THERE IS NO HELPFUL GENERAL RULE ABOUT APPEALING DISMISSALS WITHOUT PREJUDICE

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With some frequency, courts wrestle with whether litigants can appeal after dismissal without prejudice. But there is no helpful general rule to answer this question. That's because the without-prejudice designation is more or less irrelevant to whether the dismissal is a final, appealable decision. In this Essay, I show that the nature of the underlying dismissal—what the dismissal did, not its without-prejudice nature—is what matters for appealability. Courts would do well to ignore whether an action was dismissed without prejudice when it comes to determining appealability.

INTRODUCTION

Federal courts of appeals have spent a lot of energy determining whether litigants can appeal after a dismissal without prejudice.[1] Some courts have declared that these dismissals are final decisions and thus generally appealable.[2] And some courts—sometimes the same courts, albeit in different opinions—announce the opposite rule: that dismissals without prejudice are not generally appealable.[3] Atop these contradictory general rules, courts have added a number of qualifications and exceptions.[4]

But there is no helpful general rule about appealing dismissals without prejudice. That's because the without-prejudice nature of a dismissal has little to do with appealability. Far more relevant is the nature of the underlying order. So appellate courts should focus on what the district court

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1. As discussed further below, a dismissal without prejudice is the dismissal of an action that does not bar refiling the action in the same district court. For recent examples of uncertainty about appealing dismissals without prejudice, see *Carter v. Buesgen*, 10 F.4th 715, 720 (7th Cir. 2021); *Wilcox v. Georgetown Univ.*, 987 F.3d 143, 146–48 (D.C. Cir. 2021).

2. *See, e.g.*, Eastman Kodak Co. v. STWB, Inc., 452 F.3d 215, 219 (2d Cir. 2006) ("It is well established in this circuit that a dismissal without prejudice, absent some retention of jurisdiction, is a final decision within the meaning of 28 U.S.C. § 1291, and hence, appealable.").

3. *Compare* Am. States Ins. Co. v. Cap. Assocs. of Jackson Cnty., Inc., 392 F.3d 939, 940 (7th Cir. 2004) ("Dismissals without prejudice are canonically non-final and hence not appealable under 28 U.S.C. § 1291."), *with* Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc., 586 F.3d 500, 506 (7th Cir. 2009) ("There is no general rule that dismissals without prejudice are nonfinal orders and therefore nonappealable under 28 U.S.C. § 1291 . . . .").

4. *See infra* notes 19–20.

actually did, and not whether what it did was without prejudice. In fact, nothing would be lost—and much could be gained—if courts of appeals stopped looking to whether a dismissal was without prejudice when determining appealability.

I. THE FOCUS

Under 28 U.S.C. § 1291, the federal courts of appeals have jurisdiction over the "final decisions" of the district courts.[5] So to be appealable, dismissals without prejudice must produce a final decision. And a final decision is normally one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[6]

Courts can't seem to settle on whether a dismissal without prejudice is final. They've instead announced two inconsistent general rules. Sometimes courts say that these dismissals are final.[7] Other times courts say that dismissals without prejudice aren't final.[8] And neither of these rules has a solid doctrinal foundation.

Decisions in the without-prejudice-dismissals-are-final camp can largely be traced to the Supreme Court's decision in *United States v. Wallace & Tiernan Co.*[9] Decided in 1949, *Wallace & Tiernan* held that an invited, without-prejudice dismissal was final when the district court's interlocutory order effectively resolved the action.[10] In the course of doing so, the court noted that the without-prejudice nature of the dismissal did "not make the cause unappealable, for denial of relief and dismissal of the case ended [the] suit so far as the District Court was concerned."[11]

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5. 28 U.S.C. § 1291.

