

Chapter 15—Voluntary Dismissal

§ 15.01 Introduction

If the defendant responds to the complaint by filing a [motion to quash service of the summons](#), a [motion to dismiss for failure to serve the summons](#), a [demurrer](#) or [motion to transfer for lack of subject matter jurisdiction](#), a [motion to stay or dismiss for inconvenient forum](#), a [special demurrer](#) or [motion to strike](#) on grounds other than pleading defects (e.g., [failure to file a required certificate](#), [failure to exhaust administrative remedies](#), [plaintiff's lack of capacity to sue](#), [another action pending](#), or [misjoinder of parties](#)), the plaintiff has a choice of two responses. The plaintiff may [oppose the motion](#), or the plaintiff may dismiss the action and refile it in manner that cures the objection that the defendant has raised by his response (assuming that the statute of limitations does not yet bar the plaintiff's cause of action). If the court lacks personal jurisdiction over the defendant, the plaintiff may refile the action in a court that has jurisdiction. If the plaintiff has failed

to serve the summons in time, the plaintiff may refile and restart the time to serve. If the court lacks subject matter jurisdiction, the plaintiff may refile in a court that has jurisdiction. If California cannot provide a convenient forum, the plaintiff can refile the action in a forum that can. If the plaintiff has failed to obtain a necessary certificate, to exhaust administrative remedies, or to join the proper parties, the plaintiff can cure these defects and try again. If another action is pending, the plaintiff must pursue his claim in that action or dismiss it. All of these alternatives involve voluntary dismissals.

The plaintiff may also elect to dismiss the action if it appears that he is likely to lose. Voluntary dismissal without prejudice avoids a determination of the merits of the claim and thus avoids preclusion of the claim by virtue of the doctrine of *res judicata*.¹ A dismissal on technical grounds for procedural reasons does not constitute a “favorable termination” for purposes of a cause of action for malicious prosecution.² The same is true of dismissal of the proceeding by agreement, without regard to its merits.³ Thus, voluntary dismissal may avoid liability

for malicious prosecution.⁴ Courts, however, take a dim view of dismissing an action and then refile in the hope of obtaining a different judge.⁵

The plaintiff may not dismiss an action in response to a pending [motion for change of venue](#).⁶

¹ Shuffer v. Board of Trustees of California State University and Colleges, 67 Cal. App. 3d 208, 216, 136 Cal. Rptr. 527, 532 (1977). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 11:1–1.5, :10–:12, :35.8, :39.30–.31 (1996); 6 B.E. WITKIN, CALIFORNIA PROCEDURE, Proceedings Without Trial § 260 (4th ed. 1997); 7 B.E. WITKIN, CALIFORNIA PROCEDURE, *Judgment* § 321 (4th ed. 1997).

² Robbins v. Blecher, 52 Cal. App. 4th 886, 894, 60 Cal. Rptr. 2d 815, 819 (1997).

³ Oprian v. Goldrich, Kest & Assocs., 220 Cal. App. 3d 337, 344–45, 269 Cal. Rptr. 429, 433 (1990).

⁴ A voluntary dismissal, even one without prejudice, may be a favorable termination which will support an action for malicious prosecution. Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if the dismissal reflects the opinion of the court or the prosecuting party that the action would not succeed. Fuentes v. Berry, 38 Cal. App. 4th 1800, 1808, 45 Cal. Rptr. 2d 848, 853 (1995).

§ 15.02 Dismissal With and Without Prejudice

A dismissal **without prejudice** is a disposition of the case without prejudice to a plaintiff's filing of a new action on the same allegations if the case is filed within the period of the appropriate statute of limitations.⁷

⁵ See, e.g., L.A. SUPER. CT. R. 7.3(d):

It shall not be permissible to dismiss and thereafter refile any case for the purpose of obtaining a different Judge. Whenever a case is dismissed by a party or by the Court prior to judgment and thereafter the same or essentially the same claims, involving the same or essentially the same parties, are alleged in another action, the later filed action shall be assigned, unless the Presiding Judge for good cause orders otherwise, to the Judge to whom the first filed case had theretofore been assigned.

⁶ CODE CIV. PROC. § 581(i).

⁷ Wells v. Marina City Properties, Inc., 29 Cal. 3d 781, 784, 632 P.2d 217, 218, 176 Cal. Rptr. 104, 105 (1981). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 11:4–:5.1, :26.11, :35.2–:35.6 (1996); 6 B.E. WITKIN, CALIFORNIA PROCEDURE, Proceedings Without Trial § 273 (4th ed. 1997).

