1. Dismissals—function, form, and variance

Dismissals are end points. But not all endings are the same. They can arise for different reasons: Compare, for example, a case in which a plaintiff decides voluntarily to dismiss the case with one in which a judge dismisses the case because the plaintiff fails to serve the defendant. And they can mean different things for what might come next in the case. For instance, both a voluntary dismissal and a dismissal because of failure to serve are likely to be without prejudice to refiling the case; other dismissals, like a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), may be with prejudice, such that the plaintiff’s only recourse is to appeal.

Dismissals are a procedural device that contain their own categories, a catch-all for a variety of types of case-endings, from the temporary to the final. Indeed, unlike summary judgment, which is largely confined to a single, albeit broad rule—Rule 56—the rules of dismissal spread across Rules 8 through 12 (pleading requirements and motions to dismiss), to Rule 15 (amendments), all the way through Rule 41 (dismissals), to say nothing of the many other rules that either touch on or offer their own grounds for a case to be dismissed.[[1]](#footnote-1)

In this Part, we provide a simple analytic framework through which to understand dismissals as a procedural mechanism. In charting the main fault-lines of the doctrine of dismissals—the ultimately blurry distinction between with and without prejudice, and then again within the many varieties of dismissals without prejudice—we suggest that dismissals are concerned with a certain type of defects in parties’ cases. These defects are legal, not evidentiary; that is the difference between a dismissal and summary judgment.[[2]](#footnote-2) And, at least in principle, the nature of the dismissal should turn on the type of defect at issue, or at least the court’s classification of that defect. Some defects require courts to consider the merits of the case; others simply the process of getting to the merits. Some defects can be remedied; some cannot—or, in the mind of the court, should not be.

1. With and Without Prejudice

In theory, a brightline cleaves dismissals: Some are with prejudice to refiling, and others are without prejudice. “With prejudice,” as Wright and Miller put it, “is an acceptable form of shorthand for ‘an adjudication upon the merits,’” such that that a plaintiff is barred from returning to the district court with the same case. And, because of substantive preclusion law,[[3]](#footnote-3) a dismissal with prejudice also bars the plaintiff from filing the same suit elsewhere, so the only option is up—an appeal. By contrast, “the primary meaning of ‘dismissal without prejudice’ . . . is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim.”[[4]](#footnote-4) In other words, to go back to our endings, cases dismissed without prejudice are at least not quite dead yet in the trial court, where cases dismissed without prejudice are dead at the trial court.

But any hope of a stable brightline faces two functional challenges. The first is that there’s generally not an equivalently brightline way of determining which dismissals should fit into which category. As Stephen Burbank recounts, the drafters of the Federal Rules of Civil Procedure initially tried to inject clarity by “stat[ing] two separate rules governing dismissals without and with prejudice.” They abandoned the effort when they determined “that there was ‘practically complete overlap[] between’” the two proposed rules and started to worry that “[l]isting” each type of dismissal would be “dangerous because of possible omissions.”

At bottom, the challenge is that, because dismissals don’t actually involve adjudication upon the merits, there is no one-size-fits-all way to determine what types of dismissals allow a court to say that it did, effectively, adjudicate the case on the merits when dismissing the case such that the dismissal is final. Instead, today’s Rule 41 adopts what amounts to a case specific approach. Under the rule, voluntary dismissals are (generally)[[5]](#footnote-5) without prejudice, while involuntarily dismissals are (far less generally) with prejudice. But the exceptions are wide. Notably, dismissals for lack of jurisdiction, improper venue, and failure to join a necessary party are all presumptively without prejudice. So, generally, are dismissals for failure to serve and even failure to state a claim upon which relief may be granted.

Turning to the defects at issue helps to explain the tilt toward dismissing without prejudice. A plaintiff can remedy a failure to serve by serving the defendant properly; correct improper venue by re-filing the case in a court where venue is proper; join a necessary party; and so on. The defects are, on their face, fixable, so something else needs to drive a judge’s decision to dismiss with prejudice—[the litigant’s behavior, which suggests that, at least in that case, the defect isn’t actually fixable]. The result is that, although the rules try to distinguish between the types of defects that should yield one type of dismissal versus another, much of the work rests on case-specific considerations and, ultimately, judicial discretion.

