

THE IMPOSITION OF RULE 11 SANCTIONS AFTER
A VOLUNTARY DISMISSAL

Szabo Food Service, Inc. v. Canteen Corp.,
823 F.2d 1073 (7th Cir. 1987).

In *Szabo Food Service, Inc. v. Canteen Corp.*¹ the Seventh Circuit Court of Appeals held that a federal district court maintains jurisdiction to impose sanctions under Rule 11 of the Federal Rules of Civil Procedure² after a plaintiff files a notice of voluntary dismissal pursuant to Rule 41(a)(1)(i).³

Szabo Food Service, Inc. ("Szabo") and Canteen Corporation ("Canteen") submitted competing bids to supply food to the Cook County Jail.⁴ The Cook County Board awarded the contract to Canteen.⁵ Szabo filed a complaint⁶ in federal district court against Canteen and the County Board,⁷ and requested a temporary restraining order to prevent Canteen from acting on the contract. The district court refused to grant the temporary restraining order, but ordered Canteen to file, within seventy-two hours, papers in opposition to Szabo's request for a preliminary injunction.⁸ Before the seventy-two hours expired, Szabo served a notice of voluntary dismissal pursuant to Rule 41(a)(1)(i).⁹ Canteen later filed a motion for sanctions requesting attorney's fees pursuant to Rule 11.¹⁰ The district court denied the motion and Canteen appealed. On appeal, Szabo argued that the voluntary dismissal deprived the district court of

1. 823 F.2d 1073 (7th Cir. 1987).

2. FED. R. CIV. P. 11. See *infra* notes 12-18 and accompanying text.

3. FED. R. CIV. P. 41. See *infra* notes 19-20 and accompanying text.

4. 823 F.2d at 1075. Szabo previously held the contract between 1978 and November 1986. The county board requested bids for the term beginning in November 1986.

5. *Id.* Canteen's bid was lower by more than \$1 million but an evaluation committee had rated Szabo's bid superior due to other specifications.

6. The complaint alleged a state law claim violation of due process, and racial discrimination. *Id.*

7. *Id.* The complaint also named as defendants the individual board members, Cook County, and the Cook County purchasing agent.

8. *Id.* at 1073-1076. Canteen claimed that their attorneys worked round-the-clock for those 72 hours in order to prepare their opposition to Szabo's motion for preliminary injunction.

9. *Id.* at 1076. Canteen's opposition papers were due at 4:30 p.m. on October 17. At 1:15 p.m. that same day, Szabo filed the notice of voluntary dismissal.

10. *Id.* Canteen also sought fees as a prevailing party pursuant to 42 U.S.C. § 1988. Szabo had filed suit against Canteen in state court and during the course of discovery in that suit, Canteen became convinced that Szabo filed the federal suit without meeting the requirements of Rule 11. See *infra* note 12 for text of Rule 11. Canteen sought more than \$10,000 in attorney's fees. *Id.* at 1084.

jurisdiction to award attorney's fees against it. The Seventh Circuit vacated the district court's denial of sanctions¹¹ and *held*: a Rule 41(a)(1)(i) voluntary dismissal does not terminate a district court's jurisdiction to impose Rule 11 sanctions.

Rule 11 requires an attorney to make a reasonable inquiry into the legal and factual basis of any motion or pleading before filing them in court.¹² The rule mandates that a district court impose sanctions on the attorney, the client, or both¹³ upon finding that the filing is not grounded in fact, not warranted by existing law or is interposed for the purpose of delay.¹⁴ The sanction may consist of an order to pay the other party's reasonable attorney's fees.¹⁵ Since a 1983 amendment to the

11. On the merits, the court of appeals affirmed the district court's denial of § 1988 attorney's fees and remanded for further district court action on the Rule 11 sanctions. *Id.* at 1084-85.

12. FED. R. CIV. P. 11. The rule provides:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation

13. The rule states:

If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, *shall* impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Id. (emphasis added).

