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Recommended Citation

Rule 41 (b), Federal Rules of Civil Procedure - Is a Specifying Dismissal Order Unimpeachable? - Weissinger v. United States, 31 Md. L. Rev. 85 (1971)

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Rule 41(b), Federal Rules of Civil Procedure — Is A Specifying Dismissal Order Unimpeachable?

*Weissinger v. United States*¹

The fifth sentence of rule 41(b) of the Federal Rules of Civil Procedure provides: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." The United States Court of Appeals for the Fifth Circuit, sitting en banc, was called upon to interpret this sentence of rule 41(b) on the defendant's appeal from a district court judgment which had permitted successful collateral attack by the plaintiff of a dismissal "with prejudice." The dismissal had been ordered in a non-jury case after a trial in which both parties had had a full opportunity to present their claims and defenses and in which findings of fact and conclusions of law had been entered. Apparently limiting its holding to a dismissal which comes after at least some evidence has been received,² the Fifth Circuit, in a novel construction of rule 41(b), held that a dismissal which "otherwise specifies" means a dismissal order rendered either "with prejudice" or "without prejudice." On collateral review of a dismissal rendered "with prejudice" a court is forbidden to look into the record to determine if the dismissal was actually granted on a ground not reaching the merits, for example, on the basis of one of the three exceptions to the "operative effect" of rule 41(b) — improper venue, failure to join a party under rule 19, or lack of jurisdiction.

A dismissal "without prejudice" entered after some evidence had been received would "otherwise specify" and preempt the "operative effect" of rule 41(b); this much is clear from the wording of the rule. There is also little doubt that a non-specifying dismissal order under such circumstances would be final unless an examination of the entire record showed that the dismissal was based on one of the three exceptions to the rule's "operative effect." But it is a non-apparent

1. 423 F.2d 795 (5th Cir. 1970).

2. The fifth sentence of rule 41(b) applies both to a dismissal entered under that rule and any dismissal not provided for in that rule. Dismissals under rule 41(b) itself may be divided into two types: (1) dismissals under the first sentence of rule 41(b) for failure to prosecute or failure to comply with the other rules of procedure and (2) dismissals under the second through fifth sentences of rule 41(b), i.e., dismissals which are the rough equivalent of a directed verdict in a jury trial. Dismissals "not provided for in this rule" would literally include dismissals at the pleading stage under rule 12(b) of the Federal Rules of Civil Procedure.

By distinguishing *Saylor v. Lindsley*, 391 F.2d 965 (2d Cir. 1968) (see notes 47-50 *infra* and accompanying text), the *Weissinger* court excluded from its holding a dismissal "with prejudice" for failure of the plaintiff to file a security-for-costs bond when that dismissal is granted before any of the substantive aspects of the case have been heard.

Because of the importance placed by the court on the procedural setting of the trial in *Weissinger* at the time the dismissal was entered, the holding in *Weissinger* would appear to be inapplicable to dismissals entered under rule 12(b) granted at the pleading stage before any trial has begun.

reading which would include a dismissal "with prejudice" as one which "otherwise specifies" since the rule generally makes dismissal orders which do *not* "otherwise specify" adjudications on the merits. It is the purpose of this note to examine the basis of the decision that the phrase "otherwise specifies" *does* embrace a dismissal "with prejudice" and the possible ramifications of this holding.

