The Use—and Abuse—of Rule 41(a) to Destroy Federal Question Jurisdiction Post-Removal

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Abstract: *Defendants in civil litigation can level the often uneven state court playing field by removing cases to federal court through federal question removal. In those cases in which the plaintiff has alleged a claim grounded in federal law, the defendant may remove the case to an often more impartial federal forum. Once removed, the plaintiff has few options for defeating removal. About the only option available to the plaintiff is to forgo the federal claim and divest the court of federal question jurisdiction, forcing remand to state court. In pursuit of a ticket back to state court, however, plaintiffs routinely misuse Fed. R. Civ. P. 41 in seeking to dismiss fewer than all claims and less than the entire action. Too frequently courts simply go along with the ruse. This article addresses the misuse and abuse of Rule 41. It provides an overview of the text and history of Rule 41, discusses how the rule should be used and applied, analyzes decisions that indulge the misuse, and explains how the misuse can and does prejudice defendants.*

The Parties' Predicament

It is a poorly kept secret that defendants in civil litigation prefer federal courts to most state courts. From the defendant's perspective, federal courts have more exacting standards and procedures for pleadings, venue, expert testimony, and dispositive motions, all of which tend to benefit the defendant more than the plaintiff. It is no surprise, therefore, that a defendant will jump at the chance to remove a case to federal court.

Journal of Emerging Issues in Litigation / Fall 2023, Vol. 3, No. 4, pp. 365–379.

ISSN 2835-5040 (print) /ISSN 2835-5059 (online).

Knowing this poorly kept secret, a plaintiff will try to block removal. They can prevent removal on diversity of citizenship grounds by naming a nondiverse defendant or a diverse defendant who is a citizen of the forum state.[1]

When a plaintiff has taken steps to defeat diversity removal, a defendant ordinarily has only one route out of state court: federal question removal. The allure of federal question removal is that citizenship of parties has no effect on removal—nor does the one-year deadline for diversity removal.[2] Just as importantly, federal question removal can promote federal interests embodied in the federal law upon which removal is grounded.[3]

A plaintiff can prevent federal question removal by steering clear of federal claims. Under the well-pleaded complaint rule, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint."[4] Plaintiffs often go to extreme lengths to avoid even the hint of a federal question, like explicitly stating in the complaint that they are absolutely not seeking relief under any federal authority. But occasionally, when a plaintiff wishes to take advantage of federal fee-shifting statutes, a well-pleaded complaint raising a federal question cannot be avoided.[5] The claim raising a federal question thus paves the way to federal court.

Once removed, a plaintiff seeking remand to state court has one last option: abandonment of the federal claim underlying the court's jurisdiction. In practice, abandonment of a federal claim usually takes two forms:

1. pleading amendment under Rule 15(a) or
2. voluntary dismissal under Rule 41(a).

These two rules govern different scenarios that are often viewed as overlapping and interchangeable. They are not.

Rule 15(a) Versus Rule 41(a)

Too often litigants conflate these rules when a plaintiff wishes to rid the case of the federal question giving the court jurisdiction. But the rules are not interchangeable, and it is improper to treat them as if they are.

Federal Rule of Civil Procedure 15(a) governs amendment of pleadings. It permits a party to amend a pleading once within 21 days after service of the pleading or within 21 days after service of a pleading responding to it.[6] In all other scenarios, a party may amend a pleading only with the opposing party's written consent or leave of court.[7] A plaintiff hoping to divest the court of federal question jurisdiction and force a remand to state court will amend the complaint to eliminate the federal question claim that triggered removal in the first place.

