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# Voluntary Dismissals in Illinois

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Plaintiffs may take voluntary dismissals or nonsuits in Illinois courts<sup>1</sup> and Federal courts.<sup>2</sup> Section 2-1009 of the Illinois Code of Civil Procedure<sup>3</sup> gives plaintiffs the right to voluntarily dismiss their claim to correct “a procedural or technical defect.”<sup>4</sup> Rule 41(a) of the Federal Rules of Civil Procedure gives plaintiffs in Federal courts a similar right. “[T]he language and history of Rule 41(a) imply [that] the general purpose of the rule is to preserve the plaintiff’s right to a voluntary nonsuit and start over so long as the defendant is not hurt.”<sup>5</sup>

The Illinois statute allows plaintiffs, to dismiss their claims, upon notice<sup>6</sup> and payment of costs<sup>7</sup> as a matter of right<sup>8</sup>—without preju-

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1. ILL. REV. STAT. ch. 110 para. 2-1009 (1986). See text accompanying note 20 for statute. “Dismissal” and “nonsuit” are synonymous. *Connor v. Copley Press*, 99 Ill.2d 382, 459 N.E.2d 955 (1984). See also *Juen v. Juen*, 12 Ill. App. 3d 284, 286, 297 N.E.2d 633, 635, (5th Dist. 1973) (“The terms nonsuit and voluntary dismissal without prejudice are used interchangeably because there is no difference in effect between them.”) *City of Palos Heights v. Village of Worth*, 29 Ill. App. 3d 746, 749, 331 N.E.2d 190, 193 (1st Dist. 1975) (“[T]he terms ‘nonsuit’ and ‘voluntary dismissal without prejudice’ are used interchangeably because there is no difference in effect between them.”) See also *Gilbert v. Langbein*, 343 Ill. App. 132, 134, 98 N.E.2d 140, 141 (1st Dist. 1951) (“There is no difference in effect between allowing a nonsuit and dismissing the case without prejudice, because in either instance another proceeding may be instituted.”); *Bailey v. State Farm & Cas. Co.*, 137 Ill. App. 3d 155, 158, 484 N.E.2d 522, 525 (1st Dist. 1985) (“A hearing or trial, then, ‘does not begin until the parties begin to present their arguments and evidence to the court sitting without a jury in order to achieve an ultimate determination of their rights.’”).

2. FED. R. CIV. P. 41. See text accompanying note 88.

3. ILL. REV. STAT. ch. 110, para 2-1009 (1987).

4. *Gibellina v. Handley*, 127 Ill. 2d 122, 137, 535 N.E.2d 858, 865 (1989).

5. *McCall-Bey v. Franzen*, 777 F.2d 1178, 1184 (7th Cir. 1985).

6. *Bailey v. State Farm Fire & Casualty Co.*, 137 Ill. App. 3d 155, 484 N.E.2d 522 (1985).

7. *Id.*

8. *Davis v. Int’l Harvester, Co.* 139 Ill. App. 3d 264, 268, 487 N.E.2d 385, 388 (1988) (“When notice is given and proper costs paid, the plaintiff’s right to a

dice—provided that the defendant has not filed a counterclaim,<sup>9</sup> or that a trial or hearing has not yet begun.<sup>10</sup> However, once a counterclaim is filed or a trial or hearing begun, a voluntary dismissal is allowed only by stipulation of the parties or by leave of court.<sup>11</sup> Federal Rule 41(a) allows plaintiffs to voluntarily dismiss a case before a defendant serves an answer or moves for summary judgment. After service of an answer or a motion for summary judgment, a voluntary dismissal must be stipulated to by all the parties who have appeared in the action,<sup>12</sup> or must be ordered by the court.<sup>13</sup> Thus, unlike the Illinois statute, the federal rule gives the trial court more control over plaintiff's motion for voluntary dismissal.

Many feel that plaintiffs in Illinois abuse the right to voluntarily dismiss in order to harass defendants or to avoid or delay adverse judgments.<sup>14</sup> Because federal judges have more discretion in ruling on voluntary dismissals, defendants urge a statute similar to the federal rule be adopted in Illinois.<sup>15</sup> However, despite the more restrictive

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voluntary dismissal without prejudice prior to trial or a hearing is absolute, and the court has no discretion to deny the plaintiff's motion for dismissal.") *Davis* so held, despite the fact that plaintiff failed to comply with defendant's discovery requests within 30 days as ordered. *Heinz v. County of McHenry*, 122 Ill. App. 3d 895, 897, 461 N.E.2d 672, 674 (1984) ("nor does the granting of such a motion [dismissing the complaint] with leave to amend . . . affect plaintiff's absolute right to voluntarily dismiss her [case]."). *Id.*

9. *Kendle v. Village of Downers Grove*, 156 Ill. App. 3d 545, 553, 509 N.E.2d 723, 728 (1987).

10. *Kahle v. John Deere Co.*, 104 Ill. 2d 302, 309, 472 N.E.2d 787, 790 (1984).

11. ILL. REV. STAT. ch. 110, para. 2-1009 (1987). For further restrictions imposed by the Illinois Supreme Court by case law see text at notes 58, 41 and 50 under *Gibellina v. Handley*, 127 Ill. 2d 122, 535 N.E.2d 858 (1989); *O'Connell v. St. Francis Hospital*, 112 Ill. 2d 273, 492 N.E.2d 1322 (1986); and *Muskat v. Sternberg*, 122 Ill. 2d 41, 521 N.E.2d 932 (1988). *Gibellina* permits the trial court to hear pending dispositive pretrial motions despite a request for a voluntary dismissal. *O'Connell* requires a trial court to hear a pending motion to dismiss for lack of diligence in serving summons despite a request for a voluntary dismissal. *Muskat* requires a trial court to measure diligence on a motion to dismiss for lack of diligence in serving summons from the time the limitations period expired when a timely case was filed, then voluntarily dismissed after the statute ran but before service of summons was made, and finally refiled, rather than measure it from the time the case was refiled to when service of summons was made.

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

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

14. *Voluntary Dismissal Limit Urged by Judge*, Chicago Daily L. Bull., Apr. 18, 1988, at 1, col. 2; see also Ferrini & Winter, *Voluntary Dismissals—From Shield to Sword By the Convergence of Improvident Actions*, 21 J. MARSHALL L. REV. 549 (1988).

15. *Id.*

right to take dismissals, it is unclear whether adoption of a statute similar to the federal rule will diminish possible abuse of the judicial system. Because of the “two dismissal rule,”<sup>16</sup> the liberal granting of voluntary dismissals,<sup>17</sup> and the narrow standard of review,<sup>18</sup> any abuse now existing in Illinois might still continue under a statute similar to the federal rule. Furthermore, the defendants are not without procedural protections against abuses. Defendants may ask for sanctions that range from dismissals with prejudice to fees and costs.<sup>19</sup> Finally, the abuse most complained of—that of delay—takes place at the federal level in spite of federal Rule 41(a), and is committed by defendants as well as plaintiffs.<sup>20</sup> This paper suggests that since the Federal rule generates complaints similar to those generated by the Illinois statute, adoption of an Illinois statute similar to Federal Rule 41(a) will not significantly diminish perceived abuses stemming from voluntary dismissals.

