UIC Law Review

Volume 21 | Issue 3 Article 4

Spring 1988

The Voluntary Dismissal in Illinois - A Sword or a Shield, 21 J. Marshall L. Rev. 537 (1988)

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COMMENTARIES

THE VOLUNTARY DISMISSAL IN ILLINOIS—A SWORD OR A SHIELD?

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The voluntary dismissal is a procedural device with a long history. It existed early on in the English common law,[1] and has always been part of Illinois law. The form it takes from time-to-time reflects concerns about its fairness and efficacy. Currently, a concern in Illinois about the use of voluntary dismissals pops up fairly frequently.[2] The concern is that plaintiffs, who are faced with a dispositive motion that may result in an adverse judgment, may dismiss their case in order to postpone or escape the judgment. Therefore, it seems appropriate to take a look at the use of voluntary dismissals to see in what way, if any, it is unfair or inefficacious.

At common law, plaintiffs, as a matter of right, could take a voluntary dismissal without prejudice at any time prior to judgment.[3] The reason for the dismissal was immaterial. The present Illinois statute limits the common law right.[4] It allows plaintiffs as a matter of right[5] to dismiss their case on notice and payment of costs[6] without prejudice before a counterclaim is filed[7] or a "trial or

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1. S. PUTERBAUGH, COMMON LAW PLEADING AND PRACTICE § 1102 (10th ed. 1926).

2. *See* Schweit, *Voluntary Dismissal Limit Urged by Judge*, Chicago Daily L. Bull., Apr. 18, 1988, at 1, col. 2.

3. Kahle v. John Deere Co., 104 Ill. 2d 302, 307, 472 N.E.2d 787, 789 (1984).

4. ILL. REV. STAT. ch. 110, ¶ 2-1009 (1986).

5. *See* Kendle v. Village of Downers Grove, 156 Ill. App. 3d 545, 550, 509 N.E.2d 723, 726 (1987) (plaintiff's absolute right to dismiss action at any time before trial or hearing begins is not tempered by any discretionary language in the statute); Davis v. Int'l Harvester, 139 Ill. App. 3d 264, 268, 487 N.E.2d 385, 388 (1985) (plaintiff's right to voluntary dismissal is absolute and has no discretion to deny plaintiff's motion for dismissal); Heinz v. McHenry County, 122 Ill. App. 3d 895, 897, 461 N.E.2d 672, 674 (1984) (granting of 2-615 motion with leave to amend does not affect plaintiff's absolute right to voluntarily dismiss her complaint).

6. ILL. REV. STAT. ch. 110, ¶ 2-1009 (1986); *see also In Re* Marriage of Hanlon, 83 Ill. App. 3d 629, 632, 404 N.E.2d 873, 875 (1980).

hearing" begins.[8] After a counterclaim is filed plaintiffs may dismiss their action only by agreement with the counter-plaintiffs.[9] After the "trial or hearing" begins, plaintiffs may dismiss their action by agreement of the parties or by leave of the court.[10] *O'Connell v. St. Francis Hospital*[11] limits the statutory right. *O'Connell* holds that when a motion to dismiss for failure to exercise due diligence to obtain service is pending, the trial court shall rule on the motion before allowing plaintiffs to dismiss their case.[12] The statutory and case law limitations placed on the common law right are to prevent injustice and unfairness.[13]

The current concern arose from the convergence of several rules of law that led to *O'Connell*. These rules addressed the need to give a defendant timely notice of the commencement of an action.[14]

Statutes of limitations set fair periods in which a plaintiff must bring an action. The goal of the statute is to protect a defendant against stale claims with the attendant loss of evidence and to provide a defendant with a repose from litigation.[15] At common law an action was commenced for purposes of the statute of limitations by

