Increasing the "Costs" of Nonsuit: A Proposed Clarifying Amendment to Federal Rule of Civil Procedure 41(d)

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I. INTRODUCTION

Forum shopping is an all too common and virtually penalty-free practice in federal courts. Plaintiffs often engage in this activity by dismissing an action and then re-filing the same case in another court, perhaps hundreds or even thousands of miles from the original forum, subjecting defendants to the added burden and expense of appearing in multiple locations to defend against the same claim. 1 Frequently, dismissal and subsequent re-filing occurs because a plaintiff desires to make the litigation process more difficult for the defendant or to force a quick settlement by causing the defendant to expend substantial sums by virtue of litigating in an inconvenient location. 2 Other times, a plaintiff will dismiss the action because it realizes before judgment that the court of its initial choosing will not render a decision in its favor. Specifically designed to curb these tactics, Rule 41(d) of the Federal Rules of Civil Procedure empowers the district court presiding over the second

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2 See, e.g., In Re Ralston Purina Co., 726 F.2d 1002, 1006 (4th Cir. 1984) (Bryan, J., dissenting) ("From the inception of the instant controversy, the plaintiffs have relentlessly engaged in the practice of forum shopping."). Though long ago denounced, forum shopping still concerns federal courts. Id. ("The Supreme Court has itself censured this very strategy: 'the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.'" (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)).
filed action to issue any order it deems proper against the plaintiff for the payment of the “costs” of the previously dismissed action.\(^5\) Except for a handful of decisions in its sixty-four year history, Rule 41(d)’s language has received relatively minor treatment compared to other federal rules, and its terms rarely have been disputed. Rule 41(d), however, merits attention because it offers courts potentially one of the most effective means to discourage forum shopping – the ability to reimburse defendants for their attorneys’ fees accrued in a previously dismissed action.

There are several federal rules that expressly provide for and regulate requests for attorneys’ fee awards to litigants in situations where the opposing party fails to meet the particular rule’s standard of conduct,\(^4\) but in Rule 41(d) there is no express provision stating whether such fees are allowed.\(^5\) As a result, a confusing body of caselaw has evolved on the issue of whether this rule enables the defendant to receive its attorneys’ fees as part of the costs of the previously filed action.\(^6\) Although a majority of courts have agreed that costs of the action under Rule 41(d) could include attorneys’ fees,\(^7\) recent decisions of the Sixth and Seventh Circuits question whether courts should award such fees under Rule 41(d).

Specifically, in Rogers v. Wal-Mart Stores, the Sixth Circuit held that Rule 41(d) does not provide for attorneys’ fees because the rule simply “does not explicitly provide for them.”\(^8\) Then, less than three months later, in Esposito v. Pietrowski, the Seventh Circuit concluded that attorneys’ fees are not considered a component of the costs of the action under Rule 41(d) unless the substantive statute that

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\(^3\) See Fed. R. Civ. P. 41(d).

\(^4\) See, e.g., Fed. R. Civ. P. 11(c)(2) (stating that sanctions may consist of all or some “of the reasonable attorneys’ fees and other expenses incurred” by violating the rule’s signature requirements); see also Fed. R. Civ. P. 30(g) (providing for reasonable attorneys’ fee award where deponent fails to appear for deposition).

\(^5\) See Fed. R. Civ. P. 41(d) (referring only to “costs of the action”).

\(^6\) Decisions in which courts attempt to distinguish costs from attorneys’ fees are legion. See, e.g., Behrle v. Olshansky, 139 F.R.D. 370, 373 (W.D. Ark. 1991) (“So much has been written on whether . . . costs’ includes attorney’s fees that it would serve little purpose for the court to discuss that matter.”).


formed the basis of the original suit allows for the recovery of such fees as costs.\textsuperscript{9} This article suggests that these rulings are unsound, primarily because they are based on a flawed plain meaning analysis of Rule 41(d).\textsuperscript{10} In holding that Rule 41(d) does not confer power upon district courts to award attorneys’ fees, the Sixth and Seventh Circuits appear to have (i) largely ignored a long line of caselaw which had resolved that Rule 41(d) does provide for attorneys’ fees,\textsuperscript{11} and (ii) overlooked entirely the rule’s purpose of curing vexatious and bad faith litigation conduct.\textsuperscript{12} By withholding attorneys’ fees from Rule 41(d) cost awards, the Sixth and Seventh Circuits have signaled that they are willing to countenance both repetitive filings and, more importantly, only partial and incomplete reimbursement to defendants for those litigation expenses wasted because of such filings.\textsuperscript{13} The drafters of Rule 41(d) did not envision, nor could they have justified, such an unfair outcome. The Sixth and Seventh Circuits’ decisions ultimately do little to restrain forum shopping and, to the extent they continue to serve as binding precedent, will disserve the federal rules and those who litigate under them.

This article contends that Rule 41(d) implicitly authorizes district courts to grant attorneys’ fees as part of the “costs” of a previously filed action, but nevertheless requires further clarification based on the Sixth and Seventh Circuits’ abandonment of standard Rule 41(d) practice. Part Two of this article overviews Rule 41’s relevant provisions and briefly sets forth the general “American Rule” against awarding attorneys’ fees and its “bad faith” exception upon which Rule 41(d) is partially based. Part Three explains why, despite the American Rule, Rule 41(d) authorizes attorneys’ fees based on the Rule’s plain meaning and purpose. Part Four discusses the role of context in interpreting Rule 41(d). In particular, Part Four focuses on why the costs provisions in Rules 54 and 68 of the federal rules cannot be used to define costs under Rule 41(d), and on how the Sixth and Seventh Circuits in Rogers and Esposito ultimately crafted new and incorrect law by concluding that Rule 41(d) does not authorize attorneys’ fee awards. Part Four also presents several contextual reasons why including

\footnotesize{\textsuperscript{9} Esposito v. Piatowski, 223 F.3d 497, 500-01 (7th Cir. 2000) (limiting awards of attorneys’ fees under Rule 41(d) “only to those instances where the underlying statute that is the basis of the original action permits the recovery of fees as costs”).}

\footnotesize{\textsuperscript{10} See infra Part IV.B.1-2.}

\footnotesize{\textsuperscript{11} See cases cited supra note 7.}

\footnotesize{\textsuperscript{12} See infra Part III.B.}

\footnotesize{\textsuperscript{13} See infra Part IV.B.1-2.}
attorneys' fees in Rule 41(d) cost awards comports with the overall intent of Rule 41(d)'s drafters. Finally, Part Five recommends amending Rule 41(d) to harmonize the rule with other federal rules provisions that already expressly provide for attorneys' fees. The proposed amendment's likely effect will be to dissuade repetitive filings of identical lawsuits and thereby reduce the negative cost impact such filings have on litigation in federal courts.

II. RULE 41 AND THE AMERICAN RULE

A. Rule 41

Rule 41 of the Federal Rules of Civil Procedure governs voluntary and involuntary dismissal of actions and vests district courts with wide discretion to impose conditions on dismissal to avoid any prejudice to defendants that otherwise might occur as a result of a dismissal. The Rule 41(a)(1) allows a plaintiff to voluntarily dismiss (or nontsue) its case by either "filing a notice of dismissal" before the defendant responds to the complaint or "by filing a stipulation of dismissal signed by all parties who have appeared in the action." Following a second voluntary dismissal by notice, Rule 41(a)(1) treats the dismissal as an adjudication on the merits and bars any further litigation of the dismissed action. No court action or approval is required when dismissal is by stipulation or notice under Rule 41(a) because the notice or stipulation acts on its own to remove the court of its jurisdiction. Upon being voluntarily dismissed under Rule 41(a), a defendant may receive prevailing party status so that it can recoup its costs under Rule 54(d).

If the defendant already has responded to the complaint by filing an answer or summary judgment motion, and will not stipulate to a dismissal, Rule 41(a)(2) provides that the plaintiff may obtain a

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14 See FED. R. CIV. P. 41 (stating types of dismissals and effect thereof); Wahii v. City of Wichita, 701 F. Supp. 1530, 1533 (D. Kan. 1988) (stating that "Rule 41(d) is intended to confer broad discretion upon federal courts").
15 FED. R. CIV. P. 41(a)(1) (listing two alternative approaches to dismissal).
16 Id. (stating only that a second notice will act as an adjudication on the merits). This is known as the two dismissal rule. See Commercial Space Mgmt. Co. v. Boeing Co., 193 F.3d 1074, 1076 (9th Cir. 1999).
17 See Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2363 (2d ed. 1995) (noting that dismissal is effective upon filing and does not require judicial approval).
18 See Norris v. Turner, 637 F. Supp. 1117, 1124 (N.D. Ala. 1986) ("Where Rule 41(a)(2) is successfully invoked . . . the defendant is deemed to be the 'prevailing party' unless expressly provided otherwise.").
dismission by motion, and the court is then entitled to impose such terms and conditions on the dismissal as it deems proper to prevent the defendant from being affected unfairly by the order dismissing the case.\textsuperscript{19} The purpose of Rule 41(a)(2) is to allow the plaintiff to move for a nonsuit and start over as long as the defendant is not prejudiced.\textsuperscript{20} Plain legal prejudice exists when litigation has proceeded to a point such that it would no longer be fair to allow the plaintiff to dismiss and start anew.\textsuperscript{21} In assessing prejudice, factors to consider include (1) the excessive and duplicative expenses of a second litigation; (2) defendant's effort and expense in preparing for trial; (3) whether the plaintiff delayed or was dilatory in prosecuting the action; (4) insufficient explanation for taking nonsuit; and (5) the filings of motions for summary judgment.\textsuperscript{22} When no prejudice exists, a motion for voluntary dismissal under Rule 41(a)(2) usually will be granted, and the defendant then faces the prospect of a second lawsuit.\textsuperscript{23} Terms and conditions on dismissal, including payment of the defendants' attorneys' fees,\textsuperscript{24} generally are imposed, though, to protect defendants from the possibility of unreasonable abuse and harassment.\textsuperscript{25} Payment of attorneys' fees under Rule 41(a)(2) serves to compensate the defendant for all the expenses to which it was put in the first action, particularly those expenses that may have to be duplicated in a second action.\textsuperscript{26} The court, however,

\textsuperscript{19} See Fed. R. Civ. P. 41(a)(2); see also 9 Wright & Miller, supra note 17, at § 2364 (2d ed. 1995) (stating that the grant or denial of a dismissal is within the "sound discretion" of the court).

\textsuperscript{20} LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 604-05 (5th Cir. 1976) (stating that "the district court should impose only those conditions which will alleviate the harm caused to the defendant" by the dismissal). In practice, most motions under Rule 41(a)(2) are granted so long as the defendant will not suffer plain legal prejudice other than the annoyance of a second litigation. See, e.g., Ohlander v. Larson, 114 F.3d 1531, 1537 (10th Cir. 1997), cert. denied, 522 U.S. 1052 (1997) ("Absent 'legal prejudice' to the defendant, the district court normally should grant such a dismissal."); Holiday Queen Land Corp. v. Baker, 489 F.2d 1031, 1032 (5th Cir. 1974).

\textsuperscript{21} See McCall-Bey v. Franzen, 777 F.2d 1178, 1184 (7th Cir. 1985).

\textsuperscript{22} See Citizens Sav. Ass'n v. Franciscus, 120 F.R.D. 22, 25 (C.M.D. Pa. 1988) (listing factors); see also 9 Wright & Miller, supra note 17, at § 2364.

\textsuperscript{23} See Francis, 120 F.R.D. at 25 (noting plaintiff's right to take non-suit).