6. Catlin v. United States, 324 U.S. 229, 233 (1945).

7. *See, e.g.*, *Eastman Kodak*, 452 F.3d at 219 ("It is well established in this circuit that a dismissal without prejudice, absent some retention of jurisdiction, is a final decision within the meaning of 28 U.S.C. § 1291, and hence, appealable."); Davis Forestry Corp. v. Smith, 707 F.2d 1325, 1326 n.1 (11th Cir. 1983) ("A dismissal without prejudice can be appealed as a final order."); *In re* Special Apr. 1977 Grand Jury, 587 F.2d 889, 892 n.1 (7th Cir. 1978) ("Dismissals without prejudice are as final for appealability purposes as dismissals with prejudice.").

8. *See, e.g.*, S.B. v. KinderCare Learning Ctrs., LLC, 815 F.3d 150, 152 (3d Cir. 2016) ("Typically, a dismissal without prejudice is not a final decision because the plaintiff may refile the complaint, thereby creating the risk of 'piecemeal' appellate litigation." (quoting Camesi v. Univ. of Pittsburgh Med. Ctr., 729 F.3d 239, 244 (3d Cir. 2013))); Hoskins v. Poelstra, 320 F.3d 761, 763 (7th Cir. 2003) ("An order dismissing a complaint without prejudice is not final, and thus not appealable under 28 U.S.C. § 1291, because the plaintiff is free to amend his pleading and continue the litigation.").

9. United States v. Wallace & Tiernan Co., 336 U.S. 793 (1949); *see, e.g.*, Wilcox v. Georgetown Univ., 987 F.3d 143, 155 (D.C. Cir. 2021) (Randolph, J., dissenting) ("*Wallace* thus holds that a dismissal without prejudice is a final, appealable decision under § 1291."); Allied Air Freight, Inc. v. Pan Am. World Airways, Inc., 393 F.2d 441, 444 (2d Cir. 1968) (citing *Wallace & Tiernan*, 336 U.S. at 794).

10. *Wallace & Tiernan*, 336 U.S. at 794 n.1.

11. *Id.*

But *Wallace & Tiernan* is a thin reed on which to rest this general rule of appealability. Granted, the Supreme Court said that the dismissal in *Wallace & Tiernan* was appealable despite being without prejudice. But the Court did not say that *all* dismissals without prejudice are appealable, and the Court pointed out that the dismissal ended district court proceedings.

As for decisions in the not-final camp, they largely stem from courts' concerns that claims dismissed without prejudice can be refiled. That concern probably comes from courts' conflating prejudice and preclusion—that is, thinking that preclusion applies when an action is dismissed with prejudice, and it doesn't when an action is dismissed without prejudice.[12]

But that's not right.[13] The with-/without-prejudice distinction comes from Federal Rule of Civil Procedure 41, which governs dismissals.[14] A with-prejudice dismissal merely bars the plaintiff from refiling the same action in the same district court.[15] A without-prejudice dismissal doesn't.[16] Neither determines the preclusive effect of a dismissal.[17] That comes from the substantive law of preclusion. Indeed, were Rule 41 read to affect preclusion, it might violate the Rules Enabling Act's provision that procedural rules cannot "abridge, enlarge or modify any substantive right."[18]

So we have two categorical, inconsistent rules of questionable provenance. On top of those rules are a number of qualifications. Courts have

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12. Merritts v. Richards, 62 F.4th 764, 772 n.4 (3d Cir. 2023) (describing a with-prejudice dismissal's "primary function" as "indicat[ing] that a judgment has preclusive effects"); Harty v. West Point Realty, Inc., 28 F.4th 435, 445 (2d Cir. 2022) ("[A] dismissal without prejudice, even one denying leave to amend, does not preclude another action on the same claims, whereas a dismissal with prejudice is a ruling on the merits that precludes a plaintiff from relitigating—in any court, ever again—any claim encompassed by the suit." (quotation marks and citation omitted)); Vikas WSP, Ltd. v. Econ. Mud Prods. Co., 23 F.4th 442, 454 (5th Cir. 2022) ("Dismissals with prejudice are final orders with preclusive effect. They end the suit and preclude its relitigation." (citation omitted)); Papera v. Pa. Quarried Bluestone Co., 948 F.3d 607, 611 (3d Cir. 2020) ("A dismissal with prejudice operates as an adjudication on the merits [and thus] ordinarily precludes future claims," while "a dismissal without prejudice is a dismissal that does not operate as an adjudication upon the merits and thus does not have a claim-preclusive effect." (cleaned up)).

13. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505 (2001) ("The primary meaning of 'dismissal without prejudice,' we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim."); Foss v. E. States Exposition, 67 F.4th 462, 468 (1st Cir. 2023) ("The 'with prejudice' label does not itself determine a dismissal's preclusive effect."); Bryan Lammon, *Disarming the Finality Trap*, 97 N.Y.U. L. REV. ONLINE 173, 181 (2022) [hereinafter Lammon, *Disarming*].

14. FED. R. CIV. P. 41.

15. *Semtek*, 531 U.S. at 506.

16. *Id.* at 505.

17. *See id.* at 502–03.

18. *Id.* at 503.

said, for example, that dismissals without prejudice are final unless the defect that led to the dismissal is easily fixable.[19] Courts have also said that these dismissals are not final unless there can be no further proceedings in the district court.[20] Put together, courts' attempts to generalize about the appealability of dismissals without prejudice has left litigants with little helpful guidance.

II. THE IRRELEVANCE

These various rules suggest that the courts of appeals have split on the appealability of dismissals without prejudice.[21] Digging a little deeper, however, reveals very little disagreement when it comes to the ultimate question of appealability. That's because the "without-prejudice" designation has little to do with appealability. What matters for appealability is the nature of the underlying order.

Consider dismissals for a lack of subject-matter jurisdiction. These dismissals are necessarily without prejudice; lacking jurisdiction, a court cannot opine on the merits or preclude refiling the action.[22] But no one seriously doubts that dismissals for a lack of subject-matter jurisdiction are appealable.[23] The same is true with dismissals due to improper venue or for failure to join a party under Rule 19.[24]

Or consider dismissals with leave to amend. These are often denominated "without prejudice."[25] And the courts agree that they are not final.[26]

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19. *See, e.g.*, Schering-Plough Healthcare Prod., Inc. v. Schwarz Pharma, Inc., 586 F.3d 500, 506 (7th Cir. 2009).

20. *See, e.g.*, Jackson v. Volvo Trucks N. Am., Inc., 462 F.3d 1234, 1238 (10th Cir. 2006).

21. Domino Sugar Corp. v. Sugar Workers Loc. Union 392, 10 F.3d 1064, 1066 (4th Cir. 1993).

22. Brereton v. Bountiful City Corp., 434 F.3d 1213, 1216–17 (10th Cir. 2006).

23. Or almost no one. G.W. v. Ringwood Bd. of Educ., 28 F.4th 465, 468 n.2 (3d Cir. 2022) ("Though the Board argues that the dismissal without prejudice [for a lack of subject-matter jurisdiction] is not an appealable final order, its contention is without merit.").

24. *See* Johnson v. W. & S. Life Ins. Co., 598 F. App'x 454, 456 (7th Cir. 2015); N. Arapaho Tribe v. Harnsberger, 697 F.3d 1272, 1284 (10th Cir. 2012); FED. R. CIV. P. 41(b) ("Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.").

25. *See* Hoskins v. Poelstra, 320 F.3d 761, 763 (7th Cir. 2003) (noting that a dismissal "without prejudice is not final, and thus not appealable under 28 U.S.C. § 1291, because the plaintiff is free to amend his pleading and continue the litigation"); Borelli v. City of Reading, 532 F.2d 950, 951 (3d Cir. 1976) (per curiam) ("Although the district court's order did not mention amendment, an implicit invitation to amplify the complaint is found in the phrase 'without prejudice.' ").