A dismissal **with prejudice**, known at common law as a “retraxit,” bars any future action on the same subject matter. Dismissal with prejudice determines the issues in the action and precludes the dismissing party from relitigating the same cause of action. A dismissal with prejudice is a final judgment favoring the defendant. The bar raised by a dismissal with prejudice is equal, under the doctrine of *res judicata*, to the bar raised by a judgment on the merits.⁸ The *res judicata* effect of a dismissal

⁸ *Ready Transp., Inc. v. Workers' Compensation Appeals Bd.*, 53 Cal. App. 4th 147, 150, 61 Cal. Rptr. 2d 373, 375 (1997); *Torrey Pines Bank v. Superior Court*, 216 Cal. App. 3d 813, 820–21, 265 Cal. Rptr. 217, 221 (1989). *Torrey Pines* extended these principles to hold that the dismissal with prejudice of a guarantor's lawsuit against a lender collaterally estopped the guarantor from alleging the same facts as affirmative defenses in the lender's subsequent lawsuit against the guarantor. However, as Weil and Brown note, ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 11:35.4c (1996), the doctrine of collateral estoppel applied in *Torrey Pine* normally extends only to issues that were actually litigated in the prior lawsuit.

with prejudice does not depend upon the plaintiff's receipt of consideration.⁹

The preclusive effect of a dismissal with prejudice depends on what was actually litigated. A dismissal entered after the court has sustained a **general demurrer with leave to amend** is a judgment on the merits to the extent that it adjudicates that the facts alleged do not constitute a cause of action; the dismissal will bar a subsequent action alleging the same facts. Even though the plaintiff may allege different facts in the second action, if the court sustained the demurrer in the first action on a ground equally applicable to the second, the former judgment will also be a bar. If, on the other hand, the plaintiff alleges new or additional facts that cure the defects in the original pleading, the former judgment does not bar the subsequent action, whether or not the plaintiff had an opportunity to amend his complaint.¹⁰

⁹ Roybal v. University Ford, 207 Cal. App. 3d 1080, 1085–86, 255 Cal. Rptr. 469, 472 (1989).

The preclusive effects of a dismissal with prejudice of one defendant do not preclude other defendants from pursuing their indemnity claims against the dismissed defendant.¹¹

§ 15.03 Procedure

Section 581 of the Code of Civil Procedure provides that a plaintiff (or a cross-complainant) may dismiss his action, with or without prejudice, by filing a written request with the clerk at any time before the actual commencement of trial.¹² The Judicial Council provides a form [Request for Dismissal](#). The plaintiff should provide the clerk's office with two copies of the Request for Dismissal and a stamped, self-addressed envelope. The clerk's office will

¹⁰ Keidatz v. Albany, 39 Cal. 2d 826, 828, 249 P.2d 264, 265 (1952).

¹¹ Long Beach Grand Prix Ass'n v. Hunt, 25 Cal. App. 4th 1195, 1203, 31 Cal. Rptr. 2d 70, 75 (1994).

¹² CODE CIV. PROC. § 581(b)(1). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 11:3, :6.1–.2, :27–:27.3 (1996); 6 B.E. WITKIN, CALIFORNIA PROCEDURE, Proceedings Without Trial §§ 253–254, 256–257, 270–272 (4th ed. 1997).

return a conformed copy to the plaintiff for service on the defendant. The plaintiff must serve on all parties and file with the court a [Notice of Entry of Dismissal and Proof of Service](#), to which he attaches the conformed copy of the Request for Dismissal.¹³ The Judicial Council provides a form for this purpose as well.

The plaintiff may dismiss his complaint or any cause of action asserted in the complaint in its entirety or as to any defendant.¹⁴ The plaintiff may dismiss counts seeking alternative remedies for the same cause of action.¹⁵

¹³ RULES OF CT. 383. Weil and Brown suggest that violation of the notice provision might subject the violator to sanctions under CODE CIV. PROC. § 128.5 and RULES OF CT. 277. ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 11:26.11 (1996).

¹⁴ CODE CIV. PROC. § 581(c). The plaintiff may not, however, use his power of voluntary dismissal to dismiss a defendant whom the court has ordered joined as an [indispensable party](#). *Wilson v. Frakes*, 178 Cal. App. 2d 580, 584, 3 Cal. Rptr. 434, 437 (1960).

A dismissal is effective upon the filing of the request, and all subsequent proceedings are void.¹⁶ The clerk must enter a written dismissal in the clerk's register. When so entered, the dismissal is effective for all purposes. All dismissals ordered by the court must be in the form of a written order signed by the court and filed in the action. Such orders, when filed, constitute judgments and likewise are effective for all purposes. The clerk is required to note such judgments in the register of actions in the case.¹⁷ The {fast-track} rules do not impair a plaintiff's right to dismiss without prejudice.¹⁸

¹⁵ *Steele v. Litton Indus.*, 260 Cal. App. 2d 157, 172, 68 Cal. Rptr. 680, 690 (1968).