\textsuperscript{24} See 9 Wright & Miller, supra note 18, at § 2366 (including payment of attorneys' fees as one of the possible terms and conditions of dismissal); see also Le Blang Motors, Ltd. v. Subaru of Am., Inc., 148 F.3d 680, 685-87 (7th Cir. 1998) (holding that an award of attorneys' fees and other costs under Rule 41(a)(2) is not strictly limited to trial preparations that would not be useful in other litigations).

\textsuperscript{25} See Am. Cyanamid Co. v. McGhee, 317 F.2d 295, 297 (5th Cir. 1963).

\textsuperscript{26} See Cauley v. Wilson, 754 F.2d 769, 772 (7th Cir. 1985) ("Fees are not awarded when a plaintiff obtains a dismissal with prejudice because the 'defendant cannot be
has ultimate discretion to impose any type of condition it deems necessary depending on the circumstances of the case, including complete reimbursement of the defendant's attorneys' fees.\textsuperscript{27}

Rule 41(d) is implicated when the plaintiff decides to re-file its case after voluntarily dismissing it under either Rule 41(a)(1) or 41(a)(2) or under a comparable state voluntary dismissal provision. The rule specifically states:

[i]f a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.\textsuperscript{28}

The decision to impose costs and a stay under this rule resides within the sound discretion of the court.\textsuperscript{29}

Ordinarily, Rule 41(d) is not invoked if a plaintiff offers "a good reason for the dismissal of the prior action or if the plaintiff is financially unable to pay the costs."\textsuperscript{30} Some courts, however, order payment of costs and a stay regardless of plaintiffs' reasons for the first dismissal or their financial condition.\textsuperscript{31} Rule 41(d)'s main goal is to secure full payment of the defendant's costs before allowing the plaintiff to proceed with a second action.\textsuperscript{32} By its terms, Rule 41(d)

\footnotesize{made to defend again.' In the case of a dismissal without prejudice, however, the defendant may have to defend again at a later time and incur duplicative legal expenses."} (quoting Smoot v. Fox, 355 F.2d 830, 833 (6th Cir. 1965) (cert. denied sub. nom., League of Women Voters v. Smoot, 384 U.S. 909 (1966)) (emphasis omitted).

\textsuperscript{27} \textit{Le Blang Motors, Ltd.}, 143 F.3d at 685-86 (holding that Rule 41(a)(2) authorizes a court to fashion any condition it deems proper, including complete reimbursement of attorneys' fees, and that reimbursement of attorneys' fees is not limited to only those that will not be useful in a subsequent litigation).

\textsuperscript{28} \textit{Fed. R. Civ. P. 41(d)}.


\textsuperscript{30} See \textit{Zucker v. Katz}, 708 F. Supp. 525, 539 (S.D.N.Y. 1989) (quoting \textit{Wright & Miller, supra} note 18, at § 2375) (providing reasons not to award costs, but imposing them in the instant case because plaintiff failed to demonstrate adequate justification for dismissing the first action).

\textsuperscript{31} See \textit{Whitehead v. Miller Brewing Co.}, 126 F.R.D. 581, 582-83 (M.D. Ga. 1989) (assessing costs when plaintiff filed second case fully aware of the fact that it would not be able to pay a costs award); \textit{Activox, Inc. v. Envirotech Corp.}, 532 F. Supp. 248, 251 (S.D.N.Y. 1981) (holding plaintiff responsible for costs "[w]hatever the strategy" in dismissing the first case may have been).

\textsuperscript{32} See \textit{Sewell v. Wal-Mart Stores, Inc.}, 137 F.R.D. 28, 28 (D. Kan. 1991) (stating that the object of Rule 41(d) is "to prevent vexatious suits and secure payment of costs").
applies to cases that have been dismissed in any court, including state court.\textsuperscript{55} Rule 41(d)'s language has not been altered since its adoption in 1938.\textsuperscript{54}

\textbf{B. The American Rule}

The American Rule is considered the prevailing view regarding whether one party's attorneys' fees ought to be shifted to another. Simply stated, the American Rule is the widely held common law presumption that each party to a litigation should bear their own attorneys' fees except under rare circumstances.\textsuperscript{55} As opposed to the British model in which the losing party pays its opponent's attorneys' fees,\textsuperscript{56} attorneys' fees in the United States are typically only awarded where an applicable statute or rule provides for them,\textsuperscript{57} or are awarded by a court acting pursuant to its inherent equitable powers in circumstances where an opposing litigant's conduct proves obdurate, oppressive or vexatious, or evidences particularly bad faith.\textsuperscript{58} One court has noted that, "[b]ad faith may be found, not only in the actions that lead up to the lawsuit, but also in the conduct of the litigation."\textsuperscript{59} This latter bad faith exception, also referred to as procedural bad faith, is the basis for the federal rules' sanctions provisions which authorize attorneys' fee awards.\textsuperscript{60} It is the sanctions

\textsuperscript{55} See FED. R. CIV. P. 41(d).
\textsuperscript{54} See FED. R. CIV. P. 41(d) (1938).
\textsuperscript{55} See Alyeska Pipeline Servs. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975) (holding that the American Rule prevents fee shifting in most cases); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967).
\textsuperscript{57} See, e.g., FED. R. CIV. P. 11(c)(2); see also 28 U.S.C. § 1983 (allowing parties to recover attorneys' fees as part of costs pursuant to the Civil Rights Attorney's Fee Award Act of 1976).
\textsuperscript{58} Chambers v. Nasco, Inc., 501 U.S. 32, 45-46 (1991) (reaffirming courts' inherent authority to award attorneys' fees when a party acts in bad faith to delay or disrupt litigation).
\textsuperscript{59} Hall v. Cole, 412 U.S. 1, 15 (1973); see also Jane P. Mallor, Punitive Attorneys' Fees for Abuses of the Judicial System, 61 N.C.L. REV. 613, 640-46 (1983) (distinguishing bad faith in the assertion of frivolous claims from bad faith in the methodology employed in prosecuting an action).
\textsuperscript{60} Mallor, supra note 34, at 644 (stating that "procedural rules and practices provide unlimited opportunity for delay and harassment, and any procedure can be misused"); see also Browning Debenure Holders Comm. v. DASA Corp., 81 F.R.D. 407, 410 (S.D.N.Y. 1978) (finding that although action itself was not brought in bad faith, the conduct of the plaintiff in prosecuting it merited an award of attorneys' fees limited to only those fees expended to meet the groundless bad faith behavior); FED. R. CIV. P. 26(g) advisory committee's note to 1983 amendment (noting that authority to award attorneys' fees under the federal rules is derived in part from the court's inherent power to police itself).
provisions of the individual rules themselves, though, which actually empower courts to award such fees.\footnote{See FED. R. CIV. P. 26(g) advisory committee’s note to 1983 amendment.}

Despite the Supreme Court’s decision in \textit{Alyeska Pipeline Services v. United States}, which severely curtailed courts’ power to award attorneys’ fees,\footnote{See \textit{Alyeska Pipeline Services Co.}, 421 U.S. at 259.} Congress and state legislatures have passed countless statutes providing for the recovery of attorneys’ fees as part of costs.\footnote{See Marek v. Chesny, 473 U.S. 1, 44 (1985) (Brennan, J., dissenting); infra note 39.} In response, some commentators have begun to question the continuing vitality of the American Rule.\footnote{See, e.g., Gregory E. Maggs & Michael D. Weiss, \textit{Progress on Attorney’s Fees: Expanding the “Loser Pays” Rule in Texas}, 30 Hous. L. Rev. 1915, 1919 (1994) ("The American system of allocating attorney’s fees is not necessary to the administration of justice."); Thomas D. Rowe, Jr., \textit{The Legal Theory of Attorney Fee Shifting}, 1982 Duke L.J. 651, 651 (1982) (noting that the American Rule “has come under increasing questioning and criticism,” and that the rule has become “riddled with ever more numerous exceptions at both state and federal levels.").} There is no indication, though, that the American Rule soon will be discarded in favor of a loser pays or other system.

III. RULE 41(D) AUTHORIZES ATTORNEYS’ FEE AWARDS

The Federal Rules of Civil Procedure are not affirmatively enacted by Congress,\footnote{See 28 U.S.C. § 2072 (1988); 28 U.S.C § 2074(a) (1988) (“The Supreme Court shall transmit to the Congress . . . a copy of the proposed rule.”).} but they bear its imprimatur and are generally interpreted in the same manner as federal statutes.\footnote{See Zambrano v. City of Tustin, 885 F.2d 1473, 1481 n.26 (9th Cir. 1989) (stating that Congress is given the opportunity to take action to disapprove the rules and the failure of Congress to act constitutes implicit approval).} The following discussion explains why Rule 41(d) authorizes district courts to award attorneys’ fees as part of the “costs” of a previously dismissed action based on two commonly used principles of statutory interpretation, \textit{plain meaning and purpose}.

\textit{A. The Plain Meaning of Costs Does Not Exclude Attorneys’ Fees}

At the outset, it is important to distinguish between costs and expenses, two similar but not completely overlapping terms. The federal rules do not provide a general definition for the terms “costs” and “expenses,” yet both are used throughout the federal rules to describe types of court-ordered reimbursement, making attempts to assign general definitions to these terms extraordinarily difficult.\footnote{See FED. R. CIV. P. 37(a)(4) (referring to expenses, including attorneys’ fees);
Expenses clearly is the broadest of the two terms, at least within the federal rules, because it is used to describe all monetary amounts expended by a litigant during the course of a litigation, including attorneys' fees. This term primarily appears in the curative portions of the federal rules.

Costs are subsumed within expenses. Although one court has commented that defining "costs" seems pedestrian, the term "costs" indeed takes on different meanings depending on where within the federal rules it appears, and its definition is by no means static. For example, in Rule 4, the term "costs" carries the same meaning as "expenses," yet in Rule 54, costs is used to describe only expenses exclusive of attorneys' fees. This could possibly explain why the drafters never have taken the position that "costs" should have a uniform meaning throughout the federal rules. In any event, because the term "costs" is not always treated the same, courts must, as an initial matter, resist substituting that term's meaning in one federal rule for its meaning in another.

The drafters of Rule 41 did not impart a particular definition to the term "costs" or qualify the term as they did for the term in Rule 4 and for the term "expenses" in Rules 11, 26, 30 and 37. For example, to eliminate doubt that attorneys' fees comprise part of expenses, the drafters of Rules 11, 26, 30, and 37 specifically stated that sanctions imposed under these rules could comprise expenses, including attorney's fees. At least one court has expressed frustration over why the drafters were not as specific in describing the types of costs allowed under Rule 41(d). Arguably, instead of

FED. R. CIV. P. 4(d)(5) (referring to costs, including attorneys' fees).

10 WRIGHT & MILLER, supra note 18, at § 2666 (stating that expenditures include all outlays made by a party in connection with the action); United States ex rel. Smith v. Gilbert Realty Co., 34 F. Supp. 2d 527, 530 (E.D. Mich. 1998) (defining expense to include an attorney's fee); see also Dickerson v. Pritchard, 551 F. Supp. 306, 312 (W.D. Ark. 1982) (attempting to distinguish costs, attorneys' fees and expenses).

See, e.g., FED. R. CIV. P. 11(c)(2), 26(g)(3), 30(g)(2), 37(a)(4), 56(g) (providing for expenses, including attorneys' fees, as sanctions).


FED. R. CIV. P. 4(d)(5) (allowing for recovery of "costs . . . including a reasonable attorney's fee").

FED. R. CIV. P. 54(d) (allowing only certain and not all costs to be reimbursed).

See FED. R. CIV. P. 41(d).

See supra note 43.

See Behrle v. Olshansky, 139 F.R.D. 370, 373 (W.D. Ark. 1991) (stating that the court was troubled by the drafters' use of the term "costs" instead of costs, including attorneys' fees).
referring to costs, the drafters could easily have stated that "costs, including attorneys' fees" or "expenses" are recoverable. They also could have specified "costs, exclusive of attorneys' fees." Either way, Rule 41(d) would have been clearer, resulting in less confusion for both courts and litigants.

