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Personal Injury Litigation and Dismissing Fewer Than All Defendants: Managing the Gauntlet of Competing Rules

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Personal Injury Litigation and Dismissing Fewer Than All Defendants: Managing the Gauntlet of Competing Rules

Today we will be discussing:

- Voluntary Dismissals
- Admissibility of discovery responses from dismissed defendants
- Mary Carter Agreements
- Dismissal under FRCP 54
- Applicability of FRCP 21
- Preventing Surprise FRCP 54 motions
- Saving Statutes

When and why plaintiffs might seek voluntary dismissal of fewer than all defendants.

Most common reason for a voluntary dismissal is Settlement.

Other reasons for VD plaintiff is not ready to prosecute the case, problems with witnesses or retained experts, the trial date is not convenient, the parties want to mediate the case.

Federal Rules of Civil Procedure
Rule 41 – Dismissal of Actions

(a) VOLUNTARY DISMISSAL.

(1) By the Plaintiff.

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

Federal Rules of Civil Procedure
Rule 41 – Dismissal of Actions Cont.

(b) INVOLUNTARY DISMISSAL; EFFECT. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

(c) DISMISSING A COUNTERCLAIM, CROSSCLAIM, OR THIRD-PARTY CLAIM. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) COSTS OF A PREVIOUSLY DISMISSED ACTION. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

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

Types of Voluntary Dismissals

- Unilateral Voluntary Dismissal – in Federal Court as a matter of right as long as the plaintiff files the notice before the defendant answers the complaint or files a motion for summary judgment. Check your own state for requirements.
- If defendant has filed answer or motion for SJ, then the plaintiff will need leave of Court or agreement of the defendant.
- Bilateral Voluntary Dismissal where the defendant has filed a counterclaim against the plaintiff and both parties agree to voluntarily dismiss all claims.
- If plaintiff does a unilateral voluntary dismissal without defendants agreement to dismiss – defendant's counterclaim stands.

Beware – Voluntary Dismissal can only be done once, regardless if second dismissal is in another court. A second VD will be considered a ruling in favor of the defendant on the merits.

Involuntary Dismissals by the Court without Prejudice:

Procedural Defects: Improper Venue or lack of jurisdiction

Procedurally based dismissals can be refiled as dismissal is not based upon the merits of the case.

Other Considerations when Voluntarily Dismissing a case

- Plaintiff may be required to pay defendant costs.
- Plaintiff may be held to previously entered orders.
- Plaintiff may assigned to the same Judge. Plaintiff may also be barred from seeking a substitution of Judge in the re-filed case.
- If prior motion to dismiss or motion for summary judgment was partially granted, beware of dismissing and refiling as those rulings may become permanent under the theory of Res Judicata.
- Claim splitting – when a plaintiff brings potential legal claims against the same defendant in two different lawsuits.
- Two factor test – 1) (1) whether the case involves the same parties and their privies, and (2) whether separate causes arise from the same transaction or series of transactions." Khan v. H & R Block E. Enters., Inc., 2011 WL 3269440, at *6 (S.D. Fla. July 29, 2011).
- Solution – have defendant consent in writing that the claims are being split or have the Court rule that they have been split.

Example of Res Judicata after Voluntary Dismissal

"The central issue is whether the involuntary dismissal of plaintiffs' negligence claim and plaintiffs' subsequent voluntary dismissal of their remaining willful and wanton misconduct claim barred the refiling of their willful and wanton misconduct claim under the doctrine of res judicata. The appellate court concluded correctly that Rein is controlling."

"Plaintiffs commenced a new action after part of their original cause of action had gone to final judgment in a previous case. None of the exceptions to the rule against claim-splitting are present here, and thus res judicata barred plaintiffs' refiled complaint. We therefore affirm the appellate court's judgment."

Hudson v. City of Chicago, 228 Ill. 2d 462 (2008) Jan. 25, 2008 · Illinois Supreme Court · No. 100466

Traps for the unwary

- Admissibility of Discovery Responses from Dismissed Defendants – What you need to know:
  - Rule 801
  - Rule 803
  - Rule 408
  - FRCP 32
  - FRCP 33
  - Illinois Rule of 213(h) rules of evidence Rule 212

Federal Rules of Evidence
Rule 801

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if--

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

Federal Rules of Evidence
Rule 801 Cont.

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own

statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested

an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement

concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of

the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a

party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but

are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment

relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation

therein of the declarant and the party against whom the statement is offered under subdivision (E).

Federal Rules of Evidence
Rule 803

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
(6) Records of Regularly Conducted Activity.--A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 173 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling

Federal Rules of Evidence
Rule 408

Compromise Offers and Negotiations

(a) Prohibited Uses. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Federal Rules of Civil Procedure
Rule 32

(a) Using Depositions.

(1) In General. At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

(2) Impeachment and Other Uses. Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) Deposition of Party, Agent, or Designee. An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) Unavailable Witness. A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

Federal Rules of Civil Procedure
Rule 33

(4) Objections. The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

(5) Signature. The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) Use. An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

Illinois Supreme Court Rules
Rule 213 (g) and (h)

(g) Limitation on Testimony and Freedom to Cross-Examine. The information disclosed in answer to a Rule 213(f) interrogatory, or in a discovery deposition, limits the testimony that can be given by a witness on direct examination at trial. Information disclosed in a discovery deposition need not be later specifically identified in a Rule 213(f) answer, but, upon objection at trial, the burden is on the proponent of the witness to prove the information was provided in a Rule 213(f) answer or in the discovery deposition. Except upon a showing of good cause, information in an evidence deposition not previously disclosed in a Rule 213(f) interrogatory answer or in a discovery deposition shall not be admissible upon objection at trial.