While Rule 15(a) governs pleadings, Rule 41(a) governs actions. It allows voluntary dismissal of actions in three ways:

1. a notice of dismissal filed before the opposing party serves either an answer or a motion for summary judgment,
2. a stipulation of dismissal signed by all parties who have appeared, and
3. by court order on terms the court considers proper.[8]

The simplicity of the language is deceiving and prone to abuse by plaintiffs bristling at the thought of litigating in federal court. Capitalizing on courts' willingness to gloss over the differences between Rule 15(a) and Rule 41(a), a plaintiff will attempt to force remand by dismissing only the jurisdiction-establishing federal claim using Rule 41(a), not Rule 15(a), without dismissing the entire action. Once the federal claim is gone, it is easy enough for the plaintiff to convince a judge to remand the case back to state court, never to return to federal court unless a new jurisdictional basis permits removal again.[9]

A plaintiff seeking to divest the court of subject matter jurisdiction post-removal should at least comply with the requirements of the rule they have relied on. Glossing over those requirements undermines the purpose and intent of both the rule and removal statutes. The case should stay put in federal court in the absence of compliance.

History and Purpose of Rule 41

Rule 41 was promulgated in 1938.[10] And it has been amended seven times since.[11] It is procedural and applies regardless of state substantive law.[12]

Amendments over the years have been largely insignificant, but two deserve mention. In 1946, the rule was amended to give the filing of a motion for summary judgment the same effect as an answer.[13] Until then only an answer could forestall unlimited dismissal.[14] In 1991, the rule was amended to clarify that it cannot be used to obtain dismissal on the merits for insufficiency of evidence in a non-jury case.[15]

The purpose of voluntary dismissal under Rule 41 is uncontroversial. It is "to freely permit the plaintiff, with court approval, to voluntarily dismiss an action so long as no other party will be prejudiced" and to allow "the plaintiff to withdraw his action from the court without prejudice to future litigation."[16] Prejudice contemplated by the rule does not include the defendant's loss of a federal forum—assuming, of course, the dismissal is procedurally proper.[17]

How Rule 41(a) Is Supposed to Work

Rule 41(a) permits dismissal of *actions*, not *claims*; claims are dismissed through a timely and proper Rule 15(a) pleading amendment. Most courts agree.

In *Berthold Types Ltd. v. Adobe Systems Inc.*, the U.S. Court of Appeals for the Seventh Circuit instructed, "Rule 41(a)(1)(i) does not speak of dismissing one claim in a suit; it speaks of dismissing 'an action,' which is to say, the whole case."[18] In *Perry v. Schumacher Group of Louisiana*, the Eleventh Circuit similarly pointed out, "It is clear from the text that only an '*action*' may be dismissed. There is no mention in the rule of the option to stipulate dismissal of a portion of a plaintiff's lawsuit—e.g., a particular *claim*—while leaving a different part of the lawsuit pending before the trial court."[19] Many district courts correctly distinguish "action" from "claim," as the rule requires.[20]

As recently as June of this year, Judge Seeger of the Northern District of Illinois colorfully explained how Rule 41 is supposed to work, and how it is not. In *Interfocus Inc. v. Hibobi Tech. Ltd.*,[21] the plaintiff settled with one of several defendants. The plaintiff and three of the remaining defendants filed a motion "for entry of a stipulation to voluntarily dismiss" the settled defendant under Rule 41(a). Apart from the plain impropriety of a motion seeking

entry of a stipulation, Judge Seeger wrote, Rule 41(a) is not "a set of shears for trimming a case, and leaving the rest."[22] Judge Seeger pointed out that Rule 41 itself recognizes the difference between an action and a claim, noting

> Rule 41(a) speaks of an "action," but Rule 41(b) addresses "the action or any claim." So, when Rule 41(a) uses the term 'action,' it means what it says. An action and a claim are not the same thing.[23]

In disallowing the use of Rule 41(a) as a vehicle for dismissal of some but not all parties or claims, Judge Seeger explained, the "Seventh Circuit's approach shows fidelity to the text of the Federal Rules, which is the way to go."[24]

Still, Judge Seeger acknowledged the "dirty little not-so-secret is that district courts often disregard Rule 41(a) and dismiss part of the case," but asserts that fixing the language of Rule 41(a) is the remedy for the misuse of the rule, not the disregard of its plain language.[25] While recognizing the differing views of what Rule 41(a) allows, Judge Seeger offered some his own solution: "When courts widely abandon the test of the Federal Rules, maybe the text could use a little TLC."[26]

