# Attorneys' Fees and the Interpretation of Costs Under Federal Rule of Civil Procedure 41(d)

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*"After now some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything short of sickness and death."*[1]

## I. INTRODUCTION

Judge Learned Hand's well-known and widely shared dread of lawsuits emphasizes the importance of the goals of Federal Rule of Civil Procedure 41(d): deterrence of both frivolous lawsuits and forum shopping. Rule 41(d) applies to a plaintiff who previously voluntarily dismissed its suit but chooses to refile against the *same* defendant based on the *same* claim.[2] By its terms, Rule 41(d) generally deals with two groups of plaintiffs: the particularly persistent true believer or the wealthy forum-shopper.

The particularly persistent litigant is not always malicious; instead, this litigant may be a true believer—sometimes to the point of being a devoted conspiracy theorist.[3] True believers in conspiracy theories not only make

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1. Judge Learned Hand, The Deficiencies of Trials to Reach the Heart of the Matter, Lecture at the Association of the Bar of the City of New York (Nov. 17, 1921), *reprinted in* 31 Int'l Soc'y of Barristers Q. 309 (1996).

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

3. The 1970s saw an explosion in the legitimacy of conspiracy theories. Following a difficult decade marked by political unrest, the Vietnam War, and the assassination of President John F. Kennedy, the Watergate scandal confirmed many Americans' fears, fueled a deep distrust of "official" authority, and legitimized conspiracy theories. *See* Leon Neyfakh, *Rabbit Holes*, SLATE (Jan. 10, 2018, 6:00 AM), https://slate.com/news-and-politics/2019/09/slow-burn-season-1-episode-6-transcript.html [https://perma.cc/6FLW-ML62] (discussing the proliferation of the conspiracy theory and the rise of Mae Brussell following Watergate); Tom Jackman, *Ashburn's Marguerite McCausland Recalls Surviving Crash of United Flight 553 in Chicago in 1972*, WASH. POST (Dec. 6, 2012), https://www.washingtonpost.com/blogs/the-state-of-nova/post/ashburns-marguerite-mccausland-recalls-surviving-crash-of-united-flight-553-in-chicago-in-1972/2012/12/05/f991138e-3efb-11e2-bca3-aadc9b7e29c5_blog.html [https://perma.cc/LPU8-2FRM] (dismissing the theory that the FBI orchestrated the crash of United Flight 553 because Dorothy Hunt, the wife of Watergate conspirator E. Howard Hunt, was a passenger on the plane but acknowledging that the crash "continues to intrigue conspiracy

choices that lead to major catastrophes like Ruby Ridge and the resurgence of measles, but they also file lawsuits that negatively affect the efficiency of the courts.[4] The court system, with an already brimming calendar, views these frivolous suits as "a drain on precious judicial resources of time and energy" and "fight[s] back with court-imposed sanctions for frivolous filings and appeals."[5] In some jurisdictions, however, the binding circuit interpretation of Federal Rule of Civil Procedure 41(d) deprives busy federal district judges of the power to sanction vexatious and repetitive litigation; defendants—no matter how far-fetched the plot alleged by the plaintiff—may have to pay their own attorneys' fees[6] in not one but two lawsuits on the same issue.

For example, in the Tenth Circuit, a plaintiff filed a § 1983 suit alleging that defendants "conspired to violate his First Amendment rights due to his vocal opposition to the Kansas tobacco settlement and corporate hog-farming operations."[7] After the district court allowed the plaintiff to voluntarily dismiss the first complaint, the plaintiff filed the same suit again.[8] Luckily for the defendants in this case, the Tenth Circuit allows district judges to use their discretion to award attorneys' fees in situations involving frivolous litigation.[9] Had the defendants been unlucky enough to have been litigating

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theorists to this day"); *see also* GOVERNMENT BY GUNPLAY: ASSASSINATION CONSPIRACY THEORIES FROM DALLAS TO TODAY (Sid Blumenthal & Harvey Yazijian eds., 1976).

4. While some conspiracy theories appear harmless, others have contributed to tangible problems, like the fear of vaccinations leading to the resurgence of measles. Melissa Hogenboom, *The Enduring Appeal of Conspiracy Theories*, BBC FUTURE (Jan. 24, 2018), http://www.bbc.com/future/story/20180124-the-enduring-appeal-of-conspiracy-theories [https://perma.cc/6FAA-32FF] ("While some conspiracy theories are relatively harmless—the argument that N[ASA] faked the Moon landing, or bizarrely, that Beatle Sir Paul McCartney died long ago with a doppelganger taking his place ever since—others have damaging ripple-effects."). Conspiracy theorists also clog up the court systems with lawsuits. *See* Carrie Johnson, *Judge Hands Setback to Conspiracy Theorist Corsi in His Suit Against DOJ*, NPR (Jan. 3, 2019, 5:18 PM), https://www.npr.org/2019/01/03/682030915/judge-hands-setback-to-conspiracy-theorist-corsi-in-his-suit-against-doj [https://perma.cc/R9EK-P6YE].

5. *See, e.g.*, Angela P. Harris, *Vultures in Eagles' Clothing: Conspiracy and Racial Fantasy in Populist Legal Thought*, 10 MICH. J. RACE & L. 269, 283 (2005).

6. This Comment uses the phrase "attorneys' fees" to refer to "[t]he charge to a client for services performed for the client," *Attorney's Fee*, BLACK'S LAW DICTIONARY (11th ed. 2019), which includes altering some quotations. The author uses the plural possessive throughout because most scenarios involve multiple attorneys receiving fees.

7. Meredith v. Stovall, No. 99-3350, 2000 WL 807355, at *1 (10th Cir. June 23, 2000).

8. *See id.*

9. *Id.*

in the Third, Fourth, Fifth, Sixth, or Seventh Circuits, those courts would have required the defendants to pay their own attorneys' fees in both suits.[10]

While the particularly persistent plaintiff's lawsuits feature frivolous litigation, the opportunistic forum-shopping plaintiff files multiple lawsuits in different state and federal courts and adopts the wait-and-see approach, dismissing or sticking with a suit in a forum based on various rulings. This plaintiff often has the means to fund this onslaught of litigation and strategically dismisses suits that take unfavorable turns. This wastes judicial resources and empties the pockets of defendants. This type of plaintiff prompted the Second Circuit to recently hold that courts may award attorneys' fees to punish this type of plaintiff and deter forum shopping.[11] However, courts do not deal with these situations uniformly.