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7. *See Kendle*, 156 Ill. App. 3d at 553, 509 N.E.2d at 728.
8. *See Kahle*, 104 Ill. 2d at 308-10, 472 N.E.2d at 790 (1984).
9. ILL. REV. STAT. ch. 110, ¶ 2-1009 (1986).
10. *Id.*
11. 112 Ill. 2d 273, 492 N.E.2d 1322 (1986).
12. *Id.* at 283, 492 N.E.2d at 1327.
13. *See id.*; *see also* Mancuso v. Alda Blanche Beach, 149 Ill. App. 3d 188, 191, 500 N.E.2d 589, 590 (1986).
14. *O'Connell*, 112 Ill. 2d at 280, 492 N.E.2d at 1325; *see* Muskat v. Sternberg, No. 64930, slip op. (Ill. Sup. Ct. 1988). In *Muskat*, plaintiff filed suit against a surgeon, hospital and manufacturer alleging negligence and products liability when the lens implanted in her right eye became loose and migrated from its intended location. *Id.* The plaintiff filed one day before the expiration of the statute of limitations. The action was dismissed two years later for want of prosecution. During the two years the case was pending, the plaintiff neither attempted nor obtained service of process upon the defendants. *Id.* One year later, the plaintiff refiled her complaint pursuant to ¶ 13-217 of the Code of Civil Procedure, ILL. REV. STAT. ch. 110, ¶ 13-217 (1985). After defendants were served with process in the refiled action, they moved to dismiss under Rule 103(b). The trial court denied the motion, holding that the time of the refiling of the lawsuit was the proper time period by which to measure the plaintiff's diligence. On appeal, the appellate court reversed the trial court and remanded the case. *Id.* at 2.

In affirming the appellate court's reversal, the Illinois Supreme Court relied on *O'Connell* in which the supreme court stated: "We further hold that, in ruling on the pending Rule 103(b) motions, the trial court may consider the circumstances surrounding plaintiff's service or process on his original as well as his refiled complaint." *Muskat*, slip op. at 3 (quoting *O'Connell*, 112 Ill. 2d at 283, 492 N.E.2d at 1327 (1986)). The supreme court refused the plaintiff's assertion that *O'Connell*'s holding should only be applied prospectively. *Id.* at 6. In so holding, the court reasoned that *O'Connell* related to procedural rather than substantive matters and was not a clear change in the law. *Id.*

15. Comment, *The Time of Discovery Rule and The Qualified Privilege Defense For Credit Reporting Agencies in Illinois After World of Fashion v. Dun & Bradstreet, Inc.*, 10 J. MARSHALL L. REV. 359, 367-68 (1977).

service of process.[16] The Illinois statute states that an action commences with the filing of a complaint.[17] Once an action is commenced, the plaintiff, under Rule 103(b), is obliged to exercise due diligence to obtain service.[18] If service is not obtained with due diligence before the statute runs, the action may be dismissed without prejudice.[19] If service is not obtained with due diligence after the statute runs, the action may be dismissed with prejudice.[20] This procedural scheme relaxed the common law requirement that an action for purposes of the statute be commenced by service and yet retained the goal of the statute, which is to protect against stale claims and provide repose. However, *LeBarge v. Corn Belt Bank*[21] frustrated this scheme. In *LeBarge*, a plaintiff who failed to exercise due diligence to obtain service of process dismissed his case and then refiled the action within one year. In a mischievous ruling, the appellate court held that the time by which due diligence to obtain service was measured from was the date of refiling to the date of service. The ruling encouraged slothfulness on the part of plaintiffs, deprived defendants of timely notice of the commencement of an action, and needlessly burdened the courts. If the court had simply ruled that the time by which due diligence was measured was from the date the statute ran to the date service was first made (either in the original action or refiled action) the ruling likely would have encouraged diligence on the part of plaintiffs, assured defendants of timely notice of commencement of actions, and minimized the burden on the courts. The concern over the *LeBarge* ruling led to *O'Connell*.[22]

O'Connell tacitly overturned *LeBarge*.[23] In *O'Connell*, the court ruled that when a motion to dismiss for failure to exercise due diligence to obtain service is pending, the trial court shall rule on the motion before allowing the plaintiff to dismiss his case.[24] The court further ruled that in deciding the motion in a refiled action "the trial court may consider the circumstances surrounding plaintiff's service of process on his original as well as his refiled complaint."[25]