When a plaintiff wishes to dismiss the action as allowed under Rule 41(a), the court must freely grant the request absent plain legal prejudice to the defendant.[27] In ruling on a motion to dismiss under Rule 41(a), the court will consider the defendant's effort and expense in preparing for trial, the delay or lack of diligence by the plaintiff, the sufficiency of the explanation for the need for the dismissal, and the state of the litigation when the motion is made.[28]

Second Circuit Courts Misconstrue Rule 41(a)

Most circuits apply Rule 41(a) as written to allow only dismissal of actions, not individual claims. The Second Circuit, however, does not.

In *Harvey Aluminum Inc. v. American Cyanamid Co.*, the Second Circuit concluded that Rule 41(a) does not allow a plaintiff to dismiss only one of several defendants, even when the one

defendant had not answered or moved for summary judgment.[29] Consistent with the rulings of courts that correctly distinguish between dismissal of actions from dismissal of claims, the Second Circuit explained:

> However, Rule 41(a)1 provides for the voluntary dismissal of an "action" not a "claim," the work [*sic*] "action" as used in the rules denotes the entire controversy, whereas "claim" refers to what has traditionally been termed "cause of action." Rule 21 provides that 'Parties may be dropped or added by order of the court on motion', and we think that this rule is the one under which any action to eliminate Reynolds as a party should be taken.[30]

The action-claim distinction endorsed by *Harvey* soon fell out of favor with the Second Circuit and its lower courts. In *Wakefield v. Northern Telecom Inc.*,[31] the Second Circuit began to chip away at *Harvey* and the action-claim distinction. In *Wakefield*, the court stated that *Harvey* "has been criticized and is now against the weight of authority" and even questioned whether its Rule 41(a) discussion was mere dictum.[32] The court saw no meaningful difference between dismissal of a single claim through a Rule 15 pleading amendment and a Rule 41(a) voluntary dismissal. According to the court, the standards governing Rule 15 amendments are essentially the same as those governing Rule 41(a) dismissals, and a plaintiff may dismiss less than the entire action under either rule.[33]

Lower courts in the Second Circuit's jurisdiction soon followed suit. In 1994, the U.S. District Court for the Southern District of New York held that *Harvey* "is no longer persuasive authority on the issue."[34] In *Nix v. Office of Commissioner of Baseball*,[35] that same court went so far as to permit a plaintiff to dismiss pursuant to Rule 41(a) the one claim giving the court federal question jurisdiction and force remand to state court.[36]

In doing so, the court gave *Harvey* short shrift:

> Although some decisions within this circuit suggest that Rule 41(a) may only be employed to dismiss an "entire controversy," more recent cases make clear that Rule 41(a) "permit[s] the withdrawal of individual claims." And while

> it might be argued that "a motion to eliminate only certain claims" is more properly brought as a motion to amend under Rule 15 rather than a motion for voluntary dismissal under Rule 41(a), "there is no substantive difference between the two," since the operative consideration under both rules is whether defendant will be "prejudiced." Thus, the court finds that plaintiffs' invocation of Rule 41(a) to dismiss only their CFAA claim—as opposed to their entire complaint—is permissible.[37]

This willingness to overlook the differences between Rule 15(a) and Rule 41(a) is problematic for at least three reasons.