That Rule 41(d) fails to make explicit reference to attorneys' fees does not make such fees unrecoverable. In the absence of express reference, the question simply becomes whether the drafters' use of the term "costs" in Rule 41(d) evidences an intent on their part that the rule would provide for attorneys' fees. Questions of intent begin and often end with the plain meaning of the statute or rule itself, if it has one. Under this canon of construction, words in a statute, unless otherwise defined, are interpreted as taking their "ordinary, contemporary, common meaning." The "plain meaning rule" specifically instructs that if certain terms are left undefined by the statute, or have taken on no common law meaning of their own, reference should be made to the dictionary definition of the word(s) at issue to determine their ordinary meaning. Where the dictionary language is clear, the plain meaning of the term generally is deemed conclusive. If alternative readings are possible, courts determine "whether one construction makes more sense than the other as a means of attributing a rational purpose" to the drafters of the

56 Id.
57 Id. ("counsel fees ordinarily are not taxable as costs").
58 See Key Tronic Corp. v. United States, 511 U.S. 809, 815 (1994) (construing request for attorneys' fees under CERCLA).
59 See id. ("The absence of specific reference to attorney's fees is not dispositive if the statute otherwise evinces an intent to provide for such fees.").
60 United States v. Dauray, 215 F.3d 257, 260 (2d Cir. 2000) ("[T]he starting point in statutory interpretation is the statute's plain meaning.").
62 See, e.g., Schreiber v. Burlington N., Inc., 472 U.S. 1, 7 (1985) (using both dictionary and common law definitions to establish plain meaning for the term "manipulative"); see also United States v. King, 244 F.3d 736, 740 (9th Cir. 2001) (applying dictionary meaning); Harris v. Sullivan, 968 F.2d 263, 265 (2d Cir. 1992) (referring to dictionary definition to define cost of living because term was not defined in the statute and had not developed a common law meaning).
language at issue. The plain meaning rule's most important tenet is that if adoption of a term's definition produces an outcome so absurd or clearly contrary to the legislative intent, then the definition cannot be afforded any weight. The plain meaning approach to statutory construction is well established.

The plain meaning rule applies to the federal rules no differently than it does to statutes. With respect to Rule 41(d) and its plain meaning, both legal and non-legal dictionaries offer expansive definitions of the term "costs" which encompass attorneys' fees. Webster's Dictionary, for example, defines costs as either the amount of money paid for something, or the amount of money, time and effort, etc. required to achieve an end. Black's Law Dictionary also sweepingly defines costs as the "expenses of litigation, prosecution or other legal transaction." Referring to an attorneys' fee as either "the amount of money paid for something" or an "expense of litigation" is hardly absurd or inconsistent with the drafters' intent in forming Rule 41(d). To the contrary, these exceptionally broad definitions unambiguously suggest what most courts already acknowledge: Rule 41(d)’s "costs" provision grants a district court judge significant discretionary authority to impose any type of monetary sanction "it may deem proper," including attorneys' fees. This construction makes sense when considering Rule 41's original goal of discouraging litigant abuse of lenient state non-suit

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64 Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1311 (9th Cir. 1992).
65 See Hillman v. IRS, 250 F.3d 228, 232-33 (4th Cir. 2001) (stating that an exception to the plain meaning rule applies if "literal application of the statutory language at issue produces an outcome that is demonstrably at odds with clearly expressed congressional intent to the contrary[,] or if literal application produces "an outcome that can truly be characterized as absurd" (quoting Sigmon Coal Co. v. Apfel, 225 F.3d 291, 304 (4th Cir. 2000)).
66 See Pub. Lands Council v. Babbitt, 167 F.3d 1287, 1317 (10th Cir. 1999) (stating that "[i]t is a well-accepted principle that the first step in interpreting a statute is to determine whether the relevant language has a plain meaning with respect to the particular dispute in the case.").
69 WEBSTER'S THIRD NEW INT'L DICTIONARY 515 (Unabridged ed. 1981); see also Atl. Richfield Co. v. Farm Credit Bank, 226 F.3d 1138, 1153 (10th Cir. 2000) (defining costs).
70 BLACK'S LAW DICTIONARY 349 (7th ed. 1999); accord Atl. Richfield Co., 226 F.3d at 1153.
71 Fed. R. Civ. P. 41(d); see also Loubier v. Modern Acoustics, Inc., 178 F.R.D. 17, 23 (D. Conn. 1998); Eager v. Kain, 158 F. Supp. 222, 223 (E.D. Tenn. 1957) (stating that Rule 41(d) authorizes a court to award payment of costs, including attorneys' fees, as a prerequisite to the filing of a second action).
provisions,\textsuperscript{72} and the chilling effect attorneys’ fee sanctions have on such behavior. Thus, even under a narrow or otherwise conservative application of the plain meaning rule, the ordinary dictionary definition of costs is too broad to make Rule 41(d) susceptible to an interpretation that would not include attorneys’ fees awards as part of a “costs” award.\textsuperscript{73} There is nothing that suggests otherwise.

The common law use of the term “costs” reinforces this argument. Indeed, courts historically have used the word “costs” as a term of art for referring to both taxable costs and attorneys’ fees.\textsuperscript{74} \textit{Littlefield v. McGuffey} for example, is illustrative of situations where courts expressly have refused to treat costs as separate from attorneys’ fees.\textsuperscript{75} In \textit{Littlefield}, the court explained that “costs has no uniform meaning,” and that it was “reluctant to create federal common law defining the term” in a way that would exclude attorneys’ fees.\textsuperscript{76} The court stated that “costs can include attorney’s fees and expenses either if a statute provides for it or if the parties so agree in a valid contract.”\textsuperscript{77} The \textit{Littlefield} court’s view stems from equity, where courts always considered themselves free to award attorneys’ fees as “costs” to balance the interests of the respective parties.\textsuperscript{78} The equity courts’ practice of ordering payment of attorneys’ fees under the aegis of their inherent authority appears to have been carried over into Rule 41(d), which allows a court to grant costs “as it may deem proper,” typical equitable language.\textsuperscript{79} In the end, it is this tendency of courts to disfavor a bright-line definition for costs that keeps the term’s plain meaning synonymous with expenses.\textsuperscript{80}

\textsuperscript{72} See infra Part III.C (discussing purpose and history of Rule 41(d)).
\textsuperscript{74} See BLACK’S LAW DICTIONARY 416 (4th ed. 1968) (stating that “costs’ is frequently understood as including attorney fees.”) (citing Livesly v. Strauss, 206 P. 850 (Or. 1922); McClain v. Cont’l Supply Co., 168 P. 815, 817 (Okla. 1917); J.I. Case Plow-Works v. J.I. Case Threshing Mach. Co., 155 N.W. 128, 138-39 (Wis. 1916); Lonoke County v. Reed, 182 S.W. 563, 564 (Ark. 1916)).
\textsuperscript{75} Littlefield v. McGuffey, 979 F.2d 101, 104 (7th Cir. 1992).
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} See Guardian Trust Co. v. Kansas City S. Ry. Co., 28 F.2d 233, 244 (8th Cir. 1928), rev’d on other grounds, 281 U.S. 1 (1930) (“We think it may be safely stated... that whenever there have come before federal courts of equity cases in which special facts showed that, in accordance with established principles of right and equity, costs ‘as between solicitor and client’ ought to be allowed, the courts have not refused to make such allowances.”).
\textsuperscript{79} FED. R. CIV. P. 41(d).
\textsuperscript{80} See Littlefield, 979 F.2d at 104; see also WRIGHT & MILLER, supra note 18, at § 2666 (stating that “‘costs’ has an everyday meaning synonymous with
The federal rules themselves also provide insight on the plain meaning of costs. Rule 54(d)(1), for example, is entitled Costs Other than Attorneys' Fees, thus suggesting that the drafters viewed payment of attorneys' fees as part of a total "costs" package rather than merely an award of some statutory costs.\textsuperscript{81} The drafters' statement that Rule 54(d) was designed to establish procedures for presenting claims for attorneys' fees, "whether or not denominated as costs," leaves little doubt in this regard.\textsuperscript{82} Collectively, these factors suggest that attorneys' fees fall within a broader definition of costs for purposes of fashioning relief under Rule 41(d).\textsuperscript{83} Rule 41(d)'s purpose and history only confirm this point.

\textbf{B. Rule 41(d)'s Purpose & History}

The practice of considering only the plain meaning can result in an "unduly stingy" interpretation of a rule.\textsuperscript{84} Extrinsic materials, such as a rule's purpose or history, both traditional guides to statutory interpretation, often help courts ascertain the true intent of the rule's drafters.\textsuperscript{85} Consulting these sources to determine intent is appropriate regardless of whether the meaning of the language at issue is ambiguous or absurd.\textsuperscript{86} Extrinsic aids should especially be used in understanding the meaning of the federal rules. The federal

\textsuperscript{81} FED. R. CIV. P. 54(d).

\textsuperscript{82} FED. R. CIV. P. 54(d) advisory committee's note to 1993 amendment (stating that the amendment to Rule 54 applies to "requests for reimbursement of expenses, not taxable as costs, when recoverable under governing law incident to the award of fees"). Rule 54 procedure for attorneys' fees does not apply to awards of fees as sanctions authorized or mandated under the federal rules. See id. Nevertheless, in amending Rule 54(d), the drafters' comments indicate their awareness that costs is an elastic term capable of many interpretations. Id.

\textsuperscript{83} See supra notes 44-46 and accompanying text.


\textsuperscript{85} See United States v. Mohrbacher, 182 F.3d 1041, 1049 (9th Cir. 1999); see also R. Randall Kelso, Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-making, 25 PEPP. L. REV. 37, 59-60 (1997) (stating that legislative history and purpose are both helpful guides to statutory interpretation).

\textsuperscript{86} See Harrison v. N. Trust Co., 317 U.S. 476, 479 (1943) ("Words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination.'" (quoting United States v. Trucking Ass'ns., 310 U.S. 534, 543-44 (1940))); see also Marek v. Chesny, 473 U.S. 1, 16 n.5 (1985) ("The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose." (quoting United States v. Brown, 333 U.S. 18, 25-26 (1948))).
rules are created under the Supreme Court’s auspices and their interpretation is therefore less susceptible to the same separation of powers danger that exists when a court substitutes its own judgment for the intent of Congress. Quite possibly for this reason, one of the most commonly posed questions by courts when construing a federal rule is whether the rule’s proposed interpretation frustrates or advances the rule’s purpose.

Rule 41(d)’s purpose is simple. The rule was created to deter vexatious and bad faith litigation, such as forum shopping, by plaintiffs who, for tactical gain, would dismiss their case and re-file it elsewhere. It was hoped that the rule would counteract the common law’s standard practice of granting plaintiffs the absolute right to repeatedly nonsuit at any time before the jury rendered a verdict or a judgment was reached. Since its adoption, defendants that have been summoned into court for a second time on the same or a substantially similar claim routinely have asked courts to invoke Rule 41(d) on these grounds to allow them to recover their previous expenditures. Most courts have concluded, and this comment agrees, that in these situations Rule 41(d)’s purpose would be greatly advanced if the rule enabled defendants to recover their attorneys’ fees.

87 See Moore, supra note 84, at 1092-93 (“[W]hen interpreting the [federal] rules, the [Supreme] Court, pursuant to a delegation from Congress, is acting under its own Article III powers and is not interfering with Congress’s own separate powers. Restricting the Court’s power to interpret the rules by limiting consideration of purpose and policy would unreasonably constrain the judicial branch and potentially interfere with the powers of the judiciary.”); see also Sibbach v. Wilson, 312 U.S. 1, 15 (1941) (holding that the delegation of congressional power to create procedural rules does not violate the doctrine of separation of powers).