#### I. ILLINOIS VOLUNTARY DISMISSAL STATUTE

The statute governing voluntary dismissal in Illinois is Chapter 110 § 2-1009 of the Illinois Code of Civil Procedure. It provides:

(a) The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause. Thereafter the plaintiff may dismiss, only on terms fixed by the court (1) upon filing a stipulation to that effect signed by the defendant, or (2) on motion specifying the ground for dismissal, which shall be supported by affidavit or other proof. After a counterclaim has been pleaded by a defendant no dismissal may be had as to the defendant except by the defendant's consent.

(b) Counterclaimants and third-party plaintiffs may dismiss upon the same terms and conditions as plaintiffs.<sup>21</sup>

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16. See *infra* text accompanying notes 116-117 for discussion of the effect of “two dismissal rule.”

17. See *infra* text accompanying note 119 for discussion of the effect of trial courts' liberal standard for granting voluntary dismissals.

18. See *infra* text accompanying note 127 for the effect of narrow standard of appellate review.

19. See *infra* text accompanying note 136 for discussion of the effect of other procedural rules.

20. See *infra* text accompanying notes 131-135 for discussion of delays in litigation.

21. ILL. REV. STAT. ch. 110, para. 2-1009 (1987).

The plaintiff's right to voluntary dismissal has been described as absolute.<sup>22</sup> However, this absolute right has both statutory<sup>23</sup> and case law<sup>24</sup> restrictions.

#### A. STATUTORY RESTRICTIONS

##### 1. *When does a trial or hearing begin?*

The plaintiff has an absolute right to a voluntary dismissal before a trial or hearing. However, since section 2-1009 does not define the term "trial,"<sup>25</sup> questions arise as to exactly when a trial begins. Questions also arise as to when a hearing begins because "hearing" has been given confusing treatment by the appellate courts.<sup>26</sup> For bench trials, trial begins when opening statements are made or evidence is presented.<sup>27</sup> For jury trials, trial begins at *voir dire*.<sup>28</sup> Thus, examination of prospective jurors indicates a trial has begun;<sup>29</sup> section 2-1009 does not require that a full jury be selected. Even if only a

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22. *Jacobson v. Ragsdale*, 160 Ill. App. 3d 656, 662 513 N.E.2d 1112, 1116 (1987) ("As has been stated often in recent decisions of this court, the voluntary dismissal statute grants plaintiffs the absolute privilege to dismiss regardless of the circumstances or motive.").

23. ILL. REV. STAT. ch. 110, para. 2-1009 (1987).

24. See *Gibellina v. Handley*, 127 Ill. 2d 122, 535 N.E.2d 858 (1989); *Muskat v. Sternberg*, 122 Ill. 2d 41, 521 N.E.2d 932 (1988); *O'Connell v. St. Francis Hospital*, 112 Ill. 2d 273, 492 N.E.2d 1322 (1986). See also *infra* notes 41-64 and accompanying text for further discussion of these cases.

25. *Cummings v. Simmons*, 167 Ill. App. 3d 544, 547, 521 N.E.2d 634, 636 (1988) ("The Code does not define the term 'trial.'").

26. *In re Marriage of Fine*, 116 Ill. App. 3d 877, 879, 452 N.E.2d 691, 692 (1983) ("The question of whether a 'hearing' has commenced . . . so as to bar the plaintiff's absolute right to dismiss the action has been given confusing treatment by various panels of the appellate court . . . .")

27. *Kahle v. John Deere Co.*, 104 Ill. 2d at 308-310, 472 N.E.2d at 790 ("[A] hearing is a nonjury proceeding in which evidence is taken on the merits." It is the equitable equivalent to trial.)

28. *Lighthart v. Pesner*, 157 Ill. App. 3d 66, 68, 510 N.E.2d 84, 86 (1st Dist. 1987) ("[W]hen no jury has been selected, no prospective jurors have been examined or sworn, and counsel has made no opening statement, a trial for purposes of section 2-1009[a] has not begun.").

29. *Kahle*, 104 Ill. 2d at 310, 472 N.E.2d at 790. The court ruled that motions *in limine* heard on the day the case was scheduled for trial did not constitute the beginning of trial. It further ruled that since no juror was examined before plaintiff took a voluntary dismissal, trial had not begun.

few jurors are selected, trial has begun, and the plaintiff cannot voluntarily dismiss as a matter of right.<sup>30</sup>

The Illinois Supreme Court has held that, for purposes of section 2-1009, “a ‘hearing’ is the equitable equivalent of a trial.”<sup>31</sup> Thus, hearings pursuant to a motion to dismiss for failure to state a cause of action do not commence a hearing under section 2-1009.<sup>32</sup> A hearing does not begin until the parties start to present evidence and arguments to achieve the ultimate determination of their rights.<sup>33</sup>

## 2. Counterclaims

Once a defendant has filed a counterclaim, a plaintiff may not voluntarily dismiss the action.<sup>34</sup> A counterclaim is “(a)ny claim by one or more defendants against one or more plaintiffs, or against one or more co-defendants, whether in the nature of set off, recoupment, cross claim, or otherwise, and whether in tort or contract, for

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30. *Cummings*, 167 Ill. App. 3d at 544, 521 N.E.2d 634 (the examination of prospective jurors and the swearing in of a panel of four jurors was deemed to be the commencement of trial so as to bar the plaintiffs absolute right to a voluntary dismissal.).

31. *Kahle*, 104 Ill. 2d at 309, 472 N.E.2d at 790 (“a hearing is a nonjury proceeding in which evidence is taken on the merits.”; *Espedido v. St. Joseph Hospital*, 172 Ill. App. 3d 460 469, 470, 526 N.E.2d 664, 670 (1988) (“[A] ‘hearing’ is the equitable equivalent of trial . . . and does not commence until the parties begin to present evidence and arguments in order to achieve an ultimate determination of their rights.”(citation omitted)).

32. *Dunavan v. Calandrino*, 167 Ill. App. 3d 952, 959, 522 N.E.2d 347, 351 (1988) (“hearings pursuant to a section 2-615 motion to dismiss . . . do not mark the commencement of trial or hearing under section 2-1009 of the Code.” (citation omitted)). *Gibellina v. Handley*, 127 Ill. 2d 122, 535 N.E.2d 858 (1989) allows a court to hear a dispositive motion such as a 2-615 motion but does not affect the definition of “hearing” or “trial.” However, after a grant of a motion to dismiss under section 2-615 with leave to amend, a plaintiff may take a voluntary dismissal as a matter of right. *See Heinz v. County of McHenry*, 122 Ill. App. 3d 895, 461 N.E.2d 672 (1984) in which plaintiff was allowed to take a voluntary dismissal after the complaint was stricken with leave to amend but before the amended complaint was due to be filed.