¹⁶ *Aetna Casualty & Sur. Co. v. Humboldt Loaders, Inc.*, 202 Cal. App. 3d 921, 931, 249 Cal. Rptr. 175, 181–82 (1988) (a voluntary dismissal removes the court's jurisdiction over the dismissed suit even though it has been consolidated with another lawsuit for trial of common questions of fact).

¹⁷ CODE CIV. PROC. § 581d.

¹⁸ *Harris v. Billings*, 16 Cal. App. 4th 1396, 1405, 20 Cal. Rptr. 2d 718, 723 (1993).

The plaintiff may dismiss the action without prejudice as to one defendant by {amending} the complaint to omit that defendant.¹⁹

§ 15.04 Timing

The **absolute right** of the plaintiff (or of a cross-complainant) to dismiss lapses upon the actual commencement of trial, which is deemed to occur at the beginning of the opening statement or argument of any party or his counsel. If there is no opening statement, then the trial is deemed to commence when the oath is administered to the first witness or evidence is first introduced.²⁰

Example: A case is assigned to **Judge M** for trial. Plaintiff **P** demands a jury trial on the ground that the action involves both legal

¹⁹ Kuperman v. Great Republic Life Ins. Co., 195 Cal. App. 3d 943, 947, 241 Cal. Rptr. 187, 189 (1987).

²⁰ CODE CIV. PROC. § 581(a)(6). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 11:12.1–.2, :17–:26.10, :26.15 (1996); 6 B.E. WITKIN, CALIFORNIA PROCEDURE, Proceedings Without Trial §§ 262–269 (4th ed. 1997).

and equitable issues. Following an extended argument in chambers, **Judge M** denies the demand for a jury trial. **P** files a peremptory challenge against **Judge M** and requests that the cause be reassigned to the master calendar. **P** files a dismissal without prejudice. The next day, **P** files a new action in another county in the expectation that refileing will enable him to secure a jury trial. Defendant **D** files a motion in the original action for an order vacating the dismissal and restoring the matter to the calendar on the ground that **P** had made an “opening statement” in the course of argument in chambers, thereby “commencing” the trial before **Judge M**. The motion is denied.

The court ruled correctly. The discussion in chambers was simply a pretrial hearing and did not constitute the commencement of trial.²¹

Once trial has commenced, the court can dismiss the complaint, or a cause of action, without

prejudice only if all the affected parties consent or upon a showing of good cause.²² Because the plaintiff cannot unilaterally dismiss the case during trial without prejudice, a dismissal during trial is deemed a dismissal with prejudice.²³

The commencement of trial in a small claims case occurs in the small claims court. Although an appeal to the superior court consists of a de novo hearing, this fact does not detract from the appellate

²¹ *Gherman v. Colburn*, 18 Cal. App. 3d 1046, 1050, 96 Cal. Rptr. 424, 426–27 (1971).

²² CODE CIV. PROC. § 581(e). Weil and Brown suggest that the unavailability of a witness might constitute “good cause” for a dismissal without prejudice during trial. ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 11:30 (1996).

No dismissal may be made except upon the written consent of the attorney for the party or parties applying for dismissal. If the attorney does not consent, the court can dismiss the case only upon notice to the attorney. *Id.* § 581(j). The purpose of this provision is unclear.

²³ CODE CIV. PROC. § 581(d); *Fisher v. Eckert*, 94 Cal. App. 2d 890, 893, 212 P.2d 64, 67 (1949).

character of the proceeding. The superior court's power of dismissal in small claims actions extends only to a dismissal of the appeal, not dismissal of the entire action.²⁴

The use of the term "trial" in section 581 is not restricted to trials of the merits after the defendant has answered the complaint. There may be a "trial" on a [general demurrer](#) to the complaint that effectually disposes of the case. If the court sustains the demurrer, the plaintiff stands on his pleading and submits to judgment on the demurrer. If he is not satisfied, he has his remedy by appeal. In such a case there is a "trial" within the meaning of section 581.²⁵ The plaintiff's right to dismiss thus terminates before the commencement of trial if the court makes "a determinative adjudication" or "a decision that is tantamount to an adjudication"²⁶:

²⁴ *Acuna v. Gunderson Chevrolet, Inc.*, 19 Cal. App. 4th 1467, 1473, 24 Cal. Rptr. 2d 62, 66 (1993).

²⁵ *Goldtree v. Spreckels*, 135 Cal. 666, 672–73, 67 P. 1091, 1093 (1902).