88 See Mohrbacher, 182 F.3d at 1049.

89 See Ockert v. Union Barge Line Corp., 190 F.2d 303, 304-305 (3d Cir. 1951) ("While it is quite true that the practice in many states has permitted a voluntary nonsuit as of right at advanced stages in the litigation, sometimes even after submission of a case to a jury, we think the object of the federal rules was to get rid of just this situation and put control of the matter into the hands of the trial judge."); Simeone v. First Bank Nat’l Ass’n, 125 F.R.D. 150, 155 (D. Minn. 1989) (invoking Rule 41(d) to punish plaintiff for its forum shopping).

90 See Cooter & Gell v. Hartmarx Corp, 496 U.S. 384, 397 (1990) (stating that Rule 41(a)(1) was “designed to limit a plaintiffs ability to dismiss an action”).


The circumstances surrounding Rule 41’s creation support this conclusion. As early as 1894, courts acknowledged that the unfettered right to nonsuit was sometimes used by plaintiffs as a device to purposefully vex and harass defendants. In the absence of a statute or rule, courts prior to Rule 41(d)’s enactment in 1988 used their inherent power to award the defendant its costs for such repetitive filings. Indeed, before Rule 41(d), a court’s decision to require a plaintiff to pay the defendant’s costs, including attorneys’ fees, before dismissing one suit and then recommencing that suit, was based only on what “under the circumstances of the particular case the court consider [sic] to be justice to a party in defending himself against an unfounded claim.” Patterned from equity, this test was flexible and appealed to the trial courts’ discretionary authority to control the conduct of litigants. Today, courts still retain the same inherent power to award attorneys’ fees for vexatious or abusive litigation tactics under the American Rule’s bad faith exception.

The history behind Rule 41(d) is admittedly sparse. In creating Rule 41(d), though, its drafters made clear that they were not abrogating a courts’ inherent ability to award attorneys’ fees in situations where a plaintiff repeatedly filed the same suit against the same defendant, but rather that they were codifying the long accepted rule that an “unscrupulous plaintiff” should not be allowed to “harass a defendant by filing repetitive baseless lawsuits as long as each was dismissed prior to an adverse ruling on the merits.” In particular, one of its drafters remarked that Rule 41 was designed to

139 F.R.D. at 373 (discussed infra, p. 20).

94 Henderson v. Griffin, 30 U.S. 151, 158 (1831) (stating that courts are vested with such power “to meet the justice and exigencies of cases as they occur”); see also Kimble v. W. Union Tel. Co., 70 F. 888, 889-90 (C.C.D. Del. 1895).
95 Henderson, 30 U.S. at 159; see also Duffy v. Ryan, 48 N.W. 374, 375 (Wis. 1891) (affirming decision to include attorneys’ fees as costs); Reaume v. Wayne Circuit Judge, 89 N.W. 953, 954 (Mich. 1902) (setting aside nonsuit only upon payment of costs, including attorneys’ fees, incurred by defendant in first action). But see Setzer v. Odom, 176 S.E. 869, 870 (S.C. 1934) (overturning decision to award costs as attorneys’ fees because authority for taxing attorneys’ fees was not specifically identified).
96 Hall v. Cole, 412 U.S. 1, 4-5 (1973) (“[T]he power to award such fees is part of the original authority of the chancellor to do equity in a particular situation.”) (quoting Sprague v. Ticonic Nat’l Bank, 307 U.S. 161, 166 (1939))).
97 See Chambers v. Nasco, Inc., 501 U.S. 32, 46 (1991) (stating that the imposition of attorneys fees for bad faith behavior “transcends a court’s equitable power concerning relations between the parties and reaches a court’s inherent power to police itself . . .”).
prevent "the annoying of a defendant by being summoned into court in successive actions and then, if no settlement is arrived at, requiring him to permit the action to be dismissed and another one commenced at leisure." Obviously, the drafters were concerned that litigants were abusing the right to voluntary nonsuit, and that attorneys' fees for re-filing would sometimes be justified. Significantly, there is no commentary by the drafters or courts showing that the common law equitable discretion of the trial court to award all costs, including attorneys' fees, was altered by or otherwise not included in Rule 41(d). Rule 41(d)'s history thus indicates that awarding attorneys' fees when a suit is dismissed and refiled would be fully consistent with the drafters' intent.

Notably, Rule 41(d) does not expressly require a showing of bad faith before costs may be imposed. The best explanation for the Rule's silence is that the drafters adhered to the historic common law view that the practice of repetitively filing a lawsuit presumptively falls within the bad faith exception to the American Rule. Courts have agreed with this conclusion bybottoming decisions to award attorneys' fees under Rule 41(d) on implicit recognition that in cases where voluntary dismissal is sought before a subsequent action is filed, Rule 41(d) simply codifies the common law's bad faith or abusive litigation exception to the American Rule.

For example, in Esquivel v. Arau the Northern District of California stated that "Rule 41(d)'s requirement for payment of 'costs' by a plaintiff who dismisses an action and then brings the same action again evinces a legislative presumption that such conduct is abusive per se." The court reasoned that the presumption explains "why Rule 41(d) does not explicitly require a determination of subjective 'bad faith,' and instead leaves the decision whether to impose costs and a stay in the judge's discretion in light of the surrounding circumstances." The Esquivel court concluded that if

99 Id. at 397 (quoting Judge George Donworth, member of the Advisory Committee on Rules of Civil Procedure).
101 See Loubier v. Modern Acoustics, Inc., 178 F.R.D. 17, 22 (D. Conn. 1998) (("There is no requirement in Rule 41(d) or the relevant caselaw that a defendant must show bad faith on the part of the plaintiff in order to recover costs."); Rochelle Dreyfus, Note, Promoting the Vindication of Civil Rights Through the Attorney's Fees Award Act, 80 COLUM. L. REV. 346, 349 n.22 (1980) (suggesting that Rule 41(d) embodies the bad faith exception to the American Rule).
102 See note 109, infra.
104 Id. at 1391 n.14.
Rule 41(d)'s purpose is to prevent undue prejudice to a defendant from unnecessary or vexatious litigation, there did not "seem to be a clear reason why Rule 41(d) would provide only for an award of costs exclusive of attorneys' fees, since the typical defendant cannot adequately defend a case without incurring such fees." The court therefore awarded the defendants their expenses, including attorneys' fees, from a similar earlier filed action.

In *Katen v. Katen*, the Eastern District of North Carolina, citing *Esquivel*, also concluded that attorneys' fees are recoverable as costs under Rule 41(d). After noting the issue as one of first impression in the Fourth Circuit, the *Katen* court stated that in light of Rule 41(d)'s purpose to deter vexatious and repetitive litigation, it seemed "proper that in certain circumstances, attorneys' fees should be taxed against the party seeking to refile a previously dismissed suit." Based on this reasoning, the court ordered the plaintiff to pay the defendants' attorneys' fees incurred in a previously filed suit, less eighty percent of those costs to reflect expenditures that would be useful in defending against the second lawsuit. The holdings in *Katen* and *Esquivel* are consistent with other decisions in which attorneys' fees have been awarded under Rule 41(d). The drafters' failure to subsequently clarify the rule in view of these decisions "argues significantly" in favor of permitting courts to exercise their discretion and include attorneys' fees as part of the costs of the action under Rule 41(d).

IV. THE IMPORTANCE OF CONTEXT IN INTERPRETING RULE 41(D)

The plain meaning of a rule is determined not only by reference to the language itself, but also to the specific context in which the

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105 *Id.* at 1391.
106 *Id.* at 1392.
108 *Id.* at *4.
109 *Id.* at *6.
language is used.\textsuperscript{112} Contextual analysis may be performed on several levels. It can include examining "the section in which a word or phrase appears, the entire statute or rule of which the section is a part, and other statutes on the same subject."\textsuperscript{113} When courts consider context, it is far more likely they will interpret a rule in a manner that gives "effect to its entire text."\textsuperscript{114} This view is consistent with the idea that statutes and rules should not be construed to make surplusage of any of their provisions,\textsuperscript{115} i.e., that they have no superfluous words.\textsuperscript{116} Context, no less than plain meaning or purpose, supports a reading of Rule 41(d) that would allow for attorneys’ fee awards to be made upon re-filing of the same case.

A. Rules 54 & 68 Do Not Aid in Defining Rule 41(d) Costs

Much of the conflict surrounding Rule 41(d) is owed, in large part, to the fact that the term "costs" also is used in Rules 54 and 68 of the federal rules. Though few courts have fully explored the point, the meaning of costs in Rules 54 and 68 is not the same as in Rule 41(d).

1. Rule 54

Rule 54(d) states that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs."\textsuperscript{117} Rule 54 stands in partial derogation of the American Rule because it presumes that costs will be awarded despite the absence of bad faith on the part of the non-prevailing party or the absence of an

\textsuperscript{112} See Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").


\textsuperscript{114} See Apple Corps v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 476 (D.N.J. 1998) ("As a general rule of construction, . . . a statute should be construed, if possible, to give effect to its entire text.") (citing United States v. Nordic Village, 503 U.S. 30, 36 (1992) (stating that it is a "settled rule that a statute must, if possible, be construed in such a fashion that every word has some operative effect").

\textsuperscript{115} Colautti v. Franklin, 439 U.S. 379, 392 (1979) (stating that it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative."); Mickells, supra note 108, at 435.

\textsuperscript{116} See Mickells, supra note 113, at 435.

\textsuperscript{117} FED. R. CIV. P. 54(d) (1).
underlying fee shifting statute. Rule 54 “costs” are generally those costs enumerated by 28 U.S.C. § 1920 (1988) and, by definition, do not include attorneys’ fees. Although courts enjoy significant discretion in deciding whether to award costs under Rule 54(d), they are not allowed much flexibility in determining which costs are recoverable. Rule 54(d)’s purpose is not to conform litigant behavior to any standard of conduct, but rather to award the prevailing party “at least partial indemnification of the expenses incurred in establishing his claim or defense.” In short, Rule 54(d) serves merely to allocate certain specified litigation expenses between winner and loser.

More than trivial differences separate Rules 41(d) and 54(d). First, Rule 54(d) has no rational purpose or goal given that courts continue to follow the American Rule. Rule 54(d)’s drafters also actually never articulated a goal when promulgating the rule. In fact, for this reason, one commentator has suggested removing Rule 54(d) entirely from the federal rules. Rule 41(d), in contrast, serves an important function and is vital to the success of the federal procedural system. Cost awards Rule 41(d) protect the efficient and orderly administration of justice. Specifically, they discourage repetitive filings by compensating a defendant for the expenses it will

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120 Crawford Fittings Co., 482 U.S. at 441-42 (“If Rule 54(d) grants courts discretion to tax whatever costs may seem appropriate, then § 1920, which enumerates the costs that may be taxed, serves no role whatsoever. . . . [Rule 54(d)] is phrased permissively because Rule 54(d) generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party.”); see also Hilligoss v. Hovious, No. IP 90-1524-C, 1993 U.S. Dist. LEXIS 388, at *7 n.3 (S.D. Ind. Jan. 12, 1993) (noting that “the discretion . . . to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute.”) (quoting Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1964))).
121 Baez v. United States Dep’t. of Justice, 684 F.2d 999, 1003 n.20 (D.C. Cir. 1982).
122 John M. Blumers, A Practice in Search of a Policy: Considerations of Relative Financial Standing in Cost Awards Under Federal Rule of Civil Procedure 54(d)(1), 75 B.U. L. Rev. 1541, 1563 (1995) (questioning why American courts award costs at all if there is no underlying public policy for their award). Blumer contends that Rule 54 costs are merely a “symbolic vestige” of an earlier time when attorneys’ fees were regulated. Id. at 1563.
123 Id. at 1566 (“[T]he American practice of presumptively awarding litigation costs, but not attorneys’ fees, is unjustifiable. . . . It is time to abandon the ‘historical vestige’ known as Rule 54(d)(1).”).
have to duplicate in a second action on the same claim.\textsuperscript{124} Rules 41(d) and 54(d) are further distinguishable in that 54(d) requires near mechanical application, whereas a decision to award costs under Rule 41(d) involves significant discretion on the part of the court and, unlike Rule 54(d), is insensitive to who ultimately prevails in the litigation.\textsuperscript{125} In sum, the “cost” provisions of Rules 54 and 41(d) bear little, if any, similarity, and, as such, should be construed without reference to one another. At least one court has applied this reasoning in interpreting Rul 41(d)’s cost provision.\textsuperscript{126} without reference to the other.