26. *See, e.g.*, Slayton v. Am. Express Co., 460 F.3d 215, 224 (2d Cir. 2006); Ordower v. Feldman, 826 F.2d 1569, 1572 (7th Cir. 1987); Conn. Nat'l Bank v. Fluor Corp., 808 F.2d 957, 960 (2d Cir. 1987); *see also* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3914.1 (3d ed. 2024). *Cf.* Clark v. Kansas City,

That's because the plaintiff can amend its pleading and possibly proceed with the action.[27] The courts of appeals have split on what is necessary to make a dismissal with leave to amend final.[28] But they agree that, standing alone, these dismissals are not appealable.

Then there are the voluntary, without-prejudice dismissals of unresolved claims. Litigants have used these voluntary dismissals in an effort to manufacture an interlocutory appeal from the resolution of some claims.[29] The idea is to voluntarily dismiss all unresolved claims, appeal the district court's resolution of other claims, and then possibly reinstate the voluntarily dismissed claims.[30] Most courts hold that these voluntary dismissals do not produce a final decision.[31] Courts reason that because the claims dismissed without prejudice might be refiled, district court litigation is not necessarily over.[32] Courts have also expressed concern that this voluntary-dismissal tactic is an end run around Federal Rule of Civil Procedure 54(b), which authorizes the district court to enter a partial judgment on the resolution of some (but not all) claims in a multiclaim action.[33]

In each of these contexts, the without-prejudice nature of the dismissal is irrelevant. What matters is the underlying order. More specifically, what matters are the reasons for the dismissal and the prospects of future district court litigation.

So it's not enough to say (as some courts have acknowledged) that the without-prejudice nature of a dismissal is not dispositive on appealability.[34]

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172 U.S. 334, 338 (1899) (holding that the grant of a demurrer was not final). A handful of cases have said that these dismissals are final, but those cases should be regarded as outliers. *See, e.g.*, Car Carriers, Inc. v. Ford Motor Co., 789 F.2d 589, 591 n.4 (7th Cir. 1986).

27. *E.g.*, Hunt v. Hopkins, 266 F.3d 934, 936 (8th Cir. 2001) ("[W]hen a district court grants a plaintiff leave to amend his pleading, the court signals that the action has not been fully and finally adjudicated on the merits, and that further proceedings will follow.").

28. *See* Bryan Lammon, *Final Decisions & Final Judgments*, 24 J. APP. PRAC. & PROCESS 59, 69–75 (2024).

29. *See* Bryan Lammon, *Manufactured Finality*, 69 VILL. L. REV. 271, 273 (2024).

30. *Id.* at 281.

31. *See, e.g.*, Rabbi Jacob Joseph Sch. v. Province of Mendoza, 425 F.3d 207, 210–11 (2d Cir. 2005); Fed. Home Loan Mortg. Corp. v. Scottsdale Ins. Co., 316 F.3d 431, 438 (3d Cir. 2003); First Health Grp. Corp. v. BCE Emergis Corp., 269 F.3d 800, 801–02 (7th Cir. 2001); State Treasurer v. Barry, 168 F.3d 8, 13 (11th Cir. 1999); Concha v. London, 62 F.3d 1493, 1507 (9th Cir. 1995); Cook v. Rocky Mountain Bank Note Co., 974 F.2d 147, 148 (10th Cir. 1992). *But see* Great Rivers Coop. of Se. Iowa v. Farmland Indus., Inc., 198 F.3d 685, 689 (8th Cir. 1999).

32. *E.g.*, Ryan v. Occidental Petroleum Corp., 577 F.2d 298, 302 (5th Cir. 1978); Fletcher v. Gagosian, 604 F.2d 637, 639 (9th Cir. 1979).

33. *See, e.g.*, Rowland v. S. Health Partners, Inc., 4 F.4th 422, 427 (6th Cir. 2021).

