CLEANING HOUSE WITH RULE 41(b): AN EMPIRICAL STUDY OF THE MULTI-FACTOR TESTS FOR INVOLUNTARY DISMISSALS

INTRODUCTION

Judges are case managers.[1] They set deadlines for discovery, schedule conferences, and gently nudge cases towards resolution.[2] Some judges even hold mandatory settlement conferences and mediate the dispute.[3]

As case managers, federal judges frequently rely on Rule 41(b) of the Federal Rules of Civil Procedure for housekeeping measures.[4] Rule 41(b) permits the court to *sua sponte*, or upon defendant's motion, involuntarily dismiss inactive cases or as a sanction for non-compliance with the federal rules or a court order.[5] Rule 41(b) is therefore an invaluable case-management tool with a straightforward purpose: given scarce judicial resources, judges may dispose cases that are not being diligently prosecuted or involve plaintiffs who abuse the judicial process by routinely ignoring court orders.

1. As former Chief Judge Peckham noted thirty years ago, "[T]oday's massive volume of litigation and the skyrocketing costs of attorney's fees and other litigation expenses have, by necessity, cast the trial judge in a new role, that of pretrial manager." Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 771 (1980); *see also* Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 671 (2010) (describing the rise of judicial case management in federal courts).

2. Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1973 (2007); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982); Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1261 (2010).

3. Bone, *supra* note 2; Thornburg, *supra* note 2; Resnik, *supra* note 2, at 376-77.

4. FED. R. CIV. P. 41(b); Stolt-Nielsen, Inc. v. Zim Israel Navigation Co., 879 F. Supp. 1223, 1225 (S.D. Ga. 1994) *vacated on other grounds sub nom*. Stolt-Neilsen v. Zim Israel Nav. Co., 67 F.3d 314 (11th Cir. 1995) (describing Rule 41(b) as a "housekeeping measure" enabling judges to manage their dockets, while also furthering the public's interest in expeditious litigation and preventing prejudice to defendants).

5. Link v. Wabash R. Co., 370 U.S. 626, 630 (1962).

A dismissal under Rule 41(b), however, has drastic consequences. Because involuntary dismissals are adjudications on the merits,[6] the doctrine of res judicata precludes plaintiffs from filing subsequent actions in federal court.[7] Several appellate courts have therefore frowned upon its use except in "extreme situations" and only if less severe sanctions are unavailable.[8] Accordingly, when a federal judge is considering a Rule 41(b) dismissal, the principal question is: does the court's need to manage its docket outweigh the plaintiff's right to have her day in court?

In order to guide the district court's determination, each appellate court has devised its own multi-factor test for Rule 41(b) dismissals. District courts within the Seventh Circuit, for example, consider seven factors,[9] the Third Circuit considers six factors,[10] while the Second,[11] Ninth,[12] and

6. The court may also choose to order dismissal without prejudice, which would not have the same preclusive effect. 3M Co. v. Boulter, 842 F. Supp. 2d 85, 104 (D.D.C. 2012) *appeal dismissed*, 2012 WL 5897085 (D.C. Cir. Oct. 19, 2012) and *motion for relief from judgment denied*, 290 F.R.D. 5 (D.D.C. 2013). Unless the court explicitly orders dismissal without prejudice, the dismissal acts as adjudication on the merits thus barring subsequent claims. Paul v. Marberry, 658 F.3d 702, 704 (7th Cir. 2011). *But see* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 506 (2001) (holding that dismissal with prejudice under Rule 41(b) only precludes future claims in the same federal court, not in other courts).

7. *See, e.g.*, Napier v. Thirty or More Unidentified Fed. Agents, Employees or Officers, 855 F.2d 1080, 1087 (3d Cir. 1988); Kimmel v. Tex. Commerce Bank, 817 F.2d 39, 40 (7th Cir. 1987).

8. Durgin v. Graham, 372 F.2d 130, 131 (5th Cir. 1967); Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863, 867-68 (3d Cir. 1984); U.S. *ex rel* Drake v. Norden Sys., Inc., 375 F.3d 248, 254 (2d Cir. 2004); Navarro v. Chief of Police, Des Moines, Iowa, 523 F.2d 214, 217 (8th Cir. 1975).

9. The Seventh Circuit requires district courts to asses the: (1) frequency and magnitude of the failure to comply with deadlines; (2) apportionment of responsibility for the conduct between plaintiff and counsel; (3) effect of conduct on court's calendar; (4) prejudice to defendant; (5) probable merits of plaintiff's claim; (6) consequences of dismissal for the social objectives of the type of litigation that the suit represents; and (7) explicit warnings. Ball v. City of Chicago, 2 F.3d 752, 759-60 (7th Cir. 1993).

10. Courts in the Third Circuit apply the "*Poulis* test" and consider: (1) the extent of plaintiff's personal responsibility; (2) prejudice to defendant; (3) a history of dilatoriness; (4) whether the plaintiff's or attorney's conduct was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal; and (6) the meritoriousness of plaintiff's claim. *Poulis*, 747 F.2d at 868.

11. District courts within the Second Circuit consider: (1) the duration of the plaintiff's failures; (2) whether plaintiff received notice that further delays would result in dismissal; (3) whether the defendant is likely to be prejudiced by further delay; (4) striking a balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard; and (5) the efficacy of lesser sanctions. Harding v. Fed. Reserve Bank of N.Y.C., 707 F.2d 46, 50 (2d Cir. 1983); *see also* Jackson v. City of New York, 22 F.3d 71, 74 (2d Cir. 1994).

12. The Ninth Circuit requires district courts to weigh the: (1) public's interest in expeditious resolution of litigation; (2) court's need to manage its docket; (3) risk of prejudice to defendant; (4) public policy favoring disposition of cases on their merits; and (5) availability of less drastic

Tenth[13] Circuits consider five factors.[14] While there are some similarities between the multi-factor tests, there also exist significant disparities, not only about which factors are considered, but how they are considered.[15]

Despite the inconsistent approaches, and Rule 41(b)'s pivotal role in federal litigation, the circuit courts' multi-factor tests have not generated any scholarly attention. No one has systematically analyzed, for example, how judges apply the tests, whether one factor drives the outcome, and whether the factors are even useful in evaluating whether the inactivity or non-compliance warrants the "harshest sanction of dismissal."[16] Because the value of multi-factor tests depends on whether the individual factors are clear, valid, and equally weighted, this information is indeed crucial.[17] This article therefore presents the results of an empirical study that systematically examined the use of multi-factor tests for Rule 41(b) rulings by district court judges over a three-year period.[18]

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sanctions. Citizens Utilities Co. v. Am. Tel. & Tel. Co., 595 F.2d 1171, 1174 (9th Cir. 1979); *see also* Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992).

13. District courts within the Tenth Circuit apply the "*Ehrenhaus* test" and consider the: (1) degree of actual prejudice to the other party; (2) amount of interference with the judicial process; (3) litigant's culpability; (4) whether the court warned the party in advance that dismissal would be a likely sanction for noncompliance; (5) efficacy of lesser sanctions. Ehrenhaus v. Reynolds, 965 F.2d 916, 921 (10th Cir. 1992).

14. For a list of the factors considered in the First, Fourth, Fifth, Sixth, Eighth, and D.C. Circuits, *see infra* Table 1, in Part II.B.

15. Prejudice, for example, is a factor in most circuit courts' tests. Yet, some circuits consider *actual* prejudice to the defendant, *e.g.*, Briscoe v. Klaus, 538 F.3d 252, 259-60 (3d Cir. 2008), while others consider only the *risk* or the *likelihood* of prejudice, *e.g.*, *Ferdik*, 963 F.3d at 1262. Therefore, in a hypothetical situation where defendant was never served, district courts in Pennsylvania would not find that this factor favors dismissal, but courts in California would. *See, e.g.*, Sherman v. Henderson, No. 2:10-CV-02939 MCE, 2012 WL 2371066, at *3 (E.D. Cal. June 21, 2012). *But see* 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2370.1 (3d ed. 2008) ("Despite various verbal formulations, it is doubtful that the results reached are significantly different in the various circuits.").

16. These questions are best answered by using empirical methods to quantitatively assess causal connections, interrelations, and distributions between case outcomes and the independent factors. Karen A. Jordan, *Empirical Studies of Judicial Decisions Serve an Important Role in the Cumulative Process on Policy Making*, 31 IND. L. REV. 81, 83 (1998); Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 876 (2008).

17. Teed v. Thomas & Betts Power Solutions, L.L.C, 711 F.3d 763, 766 (7th Cir. 2013); *see also* Chris Guthrie, Jeffrey J. Rachlinkski, & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 41-42 (2007).

18. This type of empirical study is known as "systematic content analysis," and involves collecting documents, such as judicial opinions on a specific area or issue, systematically reading them, recording criteria, and drawing inferences. Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63-64 (2008); *see also* KLAUS KRIPPENDORFF, CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY 18 (2d ed., 2004) (defining content analysis as "a research technique for making replicable and valid

This study serves two purposes. First, using basic statistical analysis, the study demonstrates how judges apply the multi-factor tests in practice and provides data on involuntary dismissals in federal courts.[19] Second, the study's findings demonstrate a dire need to revise Rule 41(b), or at the very least to formulate a uniform multi-factor test.[20]

Part I of the article provides general background information on Rule 41(b) and discusses the utility of multi-factor tests to judicial decision-making. Part II describes the study's methodology as well as its inherent limitations. Part III presents the results from the study and discusses its implications.

Specifically, Part III.A focuses on the who, what, when, where and how of Rule 41(b) orders. It presents descriptive statistics on case outcomes based upon venue, pro se litigants, and whether a motion was filed.

Part III.B presents the results of logistic regression analysis to demonstrate that throughout the district courts, only four of the fifteen factors effect case outcomes. The remaining factors appear either irrelevant or redundant, having minimal significance on case outcomes. This directly contradicts the long-held assertion that no one factor is dispositive.[21]

Part III.C provides data on the core factors encompassing the multi-factor tests and focuses on inter-circuit and even inter-district disparities in application.

Lastly, given the study's findings, Part IV proposes a revision to the rule, or in the alternative, a formulation of a uniform nation-wide standard.

