still, the court finds instructive patterns that provide insight into when attorneys' fees are available as costs.[123]

The court notes that costs do not include attorneys' fees "where the rule incorporates a statutorily enumerated list of "costs" that itself omits attorneys' fees."[124] This means if availability of attorneys' fees is rooted in a provision, and the provision has a distinct list of the types of things which may be recovered as costs, but attorneys' fees are not included, then this provides evidence that attorneys' fees were intentionally not construed as recoverable.[125] Specific to Rule 41(d), the

[120] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 23 (2d Cir. 2018).

[121] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 23 (2d Cir. 2018).

[122] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 24–25 (2d Cir. 2018).

[123] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 25 (2d Cir. 2018).

[124] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 25 (2d Cir. 2018) (citing Hines v. City of Albany, 862 F.3d 215 (2d Cir. 2017)).

[125] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 25 (2d Cir. 2018) (citing Hines v. City of Albany, 862 F.3d 215 (2d Cir. 2017)).

court notes there is no enumerated definition of costs, either expressly in the rule or by reference in the rule, meaning that attorney's fees are not precluded.[126] The court concludes its analysis of permissive attorneys' fees as costs by stating "the entire Rule 41(d) scheme would be substantially undermined were the awarding attorneys' fees to be precluded" and it finds district courts are free in their discretion to award them.[127]

The Tenth Circuit's approach to permitting the award of attorney's fees under Rule 41(d) is highly purpose-based in terms of its view of the rule. In *Meredith v. Stovall*, the court upheld an award of attorneys' fees in addition to court costs after the plaintiff re-filed a complaint which was previously dismissed by the court.[128] The court determined that the decision whether to impose costs and attorneys' fees is within the discretion of the trial court.[129] The rationale was said to be that the "purpose of the rule is to prevent the maintenance of vexatious law suits and to secure, where such suits are shown to have been brought repetitively, payment of costs for prior instances of such vexatious conduct."[130] The court found no abuse of discretion and allowed the award of attorneys' fees to stand. In doing so, the Tenth Circuit adheres to idea that Rule 41's strength and propensity to allow voluntary dismissals requires a safety net for defendants. Without discussion

[126] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 25 (2d Cir. 2018).

[127] Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 25 (2d Cir. 2018).

[128] Meredith v. Stovall, No. 99-3350, 2000 WL 807355, at 1 (10th Cir. Jun. 25, 2000).

[129] Meredith v. Stovall, No. 99-3350, 2000 WL 807355, at 1 (10th Cir. Jun. 25, 2000) (citing 8 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE: CIVIL § 41.70 (3d ed. 2023)).

[130] Meredith v. Stovall, No. 99-3350, 2000 WL 807355, at 1 (10th Cir. Jun. 25, 2000) (citing United Transp. Union v. Main Central R.R., 107 F.R.D. 391, 392 (D. Me. 1985)).

of the merits or demerits of allowing the award of attorneys' fees, the total recovery of costs for defending vexatious actions is the most effective and just means of construing Rule 41(d), as well as Rule 41, in its entirety.

If the purpose of Rule 41(d) is to prevent vexatious litigants from filing frivolous suits in the first place, the circuit courts allowing for unfettered discretion of awarding attorneys' fees meet that purpose. However, they do so on shaky ground as the rule is written, and a circuit split such as this can have a deeper effect of encouraging forum-shopping where ill-intentioned plaintiffs wish to evade consequences. Still, the courts that allow for unfettered discretion of awarding attorneys' fees take it upon themselves to do Congress's work, just as the Sixth Circuit court warns in *Rogers*.[131] This may be workable insofar as the Supreme Court has not weighed in on the issue directly, but clarity by amendment to the rule will reduce the need for Rule 41(d) issues to arise on appeal.

F. Discretion to Award Attorneys' Fees When the Underlying Statute Permits

While the third interpretation of Rule 41(d) allowing the discretion to award attorneys' fees when the underlying statute permits is arguably the most thought-out, it operates in a judicial no man's land where the purpose of the rule is acknowledged but not met, and the language of the rule is still not met. Instead, it relies on statutes to provide the green light to supersede the language of Rule 41(d) as it is written. Despite this noncommittal view of the rule, it is the most pervasive. The Third, Fourth, Fifth and Seventh Circuits all adhere to the scheme of only awarding attorneys' fees pursuant to Rule 41(d) motions when the statute underlying the action permits.

[131] Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 875 (6th Cir. 2000).

The Seventh Circuit's controlling case on the issue is *Esposito v. Piatrowski*, which holds the payment of costs of a previously dismissed action are allowed when the same claim against the same defendant is filed, and those costs may include attorneys' fees when the underlying statute allows.[132] While this is a clear holding for district courts in the Seventh Circuit, it is an effective re-writing of Rule 41(d) which is conditioned to be struck down by the Supreme Court or eschewed by its own future rulings.

In *Esposito v. Piatrowski*, the plaintiff brough an action pursuant to 42 U.S. Code § 1983 due to his treatment while in pre-trial confinement.[133] The plaintiff alleged that nurses who worked in the county jail where he was held deliberately failed to attend to his serious medical needs.[134] One of the defendants was dismissed pursuant to Fed. R. Civ. P. 41(b) on the ground of res judicata and the others were ultimately dismissed pursuant to Fed. R. Civ. P. 41(b) for want of prosecution.[135] Approximately three months later, the plaintiff filed another action with the same allegations which led one of the defendants to move for reimbursement of costs in the amount of $6,758.91, which included attorneys' fees, copying costs, travel costs, and other expenses, from the first action pursuant to Rule 41(d).[136] The plaintiff was then ordered to pay the costs, which he failed to do.[137]

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[132] Esposito v. Piatrowski, 223 F.3d 497 (7th Cir. 2000).

[133] Esposito v. Piatrowski, 223 F.3d 497, 498 (7th Cir. 2000).

[134] Esposito v. Piatrowski, 223 F.3d 497, 498 (7th Cir. 2000).

[135] Esposito v. Piatrowski, 223 F.3d 497, 498 (7th Cir. 2000).

[136] Esposito v. Piatrowski, 223 F.3d 497, 498 (7th Cir. 2000).

[137] Esposito v. Piatrowski, 223 F.3d 497, 499 (7th Cir. 2000).

On appeal, the Seventh Circuit took issue with attorneys' fees being identified as costs.[138] The circuit court notes that the reason attorneys' fees are not included as costs is because of the importance of adhering to the American Rule of each party paying their own attorneys' fees.[139] The court concludes its discussion on this topic, saying "there is no language in the text of Rule 41(d) indicating that Congress intended to alter the "American Rule" as the rule does not refer to attorneys' fees as an awardable cost."[140] Despite the overt conclusion that allowing the award of attorneys' fees pursuant to Rule 41(d) cannot be reconciled with the American Rule, the court draws a comparison to Fed. R. Civ. P. 68.[141] The court reasoned that both rules fail to define costs, but in viewing 28 U.S.C. § 1920, which provides the statutory definition of taxation of costs, reasonable attorneys' fees are recoverable as costs when the underlying statute permits.[142]

Ultimately, the court's opinion which leads to the conclusion that attorneys' fees may be awarded when the underlying statute permits, is a cobbled collection of ideals.[143] It notes that awarding attorneys' fees should not be permitted as a condition of voluntary dismissal under Rule 41(a)(2) while prohibiting the recovery of fees when a voluntarily dismissed case is re-filed pursuant to Rule 41(d).[144] It recognizes that awarding attorneys' fees has the desirable effect of

[138] Esposito v. Piatrowski, 223 F.3d 497, 500 (7th Cir. 2000).