In the first trial of this case in the United States District Court for the Middle District of Florida, the United States sued Mrs. Weissinger as guarantor for the balance due on two Reconstruction Finance Corporation loans.³ The government alleged that it had made demand on defendant for payment in accord with the guarantee provisions and that she had failed to pay. The defendant denied that such a demand had been made. At the close of the government's evidence in this non-jury proceeding, Mrs. Weissinger filed a motion to dismiss under rule 41(b) of the Federal Rules of Civil Procedure.⁴ The court denied the motion and requested that the defendant introduce her evidence. After full trial the court entered lengthy findings of fact and conclusions of law as required by rule 52(a) of the Federal Rules of Civil Procedure.⁵ In these rulings the court denied ten of Mrs. Weissinger's eleven defenses but on the eleventh defense, lack of demand for payment, found as a conclusion of law that such a demand was necessary. The court referred to the demand as "a condition precedent to payment of any amount due under the agreements."⁶ The district court found as a matter of fact that this necessary demand had not been made by the government and thereupon dismissed the government's action "with prejudice." The government did not appeal the decision but later, apparently having made the necessary demand, brought a second suit upon the same claim in the same court. Mrs. Weissinger pleaded *res judicata*. The court held that the first judgment was not a bar to the second action and granted the government's motion for summary judgment. Mrs. Weissinger appealed to the United

3. The defendant alleged that the United States was not the proper party plaintiff; but the district court decided for the government on this issue and stated that the action need not have been brought by the Reconstruction Finance Corporation or its assignee, the Small Business Administration.

4. FED. R. CIV. P. 41(b) :

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

5. FED. R. CIV. P. 52(a) : "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. . . ."

6. 423 F.2d at 785.

States Court of Appeals for the Fifth Circuit. In a 2-1 decision, a three-judge panel affirmed the judgment of the district court.⁷

In an en banc review of this decision, the Fifth Circuit overruled the majority decision of the panel, vacated its affirmance, reversed the judgment of the district court, and entered judgment for Mrs. Weissinger.⁸ Judge Godbold, writing for the en banc majority, observed that rule 41(b) procedures had been strictly followed in the first district court trial; the findings of fact and conclusions of law showed that the district court was entering a dismissal on the merits. Although the judge thus bolstered his conclusion, he seems really to have reached it (and to have swayed his colleagues en banc) entirely upon his interpretation of the provisions of rule 41(b). This interpretation equates the dismissal order's term "with prejudice" to "otherwise specified"; thus, the section of rule 41(b) containing the "operative effect" and its "lack of jurisdiction" exception is never reached.⁹ Basically, the court felt that the "scheme" of rule 41(b) was

7. 423 F.2d 782 (1968). Judge Rives, writing for the majority, held that, although the first action was dismissed "with prejudice" in general terms and such a dismissal usually acts as *res judicata* to bar another action on the same claim, the effect of the dismissal as *res judicata* should be gathered from the entire record and not from the dismissal order alone. *E.g.*, *Great Lakes Dredge & Dock Co. v. Hoffman*, 319 U.S. 293 (1943). Upon examination of the record, the majority of the panel felt that the district court had dismissed the action on grounds which did not reach the merits. 423 F.2d at 785. Consequently, the majority felt that the dismissal had "otherwise specified" in terms of rule 41(b); the plaintiff was not barred from a second suit but was only precluded by principles of collateral estoppel from relitigating the necessity of demand. Judge Godbold, dissenting (423 F.2d at 786), argued that a demand in a case such as the one at bar was not a procedural step in the action but rather a substantive part of the government's case; therefore, the policy of *res judicata* demanded that the plaintiff be barred from a second suit. Judge Godbold also argued that the majority had violated rule 41(b) by looking behind the dismissal to ascertain what had actually been decided and by avoiding the dismissal order's terms (*i.e.*, "with prejudice") on consideration of the entire record as "otherwise specifying." *But see* 423 F.2d at 794; *Madden v. Perry*, 264 F.2d 169 (7th Cir.), *cert. denied*, 360 U.S. 931 (1959).