Circuits have split on whether "costs" in the Federal Rule of Civil Procedure 41(d) include attorneys' fees. Rule 41(d) does not explicitly define costs but instead provides the following:

> If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:
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> (1) may order the plaintiff to pay all or part of the costs of that previous action; and
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> (2) may stay the proceedings until the plaintiff has complied.[12]

Courts have taken three different approaches on whether to award attorneys' fees under Rule 41(d): (1) costs do not include attorneys' fees,[13] (2) costs do include attorneys' fees,[14] and (3) costs include attorneys' fees only if the underlying statute authorizes them.[15] The circuit split resurfaced in 2018 when the Second[16] and the Third Circuits[17] addressed the issue for the first time. This Comment argues that allowing recovery of attorneys' fees under Rule 41(d) is the right approach because it maximizes efficiency, deters

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10. *See* Garza v. Citigroup Inc., 881 F.3d 277, 279 (3d Cir. 2018); Andrews v. Am.'s Living Ctrs., LLC, 827 F.3d 306 (4th Cir. 2016); Portillo v. Cunningham, 872 F.3d 728 (5th Cir. 2017); Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868 (6th Cir. 2000); Esposito v. Piatrowski, 223 F.3d 497 (7th Cir. 2000).

11. Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 24–26 (2d Cir. 2018).

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

13. *See* Part II.B.1, *infra*.

14. *See* Part II.B.2, *infra*.

15. *See* Part II.B.3, *infra*.

16. *Horowitz*, 888 F.3d at 24–27 (costs do include attorneys' fees).

17. Garza v. Citigroup Inc., 881 F.3d 277, 279 (3d Cir. 2018) (costs include attorneys' fees if the underlying statute explicitly authorizes them).

vexatious litigation, and discourages forum shopping. Additionally, this Comment recommends that the Ninth Circuit should join the Second, Eighth, and Tenth Circuits in ruling that "costs" in Federal Rule of Civil Procedure 41(d) include attorneys' fees.

Part II explores the history of the circuit split. It first discusses the rulemaking process, Rule 41, and the "American Rule" against awarding attorneys' fees. It also explores how courts interpret "costs" in other Federal Rules of Civil Procedure and how those interpretations influence the circuit split. Part III examines the Second Circuit's recent decision in *Horowitz v. 148 South Emerson Associates LLC* and its reasoning for allowing an award of attorneys' fees under Rule 41(d). Part IV analyzes why the Second Circuit's approach best serves the judicial system, why an amendment would be the best solution, and why the Ninth Circuit would benefit from allowing an award of attorneys' fees. Finally, Part V briefly concludes.

## II. BACKGROUND

This Part discusses the rules about "costs" and the history of the circuit split. When interpreting Rule 41(d), courts consider the common-law American Rule, the text and history of Rule 41, and the interpretation of "costs" in other Federal Rules of Civil Procedure ("Federal Rules"). This Part then explains how the three different interpretations of "costs" in Rule 41(d) developed.

### *A. "Costs" at Common Law and in the Federal Rules*

The American Rule, Rule 41 itself, and the definition of "costs" in other Federal Rules influence the interpretation of "costs" in Rule 41(d). A brief history of the Federal Rules and the rulemaking process provides insight into the way courts interpret the Federal Rules. From the early days of the Republic until 1938, federal courts generally followed federal procedure for equity and admiralty but followed state procedural law as of September 1789 for other cases.[18] The wide variety in federal court procedure, based on the

18. Judiciary Act of 1789 § 34, 28 U.S.C. § 1652 (2018) (original version at ch. 20, § 34, 1 Stat. 73, 92 (1789)); *see* Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323, 325–26 (1991). For the sake of brevity, this Comment will not detail how and when federal courts followed state procedure and the changes in that process between 1789 and 1938. For such a history, *see* 4 CHARLES A. WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE §§ 1002–1003, at 9–21 (4th ed. 2015) (providing a history of procedure in the federal courts).

state in which the court was located, produced a lack of uniformity and provided incentives to forum shop.[19] In an effort to make procedure "not only simpler but more responsive to actual needs,"[20] Congress passed the Rules Enabling Act in 1934.[21] The Act gave the Supreme Court the authority to write procedural rules.[22] Rule 41 was promulgated along with the first set of Federal Rules in 1938.[23]

Although the Rules Enabling Act gave the Supreme Court the authority to write the Federal Rules, today, enactment of a new Federal Rule requires a multi-step process involving five separate institutions: the Supreme Court, the Judicial Conference, the Standing Committee, the Advisory Committee on Civil Rules, and Congress.[24] The Judicial Conference of the United States appoints and oversees the Standing Committee and the Advisory Committee on Civil Rules.[25] Composed of judges, lawyers, and law professors, the Advisory Committee oversees the formulation of the Federal Rules.[26]

A proposed rule undergoes many levels of scrutiny. Congress receives a proposed rule only after it has been approved by four separate bodies—the Advisory Committee, the Standing Committee, the Judicial Conference, and the Supreme Court.[27] A proposed rule begins with the Advisory Committee, which conducts a public notice and comment period.[28] Once the Advisory

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19. *See* Baker, *supra* note 18, at 325.

20. SELECTED PAPERS OF HOMER CUMMINGS: ATTORNEY GENERAL OF THE UNITED STATES 1933–1939, at 182 (Carl Brent Swisher ed., 1939). Homer Cummings was Attorney General of the United States from 1933–1939 and sponsored the Rules Enabling Act in 1934. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 969–70 (1987).

21. *See* Subrin, *supra* note 20, at 969–70. The current version of the Rules Enabling Act is codified at 28 U.S.C. § 2072 (2018).

22. 28 U.S.C. § 2072(a) (2018); Subrin, *supra* note 20, at 969–70. The Rules were intended to give judges greater discretion over cases, and the drafters wrestled with the "largely uncontrolled procedure" that they were creating. *Id.* at 975–76. For an excellent discussion of the legal history that led to the Rules Enabling Act, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433 (2010).

23. *See* 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2361, at 406–07 (3d ed. 2008).

24. *See* 28 U.S.C. § 2073 (2018); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103–04, 1108–09 (2002).

25. Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 892 (1999).

26. 28 U.S.C. § 2073(a)(2) (2018) (stating that each committee "shall consist of members of the bench and the professional bar, and trial and appellate judges").

27. *See* Struve, *supra* note 24, at 1114–15.

28. *Id.* at 1114.

Committee approves a proposed rule, the Standing Committee reviews the proposal and submits the proposed rule to the Judicial Conference.[29] If the Judicial Conference approves the proposed rule, it sends the proposal on to the Supreme Court.[30] If the Supreme Court approves, Congress then receives the proposal and has seven months to veto the rule.[31] Any amendment to the Federal Rules undergoes the same rulemaking process.[32] The Advisory Committee amended Rule 41 seven times but has not substantively changed the Rule.[33]

### 1. The American Rule: No Attorneys' Fees

The American Rule requires each party to pay its own attorneys' fees, regardless of who prevails;[34] the Supreme Court has noted the winning party is not generally entitled to recover attorneys' fees from the loser.[35] The American Rule developed in contrast to common practice in Great Britain, where British courts have implemented a "loser-pays" rule since the Middle Ages.[36] Instead of following suit, American courts decided that each side would generally pay its own attorneys' fees, unless statute or contract authorized otherwise.[37] When examining statutes or contracts that may award

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29. 28 U.S.C. § 2073(b) (2018); *see* Bone, *supra* note 25, at 892. After the Supreme Court discharged the Advisory Committee in 1955, Congress responded in 1958 by statutorily authorizing the creation of the Judicial Conference. *See* Baker, *supra* note 18, at 327–28. Congress charged the Judicial Conference with appointing Standing Committees. *Id.* at 329.