- A plaintiff has no right to dismiss without prejudice if a **general demurrer has been sustained without leave to amend**, since there has been a “trial” of the legal issues raised by the demurrer.²⁷
- A plaintiff may not voluntarily dismiss an action when a **general demurrer is sustained with leave to amend** and he has not amended within the time permitted.²⁸
- A plaintiff may not voluntarily dismiss an action when the court has issued an order granting **{summary judgment}** to the defendant.²⁹

²⁶ Harris v. Billings, 16 Cal. App. 4th 1396, 1402, 20 Cal. Rptr. 2d 718, 721 (1993). If the plaintiff allows a tentative ruling to become the court’s order, the required “adjudication” has occurred. M & R Properties v. Thomson, 11 Cal. App. 4th 899, 900, 14 Cal. Rptr. 2d 579, 580 (1992).

²⁷ Goldtree v. Spreckels, 135 Cal. 666, 672–73, 67 P. 1091, 1093 (1902). The plaintiff’s right to dismiss does not lapse at least until argument on the demurrer has occurred and the matter has been submitted. Datner v. Mann Theatres Corp., 145 Cal. App. 3d 768, 771, 193 Cal. Rptr. 676, 678 (1983).

- A plaintiff may not obtain a dismissal without prejudice following an adverse arbitration award

²⁸ Wells v. Marina City Properties, Inc., 29 Cal. 3d 781, 788, 632 P.2d 217, 220–21, 176 Cal. Rptr. 104, 108 (1981). A plaintiff may decline to amend a complaint and instead obtain a dismissal without prejudice during the time to amend following the sustaining of a demurrer. Parsons v. Umansky, 28 Cal. App. 4th 867, 871–72, 34 Cal. Rptr. 2d 144, 146–47 (1994). If the defendant files an amended complaint in response to a demurrer and the defendant demurs again, the plaintiff may dismiss without prejudice, notwithstanding the sustaining of the demurrer to the original complaint. The first amended complaint replaces the original complaint, and until a demurrer to that amended complaint is sustained, there is no decision sustaining a demurrer to the amended complaint. Christensen v. Dewor Devs., 33 Cal. 3d 778, 785, 661 P.2d 1088, 1093, 191 Cal. Rptr. 8, 13 (1983).

²⁹ Sweat v. Hollister, 37 Cal. App. 4th 603, 614–15, 43 Cal. Rptr. 2d 399, 406 (1995) (if a “tentative ruling” constitutes a final determination of a motion for {summary judgment}, it cuts off the plaintiff’s right to dismiss without prejudice). {Summary adjudication} of less than all the issues in a case is not a trial within the meaning of section 581. Cal-Vada Aircraft, Inc. v. Superior Court, 179 Cal. App. 3d 435, 446–47, 224 Cal. Rptr. 809, 816 (1986).

and the filing of a request for a trial de novo.³⁰

- A plaintiff may not dismiss without prejudice when, having failed to answer {requests for admissions}, all the issues in the case are deemed admitted in the defendant's favor.³¹
- A plaintiff may not dismiss without prejudice if the court has issued, but not yet entered, an order dismissing the action with prejudice.³²

The plaintiff may not dismiss the action without prejudice to avoid a pending motion to dismiss the action with prejudice.³³

³⁰ Calderon v. Kane, 36 Cal. App. 4th 1663, 1666–67, 43 Cal. Rptr. 2d 480, 482 (1995).

³¹ Miller v. Marina Mercy Hosp., 157 Cal. App. 3d 765, 770, 204 Cal. Rptr. 62, 65–66 (1984).

³² M & R Properties v. Thomson, 11 Cal. App. 4th 899, 902, 14 Cal. Rptr. 2d 579, 580 (1992) (action dismissed for lack of prosecution).

³³ Hartbrodt v. Burke, 42 Cal. App. 4th 168, 175–76, 49 Cal. Rptr. 2d 562, 567 (1996) (dismissal without prejudice to avoid dismissal with prejudice as sanction for disobedience of discovery order).

Example: **D** moves to dismiss **P**'s action for his failure to bring his case to trial within five years. The court makes a tentative ruling granting the motion. The ruling further provides that any oral argument will be heard the next morning at 9:00 a.m. The local rules of court provide that a party desiring a hearing on the motion must contact the court and opposing counsel by 4:30 p.m. of the day before the scheduled hearing. **P** does not request oral argument. Instead, the next day at 10:39 a.m. he files a request for dismissal of the action without prejudice. The clerk enters the voluntary dismissal on the same day. On **D**'s motion, the court vacates the voluntary dismissal and enters an order of mandatory dismissal.

The court ruled correctly.³⁴

³⁴ *M & R Properties v. Thomson*, 11 Cal. App. 4th 899, 905, 14 Cal. Rptr. 2d 579, 583 (1992).