[139] Esposito v. Piatrowski, 223 F.3d 497, 500 (7th Cir. 2000).

[140] Esposito v. Piatrowski, 223 F.3d 497, 500 (7th Cir. 2000).

[141] Esposito v. Piatrowski, 223 F.3d 497, 501 (7th Cir. 2000).

[142] Esposito v. Piatrowski, 223 F.3d 497, 501 (7th Cir. 2000); 28 U.S.C. § 1920.

[143] Esposito v. Piatrowski, 223 F.3d 497, 501 (7th Cir. 2000).

[144] Esposito v. Piatrowski, 223 F.3d 497, 501 (7th Cir. 2000).

preventing forum shopping and vexatious litigation.[145] The court also recognizes the inconsistency with which statutes seem to allow and disallow the recovery of fees.[146] The Seventh Circuit does not seem to be feigning false sincerity in its efforts to make sense of the rule. The court demonstrates the difficulty of attempting to navigate the case law, purposes, and exact text of Rule 41 and Rule 41(d) in particular. While noble in the opinion's methods and pursuits, the difficulty in reaching a consistent, simplified conclusion with Rule 41(d) as written signifies a need for amendment to clarify the rule.

The Third Circuit's controlling case on the issue of attorneys' fees as costs comes from *Garza v. Citigroup*.[147] There, the court reconciles the discretion of courts while adhering to the principles of the "American Rule" concerning payment of attorneys' fees.[148] Ultimately the court determined that the defendant had not shown availability of attorneys' fees under Rule 41(d) because the statute underlying the action did not call for it.[149] The court then found that the defendant waived its right to entitlement of attorneys' fees under the 28 U.S.C. § 1927 bad-faith exception to the "American Rule."[150]

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[145] Esposito v. Piatrowski, 223 F.3d 497, 501 (7th Cir. 2000).

[146] Esposito v. Piatrowski, 223 F.3d 497, 501 (7th Cir. 2000).

[147] Garza v. Citigroup Inc., 881 F.3d 277 (3rd Cir. 2018).

[148] *See* Garza v. Citigroup Inc., 881 F.3d 277, 283 (3rd Cir. 2018) (identifying the vitality of the American Rule will be maintained if the award of attorneys' fees is derived from statutory authority).

[149] Garza v. Citigroup Inc., 881 F.3d 277, 284 (3rd Cir. 2018).

[150] Garza v. Citigroup Inc., 881 F.3d 277, 284 (3rd Cir. 2018).

In *Garza v. Citigroup*, the plaintiff was the estate of a Mexican national.[151] The complaint centered around financial accounts in the decedent's name for which the relief requested was to have them turned over to the estate.[152] The defendants filed a motion to dismiss an amended complaint, which the estate did not respond to.[153] The estate instead filed a motion to amend its amended complaint.[154] The district court denied the estate's motion to amend the complaint and ordered the estate to advise whether it intended to withdraw any of its claims in the amended complaint.[155] A month following the denial of the motion to amend and accompanying order, the plaintiff estate filed a notice of voluntary withdrawal of its claims pursuant to Rule 41(a)(1)(A)(i).[156] The defendants sought to have the dismissal vacated in order to secure a dismissal of the case with prejudice, and along with the motion, sanctions were requested for multiplying the proceedings vexatiously..[157] The district court denied the motion to vacate and the dismissal was held valid.[158] The district court found that sufficient procedural safeguards rested in Rule 41(d) to recover costs in the case of a voluntary dismissal.[159]

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[151] Garza v. Citigroup Inc., 881 F.3d 277, 279 (3rd Cir. 2018).

[152] Garza v. Citigroup Inc., 881 F.3d 277, 279 (3rd Cir. 2018).

[153] Garza v. Citigroup Inc., 881 F.3d 277, 279 (3rd Cir. 2018).

[154] Garza v. Citigroup Inc., 881 F.3d 277, 279 (3rd Cir. 2018).

[155] Garza v. Citigroup Inc., 881 F.3d 277, 279 (3rd Cir. 2018).

[156] Garza v. Citigroup Inc., 881 F.3d 277, 279 (3rd Cir. 2018).

[157] Garza v. Citigroup Inc., 881 F.3d 277, 280 (3rd Cir. 2018).

[158] Garza v. Citigroup Inc., 881 F.3d 277, 280 (3rd Cir. 2018).

[159] Garza v. Citigroup Inc., 881 F.3d 277, 280 (3rd Cir. 2018).

Following the resolution of the case in New York, the estate filed a complaint in the district court in Delaware and the defendant thereafter filed its motion for costs pursuant to Rule 41(d).[160] The district court granted the motion for costs but relied on the plain language in the text of Rule 41(d) in denying the award of attorneys' fees as costs.[161] The district court granted the defendant's motion for judgment on the pleadings, but the defendant then cross-appealed the denial of its request for attorneys' fees as costs under Rule 41(d).[162]

In its opinion, the Third Circuit provides an in-depth review on the circuit split regarding the awarding of attorneys' fees pursuant to Rule 41(d) as the issue sat at the time in 2018.[163] The court detailed the lack of definition in the word 'costs,' discussed the American Rule of paying one's own attorneys' fees and broke down the three schemes of interpretation of the rule.[164] The court concluded that the most effective means of maintaining the vitality of the American Rule while protecting defendants from the consequences of frivolous litigation in the case of voluntary dismissals is by finding authority to award attorneys' fees in authority of the underlying statute instead of solely through Rule 41(d).[165] In this case, the underlying statute did not permit the

[160] Garza v. Citigroup Inc., 881 F.3d 277, 280 (3rd Cir. 2018).

[161] Garza v. Citigroup Inc., 881 F.3d 277, 280 (3rd Cir. 2018).

[162] Garza v. Citigroup Inc., 881 F.3d 277, 280 (3rd Cir. 2018).

[163] Garza v. Citigroup Inc., 881 F.3d 277, 281–84 (3rd Cir. 2018).

[164] Garza v. Citigroup Inc., 881 F.3d 277, 281–84 (3rd Cir. 2018).