I. BACKGROUND

A. What Is Rule 41(b)?

Every litigant owes a duty to diligently prosecute their case and comply with the court's directives.[22] When she breaches that duty, Rule 41(b)

inferences from texts (or other meaningful matter) to the contexts of their use"). Unlike traditional legal scholarship, which analyzes one case or a small group cases, systematic content analysis "works by analyzing a larger group of similarly weighted cases to find overall patterns." Hall & Wright, *supra*.

19. *See infra* Part II.C.

20. *See infra* Part III.

21. *See, e.g.*, U.S. *ex rel* Drake v. Norden Sys., Inc., 375 F.3d 248, 254 (2d. Cir. 2004) ("No one factor is dispositive."); Knoll v. Am. Tel. & Tel. Co., 176 F.3d 359, 363 (6th Cir. 1999) ("[N]one of the factors is outcome dispositive."); Baker v. Accounts Receivables Mgmt., Inc., 292 F.R.D. 171, 176 (D.N.J. 2013) ("No one factor is determinative.").

22. *Involuntary Dismissal for Disobedience or Delay: The Plaintiff's Plight*, 34 U. CHI. L. REV. 922, 922-23 (1967).

permits the district court to *sua sponte*, or upon defendant's motion, involuntarily dismiss the case for failure to prosecute, comply with the federal rules, or with court orders.[23] Rule 41(b) therefore ensures that federal dockets are not congested with cases that are inactive or involve plaintiffs who abuse the judicial process through their dilatory and non-compliant conduct.[24]

Although Rule 41(b) does not define "failure to prosecute,"[25] courts have interpreted the term as simple inaction or a deliberate pattern of delay.[26] This includes failing to appear on the day set for trial, repeatedly substituting counsel, or failing to serve defendant within a reasonable time.[27] A failure to comply, on the other hand, includes disobeying an order to respond to discovery, not appearing for court ordered hearings, or disregarding an Order to Show Cause ("OSC"), among other instances.[28]

B. A (Very Brief) History of Rule 41(b) and the Multi-Factor Tests

Even at its inception, Rule 41(b) was created as a housekeeping measure, specifically for calendar management purposes.[29] During the

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23. FED. R. CIV. P. 41(b).

24. *See* Nealey v. Transportacion Maritima Mexicana, S. A., 662 F.2d 1275, 1279 (9th Cir. 1980) ("[R]ule 41(b) is in large part a housekeeping measure related to the efficient administration of judicial business for the benefit of all litigants with cases pending.").

25. Gibbs v. Hawaiian Eugenia Corp., 966 F.2d 101, 109 (2d Cir. 1992); WRIGHT & MILLER, *supra* note 15, at § 2369.

26. Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 42 (2d Cir. 1982); Washington v. Walker, 734 F.2d 1237, 1238 (7th Cir. 1984).

27. *See, e.g.*, Peart v. City of New York, 992 F.2d 458, 459-62 (2d Cir. 1993) (finding dismissal proper when plaintiff's counsel failed to communicate with defendant and did not appear at trial); Morris v. Morgan Stanley & Co., 942 F.2d 648, 652-54 (9th Cir. 1991) (affirming dismissal where plaintiff unreasonably caused two years of delay by substituting counsel on four occasions, failing to appear for scheduled meetings, and ignoring defendants' correspondences); Colle v. Brazos Cnty., 981 F.2d 237, 243 (5th Cir. 1993) (affirming dismissal when plaintiff failed to identify or serve unnamed county employees after three years).

28. *See, e.g.*, Hutchins v. A.G. Edwards & Sons, Inc., 116 F.3d 1256, 1260 (8th Cir. 1997) (finding dismissal proper where plaintiff repeatedly refused to answer interrogatories after being ordered to do so on numerous occasions); Arnold v. ADT Sec. Services, Inc., 627 F.3d 716, 722 (8th Cir. 2010) (holding that district court properly dismissed plaintiff's claim for failure to comply with court's order to attend two status conferences).

29. ADVISORY COMMITTEE TO RULES OF CIVIL PROCEDURE MEETING MINUTES at 1698-1704 (1935) [hereinafter 1935 MEETING MINUTES], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-1935-min-Vol6.pdf. During the initial advisory committee meetings, the tentative rules did not contain a specific provision for involuntary dismissals for failure to prosecute or comply. Rather, the idea arose while committee members were discussing proposed Rule 81 "Case to be placed on trial calendar, when—continuances—call of docket." *Id*. at 1694-98. Interestingly, during these initial discussions, one committee member noted that the purpose of removing stale cases from dockets was to prevent their inclusion in

initial advisory committee meetings, the drafters recognized the need for judges to clear inactive cases from their dockets and decided to include a provision for involuntary dismissal for want of prosecution.[30] In order to allow judges to control their calendars, and given that the size of each court's docket varied from one city to another, the drafters specifically refrained from articulating the amount of time lapse or the standards to consider before dismissing a case.[31]

By creating Rule 41(b), the drafters established a uniform rule for the already long-standing practice in federal courts to dismiss cases for want of prosecution under various local court rules and under the judiciary's inherent power to manage its own docket.[32] Indeed, dismissing stale cases for lack of prosecution was common in both courts of law and equity,[33] and even in the Supreme Court.[34] Accordingly, after the Federal Rules of Civil

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statistics that Congress used to decide whether to appoint additional judges to district courts with large volumes of pending cases. *Id*. at 1701. Thus, it appears that committee members were just as concerned with skewing data through inactive cases as they were about allowing district judges to effectively manage their calendars.

30. *Id*. at 1698-1704. The drafters initially chose to defer a provision for involuntary dismissals for want of prosecution to each district court's Local Court Rules rather than creating a uniform federal rule. *Id.* at 1703. During the advisory committee meetings the following year, they decided to incorporate an express uniform provision. ADVISORY COMMITTEE TO RULES OF CIVIL PROCEDURE MEETING MINUTES at 893-96 (1936) [hereinafter 1936 MEETING MINUTES], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV02-1936-min-Vol4.pdf. The language permitting dismissals for failure to comply with the federal rules or court order was included in April of 1936. ADVISORY COMMITTEE TO RULES OF CIVIL PROCEDURE MEETING MINUTES (Apr. 1936), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-1936-min.pdf.

31. 1936 MEETING MINUTES, *supra* note 30. Some committee members noted that a five-year period would constitute "want of prosecution" while others preferred that the inaction occur after the statute of limitations had lapsed. 1936 MEETING MINUTES, *supra* note 30, at 893-94.

32. *See, e.g.*, Colo. E. Ry. Co. v. Union Pac. Ry. Co., 94 F. 312 (8th Cir. 1899); Zadig v. Aetna Ins. Co., 42 F.2d 142, 143 (2d Cir. 1930) (*sua sponte* dismissal for want of prosecution under Rule 28 of the General Rules of the Southern District of New York). 3 WILLIAM BLACKSTONE, COMMENTARIES *451 ("A plaintiff's bill may also at any time be dismissed for want of prosecution, which is in the nature of a nonsuit at law, if he suffers three terms to elapse without moving forward in the cause.").

33. *See, e.g.*, Bancroft v. Sawin, 9 N.E. 539 (Mass. 1887); Houston v. City & Cnty. of San Francisco, 47 F. 337, 338 (C.C.D. Cal. 1891); Cage v. Cage, 74 F.2d 377, 377-78 (5th Cir. 1934). In most equity cases, however, more than two years of inactivity lapsed before dismissal. *E.g.*, Buck v. Felder, 208 F. 474, 476-79 (M.D. Tenn. 1912) (denying defendant's motion to dismiss equity bill because only eighteen months of inactivity had lapsed before the motion was filed and plaintiff had replied to defendant's motion).

34. Like the lower courts, the Supreme Court rigidly enforced one of its own procedural rules, Rule 16, which mandated dismissal when an attorney failed to file a brief or appear for oral argument. *E.g.*, Hurley v. Jones, 97 U.S. 318 (1877); James v. McCormack, 105 U.S. 265 (1881). The Supreme Court repeatedly stressed that given its congested docket, judicial efficiency warranted involuntarily dismissing stale cases. *Id.*

Procedure were promulgated, district courts continued to exercise their inherent power to involuntarily dismiss cases even though the final version of Rule 41(b) did not expressly permit *sua sponte* dismissals.[35]

Nearly twenty-five years after the federal rules were adopted, the Supreme Court held in *Link* that district courts do, in fact, possess the inherent authority to order involuntary dismissals *sua sponte* under Rule 41(b).[36] As the Supreme Court explained, the trial court's ability to clear inactive cases from its dockets has "ancient origins," and allows prompt resolution of pending cases while preventing calendar congestion.[37] The dissent, however, expressed concerns with the majority's focus on case-management.[38] While recognizing the need to reduce docket congestion, Justice Black and Chief Justice Warren focused on an even more important interest, that of resolving cases on their merits.[39] As Justice Black so succinctly noted:

> When we allow the desire to reduce court congestion to justify the sacrifice of substantial rights of the litigants in cases like this, we attempt to promote speed in administration, which is desirable, at the expense of justice, which is indispensable to any court system worthy of its name.[40]

Thus, the Supreme Court's opinion in *Link* once again emphasized Rule 41(b)'s use as a housekeeping measure, and for the first time addressed the competing interest of resolving cases on the merits.

Following *Link*, the circuit courts began considering dismissals under Rule 41(b) by weighing the competing interests articulated in the majority

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35. *See, e.g.*, U.S. *ex rel* Shinn v. Tennessee, 74 F. Supp. 635, 638 (E.D. Tenn. 1947) (dismissing the case *sua sponte* where 260 days had passed since the complaint was filed and plaintiff had taken no further action to prosecute is claim); Carnegie Nat. Bank v. City of Wolf Point, 110 F.2d 569, 572 (9th Cir. 1940) (explaining that while Rule 41(b) does not specifically permit *sua sponte* dismissals, it also does not specifically prohibit them); Am. Nat. Bank & Trust Co. of Chi. v. United States, 142 F.2d 571, 572 (D.C. Cir. 1944) (acknowledging the court's inherent power to *sua sponte* dismiss for want of prosecution). Courts likewise relied on local court rules to dispose of inactive cases. *See, e.g.*, Soriano v. Am. Liberty S. S. Corp., 13 F.R.D. 455, 457 (E.D. Pa. 1952) (motion to dismiss for failure to prosecute filed pursuant to local court rule).

36. 370 U.S. 626, 629-31 (1962). *But see* Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers, 357 U.S. 197, 207 (1958) (describing Fed. R. Civ. P. 41(b) as a "defendant's remedy" based upon the plain meaning of the rule).