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After reversal of a judgment, the parties are restored to their original rights, including the right of the plaintiff to dismiss the action, if its exercise would not interfere with the right of the defendant to any appropriate affirmative relief (*e.g.*, restoration of the defendant's rights lost through the erroneous judgment).³⁵

§ 15.05 The Plaintiff's Absolute Right to Voluntary Dismissal

Until the **actual commencement of trial** or the filing of a **cross-complaint**, the plaintiff's right to dismiss is absolute. Neither the clerk nor the trial court has any discretion in the matter. Voluntary dismissal of a lawsuit terminates the trial court's jurisdiction over the matter and personal jurisdiction over the defendant.³⁶

Example: P enters into a settlement agreement with **D**, and they dismiss the lawsuit. **P** later files a second lawsuit against **D**, contending that **D** has not honored the

³⁵ Schubert v. Bates, 30 Cal. 2d 785, 788, 185 P.2d 793, 794–95 (1947).

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settlement agreement. **P** files a motion to enter judgment pursuant to the earlier settlement. The court grants the motion but orders that the judgment be deemed to relate back to the earlier action.

The court exceeded its jurisdiction. An action that is voluntarily dismissed in its entirety is no longer pending. Even though the trial court was persuaded that **D** had breached the settlement agreement, the court was without subject matter jurisdiction over the old action.³⁷

If some but not all of the plaintiffs dismiss, the court loses personal jurisdiction over the dismissing plaintiffs but retains jurisdiction over the remaining plaintiffs.³⁸

³⁶ Harris v. Billings, 16 Cal. App. 4th 1396, 1405, 20 Cal. Rptr. 2d 718, 723 (1993). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 11:6, :35–:35a, :35.1 (1996); ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 11:2 (1996).

³⁷ Viejo Bancorp, Inc. v. Wood, 217 Cal. App. 3d 200, 206, 265 Cal. Rptr. 620, 622 (1989).

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→Relief from Mistaken or Unauthorized Dismissals

After a voluntary dismissal with prejudice has been filed, the trial court has jurisdiction to vacate the judgment of dismissal under Code of Civil Procedure section 473 where it has been entered as a result of the plaintiff's "mistake, inadvertence, surprise, or excusable neglect."³⁹ The court may also award sanctions as punishment for repeatedly filing and dismissing the same lawsuit for abusive purposes.⁴⁰

[A] Cross-Complaints

The plaintiff may not dismiss the action if the defendant has filed a [cross-complaint](#) seeking affirmative relief.⁴¹ The same rule applies if an

³⁸ *In re Casa de Valley View Owner's Ass'n, Inc.*, 167 Cal. App. 3d 1182, 1192, 213 Cal. Rptr. 790, 796 (1985).

³⁹ *Basinger v. Rogers & Wells*, 220 Cal. App. 3d 16, 269 Cal. Rptr. 332 (1990).

⁴⁰ *Abandonato v. Coldren*, 41 Cal. App. 4th 264, 267, 48 Cal. Rptr. 2d 429, 431 (1995).

⁴¹ CODE CIV. PROC. § 581(i). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 11:7–:9.2, :35.6a–.6c (1996); 6 B.E. WITKIN, CALIFORNIA PROCEDURE, Proceedings Without Trial §§ 258–259 (4th ed. 1997).

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intervenor in the action seeks affirmative relief against a party to the action⁴² or if a spouse files a second dissolution proceeding seeking affirmative relief different from what the other spouse sought in his dissolution proceeding.⁴³ If, in response to an action seeking a declaratory judgment, the defendant files an answer in which he prays for a declaratory judgment in his favor, the prayer for a declaratory judgment does not amount to a claim for “affirmative relief” sufficient to impair the plaintiff’s absolute right to voluntary dismissal.⁴⁴

⁴² Roski v. Superior Court, 17 Cal. App. 3d 841, 845, 95 Cal. Rptr. 312, 315 (1971). If an employee fails to notify his employer of his action against a third party, thereby preventing the employer from intervening, the employer may have a cause of action against the employee but may not resurrect the employee’s action against the third party if the employee dismisses the action before the employer’s intervention. O’Dell v. Freightliner Corp., 10 Cal. App. 4th 645, 661–62, 12 Cal. Rptr. 2d 774, 783–84 (1992).

⁴³ Marriage of Tamraz, 24 Cal. App. 4th 1740, 1747–48, 30 Cal. Rptr. 2d 233, 236–37 (1994).

⁴⁴ Aetna Casualty & Sur. Co. v. Humboldt Loaders, Inc., 202 Cal. App. 3d 921, 928, 249 Cal. Rptr. 175, 179–80 (1988).