30. Bone, *supra* note 25, at 892. The Chief Justice of the Supreme Court presides over the Judicial Conference, which consists of the chief judges of each circuit court of appeals, a district judge from each circuit, and the chief judge of the Court of International Trade. 28 U.S.C. § 331 (2018); *see* Struve, *supra* note 24, at 1109–10.

31. 28 U.S.C. § 2074(a) (2018); *see* Bone, *supra* note 25, at 892; Struve, *supra* note 24, at 1115.

32. *See* 28 U.S.C. § 2073(b).

33. *See* WRIGHT & MILLER, *supra* note 23, at 406–07 ("It is doubtful if a single case would have been decided differently if the rule stood as it did in 1938 . . . .").

34. 7B WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1803 (3d ed. Supp. Nov. 2018) ("The general American rule is that attorney[s'] fees are not taxable costs and cannot be awarded without some specific authority.").

35. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975); Peter Karsten & Oliver Bateman, *Detecting Good Public Policy Rationales for the American Rule: A Response to the Ill-Conceived Calls for "Loser Pays" Rule*, 66 DUKE L.J. 729, 736–38 (2016).

36. *Alyeska Pipeline*, 421 U.S. at 247–48 n.18.

37. *Id.* at 257–58. Americans developed this rule in part to reflect their republican society, as opposed to the "hierarchical class structure" in England. Karsten & Bateman, *supra* note 35, at 731. This lack of class structure stemmed from many differences, including the distinction between advocates and solicitors in English law that is not present in America. *Id.* While American jurists provided justifications for breaking with common-law rules in adopting

attorneys' fees, courts generally look for explicit authorization by Congress.[38] In the absence of explicit authorization to award attorneys' fees, the Supreme Court has enforced the American Rule to avoid improperly encroaching on congressional authority.[39]

However, federal judges and academics have challenged the American Rule. Federal equity courts have established exceptions to the American Rule and awarded attorneys' fees "when the interests of justice so require."[40] Additionally, commentators have criticized the American Rule as offending "common sense" and posing "a serious threat to our administration of justice."[41] Despite these criticisms, the Supreme Court generally continues to enforce the American Rule.[42]

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contingency-fee payments and allowing attorneys to sue their client for payment of attorneys' fees, "one of the most curious features of the American [R]ule in the nineteenth century was its almost total absence of justification." *Id.* at 738 (quoting John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 23 (1984)).

38. *Alyeska Pipeline*, 421 U.S. at 254–55.

39. *Id.* at 269–71 ("[The American Rule] is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs . . . .").

40. *Id.* at 272 (Marshall, J., dissenting) (disagreeing with the majority's characterization of the balance of power between Congress and itself regarding the power to award attorneys' fees because federal equity courts' power in this area is "well-established"). *See, e.g.*, Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 580 (1946) (awarding attorneys' fees when a party's actions were clearly oppressive or vexatious); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426 (1923) (awarding attorneys' fees in a civil contempt action for willful disobedience of a court order); Schlein v. Smith, 160 F.2d 22, 25 (D.C. Cir. 1947) (awarding attorneys' fees in a case of gross fraud). "Even absent express statutory authority, for example, there exists in equity judicial license to grant attorney[s'] fees in particular cases." Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 645 (1974).

41. Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792, 799 (1966); *see also* Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 437–38 (1973). *See generally* Calvin A. Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV 75 (1963); Charles T. McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931); Gerald T. McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972); William B. Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967); *Court Awarded Attorney's Fees and Equal Access to the Courts*, *supra* note 40, at 645.

42. *Alyeska Pipeline*, 421 U.S. at 270–71 (recognizing criticisms of the American Rule and characterizing the decision to disallow recovery of attorneys' fees not as an assessment of the "merits or demerits of the 'American Rule,'" but rather as a judgment regarding the allocation of power between Congress and the courts).

2. Rule 41

While the American Rule governs awards of attorneys' fees under common law, Rule 41 governs voluntary and involuntary dismissal of actions.[43] The Supreme Court discussed the history of Rule 41 in *Cooter & Gell v. Hartmarx*.[44] The Court found that the drafters of the Federal Rules intended to "eliminate '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.'"[45] Justice Stevens's dissent noted that before the adoption of Rule 41(a)(1), a plaintiff "could dismiss an action at law up until the entry of the verdict or judgment."[46] This gave the plaintiff the ability to harass a defendant with frivolous litigation.[47] Courts did not consider second litigation on the same subject matter to outweigh the unqualified right of the plaintiff to dismiss the suit at any time.[48]

The drafters of the Rules intended to remedy this situation and placed limits on a plaintiff's ability to voluntarily dismiss an action without prejudice through Rule 41.[49] Rule 41 prevents a plaintiff from voluntarily dismissing an action up until the entry of the verdict and instead requires a plaintiff to voluntarily dismiss before the opposing party serves "either an answer or a motion for summary judgment."[50] If a plaintiff misses this

43. *See* FED. R. CIV. P. 41. For a discussion of the types of dismissals available under Rule 41 and their effects on preclusion, see Bradley Scott Shannon, *Dismissing Federal Rule of Civil Procedure 41*, 52 U. LOUISVILLE L. REV. 265, 274–82 (2014).

44. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 397 (1990).

45. *Id.* (quoting Judge George Donworth, member of the Advisory Committee on Rules of Civil Procedure).

46. *Id.* at 410 (Stevens, J., dissenting). Before the drafters formulated Rule 41, state statutes often allowed a plaintiff to dismiss a suit at any time before the retirement of the jury, "even after the judge had granted a motion to direct a verdict for the defendant." 8 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 41 app. 100 (Matthew Bender 3d ed. 2019) (citing *In re* Skinner & Eddy Corp., 265 U.S. 86 (1924); Barrett v. Virginian Ry. Co., 250 U.S. 473 (1919); Knight v. Ill. Cent. R.R. Co., 180 F. 368 (6th Cir. 1910); Meyer v. Nat. Biscuit Co., 168 F. 906 (7th Cir. 1909)).

47. *See Cooter & Gell*, 496 U.S. at 410.

48. "[A] plaintiff possesses the unqualified right to dismiss . . . his bill in equity unless some plain legal prejudice will result to the defendant other than the mere prospect of a second litigation upon the subject matter." Jones v. Sec. & Exch. Comm'n, 298 U.S. 1, 19 (1936). However, the plaintiff's right was not truly unqualified; courts did protect the rights of defendants in certain circumstances. MOORE ET AL., *supra* note 46, § 41 app. 100 (not allowing a voluntary dismissal if "the defendant was reasonably entitled to a decree on the merits, if the defendant sought affirmative relief, if a new suit would bar the defendant's relief, . . . if the parties had agreed to refer any issue to a master . . . subject to district court rules").