37. *Link*, 370 U.S. at 629-30.

38. *Id*. at 648-49 (Black, J., dissenting). Justices Black and Douglas again raised these concerns in their dissent to the adoption of the 1963 amendments to the federal rules. Amendments to Rules of Civil Procedure for the United States District Courts, 31 F.R.D. 587, 619 (1963).

39. *Link*, 370 U.S. at 648.

40. *Id.*

and dissenting opinions.[41] The circuit courts acknowledged the drastic consequence of involuntarily dismissing cases with prejudice under Rule 41(b), and thus required district courts to balance the need for docket management on the one hand, against the plaintiff's right to due process on the other.[42] In order to guide that determination, the circuit courts articulated various multi-factor tests for district courts to apply when adjudicating Rule 41(b) dismissals. The individual factors encompassing each circuit's multi-factor test reflect these dual interests of docket management versus adjudicating claims on the merits.[43] Table 1 provides a list of the multi-factor tests used by the twelve circuits.

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41. Pearson v. Dennison, 353 F.2d 24, 28-29 (9th Cir. 1965) ("On the one side there [is] the policy in favor of the prompt disposition of litigation. . . . On the other hand there is the policy in favor of deciding cases on their merits."); Davis v. Operation Amigo, Inc., 378 F.2d 101, 103 (10th Cir. 1967) ("The judge must be ever mindful that the policy of the law favors the hearing of a litigant's claim upon the merits."); Richman v. Gen. Motors Corp., 437 F.2d 196, 199 (1st Cir. 1971) ("[T]he power of the court to prevent undue delays must be weighed against the policy of the law favoring the disposition of cases on their merits."); Beary v. City of Rye, 601 F.2d 62, 63 (2d Cir. 1979) ("In striking the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard, we have repeatedly given a great deal of latitude to the individual district judges laboring conscientiously in a day of ever-rising filings closely to control their dockets."); Chira v. Lockheed Aircraft Corp., 634 F.2d 664, 668 (2d Cir. 1980) (noting that while district judges should rarely "deprive the languid litigant of his right to a trial on the merits. [B]urgeoning filings and crowded calendars have shorn courts of the luxury of tolerating procrastination.").

42. *See, e.g.*, *Pearson*, 353 F.2d at 28-29; Schwarz v. United States, 384 F.2d 833, 836 (2d Cir. 1967) (suggesting that district courts consider alternative sanctions, such as imposing fines, before resorting to the "drastic remedy of dismissal"); Delta Theatres, Inc. v. Paramount Pictures, Inc., 398 F.2d 323, 324 (5th Cir. 1968) (noting that because dismissal is a harsh sanction, it is only appropriate in cases with a clear record of delay); Zavala Santiago v. Gonzalez Rivera, 553 F.2d 710, 712 (1st Cir. 1977) (explaining that given the policy favoring disposition of cases on their merits, district courts should only use Rule 41(b) when lesser sanctions would be inappropriate); Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 42- 43 (2d Cir. 1982) (reiterating the importance of Rule 41(b) to efficient administration of justice and considering factors such as duration of delay, prejudice to the defendant, and other appropriate sanctions); Merker v. Rice, 649 F.2d 171, 174 (2d Cir. 1981) (reasoning that in order for district judges to "strike the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard," they must consider various factors such as less severe alternatives and duration of inactivity).

43. *See, e.g.*, Reizakis v. Loy, 490 F.2d 1132, 1135 (4th Cir. 1974) (requiring district courts to balance the policy of deciding cases on their merits against efficient judicial administration by considering four factors: (1) the degree of personal responsibility on the part of the plaintiff; (2) the amount of prejudice to the defendant caused by the delay; (3) the presence or absence of a "'drawn out history' of 'deliberately proceeding in a dilatory fashion;'" and (4) the effectiveness of sanctions less drastic than dismissal). While the competing policy of docket management and hearing cases on their merits underscore the individual factors encompassing most circuits' multi-factor tests, the Ninth Circuits factors *are* the policy considerations. *See infra* Table 1.

TABLE 1: FACTORS BY CIRCUIT

Factors	Circuit (numbers in parenthesis indicates sequence in which factor considered) 1	2	3	4	5	6	7	8	9	10	11	D.C	Total circuits applying factor
F1: Length of delay	--	(1)	--	--	--	--	--	--	--	--	--	--	1
F2: Whether plaintiff received notice or warnings	--	(2)	--	--	--	(2)	(7)	--	--	(4)	--	--	4
F3: Prejudice to defendant	(5)	(3)	(2)	(2)	(4)*	(3)	(4)	--	(3)	(1)	(4)**	--	10
F4: Efficiency of lesser or alternative sanctions	(6)	(5)	(5)	(4)	(2)	(4)	--	(3)	(5)++	(5)	(2)	(2)	11
F5: Pattern or history of dilatory conduct	(3)	--	(3)	(3)	(1)	--	(1)+	(2)	--	--	(1)	--	7
F6: Magnitude or severity of plaintiff's conduct	(1)	--	--	--	--	--	(1)+	--	--	--	--	--	2
F7: Whether conduct was willful, in bad faith, or intentional	(4)	--	(4)	--	(5)**	--	--	(1)	--	--	(5)**	--	5
F8: Degree of plaintiff's personal responsibility or fault	--	--	(1)	(1)	(3)**	(1)	(2)	--	--	(3)	(3)**	(1)	8
F9: Whether plaintiff has legitimate, mitigating excuses	(2)*	--	--	--	--	--	--	--	--	--	--	--	1
F10: Possible merits of plaintiff's claim	--	--	(6)	--	--	--	(5)	--	--	--	--	--	2
F11: Striking a balance between court's calendar & protecting a plaintiff's due process rights	--	(4)	--	--	--	--	--	--	--	--	--	--	1
F12: Effect of conduct on court's calendar or judicial process	--	--	--	--	--	--	(3)	--	(2)	(2)	--	--	3
F13: Consequences of dismissal for the social objectives of the type of litigation that the claim represents	--	--	--	--	--	--	(6)	--	--	--	--	--	1
F14: Public's interest in expeditious litigation	--	--	--	--	--	--	--	--	(1)	--	--	--	1
F15: Public policy favoring disposition of cases on merits	--	--	--	--	--	--	--	--	(4)	--	--	(3)	2
Total factors applied:	6	5	6	4	5	4	7	3	5	5	5	3	

* In some instances, the First Circuit considers the legitimacy of plaintiff's excuses, and whether the excuses mitigate the failures, as two separate factors. **Both the Fifth and the Eleventh Circuits consider prejudice, intentional conduct, or plaintiff's personal responsibility (as opposed to attorney's) in close cases. In all other cases, a pattern of delay and inadequacy of lesser sanctions are sufficient to warrant dismissal. +The Seventh Circuit considers both the frequency and the magnitude of plaintiff's conduct. ++The Ninth Circuit tends to consider "warnings" as part of the analysis for factor five, the adequacy of lesser sanctions.

C. The Utility of Multi-Factor Tests

Before explaining how multi-factor tests benefit judicial decision-making, it is essential to first discuss the difference between legal rules and legal standards. Legal scholars and commentators have for years given significant attention to whether laws should be formulated as rules or standards.[44] While "rules" are drafted as bright-line requirements that are readily applied to objective facts,[45] "standards" are formulated in general terms and require judicial interpretation.[46] Determining whether a law should be drafted as a rule or standard primarily depends upon the extent to which rule-making bodies should delineate the specific contours in advance, or defer that determination to judicial interpretation.[47]

Rules and standards each come with their own costs and benefits. Rules, for example, provide more certainty to individuals as to whether their behavior comports with the law and result in easier judicial decision-making.[48] They also tend to be over-inclusive and/or under-inclusive.[49] Accordingly, rules are ideal when "the conduct is easily described and the legal objective maps directly and unambiguously onto that conduct."[50] Standards, on the other hand, place significant enforcement costs on judges, who must determine what the standard entails and apply it to the facts before them.[51] Standards also "tend to proscribe conduct in terms of

44. Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 380 (1985); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559 (1992). Rules are "legal commands that differentiate legal from illegal behavior in a comprehensive and clear manner." Hans-Bernd Schaäfer, *Rules Versus Standards in Rich and Poor Countries: Precise Legal Norms As Substitutes for Human Capital in Low-Income Countries*, 14 SUP. CT. ECON. REV. 113, 116 (2006). Standards, on the other hand, are "general legal criteria that are unclear and fuzzy." *Id.*

45. Joseph A. Franco, *Of Complicity and Compliance: A Rules-Based Anti-Complicity Strategy Under Federal Securities Law*, 14 U. PA. J. BUS. L. 1, 27 (2011).

46. Schaäfer, *supra* note 44.

47. *See* Kaplow, *supra* note 44, at 561-62.

48. Schaäfer, *supra* note 44, at 117; *see also* Franco, *supra* note 45 ("[R]ules provide actors with greater clarity and guidance than standards regarding their legal obligations when confronted with a particular situation."). The primary benefit derived from a legal rule is thus its lower enforcement and compliance costs. Schaäfer, *supra* note 44, at 117.

49. *See* Kaplow, *supra* note 44, at 589. This is because "rules limit the range of permissible considerations whereas standards do not." *Id.*

50. Franco, *supra* note 45.

51. Kaplow, *supra* note 44, at 572-73; *see also* Franco, *supra* note 45, at 27-28 ("Standards embody legal norms that require a high degree of judgment and discretion in relating a particular legal directive to a particular factual context.").

purpose or effect."[52] Therefore, standards are appropriate in difficult to anticipate circumstances or when flexibility in application is important.[53]

Rule 41(b) was specifically formulated as a standard because the drafters acknowledged the need for flexibility in its application, especially as the volume of cases varied from one district to another.[54] The drafters also wanted to provide judges with discretion to control their own dockets to their liking.[55] Because Rule 41(b) is a legal standard, it does not proscribe conduct with bright-line precision and instead delegates to federal courts the task of determining whether a plaintiff's conduct warrants involuntary dismissal without a hearing on the merits.