33. *Espedido*, 172 Ill. App. 3d at 470, 526 N.E.2d at 670 (“[A] ‘hearing’ is the equitable equivalent of trial . . . and does not commence until parties begin to present evidence and arguments in order to achieve an ultimate determination of their rights.”); *Fine* 116 Ill. App 3d at 879, 452 N.E. 2d at 693 (“The question of whether a ‘hearing’ has commenced . . . so as to bar the plaintiff’s absolute right to dismiss the action has been given confusing treatment by various panels of the appellate court . . . .”)

34. ILL. REV. STAT. ch. 110, para. 2-1009 (1987). *See supra* text accompanying note 21.

liquidated or unliquidated damages, or for other relief.’’<sup>35</sup> To comprise a counterclaim that will avert a plaintiff’s voluntary dismissal, a defendant “must allege an independent, substantive cause of action, even though it might arise out of the same transaction.’’<sup>36</sup> More importantly, however, a counterclaim need only be pleaded to preclude a voluntary dismissal and can either be filed as a counterclaim<sup>37</sup> or judicially labeled as one.<sup>38</sup>

In *Edwards v. Fox*,<sup>39</sup> the court held that “after consolidation, the defendant’s third-party claim for contribution was properly considered as a counterclaim, for purposes of applying Section 2-1009.’’ In *Edwards*, an action involving a car accident, a husband (driver) and a wife (passenger) individually sued the driver of the other car. The defendant filed a third party complaint seeking contribution from the husband for the wife’s injuries. The defendant then moved to have the actions consolidated, and the trial court granted the motion. Thereafter, the driver-plaintiff sought to voluntarily dismiss under section 2-1009. The trial court denied the motion and the driver-plaintiff appealed. The appellate court affirmed and stated the third-party claim was a counterclaim in all but name, and it prevented the plaintiff’s 2-1009 dismissal. Thus, although not specifically called a counterclaim, a third-party complaint for contribution may bar a plaintiff’s attempt to dismiss.<sup>40</sup>

## B. CASE LAW RESTRICTION

### 1. *O’Connell v. St. Francis Hospital*

The Illinois Supreme Court limited plaintiffs’ rights to take voluntary dismissals in *O’Connell v. St. Francis Hospital*.<sup>41</sup> *O’Connell* dealt with a conflict between section 2-1009 and Supreme Court Rule

35. ILL. REV. STAT. ch. 110, para. 2-608(a) (1987) provides:

Any claim by one or more defendants against one or more plaintiffs, or against one or more codefendants, whether in the nature of setoff, recoupment, cross claim or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief, may be pleaded as a cross claim in any action, and when so pleaded shall be called a counterclaim.

36. *Kendle*, 156 Ill. App. 3d at 553-554, 509 N.E.2d at 728. The court concluded that an answer that included only a negative defense to a complaint for declaratory relief was not a counterclaim. Therefore, a counterclaim was not properly pleaded so as to defeat plaintiff’s motion for a voluntary dismissal.

37. ILL. REV. STAT. ch. 110, para. 2-1009 (1987).

38. *Edwards v. Fox*, 121 Ill. App. 3d 556, 459 N.E.2d 1083 (1984).

39. *Id.* at 559, 459 N.E.2d at 1085.

40. *Id.* at 558, 459 N.E.2d at 1084-85.

41. 112 Ill. 2d 273, 492 N.E.2d 1322 (1986).

103(b), which requires due diligence in obtaining service of summons.<sup>42</sup> The Illinois Supreme Court held that when a statute and a court rule conflict over judicial administration, the court rule prevails. Therefore, the trial court may be barred from granting a voluntary dismissal if the plaintiff has failed to use due diligence in obtaining a summons. When a 103(b) motion is filed, it must be heard on its merits before a ruling will be made on a plaintiff's motion to dismiss under section 2-1009.<sup>43</sup>

Immediately following the decision in *O'Connell*, defendants attempted to extend the holding to motions to dismiss for failure to state a claim,<sup>44</sup> to motions to dismiss based on an affirmative defense,<sup>45</sup> and to motions for summary judgment.<sup>46</sup> Initially the Illinois courts chose not to extend *O'Connell*.<sup>47</sup> In fact, the courts told defendants to petition the legislature—not the courts—for a change in section 2-1009.<sup>48</sup> “Any further limits on the plaintiff's common law rights,” the Illinois Supreme Court declared, “should be enacted by the legislature.”<sup>49</sup>

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42. ILL. REV. STAT. ch. 110A, para. 103(b) provides:

If the plaintiff fails to exercise reasonable diligence to obtain service prior to the expiration of the applicable statute of limitations, the action as a whole or as to any unserved defendant may be dismissed without prejudice. If the failure to exercise reasonable diligence to obtain service occurs after the expiration of the applicable statute of limitations, the dismissal shall be with prejudice. In either case the dismissal may be made on the application of any defendant or on the court's own motion.

43. *O'Connell*, 112 Ill. 2d at 283, 492 N.E.2d at 1327.

44. See *Mancuso v. Beach*, 149 Ill. App. 3d 188, 500 N.E.2d 589 (1986).

45. See *Jacobsen v. Ragsdale*, 160 Ill. App. 3d 656, 513 N.E.2d 1112 (1987); *Goldberg v. Swedish Covenant Hospital*, 160 Ill. App. 3d 867, 513 N.E.2d 919 (1987); *Metcalf v. St. Elizabeth's Hospital*, 160 Ill. App. 3d 47, 513 N.E.2d 12 (1987).

46. See *Rohr v. Knaus*, 153 Ill. App. 3d 1013, 506 N.E.2d 634 (1987); *Highland v. Stevenson*, 153 Ill. App. 3d 390, 505 N.E.2d 776 (1987); *Russ v. Gandhi* 149 Ill. App. 3d 660, 500 N.E.2d 1032 (1986).

47. *Griffin v. Area E-7 Hosp. Ass'n*, 158 Ill. App. 3d 720, 723, 511 N.E.2d 256, 258 (1987) (“Other attempts to narrow the scope of the application of section 2-1009 have been unsuccessful where the voluntary dismissal was taken: in order to refile with a jury demand when none was made on the filing of the first suit in the face of a pending motion to dismiss for failure to state a claim; and even in the face of pending motions for summary judgment.” (citations omitted).

48. *Id.* at 723-24, 158 Ill. App. 3d at 259. (“As the legislature has some concurrent jurisdiction with the courts and no other court in this State has been willing to expand the *O'Connell* exception to section 2-1009 . . . we decline to do so here . . . .” The court then stated that any change was up to the legislature.)

49. *Kahle*, 104 Ill. 2d at 308, 472 N.E.2d at 789.