The imposition of sanctions is mandatory upon a finding of a violation and is not left to the discretion of the district court. *See Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985) ("By employing the imperative 'shall', we believe the drafters intended to stress the mandatory nature of the imposition of sanctions pursuant to the rule. Unlike statutory provisions that vest the district court with 'discretion' to award fees, Rule 11 is clearly phrased as a directive."). *But see Schwarzer, Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 200 (1985) (courts will not consider themselves bound by the mandatory language of the rule).

14. A violation exists where after a reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is grounded in fact or law. *Eastway*, 762 F.2d at 254. The Advisory Committee Notes to the Rule's 1983 amendment state, "The standard is one of reasonableness under the circumstances." 97 F.R.D. 196, 198. The Advisory Committee Notes also list four factors that affect the reasonableness of the inquiry: (1) the length of time available for the signer; (2) whether the signer had to rely on client information as to the underlying facts; (3) whether the filing was based on a plausible view of the law; and (4) whether the signer depended on forwarding counsel or another member of the bar. 97 F.R.D. at 199. For a discussion of the reasonable inquiry standard see Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 642-43 (1987).

15. *See* text of Rule 11, *supra* note 13. Although the imposition of sanctions may be

rule,¹⁶ courts increasingly¹⁷ have invoked Rule 11 to curb frivolous or vexatious litigation and to prevent filings for the purpose of delay.¹⁸

Courts have had little opportunity, however, to address Rule 11 sanctions in the context of a Rule 41(a)(1)(i) voluntary dismissal. A Rule 41(a)(1)(i) voluntary dismissal allows a plaintiff to extricate himself from a suit any time prior to filing of the defendant's answer or motion for summary judgment.¹⁹ The plaintiff's notice of dismissal terminates the suit without further court intervention.²⁰ In addition, courts generally

mandatory, the type and amount of sanction are within the discretion of the district court. *See Levin & Sobel, Achieving Balance in the Developing Law of Sanctions*, 36 CATH. U. L. REV. 587, 600 (1987) (Courts award various types of sanctions including fines paid into the court for use of the court's time, publication of the offending attorney's name, as well as attorney's fees to the other party.).

16. Prior to 1983, Rule 11 imposed a subjective standard on an attorney. The 1983 amendment changed that standard to an objective one. For a discussion of the change in standards, *see Eastway*, 762 F.2d at 253.

17. Compare *Risinger, Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34-36 (1976) (a study revealed that between 1938 and 1976 parties invoked Rule 11 in only 23 reported cases, and courts found violations of the rule in only 9 cases) with *Levin & Sobel, supra* note 15 at 592 (a LEXIS search on March 5, 1987 uncovered approximately 700 district court cases that contain discussions of Rule 11 sanctions).

18. Rule 11 protects not only the opposing parties in the litigation but also protects the court from frivolous or vexatious litigation. Commentators have emphasized various purposes of Rule 11. *See A. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE* 38, 40, (Federal Judicial Center 1984) (emphasizing the cost shifting aspects of the sanctions—costs being shifted to give relief to innocent parties at the expense of those guilty of improper conduct); *Levin & Sobel, supra* note 15, at 593 (emphasizing the deterrent effect of amended Rule 11).

19. Rule 41(a)(1) provides: "[A]n action may be dismissed by the plaintiff without order of the court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . ." FED. R. CIV. P. 41.

This dismissal is without prejudice. FED. R. CIV. P. 41(2).

Only the occurrence of one of these two events terminates the plaintiff's right to a Rule 41(a)(1)(i) dismissal. *Thorp v. Scarne*, 599 F.2d 1169, 1174 (2d Cir. 1979). If the defendant serves an answer or moves for summary judgment, the plaintiff may only dismiss upon order of the court, and with whatever terms and conditions the court deems proper. *See* FED. R. CIV. P. 41(a)(2).

