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Pride and Prejudice

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Question: When is a dismissal without prejudice in District Court really a dismissal *with* prejudice? Answer: When two 9th Circuit judges decide that it is for purposes of establishing appellate jurisdiction. Case in point: *Romoland School District v. Inland Empire Energy Center LLC*, No. 06-56632 (9th Cir. Nov. 18, 2008). A third 9th Circuit judge, however, strongly disagreed with this transmogrification, calling the majority's approach "diametrically opposed to our federal jurisprudence." We're going to *Romoland* - but before we do, a bit of background is in order.

Though much of the practice of law concerns arguing over shades of gray, certain areas are - or are supposed to be - black and white. One such area is federal court jurisdiction: Either a matter belongs in federal court or it doesn't. There's no balancing test, evolving standards or factorial analysis. Federal courts are courts of limited jurisdiction operating within confined and well-established guidelines set by the Constitution and federal statutes. This is especially true of appellate jurisdiction: Either the appropriate circumstances exist to take a matter to the U.S. Court of Appeals or they do not. The usual prerequisite for appellate jurisdiction is a final judgment. Thus, one might think, what constitutes the one final judgment in a given situation should be clearly delineated. Yet disputes persist, and the law continues to develop in this area.

Romoland addresses this fundamental aspect of federal appellate jurisdiction in the tricky area of voluntary dismissals. Quandaries about voluntary dismissals seem to arise fairly frequently and in various contexts. For instance, assume a plaintiff sues two defendants in federal court. One defendant, the one the plaintiff cares about the most - perhaps the one with deep pockets - manages to establish a definitive defense, perhaps by summary judgment or other dispositive motion. Under the "one final judgment rule," the plaintiff has no right to appeal until the final judgment disposing of the entire action against both defendants. So the plaintiff is supposed to continue to litigate against the remaining defendant and then appeal. But what if the plaintiff decides simply to dismiss the case against that defendant? Does that create a final appealable judgment? Or is that an improper attempt to manipulate jurisdiction by creating what appears to be a final judgment? The same situation can arise even if there is only one defendant, i.e., if a plaintiff has several causes of action against a defendant and the big claims are disposed of early, leaving only the smaller claims.

The defendant or defendants in either situation is usually happy to let the plaintiff dismiss the remaining claims. But the federal courts jealously guard their limited jurisdiction and are wary about allowing litigants to "manufacture" jurisdiction, even by consent. Judicial economy disfavors piecemeal appellate review. On the other hand, forcing a plaintiff to continue to pursue defendants or claims solely to reach a final judgment for purposes of appeal, when the plaintiff really would rather drop those lesser claims or defendants, would not seem to serve judicial economy.

The usual path through this thicket is a focus on whether the voluntary dismissal is with or without prejudice. A voluntary dismissal with prejudice is deemed to create a valid final judgment, whereas a dismissal without prejudice does not result in a valid final judgment - it is viewed as a sneaky attempt to artificially manufacture finality, yet still hold something back for later litigation.

In *Romoland*, a divided panel of the 9th Circuit held that the plaintiffs' voluntary dismissal of their claims

against one defendant, following an involuntary dismissal of their claims against the other defendant, constituted an appealable final judgment.

The plaintiffs, a school district and several individuals and environmental groups, brought a citizen suit under the Clean Air Act against the Inland Empire Energy Center and the South Coast Air Quality Management District, and moved for a preliminary injunction to halt construction of a power plant near an elementary school. The Inland Empire Energy Center moved to dismiss for failure to state a claim, arguing that the District Court lacked subject matter jurisdiction. The South Coast Air Quality Management District filed a "notice of position" stating that it agreed with the energy center's jurisdictional argument and would be incorporating that argument into a forthcoming summary judgment motion. The District Court denied the plaintiffs' motion for a preliminary injunction and granted the energy center's motion to dismiss without leave to amend.

Following the District Court's ruling, the plaintiffs moved to voluntarily dismiss their remaining claims against the air management district under Federal Rule of Civil Procedure 41(a)(2), explaining that in granting their motion to dismiss without leave to amend, the District Court had made a jurisdictional decision that resolved the plaintiffs' entire action. Accordingly, the plaintiffs sought voluntary dismissal for the stated purpose of "gaining final judgment and allowing appeal."

The District Court granted the plaintiffs' unopposed motion for voluntary dismissal, but did not state whether the dismissal was with or without prejudice. The plaintiffs then filed a notice of appeal from the order granting voluntary dismissal and all interlocutory orders giving rise to it, including the dismissal without leave to amend of the claims against the Inland Empire Energy Center and the denial of a preliminary injunction.

In the majority opinion affirming the judgment, the 9th Circuit first addressed at length whether the dismissal order was an appealable final judgment. Quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the court explained that a "final decision" is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."