2. Rule 68

Rule 68 states that “a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money . . . specified in the offer, with costs then accrued.”\textsuperscript{127} If the plaintiff rejects the offer and “the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.”\textsuperscript{128} According to Rule 68, if a plaintiff rejects an offer and then obtains a less favorable judgment, the plaintiff must not only forego recovery of its own costs, but also is required to pay the defendant’s costs as well.\textsuperscript{129} Rule 68’s purpose is to promote settlement and avoid litigation.\textsuperscript{130} Unlike Rule 41(d), Rule 68’s cost provision is mandatory and leaves no room for district court discretion.\textsuperscript{131} The type of costs awarded under Rule 68, moreover, are only those recognized under Rule 54 or in a United States statute.\textsuperscript{132}

\textsuperscript{124} See discussion supra Part III.B.
\textsuperscript{125} Compare Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1964) ("[T]he discretion given district judges to tax costs [under Rule 54(d)] should be sparingly exercised with reference to expenses not specifically allowed by statute.")., with FED. R. CIV. P. 41(d) (providing district court with substantial discretion), and Roadway Express, Inc. v. Piper, 447 U.S. 752, 762 (1980) (noting that 28 U.S.C. § 1927 is “indifferent to the equities of a dispute and to the values advanced by the substantive law.").
\textsuperscript{127} FED. R. CIV. P. 68.
\textsuperscript{128} Id.
\textsuperscript{129} See id.
\textsuperscript{130} See FED. R. CIV. P. 68 advisory committee’s note to 1946 amendment (stating that Rule 68’s “provisions should serve to encourage settlements and avoid protracted litigation.").
\textsuperscript{131} See FED. R. CIV. P. 68.
\textsuperscript{132} Delta Air Lines, Inc. v. August, 450 U.S. 346, 355 (1981) (holding that Rule 68 divests a court of its Rule 54(d)(1) discretion by making such cost awards mandatory); see also Craig M. Patrick, The Offer You Can’t Refuse: Offers of Judgment In
In *Marek v. Chesny*, the Supreme Court ruled that because Rule 68 costs include those specifically set forth as such in the statute under which the cause of action arose, attorneys’ fees will be awarded as costs under Rule 68 if the statute so provides. As noted by the *Marek* dissent, where statutes with fee shifting provisions include attorneys’ fees as part of the recoverable costs, Rule 68, when invoked, forecloses a prevailing plaintiff from recovering its post-offer attorneys’ fees and would also require the plaintiff to bear the defendant’s post-offer attorneys’ fees. Under *Marek*, when the underlying substantive statute refers to attorneys’ fees as costs, attorneys’ fees will be awarded under Rule 68 as a matter of course and without there necessarily being any bad faith or unreasonable litigation conduct by the parties. *Marek’s* requirement that attorneys’ fees and other costs be mandatorily shifted under Rule 68 clearly is irreconcilable with the discretion-granting language of Rule 41(d) and leaves little in common between these two rules. Reading the cost provisions of Rule 41(d) and Rule 68 in concert would thus be improper.

B. *The Sixth and Seventh Circuits’ Narrowly Interpreted Rule 41(d)*

Despite several differences in each rule’s meaning, purpose, and application, both the Sixth Circuit in *Rogers* and the Seventh Circuit in *Esposito* concluded that Rule 41(d) authorizes only those costs traditionally recognized under Rules 54 and 68. This cannot be the case. A closer look at these decisions reveals how both courts fundamentally erred in narrowly defining the allowable scope of Rule 41(d) costs.

1. Rogers v. Wal-Mart Stores

In *Rogers*, the Sixth Circuit addressed directly the issue of whether Rule 41(d) authorizes awards of attorneys’ fees under Rule 41(d). The court held that attorneys’ fees cannot be awarded,
because "the rule does not explicitly provide for them."\textsuperscript{138} The facts of Rogers are relatively straightforward. On October 17, 1997, Shirley Rogers filed a complaint in Tennessee state court against Wal-Mart based on injuries she sustained from tripping over a pallet left on Wal-Mart's floor by its employees.\textsuperscript{139} On November 18, 1997, Wal-Mart removed the case to federal court based on diversity jurisdiction and an amount in controversy of over $75,000.\textsuperscript{140} On October 9, 1998, approximately one year later, the parties stipulated to a dismissal, and the court entered a dismissal without prejudice.\textsuperscript{141} On February 4, 1999, Rogers filed another complaint in Tennessee state court, and Wal-Mart had the case removed to federal court and moved for an award of costs and attorneys' fees, which the court granted.\textsuperscript{142} Rogers subsequently appealed that decision.\textsuperscript{143}

On appeal, the Sixth Circuit admitted initially that "an award of attorney fees may be authorized, even if not expressly provided for, 'if the statute otherwise evinces an intent to provide for such fees.'\textsuperscript{144} The court reasoned, however, that "the structure of the Federal Rules of Civil Procedure [was] ambiguous at best on the question of attorney fees."\textsuperscript{145} For example, the court stated, "whereas Rule 41(d) only speaks of 'costs' and does not mention attorney fees, several other provisions in the Federal Rules explicitly provide for recovery of attorney fees."\textsuperscript{146} The court also found that the non-inclusion of attorney fees in 28 U.S.C § 1920 indicated that, "at least in some contexts, Congress does not consider attorney fees to be part of an award of 'costs.'\textsuperscript{147} The court concluded that this ambiguity could not overcome "the absence of an express provision for attorney fees in Rule 41(d), and thus denied an award of attorneys' fees.\textsuperscript{148}

According to the Sixth Circuit, courts that had awarded attorneys' fees under Rule 41(d) relied too heavily on the policy reasons behind the rule and not enough on the rule's plain

\textsuperscript{138} Id.
\textsuperscript{139} Id. at 870.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id. at 870-71.
\textsuperscript{143} Rogers, 290 F.3d at 871.
\textsuperscript{144} Id. at 875 (quoting Key Tronic Corp. v. United States, 511 U.S. 809, 815 (1994)).
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id. at 875.
language."\textsuperscript{149} The Sixth Circuit found that “[w]here Congress has intended to provide for an award of attorney fees, it has usually stated as much and not left the courts guessing.”\textsuperscript{150} Furthermore, the court stated, “the law generally recognizes a difference between the terms ‘costs’ and ‘attorney fees,’ and [that the court had] no desire to conflate the two terms.”\textsuperscript{151} The court concluded that because Congress did not explicitly provide for attorneys’ fees in Rule 41(d), it would be “improper to essentially re-draft the rule . . . by reading into it language that is not there.”\textsuperscript{152} The Sixth Circuit, therefore, overruled the district court’s award of attorneys’ fees to defendant Wal-Mart Stores, Inc.\textsuperscript{153}

In denying attorneys’ fees under Rule 41(d), the \textit{Rogers} court acknowledged that Rule 41(d) is designed “not only to prevent vexatious litigation, but also to prevent forum shopping, ‘especially by plaintiffs who have suffered setbacks in one court and dismiss to try their luck somewhere else.’”\textsuperscript{154} The court also stated that Rule 41(d) is intended to prevent attempts to gain any tactical advantage by dismissing and re-filing a suit.\textsuperscript{155} These, however, are the same concerns that commonly motivate other courts to grant attorneys’ fees under Rule 41(d) and under the common law’s bad faith exception to the American Rule.\textsuperscript{156} The Sixth Circuit’s restatement of Rule 41(d)’s purpose clearly is at odds with its holding that the rule does not authorize an attorneys’ fee award.

The \textit{Rogers} Court claimed that courts rely too little on Rule 41(d)’s plain language, but provided no plain meaning analysis of its own. The court’s holding instead relied only upon a perceived ambiguity regarding the term “costs” and the absence of an express

\textsuperscript{149} Rogers, 230 F.3d at 875.
\textsuperscript{150} Id. at 874.
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 875-76.
\textsuperscript{153} See id. at 876.
\textsuperscript{154} Rogers, 230 F.3d at 874 (quoting Robinson, 1999 WL 95720, at 2).
\textsuperscript{155} See id.
attorneys’ fee provision within Rule 41(d).\textsuperscript{157} The term “costs,” however, is not ambiguous. As explained, supra, the plain meaning of “costs” does encompass attorneys’ fees.\textsuperscript{158} Regardless, the Sixth Circuit did not follow the Supreme Court’s holding in Key Tronic Corp. v. United States, which mandates that courts go behind the face of a statute or rule to establish its plain meaning if the language at issue appears ambiguous.\textsuperscript{159} Again, this requires looking at the rule’s history and purpose and the context in which the language at issue appears. Not only did the Rogers’ court fail to look at the plain meaning of costs and the context in which that term appears, it disregarded entirely Rule 41(d)’s purpose, a practice that courts have warned against.\textsuperscript{160} In the end, the Sixth Circuit’s conclusion that attorneys’ fees are not available under Rule 41(d) is unpersuasive and should not be followed to the extent it failed to address any of these considerations.\textsuperscript{161}

2. Esposito v. Piatrowski

In Esposito v. Piatrowski, the Seventh Circuit held that a party may recover reasonable attorneys’ fees as part of its costs under Rule 41(d) only where the underlying statute defines costs to include attorneys’ fees.\textsuperscript{162} In Esposito, the plaintiff brought an action under 42 U.S.C. § 1983, which the district court involuntarily dismissed for both failure to prosecute and res judicata.\textsuperscript{163} Plaintiff filed a second suit, and one of the defendants moved under Rule 41(d) for reimbursement of costs incurred in defending the first action and for a stay until such costs, including attorneys’ fees, were paid.\textsuperscript{164} The Seventh Circuit stated that Rule 41(d) “refers to ‘costs,’ but fails to define the term,” and that “neither the rule nor the Advisory Committee Notes address whether attorneys’ fees may be included in an award of costs.”\textsuperscript{165} The court held that “[b]ecause Rule 41(d) does

\textsuperscript{157} See supra notes 139-41 and accompanying text.
\textsuperscript{158} See supra Part III.A.
\textsuperscript{159} 511 U.S. 809, 815 (1994) (“The absence of specific reference to attorney’s fees is not dispositive. . . .”).
\textsuperscript{160} See United States v. Brown, 333 U.S. 18, 25-26 (1948); United States v. Tabor Court Realty Corp., 803 F.2d 1288, 1298 (3d Cir. 1986) (“Such a literal reading of the statute’s language would require us to ignore the statute’s purpose. We are reminded of Judge Robert J. Traynor’s advice, ‘We need literate, not literal, judges.’”).
\textsuperscript{161} See supra notes 138-47 and accompanying text.
\textsuperscript{162} 223 F.3d 497, 501 (7th Cir. 2000).
\textsuperscript{163} Id. at 498.
\textsuperscript{164} Id.
\textsuperscript{165} Id. at 501.
not refer to costs any differently than does 28 U.S.C. § 1920, which provides the statutory specification of allowable costs, [attorneys’] fees may be included as costs only where the underlying statute [(the statute giving rise to the cause of action)] so provides."\textsuperscript{166} The court explained that "there is no language in the text of Rule 41(d) indicating that Congress intended to alter the 'American Rule,'" because the "rule does not refer to attorneys' fees as an awardable cost."\textsuperscript{167} The American Rule, however, is not that harsh. It is by now well settled that the absence of an express attorneys' fee provision can no longer justify denying attorneys' fee awards.\textsuperscript{168}

The Seventh Circuit in \textit{Esposito} based its decision to deny attorneys fees under Rule 41(d) on the Supreme Court's decision in \textit{Marek v. Chesny}. The sole issue in \textit{Marek} was whether "costs" awarded under Rule 68 included attorneys' fees.\textsuperscript{169} The Supreme Court addressed the issue as follows:

The authors of Federal Rule of Civil Procedure 68 were fully aware of [the limited] exceptions to the American Rule. The Advisory Committee's Note to Rule 54(d), 28 U. S. C. App., p. 621, contains an extensive list of the federal statutes which allowed for costs in particular cases; of the 35 "statutes as to costs" . . . no fewer than 11 allowed for attorney's fees as part of costs. Against this background of varying definitions of "costs," the drafters of Rule 68 did not define the term; nor is there any explanation whatever as to its intended meaning in the history of the Rule.