First, the notion that a plaintiff may use either Rule 15(a) or Rule 41(a) to rid the case of a jurisdiction-establishing federal question conflicts with the rule of statutory construction that statutes should be construed in a way that avoids rendering one provision redundant or superfluous.[38] Traditional rules of statutory construction plainly apply to the Federal Rules of Civil Procedure.[39]

Second, allowing a plaintiff to dismiss a single claim using Rule 41(a) will encourage litigants to disregard the court's Rule 16 scheduling orders and deadlines. Under Rule 16, a court must establish a deadline for amending pleadings but not a deadline for Rule 41(a) dismissals.[40] If a plaintiff may use either Rule 15(a) or Rule 41(a) to abandon a federal claim, the plaintiff need not worry about the pleading amendment deadline in the court's scheduling order.[41] In effect, the plaintiff may amend the complaint to eliminate the federal claim long after the pleading amendment deadline. Furthermore, by using Rule 41(a), the plaintiff need not demonstrate good cause as required to amend pleadings after the deadline.[42]

Finally, allowing a plaintiff to use Rule 41(a) to dismiss a federal claim without complying with the plain language of the rule could deprive the defendant of the protection of the applicable statute of limitations. Thus, if the limitations period has expired, the plaintiff may not commence a new action following a Rule 41(a) dismissal, at least in the absence of a Journey's Account or other savings statute;[43] the statute of limitations will bar a new action, which will discourage the plaintiff from dismissing the action and permit the defendant to preserve its chosen federal forum.[44] On the other hand, allowing the plaintiff to dismiss a single claim, in

violation of the plain language of Rule 41(a), nullifies the effect of the statute of limitations, removes it as a disincentive to dismissal, and further tramples on the defendant's right to a federal forum.

Fending Off Remand Following Dismissal of Federal Claim

When a court has federal question jurisdiction, it also has supplemental jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the U.S. Constitution."[45] When the federal question goes away, either through Rule 15(a) or Rule 41(a), the court is not automatically divested of jurisdiction.[46] Instead, the court has discretion either to retain jurisdiction or to remand the case to state court.[47]

In deciding whether to exercise supplemental jurisdiction, a court may consider the fact that the plaintiff dismissed the federal claim only to force remand to state court. In that scenario, the U.S. Supreme Court has cautioned that a court may consider "whether the plaintiff has engaged in any manipulative tactics" and should "guard against forum manipulation . . ."[48] Admittedly, demonstrating manipulative tactics is an uphill battle for the defendant,[49] but one that must be waged if a defendant has any hope of defeating remand.[50]

Conclusion

Defendants are entitled to remove state court cases to federal court when federal subject matter jurisdiction exists. At the same time, plaintiffs can challenge removal in hopes that the court will remand the case to state court. But what plaintiffs may not do—and what courts should not allow—is to distort and misuse the rules to achieve their objective.

It is improper to use Fed. R. Civ. P. 41(a) to dismiss less than the entire action simply to achieve remand. Misuse of Rule 41(a) in this manner threatens to violate a defendant's right to a federal form, deprive a defendant of the protections of applicable statutes

of limitations, and disrupts the court's orderly administration of its pretrial schedule. In short, misuse of Rule 41(a) undermines "the just, speedy, and inexpensive determination of every action and proceeding."[51] It serves no legitimate purpose and should be disallowed.

Notes

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1. Under the *Strawbridge* doctrine, a federal court lacks diversity of citizenship jurisdiction unless every plaintiff is diverse from every defendant. Exxon Mobil Corp. v. Allapattah Servs, Inc., 545 U.S. 546, 553 (2005) ("In a case with multiple plaintiffs and multiple defendants, the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action.") (citing *Strawbridge v. Curtiss*, 3 Cranch 267, 2 L. Ed. 435 (1806)). And, under the forum defendant rule, a defendant may not remove the case on diversity of citizenship grounds when a properly joined and served defendant is a citizen of the forum state. *See* 28 U.S.C. § 1441(b)(2) ("A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.").

2. *See* 28 U.S.C. 1446(c)(1) ("A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.").

3. Mallory v. Norfolk S. Ry. Co., 600 U.S. ___, 143 S. Ct. 2028, 2059 (2023) (Barrett, J., dissenting) (acknowledging the importance of removal in "ensuring that federal courts can vindicate federal rights").

4. Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987).