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Though the filing of a cross-complaint does not affect the plaintiff's right to dismiss his complaint or individual causes of action, the plaintiff may dismiss the entire action only with the cross-complainant's consent. If some but not all of the defendants file cross-complaints, the plaintiff may still dismiss the action as to those defendant who did not.⁴⁵

If a plaintiff against whom the defendant has filed a cross-complaint dismisses his complaint without prejudice, the [compulsory cross-complaint rule](#) will preclude him from filing a second action on a cause of action related to the cause of action alleged in the cross-complaint.⁴⁶

Example: P sues **D Corp.** for rescission and fraud, and **D Corp.** files a compulsory cross-complaint on related claims. **P** files a voluntary dismissal of his complaint without prejudice and then files a new

⁴⁵ *Lori, Ltd. v. Wolfe*, 85 Cal. App. 2d 54, 61, 192 P.2d 112, 116–17 (1948).

⁴⁶ *Carroll v. Import Motors, Inc.*, 33 Cal. App. 4th 1429, 1435–36, 39 Cal. Rptr. 2d 791, 795 (1995).

complaint against **D Corp.** He moves to consolidate the second action with the cross-complaint from the first action. The court strikes **P**'s complaint without leave to amend on the ground that **P** had to file his claims as a compulsory cross-complaint in first action.

The court ruled correctly. The compulsory cross-complaint rule precludes a plaintiff who voluntarily dismisses his complaint from bringing a new action on the same matter when a related cross-complaint is pending.⁴⁷

[B] Representative Actions

In certain actions the courts have recognized exceptions to the plaintiff's absolute right to dismiss. These actions either involve plaintiffs acting in a representative capacity on behalf of persons whose interests dismissal may impair or initiate in rem

⁴⁷ Carroll v. Import Motors, Inc., 33 Cal. App. 4th 1429, 1435–36, 39 Cal. Rptr. 2d 791, 795 (1995).

proceedings over which the court exercises jurisdiction regardless of the plaintiff's wishes.⁴⁸

[1] Probate Proceedings

When one files a petition for the probate of a will, one institutes a proceeding *in rem*, and the court becomes vested with jurisdiction to determine whether the proposed will has been properly executed and, if the will is valid, to settle the affairs of the estate in accordance with the will. Neither the proponent of a will nor a party filing a contest to the petition for probate can divest the court of its jurisdiction to settle the issues the petition presents.⁴⁹

⁴⁸ See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 11:13 (1996); 6 B.E. WITKIN, CALIFORNIA PROCEDURE, Proceedings Without Trial § 261 (4th ed. 1997).

⁴⁹ Estate of Raymond, 38 Cal. App. 2d 305, 308, 100 P.2d 1085, 1087 (1940). See generally 6 B.E. WITKIN, CALIFORNIA PROCEDURE, Proceedings Without Trial § 261 (4th ed. 1997).

[2] Custody and Guardianship Proceedings

An action seeking custody of a child is not one which the petitioner may dismiss without the consent of the court. The court's has the child's welfare, not the parents' rights, as its paramount concern. The filing of a petition seeking custody of a child brings the child under the protection of the court and makes the child, in effect, a party to the action. The petitioner as the plaintiff in the action representing the child stands in the same position as a [guardian ad litem](#) and does not have the power to dismiss the action without the court's consent.⁵⁰

The same rule applies in guardianship proceedings.⁵¹

[3] Class Actions

According to Code of Civil Procedure section 581(k), a plaintiff may not dismiss a [{class action}](#)

⁵⁰ Ford v. Superior Court, 171 Cal. App. 2d 228, 230–31, 340 P.2d 296, 298 (1959).

⁵¹ Lyle v. Anglo-California Nat'l Bank, 77 Cal. App. 2d 153, 157, 174 P.2d 906, 909 (1946).

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once the court has certified the class unless the plaintiff has given adequate notice to the class members and the court orders dismissal.⁵² Authorities pre-dating section 581(k) hold that whenever the dismissal of a class action stems from a defendant's grant to the representative plaintiffs of benefits that are not provided to the class as a whole, the court may not dismiss the action without notice to the class, regardless of class certification.⁵³ When a plaintiff sues on behalf of a class, he assumes a fiduciary obligation to the members of the class, surrendering any right to compromise the group action in return for an individual gain.⁵⁴

Rule 365 of the California Rules of Court provides that the dismissal of a class action, or of any party

⁵² CODE CIV. PROC. § 581(k). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 11:14–:15 (1996).

⁵³ *La Sala v. American Sav. & Loan Ass'n*, 5 Cal. 3d 864, 868, 489 P.2d 1113, 1115, 97 Cal. Rptr. 849, 851 (1971).