[165] Garza v. Citigroup Inc., 881 F.3d 277, 283 (3rd Cir. 2018).

collection of attorneys' fees as costs and the order denying their award by the district court was affirmed.[166]

This conclusion was deeply dissatisfying given that the defendant had proven up its claim for costs under Rule 41(d) without issue. The defendant was denied an opportunity to be made whole after defending baseless claims because of the court's adherence to the American Rule, despite statutory deviations in existence. The same rationale could be raised regarding the American Rule as is raised by denying attorneys' fees. If the adherence to a scheme of always paying ones' own fees is truly a bedrock principle, it could be codified in federal authorities. Yet, the noncommittal attitude towards both issues means that courts are free to determine whether each party paying their attorneys' fees or being made whole after being forced to defend frivolous claims is more important to the integrity of the civil judicial system.

The Fourth Circuit allows for attorney's fees as a part of costs under Rule 41(d) when the statute allows because the Federal Rules of Civil Procedure does not define "costs."[167] The 2016 case, *Andrews v. America's Living Centers*, evinces how a lack of clarity in Rule 41(d) can cause pain, not only for defendants, but even tangentially for plaintiffs.[168]

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[166] Garza v. Citigroup Inc., 881 F.3d 277, 284 (3rd Cir. 2018).

[167] Andrews v. America's Living Ctrs., LLC, 827 F.3d 306 (4th Cir. 2016); *But see* Cromer v. Kraft Foods, 390 F.3d 812, 822 (4th Cir. 2004) (holding an award of attorneys' fees in order to punish a party may implicate the necessity for additional procedural safeguards, evincing a limitation on the Fourth Circuit's propensity to award attorneys' fees).

[168] Andrews v. America's Living Ctrs., LLC, 827 F.3d 306 (4th Cir. 2016).

In this case, the plaintiff appealed the district court's dismissal of an action for failure to pay attorneys' fees from a previous action, pursuant to Rule 41(d).[169] The plaintiff filed suit under the Fair Labor Standards Act, and thereafter, the defendants moved to dismiss by a Federal Rule of Civil Procedure 12(b)(6) motion.[170] There were procedural faults on the plaintiff's part after the motion to dismiss was filed when she missed the twenty-one day deadline to amend the complaint after a motion to dismiss and the court found the request to amend was improper since a motion was made within response to another motion.[171] Following a hearing on the outstanding motions, the plaintiff decided it would be best to voluntarily withdraw her complaint and start the process again.[172] The plaintiff then filed a second complaint, but the defendants moved to stay the second action and for costs under Rule 41(d).[173] Defendants sought $25,437.75 for attorneys' fees and other costs associated with the defense of the first action.[174] The magistrate ordered the defendants be awarded the costs with attorneys' fees, which the district court affirmed.[175] After appeals in favor of the defendants, the case was remanded and the district court dismissed the second action for failure to pay the attorneys' fees.[176] The plaintiff then appealed and the Fourth

[169] Andrews v. America's Living Ctrs., LLC, 827 F.3d 306, 308 (4th Cir. 2016).

[170] Andrews v. America's Living Ctrs., LLC, 827 F.3d 306, 308 (4th Cir. 2016).

[171] Andrews v. America's Living Ctrs., LLC, 827 F.3d 306, 308 (4th Cir. 2016).

[172] Andrews v. America's Living Ctrs., LLC, 827 F.3d 306, 309 (4th Cir. 2016).

[173] Andrews v. America's Living Ctrs., LLC, 827 F.3d 306, 309 (4th Cir. 2016).

[174] Andrews v. America's Living Ctrs., LLC, 827 F.3d 306, 309 (4th Cir. 2016).

[175] Andrews v. America's Living Ctrs., LLC, 827 F.3d 306, 309 (4th Cir. 2016).

[176] Andrews v. America's Living Ctrs., LLC, 827 F.3d 306, 309 (4th Cir. 2016).

Circuit weighed in on which circumstances permit an award of attorneys' fees pursuant to Rule 41(d).[177]

The court cites the text of Rule 41(d) and notes that the rules does not explicitly permit attorneys' fees. The court then acquiesces to the interpretation of the holistic view of the rule and its purpose, citing a district court's opinion on the matter which states "surely, Congress intended that provision of the federal rules have some teeth."[178] After analyzing the two opposing schemes of never allowing attorneys' fees as costs and courts having unfettered discretion to award fees, the Fourth Circuit court adopts the view which maintains attorneys' fees may be awarded when the underlying statute for the cause of action allows for it.[179] Without a clear direction from the text of the rule, the court takes it upon itself to strike the balance between upholding the American Rule of paying attorneys' fees while ensuring Rule 41(d) still deters forum shopping and vexatious litigation.[180] In its analysis of the case at bar, the court considers whether the underlying statute permits the recovery of attorney's fees and whether the plaintiff's conduct fit a definition of vexatious, which is that the conduct was so egregious that the district court would have erred by not declaring it to be so.[181] The court found that attorneys' fees were not properly awarded because the Federal Labor Standards Act did not allow for their award and the plaintiff's behavior did not

[177] Andrews v. America's Living Ctrs., LLC, 827 F.3d 306, 309 (4th Cir. 2016).

[178] Andrews v. America's Living Ctrs., LLC, 827 F.3d 306, 310 (4th Cir. 2016) (citing Behrle v. Olshansky, 139 F.R.D. 370, 374 (W.D. Ark. 1991)).

[179] Andrews v. America's Living Ctrs., LLC, 827 F.3d 306, 311 (4th Cir. 2016).

[180] Andrews v. America's Living Ctrs., LLC, 827 F.3d 306, 311 (4th Cir. 2016).

[181] Andrews v. America's Living Ctrs., LLC, 827 F.3d 306, 312–13 (4th Cir. 2016).

warrant a label of vexatiousness.[182] The court vacated, reversed, and remanded the matter which meant that the plaintiff did not need to pay the attorneys' fees, and the case would no longer be stayed for failure to pay them.[183]

This case is an example of how the circuit split and lack of clarity in Rule 41(d) can harm plaintiffs as well because it fails to properly guide behavior. The plaintiff was found to be correct in her belief that the opposing party was not entitled to her payment of their attorneys' fees after the dismissal of the first action. The first suit was filed on June 4, 2010 and the circuit court issued its opinion on June 28, 2016.[184] Over the course of this time, the case was held up on procedural issues, not the merits of the case. The irony of the holdup being based on a system of rules intended to make litigation simpler cannot be lost. This case is a study in Congress's failure to regulate the Federal Rules of Civil Procedure in a way that allows plaintiffs to have their claims heard in addition to the problem that plague defendants. It does not matter if Rule 41(d) is purposely ambiguous because the values of the American Rule and deterring vexatious litigation are at odds if that ambiguity creates new issues like drawn-out appeals over procedure.[185] A hindsight view provides reasonable speculation that a clear drafting of Rule 41(d) would have provided the plaintiff in *Andrews v. America's Living Centers* ample guidance to prepare a cogent strategy to properly pursue her claims or walk away from them.[186]

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[182] Andrews v. America's Living Ctrs., LLC, 827 F.3d 306, 312 (4th Cir. 2016).

[183] Andrews v. America's Living Ctrs., LLC, 827 F.3d 306, 314 (4th Cir. 2016).