20. *See Universidad Central Del Caribe, Inc. v. Liason Committee on Medical Education*, 760 F.2d 14, 19 (1st Cir. 1985). (41(a)(1)(i) is a self-executing dismissal and the court has no power to attach conditions to it); *Thorp v. Scarne*, 599 F.2d 1169, 1171 (2d Cir. 1979) (a Rule 41(a)(1)(i) dismissal requires no action or approval by the court); *Carter v. U.S.*, 547 F.2d 258 (5th Cir. 1977) (plaintiff has an absolute right to dismiss under Rule 41(a)(1)(i)). *But see* *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105 (2d Cir. 1953) (prohibiting dismissal as of right pursuant to Rule 41(a)(1)(i) because, although the defendant had not answered or moved for summary judgment, the court had addressed the merits of the claim), *cert. denied*, 345 U.S. 964. *Harvey Aluminum* is definitely the minority view. *See Foss v. Federal Intermediate Credit Bank of St. Paul*, 808 F.2d 657, 659-660 (8th Cir. 1986).

hold that a Rule 41(a)(1)(i) dismissal precludes a court from awarding attorney's fees provided for under specific federal statutes.

In *Corcoran v. Columbia Broadcast System, Inc.*,²¹ however, the Ninth Circuit awarded attorney's fees to the defendant pursuant to the Copyright Act of 1909²² after the plaintiff voluntarily dismissed the complaint. The Copyright Act authorized the court to award reasonable attorney's fees to the prevailing party in a suit brought under the Act. The court in *Corcoran* viewed the defendant as the "prevailing party" regardless of the dismissal.²³ However, a voluntary dismissal pursuant to Rule 41(a)(1)(i) is without prejudice.²⁴ Thus, the defendant cannot logically be considered a "prevailing party."

In *Williams v. Ezell*,²⁵ the Fifth Circuit reversed the district court's award of attorney's fees where the plaintiff sought voluntary dismissal under Rule 41(a)(1)(i). The court emphasized the plaintiff's absolute Rule 41(a)(1)(i) right to dismiss before a responsive pleading.²⁶ The court stated that not only did the district court lack power to deny the plaintiff's right to dismiss but that the district court also lacked the power or discretion to attach any condition or burden to that right.²⁷

In *Santiago v. Victim Services Agency*,²⁸ the Second Circuit held that a district court "did not have jurisdiction" to award attorney's fees pursuant to 42 U.S.C. § 1988²⁹ after the plaintiff filed a Rule 41(a)(1)(i) notice of voluntary dismissal.³⁰ The court further stated that the district court lacked power to reserve jurisdiction on the question of attorney's fees

21. 121 F.2d 575 (9th Cir. 1941).

22. 17 U.S.C. § 505 (1982).

23. The court stated that because the defendant had been put to the expense of making an appearance, "the party sued is the prevailing party within the spirit and intent of the [Copyright Act]." *Corcoran*, 121 F.2d at 576.

24. See *supra* note 19 and accompanying text.

25. 531 F.2d 1261 (5th Cir. 1976).

26. *Id.* at 1263. See *supra* note 20 and accompanying text. The court held that the plaintiff had a right to voluntarily dismiss pursuant to Rule 41(a)(1)(i) even though the plaintiff's action had been previously dismissed with prejudice and subsequently been partially reinstated at plaintiff's motion and even though a hearing had been held on a motion for injunctive relief. 531 F.2d at 1263.

27. *Id.* at 1264. The court stated that the district court's order granting attorney's fees was a nullity.

28. 753 F.2d 219 (2d Cir. 1985).

29. 42 U.S.C. § 1988 authorizes the award of attorney's fees to a prevailing party in a civil rights action upon a finding of a frivolous or meritless claim. *Id.* at 22.