The second challenge is that the labels themselves don’t necessarily mean anything. In a variety of circumstances, appellate courts have crafted functional rules to determine whether a dismissal is sufficiently final for an appeal to be taken, regardless of how the order is designated below. For instance, as the Seventh Circuit has explained, “the phrase ‘without prejudice’ makes jurisdictional antennae twitch for appellate judges and other mavens of appellate jurisdiction.”[[6]](#footnote-6) So, in the Seventh Circuit, dismissals “based on a lack of subject-matter or personal jurisdiction or improper venue, are final for purposes of appeal,” because they “signal clearly that the district court has finished with the case but is leaving open the possibility that the parties may pursue the dispute in another forum.”[[7]](#footnote-7)

[Defects again are helpful, because they sort which cases generally done before that particular district court. Not just an “easily fixable problem,” see 586 F.3d 500, 506-07, but rather a problem that can be fixed by the plaintiff without an intervening action by a third party. (Even this, however, breaks down.)]

1. Varieties of Dismissal Without Prejudice

The distinction between dismissals *with* and *without* prejudice gets at a major (if elusive) fault line in the law of dismissals, but like the beetles of the Galápagos Islands, such simplistic categories belie considerable diversity. Actions or claims can be dismissed without prejudice for a variety of reasons and in a variety of manners. To be sure, these species of dismissal are neither perfectly mutually exclusive nor wholly conceptually coherent. In any case, by surveying the field and searching for distinctions, we hope to learn some general principles of dismissal while also shining a light on a few outstanding puzzles.

Our best attempt at a close-to-exhaustive enumeration of dismissals without prejudice is as follows:[[8]](#footnote-8) dismissals for lack of standing;[[9]](#footnote-9) dismissal for failure to timely serve the defendant;[[10]](#footnote-10) dismissal for lack of subject matter jurisdiction;[[11]](#footnote-11) dismissal for lack of personal jurisdiction;[[12]](#footnote-12) dismissal for improper venue;[[13]](#footnote-13) dismissal for insufficiency of process;[[14]](#footnote-14) dismissal for insufficiency of service of process;[[15]](#footnote-15) dismissal for failure to state a claim upon which relief can be granted;[[16]](#footnote-16) dismissal for failure to join a necessary party;[[17]](#footnote-17) failure to prosecute the action in the name of the real party in interest;[[18]](#footnote-18) failure to timely move for substitution following a party’s death;[[19]](#footnote-19) failure to provide or permit discovery or to oetherwise obey a discovery order;[[20]](#footnote-20) failure to attend, participate in, or obey orders entered pursuant to a scheduling or other pretrial conference;[[21]](#footnote-21) failure to preserve electronically stored information and doing so with an intent to deprive another party of the information’s use in litigation;[[22]](#footnote-22) failure of the plaintiff to prosecute or to comply with the Federal Rules of Civil Procedure or any order of court;[[23]](#footnote-23) dismissal when deemed by a judge the appropriate sanction for a Rule 11 violation;[[24]](#footnote-24) voluntary dismissal by a plaintiff following the filing of a timely notice or a stipulation signed by all parties;[[25]](#footnote-25) and, if the time limit for a voluntary dismissal by notice has expired, dismissal upon the granting of a plaintiff’s motion for voluntary dismissal.[[26]](#footnote-26) Dismissals are frequently and categorically described as involving defects in “procedure” rather than in the merits of a claim or action.[[27]](#footnote-27) There is truth to this description, but as the forgoing list illustrates, it also papers over real practical and conceptual differences between various modes of dismissal.

Whether with or without prejudice, every dismissals can be slotted into one of four roughly mutually exclusive categories: first, dismissals due to technical procedural deficiency; second, dismissals due to a lack of jurisdiction, either over the parties or the subject matter; third, dismissals due to a lack of will; and fourth, dismissals due a lack of merit. In our schema, all dismissals indeed derive from defects in the action or claim, and such defects can be plausibly label as “procedural,” but the label fits much better for some than for others.