16. *See* Walker v. Amco Stell Corp., 446 U.S. 740 (1979).
17. ILL. REV. STAT. ch. 110, ¶ 2-201(a) (1986).
18. *Id.* ¶ 103(b).
19. *Id.*
20. *Id.*
21. 101 Ill. App. 3d 741, 428 N.E.2d 711 (1981). The court concluded that the plaintiff was "entitled to refile his cause within one year following a voluntary dismissal irrespective of his failure to exercise reasonable diligence to obtain service on the defendants . . . ."
22. *See, e.g.*, Land v. Greenwood, 133 Ill. App. 3d 537, 478 N.E.2d 1203 (1985); Dillie v. Bisby, 121 Ill. App. 3d 559, 459 N.E.2d 1097 (1984).
23. *See O'Connell*, 112 Ill. 2d 273, 492 N.E.2d 1322.
24. *Id.* at 283, 492 N.E.2d at 1327.
25. *Id.*

The court noted that "[d]ue diligence in serving process is essential [to render justice fairly and promptly] for it is the sole legally sufficient means of alerting defendants to the pendency of a civil suit."[26]

The *O'Connell* court seemed to feel that the problem created by voluntary dismissals in the face of a motion to dismiss for lack of due diligence to obtain service was unique. The court concluded that the statute allowing voluntary dismissals and refiling as a matter of right was constitutionally at odds with Rule 103(b), which required due diligence to obtain service.[27] Therefore, since the court is primarily responsible for judicial administration, under the doctrine of separation of powers, Rule 103(b) prevailed. But even more, once the court concluded that the date from when the statute ran to the date when the plaintiff first made service (whether first made in the original case or the refiled case) was the correct measure of due diligence, the problem was solved.

O'Connell corrected a problem that should never have existed. However, it created a rash of appeals (mostly in personal injury cases) in which defendants sought to extend its rule to motions other than ones brought under Rule 103(b).[28] In these appeals defendants contended that the *O'Connell* rule should be applied to motions to dismiss for failure to state a cause of action,[29] motions to dismiss based on an affirmative defense[30] and motions for summary judgments.[31] The defendants argued that the same unfairness that *O'Connell* addressed in limiting a voluntary dismissal in the face of a "dispositive" Rule 103(b) motion existed in each of their cases.[32] They argued about delays and expenses caused by allowing a voluntary dismissal with a right to refile once within a year in the face of a dispositive motion.[33] The appellate courts may have uniformly refused to extend the *O'Connell* rule to motions other than those based on Rule 103(b).[34] Although some courts have called for legisla-

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26. *Id.* at 282, 492 N.E.2d at 1326.

27. *Id.* at 283, 492 N.E.2d at 1327.

28. *See infra* notes 29-31.

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

30. *See* Jacobsen v. Ragsdale, 160 Ill. App. 3d 656, 513 N.E.2d 1112 (1987); Goldberg v. Swedish Covenant Hosp., 160 Ill. App. 3d 867, 513 N.E.2d 919 (1987); Metcalfe v. St. Elizabeth Hosp., 160 Ill. App. 3d 47, 513 N.E.2d 12 (1987).

31. *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. Gandy, 149 Ill. App. 3d 660, 500 N.E.2d 1032 (1986).

32. *See, e.g., Jacobsen*, 160 Ill. App. 3d at 662-63, 513 N.E.2d at 1116 (defendants argued that court's grant of voluntary dismissal before hearing on defendant's motion for involuntary dismissal frustrated purpose of rule allowing latter motion).

33. *See, e.g., Rohr*, 153 Ill. App. 3d at 1017, 506 N.E.2d at 637 (defendants argued that plaintiff's right to refile tended to perpetuate meritless litigation and to escalate costs).

34. *See supra* notes 29-31. The only case which extended *O'Connell* beyond

tive changes in the statute allowing voluntary dismissals,[35] these courts have not explored fully the ramifications or need for the change.