In this setting, given the importance of "costs" to the Rule, it is very unlikely that this omission was mere oversight; on the contrary, the most reasonable inference is that the term "costs" in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority . . . . Thus, absent congressional expressions to the contrary, where the underlying statute defines "costs" to include attorney's fees, . . . such fees are to be included as costs for purposes of Rule 68.\textsuperscript{170}

\textit{Marek}'s reasoning, however, is inapposite to the Rule 41(d) situation in \textit{Esposito}. Indeed, in determining whether to award attorneys' fees under Rule 41(d), the Seventh Circuit should not have looked to whether an underlying statute authorized attorneys' fees, but rather to Rule 41(d) itself, which serves as its own enforcement mechanism.

\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.} at 500.
\textsuperscript{168} Key Tronic Corp. v. United States, 511 U.S. 809, 815 (1994).
\textsuperscript{169} \textit{See} Marek v. Chesny, 473 U.S. 1, 3 (1985).
\textsuperscript{170} \textit{Id.} at 8-9.
By making an award of attorneys’ fees under Rule 41(d) dependent on what another statute provides, the Seventh Circuit essentially stripped district courts of all discretionary authority originally vested in them by Rule 41(d)’s drafters.

In *Esposito*, the Seventh Circuit recognized that “[i]t would be inconsistent to award attorneys’ fees as a condition of voluntary dismissal under Rule 41(a)(2), but completely prohibit the awarding of such fees when a case that is voluntarily dismissed is refiled under Rule 41(d).” The court also noted that awarding such fees as part of costs advances Rule 41(d)’s goal of deterring “forum shopping and vexatious litigation.” The court, however, did not explain how Rule 41(d)’s purpose would be advanced in cases where the underlying statute did not include attorneys’ fees as part of the costs of the action. In effect, the Seventh Circuit’s decision creates a two-tier system of attorneys’ fee awards under Rule 41(d) by allowing “costs” to vary from case to case depending on the phraseology of the underlying fee-award statute. This is a schizophrenic practice that ultimately “cut[s] against the drafters’ intent to create uniform procedures applicable to ‘every action’ in federal court,” which is probably the single most important mandate of the Federal Rules.

Applying the *Esposito* holding, a plaintiff could exhibit absolutely no bad faith or vexatious behavior, but still have attorneys’ fees levied against it under Rule 41(d) simply because it sued under a federal statute with a cost shifting provision. At the same time, in a diversity case, a plaintiff could never be subject to attorneys’ fees under the rule, even when its motive in re-filing is plainly to delay or harass. This is not what Rule 41(d)’s drafters intended when they created the rule. The meaning of “costs” in Rule 41(d) is limited no more by the term’s definition in Rule 68 than it is by that term’s definition in Rule 54. The Seventh Circuit clearly erred in turning

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171 *Esposito*, 223 F.3d at 501.
172 *Id.*
174 *Id.* at 19 (Brennan, J., dissenting) (citing *Fed. R. Civ. P.* 1).
175 *Id.* at 19 n.9 (Brennan, J., dissenting) (citing 4 *CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE §* 1029 (1st ed. 1969)).
176 *Marek*, 473 U.S. at 27 (Brennan, J., dissenting); *Esposito*, 223 F.3d at 501.
177 *Marek*, 473 U.S. at 27 (Brennan, J., dissenting); *Esposito*, 223 F.3d at 501.
178 *See supra* notes 113-31 and accompanying text.
to Rule 68 to construe Rule 41(d)'s cost provision.\textsuperscript{179}

C. \textit{Contextual Reasons for Permitting Attorneys' Fees Under Rule 41(d)}

At least three contextual arguments support an interpretation of Rule 41(d) that would allow for attorneys' fee awards upon refilling of the same suit: (1) Rule 41(d)'s language is non-restrictive; (2) other parts of Rule 41 provide for attorneys' fees and (3) other similar federal rules provide for attorney fees. All of these points have been raised and addressed by courts that have construed Rule 41(d)'s cost provision, but were either given short-shrift, or not addressed at all, by the Rogers and Esposito panels.

1. Rule 41(d)'s Language is Nonrestrictive

Words, like people, are generally known by the company they keep and, when read in context, may sometimes have a broader meaning than they might if read standing alone, out of context.\textsuperscript{180} Placing magnified emphasis on a single word to give it a meaning contradictory to the import of the language around it is therefore discouraged.\textsuperscript{181} The Rogers and Esposito courts ignored this admonition by divorcing the term “costs” in Rule 41(d) from the language surrounding it, purporting instead to rely on the term’s plain meaning only.\textsuperscript{182} This is not surprising given the outcome in both cases. Solely emphasizing the term “costs” in those cases was improper and did not lend itself to a fair interpretation of Rule 41(d).

The term “costs” in Rule 41(d) deserves a broad construction rather than a hyper-technical one.\textsuperscript{183} The rule is permissive, stating that a court “may” make an award of costs “as it may deem proper

\textsuperscript{179} \textit{Id.}
\textsuperscript{180} Chuchuru v. Chuchurru, 185 F.2d 62, 64 (10th Cir. 1950) (stating that words sometimes take on a wider meaning “when joined with others and viewed in the light of the entire statute”); see also Keith v. Volpe, 965 F. Supp. 1337, 1353 (C.D. Cal. 1996) (construing the term “landscaed freeway” in court decree broadly in view of “all the circumstances”); Cablevision Co. v. Motion Picture Assoc., 641 F. Supp. 1154, 1162 (D.D.C. 1986) (“Terms which appear to mean the same standing alone may, when placed in their proper context, hold a very different meaning.”).
\textsuperscript{182} See, \textit{e.g.}, supra notes 143, 161 and accompanying text.
and may stay the proceedings."\textsuperscript{184} Rather than imposing limitations on a court, this language affords courts ample discretion in fashioning monetary sanctions against litigants who dismiss and refile the same case.\textsuperscript{185} Restricting a court’s authority under Rule 41(d) to granting only taxable costs traditionally recognized under Rule 54 or 68, which generally involves little discretion and provides for automatic calculation by the clerk of the court, renders this discretionary language meaningless and does nothing to further Rule 41(d)’s purpose of avoiding repetitive filings.\textsuperscript{186} As noted by one court, “[s]urely Congress intended that [this] provision of the federal rules have some ‘teeth,’ and it simply has none... if the costs that would have been recoverable under Rule 54(d) are all that the defendant can receive for years of fruitless litigation.”\textsuperscript{187} Accordingly, based on the discretionary language surrounding the term “costs” in Rule 41(d), there is a strong likelihood that the drafters of Rule 41(d) meant for “costs” to have broader significance consistent with the term’s ordinary meaning.\textsuperscript{188} Case law supports this conclusion.

For example, in \textit{Behrle v. Olshansky}, the Western District of Arkansas reasoned that a reading of Rule 41(d) that did not allow for attorneys’ fees was “too restrictive in view of [the rule’s] intended purpose.”\textsuperscript{189} The court found that there [was] probably no reason for one to suppose that Congress intended that costs recoverable by the winning party under the provisions of Rule 54(d) would be exactly the same items of expense as are incurred by a party because of the actions of a party in dismissing an action and refiling it.\textsuperscript{190} The \textit{Behrle} court observed that Rule 41(d) costs are broader than the costs recoverable under Rule 54, and that the American Rule has no effect on a court’s ability to award attorneys’ fees under Rule 41(d). Rule 41(d), the court said, is simply an extension of the American Rule’s bad faith exception.\textsuperscript{191} The \textit{Behrle} court concluded that Rule 41(d), when adopted, gave courts “discretion to include reasonable attorneys’ fees” as part of any costs award imposed.\textsuperscript{192} The \textit{Behrle} court

\textsuperscript{184} \textit{Fed. R. Civ. P.} 41(d).
\textsuperscript{186} \textit{See supra} Part IV.A.1-2.
\textsuperscript{188} \textit{See id.}
\textsuperscript{189} \textit{Behrle}, 139 F.R.D. at 373.
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{See id.} at 374-75.
\textsuperscript{192} \textit{Id.}
thus assigned to Rule 41(d) a meaning consistent with its drafters' intent.

In contrast, consider *Anders v. FPA Corp.*, in which the District of New Jersey completely disregarded contextual principles in deciding that Rule 41(d) does not authorize attorneys’ fees. In *Anders*, the court suggested that the language in Rule 41(d) stating that a court could award costs “as it may deem proper” referred only “to the court’s discretion in its initial decision whether to award costs or not” and not what can be included as part of costs. The court reasoned that decisions to award attorneys’ fees are rarely “left up to the discretion of the judiciary.” This interpretation renders superfluous, and thus meaningless, the opening language in Rule 41(d) stating that “the court may make such order for the payment of costs.” This phrase precedes the phrase “as it may deem proper.”

The only way to supply meaning to both of these phrases is if the first phrase, “may make such order,” authorizes the court to make the initial decision and the second phrase, “as it may deem proper,” controls the types of costs awarded after the initial decision is made. The *Anders* court’s forced interpretation of Rule 41(d) yields an obvious “internal redundancy” and therefore does not withstand scrutiny.

2. Other Parts of Rule 41 Authorize Attorneys’ Fees

Attorneys’ fee awards under Rule 41(d) are also proper given courts’ authority to make attorneys’ fee awards as a “condition of dismissal” under rule 41(a)(2) when a plaintiff voluntarily nonsuits. In *Esquivel v. Arau*, for example, the court explained

> it would be inconsistent to conclude that a court has discretion to condition Rule 41(a)(2) voluntary dismissal without prejudice on payment of attorneys’ fees, but that a court does not have discretion [under Rule 41(d)] to exact the same payment from a plaintiff who has noticed a Rule 41(a)(1) dismissal in a previous...

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194 *Id.* at 390.

195 *Id.*


197 *Id.*

198 See, e.g., *Capozziello v. Brasileiro*, 443 F.2d 1155, 1158-59 (2d Cir. 1971) (“Unless there is no alternative, an interpretation having such a result should be avoided.”).

199 *See supra* notes 20-22 and accompanying text.
case.  

In both cases, the court said, "the plaintiff has required the defendant to incur expenses that may be substantial." The court concluded that "[i]t would be anomalous to require the plaintiff to internalize the full costs of its conduct in one context but not the other."  