* 1. *Dismissals due to technical procedural deficiency*

It’s not uncommon to see a journalist or other observer describe a court’s ruling as “merely procedural.” The intended effect, it seems, is to emphasize

TK.

* 1. *Dismissals due to lack of jurisdiction*

TK.

* 1. *Dismissals due to lack of (litigant) will*

Not infrequently, claimants lose the will to pursue their claims. It could be the result of strategic decisionmaking—agreeing to withdraw one’s claim in exchange for a sufficiently generous settlement offer, for example—but it could just as easily reflect exhaustion, confusion, or inattention on the part of the claimant. TK.

* 1. *Dismissals due to lack of merit*

Dismissals without prejudice never go to the “merits” of the claim or claims—except when they do. Dismissals for failure to state a claim upon which relief can be granted under Rule 12(b)(6) stand as the sole exception to the general rule, but they are a highly notable exception.[[28]](#footnote-28) Dismissals for failure to state a claim are no doubt procedural—generally pointing to non-compliance with Rules 8 or 9, governing the content of pleadings—but not in a merely technical sense. Indeed, Rule 8 specifically provides that allegations must be “simple, concise, and direct,” but that “technical forms [are not] required.”[[29]](#footnote-29) Rather, dismissals under Rule 12(b)(6) are generally thought to reflect either legal or factual insufficiency’s in the claimant’s claims.[[30]](#footnote-30)

Somewhat perplexingly, dismissals for failure to state a claim can be ordered both with and without prejudice. TK.