[184] Andrews v. America's Living Ctrs., LLC, 827 F.3d 306, 308 (4th Cir. 2016).

[185] Safir v. U.S. Lines, Inc., 792 F.2d 19 (2d Cir. 1985).

[186] Andrews v. America's Living Ctrs., LLC, 827 F.3d 306 (4th Cir. 2016).

The Fifth Circuit, which provided the controlling interpretation of Rule 41(d) for the Northern District of Texas's holding in *Varsity Gay League v. Nichols*,[187] follows a familiar path of reaching a conclusion that splits the extremes of allowing attorneys' fees as costs completely at the discretion of the court upon granting a Rule 41(d) motion and never allowing attorneys' fees to be considered costs under Rule 41(d). In *Portillo v. Cunningham*, the Fifth Circuit Court found the district court abused its discretion in awarding attorneys' fees because a finding of frivolousness was not made.[188]

The plaintiff was a police officer at the Houston Community College who raised concerns to his superiors about deficiencies in the safety of the operations of the police department for which he worked.[189] The plaintiff's concerns were not addressed, so he wrote a letter to the president of the college.[190] Soon after the letter was sent, a newspaper published an article referencing the article.[191] This article resulted in the police chief accusing the plaintiff of leaking information, which the plaintiff denied doing.[192] In the following weeks, the plaintiff was involved in an arrest which the suspect then filed a complaint about, saying the plaintiff used excessive force and

[187] Varsity Gay League, LLC v. Nichols, No. 22-2711, 2023 WL2938238, at 5 (N.D. Tex. Apr. 13, 2023).

[188] Portillo v. Cunningham, 872 F.3d 728 (5th Cir. 2017).

[189] Portillo v. Cunningham, 872 F.3d 728, 732 (5th Cir. 2017).

[190] Portillo v. Cunningham, 872 F.3d 728, 732 (5th Cir. 2017).

[191] Portillo v. Cunningham, 872 F.3d 728, 732 (5th Cir. 2017).

[192] Portillo v. Cunningham, 872 F.3d 728, 732 (5th Cir. 2017).

racially profiled him.[193] In light of this, the police chief initiated an investigation and placed the plaintiff on administrative leave.[194] After the investigation, the plaintiff was terminated from the police department because he was alleged to have falsified statements in the arrest report from which the investigation stemmed.[195] The police chief asked the Texas Commission on Law Enforcement to categorize the plaintiff's separation from the police department as a 'dishonorable discharge,' which was accepted by the commission.[196] Additionally, the plaintiff was then criminally prosecuted for making false statements on a government record, the facts of which were found in the investigation that resulted in his termination.[197] Despite the prosecution and dishonorable discharge, the plaintiff was found not guilty and the State Office of Administrative Hearings amended his status to reflect an honorable discharge.[198] Even with the record being changed, the plaintiff claimed that he could not find employment as an officer because the police department which terminated him was informing potential employers that he was "terminated and is ineligible for rehire."[199]

The plaintiff filed his first action in Texas state court in 2015, raising claims at common law and under Texas statutes, naming the police chief, officers involved in his investigation, and

[193] Portillo v. Cunningham, 872 F.3d 728, 732 (5th Cir. 2017).

[194] Portillo v. Cunningham, 872 F.3d 728, 732 (5th Cir. 2017).

[195] Portillo v. Cunningham, 872 F.3d 728, 732 (5th Cir. 2017).

[196] Portillo v. Cunningham, 872 F.3d 728, 732 (5th Cir. 2017).

[197] Portillo v. Cunningham, 872 F.3d 728, 732 (5th Cir. 2017).

[198] Portillo v. Cunningham, 872 F.3d 728, 732 (5th Cir. 2017).

[199] Portillo v. Cunningham, 872 F.3d 728, 732 (5th Cir. 2017).

the college at which he worked.[200] The plaintiff nonsuited the case pursuant to state procedural rules and refiled a few weeks later with the addition of two more defendants and the inclusion of constitutional claims.[201] The court dismissed with prejudice all claims aside from the constitutional claims and those against one of the defendants, and the plaintiff soon after nonsuited the second action.[202] The plaintiff then brought his third action, this time in federal court.[203] The third action was virtually the same as his second and the defendants moved for costs with attorneys' fees under Rule 41(d), which the court granted, ordering the plaintiff to pay $110,000.[204]

On appeal, the Fifth Circuit agrees with the Seventh and Fourth Circuits, allowing attorneys' fees as costs when the underlying statute allows.[205] The court then looked to the language of 42 U.S.C. § 1983, and in turn, 42 U.S.C. § 1988, to determine whether fees were included as costs.[206] The court found attorney's fees, in such a case, were only available to the prevailing party, and since the action was voluntarily dismissed, the defendants could not be

[200] Portillo v. Cunningham, 872 F.3d 728, 732 (5th Cir. 2017).

[201] Portillo v. Cunningham, 872 F.3d 728, 733 (5th Cir. 2017).

[202] Portillo v. Cunningham, 872 F.3d 728, 733 (5th Cir. 2017).

[203] Portillo v. Cunningham, 872 F.3d 728, 733 (5th Cir. 2017).

[204] Portillo v. Cunningham, 872 F.3d 728, 733 (5th Cir. 2017).

[205] Portillo v. Cunningham, 872 F.3d 728, 740 (5th Cir. 2017).

[206] Portillo v. Cunningham, 872 F.3d 728, 739 (5th Cir. 2017); See also Walker v. U.S. Dep't Hous. and Urb. Dev., 99 F.3d 761, 767 (5th Cir. 1996) (awarding attorneys' fees to the prevailing party is sometimes allowed).

considered a prevailing party.[207] The court then determined that even if the defendants were found to be the prevailing party, the defendants would need to demonstrate that the plaintiff acted frivolously.[208] The court found the plaintiff did not act frivolously and that the voluntary dismissal of claims is not sufficient to find frivolous behavior.[209] On the issue of awarding attorneys' fees the court found that the district court abused its discretion and in its analysis, the Fifth Circuit joined the circuits which allow the award of attorneys' fees when the statute underlying the action permits.[210]

The middle approach for viewing Rule 41(d) is troubling. The purpose of viewing the rule through this lens serves to avoid ruffling the feathers of the strength of the American Rule while giving some support to the invoked Rule 41(d), which prevents vexatious litigation. For that reason, this view turns Rule 41(d) into a self-licking ice cream cone, supporting itself by hollow intent and becoming a roadblock to justice. It provides fodder for circuit courts to contemplate, practically in dicta, historical origins of paying attorneys' fees, favoring unenumerated principles over justice. It must be reiterated though, this is no fault of the circuit judges. They are in a difficult position and must choose between allowing full discretion in contrast to the text of the rule, disallowing any fees, and taking the teeth out of Rule 41(d), or selecting a middle ground which bears only confusion for litigants.

[207] Portillo v. Cunningham, 872 F.3d 728, 740 (5th Cir. 2017).

[208] Portillo v. Cunningham, 872 F.3d 728, 740 (5th Cir. 2017).