34. *E.g.*, Carter v. Buesgen, 10 F.4th 715, 720 (7th Cir. 2021) ("As a general and highly imperfect rule of thumb, a dismissal with prejudice is final and thus reviewable, and a dismissal without prejudice is not."); Arrow Gear Co. v. Downers Grove Sanitary Dist., 629 F.3d 633, 636–37 (7th Cir. 2010) (noting a without-prejudice dismissal that doesn't permit refiling in the same court (or at all) is final, but a without-prejudice dismissal is not final when it "allows the plaintiff to start over in the same court"); Schering-Plough Healthcare Prods.,

It would be better to ignore the without-prejudice nature altogether and look instead to the order itself.

III. FOCUSING ON FINISHED

Judge Easterbook of the Seventh Circuit recently suggested a similar shift in attention.[35] At issue was the appealability of a dismissal without prejudice due to a failure to exhaust state habeas remedies.[36] The state courts had made clear that they would not entertain the plaintiff's claim.[37] There was thus no need to further exhaust state remedies, and the dismissal without prejudice was appealable.[38]

Judge Easterbrook concurred to explain that the without-prejudice designation does not determine appellate jurisdiction.[39] Sometimes a without-prejudice dismissal means that there is more to do in the district court, so there is no final decision.[40] Other times, it means the litigants should go litigate elsewhere.[41] He offered a simple rule: "[W]hen 'without prejudice' means 'I have not resolved the merits but this case is over nonetheless,' then the decision is final; when it means 'the problem can be fixed so that litigation may continue in this court,' then the decision is not final."[42] So "a decision closing the case *always* is final."[43]

Lurking in Judge Easterbrook's simple rule is a potentially radical rethinking of finality. When it comes to appeals at the end of district court proceedings, modern finality doctrine largely asks if the district court has resolved all of the claims in an action.[44] That's why most courts hold that the voluntary, without-prejudice dismissal of some claims does not produce a final decision. The district court has not resolved all of the claims in the action. The claims are instead paused, and they might resume after the appeal.

A different conception of finality might ask only if the district court has finished with the action. If the district court is done, then it has issued a final decision, and the court of appeals has jurisdiction. We can see this

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Inc. v. Schwarz Pharma, Inc., 586 F.3d 500, 506 (7th Cir. 2009) ("There is no general rule that dismissals without prejudice are nonfinal orders and therefore nonappealable under 28 U.S.C. § 1291 . . . ."); United States v. City of Milwaukee, 144 F.3d 524, 528 n.7 (7th Cir. 1998) ("[T]his court has not accorded talismanic importance to the fact that a complaint, or in this case a motion, was dismissed 'without prejudice' ").

35. *See Carter*, 10 F.4th at 724–25 (Easterbrook, J., concurring).

36. *Id.* at 720 (majority opinion).

37. *Id.*

38. *Id.*

39. *Id.* at 724–25 (Easterbrook, J., concurring).

40. *Id.* at 724.

41. *Id.*

42. *Id.* at 725.

43. *Id.*

44. *See* Lammon, *Manufactured Finality*, *supra* note 29.

conception of finality in two of the doctrines mentioned above: dismissals for a lack of subject-matter jurisdiction, and dismissals with leave to amend. In the former, the district court has finished. So its decision is final. In the latter, the district court is not finished; litigation can resume if the plaintiff amends. So there is no final decision.

Focusing on whether the district court is finished could radically change current finality doctrine. The idea requires significant research and consideration before pursuing. But it also might be an intuitive, simple, and predictable rule—something that the modern law of federal appellate jurisdiction often lacks. Ignoring the without-prejudice nature of a dismissal would be one step towards this new conception of finality.

CONCLUSION

That an action was dismissed without prejudice is irrelevant to appellate jurisdiction. What matters is the underlying order—is the order, regardless of the without-prejudice designation, a final, appealable order? Shifting the focus away from the without-prejudice designation would be an easy, small step towards simplifying the law in this area. It would be a much larger step to go further and ask only whether the district court is finished with an action. But that also might be a major step towards much-needed simplicity and predictability in federal appellate jurisdiction.