49. *Cooter & Gell*, 496 U.S. at 397.

50. *See* FED. R. CIV. P. 41(a)(1)(A)(i).

deadline but still wishes to dismiss the suit, the plaintiff can voluntarily dismiss without prejudice by convincing "all parties who have appeared" to stipulate to a dismissal.[51] Moreover, the drafters placed additional safeguards in the future: if a plaintiff re-files after a previous dismissal, the court "may order the plaintiff to pay all or part of the costs of that previous action."[52] While the history behind Rule 41 is informative, the plain language provides little guidance; it does not specify whether costs include attorneys' fees.[53] However, all circuits agree that the purpose of Rule 41(d) is "to deter forum shopping and vexatious litigation."[54]

### 3. Costs in Other Rules

The Federal Rules use the terms "attorneys' fees," "costs," and "reasonable expenses," and the relationships between the three terms remain murky. Federal Rule of Civil Procedure 54(d) explicitly provides for the recovery of "attorney[s'] fees."[55] Additionally, Federal Rule of Civil Procedure 37(d) describes "reasonable expenses" as "including attorney[s'] fees."[56] On the other hand, the Supreme Court has interpreted "costs" to include attorneys' fees only where authorized by the underlying statute in Federal Rule of Civil Procedure 68.[57] Because *Marek v. Chesny* is the only case in which the Supreme Court has considered the meaning of "costs" in the Federal Rules, its analysis provides insight.

In *Marek*, the Supreme Court considered the purpose, definition, and history of Federal Rule of Civil Procedure 68 when determining that "costs" include "attorney[s'] fees" if authorized by the underlying statute.[58] The purpose of the Rule—to encourage settlements—was "neutral."[59] The Court noted that most exceptions to the American Rule were statutory

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51. *See id.* § 41(a)(1)(A)(ii). A plaintiff may also request for a suit to be dismissed by a court order "on terms that the court considers proper." *Id.* § 41(a)(2).

52. *Id.* § 41(d).

53. *See id.*

54. *See, e.g.*, Garza v. Citigroup, Inc., 881 F.3d 277, 281–82 (3d Cir. 2018) (quoting Esposito v. Piatrowski, 223 F.3d 497, 501 (7th Cir. 2000)).

55. FED. R. CIV. P. 54(d); *see* Andrews v. Am.'s Living Ctrs., LLC, 827 F.3d 306, 311 n.2 (4th Cir. 2016).

56. FED. R. CIV. P. 37(d).

57. *See* Marek v. Chesny, 473 U.S. 1, 8–9 (1985) (examining the statute that provided the cause of action to determine whether it authorized recovery of attorneys' fees).

58. *Id.* at 8–10.

59. *See id.* at 10 (finding that encouraging settlements—the purpose of the Rule—will "serve the interests of plaintiffs as well as defendants").

authorizations that expressly authorized the award of attorneys' fees.[60] The Court found that despite the drafters' awareness of statutorily authorized exceptions to the American Rule, the drafters did not define "costs" or leave any clues about its meaning in the history of the Rule.[61] Because the Court found that the drafters purposefully left "costs" undefined, the Court inferred that the drafters intended to leave the issue to Congress.[62] Therefore, if Congress authorized recovery of attorneys' fees in the substantive statute, then courts could award attorneys' fees under Rule 68.[63]

Can "costs" in other Federal Rules provide guidance or is the meaning fundamentally different in Rule 41(d)? As discussed in Part II.A, the Supreme Court oversees the creation of the Federal Rules under a delegation of authority from Congress.[64] When the Court interprets the rules, its "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."[65] Because of this, courts generally consider whether an interpretation of a Federal Rule would frustrate or advance the rule's purpose.[66] One commentator argues against using Rule 54 and Rule 68 as guidance for interpreting Rule 41(d) because the meaning of "costs" is not the same in both rules.[67] Another commentator argues that the express provision of attorneys' fees in other Rules shows that attorneys' fees are not included in "costs" in Rule 41(d).[68] Because the purposes of Rule 68 (encouraging settlement) and Rule 41(d) (deterring frivolous and vexatious litigation) do not align, this Comment argues that the definition of "costs" in Rule 68 is not helpful in interpreting Rule 41(d).[69]

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60. *Id.* at 8.

61. *Id.* at 8–9.

62. *Id.* at 9 ("[T]he 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.").

63. *Id.*

64. 28 U.S.C. § 2072 (2018); *see supra* notes 18–23 and accompanying text.

65. Thomas Southard, *Increasing the "Costs" of Nonsuit: A Proposed Clarifying Amendment to Federal Rule of Civil Procedure 41(d)*, 32 SETON HALL L. REV. 367, 380 (2002).

66. *Marek*, 473 U.S. at 6 (adopting a "construction of the Rule [that] best furthers the objective of the Rule" when interpreting Federal Rule of Civil Procedure 68); *see* Southard, *supra* note 65, at 380.

67. Southard, *supra* note 65, at 384–87.

68. Edward X. Clinton, Jr., *Does Rule 41(d) Authorize an Award of Attorney's Fees?*, 71 ST. JOHN'S L. REV. 81, 90 n.60 (1997) (discussing the express authorization of the recovery of attorneys' fees in Rule 11(c)(2), Rule 26(g)(3), Rule 30(g)(2), Rule 37(a)(4)(A) & (B), Rule 37(c)(1)–(2), Rule 37(d), and Rule 56(g)).

69. *See infra* Part IV.A.

### *B. History of the Circuit Split*

Courts have taken three different approaches on whether to award attorneys' fees under Rule 41(d): (1) costs do not include attorneys' fees, (the "Never Awardable Interpretation"),[70] (2) costs do include attorneys' fees, (the "Always Awardable Interpretation"),[71] and (3) costs include attorneys' fees only if the underlying statute authorizes them (the "Underlying Substantive Statute Interpretation").[72]

#### 1. Costs Do Not Include Attorneys' Fees

The Sixth Circuit adopted the first approach, finding that costs do not include attorneys' fees because of the plain language of the Rule and Congress's ability to authorize attorneys' fees.[73] In *Rogers*, the plaintiff brought a tort claim in state court based on her injuries after she tripped and fell on a wooden pallet in the aisle of a Wal-Mart store.[74] Wal-Mart removed the suit to federal district court under diversity jurisdiction.[75] The suit proceeded for a year, but after the plaintiff missed the deadline to disclose her expert witnesses, the parties stipulated to a dismissal without prejudice.[76] Four months later, the plaintiff filed a claim based on the same subject matter in state court, and Wal-Mart again filed a notice of removal to federal district court.[77] After the district court awarded costs and attorneys' fees from the first action under Rule 41(d), the plaintiff appealed.[78]

In front of the Sixth Circuit, the plaintiff argued that she merely wanted to litigate her case in state court, so she did not possess vexatious intent.[79] Wal-Mart argued that the plaintiff only sought to dismiss the initial action after she had missed the deadline to disclose her expert witnesses, which led the court to conclude that the plaintiff may have had some intent to gain a tactical

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

71. Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 24–26 (2d Cir. 2018); Meredith v. Stovall, No. 99-3350, 2000 WL 807355, at *1 (10th Cir. June 23, 2000); Evans v. Safeway Stores, Inc., 623 F.2d 121, 122 (8th Cir. 1980) (per curiam).