1. See Bradley Scott Shannon, Action Is an Action Is an Action Is an Action, 77 Wash. L. Rev. 65, 116-120 (2002); see, e.g., Fed. R. Civ. P. 4(m) (establishing time limit for service after which “the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time”). [↑](#footnote-ref-1)
2. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986) “One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses.”). [↑](#footnote-ref-2)
3. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001); see Bryan Lammon, There Is No Helpful General Rule About Appealing Dismissals Without Prejudice, 123 Mich. L. Rev. Online 16, 19 (2024). [↑](#footnote-ref-3)
4. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505 (2001) [↑](#footnote-ref-4)
5. For example, cases voluntarily dismissed twice are dismissed with prejudice. See 41. [↑](#footnote-ref-5)
6. Lauderdale-El v. Indiana Parole Board, 35 F.4th 572, 576 (2022). [↑](#footnote-ref-6)
7. Id; see also U.S. v. Wallace & Tiernan Co., 336 U.S. 793, 794 n.1 (1949 (“That the dismissal was without prejudice to filing another suit does not make the cause unappealable, for denial of relief and dismissal of the case ended this suit so far as the District Court was concerned.”) [Bryan Lammon suggests that, rather than formal finality doctrine, “[f]ocusing on whether the district court is finished,” as the Seventh Circuit does, could radically change current finality doctrine” for the better by creating “an intuitive, simple, and predictable rule.” Lammon, supra note \_\_, at 22.] [↑](#footnote-ref-7)
8. In an effort to discover the meaning of the precise term “dismissal,” Bradley Scott Shannon enumerated a similar though slightly less exhaustive list. An Action Is an Action Is an Action Is an Action, 77 Wash. L. Rev. 65, 117–18 (2002). [↑](#footnote-ref-8)
9. Where in the Rules to ground a motion to dismiss for “lack of standing” is notoriously murky, with litigants and judges variously classifying such motions under Rule 12(b)(1), Rule 12(b)(6), or both. *See, e.g.*, Ballentine v. U.S., 486 F.3d 806, XX (3d Cir. 2007) (classifying a motion to dismiss for lack of standing as “propertly brought pursuant to Rule 12(b)(1), because standing is a jurisdictional matter,” but nonetheless evaluating the motion under the rubric of Rule 12(b)(6)); *see also* John H. Garvey, *A Litigation Primer for Standing Dismissals*, 55 N.Y.U. L. Rev. 545 (1980) (arguing that either Rule provides an appropriate basis for a standing motion, depending upon the nature of the defendant’s standing argument). [↑](#footnote-ref-9)
10. Fed. R. Civ. P. 4(m). [↑](#footnote-ref-10)
11. Fed. R. Civ. P. 12(b)(1). [↑](#footnote-ref-11)
12. Fed. R. Civ. P. 12(b)(2). [↑](#footnote-ref-12)
13. Fed. R. Civ. P. 12(b)(3); 28 U.S.C. § 1406(a) (“The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case…”); see also Fed. R. Civ. P. 19(a) (); [↑](#footnote-ref-13)
14. Fed. R. Civ. P. 12(b)(4). [↑](#footnote-ref-14)
15. Fed. R. Civ. P. 12(b)(5). Although “[t]he distinction between the two insufficiencies is often blurred,” Adams v. AlliedSignal Gen. Aviation Avionics, 74 F.3d 882, 884 (8th Cir. 1996), dismissal under Rule 12(b)(4) is generally “proper only to challenge noncompliance with the provisions of Rule 4(b) or any applicable provision incorporated by Rule 4(b) that deals specifically with the content of the summons [whereas a] Rule 12(b)(5) motion is the proper vehicle for challenging the mode of delivery, the lack of delivery, or the timeliness of delivery of the summons and complaint.” 5B Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 1353 (4th ed. 2025). In this way, a motion under Rule 12(b)(5) also seems to subsume motions under Rule 4(m). [↑](#footnote-ref-15)
16. Fed. R. Civ. P. 12(b)(6). [↑](#footnote-ref-16)
17. Fed. R. Civ. P. 12(b)(7); Fed. R. Civ. P. 19(b). [↑](#footnote-ref-17)
18. Fed. R. Civ. P. 17(a). [↑](#footnote-ref-18)
19. Fed. R. Civ. P. 25(a)(1). [↑](#footnote-ref-19)
20. Fed. R. Civ. P. 37(b)(2)(A). [↑](#footnote-ref-20)
21. Fed. R. Civ. P. 16(f) (cross-referencing sanctions available under Rule 37(b)(2)(A), including dismissal). [↑](#footnote-ref-21)
22. Fed. R. Civ. P. 16(e). [↑](#footnote-ref-22)
23. Fed. R. Civ. P. 41(b). This would appear to provide the technical basis for a judge’s dismissal for failure to adequately respond to an “Order to Show Cause.” [↑](#footnote-ref-23)
24. See Fed. R. Civ. P. 11 (c)(4) (limiting available sanctions to “what suffices to deter repetition of the conduct or comparable conduct by others similarly situated); see also, e.g., Marina Mgmt. Servs., Inc. v. Vessel My Girls, 202 F.3d 315, 325 (D.C. Cir. 2000), cert. denied 531 U.S. 985 (2000) (“Dismissal is a legitimate sanction under Rule 11 . . . for serious misconduct when lesser sanctions would be ineffective or are unavailable.”). [↑](#footnote-ref-24)
25. Fed. R. Civ. P. 41(a)(1). [↑](#footnote-ref-25)
26. Fed. R. Civ. P. 41(a)(2). [↑](#footnote-ref-26)
27. See, e.g., Bradley Scott Shannon, An Action Is an Action Is an Action Is an Action, 77 Wash. L. Rev. 65, 127, 131 (2002). [↑](#footnote-ref-27)
28. As of September 2015, Adam Steinman found that federal judges had already cited Twombly and Iqbal more frequently than all but two other Supreme Court opinions. See Adam Steinman, The Rise and Fall of Plausibility Pleading?, 69 Vand. L. Rev. 333, 390 (2016). [↑](#footnote-ref-28)
29. Fed. R. Civ. P. 8(d)(1). [↑](#footnote-ref-29)
30. *See* Bradley Scott Shannon, *I Have Federal Pleading All Figured Out*, 61 Case W. Res. L. Rev. 453, 457­­­­–86 (2011) (categorizing dismissals for failure to state a claim as stemming from factual insufficiency, legal insufficiency, or insufficiency of proof); *but see*  [↑](#footnote-ref-30)