This argument has merit because in both situations the potential for abusive litigation exists. Accordingly, the drafters likely intended for Rule 41(d) costs to include at least the same type of costs allowed under Rule 41(a)(2).  

One commentator has expressed disagreement with this argument on two grounds. First, he contends that the text of Rule 41(a)(2) does not expressly authorize attorneys' fees, and therefore that the language in Rule 41(a)(2) stating that a court may dismiss "upon such terms and conditions as the court deems proper" is too ambiguous to suggest whether an award of fees may be authorized under that rule. The problem with this commentator's reasoning is that the Supreme Court in Key Tronic v. United States clearly held that "[t]he absence of specific reference to attorneys' fees is not dispositive if the statute [or rule] otherwise evinces an intent to provide for such fees." In addition, many courts already have concluded that Rule 41(a)(2) authorizes courts to award attorneys' fees as a condition of dismissal despite the rule not specifically referencing such fees in its text. The fact that Rule 41(a)(2) makes no mention of attorneys' fees should have no bearing on decisions to make Rule 41(d) attorneys fee awards.  

The same commentator also objects to allowing for Rule 41(d) attorneys fee awards on the ground that any award of attorneys' fees award pursuant to Rule 41(a)(2) is the "product of a bargain between well-informed parties," i.e., the plaintiff and the court, whereas Rule 41(d) involves no agreement or relative bargaining power on the part of the plaintiff. Thus, he contends, it is not anomalous that attorneys' fees would be awarded under Rule 41(a)(2) but not under

201 Id.
202 Id.
203 Edward X. Clinton, Jr., Does Rule 41(d) Authorize an Award of Attorney’s Fees?, 71 St. JOHN'S L. REV. 81, 95 (1997).
204 511 U.S. 809, 815 (1994).
205 See, e.g., Mortgage Guar. Ins. Corp. v. Richard Carlyon Co., 904 F.2d 298, 300 (5th Cir. 1990); McGregor v. Board of Comm’rs of Palm Beach County, 956 F.2d 1017, 1021 (11th Cir. 1992); see also Wright & Miller, supra note 18, at § 2366.
206 See Clinton, supra note 209 at 96.
Rule 41(d).²⁰⁷

This argument also lacks merit. First, the need to impose attorneys' fees to protect a defendant from defending the same lawsuit again is far more immediate under Rule 41(d), after a case has been re-filed, than under Rule 41(a)(2), before the case is re-filed.²⁰⁸ Second, the terms and conditions language in Rule 41(a)(2) serves the same purpose as Rule 41(d), to deter vexatious litigation and to protect the defendant in the event the case is re-filed, which explains why most courts will not condition dismissal on payment of the defendants' attorneys' fees if a case is dismissed with prejudice.²⁰⁹ The only practical difference between Rules 41(a)(2) and 41(d) is the time during the litigation when each is invoked, which has nothing to do with bargaining power. A plaintiff, in fact, has no bargaining power under Rule 41(a)(2) because the court has sole discretion in formulating the conditions for dismissal.²¹⁰ The plaintiff's opportunity to proceed with litigation rather than dismissing and incurring attorneys' fees under Rule 41(a)(2) is, therefore, largely irrelevant to the issue of whether Rule 41(d) authorizes payment of attorneys' fees.²¹¹

3. Other Federal Rules Provide for Attorneys' Fees

Statutes and rules on the same subjects should be construed together even if they were enacted at different times.²¹² For Rule 41(d) this would involve looking to other similar provisions within the Federal Rules to glean a more informed plain meaning, such as, for example, Rules 4, 11 and 37. Like Rule 41(d), Rules 4, 11, and 37 address improper and vexatious litigation practices, and each grants a court broad discretion to impose attorneys' fees against parties who

²⁰⁷ Id.
²⁰⁹ See 9 WRIGHT & MILLER, supra note 18, at § 2366 (explaining that courts lack power to order payment of attorneys' fees when dismissal is with prejudice).
²¹⁰ See Fed. R. Civ. P. 41(a)(2) (allowing dismissal upon "such terms and conditions as the court deems proper").
²¹¹ See id.
²¹² See Prudential Ins. Co. of Am. v. Rand & Reed Powers P'ship., 972 F. Supp. 1194, 1209 (N.D. Iowa 1997) ("[W]hen statutes relate to the same subject matter or to closely allied subjects they are said to be im pail [sic] materia and must be construed, considered and examined in light of their common purpose and intent...." (quoting Farmers Co-op Co. v. DeCoster, 528 N.W. 2d 536, 538 (Iowa 1995)); Olympus Aluminum Prods. v. Kehm Enters., 930 F. Supp. 1295, 1313 (N.D. Iowa 1996) (finding no impediment to reading statutes in pari materia although statutes "were enacted at very different times.").
engage in disruptive and abusive litigation tactics.\textsuperscript{215} Rules 54 and 68, on the other hand, are designed only to reward the prevailing party or to promote settlement.\textsuperscript{214} Thus, in resolving whether Rule 41(d) authorizes attorneys' fees, the Sixth and Seventh Circuits should have turned first to the punitive cost provisions of Rules 4, 11, or 37.

It only seems logical that district courts should be authorized under Rule 41(d). Vexatious litigation practices result in extensive and unwarranted use of judicial resources, and cannot be remedied without district courts having authority to formulate an appropriate monetary penalty to fit the particular conduct being sanctioned. As stated by the Supreme Court, sanctions under the federal rules must be applied diligently "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."\textsuperscript{215} The Federal Rules' sanction provisions have been structured with this concern in mind,\textsuperscript{216} and no exception should be made with regard to Rule 41(d). The Sixth and Seventh Circuits have undermined this goal by not recognizing the right to attorneys fees under Rule 41(d).

V. AMENDING RULE 41(D)

As the number of cases on courts' dockets increases, so too does the need for reigning in procedural abuse. Sanctions are the lynchpin to deterrence, but experience teaches that unless express authority exists, courts are reluctant to impose sanctions against litigants for conducting litigation in bad faith.\textsuperscript{217} An example of a court's hesitancy to impose sanctions can be found in \textit{Roadway Express, Inc. v. Piper}. In \textit{Piper}, the Supreme Court held that 28 U.S.C. § 1927, which provided that lawyers who multiply court proceedings vexatiously may be assessed the excess costs they create, and at the time did not allow for recovery of attorneys' fees.\textsuperscript{218} The court reasoned that §1927 should not allow for attorneys' fees as part of costs because § 1927 must be read together with §1920, which defines allowable costs and does not include attorneys' fees.\textsuperscript{219} The holding

\textsuperscript{215} See, e.g., FED. R. CIV. P. 11(c)(2), 26(g)(3), 30(g)(2), 37(a)(4), 56(g) (providing for expenses, including attorneys' fees, as sanctions).

\textsuperscript{214} See supra notes 113-31 and accompanying text.


\textsuperscript{216} See, e.g., supra note 43.

\textsuperscript{217} See FED. R. CIV. P. 11 advisory committee's notes to 1983 amendment.

\textsuperscript{218} 447 U.S. 752, 763 (1980).

\textsuperscript{219} Id. at 760 ("[H]istory suggests that § 1920 and § 1927 should be read together
in *Piper* is not inconsistent with the argument that Rule 41(d) authorizes attorneys' fees because, unlike § 1927, the federal rules do not come with their own internal definition of costs.\(^{290}\) In response to the holding in *Piper*, Congress amended § 1927 to expressly provide that attorneys' fees are recoverable as part of the "excess" costs created by attorney misconduct.\(^{291}\) Based on (i) the recent split in authority over whether Rule 41(d) provides for attorneys' fee, and (ii) courts' apparent need for express guidance regarding their sanctioning authority, Rule 41(d) should be amended too.\(^{292}\)

As a practical matter, regardless of whether Rule 41(d) is amended, courts always would retain inherent power to impose attorneys' fees under the American Rule's bad faith litigation exception.\(^{293}\) That notwithstanding, "the most practicable means for establishing appropriate standards and procedures" for dealing with the problem of repetitive filings is by "plenary rule rather than ad-hoc judicial decisions," which often can lead to vagueness and unpredictability.\(^{294}\) Accordingly, having a clear standard upon which to base an award of attorneys' fees under Rule 41(d) should not be discounted, especially when attorneys' fees are the principle expense in defending against frivolous lawsuits.

At least one commentator has recommended applying an objective standard for assessing procedural bad faith under the federal rules, because it is easier for courts to assess whether a procedural move is justified.\(^{295}\) An objective standard is one premised on inferences that certain procedural maneuvers give rise to an assumption of bad faith, and thus, to an award of attorneys' fees.\(^{296}\) Because judges are obviously "in a better position to observe parties' conduct first hand" and are "more experienced in procedural matters,"\(^{297}\) an objective standard should be used in deciding whether,

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\(^{290}\) Fulps v. Springfield, 715 F.2d 1088, 1095 n.8 (6th Cir. 1983) ("In approving the Federal Rules, Congress appears to have incorporated the definition of costs found in the substantive statute at issue in the litigation.") (citing FED. R. CIV. P. 54(d)).


\(^{292}\) Local Civil Rule 12.4 for the Central District of California already allows courts to impose attorneys' fees when cases have been dismissed and re-filed. C.D. CAL. LOCAL RULE 12.4. Rule 12.4 states the following: "If any action dismissed . . . is reinstated, the Court may impose such sanctions as it deems just and reasonable." *Id.*

\(^{293}\) See supra notes 33-35 and accompanying text.


\(^{295}\) See Mallor, *supra* note 34, at 645.

\(^{296}\) *Id.*

\(^{297}\) *Id.* at 646 ("Being experienced in procedural matters, [judges] readily can compare the litigants' procedural conduct with the norm.").
in a particular case, an award of attorneys’ fees is merited under Rule 41(d).

In line with this standard, this article proposes amending Rule 41(d) to state the following: *If a plaintiff who has once dismissed, or had involuntarily dismissed, an action in any court commences an action based upon or including the same claim against the same defendant, the court shall require the plaintiff to pay the defendant those costs of the previously dismissed action, including attorneys’ fees, that have not already been reimbursed and which will not contribute to the defense of the re-filed action, unless the court finds either that the dismissal was substantially justified or that an award of costs would be unjust. The court may order the action stayed until any costs awarded under this rule are paid.* This amendment retains some of Rule 41(d)’s existing language, but largely tracks Rule 37(a)(4), which relates to discovery sanctions. 228

Rule 37(a)(4) states, in part, that the “court shall, after affording an opportunity to be heard, require the party . . . to pay the moving party the reasonable expenses incurred in making the motion, including attorney’s fees, unless the court finds . . . the opposing party’s nondisclosure, response or objection was substantially justified, or that other circumstances make an award of expenses unjust.” 229 Before 1970, Rule 37(a)(4) expenses would only be awarded if the party against whom the discovery motion was filed was found to have acted without substantial justification. The advisory committee note to the 1970 amendment to Rule 37 explains that changing the rule to require payment of expenses unless the conduct is substantially justified “encourages judges to be more alert to abuses occurring in the discovery process.” 230 The advisory committee note further states that the amended Rule 37(a)(4) maintained a necessary flexibility and did not limit a court’s “power to find that other circumstances make an award of expenses unjust.” 231 The advisory committee concluded that the 1970 amendment would “not significantly narrow the discretion of the court” to award attorneys’ fees, but rather would press a court “to address itself to abusive practices.” 232 The amendment to Rule 41(d) proposed by this article should have a similar effect by making judges and plaintiffs more aware of the potential for procedural abuse that may result from plaintiffs having the opportunity to repetitively file with near absolute

231 Id.
232 Id.
impunity.

The proposed amendment’s requirement that the court “shall” impose costs, including attorneys’ fees, would not contravene the American Rule because repetitive filings presumptively fall within the rule’s bad faith exception.253 Nor would this requirement restrict a court’s discretion in deciding not to award attorneys’ fees or any other costs. In contrast to current Rule 41(d), however, this amendment would place the burden on the plaintiff to show that the initial dismissal was either justified or for some other reason does not merit an award of costs.254 Under present practice, the defendant generally must raise the issue of costs with the court, especially since the second filed action is not always in the same court as the previous action. Placing the burden on the plaintiff to show substantial justification is not unfair given the potential for procedural abuse and prejudice to a defendant whenever a case is re-filed.