30. 753 F.2d at 220. The court stated that once a plaintiff dismisses the action the district court loses all jurisdiction over the action. See generally *In re International Business Machines Corp.*, 687 F.2d 591, 600-02 (2d Cir. 1982) (discussion of Rule 41(a)(1) in the context of consent decrees).

after a 41(a)(1)(i) voluntary dismissal. In *Santiago*, the court noted that allowing a district court to reserve jurisdiction would discourage voluntary dismissals.³¹

Recently, courts have addressed the *Williams* and *Santiago* holdings in the context of Rule 11 sanctions. In *Perez v. Velez*,³² the district court found that Rule 11 attorney's fees were appropriate even though the plaintiff filed notice of voluntary dismissal. The *Perez* court distinguished *Santiago* because in *Perez* the district court had dismissed the complaint due to lack of merit before the plaintiff filed the notice of voluntary dismissal. The court stated that the plaintiff, relying on *Santiago*, filed the notice of voluntary dismissal in an apparent attempt to avoid the sanction.³³

In *Foss v. Federal Intermediate Credit Bank of St. Paul*,³⁴ the Eighth Circuit held that Rule 11 sanctions were invalid after the plaintiff's Rule 41(a)(1)(i) voluntary dismissal. In *Foss*, the district court refused to recognize the plaintiff's notice of dismissal and proceeded to the merits of the case. The district court then dismissed the action with prejudice and imposed Rule 11 sanctions. In reversing, the Eighth Circuit relied on the mandatory, self-executing nature of a Rule 41(a)(1)(i) dismissal.³⁵

31. *Santiago*, 753 F.2d at 223. The court also emphasized that a defendant in a frivolous suit can preserve his claim for attorney's fees simply by filing an answer or motion for summary judgment. *Id.*

32. 629 F. Supp. 734 (S.D.N.Y. 1985). See also *Interstate Underwriting Agencies, Inc. v. Gunter*, 624 F. Supp. 774, 775 (S.D. Fla. 1985). (The *Perez* court relied on *Williams* for a finding that Rule 11 sanctions were inappropriate. The court stated, "Had the defendants moved for attorney's fees under the sanction provision of Rule 11 . . . this court would be without jurisdiction to enter any orders, in light of plaintiff's voluntary dismissal.")

33. 629 F. Supp. at 737.

34. 808 F.2d 657 (8th Cir. 1986).

35. *Id.* at 659, 660. The Eighth Circuit in *Kurkowski v. Volker*, 819 F.2d 201 (8th Cir. 1987), allowed an award of Rule 11 sanctions after the plaintiff's voluntary dismissal. The *Kurkowski* court distinguished *Foss* because in *Kurkowski* the defendant moved to dismiss before the plaintiff filed a notice of voluntary dismissal. *Id.* at 203 n.7. The district court considered matters outside the pleadings when ruling on the defendant's motion for dismissal thereby transforming the defendant's motion for dismissal into a motion for summary judgment. The motion for summary judgment terminated the plaintiff's right to voluntary dismissal without prejudice under Rule 41(a)(1)(i). See *supra* notes 19-20 and accompanying text. In *Fisher Bros. Sales Inc. v. United Trading Co.*, No. 85 Civ. 7502 slip op. (April 28, 1987), another post-*Szabo* decision, the District Court for the Southern District of New York held that it could impose Rule 11 sanctions after a Rule 41(a)(1)(i) voluntary dismissal. The court distinguished *Santiago* on the ground that *Santiago* addressed statutory attorney's fees pursuant to § 1988 of the Civil Rights Act, while *Fisher* addressed Rule 11 sanctions. The court stated that it acquired jurisdiction to decide Rule 11 sanctions once counsel signed and filed the pleading and retained jurisdiction after the dismissal.

In *Szabo Food Service, Inc. v. Canteen Corp.*,³⁶ the Seventh Circuit ruled that the Second Circuit's holding in *Santiago* precluded an award of attorney's fees pursuant to 42 U.S.C. section 1988 after a 41(a)(1)(i) notice of dismissal, but did not preclude the imposition of Rule 11 sanctions. The *Szabo* court stated that Rule 11 does not require that a party prevail on the merits or be entitled to costs in order to receive attorney's fees.³⁷ However, this does not distinguish *Santiago* because the *Santiago* court did not rely solely on the section 1988 requirement that a party prevail in order to receive attorney's fees. The *Santiago* court broadly held that a district court "lacked jurisdiction" to award attorney's fees after a Rule 41(a)(1)(i) dismissal.³⁸ Therefore, to distinguish *Santiago*, the *Szabo* court inquired into the sense in which *Santiago* used the phrase "lack of jurisdiction."