72. Garza v. Citigroup, Inc., 881 F.3d 277, 279 (3d Cir. 2018); Portillo v. Cunningham, 872 F.3d 728, 738–39 (5th Cir. 2017); Andrews v. Am.'s Living Ctrs., LLC, 827 F.3d 306, 309–11 (4th Cir. 2016); Esposito v. Piatrowski, 223 F.3d 497, 500–01 (7th Cir. 2000).

73. *Rogers*, 230 F.3d at 873–76.

74. *Id.* at 870.

75. *Id.*

76. *Id.* at 870, 874.

77. *Id.* at 870.

78. *Id.* at 871, 873.

79. *Id.* at 874.

advantage in re-filing in state court.[80] The court noted, though, that Rule 41(d) intends to prevent forum shopping, in addition to preventing vexatious litigation.[81] Because of this, the court affirmed the "costs" of $185 but denied the award of attorneys' fees.[82] An award of attorneys' fees would have increased the size of the plaintiff's liability to $1766.55.[83]

After acknowledging that the majority of courts have found that attorneys' fees are available under Rule 41(d), the Sixth Circuit held that attorneys' fees are not available under Rule 41(d) because the plain language of the rule does not include attorneys' fees.[84] The court found that Congress generally expressly authorized attorneys' fees if it intended for attorneys' fees to be awardable.[85] However, the court noted that Congress did not actually choose the words in the rule but rather declined to exercise its veto power.[86] Additionally, the court wanted to avoid conflating the terms "costs" and "attorney[s'] fees," because the law generally recognizes a difference between the two terms.[87] When considering the structure of the Federal Rules in determining the question of attorneys' fees, the court found it "ambiguous at best."[88]

The Sixth Circuit rejected the majority rule because it gave too little consideration to the plain language of the rule and too much consideration to the policy behind the rule.[89] The court also considered the argument that because Rule 41(a)(2) allows for recovery of attorneys' fees and both rules intend to prevent vexatious litigation and forum shopping, both rules should permit an award of attorneys' fees.[90] However, the court again found that the

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80. *Id.*

81. *Id.* (finding that Rule 41(d)'s purpose is to prevent forum shopping "especially by plaintiffs who have suffered setbacks in one court and dismiss to try their luck somewhere else") (quoting Robinson v. Nelson, No. 98–10802–MLW, 1999 WL 95720, at *2 (D. Mass. Feb.18, 1999)).

82. *Id.*

83. *Id.* at 873.

84. *Id.* at 874. When this case was decided in 2000, the majority of courts awarded attorneys' fees under Rule 41. *Id.* As this Comment discusses, courts have more recently split into the three approaches: the Never Awardable Interpretation, the Always Awardable Interpretation, and the Underlying Substantive Statute Interpretation.

85. *Id.*

86. *Id.* at 874 n.4 (explaining the process that leads to the Federal Rules of Civil Procedure and noting that the Advisory Committee on Civil Rules is responsible for the Rule and Congress possesses a veto power—not power to write the rules) (citing Bone, *supra* note 25, at 892–93).

87. *Rogers*, 230 F.3d at 874.

88. *Id.* at 875 (finding ambiguous structure because several rules, including 30(g)(2), 37(a)(4), 37(c), 37(d) & 56(g), explicitly allow recovery of attorneys' fees).

89. *Id.*

90. *Id.*

structure of the Federal Rules is "not so clear on this issue that it overcomes the absence of an express provision for attorneys' fees in Rule 41(d)."[91]

2. Costs Do Include Attorneys' Fees

The Eighth, Tenth, and Second Circuits have adopted the second approach, the Always Awardable Interpretation.[92] Until 1980, no circuit courts had addressed whether costs in Rule 41(d) include attorneys' fees. In *Evans v. Safeway Stores, Inc.*,[93] the Eighth Circuit affirmed an award of two hundred dollars of attorneys' fees with very little explanation.[94] Twenty years later, the Tenth Circuit agreed. In *Meredith*, the plaintiff filed a § 1983 suit alleging that defendants "conspired to violate his First Amendment rights due to his vocal opposition to the Kansas tobacco settlement and corporate hog-farming operations."[95] The district court dismissed the plaintiff's first complaint.[96] After the plaintiff filed a second complaint that was also subsequently dismissed, the district court ordered the plaintiff to pay the defendants' costs and attorneys' fees under Rule 41(d).[97]

On appeal, the Tenth Circuit first found that under the language of Rule 41(d), the trial court possessed the discretion to decide whether to impose costs and attorneys' fees.[98] Because the Tenth Circuit found that the trial court could award attorneys' fees, the Tenth Circuit reviewed the finding only for abuse of discretion.[99] In deciding to affirm the order for payment of attorneys' fees, the court considered the purpose of Rule 41(d)—to prevent vexatious lawsuits.[100] The court found that Rule 41(d) intends to impose costs when

91. *Id.* (discussing the argument that while Rule 41(a)(2) contemplates negotiation between the court and the litigant, Rule 41(d) does not; as such, the rules are not parallel enough to permit inferring that attorneys' fees must be available in both).

92. Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 24–27 (2d Cir. 2018); Meredith v. Stovall, No. 99-3350, 2000 WL 807355, at *1 (10th Cir. June 23, 2000); Evans v. Safeway Stores, Inc., 623 F.2d 121, 122 (8th Cir. 1980) (per curiam). See Part III.A, *infra*, for a discussion of the Second Circuit's opinion in *Horowitz*.

93. *Evans*, 623 F.2d at 122.

94. *Id.*

95. *Meredith*, 2000 WL 807355, at *1.

96. *Id.*

97. *Id.*

98. *Id.* (citing MOORE ET AL., *supra* note 46, §§ 41.70[1], 41.70[6] (3d ed. 1997)). The current version of Moore's Federal Practice § 41-70[6] still finds that costs under Rule 41(d) "generally . . . include attorney[s'] fees," but recognizes that "there is authority to the contrary," noting the two other approaches: attorneys' fees are not recoverable, or attorneys' fees are recoverable only when allowed by statute. MOORE ET AL., *supra note* 46, § 41.70[6].

99. *Meredith*, 2000 WL 807355, at *1.