The Illinois Code of Civil Procedure and Supreme Court Rules are to be "liberally construed [so] that controversies may be speedily and finally determined according to the substantive rights of the parties."[36] The concern about voluntary dismissals should be investigated in light of this policy. It should be tested in terms of fairness to the parties and convenience to the court. It should be measured against other rules. And it should be resolved in a thoughtful, deliberate way.

In order to determine cases on the substantive rights of the parties, modern civil procedure provides the means and time to correct defects in claims and defenses. A defect that is correctable should be corrected with reasonable diligence. If a litigant fails to correct the defect with reasonable diligence, an appropriate sanction should be imposed. An appropriate sanction is the least stringent sanction that accomplishes the goals of the rules.[37]

The concern, boiled down to its essence, is that a plaintiff who takes a voluntary dismissal may postpone or escape an unfavorable ruling on the substantive rights of the case. The plaintiff may delay the ruling if the defect is uncorrectable. It may escape the ruling if the defect is correctable. Except when the defect is lack of due diligence in service of summons, the defect does not involve timely notice of the action so as to cause the harm the statute of limitations tries to prevent.

Cases in which plaintiffs, faced with a dispositive motion, take a voluntary dismissal to avoid an unfavorable ruling on the substantive rights of the case may involve either an uncorrectable defect or a correctable defect. If the plaintiffs take a voluntary dismissal in a case with an uncorrectable defect, the plaintiffs either concede or postpone the inevitable ruling. If they do not refile, the plaintiffs concede. If they do refile, the plaintiffs postpone the inevitable ruling. If the plaintiffs take a voluntary dismissal in a case with a correctable defect, the plaintiffs may escape the ruling by refiling the case with the defect corrected.

Rule 103(b) motions was Highland v. Stevenson, 153 Ill. App. 3d 390, 505 N.E.2d 776 (1987) (motions for summary judgment).

35. *See* Kahle v. John Deere Co., 104 Ill. 2d 302, 311, 472 N.E.2d 787, 791 (1984) (Ryan, J., concurring); *see also* Schweit, *Voluntary Dismissal Limit Urged By Judge*, Chicago Daily L. Bull., Apr. 18, 1988, at 1, col. 2.

36. ILL. REV. STAT. ch. 110, ¶ 1-106 (1986).

37. *See* Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1437 (7th Cir. 1987) (imposing least severe adequate sanction consistent with basic principles of FED. R. CIV. P. 11, which requires that attorneys be sanctioned for filing frivolous or harassing claims).

Diligent service of process is the "sole legally sufficient means of alerting defendants to the pendency of [the] suit."[38] Thus the timely filing of a complaint and diligent service fulfill the purpose of the statute of limitations and Rule 103(b). Any harm the defendant suffers stems from the lapse in time from the date of the voluntary dismissal to the date when the case is refiled or barred by the statute. An unspecific harm may be presumed or a specific harm may be proven. An unspecific harm is hard to imagine, particularly in the area of personal injury litigation. Defendants in personal injury litigation are no strangers to delay.[39] They routinely demand jury trials and resist motions to advance in cases involving impoverished or dying plaintiffs. At most, the liability insurer is faced with keeping a reserve on the case on which it draws substantial interest. Other rules address specific harm. If the case as filed or refiled was not "grounded on fact" or "warranted by law," the defendant may ask for sanctions.[40] The sanctions may range from assessment of fees and costs to discipline.[41] The appropriate sanction should compensate the defendant for losses, if any, suffered and ensure that the defendant receives a fair disposition on the substantive rights.

A plaintiff, whose case involves a defect that could be corrected given time, may be denied a hearing on the substantive right of the case if she is not allowed to dismiss the case. To deny a dismissal and to force a dispositive ruling under these circumstances frustrates the express policy of modern procedure, deprives the plaintiff of a full hearing on the substantive rights of the case, and gives the defendant a windfall.

The court is unlikely to suffer substantial inconvenience when a plaintiff voluntarily dismisses her case in the face of a dispositive pretrial motion. Unlike a dismissal on the eve of trial, the court does not commit substantial time and resources in anticipation of the

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38. *O'Connell*, 112 Ill. 2d at 282, 492 N.E.2d at 1326.