5. In the recreational vehicle arena, the most commonly used federal fee-shifting statute is the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(2) (authorizing a prevailing consumer to recover reasonably incurred costs, expenses, and attorneys' fees). Magnuson-Moss permits a consumer to sue in any state or federal court. *Id.* § 2310(d)(1).

6. Fed. R. Civ. P. 15(a)(1).

7. *Id.* 15(a)(2).

8. Fed. R. Civ. P. 41(a).

9. "Forever" because remand orders are not reviewable except in civil rights cases or cases involving federal officers or agents. *See* 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . .").

10. 9 Arthur R. Miller, Federal Practice and Procedure § 2361 (4th ed. April 2023 update).

11. *Id.*

12. *Id. See also* Fed. R. Civ. P. 81(c)(1) ("These rules apply to a civil action after it is removed from a state court.").

13. Fed. R. Civ. P. 41 advisory committee's note to 1946 amendment.

14. *Id.*

15. *Id.*

16. Thomas v. Early Childhood Dev. Co. LLC, No. 1:19-CV-3644-CAP, 2020 WL 13157783, at *2 (N.D. Ga. June 18, 2020) (citing *LeCompte v. Mr. Chip Inc.*, 528 F.2d 601 (5th Cir. 1976)).

17. *See* Wilson v. City of San Jose, 111 F.3d 688, 694 (9th Cir. 1997) ("The voluntary dismissal of an action that has been removed to federal court does not constitute the sort of egregious forum shopping that federal courts have traditionally sought to discourage.") *Compare with* Thatcher v. Hanover Ins. Grp. Inc., 659 F.3d 1212, 1214 (8th Cir. 2011) ("Likewise, a party is not permitted to dismiss merely to escape an adverse decision nor to seek a more favorable forum.") (citation omitted).

18. 242 F.3d 772, 777 (7th Cir. 2001).

19. 891 F.3d 954, 958 (11th Cir. 2018) (emphasis in original).

20. *See* Shwachman v. Town of Hopedale, 540 F. Supp. 3d 134, 139 (D. Mass. 2021) ("The plain and ordinary language of Rule 41(a)(2) allows a plaintiff to dismiss an entire action against a defendant as opposed to one of several claims against a defendant."); Kirkland v. The Columbia Coll., No. C/A 3:10-1851, 2010 WL 4318843, at *1 (D.S.C. Sept. 8, 2010) ("[I]t is questionable whether Federal Rule of Civil Procedure 41(a) is applicable when the parties do not seek dismissal of all of the claims in an action"); *report and recommendation adopted sub nom.* Kirkland v. Columbia Coll., No. CIV.A. 3:10-01851, 2010 WL 4340402 (D.S.C. Oct. 26, 2010); Adamson v. Metro. Life Ins. Co., No. CIV. JFM 00-1018, 2001 WL 111227, at *2 (D. Md. Feb. 6, 2001) ("Fed. R. Civ. P. 41(a) covers voluntary dismissal of 'actions.' The rule does not allow the plaintiff to dismiss individual claims from a multi-claim complaint."); Bragg v. Robertson, 54 F. Supp. 2d 653, 660 (S.D.W. Va. 1999) ("[O]n its face Rule 41(a)(2) is an appropriate mechanism only when a plaintiff seeks to dismiss an entire action as against a defendant. To dismiss only some counts against Federal Defendants, Plaintiffs properly should move to amend their First Amended Complaint under Rule 15(a).").

21. No. 22-CV-2259, 2023 WL 4137886 (N.D. Ill. June 7, 2023).

22. *Id.* at *2.

23. *Id.* at *1.

24. *Id.*

25. *Id.* at *6-7.

26. *Id.* at *6.

27. Deloach v. EK Real Est. Servs. of NY, LLC, No. 9:22-CV-01449-DCN, 2022 WL 17625911, at *3 (D.S.C. Dec. 13, 2022) ("As a general rule, a plaintiff's motion for voluntary dismissal without prejudice under Rule 41(a)(2) should not be denied absent plain legal prejudice to the defendant.").