100. *Id.*

vexatious lawsuits have been filed repetitively.[101] Because the court found that the plaintiff's complaint was frivolous, the court affirmed the award of attorneys' fees under Rule 41(d).[102] However, the Tenth Circuit's opinion was unpublished, and as such does not serve as binding precedent.[103] While most district courts have followed the Tenth Circuit in authorizing an award of attorneys' fees,[104] one district court instead agreed with the Never Awardable Interpretation, holding that an award of attorneys' fees is not available under Rule 41(d) and suggesting that even if *Meredith* were binding, it would require a showing that the plaintiff had acted vexatiously.[105]

### 3. Yes, Costs Include Attorneys' Fees Only if the Underlying Statute Authorizes Them

The Third, Fourth, Fifth, and Seventh Circuits adopted the third approach, the Underlying Substantive Statute Interpretation.[106] These courts balance the American Rule's policy of denying an attorneys' fees award with Rule 41(d)'s purpose of preventing vexatious litigation.[107] In striking the balance between the American Rule and its exceptions, these courts have found the Supreme Court's interpretation of "costs" in Rule 68 persuasive.[108]

In *Garza*, the Third Circuit considered the three differing approaches among the circuits.[109] The court rejected the Always Awardable Interpretation because it was reluctant to disturb the American Rule without

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101. *Id.* (finding that "[t]he purpose of the rule is to prevent the maintenance of vexatious law suits [sic] and to secure, where such suits are shown to have been brought repetitively, payment of costs for prior instances of such vexatious conduct." (quoting United Transp. Union v. Me. Cent. R.R. Co., 107 F.R.D. 391, 392 (D. Me. 1985))).

102. *Id.*

103. *Id.*

104. *See, e.g.*, Oteng v. Golden Star Res., Ltd., 615 F. Supp. 2d 1228, 1240 (D. Colo. 2009) (following the "majority rule" in holding that attorneys' fees are available under Rule 41(d)); *see also* Moore v. Stadium Mgmt. Co., No.15-cv-00482-PAB-NYW, 2015 WL 8306523, at *4 (D. Colo. Dec. 9, 2015) (noting that a party's motive is not dispositive of the Rule 41(d) issue but that the court will weigh the party's motives).

105. Cardozo v. Home Depot U.S.A., Inc., No. 10–2011–JWL, 2010 WL 2774137, at *5–8 n.5 (D. Kan. July 13, 2010).

106. Garza v. Citigroup Inc., 881 F.3d 277, 279 (3d Cir. 2018); Portillo v. Cunningham, 872 F.3d 728, 738–39 (5th Cir. 2017); Andrews v. Am.'s Living Ctrs., LLC, 827 F.3d 306, 309–12 (4th Cir. 2016); Esposito v. Piatrowski, 223 F.3d 497, 501–02 (7th Cir. 2000).

107. *Garza*, 881 F.3d at 281–82; *Portillo*, 872 F.3d at 738–39; *Andrews*, 827 F.3d at 309–10.

108. *Garza*, 881 F.3d at 284; *Portillo*, 872 F.3d at 739; *see supra* notes 55–61 and accompanying text.

109. *Garza*, 881 F.3d at 281.

a persuasive reason.[110] Although awarding attorneys' fees serves the deterrent effect of Rule 41(d), the Third Circuit relied on the Supreme Court's rejection of this reasoning in *Alyeska Pipeline Service Co. v. Wilderness Society*,[111] finding that "courts are not permitted to engage in this policymaking exercise," which properly belongs to Congress.[112]

In its discussion of the Never Awardable Interpretation, the Third Circuit considered the plain language argument; "costs" cannot include attorneys' fees because the drafters did not explicitly include the term.[113] The Third Circuit easily rejected this argument though, because "the Supreme Court of the United States has recognized that 'costs' is an ambiguous term subject to 'varying definitions.'"[114] The Third Circuit found that it must analyze more than just the plain language of Rule 41(d) to determine Congress's intent regarding "costs."[115]

In analyzing Congress's intent, the Third Circuit followed the Supreme Court's reasoning in *Marek*. Just as the Supreme Court found that the drafters did not define the term "costs," explain its intended meaning, or refer to attorneys' fees in Rule 68, the Third Circuit found that the drafters did not define the term "costs," explain its intended meaning, or refer to attorneys' fees in Rule 41(d).[116] Because Congress knew how to create exceptions to the American Rule, its inaction regarding the word "costs" in Rule 41(d) implied that it was "very unlikely that the omission was mere oversight."[117] The Third Circuit agreed with the Supreme Court's analysis that the drafters intentionally left "costs" ambiguous, in order to allow Congress to explicitly authorize an award of attorneys' fees under statutes.[118]

From 2016 to 2018, the Underlying Substantive Statute Interpretation appeared to be trending as the Third, Fourth, and Fifth Circuits adopted it. However, the Second Circuit's recent decision in *Horowitz* indicated that the circuits still lack consensus on the issue.

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110. *Id.* ("Before a court can shift a party's legal fees to another party, it must find a reason to depart from this bedrock rule.").

111. 421 U.S. 240 (1975); *see supra* notes 34–42 and accompanying text.

112. *Garza*, 881 F.3d at 282.

113. *See id.*

114. *Id.* (quoting Marek v. Chesny, 473 U.S. 1, 8 (1985)).

115. *Id.*

116. *Id.* at 283.

117. *Id.* (quoting *Marek*, 473 U.S. at 9).

118. *Id.*

## III. 2018: THE SECOND CIRCUIT EXPLORES WHY COSTS SHOULD INCLUDE ATTORNEYS' FEES IN RULE 41(D)

In 2018, the Second Circuit held that "costs" do include attorneys' fees in Rule 41(d) and provided a substantive discussion on all three interpretations.[119] In *Horowitz*, the Second Circuit was dealing with a dispute that produced a number of "bitterly contested" lawsuits between the parties, including litigation in Georgia federal court, New York state court, Georgia state court, and New York federal court.[120] The Georgia state court denied the plaintiffs' motion for a temporary restraining order and found that the action was both "meritless" and likely violated an order previously entered by the New York state court.[121] To avoid this unfavorable development, the plaintiffs dismissed the Georgia state-court action and filed a new action in the Eastern District of New York.[122] Under Rule 41(d), the New York district court ordered the plaintiffs to reimburse the defendant's costs from the Georgia state-court action.[123] The court held that those costs included attorneys' fees.[124] Had the district court not awarded attorneys' fees, the costs from the Georgia state action would have amounted to an award of $75.48.[125]

On appeal, the Second Circuit noted that federal authorities lacked uniformity on the issue of whether "costs" include attorneys' fees.[126] From caselaw in other circuits regarding interpretation of Federal Rules, the court found two principles in determining whether attorneys' fees are available when a Federal Rule allows "costs" but does not expressly provide for attorneys' fees.[127] The court found that if the Federal Rule "incorporates a statutorily enumerated list of 'costs' that itself omits attorneys' fees," then "costs" do not include attorneys' fees.[128] Because Rule 41(d) does not include a statutorily enumerated list of "costs," the court found that the issue

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119. Horowitz v. 148 S. Emerson Assocs. LLC, 888 F.3d 13, 24–26 (2d Cir. 2018).