Multi-factor tests are helpful tools for judges tasked with applying legal standards, like that set forth in Rule 41(b), for several reasons. First, multi-factor tests set a parameter on the relevant criteria a judge can consider, thus infusing some predictability into the standard, albeit not to the extent of bright-line rules.[56] Second, scholars believe that multifactor tests potentially mitigate against the cognitive errors that judges are prone to make.[57] In fact, when judges use multi-factor tests, they are less likely to rely on their intuition and instead engage in the type of deliberate cognitive processes that yield more accurate decisions.[58]

Multi-factor tests, however, are not perfect. For example, excessive reliance on them may create "mechanical jurisprudence."[59] Their utility is also diminished if judges rely on just a few of the factors instead of conducting a comprehensive multi-factor analysis.[60] Lastly, their value depends on whether the individual factors are clear, equally weighted, and well-suited to achieve the rule's objective, so that the test can be applied

52. Franco, *supra* note 45, at 28.

53. *Id.* at 29.

54. *See supra* Part II; Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 292 (2010) ("[T]he Federal Rules were designed as general rules that delegated broad discretion to trial judges. Delegating discretion made sense because of the assumption that trial judges, as skilled procedure technicians, could tailor procedures to the specific needs of each individual case.").

55. Bone, *supra* note 54, at 292.

56. James G. Wilson, *Surveying the "Forms of Doctrine" on the Bright Line-Balancing Continuum*, 27 ARIZ. ST. L.J. 773, 800 (1995).

57. Guthrie et al., *supra* note 17, at 41; *see also* Teed v. Thomas & Betts Power Solutions, 711 F.3d 763, 766 ("Judges tend to be partial to multifactor tests, which they believe discipline judicial decisionmaking, providing objectivity and predictability.").

58. Guthrie et al., *supra* note 17, at 41-42.

59. *Id.* at 41.

60. *Id*.

objectively. [61] It is important, therefore, to determine whether the multi-factor tests for Rule 41(b) are suitable decision-making tools that provide objectivity, predictability, and allow for more accurate decisions.

II. METHODOLOGY

As this was the first empirical study focusing on the multi-factor tests used for Rule 41(b) orders,[62] a new methodology was designed and modeled after the best practices used by legal scholars to conduct similar studies.[63] The following section describes the case selection and coding process, and discusses the study's inherent limitations.

A. Case Selection

The potential population for the study was all written district court cases using the particular circuit court's multi-factor test to adjudicate a Rule 41(b) dismissal. For purposes of this study, "cases using the circuit's particular multi-factor test" was defined as written decisions that referred to the multi-factor test, and then applied the factors to the particular situation, however briefly. Cases that merely set forth the multi-factor test without applying it to the facts were therefore excluded from this definition. Given the difficulty of compiling and coding the entire universe of cases within this definition,[64] the population was limited to district court decisions

61. *Teed*, 711 F.3d at 766. Unfortunately, there exist some multifactor tests that "are poorly designed and include inappropriate factors that duplicate or overlap with other factors within the test." Guthrie et al., *supra* note 17, at 42.

62. This type of an empirical study is referred to as "systematic content analysis." Hall & Wright, *supra* note 18. Systematic content analysis involves collecting documents, such as judicial opinions pertaining to a specific legal area or issue, systematically reading them, recording criteria, and then drawing inferences from the observations. *Id.* at 64; *see also*, KLAUS KRIPPENDORFF, CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY 18 (2d ed. 2004) (defining content analysis as "a research technique for making replicable and valid inferences from texts (or other meaningful matter) to the contexts of their use").

63. For example, the study borrowed from the methodology Professor Beebe used in his two empirical studies on multi-factor tests within the context of trademark and copyright law. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA L. REV. 549 (2008); Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581 (2006). The methodology was also partly designed according to the guidelines provided in Professor Hall and Dean Wright's article. Hall & Wright, *supra* note 18, at 99-118; *see also* David S. Almeling et. al., *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 GONZ. L. REV. 291, 295 n.23 (2009) (explaining that the study's methodology was based on Professor Hall and Dean Wright's guidelines). Professor Hall and Dean Wright presented best practices after collecting examples from empirical legal articles that systematically analyzed the content of judicial opinions. *Id.*

64. There are over 1,000 decisions per year available on Westlaw alone.

available in the Westlaw database that were filed between January 1, 2010 through December 31, 2013.[65]

An initial sample was compiled from WestlawNext using the search term "Federal Rules of Civil Procedure 41(b)" and then narrowing the search results by selecting "Citing References" followed by "Cases." This broad search resulted in 34,162 cases. The search results were then filtered to district court cases and the date range was specified as after 12/31/2009 and before 1/1/2014. This additional filtering yielded 10,404 results. These cases were then divided into two categories, "published" (385 cases) and "unpublished" (10,019 cases). Because the two categories contained a disproportionate amount of cases, and in order to include the entire population of published cases in the final sample, a different approach was used to select cases from each category.

To select a final sample from the "published" category, the 385 cases were further filtered with the search term "41(b)," yielding 195 cases.[66] These 195 cases were then reviewed to determine whether the circuit court's multi-factor test was applied. From the 195 cases, 23 met this criterion. All 23 cases were included in the final sample.

To select a final sample from the "unpublished" category, the 10,404 cases were screened with the search term "41(b) & factors."[67] This filtering resulted in 1,694 cases. These unpublished cases were each reviewed to determine whether a multi-factor test was used. Cases involving a magistrate judge's report and recommendation that was not adopted, cases later vacated or reversed on appeal for any reason, or cases where the multi-factor test was merely mentioned but not applied, were all excluded. After filtering the cases, the unpublished category contained a total population of 727 cases.[68] The cases were then inputted into an Excel spreadsheet and organized in chronological order from newest to oldest. Every 7th case was then selected to represent the unpublished cases category, leaving 103

65. This three-year period was chosen because this study's aim is to identify *recent* adjudication trends.

66. This omitted cases referencing Rule 41 but only within the context of motions for voluntary dismissal under 41(a).

67. Four separate searches were conducted, each limited to one year, because WestlawNext's "search within results" function cannot search more than 10,000 cases at one time. The four specified date ranges were "after 12/31/2012 and before 1/1/2014," "after 12/31/2011 and before 1/1/2013," "after 12/31/2010 and before 1/1/2012," and "after 12/31/2009 and before 1/1/2011."

68. Because the total population of unpublished cases was too large to be manageable, a systematic sampling technique was used to create a sample of cases for which to code.

cases.[69] These 103 unpublished cases combined with the 23 published cases yielded a final sample of 126 opinions.

B. Coding Cases

A list of 120 criteria, or variables, was chosen for coding.[70] The variables were divided into the following categories:

- **Case Data.** Case name, citation, district court, district court's circuit, date opinion filed, author of the opinion, whether the opinion was a report & recommendation, case type, precedential status, and a very brief summary of the facts.
- **Rule 41(b) Data.** Disposition,[71] grounds for dismissal,[72] whether the ruling was appealed, filing party,[73] date complaint filed with district court, date of plaintiff's last filing or appearance,[74] and whether the judge referenced local court rules.
- **Factor Data.**[75] Factor's disposition,[76] sub-factor data,[77] weight assigned, and word count.

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69. The selection of every 7th case was done using the following macro in Excel:

```
Sub SelectEveryNthRow()
ColsSelection = Selection.Columns.Count
RowsSelection = Selection.Rows.Count
RowsBetween = 7
Diff = Selection.Row - 1
Selection.Resize(RowsSelection, 1).Select
Set FinalRange = Selection. _  Offset(RowsBetween - 1, 0).Resize(1, ColsSelection)
For Each xCell In Selection
If xCell.Row Mod RowsBetween = Diff Then
Set FinalRange = Application.Union _
(FinalRange, xCell.Resize(1, ColsSelection))
End If
Next xCell
FinalRange.Select
End Sub
```

70. The coding was done entirely by the author. All coding materials are available upon request.

71. This was done using two different variables, disposition and outcome. Disposition was coded as: dismissed with prejudice, dismissed without prejudice, dismissed but prejudice not indicated, and not dismissed. Outcome was coded as: dismissed, not dismissed.

72. E.g., failure to prosecute, failure to comply with court's order, both, or unclear/not specified.

73. E.g., dismissal ordered *sua sponte*, motion filed by defendant.

74. This included substantive motions and procedural matters, such as updating an address. If the last filing was a motion to substitute counsel, the case was flagged and noted on a "Miscellaneous Observations" list.

75. Because several factors from each circuit's test overlap or are similar, a total of fifteen factors form the multi-factor test for Rule 41(b) purposes. All fifteen factors were coded in each case.

- **Miscellaneous Data.** Whether the court explicitly considered other factors, whether the court took plaintiff's pro se status into consideration, whether an attorney was responsible for the inactivity or non-compliance, and whether the court decided between ordering dismissal with prejudice or dismissal without prejudice.

Each case was coded to the extent that the information could be discerned from the court's opinion.[78]

C. The Methodology's Limitations

Even the most carefully designed and executed empirical study contains limitations, and this study is no different.[79] First, the study's defined population is only a fraction of the complete universe of decisions involving Rule 41(b) where the multi-factor test was employed.[80] Not all Rule 41(b) orders are available on Westlaw, and a three-year window is relatively small considering that some multi-factor tests date back to the 1960s.[81] Given the practical considerations involved with coding thousands

76. E.g., not addressed, favors dismissal, does not favor dismissal, neutral, factor not relevant, unclear.

77. Specifically, data pertaining to only one factor, or a group of factors. For example, data pertaining to "warnings" included the number of times and the manner in which the court warned plaintiff, while data pertaining to "effect of conduct on court's calendar" included whether the court determined that conduct effects calendar, whether the court determined conduct effects the judicial process, and if the court's assessment was based upon presumptions that the factor weighed for, or against, dismissal.

78. By far the greatest difficulty with coding occurred in district court cases within the Ninth Circuit's jurisdiction. For example, some judges would combine two or more factors into one heading while their analysis applied to just one. Others would not arrive at any conclusion or would address the factor in such a confusing manner that it was nearly impossible to discern the conclusion. These decisions were coded without making any judgment calls on what the judge was trying to say and were noted on the "Miscellaneous Observations" list. Moreover, information pertaining to case type, complaint's filing date, date of last filing or appearance, date R&R adopted, and appeal, were collected from the docket, which was also available on WestlawNext, rather than the court's opinion.

79. As Professors Sisk and Heise eloquently stated, "No study could survive a scrutiny that demands absolute perfection, in methodology or in expression of the results." Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 792 (2005).