Recounting the historical application of this principle to voluntary dismissals in the 9th Circuit, the court noted that for many years the "general rule" had been that voluntary dismissals without prejudice do not create appealable final judgments, while voluntary dismissals with prejudice do. *Concha v. London*, 62 F.3d 1493 (9th Cir. 1995). The court then noted that the "legal landscape was altered slightly" with *James v. Price Stern Sloan Inc.*, 283 F.3d 1064 (9th Cir. 2002). In *James*, the court had held that even a voluntary dismissal without prejudice could be final and appealable where the plaintiff sought the dismissal of remaining claims against the same defendant after a grant of partial summary judgment and where the record revealed no evidence of an intent to "manipulate" appellate jurisdiction. Later, the 9th Circuit clarified that *James* was an "exception" to the general rule that an order that adjudicates fewer than all the claims does not terminate the action. The court cited *Am States Ins. Co. v. Dastar Corp.*, 318 F.3d 881 (9th Cir. 2003). The court in *United States v. Community Home & Health Care Services Inc.*, (9th Cir. No. 07-56060, Dec. 16, 2008), citing *United National Insurance Co. v. R.&D Latex Corp.*, 141 F.3d 916 (9th Cir. 1998), found that a "party's decision to dismiss its remaining claims without prejudice generally renders a partial grant of summary judgment final."

The majority in *Romoland* noted certain similarities and differences with *James*. First, the court noted that, as in *James*, the record reflected no evidence of intentional manipulation, but rather a legitimate effort to achieve judicial economy. At the same time, the court noted the case was distinguishable from *James* in that *Romoland* involved multiple defendants and intertwined claims that would not otherwise be amenable to severance under Federal Rule of Civil Procedure 54(b).

Ultimately, however, the court avoided deciding whether the case fit into the exception created by James. Instead, the court adopted a "pragmatic evaluation of finality" and treated the dismissal as being with prejudice. The court noted that the dismissal order was silent as to whether it was with or without prejudice. The usual presumption from Rule 41(a)(2) is that "unless the order states otherwise, a dismissal under this paragraph ... is without prejudice." Nevertheless, the court looked beyond the text of the order and concluded from the plaintiffs' other statements that their intent was to dismiss their claims with prejudice. Specifically, the court pointed to the plaintiffs' reliance on the previous dismissal of their claims against the energy center, which had been with prejudice, and the plaintiffs' counsel's assurance at oral argument that

the plaintiffs had "no intention" of relitigating their claims against the South Coast Air Quality Management District and instead sought an immediate appeal in the interest of judicial economy. Based on its conclusion that the dismissal was with prejudice, the court concluded the dismissal was "an unquestionably final judgment" and therefore appealable.

In a separate opinion - concurring as to the result - Judge J. Clifford Wallace disagreed that the dismissal order was appealable. Wallace would have applied a bright-line rule that a voluntary dismissal without prejudice "cannot constitute an appealable final judgment." He criticized the majority for adding uncertainty to the final judgment rule, likening the majority's expanded "pragmatic approach to finality" to Justice Potter Stewart's famous definition of pornography: "I know it when I see it." In Wallace's view, lawyers should be held responsible for meeting the statutory requirements for appellate jurisdiction: "We do not need to remind good lawyers to meet this standard, and we do not improve the appellate process by crafting rules to make up for those who are incompetent."

What lessons can practitioners draw from *Romoland*? First of all, give careful thought to whether a voluntary dismissal is with or without prejudice. Clarifying that a dismissal is with prejudice simplifies matters by avoiding questions of finality for appellate jurisdiction. Yet lawyers are loath to ever dismiss with prejudice if they can help it. In *Romoland*, for instance, the issue arose, and the plaintiffs refused to put themselves at any imaginable disadvantage by refusing to make their dismissal expressly with prejudice. This strategy worked to the extent that the majority declined to dismiss the appeal for lack of a final judgment - though the court then affirmed the District Court's dismissal against the plaintiffs anyway. Moreover, even if the parties never raised the question of prejudice, the District Court could have done so.

Second, *Romoland* makes clear that "the label attached to [a] dismissal is not dispositive" - the appellate courts may treat a dismissal without prejudice to be one with prejudice, at least for purposes of creating appellate jurisdiction. But *Romoland* provides little guidance about when that might occur or how a practitioner might arrange for that to happen. Plaintiffs' counsel therefore cannot count on being able to appeal a dismissal without prejudice. Likewise, defendants' counsel, when considering an agreement to a dismissal without prejudice, should be aware that such a dismissal may not preclude an appeal. In sum, the procedural posture of *Romoland* is too unique to provide much practical guidance, and practitioners would be well advised to follow Wallace's admonition to exercise care and precision in addressing matters of appellate jurisdiction.

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