28. *Id.*

29. 203 F.2d 105 (2d Cir. 1953), *cert. denied*, 345 U.S. 964 (1953). The Second Circuit's reasoning is puzzling in that it correctly distinguishes between action and claim, but it concludes that Rule 41(a) does not allow dismissal of an entire action against one of several defendants. Many, if not most, courts construe Rule 41(a) to allow dismissal of all claims—the whole action—against one of multiple defendants in a case. *See* Noga v. Fulton Fin. Corp. Emp. Benefit Plan, 19 F.4th 264, 271 n.3 (3d Cir. 2021) ("Rule 41(a) provides a mechanism for a plaintiff to

voluntarily dismiss an entire lawsuit, and this Circuit also recognizes that the rule allows a party to voluntarily dismiss all of its claims against a particular party."); *see generally* 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2362 (4th ed. 2020) (explaining that "the sounder view and the weight of judicial authority" are that Rule 41(a) permits dismissal of all claims against one party and does not require dismissal of all claims against all parties).

30. 203 F.2d at 108.

31. 769 F.2d 109, 114 n.4 (2d Cir. 1985).

32. *Id.*

33. *Id.* at 114, 114 n.4.

34. Mut. Ben. Life Ins. Co. in Rehab. v. Carol Mgmt. Corp., No. 93 CIV. 7991 (LAP), 1994 WL 570154, at *1 (S.D.N.Y. Oct. 13, 1994).

35. No. 17-CV-1241 (RJS), 2017 WL 2889503 (S.D.N.Y. July 6, 2017).

36. 2017 WL 2889503, at *5.

37. 2017 WL 2889503, at *3 n.2 (citations omitted).

38. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (quotations omitted); *cf.* Kungys v. United States, 485 U.S. 759, 782 (1988) ("That seems to us ill achieved by reading the two differently worded provisions (or, as the concurrence would have it, *three* differently worded provisions) to be redundant.") (internal citation omitted).

39. Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1125 (9th Cir. 2017) ("We employ the 'traditional tools of statutory construction' to interpret the Federal Rules of Civil Procedure.") (quotations omitted); Birren v. Royal Caribbean Cruises, Ltd., 336 F.R.D. 688, 692-93 (S.D. Fla. 2020) ("As noted by the Middle District of Alabama, 'to artificially supply Rules 8(b)(1) and 8(c)(1) with the unique language of Rule 8(a)(2) requiring a "showing" is to contravene well-established principles of statutory construction, which have been found applicable to interpreting the Federal Rules of Civil Procedure.'") (citations omitted); *accord* Bus. Guides, Inc. v. Chromatic Commc'ns Enterprises, Inc., 498 U.S. 533, 540-41 (1991) (applying the plain language rule of statutory construction to Federal Rules of Civil Procedure).

40. *See* Fed. R. Civ. P. 16(b)(3)(A) ("The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.").

41. As with other deadlines required by Rule 16, a pleading amendment deadline "assures that at some point both the parties and the pleadings will be fixed, by setting a time within which joinder of parties shall be completed and the pleadings amended." Fed. R. Civ. P. 16 advisory committee's note to 1983 amendment. Disregarding the deadline threatens to undermine the purposes of the pretrial conference and the order it generates. *See* Fed. R. Civ. P. 16(a) (stating that the purposes of the pretrial conference are to expedite disposition of the case, establishing early and continuing control over the case, discouraging wasteful pretrial activities, improving the quality of trial, and facilitating settlement).

42. *See* Fed. R. Civ. P. 16(b)(4) ("A schedule may be modified only for good cause and with the judge's consent."); *see also* Berenyi, Inc. v. Nucor Corp. by & through Berkeley Div., No. 2:20-CV-03170-DCN, 2022 WL 2719820, at *2 (D.S.C. July 13, 2022) ("[A]fter the deadlines provided by a scheduling order have passed, the [Rule 16(b)] good cause standard must be satisfied to justify leave to amend the pleadings.") (quoting *Nourison Rug Corp. v. Parvizian*, 535 F.3d 295, 298 (4th Cir. 2008)).