8. Issues which are summarily discussed in the en banc majority opinion or taken as established are the following:

(a) The 1946 amendment to FED. R. CIV. P. 41(b), added sentences three and four to the rule. This amendment in effect adopted the Sixth, Seventh, and Ninth Circuits' approach of allowing the trial court to "weigh" the evidence. *See Ellis v. Carter*, 328 F.2d 573 (9th Cir. 1964); *Penn-Texas Corp. v. Morse*, 242 F.2d 243 (7th Cir. 1957); *Bach v. Freidan Calculating Mach. Co.*, 148 F.2d 407 (6th Cir. 1945). The amendment clearly rejected the rule of the Third Circuit that the judge must only decide if the plaintiff would have had sufficient evidence to take his case to the jury and view the evidence most favorably to the plaintiff. *See Schad v. Twentieth Century-Fox Film Corp.*, 136 F.2d 991 (3d Cir. 1943). For a full discussion of this area, see 2B W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE & PROCEDURE* § 919 (1961); 5 J. MOORE, *FEDERAL PRACTICE* ¶ 41.13 (2d ed. 1969); 45 MICH. L. REV. 788 (1947). For a criticism of the amendment, see Steffen, *The Prima Facie Case in Non-Jury Trials*, 27 U. CHI. L. REV. 94 (1959).

(b) The 1963 amendment of sentence two of rule 41(b) settled much of the confusion between a dismissal in a non-jury case and a directed verdict in a jury trial. *See O'Brien v. Westinghouse Elec. Corp.*, 293 F.2d 1 (3d Cir. 1961).

(c) If a rule 41(b) dismissal is on the merits, the court is required to make findings of fact and conclusions of law in accord with rule 52(a); and these findings of fact cannot be overturned unless they are clearly erroneous. *See Benton v. Blair*, 228 F.2d 55 (5th Cir. 1956); *Gary Theatre v. Columbia Pictures Corp.*, 120 F.2d 891 (7th Cir. 1941).

9. The court stated, "But in trying to determine after the event what a dismissal order means one never reaches the 'operative effect' rule if the order says on its face what it means, *i.e.*, 'otherwise specifies.'" 423 F.2d at 799.

to confer total authority upon dismissals which state clearly and unambiguously that they are with or without prejudice; the court which collaterally reviews such a dismissal has no power to look behind it.

Conversely, the four judges dissenting from the en banc opinion stated that the common law did not preclude a court from examining the record merely because the dismissal was stated to be "with prejudice"; nor was it the "scheme" of rule 41(b) to change the common law in this respect. Upon such examination of the record the dissent found (1) that the dismissal was not on the merits and thus it "otherwise specified" and (2) that, regardless of whether an order is specifying, the operative effect rule and its exceptions are reached. On the authority of *Costello v. United States*,¹⁰ the dismissal would fall under the "lack of jurisdiction" exception to the "operative effect" of rule 41(b). The dissent felt, therefore, that the dismissal was not a bar to a second action after the United States had rectified the defect of the first trial.¹¹

In order to understand this innovative decision, both the majority and dissenting opinions must be examined against the backdrop of several distinct, yet overlapping, areas of the law. This note will discuss (1) the import at common law of a dismissal "with prejudice," (2) the necessity for a demand and the common law *res judicata* effect of a ruling on necessity — a middle ground for decision, (3) the "scheme" of rule 41(b) and its relationship to the common law, and (4) "conditions precedent" and *Costello v. United States*.¹²

I.

The prevailing *Weissinger* interpretation of the "otherwise specifies" language of rule 41(b) seems to reverse a common law principle of long standing that a dismissal order rendered "with prejudice" could, in fact, be reopened on collateral review and be examined to determine if it was on the merits. In a leading case, *Pueblo de Taos v. Archuleta*,¹³ an action in ejectment was dismissed "with prejudice for want of prosecution" and the dismissal was raised as a bar in a new action on the same claim. The court held that, since the dismissal was not on the merits,¹⁴ the words "with prejudice" in the dismissal

10. 365 U.S. 265 (1961).

11. *Cf. Ripperger v. A.C. Allyn & Co.*, 37 F. Supp. 373 (S.D.N.Y.), *aff'd*, 113 F.2d 332 (2d Cir.), *cert. denied*, 311 U.S. 695 (1940). There an action was dismissed for improper venue and plaintiff did not appeal but brought a second action on the same claim; the court stated:

While a dismissal of an action on the sole ground that the court has no jurisdiction of the subject matter or of the parties is a conclusive determination of the fact that the court lacks jurisdiction, it is not an adjudication of the merits and will not bar another action in the proper tribunal for the same cause; nor will it bar a second suit where the pleader in the prior suit failed to allege some essential jurisdictional fact which later is supplied in a new pleading.