[209] Portillo v. Cunningham, 872 F.3d 728, 740 (5th Cir. 2017).

[210] Portillo v. Cunningham, 872 F.3d 728, 742 (5th Cir. 2017).

G. The Supreme Court Weighs In

The Supreme Court has not yet put to rest the issue of Rule 41(d) and the award of attorneys' fees. However, the Court has answered the question of the circuit courts' ability to award attorneys' fees upon self-imposed equitable powers in *Alyeska Pipeline Service v. Wilderness Society*.[211] In this case, the DC Circuit Court sought to find an exception to the American Rule to award attorneys' fees because the underlying statute did not allow for recovery.[212] Unable to do so, the Court of Appeals reasoned the application of the 'common benefit' exception applied because the respondents had acted to vindicate 'important statutory rights of all citizens.'[213] Ultimately, the court ordered the payment of one-half of the full award to which the respondents were entitled.[214]

[211] Alyeska Pipeline Serv. v. Wilderness Soc'y, 421 U.S. 240 (1975); *See* Fox v. Vice, 563 U.S. 826, 829 (2011) (providing the award of costs for frivolous actions to a defendant); *See* Christianburg Garment Co. v. Equal Emp. Opportunity Comm'n, 434 U.S. 412, 415–16 (1978) (demonstrating the Supreme Court's cautiousness in awarding attorneys' fees at the court's discretion by refusing an award of such in at Title VII case); *But see* Newman v. Piggies Park Enter., 390 U.S. 400 (1968) (explaining a circumstance which attorneys' fees may be awarded to the opposing party, such as in cases where no damages may be awarded).

[212] Alyeska Pipeline Service v. Wilderness Society, 421 U.S. 240, 245 (1975).

[213] Alyeska Pipeline Service v. Wilderness Society, 421 U.S. 240, 245 (1975).

[214] Alyeska Pipeline Service v. Wilderness Society, 421 U.S. 240, 246 (1975).

In its opinion, the Supreme Court described the history and importance of the American Rule of each party paying its own attorneys' fees.[215] As to where the power of the American Rule resides, the Supreme Court states "Congress itself presumably has the power and judgement to pick and choose among its statutes and to allow attorneys' fees under some, but not others."[216] Although this speaks to statutes instead of Federal Rules of Civil Procedure, the thrust is the same in that the door is completely open to eschew the American Rule either completely, or in part.

The Court says, "we do not purport to assess the merits or demerits of the 'American Rule.'"[217] Instead, the Court's holding only denies lower courts the ability to "fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party."[218] The most important takeaways from this holding is the reinforcement of the power to create statutes, and a fortiori Federal Rules of Civil Procedure, which allow for fee-shifting when the importance of doing so exceeds the importance of adhering to the American Rule for attorneys' fees. In *Alyeska*

[215] Alyeska Pipeline Service v. Wilderness Society, 421 U.S. 240, 247–254 (1975); *But see* Octane Fitness, LLC v. ICIN Health & Fitness, Inc., 572 U.S. 545 (2014) (explaining the Supreme Court's stance in allowing some exceptions to the American Rule for willful disobedience).

[216] Alyeska Pipeline Service v. Wilderness Society, 421 U.S. 240, 263 (1975).

[217] Alyeska Pipeline Service v. Wilderness Society, 421 U.S. 240, 270 (1975); .

[218] Alyeska Pipeline Service v. Wilderness Society, 421 U.S. 240, 269 (1975).

v. Wilderness Society,[219] the Court puts the burden squarely on the promulgators of the Federal Rules of Civil Procedure to make changes to attorneys' fee awards as they see fit.[220]

While the Supreme Court has not specifically weighed in on the award of attorneys' fees under Rule 41(d), the previously discussed case as well as the Court's opinion in *Marek v. Chesny*,[221] which reversed an award of attorneys' fees awarded by the district court under Federal Rules of Civil Procedure Rule 68, provide a realistic prediction for what the Court would hold if the issue were reviewed. Although the Court is vastly different in 2024 than it was when these cases were decided, the awarding of attorneys' fees is seemingly not a matter which is ripe for picayune disagreement. In recognizing the traditional adherence to the American Rule and the ease with which drafters could change Rule 41(d), the Supreme Court would likely reverse an award of attorneys' fees if given under the rule.

H. Re-working Rule 41(d)

To re-work Rule 41(d) in a way that unambiguously states its effectuation and fully reaches its purpose of deterring vexatious, bad-faith litigation, it must be written to include attorney's fees.

1. Punishing Bad-Faith Litigants

If the purpose of Rule 41(d) is to prevent bad-faith plaintiffs from filing, they should be punished to the maximum extent that is reasonable. If a plaintiff pokes the hornets' nest by filing frivolous litigation that requires building a strong defense, they should be reasonably aware that

[219] Alyeska Pipeline Service v. Wilderness Society, 421 U.S. 240 (1975).

[220] See Peter v. Nantkwest, 140 S.Ct. 365, 373 (2019) (explaining the idea of attorneys' fees being a subset of expenses where the statute defines).

[221] Marek v. Chesny, 473 U.S. 1 (1985).

the defendant will obtain counsel at a cost that is commensurate with the seriousness of the claims and their status as an individual or entity. This will be on a case-by-case basis, and the plaintiff will soon become aware of potential costs once the attorney or attorneys enter on behalf of the defendant.

2. Protecting Defendants

Court costs can often amount to a slap on the wrist for filing fees, but it is not reflective of the true costs incurred by litigation. When a defendant is forced to defend frivolous claims, the defendant must spend valuable time and resources obtaining counsel and mounting a defense, plus the emotional costs and opportunity costs of spending human capital away from their other personal or economic activities. Even with a vastly liberal construction of Rule 41(d) including attorneys' fees, it is impossible to completely protect an innocent defendant from every externalitiy of frivolous litigation. A re-writing of Rule 41(d) can accomplish the implied goal of protecting defendants in most of the direct economic costs associated with defending against unfair claims.

3. Re-filing Should not be Required to Meet Rule 41(d)

The courts are highly capable of determining whether or not litigation is in bad faith, not only by the merits of the claims themselves, but also by the actions of the plaintiff.[222] Since Rule 41(d) is tied to dismissals of claims, and not the re-filing of claims, it makes little sense as to why defendants subjected to the defense of frivolous claims must wait for the plaintiffs to re-file**.** This comment has not fully explored the implications or rationale of requiring a refiling to invoke

[222] *See* Varsity Gay League, LLC v. Nichols, No. 22–2711, 2023 WL 2938238 1 (N.D. Tex. Apr. 13, 2023) (Describing the plaintiff's actions of filing unauthenticated exhibits and dismissing the claims three hours before a summary judgment hearing).

Rule 41(d). The reason is because the refiling requirement has not been challenged under Rule 41(d) in any meaningful capacity, but it is also not the most pressing impediment to justice.