80. The population was defined as "District court decisions on Rule 41(b) that: (1) used the circuit court's multi-factor test; (2) was issued between January 1, 2010 and December 31, 2013, inclusive; and (3) available on the Westlaw database."

81. *See, e.g.*, Pearson v. Dennison, 353 F.2d 24, 28 (9th Cir. 1965) (using the policy favoring prompt disposition of cases, plaintiff's duty to proceed diligently, prejudice to the defendant, and the policy favoring disposition of cases on their merits as factors to determine whether the trial judge abused its discretion in dismissing case for failure to prosecute).

of cases, this limitation is unresolvable. Notwithstanding the limitation, this study does not purport to present statistics about *all decisions* on Rule 41(b) dismissals. It instead presents statistics about *recent* adjudication trends by using a random sampling of cases from a three-year time period.

Similarly, the unpublished cases used in this study are a sample group representing the entire population of 727 cases. This is thus a sampling study and not a population study.[82] A primary concern with any sampling study is the "selection bias" that occurs when the representative group is derived through non-random methods.[83] As discussed above, the study's representative sample was compiled through a random and systematic process that selected every 7th case, which mitigated against selection bias.[84] This method ensured that the selection process did not involve subjective criterion and was unrelated to the outcome variable being studied.[85]

Lastly, in some instances, determining how a case should be coded required personal judgment and discretion.[86] This is inherent in any study

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82. A population study sets the contours of a narrowly defined and limited population, and selects every case within those parameters. Christian A. Chu, *Empirical Analysis of the Federal Circuit's Claim Construction Trends*, 16 BERKELEY TECH. L.J. 1075, 1091 n.79 (2001). A sampling study, in contrast, selects a small group of cases from a larger population of cases. *Id.* Some scholars have noted that in the legal context, population studies are more appropriate than sampling studies. *E.g.*, John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AM. INTELL. PROP. L. ASS'N Q.J. 185, 194 n.20 (1998) ("[W]hen using reported cases as data sources, there are intractable problems with treating the grouping of cases as a representative random sample, regardless of how carefully one has defined the grouping."). But given significant time constraints and limited resources, conducting a population study and coding all 727 unpublished cases was infeasible. In fact, Professors Epstein and King recommend using a random sampling method when a population study is impractical. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 108 (2002); *see also*, Hall & Wright, *supra* note 18, at 102 (providing a list of sampling techniques to use when "the total population is too large to be manageable").

83. Christopher Winship & Robert D. Mare, *Models for Sample Selection Bias*, 18 ANN. REV. SOC. 327, 328 (1992) ("Sample selection is a generic problem in social research that arises when an investigator does not observe a random sample of a population of interest. Specifically, when observations are selected so that they are not independent of the outcome variables in the study, this sample selection leads to biased inferences about social processes.").

84. Systematic sampling has also been used in other empirical legal studies. *See, e.g.*, Robert A. Kagan, et al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 124-26 & n.12 (1977**)** (using random systematic sampling based on five-year intervals to create a representative sample of 5,904 cases from a total population of 66,950).

85. Epstein & King, *supra* note 82, at 110-11; Hall & Wright, *supra* note 18, at 102.

86. Take, for example, the following language from a case arising out of the Central District of California:

> The fifth factor-the public policy favoring the disposition of cases on their merits-ordinarily weighs against dismissal. However, it is the responsibility of the moving party to prosecute the action at a reasonable pace, and to refrain from dilatory and evasive tactics. *See Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 652 (9th Cir.1991). Here, Plaintiff has failed to

attempting to convert "written opinions into hard numbers."[87] Although it is unlikely that this systematically biased the results or the coding, yet in an abundance of caution, 10% of the cases were randomly selected and reviewed by a third-party.[88] The agreement between these two datasets was tested through Cohen's kappa coefficient, which confirmed that the same cases were mostly coded in the same manner.[89]

Despite these limitations, given the value of empirical studies within the legal context, this article can hopefully set the foundation for similar studies in the future and help create a more complete understanding of our federal court system.

III. THE STUDY

The analysis provided in this section describes the results and discusses the implications of the following criteria: (A) summary statistics on case outcomes, *sua sponte* versus defendant's motion rulings, venue and pro se litigants; (B) influence of the factors on case outcomes; (C) factor-specific data.[90]

> discharge his responsibility to prosecute this action despite the Court's express warning about the possibility of dismissal. Under these circumstances, the public policy favoring the resolution of disputes on the merits does not outweigh Plaintiff's failure to file an amended complaint.

Williams v. Young, No. CV 10-06640 VBF (SS), 2010 WL 5524987 at *3 (C.D. Cal. Dec. 16, 2010).

This case could be coded in several ways. First, factor fifteen (the public policy favoring disposition of cases on their merits) could be coded as "does not favor dismissal." But that is not what the language indicates. Rather, the opinion *starts off* by stating that this factor ordinarily weighs against dismissal, but not in this particular case. So should this be coded as "favors dismissal"? Not necessarily, since the opinion merely states that the other factors outweigh this one. In the end, "unclear" appears to be the most appropriate code.

87. Allison & Lemley, *supra* note 82, at 203.

88. This method was likewise employed in another study, also in an attempt to increase the study's reliability. Almeling et. al., *supra* note 63, at 300-01.

89. The average kappa statistic was 0.65, which falls within the range of .61 to indicate substantial strength in agreement. J. Richard Landis & Gary G. Koch, *The Measurement of Observer Agreement for Categorical Data*, 33 BIOMETRICS 159, 165 (1977).

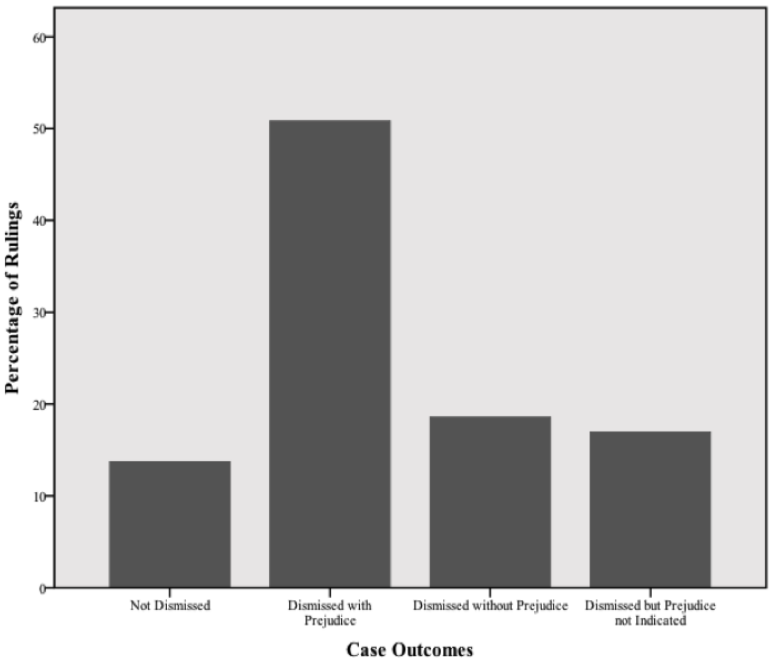
90. All statistical analysis was conducted using *R* and SPSS software.

A. Summary Statistics

1. Over 86% of Cases Were Involuntarily Dismissed Under Rule 41(b)

Of the 124 cases sampled, 86.3% were involuntarily dismissed pursuant to Rule 41(b).[91] This includes dismissal with prejudice and without prejudice. Figure 1 provides a further breakdown of case outcomes and demonstrates that a majority of cases sampled were dismissed prejudice, either because the judge explicitly indicated prejudice or failed to do so.[92] Less than 20% occurred without prejudice, which would have allowed the plaintiff to re-file the case assuming the statute of limitations had not lapsed.[93]

FIGURE 1: DISPOSITION OF RULE 41(b) ORDERS



91. In comparison, around 4% of motions for summary judgment were granted in 2006. Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* 4 (Cornell L. Sch. Paper Series No. 08-022), *available at* http:// ssrn.com/abstract=1138373.

92. *See supra* note 6 and accompanying text.

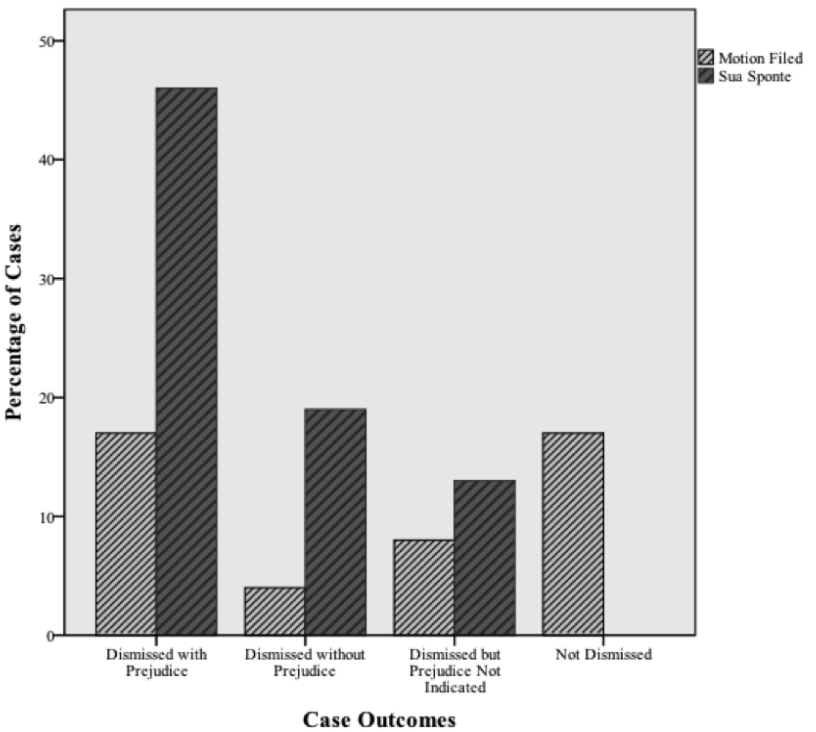
93. *Id*.