120. *Id.* at 16–18.

121. *Id.* at 17–18, 23.

122. *Id.* at 18, 23.

123. Horowitz v. 148 S. Emerson Assocs., LLC, No. 16-CV-2741(SFJ)(AKT), 2016 WL 11508981, at *12–13 (E.D.N.Y. Oct. 19, 2016).

124. *Id.* at *13 ("Rule 41(d)'s purpose is to compensate a defendant for costs and fees that are 'wasted' once a plaintiff voluntarily dismissed an action.").

125. *Horowitz*, 888 F.3d at 26.

126. *Id.* at 24–25 (discussing the different interpretations: "costs" in Federal Rule of Appellate Procedure 39 and an earlier version of 28 U.S.C. § 1927 do not incorporate attorneys' fees; "costs" in Federal Rule of Civil Procedure 54(d) has been written to include attorneys' fees; "costs" in Federal Rule of Civil Procedure 68 and Federal Rule of Appellate Procedure 7 include attorneys' fees only when the underlying cause of action allows).

127. *Horowitz*, 888 F.3d at 25.

128. *Id.* (citing Hines v. City of Albany, 862 F.3d 215, 220–21 (2d Cir. 2017)).

remained open to interpretation.[129] When a term is undefined, the second principle directs courts to examine whether "the statute otherwise evinces an intent to provide for [attorneys'] fees."[130] Because Rule 41(d)'s purpose is to deter forum shopping and vexatious litigation, an interpretation prohibiting recovery of attorneys' fees would "substantially undermine" the scheme.[131] Awarding costs without attorneys' fees, as in the case of the $75.48, serves as a paltry deterrent.[132]

Based on this reasoning, the Second Circuit rejected the Never Awardable Interpretation, because Rule 41(d) "evinces an unmistakable intent for a district court to be free, in its discretion, to award attorneys' fees as part of costs."[133] Additionally, the Second Circuit noted the Supreme Court's willingness, when interpreting Rule 68, to find attorneys' fees available in certain circumstances, despite the absence of express authorization.[134] The Second Circuit also rejected the Underlying Substantive Statute Interpretation because Rule 41(d) lacks any connection to the underlying cause of action.[135] Instead, the court reasoned that the Always Awardable Interpretation is consistent with the language of Rule 41(d) while best serving its purpose.[136]

Although the Second Circuit's reasoning in *Horowitz* is clear, its decision contributes to the three-way circuit split that produces uncertainty for litigants and creates opportunities for forum shopping.

## IV. ANALYSIS

This Part analyzes why "costs" should include attorneys' fees, why an amendment would fix the problem but is unlikely to pass, and why the Ninth Circuit would benefit from holding that "costs" in FRCP 41(d) do include attorneys' fees.

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129. *Id.*

130. *Id.* (quoting Key Tronic Corp. v. United States, 511 U.S. 809, 815 (1994)).

131. *Id.*

132. *Id.* (finding that, without an award of attorneys' fees, the Rule would be "greatly limited as an effective deterrent").

133. *Id.*

134. *Id.*

135. *Id.* at 26 n.6.

136. *Id.* at 25, 26 n.6.

### *A. The Second Circuit Interpreted the Rule Correctly: Costs Should Include Attorneys' Fees.*

The Second Circuit correctly rejected the Never Awardable Interpretation. The Sixth Circuit's reasoning behind denying an attorneys' fees award relied on deference to Congress; Congress meant what it said. However, Congress did not write the text of Rule 41(d). Congress simply chose not to veto it. In general, equating congressional inaction with congressional approval is a troubling proposition. Justice Frankfurter addressed this issue in the context of the Federal Rules in *Sibbach v. Wilson & Co.*, stating that "to draw any inference of tacit approval from non-action by Congress is to appeal to unreality."[137] In addition, a number of commentators have addressed the fallacy of equating congressional inaction with congressional approval.[138] Nonetheless, the majority in *Sibbach* believed that Congress would veto a rule "if contrary to the policy of the legislature."[139] This argument is not persuasive both because congressional inaction does not equal congressional approval and because Congress rarely vetoes procedural rules.

The Second Circuit also appropriately rejected the Underlying Substantive Statute Interpretation. The circuits that adopted this approach relied heavily on the Supreme Court's interpretation of Rule 68 in *Marek*. However, the Court's discussion of Rule 68's purpose played a crucial role in its analysis. There, the Court found that the purpose of Rule 68—encouraging settlements—was "neutral," applying equally to plaintiffs and defendants.[140] Conversely, the purpose of Rule 41(d)—to discourage forum shopping and vexatious litigation—is not neutral, applying only to plaintiffs who are dismissing cases. Because the drafters targeted Rule 41(d) at plaintiffs, the appropriate analysis for a neutral Federal Rule, like Rule 68, is inapplicable.

On the other hand, not all policy considerations, like deterring frivolous litigation, point towards allowing an attorneys' fees award. Many of the policy justifications underlying the American Rule provide persuasive reasons to adopt the Never Awardable Interpretation. Justice Alfred C. Lockwood, addressing the issue as a question of first impression in Arizona, noted that the American Rule was "most in harmony with justice and our

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137. Sibbach v. Wilson & Co., 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting) ("Plainly the Rules are not acts of Congress and can not be treated as such.").

138. Burbank, *supra* note 22, at 1102; Paul J. Mishkin, *Some Further Last Words on* Erie*—The Thread*, 87 HARV. L. REV. 1682, 1687–88 (1974) (citing HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1394–1401 (tent. ed. 1958)).

139. *Sibbach*, 312 U.S. at 15.

140. See *supra* Part II.A.3.

public policy" because "the law does not desire to throw around the right of a party to appeal to the courts such risks that a fear of the result might deter him from asserting a claim in which he has an honest belief."[141] Honest plaintiffs may never utilize the court system if paralyzed by fear of the costs they will have to pay if their suit is not successful. Access to the courts should not be denied for the less wealthy.[142]

While these policy arguments may generally further the honest plaintiff's interests, an award of attorneys' fees under Rule 41(d) will rarely, if ever, punish the honest plaintiff. Rule 41(d)'s two prerequisites, a prior voluntary dismissal and a re-filing, filter out most "honest plaintiffs." The plaintiff in *Horowitz* typifies the type of "dishonest plaintiff" that Rule 41(d) should deter: a plaintiff who filed in four courts (New York state court, Georgia state court, New York federal district court, and Georgia federal district court) and voluntarily dismissed suits whenever litigation took an unfavorable turn.