39. *See* Hernandez v. Power Const. Co., 43 Ill. App. 3d 860, 864, 359 N.E.2d 606, 610 (defendant in a Cook County personal injury case waived jury right on eve of trial—court held plaintiff was entitled to a jury trial, even though plaintiff waived the right, since defendant abused procedure by gaining delay in demanding jury, then getting bench trial by waiving jury), *aff'd*, 73 Ill. 2d 90, 382 N.E.2d 1201 (1978); *see also* Campen v. Executive House Hotel, Inc., 105 Ill. App. 3d 576, 434 N.E.2d 511 (1982) (defendant attempted to delay the advancement of a case in which the plaintiff was dying of cancer); Stephens v. Kasten, 383 Ill. 127, 48 N.E.2d 508, (1943) (plaintiffs' failure to timely notify defendants of motion to strike demand for jury trial was prejudicial to defendants).

40. ILL. REV. STAT. ch. 110, ¶ 2-611.1 (1987). The statute provides in pertinent part: "[Allegations and denials, made without reasonable cause and found to be untrue, shall subject the party pleading them or his or her attorney, or both, to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with reasonable attorneys' fees . . . ."

41. *See* In re Mooney, 841 F.2d 1003 (9th Cir. 1988); *Brown*, 830 F.2d at 1429; Cheek v. Doe, 828 F.2d 395 (7th Cir. 1987).

hearing on the motion. It has not set aside time for the trial or convened a jury and court personnel for the trial. The judge may be justifiably irritated by the delay.[42] If the plaintiff's lawyer is slothful, the court may impose sanctions that range from reprimand to referral to the disciplinary counsel.[43] Further, to force an unfavorable ruling on a dispositive pretrial motion in a case with a correctable defect may not reduce the overall number of cases on the court calendar. It may only substitute a more complicated malpractice case against plaintiff's counsel for the case that was dismissed with prejudice on the dispositive motion.

In the balance then, despite the hue-and-cry, the concern about plaintiffs who take voluntary dismissals when faced with dispositive pretrial motions seems misdirected. Defendants are not yet able to point out any specific harm that cannot be compensated or corrected by existing rules.[44] Indeed, the defendants seem to be looking for a windfall in many cases. Plaintiffs may be deprived of a full hearing on the substantive rights of their cases. Courts are not substantially inconvenienced. Existing rules may remedy the imposition of frivolous cases and lack of diligence.[45] The general conclusion that the concern is misdirected is supported by a brief treatment of cases involving motions to dismiss, motion for summary judgments, and motions for sanctions under discovery.

Defendants most likely will not suffer harm if plaintiffs voluntarily dismiss their actions in the face of a motion to strike and dismiss for failure to state a cause of action. First, a motion to dismiss is filed early on in the litigation and discovery is not allowed while the motion is pending. The only effort the defendant expends is related to the motion itself. The motion would be based on one of two theories: first, the complaint is not based on a recognized rule of law, or, second, the complaint is factually insufficient.

If a complaint fails to state a cause of action because it is not based on a recognized rule of law, the complaint suffers from an uncorrectable defect. In such a case, the plaintiff may be seeking to modify existing law or may be ignorant of the law. If the plaintiff is seeking to modify existing law, the plaintiff is unlikely to voluntarily dismiss the case. The very purpose of filing a complaint to modify existing law is to draw a dispositive ruling in order to appeal. The

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42. *See* RODES, RIPPLE, & MOONEY, SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE 85 (Notre Dame 1981).

43. See *supra* note 41 for reference to sanctions available to defendants. The Illinois Code of Professional Responsibility recommends disciplinary measures for the lawyer who "[n]eglect[s] a legal matter entrusted to him." ILL. REV. STAT. ch. 110A, Canon 6, Rule 6-101(a)(3) (1986). Types of available discipline for attorneys who violate the Code include disbarment, suspension, and censure. *Id.* ¶ 771.