37 F. Supp. at 374.

12. 365 U.S. 265 (1961).

13. 64 F.2d 807 (10th Cir. 1933).

14. The court was operating under the assumption that a dismissal for failure to prosecute was not an adjudication of the controversy which would bar a second action on the same claim because, at that time, there must have been at least one decision on the merits in order to bar the second suit. *See Haldeman v. United*

order could not lend it any additional weight. The *Archuleta* court felt duty-bound to inspect a judgment which was pleaded as a bar and to inspect the entire record to determine what was actually decided. The court stated that such an inspection of the record is not a collateral attack on the judgment because a judgment is not attacked by an ascertainment of its scope.¹⁵ In another principal case, *Goddard v. Security Title Insurance & Guaranty Co.*,¹⁶ the plaintiff, who was a depositor of money with the defendant corporation, sued for conversion. The defendant demurred to the complaint and his demurrer was sustained, the court dismissing the action "with prejudice."¹⁷ In a subsequent suit on the same cause against the stockholders of defendant's corporation, the court rejected the defense of res judicata, stating that the intention of the first court to bar a future action on the same cause by using the words "with prejudice" was immaterial. If the intent of the court were the test of the effect of a judgment on a subsequent action, res judicata would be rendered meaningless as a legal principle; the bar of a judgment would depend fully on the whim of the first judge, who would often speak through an order drafted by counsel.

The language in these cases reflects the common law attitude toward dismissals with prejudice.¹⁸ In many cases at common law in which dismissals with prejudice were ordered, the judgment *was* held to be a bar to further actions on the same cause, not because of the presence of the words "with prejudice," but rather because the judgment was on the merits.¹⁹ While the majority opinion in *Weissinger* was that the common law approach was abandoned in the adoption of rule 41(b), the dissent perceived no intent to change the common law. Embracing the traditional rules,²⁰ the dissenters looked behind the dismissal order to ascertain its scope.

II.

The task of the dissent became one of deciding, on common law principles, whether a dismissal for failure to make a demand for pay-

States, 91 U.S. 584 (1875). In this respect the decision is obviously superseded by rule 41(b), under which a dismissal for failure to prosecute "operates" as a judgment on the merits. However, the case seems to remain authority concerning the effect of a dismissal "with prejudice."

15. 64 F.2d at 812.

16. 83 P.2d 24 (Cal. 1938), *aff'd on rehearing*, 14 Cal. 2d 47, 92 P.2d 804 (1939).

17. This dismissal was one at the pleading stage, similar to one under rule 12(b)(6). The *Weissinger* holding would appear not to apply to make such a dismissal authoritative. See note 2 *supra*.

18. See also *Rivers v. Norfolk, Baltimore & Carolina Line, Inc.*, 210 F. Supp. 283, 287 (E.D. Va. 1962); *Chirelstein v. Chirelstein*, 12 N.J. Super. 468, 79 A.2d 884 (1951).

19. See, e.g., *Pueblo de Taos v. Archuleta*, 64 F.2d 807 (10th Cir. 1933); *Mars v. McDougal*, 40 F.2d 247 (10th Cir.), *cert. denied*, 282 U.S. 850 (1930); *Owen v. Simons*, 134 A.2d 92 (D.C. Mun. App. 1957); *Berman v. Thomas*, 41 Ariz. 457, 19 P.2d 685 (1933).

