Some part of the confusion around dismissals without prejudice and their practical effect may stem from the diversity of arrangements that get grouped together under the label “dismissal without prejudice.”

Consider settlement. When a plaintiff wishes to cease pursuing an action, she may seek a voluntary dismissal. By default, Federal Rule of Civil Procedure 41(a) treats such dismissals as “without prejudice.” The practical effect of a voluntary dismissal is to make it as if the action was never initiated.[[1]](#footnote-1)

Dismissal for lack of prosecution

A "dismissal" is the termination of an action without further hearing1 and in effect is equivalent to a nonsuit.2In the context of pleadings and motions, a "dismissal" is the withdrawal of an application for judicial relief by the party seeking such relief, or the removal of the application by a court.3

The Federal Rules of Civil Procedure provide for the "dismissal" of actions.4

A dismissal with prejudice connotes an adjudication5 or final determination on the merits,6 and extinguishes7 or bars any future claim.8

24 Am. Jur. 2d Dismissal § 1

In the context of voluntary dismissals, the phrase "without prejudice" means that the dismissal has been taken with no decision on the merits of the case and, therefore, without prejudice to refiling.1 In other words, the primary meaning of "dismissal without prejudice" is dismissal without barring the defendant from returning later, to the same court, with the same underlying claim.2 No right or remedy of the parties is affected by a dismissal without prejudice; rather, the use of the phrase simply shows that there has been no decision of the case upon the merits,3 and prevents the defendant from setting up the defense of res judicata.4

24 Am. Jur. 2d Dismissal § 2

A voluntary dismissal without prejudice requested by a plaintiff is referred to under some authority as a "nonsuit."1 Nonsuit is a procedural step that terminates the pending litigation but leaves the issues of the cause undecided.2 It is, in effect, equivalent to a dismissal, and is governed by the rule relating to dismissals.3

24 Am. Jur. 2d Dismissal § 4

A non prosequitur is a judgment entered when the plaintiff at any stage of the proceedings fails to prosecute the action, or any part of it, in due time. The judgment is entered at the instance of the defendant.1

24 Am. Jur. 2d Dismissal § 5

A dismissal with prejudice is the modern name for a common-law retraxit.1 A retraxit is an open and voluntary renunciation by the plaintiff of his or her suit in court, made when trial is called on, by which the plaintiff forever loses his or her action, or is barred from commencing another action on the same cause; thus, retraxit operates as a dismissal of the cause with prejudice.2

24 Am. Jur. 2d Dismissal § 6

Black’s Law Dictionary (7th ed. 1999) defines dismissals as "[t]ermination of an action or claim without further hearing, esp. before the trial of the issues involved," and 'Judgment of dismissal" (at 847) as "[a] final determination of a case without a trial on its merits"). Compare id. at 848 (defining 'Judgment on the merits" as "[a] judgment based on the

evidence rather than on technical or procedural grounds").

From Bradley Scott Shannon, interesting anecdote about old Rule 41(b) language allowing for “dismissal” in what sounds closer to directed verdict. Later moved to Rule 52 and clarified it’s not a dismissal but a judgment.

The Varieties of Dismissals Without Prejudice

Voluntary vs. involuntary

Within involuntary

* Lack of jurisdiction
* Violations of rules or norms of litigation practice (?) (by norms, I mean something like failure to prosecute)
* Lacking in merits (e.g. 12(b)(6), 12(c))

Definitional stuff

A better definition might be that a dismissal is merely a (final?) termination/disposition without a judgment.

Types of dimissals:

The distinction between dismissals *with* and *without* prejudice gets at a major fault line in the law of dismissals, but within the latter category especially, countless more varieties of dismissal demand additional distinctions with varying degrees of conceptual, doctrinal, and practical consequence. Actions or claims can be dismissed without prejudice for a variety of reasons and in a variety of manners. Our best attempt at a close-to-exhaustive enumeration of dismissals without prejudice is as follows: dismissal for failure to timely serve the defendant;[[2]](#footnote-2) dismissal for lack of subject matter jurisdiction;[[3]](#footnote-3) dismissal for lack of personal jurisdiction;[[4]](#footnote-4) dismissal for improper venue;[[5]](#footnote-5) dismissal for insufficiency of process;[[6]](#footnote-6) dismissal for insufficiency of service of process;[[7]](#footnote-7) dismissal for failure to state a claim upon which relief can be granted;[[8]](#footnote-8) dismissal for failure to join a necessary party;[[9]](#footnote-9) To be sure, these species of dismissal are neither mutually exclusive nor wholly conceptually coherent. As others have observed, that the Federal Rules provide for “dismissal”

Dismissals are frequently described as involving defects in “procedure” rather than in the merits of a claim or action.[[10]](#footnote-10) There is truth to this description, but it also elides real practical and conceptual differences between various modes of dismissal and, perhaps especially, for how the concepts of “merits” and “procedure”

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.

*Dismissals due to technical procedural deficiency*

These definitions and distinctions notwithstanding, we’re left with a handful of fundamental questions regarding the nature and effect of dismissals. Among them is how, if at all, dismissals relate to the “merits” of an action. Depending upon who one asks, dismissals are either “nonadjudicatory […] in the sense that there is no actual adjudication on the merits,”[[11]](#footnote-11) or else they presumptively “operate[] as an adjudication on the merits.”[[12]](#footnote-12)

1. *See,* e.g., United States v. L-3 Comm’s EOTech, Inc., 921 F.3d 11, 19 (2d Cir. 2019) (citing Wright & Miller § 2367, at 559) ( “[I]t is hornbook law that a voluntary dismissal without prejudice leaves the situation as if the action never had been filed.”). [↑](#footnote-ref-1)
2. Fed. R. Civ. P. 4(m). [↑](#footnote-ref-2)
3. Fed. R. Civ. P. 12(b)(1). [↑](#footnote-ref-3)
4. Fed. R. Civ. P. 12(b)(2). [↑](#footnote-ref-4)
5. 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-5)
6. Fed. R. Civ. P. 12(b)(4). [↑](#footnote-ref-6)
7. 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-7)
8. Fed. R. Civ. P. 12(b)(6). [↑](#footnote-ref-8)
9. Fed. R. Civ. P. 12(b)(7); Fed. R. Civ. P. 19(b). [↑](#footnote-ref-9)
10. *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-10)
11. Bradley Scott Shannon, *An Action Is an Action Is an Action Is an Action*, 77 Wash. L. Rev. 65, 116 (2002). [↑](#footnote-ref-11)
12. Fed. R. Civ. P. 41(b) (“Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 —operates as an adjudication on the merits.”). [↑](#footnote-ref-12)