44. *See* Taragan v. Eli Lily & Co., 838 F.2d 1337 (D.C. Cir. 1988).

45. *E.g.*, ILL. REV. STAT. ch. 110, ¶ 2-611 (1988).

simplest, cleanest, and least expensive dispositive ruling from which to appeal is one based on a motion to dismiss. A complaint that is filed to modify existing law is likely to be based on a reasonable inquiry into the existing law and warranted by a good faith argument to modify the law. In such a situation, the plaintiff is engaged in a centuries old practice by which the common law has developed.[46] If the plaintiff was ignorant of the existing law it is unlikely that the plaintiff will refile the case after taking a voluntary dismissal. The plaintiff faces the risk of being assessed fees and costs in the first case for failing to make a reasonable inquiry into the law. If the plaintiff refiles, the plaintiff has merely delayed the inevitable unfavorable ruling and additionally faces the assessment of fees and costs for filing a case for an improper purpose.

If a complaint is factually insufficient, the defect may be uncorrectable or correctable. The complaint is uncorrectable if the necessary facts to make it sufficient just do not exist. The complaint is correctable if the necessary facts exist but were not pleaded. In either event, the plaintiff faces the assessment of fees and costs for failure to make a reasonable inquiry into the facts. If the plaintiff voluntarily dismisses the case, the plaintiff is unlikely to refile unless the complaint is corrected. If the plaintiff refiles a complaint with the same factual defect, the plaintiff has merely delayed the inevitable ruling and additionally faces being assessed fees and costs for filing a case for an improper purpose.[47]

A motion for summary judgment differs from a motion to dismiss for failure to state a cause of action. It questions whether at the time of trial sufficient evidence will support the facts pleaded in the complaint. It is often presented after rather extensive discovery. If it is, the defendant has expended time and money in its preparation. To that extent, the defendant may suffer harm similar in kind but to a greater degree when a plaintiff voluntarily dismisses her case in face of a motion for summary judgment as opposed to a motion to dismiss. If the harm is greater in degree only, the remedy for it is the assessment of fees and costs in an amount that compensates the defendant.

Motions for discovery sanctions present a problem that is different in kind than motions to dismiss for failure to state a cause of action or motions for summary judgment. In motions for discovery sanctions, the dispute stems from the failure of a party to comply with rules or orders to disclose facts. A plaintiff, who is faced with

46. The large number of appeals asking the courts to extend *O'Connell* to dispositive pretrial motions other than Rule 103(b) motions indicates that the defendant personal injury bar is engaged in this practice.

47. ILL. REV. STAT. ch. 110, ¶ 2-611 (1986).

numerous orders to comply with discovery requests and an exasperated judge, and is unable to comply, may take a voluntary dismissal to avoid dispositive sanction. The plaintiff may be unable to comply either because she was neglectful or because, even though she exercised diligence, the facts were unobtainable. If the facts are unobtainable, the problem is uncorrectable. If the facts are obtainable, the problem is correctable. If the problem is correctable, the case is likely to be refiled. In such a situation, the defendants may suffer harm. First, the defendants my expend needless time and money. Second, the defendants may be denied access to those facts they seek disclosed due to the passage of time.

If the defendants have expended needless time and money on motions to compel, they are entitled to fees and costs. The fees and costs may be assessed on each motion to compel or in total at the time of the voluntary dismissal. The former practice of sanctioning is more appropriate. But trial judges seem loathe to impose fees and costs on motions to compel. They seem even more reluctant to discipline neglectful lawyers. The typical pattern of sanction that emerges from the reported cases is one in which the delay, obfuscation, contumacy, and lame excuses on the part of litigants and their lawyers are tolerated without any measured remedial action until the court is provoked beyond endurance. At that point the trial court punishes one side or the other with a Draconian sanction, such as termination of the lawsuit by dismissal or default instead of imposing lesser sanctions when the conduct first occurs and imposing progressively more severe sanctions if it continues.[48] This "all or nothing" approach to sanctions results in considerable laxity in the day-to-day application of the rules. Lawyers are well aware that sanctions will be imposed only in the most flagrant situations.[49] And a plaintiff may avoid a sanction by use of a voluntary dismissal.