## 2. *Muskat v. Sternberg*

The Illinois Supreme Court, however, extended the *O'Connell* holding in *Muskat v. Sternberg*.<sup>50</sup> In *Muskat*, the plaintiff filed suit against a surgeon, hospital and manufacturer alleging negligence and product liability one day before the expiration of the applicable statute of limitations.<sup>51</sup> For two years, the plaintiff neither attempted nor obtained service of process upon the defendant, and the action was dismissed for want of prosecution.<sup>52</sup> The plaintiff later refiled her complaint,<sup>53</sup> and the defendants moved to dismiss under Rule 103(b), alleging the plaintiff failed to exercise reasonable diligence in effectuating the service of process.<sup>54</sup> The trial court denied the motion, holding that the time from refiled the lawsuit to service of summons was the proper period by which to measure the plaintiff's diligence. On appeal, the appellate court reversed the trial court and remanded the case.<sup>55</sup>

In affirming the appellate court's reversal, the Illinois Supreme Court quoted *O'Connell*: "We further hold that, in ruling on the pending Rule 103(b) motions, the trial court may consider the circumstances surrounding plaintiff's service of process on his original as well as his refiled complaint."<sup>56</sup> The Supreme Court refused the plaintiff's assertion that the *O'Connell* holding should only be applied prospectively and reasoned that *O'Connell* related to procedural rather than substantive matters and was not a clear change of law.<sup>57</sup>

## 3. *Gibellina v. Handley*

Although the Illinois Supreme Court first firmly declined to extend *O'Connell* from 103(b) motions to other dispositive motions, it recently changed its view and substantially limited the use of voluntary dismissals in *Gibellina v. Handley*.<sup>58</sup> The Illinois Supreme Court consolidated three cases in *Gibellina*, all procedurally similar in many respects. In each case the plaintiff was barred from using

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50. 122 Ill. 2d 41, 521 N.E.2d 932 (1988).

51. *Id.* at 43, 521 N.E.2d at 933.

52. *Id.*

53. ILL. REV. STAT. ch. 110, para. 13-217 (1987) permits a plaintiff to refile an action once upon taking a voluntary dismissal after the statute of limitations has run. See *infra* text at note 68.

54. 122 Ill. 2d at 43, 521 N.E.2d at 933.

55. *Id.* at 43-44, 521 N.E.2d at 933.

56. *Id.* at 45, 521 N.E.2d at 934.

57. *Id.* at 49, 521 N.E.2d at 936.

58. 127 Ill. 2d 122, 535 N.E.2d 858 (1989).

expert witnesses for failure to disclose their names, expertise, and opinions. Because an expert opinion was necessary to prove the claim in each case, the appellants filed pretrial motions for summary judgment. The appellees each subsequently filed a motion for voluntary dismissal before any decision had been entered on the motions for summary judgment.<sup>59</sup> In each case, the trial courts granted the motions for summary judgment and denied the motions for voluntary dismissal. The appellate courts reversed, holding that the trial courts did not have discretion to hear the motions for summary judgments in advance of the motions for voluntary dismissal,<sup>60</sup> and the Illinois Supreme Court granted leave to appeal.<sup>61</sup>

Although the Illinois Supreme Court declined to adopt a rule similar to Federal Rule of Civil Procedure 41(a),<sup>62</sup> the court held that “the trial court may hear and decide a motion which has been filed *prior to* a section 2-1009 motion when that motion, if favorably ruled on by the court, could result in a final disposition of the case.”<sup>63</sup> Although at first glance this may appear to significantly limit the impact of section 2-1009, the court was careful to state that the holding “of course, does not assure an automatic denial of the section 2-1009 motion, for it is quite possible that the opposing party’s prior filed motion is without merit; in that case the subsequent 2-1009 motion must be granted.”<sup>64</sup> Thus, plaintiff’s statutory right to voluntarily dismiss may be limited if a defendant’s dispositive motion is ruled on favorably.

### C. PERCEIVED POTENTIAL ABUSE

Defendants sought to expand *O’Connell* because they felt that plaintiffs often abuse their absolute right to voluntary dismissals.<sup>65</sup> Furthermore, defendants feared that a plaintiff who can voluntarily dismiss a claim or action and then refile it within one year,<sup>66</sup> after the statute of limitations has run, could abuse that right and thus make defendants the targets of vexatious lawsuits.<sup>67</sup> The concern was that

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59. *Id.* at 125, 535 N.E.2d at 860.

60. *Id.*

61. *Id.*

62. *Id.* at 135, 535 N.E.2d at 864.

63. *Gibellina v. Handley*, 127 Ill. 2d 122, 138, 535 N.E.2d 858, 866 (1989).

64. *Id.*

65. *Id.*

66. ILL. REV. STAT. ch. 110, para. 13-217 (1987).

67. *See supra* note 14.

plaintiffs would continually dismiss and then refile. However, this worry is unfounded.

Section 13-217 of the Illinois Code of Civil Procedure allows for the refiling of a claim within one year after it has been dismissed without prejudice. It provides:

In the actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, if . . . the action is voluntarily dismissed by the plaintiff . . . then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff . . . may commence a new action within one year or within the remaining period of limitation, whichever is greater, . . . after the action is voluntarily dismissed by the plaintiff.<sup>68</sup>

Defendants complain that section 2-1009 in conjunction with section 13-217 allows plaintiffs multiple filings of the same action.

### 1. *Potential Abuse Diminished by Refiling Limit*

By allowing a plaintiff to refile after a voluntary dismissal, plaintiffs might attempt to abuse the system by repeatedly filing a suit and then dismissing it. However, the Illinois courts have recognized this problem and have refused to permit section 13-217 to be used to harass defendants.<sup>69</sup> The Illinois Supreme Court has ruled that plaintiffs are entitled to only one refiling after the statute expires pursuant to the savings provision of section 13-217.<sup>70</sup> The Illinois Supreme Court stated that section 13-217 “was not intended to permit multiple refilings following voluntary dismissals of an action for which the original statute of limitations has lapsed. A contrary interpretation would foster abuse of the judicial system by allowing a nondiligent plaintiff to circumvent . . . the otherwise applicable statute of limitations.”<sup>71</sup> Thus, the potential for abuse is significantly diminished by

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68. ILL. REV. STAT. ch. 110, para. 13-217 (1987).

69. *Tuch v. McMillen*, 167 Ill. App. 3d 747, 750, 521 N.E.2d 1218, 1221 (“[section 13-217] acts as a limited extension [of the statute of limitations] to prevent injustice; it should not, however, be permitted to become a harassing renewal of litigation.”).

70. *Gendek v. Jehangir*, 119 Ill. 2d 338, 343-344, 518 N.E.2d 1051, 1053 (1988). See also *Tuch*, 167 Ill. App. 3d at 750, 521 N.E.2d at 1221. Both *Gendek* and *Tuch* hold that when a plaintiff takes a voluntary dismissal after the statute of limitations runs, the plaintiff may refile once, but only once.

71. *Gendek*, 119 Ill. 2d at 343, 518 N.E.2d at 1053.

allowing only one refiling pursuant to section 13-217 after a voluntary dismissal.