Some courts have noted that it seems anomalous to permit reimbursement of attorneys’ fees under either Rule 41(a)(2) or 41(d) if in the first filed action the plaintiff would not have been liable for attorneys’ fees had the case been fully adjudicated.255 When the first case is dismissed without prejudice, though, the defendant incurs damage by being put to the expense of litigating that first case when there is no chance of having the court render a determination in its favor.256 Under these circumstances, upon filing of the second action, it is proper to reimburse the defendant for the expenses to which it has already been put, at least to the extent those expenses will not serve any useful purpose in the second action.257 Thus, as a sanction for re-filing, the proposed rule requires the plaintiff to compensate the defendant for the lost chance of prevailing on the

253 See Loubier v. Modern Acoustics, Inc., 178 F.R.D. 17, 22 (D. Conn. 1998);
DREYFUS, supra note 97.
254 See supra p. 44.
255 See Victory Beauty Supply, Inc. v. La Maur, Inc., 98 F.R.D. 306, 309 n.8 (N.D. Ill. 1983); Lunn v. United Aircraft Corp., 26 F.R.D. 12, 18 (D. Del. 1960) (“Something might be said as to the anomaly of the defendant obtaining much more in a voluntary dismissal than he could have recovered after a successful trial at length.”).
256 See, e.g., Goldlawr, Inc. v. Shubert, 32 F.R.D. 467, 472 n.15 (S.D.N.Y. 1963) (noting that the rationale on which an award of attorneys’ fees is based under Rule 41(a)(2) is not that successful defendants could have secured such fees, but that defendants have been put to the expense of litigation that may have to be repeated). By the time Rule 41(d) is invoked, it is no longer a possibility that the litigation will be repeated. Rather that possibility is now a reality.
257 See McLaughlin v. Cheshire, 676 F.2d 855, 856-57 (D.C. Cir. 1982) (“[P]laintiffs should not be forced to pay for work that is being or will be used against them in ongoing litigation”).
merits by returning the defendant to the position it would have been in had the first suit not been dismissed.

At least one court has ordered total reimbursement of costs to defendants pursuant to a conditional dismissal under Rule 41(a)(2), but the majority of decisions under both Rule 41(a)(2) and Rule 41(d) favor allowing only those costs that will not be useful in defending the second action. The proposed amendment adopts the latter practice. Thus, costs for legal research, discovery, and motions on issues that are common in both the first and second action will ordinarily not be recoverable. Total reimbursement of expenditures becomes important only if the second action is never filed or if the plaintiff brought the first action solely to harass the defendant. Of course, on some level, all repetitive filings harass, cause delay, and increase litigation costs, but whether the first action was justified is more properly reserved for a motion under Rule 11.

For Rule 41(d) not to produce unduly harsh results, costs would not be imposed under the proposed rule if the plaintiff offers substantial justification for dismissing the first action. In the past, good reasons justifying denying sanctions have included prejudice against the plaintiff in the first court, a defendant avoiding service of process for the purpose of delay, and a plaintiff’s inability to raise certain claims in state court, and a plaintiff dismissing because it could not meet the jurisdictional amount in controversy requirement. All of these dismissals would still be excused as substantially justified. The proposed rule, however, presumes there is no substantial justification for dismissal.

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238 See Le Blang Motors, Ltd. v. Subaru of Am., Inc., 148 F.3d 680, 685-86 (7th Cir. 1998) (agreeing with district court conclusion that an award of attorneys’ fees should not necessarily be limited to work that would only be useful in first action).

239 See, e.g., Esquivel v. Arau, 913 F. Supp. 1382, 1388 (C.D. Cal. 1996) (allowing reimbursement only for those costs that would not contribute toward the defense of the second action); Cauley v. Wilson, 754 F.2d 769, 772 (7th Cir. 1985); see also 9 WRIGHT & MILLER, supra note 18, at § 2366.

240 See FED. R. CIV. P. 11(b)(1),(c) (permitting sanctions when case is filed to harass and cause delay).

241 See supra p. 44.


243 See 9 WRIGHT & MILLER, supra, note 18, at § 2375; see also Zucker v. Katz, 708 F. Supp. 525, 559-40 (S.D.N.Y. 1989) (noting that a court can refuse to deny costs if a plaintiff offers a good reason for dismissal).

244 Ayers v. Conser, 26 F. Supp. 95, 95 (E.D. Tenn. 1938).


The proposed amendment's residual exception is that an award of costs shall not be awarded if the result is "unjust." This covers situations where the plaintiff is financially unable to pay the other side's costs and would be denied its day in court if the action were stayed until such costs were paid. This provision is also consistent with current Rule 41(d) practice.

Under the proposed rule, when a first action is dismissed without an award of costs, the court in which the second action is filed should offer that the defendant submit a statement of costs, including attorneys' fees, from the previously dismissed action, supported by affidavit, declaration, or any other documentation, including billing records. If the plaintiff objects to any identified costs, then the court can establish a time for a hearing or further briefing on the issue to dispose of the issue. In cases where the defendant seeks a stay as well, a bill of costs should be filed together with the motion to stay. Although this practice will delay the resolution of some cases, the amendment should have the salutary effect of discouraging dismissals in the first instance.

This proposed amendment will not likely impact wealthy plaintiffs who may, because of their wealth, choose to flout the rule, but it should discourage at least some frivolous claims. In many cases, plaintiffs will have no excuse for re-filing, and costs, including attorneys' fees, should be imposed, unless circumstances warrant otherwise. In other cases, valid reasons for dismissal may exist, but the burden will be on the plaintiff to explain why it was substantially justified in dismissing the first action. A finding of substantial justification should rest on particular and individualized facts rather than on mere allegations. The threshold showing for substantial justification should be no more or less stringent than the requirements for demonstrating substantial justification under Rule 37(a)(4).

Plaintiffs have argued that a finding of bad faith is impossible under Rule 41(d) when Rule 41 itself is structured to allow plaintiffs

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247 See supra p. 44.
248 See 9 WRIGHT & MILLER, supra note 18, at § 2875.
250 See id. (estabishing time frames for submitting response and reply regarding cost request).
251 This is similar to the "good cause" requirement under Fed. R. Civ. P. 26(c). Hines v. Wilkinson, 163 F.R.D. 262, 266 (S.D. Ohio 1995).
to dismiss and re-file their complaints. By allowing a district court to award costs in its discretion, though, Rule 41(d)'s original drafters had predetermined that a plaintiff re-files at its own peril. Thus, although the rule allows plaintiffs to re-file, it is designed to discourage such behavior by permitting costs. Indeed, not all re-filings are vexatious or in bad faith, but many are, and courts should presume so unless the plaintiff demonstrates otherwise. Applied in this manner, Rule 41(d) strikes a balance between foreclosing a plaintiff's ability to re-file its suit and preventing unscrupulous plaintiffs from abusing that ability to the detriment of defendants and the judicial process. There is nothing incompatible, therefore, with allowing a plaintiff to re-file its case and at the same time impose attorneys' fees for doing so when the first dismissal was not substantially justified. What many plaintiffs need to realize is that the right to dismiss and re-file was never intended to be a consequence free license to vex and harass or to force an unfair settlement.

There is authority suggesting that costs can be awarded under Rule 41(d) even when the first action was involuntarily dismissed. Rule 41(b) governs involuntary dismissal and states that a case may be dismissed for failure of the plaintiff to prosecute its claim or for failure to comply with the Federal Rules of Civil Procedure or any other order of court. Courts that have invoked Rule 41(d) when there has not been a voluntary dismissal have concluded that the same dangers of harassment and prejudice arising with voluntary dismissal can also occur with involuntary dismissal. For example, in Zaege1 v. Public Finance Co., the Eastern District of Missouri found that "[f]ailure [on the part of the plaintiff] to comply with the Court's pre-trial order involve[d] an element of voluntariness such that . . . a dismissal based on this serious breach of procedural duty warrant[ed] the use of Rule 41(d)." The Ninth Circuit similarly has cautioned that "a dismissal for failure to prosecute . . . may result from a plaintiff's intentional conduct as much as a voluntary dismissal," and concluded that "[t]he dangers of harassment and vexatious litigation are [thus] not necessarily less significant in cases of involuntary dismissal. . . ."

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253 Id. (stating that "even though a party has a right to take one voluntary nonsuit under [Arkansas Rule 41(d)], he still does so at his peril."). Rule 41(d) implicitly incorporated the bad faith exception into its language. Esquivel, 913 F. Supp. at 1390-91.
256 Hacopian v. United States Dep't of Labor, 709 F.2d 1295, 1297 (9th Cir. 1983).
accord with these views by permitting any case previously dismissed under Rule 41 to be subject to the cost and stay provisions of Rule 41(d). A court does not exceed its discretion under Rule 41(d) by awarding costs regardless of the form of dismissal, because federal courts always have had inherent power to protect a defendant by dismissing or staying a second case when a plaintiff has failed to pay the costs of a prior action. 297

The changes to Rule 41(d) proposed by this amendment place much greater stress on the serious nature of repetitive filings than current Rule 41(d) and are significantly clearer about the potential adverse consequences courts can visit upon plaintiffs who act in derogation of Rule 41(d)’s strictures. Amending Rule 41(d) in this manner should therefore deter the number of voluntary and involuntary dismissals and subsequent re-filings.

VI. CONCLUSION

“No clearer case of delay to the judicial process, unnecessary expense to an opposing party, and encumbering of the court’s docket exists than when a case is voluntarily dismissed by a party and then refiled.”298 Authority to order payment of attorneys’ fees under Rule 41(d) should therefore be conclusively established if courts desire to advance the rule’s purpose. Arguably this authority already exists, but it has not been uniformly recognized. Restricting courts’ ability to exercise this discretionary authority will embolden plaintiffs to use the practice of voluntary dismissal and re-filing as a tool to financially wear down a defendant in order to extract favorable settlements upon re-filing. The proposed amendment eliminates uncertainty surrounding Rule 41(d) by requiring imposition of attorneys’ fee sanctions upon re-filing, except where there is substantial justification for re-filing or where such an award would be unjust. In the end, holding plaintiffs responsible for defendants’ attorneys’ fees will continue the trend toward greater civil justice reform and litigant accountability without unduly interfering with a plaintiff’s ability to sustain a lawsuit or, for that matter, its need to dismiss one.

Imposing attorneys’ fees does not offend the American Rule because courts retain discretion to deny attorneys’ fees. Further, the rule only applies when a party acts in bad faith, which would be presumed under the Rule when a case is voluntarily dismissed and re-filed. Shifting attorneys’ fees under Rule 41(d) would ultimately

297 See supra note 230 and accompanying text.
vindicate judicial authority and restore to the defendant those expenses that are the product of the plaintiff’s improper tactics. This practice would be consistent with Rule 1’s mandate that the federal rules be construed liberally to achieve the “just, speedy and inexpensive determination of every action.”

With a harsher penalty for dismissing and re-filing, there will likely be fewer unjustified re-filings, and more of a likelihood of full reimbursement for defendants forced to expend unnecessary time and money by virtue of defending the same claim on two separate occasions. The proposed amendment thus would positively impact the cost of conducting federal civil litigation.

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