⁵⁴ *La Sala v. American Sav. & Loan Ass'n*, 5 Cal. 3d 864, 871, 489 P.2d 1113, 1117, 97 Cal. Rptr. 849, 852 (1971).

or cause of action in a class action, requires court approval. The party requesting dismissal must submit an affidavit or declaration setting forth the facts on which the party relies. The affidavit or declaration must state whether consideration, direct or indirect, is being given for the dismissal and must describe the consideration in detail. The court may grant the request without a hearing. If the court disapproves the request, any party may seek, within 15 calendar days of the service of the notice of tentative disapproval, a hearing on the request. If no party seeks a hearing is sought within that period, the request for dismissal is deemed denied.⁵⁵

In the case of a class action under the Consumers Legal Remedies Act,⁵⁶ the action may be dismissed without court approval and notice to class members who have not requested exclusion from the class.⁵⁷

⁵⁵ Accord, L.A. SUPER. CT. R. 15.48; SAN FRANCISCO SUPERIOR COURT CLASS ACTIONS MANUAL § 470; SAN MATEO SUP. CT. R. 7.11.

⁵⁶ CIV. CODE §§ 1750 et seq.

⁵⁷ CIV. CODE § 1781(f).

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[4] Shareholder Derivative Suits

A stockholder bringing a shareholder derivative suit is a trustee for the corporation's cause of action and cannot dismiss the action without the court's consent.⁵⁸

§ 15.06 Voluntary Dismissal with Prejudice After the Commencement of Trial

Code of Civil Procedure section 581(e) provides that, after the commencement of trial, the court must dismiss the complaint, or any causes of action asserted in it, in its entirety or as to any defendants, with prejudice if the plaintiff requests a dismissal. The court may dismiss without prejudice only if all the affected parties to the trial consent to dismissal without prejudice or upon a showing of good cause.⁵⁹

Subsection (d) also address dismissals after the commencement of trial. It requires the court to dismiss with prejudice “when upon trial and before

⁵⁸ Ensher v. Ensher, Alexander & Barsoom, Inc., 187 Cal. App. 2d 407, 410, 9 Cal. Rptr. 732, 734 (1960). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 11:16 (1996).

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the final submission of the case, the plaintiff abandons.” This subsection seems to be directed to inaction on the plaintiff’s part, in contrast to subsection (e), which is directed to express dismissals. The cases hold, however, that subsection (d) is “a mechanism by which a plaintiff (and not the court) voluntarily dismis[s] an action which had been expressly and intentionally abandoned. The dismissal must be predicated upon a clear, unequivocal and express intent to abandon an action, demonstrated to the court by way of a motion to dismiss, stipulation of the parties or some other form of express intent on the record.⁶⁰ The plaintiff’s right to dismiss under subsection (d) is not absolute (unlike the plaintiff’s right to dismiss without prejudice before commencement of the trial) but is subject to the court’s discretion.⁶¹

⁵⁹ CODE CIV. PROC. § 581(e). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 11:28–:31 (1996); 6 B.E. WITKIN, CALIFORNIA PROCEDURE, Proceedings Without Trial §§ 275–278 (4th ed. 1997).

⁶⁰ Kaufman & Broad Bldg. Co. v. City & Suburban Mortgage Co., 10 Cal. App. 3d 206, 212, 88 Cal. Rptr. 858, 861 (1970).

§ 15.07 The Defendant's Rights Upon Dismissal

Although the plaintiff's voluntary dismissal of his case terminates the court's **jurisdiction**, the court retains the residual authority to enforce the defendant's rights based on the favorable outcome of the case.

[A] Costs

A defendant in whose favor a dismissal is entered is entitled as a matter of right to recover his **{costs}**.⁶² The voluntary dismissal of an action by one of several plaintiffs creates liability for costs, even though the balance of the action proceeds to trial as to the other plaintiffs. The dismissing plaintiff's liability, however, is limited to those costs incurred while he was a party to the action.⁶³

⁶¹ *Broadwell v. Ryerson*, 85 Cal. App. 2d 352, 356, 192 P.2d 797, 800 (1948).

⁶² CODE CIV. PROC. § 1032(b). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 11:36–:38.4 (1996).

⁶³ *Catello v. I.T.T. Gen. Controls*, 152 Cal. App. 3d 1009, 1014, 200 Cal. Rptr. 4, 8 (1984).

Example: **Insurer** intervenes in **Employee's** product liability action against **Manufacturer** to recover from **Manufacturer** the compensation payments it made to **Employee**. **Insurer** and **Employee** agree to a lien in favor of **Insurer** on **Employee's** recovery from **Manufacturer**, and **Insurer** dismisses its complaint in intervention. **Manufacturer** prevails in the personal injury action and files a {[memorandum of costs](#)} against **Insurer**. The court grants **Insurer's** motion to strike the memorandum of costs.