## 2. *Potential Abuse Diminished by Payment of Costs*

The potential for abuse is further reduced by the statutory requirement that plaintiffs pay costs before dismissal.<sup>72</sup> Plaintiffs may dismiss without prejudice upon notice to all parties and upon payment of costs.<sup>73</sup> “Costs are allowances in the nature of incidental damages awarded by law to reimburse the prevailing party, to some extent at least, for the expenses necessarily incurred in the assertion of his rights in court.”<sup>74</sup> Thus, defendant’s appearance and jury demand fees may be taxed as costs, but deposition expenses may not.<sup>75</sup> In 1982, the Illinois Supreme Court addressed the problem raised by defendants that refusing to allow taxation of deposition costs would encourage oppressive use of voluntary dismissals. In *Galowich v. Beech Aircraft Corp.*<sup>76</sup> the court stated:

This argument misses the mark. It assumes a conclusion, *viz* that plaintiff’s suit is groundless, without merit and filed solely to harass. If this were so, the defendants would have a remedy under Section 41 of the Civil Procedure Act [now Ill. Rev. Stat. ch. 110A section 137] . . . . Further, it cannot be said that a plaintiff’s exercise of a statutory right to dismiss upon the terms specified by the statute is oppressive or unfair to a defendant . . . . Moreover, plaintiffs as well as defendants must bear the expense of depositions which they cause to be taken (with the exception of necessary depositions to which Rule 208(d) applies).<sup>77</sup>

Thus, section 2-1009 diminishes potential abuses by conditioning a voluntary dismissal upon payment of costs.

## 3. *Potential Abuse Diminished by Other Procedural Rules*

In addition to the provisions in section 2-1009, other provisions in the Illinois Code of Civil Procedure protect against litigation

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72. ILL. REV. STAT. ch. 110, para. 2-1009 (1987).

73. *Kahle v. John Deere Co.*, 151 Ill. App. 3d 139, 141, 502 N.E.2d 1172, 1173 (1986).

74. *Galowich v. Beech Aircraft Corp.*, 92 Ill. 2d 157, 165-66, 441 N.E.2d 318, 321 (1982).

75. *Id.* at 165, 441 N.E.2d at 321.

76. 82 Ill. 2d 157, 441 N.E.2d 319 (1982).

77. *Id.* at 167-68, 441 N.E.2d at 322-23.

abuses. Within the context of the Code, section 2-1009 strikes a balance between the interests of the plaintiff, defendant and court,<sup>78</sup> and should be tested as to its fairness in its individual application and its application along with other procedural rules;<sup>79</sup> some rules give the plaintiff an advantage and other rules give the defendant an advantage.

For example, a plaintiff initially chooses the defendants and the claims,<sup>80</sup> although those choices are not without limitations.<sup>81</sup> If the plaintiff's choice is unreasonable or frivolous, the defendant has several available options. The defendant may file a motion to dismiss for failure to state a cause of action as to any claim or any defendant,<sup>82</sup> or may initiate discovery and file a motion for summary judgment.<sup>83</sup> In addition, if the plaintiff fails to comply with discovery orders, the defendant may ask the court to dismiss the case, exclude evidence or witnesses, and assess attorney's fees.<sup>84</sup> Moreover, if the case is filed without reasonable inquiry into the facts or law or is frivolous, the defendant may ask for fees regardless of whether the plaintiff takes a voluntary dismissal.<sup>85</sup> If the plaintiff is allowed to take a voluntary dismissal in order to abandon an unmeritorious case order to correct a defect, then section 2-1009 has served its purpose and the overall purpose of the Code to dispose of the case on the merits.<sup>86</sup> If the case

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78. *Gibellina*, 127 Ill. 2d at 132-33, 535 N.E.2d at 863 ("As one Court noted, '[t]he present wording of the statute, then, is an apparent compromise between two extremes: the view that a plaintiff has an unfettered ability to dismiss his case, and the view that the inconvenience and expense suffered by a defendant can thwart a plaintiff's right of dismissal.'")

79. *Id.* at 134-35, 535 N.E.2d 864-65.

80. See ILL. REV. STAT. ch. 110, para. 2-404 (1987) (voluntary joinder of plaintiffs); para. 2-405 (voluntary joinder of defendants); para. 2-614 (voluntary joinder of claims) (1987).

81. See ILL. REV. STAT. ch. 110, para. 2-406(a)(1987) (mandatory joinder of parties).

82. See ILL. REV. STAT. ch. 110, para. 2-615(a)(1987) providing in part that "a pleading or portion thereof [may] be stricken because [it is] substantially insufficient in law."

83. See ILL. REV. STAT. ch. 110A, para. 201 *et seq* (1987). (defining the scope and limitations of discovery and the devices by which to take discovery); and ILL. REV. STAT. ch. 110, para. 2-1005(1985) (providing for summary judgments).

84. See ILL. REV. STAT. ch. 110A, para. 219 (providing for sanctions for failure to comply with discovery orders ranging from striking portions of pleadings to contempt), and para. 220 (requiring a court to exclude expert witnesses from testifying at trial for failure to properly disclose the expert before trial).

85. ILL. REV. STAT. ch. 110A, para. 137(1989).

86. See *Gibellina v. Handley*, 127 Ill. 2d 122, 137, 535 N.E.2d 858, 863 (1989).

is refiled and the defect is uncorrected, the defendant may still present a dispositive motion and ask for fees.<sup>87</sup>

## II. VOLUNTARY DISMISSAL IN FEDERAL COURT

Federal Rule of Civil Procedure 41(a) governs voluntary dismissal in federal court. An action may be dismissed without prejudice by the plaintiff,<sup>88</sup> by stipulation between the parties,<sup>89</sup> or by an order of the court.<sup>90</sup> Rule 41(a) provides:

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

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.<sup>91</sup>

Thus, Rule 41(a) states a clear standard of when a plaintiff may voluntarily dismiss an action without a court order and when a court order is necessary. Although the language of the rule varies consid-

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87. Johnston, *The Voluntary Dismissal in Illinois—A Sword or a Shield?*, 21 J. MARSHALL L. REV. 537 (1988) (hereinafter Johnston).

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

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

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

91. FED. R. CIV. P. 41(a).

erably from section 2-1009, applying both rules to a specific fact situation produces similar results.

A. VOLUNTARY DISMISSAL BEFORE AN ANSWER OR MOTION FOR SUMMARY JUDGMENT

Rule 41(a)(1)(i) authorizes plaintiffs to dismiss actions on their own without court orders by filing a notice of dismissal at any time before service by the adverse party of an answer or motion for summary judgments, which ever occurs first,<sup>92</sup> Rule 41(a)(1) provides a clear test of when a plaintiff can voluntarily dismiss: "Rule 41(a)(1) as it was drafted simplifies the court's task by telling it whether a suit has reached the point of no return. If the defendant has served either an answer or a summary judgment motion it has; if the defendant has served neither, it has not."<sup>93</sup> Because the language is specific, the relative stage of the litigation is not controlling. Even after hearings on a motion for a preliminary injunction, a plaintiff may voluntarily dismiss without prejudice and without a court order.<sup>94</sup> Further, a lawsuit in which discovery has taken place for one year may still be dismissed if an answer or summary judgment is not served.<sup>95</sup>

B. VOLUNTARY DISMISSAL BY STIPULATION BETWEEN THE PARTIES

An action may be dismissed by a stipulation between the parties. When the parties want to dismiss the case because it has been settled, the parties proceed under Rule 41(a)(1) (ii).<sup>96</sup> The stipulation may provide that the dismissal is with prejudice.<sup>97</sup> Dismissals pursuant to Rule 41(a)(1)(ii) are made without court action; thus, no court order is necessary.<sup>98</sup> Although no court order is necessary, the rule requires that the stipulation, not the settlement, be filed in court.<sup>99</sup> The

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92. *Id.*

93. *Winterland Concessions Co. v. Smith*, 706 F.2d 793, 795 (7th Cir. 1983) (defaults entered against some defendants and a preliminary injunction was entered against others, but no answer or summary judgment was filed by any defendant).