20. The dissenters stated, "[T]he addition of the phrase 'with prejudice' cannot forever preclude the plaintiff from collecting its debt. That is in accord with the uniform rulings of all previous cases, federal and state, where the phrase 'with prejudice' has been added to an order of dismissal which the record showed was made for a reason which did not touch the merits." 423 F.2d at 803.

ment is a dismissal on the merits or not. The general standards for the necessity of a demand were first announced in *First National Bank of Waterloo v. Story*;²¹ the court stated, "(1) When the promise is to pay one's own debt for a specified amount on demand, no demand need be alleged or proved. (2) When the promise to pay on demand is not to pay one's own debt, but is a collateral promise to pay the debt of another, a demand is necessary, for it is part of the cause of action."²² In a later case in the Fifth Circuit Court of Appeals, *Texas Water Supply Corp. v. Reconstruction Finance Corp.*,²³ where the guarantee agreement was identical to the one in *Weissinger*,²⁴ the court, in applying the *Story* standard, stated that "we think that the rule to be applied should be the same as if the note were the direct and primary obligation of the guarantors and, hence, that no demand before suit was necessary. The suit itself was sufficient demand."²⁵ The district court in the first *Weissinger* trial chose not to follow the *Texas Water Supply* case and decided that the suit itself was not a sufficient demand. The dissent objected to this holding but, since the government had not appealed the decision, it was bound by principles of collateral estoppel from attacking it.²⁶

A demand being necessary and not having been made, the en banc appellate dissent proceeded to determine the effect of a dismissal on this ground. It concluded that the demand for payment is merely a precondition to suit and is not an integral part of the merits of the action. The dismissal was not on the merits, did not bar a second suit, but merely precluded the government from relitigating issues actually decided against it.

The en banc majority, despite the fact that the guarantee agreement provided that the debt was to be deemed equivalent to "the direct and primary obligation" of the guarantor,²⁷ might have accepted the determination of the first trial court that the guarantee was one for the debt of another and, therefore, that demand was a prerequisite to suit; it might have read the *Story* case as making such demand an important substantive element of plaintiff's case; dismissal for failure to make demand would thus go to the merits and should bar a second suit.²⁸

21. 200 N.Y. 346, 93 N.E. 940 (1911).

22. *Id.* at 943 (emphasis added).

23. 204 F.2d 190 (5th Cir. 1953).

24. Both guarantee agreements provided in part: "In case the Debtor shall fail to pay all or any part of the Liabilities when due, whether by acceleration or otherwise, according to the terms of said note, the undersigned, immediately upon the written demand of Reconstruction Finance Corporation, will pay to Reconstruction Finance Corporation the amount due and unpaid by the Debtor as aforesaid, in like manner as if such amount constituted the direct and primary obligation of the undersigned." 423 F.2d at 787 and 802 n.5.

25. 204 F.2d at 194.

26. See RESTATEMENT OF JUDGMENTS § 68 (1942).

27. See note 24 *supra*.

28. See *Haldeman v. United States*, 91 U.S. 584 (1875), where the Court stated, "[T]here must be at least one decision on a *right* between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to subsequent suit. . . . There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively." 91 U.S. at 585-86. And in *Hughes v. United States*, 71 U.S. (4 Wall.) 232 (1866), the Court concluded, "If the first suit was dismissed for defect of pleadings or parties,

In other words, the majority need not have wrestled with the language of rule 41(b). In relying upon the *Story* rationale, the majority could have distinguished the present dismissal from others which at common law did not act as a bar to a second suit (*i.e.*, because the substantive merits were not reached). One example is where the cause of action has not yet accrued. In *Waterhouse v. Levine*²⁹ the court held that, where the plaintiff brings suit on a note before the debt is due, he is not precluded from bringing another suit on the same note after the debt is due.³⁰ Another example is a dismissal for mere failure to *allege* a fact which is necessary to the cause of action.³¹ In *Clouatre v. Houston Fire & Casualty Co.*,³² it was stated that such a dismissal does not bar the plaintiff's second suit. In *Weissinger* the plaintiff did *allege* demand; the defendant did join issue; and a full hearing was held on the matter. The defect was that, in fact, no demand had been made.