43. *E.g.*, Ga. Code Ann. § 9-2-61 (West) ("When any case has been commenced in either a state or federal court within the applicable statute of limitations and the plaintiff discontinues or dismisses the same, it may be recommenced in a court of this state or in a federal court either within the original applicable period of limitations or within six months after the discontinuance or dismissal, whichever is later …"); Okla. Stat. Ann. tit. 12, § 100 (West) ("If any action is commenced within due time, and a judgment thereon for the plaintiff is reversed, or if the plaintiff fail in such action otherwise than upon the merits, the plaintiff, or, if he should die, and the cause of action survive, his representatives may commence a new action within one (1) year after the reversal or failure although the time limit for commencing the action shall have expired before the new action is filed."). A Journey's Account Statute is a type of savings statute. *See* 18 Ind. Law Encyc. *Limitation of Actions* § 79 (March 2023 updated) ("The Journey's Account Statute typically saves an action filed in the wrong court by allowing

the plaintiff enough time to refile the same claim in the correct forum. For instance, where a cause of action brought in federal court fails for lack of jurisdiction, the plaintiff's subsequent state action filed against the same defendant for the same claim within the period designated by the Journey's Account Statute is timely.").

44. *E.g.*, Beck v. Caterpillar Inc., 50 F.3d 405, 407 (7th Cir. 1995) ("While his first lawsuit was filed within the limitations period, that suit was voluntarily dismissed pursuant to Fed. R. Civ. P. 41(a), and is treated as if it had never been filed. The statute of limitations accordingly continued to run during the pendency of that case."); 9 Arthur R. Miller, Federal Practice and Procedure § 2367 (4th ed. April 2023 update) ("And, most importantly, it seems well settled in the case law that the statute of limitations is not tolled by bringing an action that later is dismissed voluntarily under Rule 41(a).").

45. 28 U.S.C. § 1367(a).

46. Millar v. Bay Area Rapid Transit Dist., 236 F. Supp. 2d 1110, 1116 (N.D. Cal. 2002).

47. 28 U.S.C. § 1367(c)(3).

48. Carnegie-Mellon University v. Cohill, 484 U.S. 343, 357 (1988).

49. Dean v. City of Fresno, 546 F. Supp. 2d 798, 821 (E.D. Cal. 2008) ("In fact, 'it is generally preferable for a district court to remand remaining pendent claims to state court.'"); Graham v. Rockford Fabricators, No. 01 C 50347, 2002 WL 31618295, at *1 (N.D. Ill. Nov. 5, 2002) ("Relinquishing pendent jurisdiction once federal claims are dismissed is the norm, not the exception."); *id.* at *12 ("That said, the court shares defendant's concern about what appears to be a purposeful manipulation of the court system by plaintiff and his counsel.").

50. Results of this discretionary determination are mixed. *Compare* Baddie v. Berkeley Farms, Inc., 64 F.3d 487, 491 (9th Cir. 1995) ("There was nothing manipulative about that straight-forward tactical decision . . ." to dismiss the federal claim to force remand.) *with* Mishra v. Colmen Motors, LLC, No. 4:16cv01553 PLC, 2018 WL 690990, at *3 (E.D. Mo. Feb. 2, 2018) (denying motion to amend "[b]ecause Plaintiff's admitted purpose for amending the petition is to defeat federal jurisdiction and our courts disfavor such gamesmanship . . ."). The court in *Mishra* correctly distinguished between dismissal of a single claim through a Rule 15(a) amendment and dismissal of the entire action pursuant to Rule 41(a). *See* Mishra, 2018 WL 690990, at

*3 (denying Rule 15(a) motion to amend pleading to eliminate federal claim because it was improper gamesmanship but granting Rule 41(a) motion to dismiss entire action without prejudice).

51. Fed. R. Civ. P. 1.