However, it makes little sense for a refiling requirement to exist in the context of voluntary dismissals. Certainly, a litigant could be vexatious absent a multiplication of proceedings. For example, in *Varsity Gay League v. Nichols*, re-filing made no impact on the damage done by incurring costs of $55,923.61 only to have the matter voluntarily dismissed mere hours before trial.[223] Removing the re-filing requirement would truly put the purpose of Rule 41(d) in concert with its text. Yet, such wisdom, as indicated by circuit judges across the United States, is best left to Congress. While cases of deficiency in Rule 41(d) are rampant in terms of attorneys' fees, the removal of the re-filing requirement is not something that can be persuasively argued for at this time.

4. Reconciliation with the American Rule and Preventing Discouragement of Legitimate Litigants

Amending Rule 41(d) does not serve to upend the tradition and history of the American Rule. Realistically, an amendment to Rule 41(d) does not impact the purpose of the American Rule in any sense. The purpose of the rule is to promote access to justice for deserving plaintiffs.[224] An effective amendment which shifts the burden of attorneys' fees from defendants who must defend frivolous claims would not create any burden on deserving plaintiffs. It would merely

[223] Def.'s Br., Varsity Gay League, LLC v. Nichols, No. 22-2711, 2023 WL 2938238, at 1 (N.D. Tex. Apr. 13, 2023).

[224] John Leubsdorf, *Does the American Rule Promote Access to Justice? Was That Why it was Adopted?*, 67 Duke L.J. 257 (2019).

discourage vexatious litigants which would mean that there is a higher degree of certainty that the plaintiffs who bring their claims to bar do so in good faith.

While the concept of the American Rule has been called a 'bedrock principle,' this assertion is somewhat glazed over when it is referenced.[225] When deeply analyzed, the American Rule can get in its own way of promoting poorer plaintiffs' access to courts because even when they prevail on a strong claim, they must still be denied recovery of their own expenses.[226] Perhaps the most reasonable view of the American Rule's propensity to promote justice for poorer plaintiffs is the idea that it prevents lengthy and costly court battles over fees by comparison to the English Rule.[227]

It is plausible that rigidly adhering to the American Rule because it directly contrasts the English Rule and has historical connotations of justice are not reason enough to check every rule regarding attorneys' fees against those principles. It is more likely that an amendment to Rule 41(d), although potentially shifting the burden of attorneys' fees, stands to protect poorer litigants far better than the American Rule does by itself. An amendment to Rule 41(d) allowing attorneys' fees as costs is agnostic to the socio-economic status of defendants. If a poor defendant is targeted with frivolous litigation, they are afforded the same protection a wealthy defendant

[225] Baker Botts L.L.P. v. Asarco, 576 U.S. 121, 126 (2015) (Citing *Hardt v. Reliance Standard Life Ins. Co.,* 560 U.S. 242, 252–253 (2010) (internal quotation marks omitted)).

[226] John Leubsdorf, *Does the American Rule Promote Access to Justice? Was That Why it was Adopted?*, 67 Duke L.J. 257, 258 (2019).

[227] John Leubsdorf, *Does the American Rule Promote Access to Justice? Was That Why it was Adopted?*, 67 Duke L.J. 257, 262–63 (2019).

would receive, no matter the status of the plaintiff. In this sense, the purpose of the American Rule, ensuring equal access to the courts is intact, and perhaps improved.

5. An Amendment to the Rule does not Present a Higher Likelihood of Abuse of Judicial Discretion

Actively encouraging courts to act by their own discretion requires a leap of faith away from the misplaced comforts of rigid formalism, but the leap required by an amendment to Rule 41(d) is not inconsistent or materially more extreme than in other areas of procedural law.

Judicial discretion can be broken up conceptually as being substantive in nature or procedural in nature.[228] In substantive judicial discretion, the judge can shape legal doctrine notwithstanding the doctrine of stare decisis.[229] In other words, even with precedent in place, applying a rule to the facts at bar might mean that the judge is broadening or narrowing the scope of the rule it seeks to apply. For example, a judge applying a rule which states that a person commits an infraction who drives at "an unsafe speed."[230] This rule gives a wide latitude to determine the speed which constitutes an unsafe one, and the judge will use her discretion to determine the outcome based on the circumstances in the case.[231]

The catalyst for rule drafters' ability to craft schemes which provide latitude to use discretion came in 1934 when Congress passed the Rules Enabling Act.[232] The act authorizes the

[228] Richard L. Marcus, *Slouching Toward Discretion*, 78 Notre Dame L. Rev. 1561, 1565 (1989).

[229] Richard L. Marcus, *Slouching Toward Discretion*, 78 Notre Dame L. Rev. 1561, 1569 (1989).

[230] Richard L. Marcus, *Slouching Toward Discretion*, 78 Notre Dame L. Rev. 1561, 1569 (1989).

[231] Richard L. Marcus, *Slouching Toward Discretion*, 78 Notre Dame L. Rev. 1561, 1570 (1989).

[232] Richard L. Marcus, *Slouching Toward Discretion*, 78 Notre Dame L. Rev. 1561, 1576 (1989).

Supreme Court to "prescribe general rules of practice and procedure and rules of evidence for the federal courts."[233] The act additionally delegates the rulemaking functions to a co-equal branch of government between Congress and the Supreme Court.[234] The implication of this act speaks to the idea that the rules are promulgated based on the scope of their need. If the values of rule-drafting were so philosophically important that they must adhere to a Blackstonian[235] view of law, it would stand to reason that only the Supreme Court would oversee the creation of rules surrounding legal practice. Instead, the duty is shared, crafting and sometimes amending rules so that they made serve to meet a defined purpose while adhering to principles consistent with the

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[233] *Laws and Procedures Governing the Work of the Rules Committee*, UNITED STATES COURTS, https://www.uscourts.gov/rules-policies/about-rulemaking-process/laws-and-procedures-governing-work-rules-committees#:~:text=The%20Rules%20Enabling%20Act%2C%2028,evidence%20for%20the%20federal%20courts [https://perma.cc/4ELT-4HPJ].

[234] *Laws and Procedures Governing the Work of the Rules Committee*, UNITED STATES COURTS, https://www.uscourts.gov/rules-policies/about-rulemaking-process/laws-and-procedures-governing-work-rules-committees#:~:text=The%20Rules%20Enabling%20Act%2C%2028,evidence%20for%20the%20federal%20courts [https://perma.cc/4ELT-4HPJ].

[235] *See* William S. Brewbaker III, *Found Law, Made Law and Creation: Reconsidering Blackstone's Declaratory Theory*, 22 J. L. & Religion 255, 256 (2006) (describing William Blackstone's belief that the judge's job is to determine the law according to the known laws and customs of the land).

Constitution and American tradition. It is for this reason that it may be appropriate at times to create a rule which would state that a person commits an infraction when driving 'at an unsafe speed' and it may be appropriate in other times to create a rule which states that driving 'in excess of 65 miles per hour' constitutes an infraction.[236]

In the case of rules regarding attorneys' fees, the amount of discretion granted with an amendment to Rule 41(d) does not extend past what is reasonable in a substantive or procedural sense. The ability to award attorneys' fees would not give courts discretion to choose an arbitrary and punitive monetary penalty against a vexatious litigant. Nor would it extend to other types of sanctions. An amendment to Rule 41(d) merely makes an aggrieved victim-defendant whole in terms of the costs they incurred while defending a frivolous action.