Since the common law could be interpreted either to allow or to prevent the application of *res judicata* in the present case, the decision to apply *res judicata* might well have hinged on a policy determination. In this connection, the fact that the plaintiff did not appeal the first adverse decision plays a considerable role. The cases pertaining to the importance of appeal are conflicting³³ and depend to a large extent on whether there was a determination on the merits. In *Weissinger* there had been a full trial on all the issues; the defendant had been required to prepare for the merits of the case. In these particular circumstances the majority concluded that the government had indeed had its day in court. Judge Godbold in his three-judge panel dissent noted that, if *res judicata* did not apply, the government could sue again without making a demand and have another judgment entered against it, sue a third time without demand, and so on *ad infinitum*. He felt that this process must have a terminal point and that it should come after the first judgment.³⁴ Although the en banc *Weissinger* majority used rule 41(b) rather than common law to effect this result, it is evident that the same *res judicata* policy was an underlying basis for its decision. The majority expressed this rationale clearly:

But, in any event, going behind such an order, if ever allowed, is not authority that a dismissal specified to be with prejudice, entered after full trial on all issues and with complete findings

or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any grounds which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." 71 U.S. (4 Wall.) at 237.

29. 182 Mass. 407, 65 N.E. 822 (1933).

30. See *Radick v. Underwriters at Lloyd's*, 137 F.2d 21 (7th Cir. 1943).

31. See *Fujii v. Dulles*, 259 F.2d 866 (9th Cir. 1958); *West v. American Tel. & Tel. Co.*, 121 F.2d 142 (6th Cir.), *cert. denied*, 314 U.S. 672 (1941). This kind of dismissal would now fall under rule 12(b)(6), which dismissal appears not to have been included within the *Weissinger* holding. See note 2 *supra*.

32. 229 F.2d 596 (5th Cir. 1956).

33. For a decision holding that the plaintiff should not be limited to the remedy of appeal, see *Goddard v. Security Title Ins. & Guar. Co.*, 83 P.2d 24 (Cal. 1938), *aff'd on rehearing*, 14 Cal. 2d 47, 92 P.2d 804 (1939). *Contra*, *Berman v. Thomas*, 41 Ariz. 457, 19 P.2d 685 (1933).

34. 423 F.2d at 790.

and conclusions, may be treated as a mere warm-up for another trial if the unsuccessful party decides, without an appeal, that he would like to go around the track again. We find no case in which any court has allowed that.³⁵

III.

Having decided that rule 41(b) was a more appropriate framework within which to operate, the en banc majority in *Weissinger* held that, on the basis of the language and "scheme" of the rule, a dismissal "with prejudice" is one which "otherwise specifies" under rule 41(b). As such, the dismissal is given unbridled authority; and a reviewing court need never delve into what has actually been decided. Furthermore, the court held that a dismissal order which "otherwise specifies" precludes a reviewing court from reaching the "operative effect" rule.

While one intended effect of rule 41(b) may have been to give more authority to certain non-specifying orders, its expressed intent was not to render specifying orders untouchable.³⁶ There is some precedent, however, for the *Weissinger* conclusion that rule 41(b) forbids a reviewing court to look behind a dismissal order (whether "with prejudice" or non-specifying) as was formerly allowed at common law. In *Kern v. Hettinger*,³⁷ where there was a non-specifying order, the court refused to examine the record saying, "[I]n view of the unequivocal language of Rule 41(b), and the absence of the words without prejudice, we must and do decide that the dismissal was on the merits and it was intended to be on the merits."³⁸ Further, in *American National Bank & Trust Co. v. United States*³⁹ the court refused to examine an affidavit of the trial judge purporting to show that the case was not decided on the merits since the dismissal order was not stated to be "without prejudice." The *Weissinger* court cited *Kern*⁴⁰ and felt that in the case of a dismissal "with prejudice" the policy of forbidding collateral review is even more compelling.