94. *Id.* at 796.

95. *Scam Instrument Corp. v. Control Data Corp.*, 458 F.2d 885 (7th Cir. 1972) (plaintiff's notice of dismissals was upheld even though a full year's discovery was taken without an answer or motion for summary judgment being filed).

96. *McCall-Bey v. Franzen*, 777 F.2d 1178, 1184 (7th Cir. 1985) (trial court retained jurisdiction to enforce settlement agreement even after plaintiff took a voluntary dismissal).

97. *Id.*

98. *Id.*

99. *Id.* at 1185.

dismissal takes effect on the date of filing,<sup>100</sup> and violation of a stipulation is treated as a breach of contract which can be remedied in state court.<sup>101</sup>

### C. VOLUNTARY DISMISSAL BY COURT ORDER

If the provisions of Rule 41(a)(1) are not met, plaintiffs may still seek voluntary dismissals “upon order of the court and upon such terms and conditions as the court deems proper.”<sup>102</sup> Unless the court specifies otherwise, this dismissal is without prejudice.<sup>103</sup> Unlike dismissals under Rule 41(a)(1), the court must use its discretion in granting or denying the dismissal.

Court discretion under Rule 41(a)(2) is what some attorneys, commentators and judges believe is needed in Illinois courts.<sup>104</sup> This discretion would allow the court to deny motions for voluntary dismissals and thereby prevent harassing or vexatious litigation and abuse of the judicial system. However, the Seventh Circuit looks at whether a defendant will suffer plain legal prejudice if the dismissal is granted. Therefore, it is questionable if a rule of this type prevents any of those injuries of which defendants now complain.<sup>105</sup>

Unless the defendant can show it will sustain plain legal prejudice if the action or claim is dismissed, the district court should grant plaintiff’s motion to dismiss.<sup>106</sup> This ruling may be reversed on appeal only if the appellant can establish that the court abused its discretion

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100. *Id.*

101. *McCall-Bey v. Franzen*, 777 F.2d 1178, 1185 (7th Cir. 1985).

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

103. *Id.*

104. *Voluntary Dismissal Limit Urged by Judge*, Chicago Daily L. Bull., April 18, 1988, at 1 Col. 2; Ferrini and Winter, “*Voluntary Dismissals-From Shield to Sword by Convergence of Improvident Actions*,” 21 J. MARSHALL L. REV. 549 (1988).

105. The defendants in federal courts make complaints similar to those the defendants make in state court. *See, e.g., Kovalic v. DEC International Inc.*, 855 F.2d 471 (7th Cir. 1988) (defendant complained that the court allowed plaintiff to take a voluntary dismissal to avoid a summary judgment and choose another forum); *United States v. Outboard Marine Corp.*, 789 F.2d 497 (7th Cir. 1986) (the defendant complained that the court allowed plaintiff to take a voluntary dismissal that would cause delay in resolving the dispute); *McCall-Bey v. Frazen*, 777 F.2d 1178 (7th Cir. 1985) (the codefendant complained that it was prejudiced by the court allowing plaintiff to take a voluntary dismissal as to the codefendant only with whom it had settled.)

106. *Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1233 (7th Cir. 1983) (“[u]nder [Rule 41] a defendant must demonstrate plain legal prejudice in order to prevent a voluntary dismissal. . . . [T]he prospect of a second lawsuit or the creation of a tactical advantage, is insufficient to justify denying the plaintiff’s motion to dismiss.”) (citations omitted).

in granting the dismissal.<sup>107</sup> The plain legal prejudice standard was first set forth in the Seventh Circuit in *Pace v. Southern Express Company*.<sup>108</sup> In *Pace*, the court stated:

Some of the factors justifying denial are the defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and the fact that a motion for summary judgment has been filed by the defendant.<sup>109</sup>

Nineteen years later, the Seventh Circuit in *Kovalic v. DEC International, Inc.* still looked to the *Pace* standard in determining whether plaintiffs' voluntary dismissals should be granted.<sup>110</sup> However, the *Kovalic* Court noted that *Pace* is "simply a guide for the trial judge . . ."<sup>111</sup> "The enumeration of the factors to be considered in *Pace* is not equivalent to a mandate that each and every such factor be resolved in favor of the moving party before dismissal is appropriate."<sup>112</sup> Furthermore, an injury such as a second lawsuit or the creation of a tactical advantage is not plain legal prejudice.<sup>113</sup> Although these injuries—the possibility of a second suit and a tactical advantage—are not enough to deny plaintiff's dismissal, the court can evaluate these injuries in determining whether to award attorney's fees or costs to the defendant.<sup>114</sup>

### III. REASONS WHY A "41(A)-TYPE" RULE MIGHT NOT SOLVE PERCEIVED PROBLEMS IN ILLINOIS

Four aspects of Federal Rule 41(a) and the federal litigation surrounding it show that adoption by Illinois of a rule similar to

107. *Kovalic v. DEC International, Inc.*, 855 F.2d 471, 474 (7th Cir. 1988) (trial court did not abuse its discretion in granting a voluntary dismissal so as to deprive the defendant of "its right to defend against the lawsuit in a federal, rather than a state, forum.").

108. 409 F.2d 331 (7th Cir. 1969).

109. *Id.* at 334 (citing 5 J. MOORE, J. LUCAS & J. WICKER, *MOORE'S FEDERAL PRACTICE* § 41.05[1] (2d ed. 1968)).

110. *Kovalic*, 855 F.2d at 473-74.

111. *Id.* at 474.

112. *Tyco Laboratories, Inc. v. Koppers Co. Inc.*, 627 F.2d 54, 56 (7th Cir. 1980). The defendant argued, with some justification, that "the facts of this case fit squarely within the *Pace* 'test' for denying a motion to dismiss." *Id.* However, the court found the trial judge had not abused his discretion in granting plaintiff a voluntary dismissal despite the amount of discovery taken and the pending motion for summary judgment. *Id.*

113. *Id.* at 56-57.

114. *Quad/Graphics*, 724 F.2d at 1233, n.2.