Without making disclosure under this rule, however, a cross-examining party can elicit information, including opinions, from the witness. This freedom to cross-examine is subject to a restriction that applies in actions that involve multiple parties and multiple representation. In such actions, the cross-examining party may not elicit undisclosed information, including opinions, from the witness on an issue on which its position is aligned with that of the party doing the direct examination.

(h) Use of Answers to Interrogatories. Answers to interrogatories may be used in evidence to the same extent as a discovery deposition.

Illinois Supreme Court Rules
Rule 212

Use of Depositions
(a) Purposes for Which Discovery Depositions May Be Used. Discovery depositions taken under the provisions of this rule may be used only:
(1) for the purpose of impeaching the testimony of the deponent as a witness in the same manner and to the same extent as any inconsistent statement made by a witness;
(2) as a former statement, pursuant to Illinois Rule of Evidence 801(d)(2);
(3) if otherwise admissible as an exception to the hearsay rule;
(4) for any purpose for which an affidavit may be used; or
(5) upon reasonable notice to all parties, as evidence at trial or hearing against a party who appeared at the deposition or was given proper notice thereof, if the court finds that the deponent is not a controlled expert witness, the deponent's evidence deposition has not been taken, and the deponent is unable to attend or testify because of death or infirmity, and if the court, based on its sound discretion, further finds such evidence at trial or hearing will do substantial justice between or among the parties.
(b) Use of Evidence Depositions. The evidence deposition of a physician or surgeon may be introduced in evidence at trial on the motion of either party regardless of the availability of the deponent, without prejudice to the right of either party to subpoena or otherwise call the physician or surgeon for attendance at trial. All or any part of other evidence depositions may be used for any purpose for which a discovery deposition may be used, and may be used by any party for any purpose if the court finds that at the time of the trial:
(1) the deponent is dead or unable to attend or testify because of age, sickness, infirmity or imprisonment;
(2) the deponent is out of the county, unless it appears that the absence was procured by the party offering the deposition, provided, that a party who is not a resident of this State may introduce his or her own deposition if he or she is absent from the county; or

What is a Mary Carter Agreement

Booth v. Mary Carter Paint Co., 202 So. 2d 8 (1967), Florida appeals court case that popularized the agreement

: a secret agreement between a plaintiff and one or more but not all codefendants which limits the liability of the defendants by giving them an interest in the recovery awarded to the plaintiff NOTE: In a Mary Carter agreement, the participating defendants agree to remain as parties to the lawsuit and guarantee payment to the plaintiff of a settled amount if no recovery is awarded against the other defendants. The plaintiff agrees to offset their liability by, or sometimes even to pay them from, a recovery awarded from the other defendants. Some states allow the admission of Mary Carter agreements into evidence. In other states they are illegal.

Accessed 1/19/2021 Mary Carter Agreement - FindLaw

Validity of Mary Carter Agreements

Federal Common Law	State and Federal Diversity Cases
Valid	Majority Position: Not Valid Where valid: Disclosure to Court and other parties – check ethical cannons and forum case law.

Dismissal under FRCP 42 and applicability of FRCP 21

Rule 42

Consolidation; Separate Trials

(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

Rule 21

Misjoinder and Nonjoinder of Parties

Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

Preventing surprise FRCP 54
Motions for Attorney Fees

Judgment; Costs
(a) Definition; Form. “Judgment” as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.

(c) Demand for Judgment; Relief to Be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs; Attorney's Fees.

(1) Costs Other Than Attorney's Fees. Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days’ notice. On motion served within the next 7 days, the court may review the clerk's action.

(2) Attorney's Fees.

Preventing surprise FRCP 54 Motions for Attorney Fees Cont.

(A) Claim to Be by Motion. A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) Proceedings. Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge. By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) Exceptions. Subparagraphs (A)–(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. §1927.

Savings Statutes

- laws designed to protect litigants that either voluntarily dismiss litigation or have their case dismissed for a non-merit-based reason. These “savings statutes” allow the litigant to re-file their claim even if the statute of limitations has expired. “Saving statutes” vary from state to state and can have be as extreme as having no savings clause, to an extremely short period of time, 30 days, to an extremely long period of time, 3 years. You must be aware of the law in the state that you practice in.

Saving Statutes at a glance

- States with NO saving statute: Alabama, Florida, Hawaii, North Dakota, South Caroline and South Dakota.
- States with saving statutes that only apply in RARE CIRCUMSTANCES: Michigan, Vermont and Wisconsin.
- States with saving statutes LESS THAN 6 MONTHS: Colorado 90 days, Kentucky 90 days, Nevada 90 days, Oregon 60 days, Texas 60 days.
- States with saving statutes of 6 MONTHS: Arizona, Georgia, Kansas, Maine, New Mexico, and New York.
- States with 1 YEAR saving statutes that require SPECIAL CIRCUMSTANCES: Arkansas, California, Connecticut, Delaware, Idaho, Massachusetts, Minnesota, Montana, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island and West Virginia.
- States with 1 YEAR saving statutes that have LITTLE TO NO REQUIREMETNS: Alaska, Illinois, Mississippi, Missouri, New Hampshire, Tennessee, Utah, and Wyoming.
- Indiana has 3 YEAR saving statute that applies UNLESS dismissed voluntarily or for lack of prosecution.

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