1. Problems with an Amendment Allowing Fees with an Underlying Statute

While an amendment to the rule should clear up ambiguity, Congress may be enticed to draft in a way that follows the Third, Fourth, Fifth, and Seventh Circuits in requiring that the statute underlying the claim to provide for attorneys' fees. This would be a hindrance to preventing frivolous litigation. In such a case, a landscape is likely where vexatious litigants simply choose claims in which the statutes do not permit the consideration of attorneys' fees as costs. While this may seem like a stretch, it is impractical to assume that vexatious litigants will draw some sort of ethical line when it comes to filing frivolous litigation. It would not be improbable for litigants to file a litany of claims just to drive up attorneys' fees for the defendants without fear of having to pay more than a nominal amount of court costs.

[236] Richard L. Marcus, *Slouching Toward Discretion*, 78 Notre Dame L. Rev. 1561, 1570 (1989).

I. Proposed Amendment to the Rule

Rule 41 Voluntary Dismissal

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs, **including attorney's fees**, of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

The above proposed amendment[237] is the simplest means of effectuating proper change to allow discretionary awarding of attorneys' fees in cases of vexatious litigation. This maintains the harmony between the long-standing tradition of the American Rule and remedy for the plague of vexatious litigation. The purpose of the American Rule has been to allow for full access to the courts and to not discourage litigants from raising or defending their cases. Under the scheme of discretionary award of attorneys' fees for the victims of vexatious litigation, the spirit and integrity of the American Rule is upheld because the award of attorneys' fees is not based on the merits of the case. The award rests upon a learned judge's finding that a vexatious litigant enters the courthouse doors with a nefarious intent to pervert justice, where there cannot be a prevailing party and losing party, only an agitator and a victim. By an amendment to Rule 41(d), the purpose of the American Rule is undisturbed.

[237] The proposed amendment to Rule 41(d) is in bold and adds in the words "including attorneys' fees" to the text of the existing rule.

Those against the amendment of Rule 41(d) or a statute allowing for the collection of attorneys' fees by victims of frivolous litigation are likely fearful of abrogating the long-held tradition of the American Rule. The fear stems from going against the purpose of the American Rule and encouraging trust in the judicial system. However, we can look to other areas of the law to see how distrust is largely amorphous, shifting and filling out to other aspects of litigation. While the American Rule was designed to encourage individuals and less wealthy litigants to pursue just claims against sophisticated parties with deep pocket, calls for tort reform due to massive payouts for plaintiffs underscores the idea that vexatious litigants have a strong incentive to lurk in the shadows of justice.[238]

J. Analyzing the Validity of the Proposed Amendment to Rule 41(d)

Articulating a justification for a change to Rule 41(d) and creating the proposed amendment itself constitute the first parts of an effective betterment of the Federal Rules of Civil Procedure. These previous discussions demonstrate the need for a change to Rule 41(d) and establish a means of doing so, but the final aspect of a proposal is assessing the validity of the change. Validity, in this context, refers to the idea that rule does not "'abridge, enlarge, nor modify substantive rights,' in the guise of regulating procedure."[239] Plainly, testing the rule's validity ensures that Congress is not using its rightful power to regulate procedure of federal courts in the wrong way. The following section will analyze the proposed amendment to Rule 41(d) through the lens of how the courts have reviewed the validity of federal rules in other cases, which

[238] Conte v. Flota Mercante Del Estado, 277 F.2d 644, 672 (2d Cir. 1960); *See generally* Stephen Sugarman, *United States Tort Reform Wars* 25 UNSWLJ 849 (2002).

[239] Sibbach v. Wilson, 312 U.S. 1, 10 (1941).

considers the interplay of the text among other rules, the power to enact them, and foundations of law from which they spring.

1. The Responsibility to Amend Rules when Necessary

In analyzing validity, it is important to broadly view the purposes of amending rules. While the Rules Enabling Act empowers the prescription of rules,[240] the prudence required to do so effectively and appropriately requires a broad base of knowledge and understanding. As Chief Justice Roberts stated in his 2015 Year-End Report on the Federal Judiciary,

> The process of judicial rule formulation, now more than 80 years old, is elaborate and time-consuming, but it ensures that federal court rules of practice and procedure are developed through meticulous consideration, with input from all facets of the legal community, including judges, lawyers, law professors, and the public at large.[241]

The Chief Justice emphasizes the exhaustive nature of amending and writing rules because of their impact on the judicial process. The decision to amend a rule is not done on a whim or to address one-off problems that have occurred in the administration of justice. Rather, the sole purpose of the undertaking is to "address the most serious impediments to just, speedy, and

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[240] *2015 Year-End Report on the Federal Judiciary*, SUP. CT., https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf [https://perma.cc/776P-Z9WS].

[241] *2015 Year-End Report on the Federal Judiciary*, SUP. CT., https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf [https://perma.cc/776P-Z9WS].

efficient resolution of civil disputes."[242] When the Advisory Committee on Civil Rules concluded its 2015 mission to ensure that Federal Rules "should be construed, administered, and employed by the parties to secure the just, speedy, and inexpensive determination of every action and proceeding,"[243] it took a step in shaping the rules in a way matched the reality of civil litigation in federal courts. In fact, the very purpose itself was expanded as shown in the previous quotation from Rule 1 of the Federal Rules of Civil Procedure – "and employed by the court and the parties" was amended with the 2015 change.[244] By the addition of eight words, which may be innocuous out of context, the focus of the rules' goals is elegantly evinced. The Supreme Court, Congress, and legal thought-leaders have placed a premium on efficiency and meeting the natural evolution of civil law with rules that make sense.

The purpose of this discussion is to ensure that an amendment to the Federal Rules of Civil Procedure is consistent with the goals of the judiciary. While the goals can be amorphous and unclear the promulgation of some rules, at its core, the purpose stated by Chief Justice Roberts is

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[242] *2015 Year-End Report on the Federal Judiciary*, SUP. CT., https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf [https://perma.cc/776P-Z9WS].

[243] *2015 Year-End Report on the Federal Judiciary*, SUP. CT., https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf [https://perma.cc/776P-Z9WS].

[244] *2015 Year-End Report on the Federal Judiciary*, SUP. CT., https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf [https://perma.cc/776P-Z9WS].

to "engineer a change in our legal culture that places a premium on the public's interest in speedy, fair, and efficient justice. But I am now motivated to address the subject now because the 2015 civil rules amendments provide a concrete opportunity for actually getting something done"[245] Chief Justice Roberts candidly indicates that one of the best ways to steer the justice system in the right direction is by amending Federal Rules.

K. Validity Tests in Other Cases

With Chief Justice Roberts' charge in mind, the solemn responsibility that comes along with amending a rule requires an in-depth review of its implications to ensure that the validity is maintained. There is no formalistic method for testing validity. Instead, the inquiry into the exercise of rulemaking is raised in the courts when a case or controversy forces its confrontation.