Federal Rule of Civil Procedure 41(a) would not prevent abuses of the Illinois judicial system. First, limits on voluntary dismissals in Illinois already prevent a plaintiff's abuse by means of vexatious filings. Second, the discretion given a trial judge in ruling on voluntary dismissals under Rule 41(a) would likely be duplicated if a similar statute were adopted in Illinois. Third, because the appellate court's standard of review for reversing the trial court's ruling is limited, any perceived abuses would remain. Lastly, the frequent complaint that plaintiffs utilize Rule 41(a) as a strategy of delay is an argument with another dimension.

A. BOTH THE ILLINOIS STATUTE AND THE FEDERAL RULE ARE SIMILAR; THEY BOTH ALLOW ONE DISMISSAL AS A MATTER OF RIGHT

Just as the Illinois Supreme Court has said that section 13-217 "was not intended to permit multiple refilings following voluntary dismissals of an action . . .,"<sup>115</sup> the federal courts have stated, "(t)he policy behind Federal Rule of Civil Procedure 41(a)(1) is to protect a defendant by providing that if the plaintiff has taken advantage of his right to early dismissal in one occasion, he may not repeat the process with impunity."<sup>116</sup> Rule 41(a)(1) states that a "dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim."<sup>117</sup> The two dismissal bar not only acts on dismissals within federal courts but also between state and federal courts. Similarly, when section 2-1009 is combined with section 13-217, plaintiffs are entitled to only one refiling pursuant to the savings provision of section 13-217.<sup>118</sup> Thus, under current Illinois and federal law, a plaintiff cannot voluntarily dismiss more than once, both within Illinois courts and between Illinois state courts and federal courts. Therefore, an adoption of a statute similar to Rule 41(a)(1) would be superfluous because the two dismissal bar already prevents plaintiffs' abuse of repeated vexatious filings, both in Illinois and federal courts.

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115. *Gendek*, 119 Ill. 2d at 343, 549 N.E.2d at 1058.

116. *Schott v. Helper*, 101 F.R.D. 99, 100 (N.D. Ill. 1984) in which plaintiff first filed and dismissed in state court, next filed and dismissed in federal court, then refiled in federal court. The court applied the two dismissal rule as a bar to the refiled action.

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

118. *Tuch*, 167 Ill. App. 3d at 751, 521 N.E.2d at 1221.

## B. TRIAL COURT STANDARD FOR RULING ON DISMISSALS

Under Federal Rule of Civil Procedure 41(a), a trial court should grant a voluntary dismissal unless the defendant can show he will sustain plain legal prejudice.<sup>119</sup> The trial judge has broad discretion in ruling on a voluntary dismissal. Judges who are loath to impose modest sanctions on motions to compel discovery are not likely to deny a motion for a voluntary dismissal.<sup>120</sup> Even if the judges were inclined to deny a motion for a voluntary dismissal, they would have to find the defendant suffered "legal prejudice."<sup>121</sup> The boundaries of legal prejudice are not precise. However, it must be substantial, clear, or plain.<sup>122</sup> It is "something other than the necessity that defendant might face in defending another action. That kind of disadvantage can be taken care of by a condition that plaintiff pay to defendant its costs and expenses incurred in the first action."<sup>123</sup>

If Illinois adopted a statute similar to the federal rule, the likelihood is great that the perceived abuse would continue.<sup>124</sup> The

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119. *Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1233 (7th Cir. 1983).

120. *Johnston*, *supra* note 87, at 546.

121. *Quad/Graphics*, 724 F.2d at 1233.

122. *See, e.g.*, 5 J. MOORE, W. TAGGARD & J. WICKER, *MOORE'S FEDERAL PRACTICE* § 41.05(1) (2d ed.1986) at 41-62, 63. ("Where substantial prejudice is lacking, the district court should exercise its discretion by granting a motion for voluntary dismissal without prejudice."); 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2364 (1971) (district court will deny motion if defendant will be seriously prejudiced by a dismissal); *Andes v. Versant Corp.*, 788 F.2d 1033, 1036 (4th Cir. 1986) (voluntary dismissal "should not be denied absent substantial prejudice to the defendant") *Id.*; *McCants v. Ford Motor Co.*, 781 F.2d 855, 856-57 (11th Cir. 1986) ("in most cases a dismissal should be granted unless the defendant will suffer clear legal prejudice"); *Hamilton v. Firestone Tire and Rubber Co.*, 679 F.2d 143, 145 (9th Cir. 1982) ("plain legal prejudice" required) *Id.*; *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976) (dismissal should generally be granted "unless the defendant will suffer some legal harm"). *Id.*

123. *Kern v. TXO Production Corp.*, 738 F.2d 968, 970 (8th Cir. 1984) in which the court stated:

in the federal courts, after answer, such dismissals should be granted only 'if no other party will be prejudiced.' (citation omitted). By 'prejudice' in this context is meant something other than the necessity that defendant might face of defending another action. That kind of disadvantage can be taken care of by a condition that plaintiff pay to defendant its costs and expenses incurred in the first action. One sort of prejudice that cannot be cured by the attachment of conditions is the loss by defendant of success in the first case. If defendant has already won its case, reimbursement of fees and expenses cannot make it whole from the injury of being sued again, perhaps this time to lose.

*Id.*

124. *See Johnston*, *supra* note 87, at 543.

plain legal prejudice standard is a strict standard but it gives the courts broad discretion in ruling on voluntary dismissals.<sup>125</sup> Therefore, it is likely defendants would continue to complain about “the perceived reticence of . . . trial court(s) to manage and control litigation as tightly as (they) might like.”<sup>126</sup>

#### C. STANDARD OF REVIEW IN THE APPELLATE COURTS

A district court’s decision to grant plaintiff’s motion for dismissal without prejudice is within the district court’s discretion and will not be reversed unless the appellant can show the court abused its discretion.<sup>127</sup> Although abuse of discretion is the standard of review generally stated, the standard of “zone of choice” has also been used.<sup>128</sup> The idea of discretion presupposes a zone of choice in which the trial court may either grant or deny the motion.<sup>129</sup> The standard of zone of choice was first used in administrative agency decisions,<sup>130</sup> and narrowly restricts review by appellate courts, resulting in only rare reversals. Since district courts only deny plaintiffs’ motions for voluntary dismissal if there is plain legal prejudice, the district courts are not likely to generously grant dismissals. Because the standard of review is so narrow and the district court’s discretion is so broad, these rulings will be upheld. Therefore, the adoption of a statute similar to Rule 41(a) will not prevent perceived abuses because the appellate court has limited authority to reverse the trial court’s ruling.

#### D. DELAY

Although defendants often complain that plaintiffs use Rule 41 as a tactic to delay, as the Seventh Circuit Court of Appeals noted in *United States v. Outboard Marine Corp.*<sup>131</sup> defendants are no strangers to delay, and, like plaintiffs, attempt to gain as many tactical advantages as possible. In *Outboard Marine Corp.*, an estimated 1.1 million pounds of polychlorinated biphenyles (PCB) rested on a harbor bed

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125. The trial court must apply the correct standard and consider relevant factors in deciding whether the plain legal prejudice exists, but in applying the standard and considering the factors has a broad range of choice which is reversed only if the trial court commits a clear error of judgment. See *Kern*, 738 F.2d at 970.