The *Szabo* court addressed three possible meanings for "lack of jurisdiction" as an effect of a 41(a)(1)(i) dismissal.³⁹ One situation in which a court loses jurisdiction occurs where the court has subject matter jurisdiction but loses the power to proceed due to the entry of final judgment or the filing of a valid appeal.⁴⁰ The *Szabo* court acknowledged that a dismissal pursuant to Rule 41(a)(1)(i) terminates the case without court intervention and that a judge must honor a Rule 41(a)(1)(i) dismissal and therefore, may not reach the merits of the case.⁴¹ However, the court distinguished jurisdiction to decide the case on the merits from jurisdiction to award attorney's fees. The court stated that under the latter meaning of "jurisdiction," a district court did not lose the power to

36. 823 F.2d 1073 (7th Cir. 1987).

37. *Id.* at 1077. The court stated that this implied the ability of the district court to award sanctions whether the plaintiff wins or loses on the merits or dismisses. *Id.*

38. See *supra* notes 28-31 and accompanying text. The *Szabo* court extrapolated from the broad "lack of jurisdiction" language to find that *Santiago* held that a district judge could not award fees under any statute or rule after a Rule 41(a)(1)(i) dismissal. 823 F.2d. at 1077. The court stated, "To the extent the Second Circuit [*Santiago*] believes that a dismissal under Rule 41(a)(1)(i) deprives the court of the power to do anything at all, we agree with the Ninth Circuit's contrary view in *Corcoran*." *Id.* For a discussion of *Corcoran*, see *supra* notes 21-24 and accompanying text.

39. The court first addressed federal subject matter jurisdiction. The court stated that although a court may lack federal subject matter jurisdiction, it has jurisdiction to determine whether the complaint creates federal subject matter jurisdiction. If the complaint does not create it, attorney's fees may be awarded as part of the costs. 823 F.2d at 1077-78.

40. *Id.* at 1078. A judge who enters final judgment loses jurisdiction to hold another trial. Also, once a losing party has filed a valid appeal from the final decision, the district judge loses jurisdiction on the merits.

41. See *supra* note 20 and accompanying text.

award attorney's fees.⁴²

The court addressed another possible interpretation of "jurisdiction" based on Article III's case or controversy requirement.⁴³ A plaintiff's 41(a)(1)(i) dismissal ends the controversy⁴⁴ and therefore ends the court's power to act. However, the *Szabo* court posed hypothetical situations to illustrate that a court does not lose all power with such a loss of controversy.⁴⁵ For example, the court reasoned that a plaintiff could not avoid sanctions for contempt of court through a Rule 41(a)(1)(i) dismissal.⁴⁶

The *Szabo* court concluded that sanctions under Rule 11 are more analogous to sanctions for contempt of court than to a disposition on the merits or an award of costs. The court stated that Rule 11 is a "sanction" for violating a rule of court and therefore a Rule 41(a)(1)(i) dismissal is significant only in that it stops the accumulation of attorney's fees.⁴⁷ Rule 11 imposes affirmative requirements upon an attorney's behavior which he cannot avoid by dismissing his client's suit.⁴⁸

The *Szabo* court reached the correct conclusion. Rule 11 provides a sanction for violating a rule of court and, therefore, a court may impose sanctions on its own motion, whenever a violation is found.⁴⁹ The rule's function as a deterrent to frivolous or vexatious claims⁵⁰ would be under-

42. See *Obin v. District #9*, 651 F.2d 574, 582 (8th Cir. 1981) (a motion for attorney's fees raises a collateral and independent claim); *Patzer v. Board of Regents*, 763 F.2d 851, 858-59 (7th Cir. 1985) (award of attorney's fees is a collateral and separate question to adjudication on the merits); but see *Crocker v. Boeing Co.*, 662 F.2d 975, 983 (3rd Cir. 1981) (award of attorney's fees is not collateral to the merits of the litigation and judgment is not final until the district court determines the extent of attorney's fees).