In *Sibbach v. Wilson*,[246] the Supreme Court answered questions about the validity of Rule 35 and Rule 37 of the Rules of Civil Procedure.[247] Rule 35 authorizes an order for physical

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[245] *2015 Year-End Report on the Federal Judiciary*, SUP. CT., https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf [https://perma.cc/776P-Z9WS].

[246] Sibbach v. Wilson, 312 U.S. 1 (1941).

[247] Sibbach v. Wilson, 312 U.S. 1, 6 (1941); *See generally* Arthur R. Miller, *§ 4508 The Erie Doctrine, Rules Enabling Act, and Federal Rules of Civil Procedure—Matters Covered by the Civil Rules*, 19 Fed. Prac. & Proc. Juris. 4508 (3d ed.) (2023) (detailing the Sibbach v. Wilson case and providing greater context for the Rules Enabling Act and the Federal Rules of Civil Procedure).

examination of a party when a physical condition is in controversy.[248] Rule 37, on the other hand, details the consequences of contempt for refusing to comply with a court order.[249] In this case, the plaintiff who was ordered to be physically examined challenged the court's authority to order her to submit to an examination.[250] Ultimately, the Court determined that the provisions set forth by Rule 35 and Rule 37 were valid exercises of rule-making authority by Congress.[251] The discussion on Congress's authority hinged on the question of whether the rules, in their application to the case at hand, served to meet the purpose of ensuring a "speedy, fair and exact determination of the truth."[252] More specifically, the Court says the test for validity is whether the rule "really regulates procedure, – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[253] The Court emphasizes the process by which the rules are created, stating that the rules were created in line with the Rules Enabling Act of 1934, and that Congress had a chance to review the drafts, with an opportunity to veto them if their going into effect was contrary to the policy of the legislature.[254] The Court restates the importance of Congress's reserved power to examine proposed rules and

[248] Sibbach v. Wilson, 312 U.S. 1, 7 (1941); Fed. R. Civ. P. 35.

[249] Sibbach v. Wilson, 312 U.S. 1, 8–9 (1941); Fed. R. Civ. P. 37.

[250] Sibbach v. Wilson, 312 U.S. 1, 6 (1941).

[251] Sibbach v. Wilson, 312 U.S. 1, 16 (1941).

[252] Sibbach v. Wilson, 312 U.S. 1, 14 (1941).

[253] Sibbach v. Wilson, 312 U.S. 1, 15 (1941).

[254] Sibbach v. Wilson, 312 U.S. 1, 14–15 (1941).

makes sure they are well drafted and their impact fit squarely within the bounds of their intent.[255] Since Congress has a clear power to establish rules, and the processes implemented to enact them is so discreet, the duty to amend Rule 41(d) rings soundly. Speedy resolutions, fairness in procedure, and exact determinations are hallmarks of what the rules intend to promote, so the case for Congressional action in amending Rule 41(d) to include attorneys' fees is an obligation. In testing the proposed amendment to Rule 41(d) against the validity for regulating procedure, the inclusion of attorneys' fees only stands to further the intent for which the rule was created. The addition has no effect on the substantive nature of dismissals or any other procedure, and thus remains squarely within the purview of Congressional discretion.

The Federal Rules of Civil Procedure enjoy presumptive validity "under both the constitutional and statutory constraints."[256] The reason for this lies in the careful process by which rules are made and all of the oversight they receive before enactment, but in any case, the rules are given great deference by the courts. The Supreme Court notes this idea to the effect that presumptive validity exists because of the "study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect."[257] The result of this presumption is that the Supreme Court has so far "rejected every challenge to the Federal Rules

[255] Sibbach v. Wilson, 312 U.S. 1, 15–16 (1941).

[256] Pledger v. Lynch, 5 F.4th 511, 521 (4th Cir. 2021) (Burlington Northern R. Co. v. Woods, 480 U.S. 1, 6 (1987)).

[257] Burlington Northern R. Co. v. Woods 480 U.S. 1, 6 (1987).

that it has considered under the Rules Enabling Act."[258] Between the power reserved for drafters of the rules and the courts' adherence to procedural rules, there exists no reconciliation on the issue of attorneys' fees being recovered by defendants in cases of vexatious litigation without an amendment to the rules. This has been shown by court opinions at the district and appellate level as well as by legal scholars and in the writing by Chief Justice Roberts. On an issue which stands in sharp contrast to efficiency and justice, there are no work-arounds. The only means of changing an unfortunate blemish in the civil justice system is through an amendment to the rule.

IV. Conclusion

Rule 41(d) has a noble purpose. Instead of assuming that all who enter the courthouse doors do so with pure intentions in the interest of justice, it acknowledges that some file claims to cause unrest and hindrance to those with whom they have personal or professional issues. The courts serve to render justice both in equity and in law, but frivolous litigation undermines that principle by its nature. Yet, the long-held tradition of paying ones' own attorneys' fees is an American principle that encourages truly aggrieved parties to come forward and pursue their claims without fear of their punishment being doubled in the case of judgment against their favor. Even in acknowledging that the American Rule for attorneys' fees is a bedrock principle of the American justice system, there are existing exceptions and a clear need for a least one more. The exceptions should be drawn to prevent ill-intentioned litigants from taking advantage of the equitable frameworks that are in place. At the heart of the circuit split on the awarding of attorneys'

[258] Pledger v. Lynch, 5 F.4th 511, 521 (4th Cir. 2021) (Quoting Abbas v. Foreign Pol'y Grp, 783 F.3d 1328, 1336 (D.C. Cir. 2015)).

fees under Rule 41(d) is disagreement over which is most important: adhering to text in federal regulations, maintaining the integrity of the American Rule pertaining to attorneys' fees, and whether a victim of frivolous litigation should be made whole. However, the idea that a victimized defendant should be made whole is not actually at issue. An amendment to Rule 41(d) will settle the circuit split with the addition of three words. Including the discretionary award of attorneys' fees under Rule 41(d) will empower learned judges to exercise discretion over its courts and ensure that litigants act in good faith to hear claims heard that plaintiffs intend to fully pursue.

Chief Justice Roberts' 2015 report gives a rare insight into the over-arching goals of what Congress needs to achieve in writing Federal Rules by way of a plainly written statement. "We should not miss the opportunity to help ensure that federal court litigation does not degenerate into wasteful clashes over matters that have little to do with achieving a just result."[259] The addition of three simple words to Rule 41(d) will achieve the exact purpose that Chief Justice Roberts states. Allowing the recovery of attorneys' fees in frivolous or vexatious suits will prevent wasteful clashes that have no propensity to result in justice. In cases where problematic claims persist, a remedy can now be in place to protect aggrieved defendants and ensure that the courthouse maintains its sanctity.

[259] *2015 Year-End Report on the Federal Judiciary*, SUP. CT., https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf [https://perma.cc/776P-Z9WS].