2. Most Rule 41(b) Orders Are *Sua Sponte*

More than half of the opinions sampled involved *sua sponte* Rule 41(b) dismissals.[94] Given that judges are incredibly active in managing the cases before them, the high proportion of dismissals ordered *sua sponte* in comparison to dismissals upon defendant's motion is not surprising.[95]

Not only were motions to dismiss less frequent, their success rate was also lower, as judges granted motions to dismiss 63% of the time. Their reluctance to order dismissal when requested by the defendant may indicate that Rule 41(b) is a case-management tool rather than a "defendant's remedy."[96]

FIGURE 2: DISPOSITION OF RULE 41(b) ORDERS – *SUA SPONTE* VERSUS NOTICED MOTIONS



94. 37.9% were noticed motions compared to 62.1% *sua sponte*.

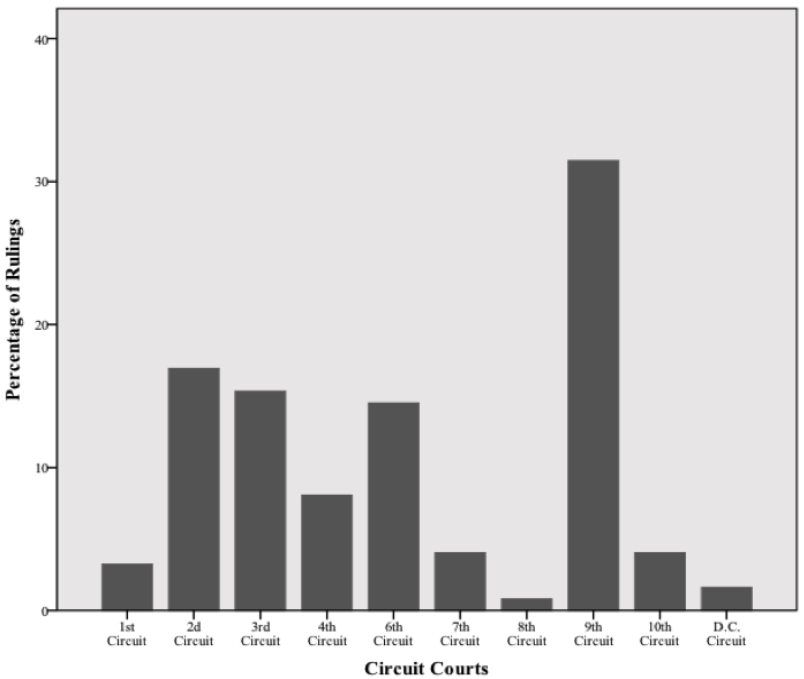
95. *See supra* note 1 and accompanying text.

96. *Id.*

3. Most Rule 41(b) Orders Arise out of District Courts Within the Ninth Circuit's Jurisdiction

As Figure 3 demonstrates, over 30% of the cases sampled came from the Ninth Circuit. Because district courts within the Ninth Circuit's jurisdiction are some of the most congested and burdened courts in the country, it is not surprising for judges there to more frequently rely on Rule 41(b).[97]

FIGURE 3: DISTRIBUTION OF RULE 41(b) ORDERS BY CIRCUIT COURT



Moreover, the Eastern District of California produced the most amount of cases sampled, with 12% of overall cases. The Central District of California, which is the most congested in the country, came second with 8% of the cases.[98]

The Eastern District of California also produced the most amount of dismissals, as 13% of all cases that were involuntarily dismissed under

97. U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, tbl. C-1 (2013), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/C00Mar13.pdf.

98. *Id.*

41(b) came from this district.[99] Meanwhile, the Western District of Tennessee and the Southern District of Ohio led in the "not dismissed" category with 11.8% of cases.[100]

Interestingly, Judge Kendall J. Newman from the Eastern District of California not only authored the most amount of overall cases (8.9%),[101] but also led with the highest percentage of cases from the dismissed category (10.3%),[102] and the percentage of *sua sponte* orders with an astounding 14%.[103] No other judge came close to Judge Newman in the three categories of overall cases, dismissals, and *sua sponte* orders.[104]

4. Rule 41(b) dismissals involving pro se plaintiffs are more common.

From the 124 cases sampled, 81.5% involved pro se plaintiffs and their cases were dismissed 92% of the time. On the other hand, of the 18.5% of cases where the party was represented by an attorney, 60.9% were dismissed and 39.1% were not. Furthermore, from the cases that were dismissed (86.3%), 86.9% involved pro se plaintiffs, compared to 13.1% that involved attorney representation. The high percentage of Rule 41(b) dismissals in cases with pro se plaintiffs may correlate with the subject matter of the underlying lawsuits. A majority of cases sampled were Civil Rights claims filed under 42 U.S.C. § 1983,[105] which often involve incarcerated plaintiffs who appear pro se.[106]

The high percentage of dismissals involving pro se plaintiffs may also be due to the difficulty of navigating through the federal court system without the benefit of counsel.[107] Most circuit courts have recognized this issue and have therefore cautioned against using Rule 41(b) to involuntarily

99. While California's Central District dismissed all 100% of cases, the Eastern District dismissed 93%. But given the higher percentage of overall cases, the Eastern District led in the percentage of dismissals.

100. Although all 100% of cases arising from the Western District of Tennessee were not dismissed, only 40% of cases from the Southern District of Ohio were not dismissed.

101. Judge Suzanne H. Segal from the Central District of California was second with 3.2% of cases.

102. All 100% of Judge Newman's cases resulted in dismissal.

103. All 100% of Judge Newman's cases were *sua sponte* rulings.

104. This demonstrates the extent to which Judge Newman is zealously controlling his calendar and ensuring the prompt disposition of the cases before him.

105. 37.9% of the sampled cases were § 1983 Civil Rights claims.

106. Henry F. Fradella, *In Search of Meritorious Claims: A Study of the Processing of Prisoner Civil Rights Cases in A Federal District Court*, 21 JUST. SYS. J. 23, 26 (1999).

107. *Id.*

dismiss cases involving pro se plaintiffs except in extreme circumstances.[108] Nevertheless, district courts considered plaintiff's pro se status as part of their overall analysis only 34% of the time.[109]

B. Results from a Logistic Regression Analysis Demonstrate That Judges Rely on a Core Subset of Factors from the Multi-Factor Tests When Deciding Rule 41(b) Dismissals

From the outset, one of this study's aims was to determine whether certain factors from the multi-factor tests drive the outcome of Rule 41(b) orders. Using a logistic regression analysis, the study found that not only do a core set of factors impact the judge's decision, but that these factors change when a motion to dismiss is filed.

1. When Dismissal Is Ordered *Sua Sponte* or upon Defendant's Motion, the Outcome Depends on Whether the Plaintiff Received Warnings, Whether the Conduct Was Willful, in Bad Faith or Intentional, the Degree of Plaintiff's Responsibility, and the Public's Interest in Expeditious Litigation

In order to determine the relationship between case outcomes and the independent factors that make up the multi-factor tests, a logistic regression model was developed. Logistic regression determines the probability that a certain event will happen (the dependent variable) when given a set of predictor variables (the independent variables).[110]

108. *See, e.g.*, Lucas v. Miles, 84 F.3d 532, 535 (2d Cir. 1996) ("We have also explained that district courts should be especially hesitant to dismiss for procedural deficiencies where, as here, the failure is by a pro se litigant.").

109. In 66% of the cases, the district court did not consider pro se status. Of the cases where pro se status was considered (34%), judges found that this was sufficient to outweigh dismissal 12% of time and not sufficient to outweigh dismissal 48% of the time. Furthermore, judges considered pro se status in order to determine whether to dismiss with prejudice or without prejudice 9% of the time. Lastly, in 30% of cases judges considered pro se status without making any explicit findings as to whether or not this favored dismissal.

110. DAVID W. HOSMER, JR. ET AL., APPLIED LOGISTIC REGRESSION §1.1, at 1 (3d ed. 2013). Logistic regression is an appropriate method when the outcome variable is binary and can only take two forms, such as yes or no. *Id.* For purposes of this study, the outcome variable (case outcomes) is binary having only two set of values: dismissed (1) or not dismissed (2). Accordingly, a binominal logistic regression model was used to determine the relationship between case outcomes and the fifteen factors.

TABLE 2: LOGISTIC REGRESSION OF CASE OUTCOMES (MODEL ONE)

Factors	Estimate	Standard Error	z value	Pr(>|z|)
(Intercept)	11.70179	2.85836	4.094	4.24e-05 ***
F1: Length of delay	-2.10401	1.20279	-1.749	0.080245 .
F2: Whether plaintiff received notice or warnings	-3.24709	1.04883	-3.096	0.001962 **
F3: Prejudice to defendant	-0.91494	0.73365	-1.247	0.212361
F4: Efficiency of lesser or alternative sanctions	-1.74998	0.91386	-1.915	0.055503 .
F5: Pattern of dilatory conduct	0.05364	0.48469	0.111	0.911885
F6: Magnitude or severity of plaintiff's conduct	-4.31109	2.81991	-1.529	0.126313
F7: Whether conduct was willful or in bad faith	-1.83454	0.94491	-1.941	0.052199 .
F8: Degree of plaintiff's personal responsibility	-4.59043	1.34171	-3.421	0.000623 ***
F9: Any legitimate or mitigating excuses	0.41801	2.04793	0.204	0.838264
F10: Possible merits of plaintiff's claim	0.27631	0.66064	0.418	0.675766
F11: Balancing court's calendar & due process	0.88315	1.43212	0.617	0.537449
F12: Effect on court's calendar or judicial process	-0.37904	0.96019	-0.395	0.693024
F13: Consequences for claim's social objectives	-4.44565	1199.77604	-0.004	0.997044
F14: Public's interest in expeditious litigation	-3.55209	1.83337	-1.937	0.052688 .
F15: Policy favoring disposition of cases on merits	-0.01848	0.65938	-0.028	0.977644

Table 2: Results of logistic regression analysis of Rule 41(b) orders. The dependent variable is case outcomes coded as dismissed (1) or not dismissed (2).
*** indicates $p \leq 0$, ** indicates $p \leq 0.001$, * indicates $p \leq 0.05$, and . indicates $p \leq 0.1$. The AIC number for Model One is 80.852.

Model One's confidence level was set at 0.05, a commonly used standard, which only accepted conclusions where there was a 95 percent or greater likelihood that the observed relationship was not due to chance.[111] The logistic regression results from Model One demonstrate that when all fifteen factors are present, only factors two and eight are significant at 0.05, while factors one, four, seven, and thirteen, are significant at 0.1.