However, the second conclusion of the *Weissinger* court, that the "operative effect" rule of 41(b) is never reached where there is any specifying dismissal order, even one which specifies the dismissal to be "with prejudice," appears to have been reached without the benefit of prior authority. Analysis of relevant cases indicates that none has gone so far as to provide that a dismissal "with prejudice" preempts the "operative effect" rule and "lack of jurisdiction" provision of rule 41(b). In other words, none has held a dismissal "with prejudice" to be a bar where the dismissal was one for lack of jurisdiction, for improper venue, or for failure to join a party. The reliance upon

35. *Id.* at 799-800.

36. Professor Moore states that the purpose of the fifth sentence of rule 41(b) is to avoid "any need for speculation as to the intent of the court and the effect of its dismissal order, where the order fails to indicate whether or not it is with prejudice." 5 J. MOORE, FEDERAL PRACTICE ¶ 41.14(1), at 1176 (2d ed. 1969).

37. 303 F.2d 333 (2d Cir. 1962).

38. *Id.* at 340. See *Bartsch v. Chamberlin Co.*, 266 F.2d 357 (6th Cir. 1959).

39. 142 F.2d 571 (D.C. Cir. 1944).

40. 423 F.2d at 798.

the "otherwise specifies" phrase of rule 41(b) was apparently a vehicle to express a broad *res judicata* policy.

IV.

The en banc dissent reasoned that the "lack of jurisdiction" exception to rule 41(b) is explicitly provided for by that rule and the "otherwise specifies" phrase does not take precedence over it. After concluding that the first action was dismissed on a procedural nicety, it decided that the action had indeed been dismissed for "lack of jurisdiction." The "lack of jurisdiction" exception to rule 41(b) was defined by the Supreme Court in *Costello v. United States*.⁴¹ In *Costello* the dismissal of a denaturalization proceeding due to the government's failure to file a required affidavit of good cause with the court was held to be a dismissal for "lack of jurisdiction" under rule 41(b). The Supreme Court felt that it was too narrow a reading of the "lack of jurisdiction" exception to relate the concept of jurisdiction expressed in that rule only to the fundamental jurisdictional defects which render a judgment subject to collateral attack, such as lack of jurisdiction over the subject matter or person. The Court, in essence, broadened the conventional meaning of lack of jurisdiction to include dismissals which are founded on the "plaintiff's failure to comply with a precondition requisite to the court's going forward to determine the merits of his substantive claim."⁴² Since *Costello*, the word "jurisdiction" as used in rule 41(b) can no longer be equated with the word as used in rule 12(b).⁴³ The Supreme Court made no attempt to limit its holding to non-specifying dismissal orders (although the dismissal in the case before it was of the non-specifying variety), but rather couched its opinion in broad terms, stating, "We do not discern in rule 41(b) a purpose to change this common-law principle [no *res judicata* effect] with respect to dismissals in which the merits could not be reached for failure of the plaintiff to satisfy a precondition."⁴⁴

The *Weissinger* en banc dissent, in deciding that a dismissal for failure to make a necessary demand was dismissal for "lack of jurisdiction," further enlarged that concept. *Costello* had limited the preconditions to suit, the non-satisfaction of which would make a dismissal one for "lack of jurisdiction," to those procedural steps required by the court for going forward with its deliberations; here the precondition

41. 365 U.S. 265 (1961).

42. *Id.* at 285 (emphasis added).

43. Rule 12(b) reads in part:

Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19.

FED. R. CIV. P. 12(b).

44. 365 U.S. at 286.

was not such a step, but was one required by the contract relationship of the parties.