Instead of barring the "honest plaintiff," Rule 41(d) narrowly applies to the types of plaintiffs that the judicial system wishes to discourage: those who are filing frivolous lawsuits or forum shopping. Additionally, the Always Awardable Interpretation does not contravene traditional interpretation of the American Rule, as courts have recognized exceptions to the American Rule "for classes of cases in which equity seemed to favor fee shifting."[143] Because the Always Awardable Interpretation serves the purpose of Rule 41(d) and is consistent with the text of the Rule, it best serves the interests of fairness and efficiency.

### *B. The Clearest Solution: Amend the Rule*

An amendment would produce the clearest result. If the Advisory Committee amended Rule 41(d) to explicitly allow attorneys' fees,[144] courts could efficiently and uniformly apply Rule 41(d). Uniform application of this amended rule would deter forum shopping. In order to assuage concerns

141. Ackerman v. Kaufman, 15 P.2d 966, 967 (Ariz. 1932); *see* Karsten & Bateman, *supra* note 35, at 745–46. Although this discussion of the American Rule arose in the context of the Arizona state court system, the policy considerations regarding honest plaintiffs apply equally to federal courts.

142. *See* Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 237–39 (1964) (Goldberg, J., concurring).

143. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 272 (1975) (Marshall, J., dissenting) (citing Hall v. Cole, 412 U.S. 1, 5, 9 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391–92 (1970); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939)).

144. The Judicial Conference accepts suggestions for changes. *How To Suggest a Change to Federal Court Rules and Forms*, U.S. COURTS, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-suggest-change-federal-court-rules-and-forms [https://perma.cc/8NTB-E3LJ].

about exceptions to the American Rule, the ideal amendment would not mandate an award of attorneys' fees, but rather leave such an award to the discretion of the court. In that case, the court would always be free to punish a bad actor but could make exceptions as necessary. The proposed amendment would read as follows:

> If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:
>
> (1) may order the plaintiff to pay all or part of the costs, including attorneys' fees, of that previous action; and
>
> (2) may stay the proceedings until the plaintiff has complied.

However, because of both the costs involved in amending the rule and the Committee's historical reluctance to change Rule 41(d), the odds of a successful amendment are low. Although an amendment seems more efficient than each circuit spending judicial resources to decide which stance to adopt (and its own district courts apparently deciding whether to abide by that circuit's stance),[145] the time and cost involved in passing an amendment is still high.[146] The sheer number of committees—both judicial and congressional—that have to approve a proposed change makes an amendment an uphill battle.

Additionally, history indicates that the support for an amendment does not exist. In 2000, one commentator proposed an amendment to Rule 41(d) to clarify when attorneys' fees should be awarded.[147] However, this has not received any traction among the Advisory Committee on Federal Rules. In fact, the Committee has not considered an amendment to Rule 41(d) in the

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145. *See supra* notes 98–100 and accompanying text.

146. *See supra* notes 22–32 and accompanying text. The process for adopting an amendment is the same as that of adopting a new Rule. *See* Struve, *supra* note 24, at 1110–12.

147. Southard, *supra* note 65, at 399–401.

> The proposed amendment would read: "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."

*Id.* at 400.

past eighteen years. While confusion over whether attorneys' fees are available in repetitious litigation is problematic, the issue is not likely to be problematic enough to motivate the outcry necessary to change a Federal Rule. However, a small problem by itself can cause a large problem in the aggregate. While individual parties may not be motivated to force an amendment through, the toll on court efficiency should be noted.

### *C. The Ninth Circuit Should Rule that "Costs" Include Attorneys' Fees in Rule 41(d)*

Because of the Ninth Circuit's demanding caseload and threatened split, it would be in the Ninth Circuit's best interest to rule that "costs" include attorneys' fees in Rule 41(d). The Ninth Circuit is the busiest federal appellate court; it heard twenty-two percent of all new appeals nationally in 2017.[148] A decision to impose an award of attorneys' fees on plaintiffs bringing frivolous or repetitive suits will reduce the caseload, ensure that the court's time is spent on legitimate claims, and reduce forum shopping.

Moreover, the Ninth Circuit has an additional interest in maximizing efficiency because of impending legislation proposing to split the Ninth Circuit. While legislation proposing to split the Ninth Circuit may not have garnered widespread support in Congress, splitting the Ninth Circuit is a topic that resurfaces on a regular basis.[149] Arizona Governor Doug Ducey and Arizona Senator Jeff Flake have supported legislation that would split the Ninth Circuit.[150] Even a federal district judge in the Ninth Circuit recommended splitting the court—in part because of the slow resolution of cases.[151] While deterring the type of repeat litigation that occurs under Rule 41(d) will not unilaterally cure the Ninth Circuit's problems, it provides a small step in the right direction.

Authorizing an award of attorneys' fees under Rule 41(d) will both serve the interests of the Ninth Circuit and accomplish the purpose of the Rule. Plaintiffs will be less likely to file frivolous suits if they face having to pay the defendants' attorneys' fees. Because the Ninth Circuit already bears a heavy caseload, it will most effectively deter forum shopping.

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148. 2017 ANNUAL REPORT: UNITED STATES COURTS FOR THE NINTH CIRCUIT 43 (2017).

149. *See* Judicial Administration and Improvement Act of 2016, H.R. 250, 115th Cong. (2017–2018); Ninth Circuit Court Modernization and Twelfth Circuit Court Creation Act, H.R. 1598, 115th Cong. (2017); Ninth Circuit Court of Appeals Reorganization Act of 2000, S. 2184, 106th Cong. (2000).

150. *See* Judicial Administration and Improvement Act of 2017, S. 276, 115th Congress (2017).

151. Hon. John M. Roll, *Splitting the Ninth Circuit*, 42 ARIZ. ATT'Y 34 (Sept. 2005).

## V. CONCLUSION

While the American Rule generally provides a fair opportunity for every plaintiff to have its day in court by removing the threat of the other party's attorneys' fees, both the particularly persistent and opportunistic forum-shopping plaintiffs force courts to make an exception to protect both judicial resources and innocent defendants. Persistent true believers refuse to acknowledge the frivolousness of their litigation, and wealthy forum-shoppers will continue to dismiss and re-file unless courts impose a harsher penalty. The Always Awardable Interpretation is the only approach that will successfully deter both categories of plaintiffs.

The drafters created Rule 41(d) in order to deter forum shopping and prevent vexatious litigation from a plaintiff who already enjoyed an opportunity to litigate, voluntarily dismissed, and then chose to file the same lawsuit against the same defendant. Although the plain language of Rule 41(d) does not explicitly use the term "attorneys' fees," the plain language of the Rule also does not reflect congressional intent because the rulemaking process only involves an opportunity for a congressional veto. In order to serve the purposes of Rule 41(d), the Advisory Committee should amend the Rule to explicitly allow an award of attorneys' fees. If an amendment fails to pass, the Ninth Circuit should adopt the Always Awardable Interpretation to deter forum shopping, reduce its caseload, and avoid a split.