As a model's ability to predict events increases when the AIC number decreases,[112] a revised model was created to omit the non-significant factors. The Second Model's AIC decreased by nearly 10 points indicating that it was a better predictor of case outcomes.[113] Accordingly, Model Two was used to make inferences.

TABLE 3: LOGISTIC REGRESSION OF CASE OUTCOMES (MODEL TWO)

Factors	Estimate	Standard Error	z value	Pr(>|z|)
(Intercept)	9.4990	1.9259	4.932	8.13e-07 ***
F1: Length of delay	-1.1791	0.8341	-1.414	0.157485
F2: Whether plaintiff received notice or warnings	-3.8154	0.9096	-4.195	2.73e-05 ***
F4: Efficiency of lesser or alternative sanctions	-0.6974	0.6579	-1.060	0.289091
F7: Whether conduct was willful or in bad faith	-1.8952	0.7021	-2.699	0.006948 **
F8: Degree of plaintiff's personal responsibility	-4.1440	1.0702	-3.872	0.000108 ***
F14: Public's interest in expeditious litigation	-4.0372	1.2766	-3.163	0.001564 **

Table 3: Results of logistic regression analysis of Rule 41(b) orders using a second model with revised independent variables from the first model. The dependent variable is case outcomes coded as dismissed (1) or not dismissed (2).
*** indicates $p \leq 0$, ** indicates $p \leq 0.001$, * indicates $p \leq 0.05$, and . indicates $p \leq 0.1$. The AIC number for Revised Model is 70.7.

111. *See Significance in Statistics & Surveys*, CREATIVE RESEARCH SYS., http://www.survey system.com/signif.htm (last visited Jan. 5, 2015).

112. The Akaike Information Criterion (AIC) is a model selection method. It seeks the model with a good fit to the truth but with a few parameters. Brian O'Meara, *Model Selection Using the Akaike Information Criterion (AIC)*, BRIAN O'MEARA LAB, http://www.brianomeara.info/ tutorials/aic (last visited March 1, 2014).

113. *See* Robert Steinbuch, *An Empirical Analysis of Reversal Rates in the Eighth Circuit during 2008*, 24 LOY. L.A. L. REV. 51, 60 (2009).

Model Two demonstrates that four factors are statistically significant to case outcomes. The four factors are: (F2) whether plaintiff received warnings;[114] (F7) whether the conduct was willful or in bad faith; (F8) degree of plaintiff's personal responsibility; and (F14) the public's interest in expeditious litigation.

This has several implications. Starting with F2, because prior warnings or notice is an objective factor, its influence on case outcome is a promising sign for the multi-factor tests' utility.[115] Judges are able to determine whether this factor weighs for or against dismissal simply by referring to the objective facts in the record without subjective application.[116] For example, if the record demonstrates that plaintiff received warnings or notice of dismissal, then this factor would favor dismissal, and if the plaintiff was not warned, then it would weigh against dismissal. As this factor is objectively applied, it potentially increases the predictably of the judge's decision, thereby adding value to the multi-factor test.[117]

Moreover, the significance of F2 demonstrates that while neither the Supreme Court[118] nor the circuit courts[119] *require* warnings or notice before dismissal, trial courts not only consider this factor,[120] but are less likely to dismiss a case when plaintiffs have not been warned.[121] Indeed, in all instances where the court found that this factor does not weigh in favor of dismissal, the case was not dismissed.[122]

The significance of both F7 and F8 demonstrates that district courts are less inclined to dismiss cases when the attorney causes the delay or

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114. The odds ratio for F2 was 3.068. Accordingly, judges are twice as likely to dismiss under Rule 41(b) when this factor favors dismissal.

115. *See* Guthrie, et al., *supra* note 17, at 41-42; *see also* Teed v. Thomas & Betts Power Solutions, L.L.C., 711 F.3d 763, 766 (7th Cir. 2013) ("Judges tend to be partial to multifactor tests, which they believe discipline judicial decision-making, providing objectivity and predictability.").

116. For a discussion on the number of and manner in which warnings are given, see *infra* Part III.C.1.

117. *See* Guthrie, et al., *supra* note 17, at 41-42.

118. Link v. Wabash R. Co., 370 U.S. 626, 632 (1962).

119. *See, e.g.*, United States v. Reyes, 307 F.3d 451, 458 (6th Cir. 2002) (affirming dismissal despite no prior warning); Colokathis v. Wentworth-Douglass Hosp., 693 F.2d 7, 10 (1st Cir. 1982) (lack of warnings not dispositive).

120. Even in cases where F2 was not one of the applied factors, district courts still took prior warnings or notice of dismissal into consideration. *See, e.g.*, Mance v. Ariz. State Univ., No: CV-12-901-PHX-LOA, 2012 WL 2798767, at *3-*4 (D. Ariz. Jul. 9, 2012).

121. Only 5% of cases were dismissed even though plaintiff was not warned. None of these cases occurred in district courts that apply warnings as a part of the multi-factor analysis.

122. A crosstabulation of F2 by outcome demonstrated that 100% of cases where "warnings" did not favor dismissal were not dismissed.

inactivity[123] or when plaintiff is merely negligent.[124] Factors seven and eight thus alleviate Justice Black's concerns that the majority's holding in *Link* may penalize innocent plaintiffs for their attorney's conduct.[125]

As to F14, which is only considered in the Ninth Circuit, its significance raises some concerns.[126] In 97.3% of cases, the district court found that F14 favored dismissal. In those cases where F14 was considered, 97.4% favored dismissal. This high percentage of cases favoring dismissal is rather alarming because under the Ninth Circuit's guidance, 74.3% of district judges that considered F14 explicitly began with the presumption that it favors dismissal.[127] Only 25.6% made no presumptions when addressing F14.[128]

From the 74.3% of cases which began with a presumption favoring dismissal, 75.9% conducted a factual analysis before finding that F14 favors dismissal, whereas 24.1% concluded that it favors dismissal without any factual analysis. When the court conducted a factual analysis (75.9%), the analysis pertained to the length of delay or inactivity.[129] This demonstrates that district courts are considering the length of delay or inactivity instead of only the policy favoring expeditious disposition of litigation. That is, they are more considered with *how* the plaintiff's conduct effects the ability to expeditiously move cases forward, rather than the mere policy favoring expeditious litigation. The district court's application of F14 in this manner demonstrates a need to replace "public

123. This also coincides with instructions from some appellate courts for district judges to refrain from treating an attorney's failure to prosecute or comply more harshly in order to avoid punishing the plaintiff. *See, e.g.*, Wu v. T.W. Wang, Inc., 420 F.3d 641, 643 (6th Cir. 2005) ("These factors have been applied 'more stringently in cases where the plaintiff's attorney's conduct is responsible for the dismissal.'" (quoting *Harmon v. CSX Transp., Inc.* 110 F.3d 364, 367 (6th Cir.1997))).

124. There was one particular sampled case where the district judge specifically found that the attorney, as opposed to the plaintiff, was responsible for the inactivity yet still dismissed the case under Rule 41(b). Miranda-Lopez v. Figueroa-Sancha, 943 F. Supp. 2d 276, 279 (D.P.R. 2013). In that particular circuit, however, F7 is not part of the multi-factor analysis. *Id.*

125. Link v. Walbach R. Co., 370 U.S. 626, 637-49 (1962); *see also* Russell G. Vineyard, *Dismissal with Prejudice for Failure to Prosecute: Visiting the Sins of the Attorney Upon the Client*, 22 GA. L. REV. 195, 202-03 (1987).

126. *See* Table 1 *supra* Part II.B.

127. "The public's interest in expeditious resolution of litigation *always* favors dismissal." Yourish v. Cal. Amplifier, 191 F.3d 983, 990 (9th Cir.1999) (emphasis added).

128. In only 4.5% of cases the district court ultimately found that F14 did not weigh in favor of dismissal after beginning with the presumption that it did.

129. *See, e.g.*, Johnson v. Boykin, No. CIV S-09-3034 KJM EFB, 2012 WL 6651162, at *3 (E.D. Cal. Dec. 20, 2012) ("Plaintiff's repeated failure to timely prosecute his case has unreasonably prolonged this case long beyond the time originally set for trial. The first *Henderson* factor weighs in favor of dismissal.").

policy favoring expeditious litigation" with "duration of delay or inactivity."[130]

2. On the Other Hand, When a Defendant Files a Rule 41(b) Motion, the Outcome Depends on Whether the Plaintiff Received Warnings, Prejudice to the Defendant, Efficiency of Lesser Sanctions, the Degree of Plaintiff's Responsibility, and the Public's Interest in Expeditious Litigation

In order to determine whether the factors that predicted case outcome changed if the defendant filed a Rule 41(b) motion, a third model was created.[131] This model included a selection variable of filing party, thus excluding cases where the multi-factor tests were applied to *sua sponte* Rule 41(b) orders.[132] Table 4 provides the results of this logistic regression analysis.

TABLE 4: LOGISTIC REGRESSION OF CASE OUTCOMES FOR RULE 41(b) MOTIONS

Factors	Estimate	Standard Error	Pr(>|z|)
(Intercept)	19.384	7.542	0.0102 *
F2: Whether plaintiff received notice or warnings	-6.107	2.416	0.0115 *
F3: Prejudice to the defendant	-3.643	1.722	0.0343 *
F4: Efficiency of lesser or alternative sanctions	-3.256	1.498	0.0297 *
F8: Degree of plaintiff's personal responsibility	-8.045	3.332	0.0158 *
F14: Public's interest in expeditious litigation	-6.156	2.674	0.0213 *

Table 4: Results of logistic regression analysis of Rule 41(b) motions filed by defendants. The dependent variable is case outcomes coded as dismissed (1) or not dismissed (2). The selection variable is motion filed by defendant coded as yes (1). The confidence interval is 95%.
* indicates $p \leq 0.05$. The AIC number is 29.089.

130. *See infra* Part IV.

131. For purposes of this study, the term "Defendant" was defined to include cross-defendant.

132. Although this also reduced the amount of cases in the logistic regression, it was still enough cases to produce an accurate model.