If the defendants, in addition to incurring needless expenses, are denied access to facts due to passage of time from the voluntary dismissal to the refiling of the case, they are entitled to an appropriate sanction. If, for example, the facts that are now unavailable were helpful to the defendants' case, an appropriate sanction would be an instruction to the jury that the plaintiffs failed to produce the facts when they should have and that the failure to produce constitutes an admission that the facts were unfavorable to the plaintiffs.[50] If the facts were essential to the defendants' case, an appropriate sanction might be to find the defense, or the part to which the facts were

48. Jaffe v. Fogelson, 137 Ill. App. 3d 961, 485 N.E.2d 531 (1st Dist. 1985).

49. *See* RODES, RIPPLE & MOONEY, *supra* note 42, at 85.

50. Campen v. Executive House Hotel, Inc., 105 Ill. App. 3d 576, 434 N.E.2d 511 (1982).

relevant, as established.[51]

Several solutions are proposed to correct the "abusive" use of voluntary dismissals. Perhaps the most common solution expressed is to adopt Federal Rule of Civil Procedure 41, which requires leave of court to take a voluntary dismissal after an answer or motion for summary judgment is filed. However, the adoption of Rule 41 may not solve the problem in the state courts. First, judges who are loath to impose modest sanctions on motions to compel discovery are not likely to deny a motion for a voluntary dismissal. Second, even if the judges were inclined to deny a motion for voluntary dismissal, they would have to find "legal, prejudice" for the defendant. The boundaries of legal prejudice are not clear. However, it must be substantial, clear, or plain.[52] It is "something other than the necessity that the defendant might face if defending another action. That kind of disadvantage can be taken care of by a condition that plaintiff pay to defendants their costs and expenses incurred in the first action."[53]

Clearly, the most common form of harm a defendant may suffer when a plaintiff voluntarily dismisses her case is needless fees and costs. Except in rare cases, other forms of legal harm seem unlikely. The present rules provide ample means to compensate defendants for the needless expenditure of fees and costs. The most apparent solution is to enforce those rules. If modest sanctions were imposed at appropriate times and neglectful attorneys were disciplined, the cases that now rest in the hands of a few lawyers (principally personal injury lawyers) would soon be more broadly distributed among the many competent young lawyers who are eager and able to handle many of the cases that now clog court calendars.[54] If the cases were more broadly distributed, delay in the preparation and trial of cases and court congestion would likely be reduced. Voluntary dismissals by lawyers too busy to pay attention to their cases, too,

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51. *Id.*

52. *See, e.g.*, 5 J. MOORE, W. TAGGARD & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 41.05(1) (1986) ("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"); *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); *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").

53. Kern v. TXO Production Corp., 738 F.2d 968, 970 (8th Cir. 1984).

54. *See* Schweit, *"Down time" during special call criticized by Law Division Judge*, Chi. Daily L. Bull., April 27, 1988, at 1, 5.

would be reduced.

The current concern about the use of voluntary dismissals by plaintiffs may be legitimate. However, the reasons for the concern and the proposed solutions for the problem are misdirected and overbroad. First, the concern is based solely on the use of voluntary dismissals in the face of dispositive pretrial motions. The proposed solutions, therefore, are not tailored. Instead, they are piecemeal solutions that are not integrated into the rules as a whole. The analysis of the problem fails to consider other existing rules that may provide an adequate solution. Third, the proposed solutions may have little effect on the problem in the long-run. Fourth, the problem seems to be limited to personal injury litigation. It is reminiscent of the "insurance crisis" of the recent past. That crisis was, it seems, manufactured, at least in part. The insurance industry is as prosperous as ever, if not more prosperous. And some members of that industry are now being sued for conspiracy to raise prices by some states for their actions relative to the crisis. To some, the concern may appear to be a nonfatal, posturing skirmish within the personal injury bar which is drawing others into it without clear definition of the problem or exploration of the solutions.