126. *Gibellina*, 127 Ill. 2d at 135, 535 N.E.2d at 861.

127. *Tyco Laboratories*, 627 F.2d at 56.

128. See *Kovalic*, 855 F.2d at 474.

129. *Id.*

130. See *Baker v. Heckler*, 730 F.2d 1147 (8th Cir. 1984) for application of the “zone of choice” standard in review of an administrative decision.

131. 789 F.2d 497 (7th Cir. 1986).

in Waukegan, Illinois. The government brought an action to require Outboard Marine to clean up the polychlorinated biphenyles from the harbor. "This case," the court noted in affirming the trial court's grant of the government's motion for a voluntary dismissal, "has a lengthy and tangled history spawning numerous decisions by this and other courts. It is unfortunate that [the court is] unable to write the final chapter at this time and thus the conclusion of this case will have to wait another day."<sup>132</sup>

Instead of forcing the appellant, Outboard Marine, to remove the PCB, the government decided to dismiss the action, clean up the waste and then charge Outboard for the cost, pursuant to CERCLA section 107. The court allowed the government to dismiss the action with the promise to pay for fees and costs and not to sue for injunctive relief. Outboard complained that the dismissal should not have been granted and that the government was abusing the judicial system by using delaying tactics. The appellants felt that the government was "acting with less than a sincere motive in requesting that the court dismiss its action without prejudice in order that it might remove the PCB from the harbor and later sue for the cost of removal."<sup>133</sup> The court was puzzled by the complaint and noted:

The appellants have fought the government every possible inch of the way for over six years in court concerning the validity of the proposed injunctive relief action and whether the State of Illinois was a proper party to this action. A major reason why the PCB problem has not been resolved at this point in time is the continuous and protracted litigation of this case. While we do not fault the appellants for exercising their constitutional right to defend this action in the manner they believe is most appropriate, it is 'too late in the day' for them to complain that they somehow have been prejudiced by the delay in this case in proceeding to trial for they actively participated in this litigation nightmare which we are sad to say is far from its final chapter.<sup>134</sup> The court further stated, "they knowingly and actively participated in the delay by contesting the government's position taken throughout this litigation, obviously in the hope of postponing the day of reckoning as long as possible."<sup>135</sup>

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132. *Id.* at 498.

133. *Id.* at 503.

134. *Id.* at 504.

135. *United States v. Outboard Marine Corp.*, 789 F.2d 497 (7th Cir. 1986).

Thus, although defendants often complain of delay in both state and federal court, they also delay litigation when it furthers their interests. To a large extent, delay is inherent in litigation, particularly complex litigation, and often is decried when it results in little, if any, unforeseen harm. Delay also is decried at times to mask other tactics (even delay) by those who complain of it.

#### E. OTHER PROCEDURAL RULES

In addition to the four protections already discussed, other procedural rules exist which protect defendants against perceived plaintiff abuse of the judicial system. These rules protect defendants by limiting the time a plaintiff can refile,<sup>136</sup> by ensuring compliance with discovery requests,<sup>137</sup> and by barring frivolous actions.<sup>138</sup>

A plaintiff is entitled to refile only once and the refile must be within one year after the action has been dismissed or within the remaining period of limitation.<sup>139</sup> Clearly, allowing a plaintiff to refile within the period of the limitation is unoffensive and equitable. Further, “[s]hould an individual case be refiled pursuant to section 13-217, a diligent defense, using available motions, need not countenance a controversy languishing in the courts for a decade.”<sup>140</sup>

An additional procedural protection is a motion to comply with discovery requests. If a party fails to comply with discovery orders or rules, Illinois Supreme Court Rule 219 allows a court to “order that the offending party or his attorney pay the reasonable expenses, including attorney’s fees incurred by any party as a result of the misconduct.”<sup>141</sup> In addition, if a defendant believes that a case is filed without reasonable cause and found to be untrue or not “grounded in fact” or “warranted by law,” the defendant may request sanc-

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136. ILL. REV. STAT. ch. 110, para. 13-217 (1987). *See supra* note 68 and accompanying text.

137. ILL. REV. STAT. ch. 110A, para. 219 (1987) provides for sanctions for failure to comply with discovery orders that range from striking portions of pleadings to contempt.

138. ILL. REV. STAT. ch. 110A, para. 137 (1989) which requires lawyers to sign pleadings and other papers filed in court and that the signature constitutes a certification that the pleader has made a reasonable inquiry into the facts and law and that the allegations in the pleading or statement in the paper is supported by the facts and law. Violation of para. 137 exposes the lawyer who signs the pleadings to sanctions.

139. ILL. REV. STAT. ch. 110, para. 13-217 (1987).

140. Gibelliana, 127 Ill. 2d at 135, 535 N.E.2d at 865.

141. ILL. REV. STAT. ch. 110A, para. 219 (1987).

tions.<sup>142</sup> These sanctions include discipline and the payment of costs and attorney fees.<sup>143</sup> Thus, with these procedural rules, "defendants are not left, as they may cry, at the mercy of wolves; they do have recourse."<sup>144</sup>

#### IV. CONCLUSION

The Illinois statute on voluntary dismissals is a compromise between "the view that a plaintiff has an unfettered ability to (voluntarily) dismiss his case, and the view that the inconvenience and expense suffered by the defendant can thwart a plaintiff's right of dismissal."<sup>145</sup> To the extent that the statute interferes with the constitutional powers or the authority of the judiciary to discharge its duties fairly and expeditiously, the Court in *O'Connell* and *Gibellina* has addressed and solved those problems. Problems complained of by the defendants' bar will not necessarily be solved by adoption of a statute similar to Federal Rule of Civil Procedure 41(a). Indeed, it may merely shift the argument to another point or may give defendants a windfall at the expense of plaintiffs.<sup>146</sup> Furthermore, because the federal and Illinois judicial systems often deal with different subject matter, parallel procedural provisions are not always appropriate. A small tort or contract dispute in the state courts does not present the same procedural or administrative problems as a multi-million dollar securities case in the federal courts. To equate the two systems without more is misleading.

At present, plaintiffs and defendants derive different advantages from the rules generally and from some specifically. The rules must be judged as a whole.<sup>147</sup> The rules give both plaintiffs and defendants some advantages in the pretrial stages of litigation, and some during the trial itself. Within the present arrangement of the rules, the perceived abuses (which may be unfounded) may not be corrected by the adoption of a statute similar to Federal Rule of Civil Procedure 41(a). Further, the defendants are adequately protected in the balance with other procedural rules such as sanctions or dismissals with prejudice and assessment of fees and costs.

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142. *Id.* para. 137.

143. Johnston, *supra* note 87.

144. *Gibellina*, 127 Ill. 2d at 135, 535 N.E.2d at 865.

145. *In re Marriage of Wright*, 92 Ill. App. 3d 708, 711, 415 N.E.2d 1196, 1199 (1980).

146. Johnston, *supra* note 87.

147. *Id.* at 547.