The en banc dissent in *Weissinger* also extends the holding of *Costello* by allowing the "lack of jurisdiction" exception to be applied in a trial situation where there had been a full hearing of all claims and the defendant had been required to defend on the merits. *Costello* had limited the "lack of jurisdiction" exception in rule 41(b) to those cases in which the defendant does not incur the inconvenience of preparing for the merits because there is an initial bar to the court's reaching them (*i.e.*, a precondition required by the court has not been met).⁴⁵ The dissent sought to explain this apparent conflict with precedent by arguing that, even though Mrs. Weissinger had met all the issues on the merits, she could have avoided this inconvenience by moving for dismissal at the pleading stage⁴⁶ and by alleging failure of demand. If the defendant had done so, the dissent reasoned, the dismissal granted would have been for "lack of jurisdiction." The plaintiff should not be denied a non-merits dismissal for "lack of jurisdiction" merely because the defendant had inconvenienced herself.

Under this expansive view of *Costello*, it is difficult to ascertain the extent of the "lack of jurisdiction" exception to rule 41(b). The concept of jurisdiction was stretched by *Costello* itself; the *Weissinger* dissenting opinion, which describes a dismissal for failure to meet a precondition *between the parties* after a full hearing on all issues as a dismissal for "lack of jurisdiction," renders the meaning of the word "jurisdiction" unrecognizable. The *Weissinger* dissent would threaten uncertainty in the application of res judicata principles to any dismissed action; it sets up no test which could be applied with confidence to determine whether future dismissals would be for "lack of jurisdiction."

The en banc majority was compelled to distinguish *Costello*, which had held that a dismissal under circumstances which were similar to the ones in *Weissinger* was for "lack of jurisdiction" and, therefore, not on the merits. The en banc majority chose to distinguish the *Costello* case on two grounds: first, *Weissinger* is concerned with a specifying dismissal order, while *Costello* defined the limits of the "lack of jurisdiction" exception to rule 41(b) in the context of a non-specifying dismissal order; and second, in *Weissinger* the court made findings of fact and conclusions of law, while in *Costello* the court had not.

The distinguishing of *Saylor v. Lindsley*⁴⁷ was more difficult; in doing this the majority severely limits its own holding. In the first trial of that stockholder's derivative suit, the action was dismissed "with prejudice" on the defendant's motion for summary judgment for failure of the plaintiff to comply with an order of the court requiring the posting of a security-for-costs bond.⁴⁸ In a second suit on the

45. *Id.*

46. Although Mrs. Weissinger did move to dismiss, her motion presumably ought to have been under rule 12(b) rather than under rule 41(b).

47. 391 F.2d 965 (2d Cir. 1968).

48. The appeal from this dismissal is reported in *Hawkins v. Lindsley*, 327 F.2d 356 (2d Cir. 1964).

same claim, the district court upheld the defendant's plea of res judicata, holding that *Costello* was inapplicable.⁴⁹ On appeal from that decision, the United States Court of Appeals for the Second Circuit *did* examine the entire record of the first trial and held that, since the dismissal "with prejudice" was for failure to meet a precondition required by the court and the defendant had not prepared for the merits, the dismissal was for "lack of jurisdiction" under the *Costello* standard. The *Weissinger* court stated that *Saylor* was distinguishable from its holding that a court cannot look behind a dismissal "with prejudice" and that such a dismissal preempts the "operative effect" section of rule 41(b) because in *Saylor* none of the substantive aspects of the case were heard, the defendant was not inconvenienced by preparing for his defense, and the merits had not been reached. It must then be assumed that the *Weissinger* holding was meant only to be applied in a limited procedural setting.⁵⁰

V. CONCLUSION

The principal effect of the *Weissinger* decision will be to stop later collateral attack on a dismissal which has been rendered "with prejudice" under rule 41(b) after some evidence has been introduced. This would seem to be a wise manifestation of the rule that a man is entitled to only one day in court. It might ease, if only slightly, the overwhelming caseloads of our courts. And although the wisdom of emphasizing the "otherwise specifies" phrase of rule 41(b) may be challenged on the basis of prior authority, the result is a clearly defined standard for application of res judicata principles. When a court specifies that its dismissal is "with prejudice," it is rare that its decision should be challenged.

49. *Saylor v. Lindsley*, 274 F. Supp. 253 (S.D.N.Y. 1967).

50. See note 1 *supra*.