43. U.S. CONST. art. III, § 2, cl. 1.

44. The court emphasized the language of *Bryan v. Smith*, 174 F.2d 212, 214 (7th Cir. 1949), which stated, "It is as if the suit had never been brought." *Szabo*, 823 F.2d at 1078.

45. *Id.* In one hypothetical the plaintiff filed suit and paid the filing fee with a bad check. The plaintiff then dismissed the suit pursuant to Rule 41(a)(1)(i). The court reasoned that in that situation, "surely the plaintiff could not get out of paying the filing fee because 'it is as if the suit had never been brought.'" *Id.* at 1078-79.

46. *Id.* at 1079. The court hypothesized a hearing for a temporary restraining order where the plaintiff "emits a Bronx cheer and punches the judge in the nose." The plaintiff then files notice of a Rule 41(a)(1)(i) dismissal before the sanction for contempt of court. The court stated that surely the judge can cite the plaintiff for contempt of court without the plaintiff arguing that he cannot be cited because "it is as if the suit had never been brought." *Id.*

47. Sanctions imposed after an early 41(a)(1)(i) dismissal are likely to be minimal, although in this case Canteen requested over \$10,000 in attorney's fees. *Id.*

48. "The obligation to answer for one's act accompanies the act." 823 F.2d at 1079.

49. See also the discussion of *Fisher Bros. v. United Trading Co.*, *supra* note 35.

50. Rule 11 is not merely compensatory in nature but was formulated to act as a deterrent. See the Advisory Committee Comments, 97 F.R.D. 196, 199 (calling it a "sanction" to emphasize the deterrent orientation of the rule). See also *supra* note 18.

mined if a plaintiff's attorney could file a complaint without first performing the required inquiry and then avoid sanctions by dismissing the complaint under Rule 41(a)(1)(i). The *Szabo* court inferred that, on balance, the deterrent and compensatory purposes of Rule 11 outweigh the plaintiff's unfettered right to voluntary dismissal granted in Rule 41(a)(1)(i).

The *Szabo* decision will have two probable effects on the practice of law. First, it will strengthen compliance with Rule 11 requirements before the initial filing of a complaint. A plaintiff's attorney will not file a claim until he or she has made an inquiry into its legal and factual validity because he or she cannot escape sanctions by dismissing under 41(a)(1)(i), or by any other means. This holding should have its greatest impact on complaints requesting temporary restraining orders or preliminary injunctions where, because of time constraints, a plaintiff's attorney may not make a thorough inquiry, and because of the same urgency a defendant's attorney will bill substantial attorney's fees in a short period of time.⁵¹

The second probable effect is a decrease in the incentive to dismiss a lawsuit voluntarily before the defendant has filed an answer or motion for summary judgment.⁵² Not only are plaintiffs no longer assured that they can unconditionally extricate themselves from a suit through a 41(a)(1)(i) dismissal, they may also fear that a court may consider a notice of voluntary dismissal as an admission that the claim lacks a legal or factual basis.

The *Szabo* court held, in effect, that increased compliance with Rule 11 is preferable to a policy allowing the plaintiff an unconditional right to dismiss. The *Szabo* court's holding, viewed in the light of Rule 11's dual role of providing deterrence and compensation, is salutary. Plaintiffs' attorneys should be significantly deterred from filing frivolous or vexatious suits by the threat of Rule 11 sanctions. Defendants will, correspond-

51. The district court could consider the time constraints when determining if the attorney made a reasonable inquiry prior to filing the suit. *See supra* note 14.

52. The *Santiago* court was concerned that a court's ability to reserve jurisdiction to impose attorney's fees after a voluntary dismissal would discourage plaintiffs from filing voluntary dismissals. *See text accompanying supra* note 31. However, it seems that halting the running of attorney's fees is an incentive to voluntarily dismiss. *See supra* text accompanying note 46.

ingly, be compensated for attorney's fees required to defend meritless claims.

W.C.S.