This model demonstrates that when judges adjudicate Rule 41(b) motions, they rely on a different set of factors. In these instances, the significant factors are: (F2) whether plaintiff received notice or warnings; (F3) prejudice to the defendant; (F4) efficiency of lesser or alternative sanctions; (F8) degree of plaintiff's personal responsibility; and (F14) the public's interest in expeditious litigation. In fact, judges are twice as likely to grant the motion when F2, F3, and F14 favor dismissal, and three times as likely to grant the motion when F4 and F8 favor dismissal.[133] These findings indicate that judges themselves intuitively alter the factors that they believe are more important in determining whether the plaintiff's conduct warrants the harshest *sanction* of dismissal.

3. If Only a Few Set of Factors Influence Case Outcomes, What Does This Say About the Remaining Factors?

According to Professor Beebe, who conducted a similar study on the multi-factor tests for likelihood of confusion in trademark disputes, judges "stampede" the remaining factors to support their conclusion.[134] Once they have determined that certain factors favor, or do not favor dismissal, the remaining factors "subsequently fall in line to support that outcome."[135] In doing so, however, judges are not necessarily rendering inaccurate decisions.[136] Rather, they are merely attempting to decide both efficiently and accurately by considering only a few, most decisive factors.[137]

C. Factor Specific Data

The foregoing demonstrates that six core factors drive the outcome of the circuit courts' multi-factor tests. This Part focuses on how some of those six factors operate in practice, beginning with the most influential, whether plaintiff received warnings or notice before dismissal, followed by the availability of lesser sanctions and prejudice to the defendant.

133. Specifically, the odds ratio for F2, F3, F4, F8, and F14 was 2.23, 2.62, 3.85, 3.21, and 2.12, respectively.

134. Beebe, *supra* note 63, at 1614-15.

135. *Id.*

136. *Id.*

137. *Id.*

1. Whether Plaintiff Received Notice or Warnings That Further Delays Would Result in Dismissal

The data clearly show that warnings is by far the most important factor in the multi-factor test irrespective of whether a judge orders dismissal *sua sponte* or upon defendant's motion. In fact, although warnings is not one of the more common factors, since only four circuits require district courts to consider it as a part of its multi-factor analysis,[138] most judges nonetheless take it into consideration at some point in their decision.[139]

As to the amount and the manner of warnings given, in 49.5% of the cases, plaintiffs were warned at least one time and in 36.1% they were warned more than once. Plaintiffs were not warned in only 14.2% of cases.[140] Moreover, 91.6% of the warnings were provided in writing, 2.3% orally, and 5.9% both in writing and orally.

2. The Availability of Lesser Sanctions

Of all the factors that comprise Rule 41(b)'s various multi-factor tests, the availability of lesser sanctions is the most common as all circuits but the Seventh consider it.[141] But the results of this study demonstrate that this factor is a mere formality, since alternative sanctions were previously imposed in only 7.3% of cases and considered in only 33% of cases.[142] When judges did consider alternatives (33%), they imposed the alternative sanction rather than dismiss the case under Rule 41(b) 19.4% of the time.

But why don't judges consider alternative sanctions? The answer is rather simple: most judges simply conclude that alternatives would be futile.[143] Judges also tend to use prior warnings to satisfy this factor.[144]

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138. *See* Table 1 *supra* Part II.B.

139. *See, e.g.*, Rollins v. Superior Court, 706 F. Supp. 2d 1008, 1014 (C.D. Cal. 2010). In fact, the Ninth Circuit has held that "warnings" can be used to satisfy the fourth factor, the availability of lesser sanctions. Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992) ("[O]ur decisions also suggest that a district court's warning to a party that his failure to obey the court's order will result in dismissal can satisfy the 'consideration of alternatives' requirement.") (quoting Malone v. U.S. Postal Svc., 833 F.2d 128, 132-33 (9th Cir. 1987)).

140. In most of these cases, the plaintiff had not provided the court with an updated mailing address and thus it was infeasible for the court to mail written warnings or notice before dismissing the case. *See, e.g.*, Lopez v. Smurfit-Stone Container Enter., Inc., 289 F.R.D. 103, 105 (W.D.N.Y. 2013).

141. *See* Table 1 *supra* Part II.B.

142. In 91.7% of cases, the court had not previously imposed sanctions. Alternative sanctions were not considered in 68.5%.

143. This occurred in 63.4% of the cases.

144. This occurred in 21.8% of the cases.

3. Prejudice to the Defendant

Ten different circuit courts require its district courts to consider prejudice to the defendant as part of their multi-factor analysis. Yet, there exists significant inter-circuit and even intra-circuit disparity in *how* judges apply this factor.[145] Some judges require a showing of actual prejudice, others require unreasonable delay, but a vast majority simply presumes that defendant was prejudiced.

Of all cases sampled, prejudice was presumed 44% of the time, and actually demonstrated only 36.9% of the time. In 44% of the cases where prejudice was presumed, 51% ultimately found that this factor favors dismissal. This directly conflicts with well-established jurisprudence that prejudice requires not only delay, but also "the loss of evidence, increased difficulties in discovery, or greater opportunities for fraud and collusion."[146]

IV. REVISING RULE 41(b) AND FORMULATING A UNIFORM MULTI-FACTOR TEST

As this article demonstrates, the various circuits' multi-factor tests are ill-suited to address the concern of stale cases remaining on courts' dockets for lengthy periods of time or litigants who refuse to comply with court orders. Courts should instead approach involuntary dismissals differently when a party files a Rule 41(b) motion versus when dismissal is ordered *sua sponte*.

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145. For example, in one particular case sampled, the district judge explicitly stated:

> With respect to the third factor (the risk of prejudice to the City), the City points to a delay in service of the First Amended Complaint. Lalau can hardly complain that the delays were caused by lack of knowledge of where to serve the City, a matter no doubt known to Lalau or his counsel before this lawsuit even began, or easily ascertained. That does not mean, however, that the delay was unreasonable. Indeed, because the record is devoid of evidence going to the reasons for that delay, the court is unable to label the delay unreasonable. Delay alone will not support dismissal. "A dismissal for lack of prosecution must be supported by a showing of unreasonable delay." Id. (emphasis added).

Lalau v. City of Honolulu, 938 F. Supp. 2d 1000, 1009 (D. Haw. 2013) (quoting Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986).

Yet, in another case, which also arose from the Ninth Circuit, the court simply presumed prejudice to the defendant even in the absence of actual prejudice or unreasonable delay. As the court stated:

> In addition, the third factor, which considers the risk of prejudice to a defendant, favors dismissal. Haas, Naiman, and Minton have been sued by a plaintiff who has demonstrated no desire to pursue his claims against them. It is prejudicial to these defendants to allow plaintiff's claims to linger against them in perpetuity.

Kuder v. Haas, 2:10-CV-00404 MCE, 2011 WL 1601570, at *3 (E.D. Cal. Apr. 27, 2011).

146. Berthelsen v. Kane, 907 F.2d 617, 621 (6th Cir.1990).

In *sua sponte* dismissals stemming from staleness, a mere legal standard and multi-factor tests are of little value.[147] District courts should instead formulate a bright-line rule, perhaps as a local court rule, which sets forth a specific period of inactivity after which the case will be dismissed *sua sponte* under Rule 41(b). Before dismissing the case, however, the court clerk should provide notice to the plaintiff and his or her representative, if any, with an explicit warning that continued lack of action on their part will result in an automatic dismissal. This will ensure that only cases where the plaintiff has no interest in pursuing are dismissed and that when the inactivity is the result of an attorney's negligence, the client will be placed on proper notice.[148]

In instances where a party moves for dismissal, district courts should consider different factors. For example, prejudice should not merely be presumed, as is the typical practice within the Ninth Circuit,[149] but should be demonstrated in each particular case.[150] Moreover, judges should address the possible merits of the underlying claim, especially given Rule 41(b)'s competing interests of docket management and the adjudication of cases on their merits.[151]

The multi-factor test to adjudicate Rule 41(b) motions should thus be formulated as follows: (1) whether plaintiff received warnings; (2) duration of inactivity or number of non-compliances; (3) whether the conduct resulted in actual prejudice to the defendant; (4) availability of lesser sanctions; (5) degree of plaintiff's personal responsibility; and (6) possible

147. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1690 (1976) ("[F]ormal [rules] eliminate[] the sub rosa lawmaking that is possible under a regime of standards. It will be clear what the rule is, and everyone will know whether the judge is applying it. In such a situation, the judge is forced to confront the extent of his power, and this alone should make him more wary of using it than he would otherwise be."); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 890-91 (1999).

148. This mirrors the practice of most local court rules, which were touted as effective calendar control mechanisms during the first Seminar on Procedures for Effective Judicial Administration. PROCEEDINGS OF THE SEMINAR ON PROCEDURES FOR EFFECTIVE JUDICIAL ADMINISTRATION, 29 F.R.D. 191, 231-32 (1961). At that time, most local court rules contained provisions permitting dismissal when a case was inactive for a fixed period ranging from two months to two years. *Id.* Inactive cases were placed on a calendar for dismissal, notice was provided to counsel, and then "dismissed unless good cause [was] shown for the delay." *Id.*

149. *See supra*, Parts II, III.

150. In a case from 1900, for example, the D.C. Circuit reversed the trial court's decision granting the defendant's motion for involuntary dismissal for failure to prosecute, even though the case had been stale for nearly 16 years, because the defendant himself had not been diligent in the prosecution. Meloy v. Keeman, 17 App. D.C. 235, 237 (D.C. Cir. 1900). As the court reasoned, the defendant was just "as indifferent as the plaintiff" and thus was in "no situation to complain of his neglect." *Id.*

151. *See supra* Parts I, II.

merits of plaintiff's claim. This would not only ensure that defendants and the courts are protected from dilatory behavior, but that innocent plaintiffs are not deprived of their only chance to pursue the merits of their claim.

CONCLUSION

When Rule 41(b) was drafted, docket congestion was not a national concern. But as judges have taken a greater management role over their dockets, and because over-crowding has become an issue throughout the country, the need for a uniform rule is becoming more and more obviated. As demonstrated by the results of this article's empirical study, the twelve multi-factor tests have largely failed to provide adequate guidance for judicial decision-making.

Rule 41(b) should therefore be revised to provide a bright-line rule authorizing *sua sponte* involuntary dismissals for failure to prosecute when the case has become stale for a fixed period of time, so long as an explicit warning has been provided and good cause for the delay has not been shown. The rule should further be revised to provide a uniform set of factors to consider when adjudicating Rule 41(b) motions.

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