The court erred. Upon **Insurer's** voluntary dismissal of its complaint, **Manufacturer** was entitled to costs it incurred while **Insurer** was a party to the action.⁶⁴

When a dismissed defendant incurs costs jointly with other defendants who remain in the litigation, during

⁶⁴ Catello v. I.T.T. Gen. Controls, 152 Cal. App. 3d 1009, 1014, 200 Cal. Rptr. 4, 8 (1984).

the pendency of the litigation the dismissed defendant may recover only those costs actually incurred on his behalf in prosecuting or defending the case.⁶⁵

Rule 383 of the California Rules of Court provides, "A party who requests dismissal of an action shall serve on all parties and file **notice of entry of the dismissal.**" Rule 870(a)(1) provides, "A prevailing party who claims costs shall serve and file a memorandum of costs within 15 days after . . . the date of service of written **notice of entry of judgment or dismissal . . .**" It would appear, therefore, that when the plaintiff gives [notice](#) to the defendant of his dismissal of the case in compliance with Rule 383, the defendant has 15 days in which to file his memorandum of costs. Weil and Brown suggest, however, that more is required. They contend that the court must enter a judgment or order upon which the court may base a costs award,

⁶⁵ Cf. *Fennessy v. DeLeuw-Cather Corp.*, 218 Cal. App. 3d 1192, 1196, 267 Cal. Rptr. 772, 774–75 (1990) (rule applied to a defendant who escaped from the litigation early by means of a [{motion for summary judgment}](#)).

and they suggest that, to obtain a judgment awarding costs after a voluntary dismissal, the defendant should prepare and submit to the court a proposed "Judgment of Dismissal."⁶⁶ It appears to this writer that, in view of the provision of Code of Civil Procedure section 581d that "[a] written dismissal of an action . . . is effective **for all purposes**" when entered in the clerk's register, a separate Judgment of Dismissal is unnecessary.

[B] Attorneys' Fees

Civil Code section 1717(a) provides that in any action on a contract, where the contract provides that attorneys' fees incurred to enforce the contract shall be awarded either to one of the parties or to the prevailing party, the prevailing party, whether the party specified in the contract or not, is entitled to reasonable attorney's as costs. The statute further provides, however, that if the plaintiff voluntarily dismisses the action (or if the case is dismissed

⁶⁶ ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 11:38.1–.2 (1996).

§ 15.07 The Defendant's Rights Upon Dismissal

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pursuant to a settlement of the case), then there is no prevailing party for purposes of the statute.⁶⁷

Example: **P** sues **D** for breach of contract and for various torts. **D** obtains a judgment on the pleadings on **P**'s breach of contract count. Before trial on the tort counts, **P** voluntarily dismisses the action. The court disallows **D**'s request for attorneys' fees.

The court ruled correctly. **D**'s success on **P**'s contract claim does not negate the fact that **P** voluntarily dismissed the entire action, thus bringing the case within the exception to Civil Code section 1717.⁶⁸

The same rule applies to a [voluntary dismissal with prejudice after the commencement of trial](#).⁶⁹ There

⁶⁷ CIV. CODE § 1717(b)(2). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 11:39–:39.23 (1996).

⁶⁸ Rosen v. Robert P. Warmington Co., 201 Cal. App. 3d 939, 247 Cal. Rptr. 635 (1988).

⁶⁹ D & J, Inc. v. Ferro Corp., 176 Cal. App. 3d 1191, 1194–95, 222 Cal. Rptr. 656, 658 (1986).

is a split of authority on the issue whether the voluntary dismissal exception to section 1717 applies only to reciprocal claims for attorneys' fees by parties who, by contract, would not otherwise be entitled to attorneys' fees or extends to all claims for attorneys' fees.⁷⁰

The voluntary dismissal exception to section 1717 does not apply to claims for attorneys' fees under statutes awarding attorneys' fees to prevailing parties.⁷¹ The fact that the dismissed defendant is the prevailing party for purposes of the costs statute⁷² does not mean that the dismissed defendant is the prevailing party for purposes of statutes awarding attorneys' fees to the "prevailing

⁷⁰ *Compare* Honey Baked Hams, Inc. v. Dickens, 37 Cal. App. 4th 421, 428, 43 Cal. Rptr. 2d 595, 598–99 (1995) (limiting the exception to reciprocal claims for attorneys' fees under section 1717), *with* Jue v. Patton, 33 Cal. App. 4th 456, 459, 39 Cal. Rptr. 2d 364, 367 (1995) (extending exception to all contractual claims for attorneys' fees).

⁷¹ Heather Farms Homeowners Ass'n, Inc. v. Robinson, 21 Cal. App. 4th 1568, 1572–73, 26 Cal. Rptr. 2d 758, 760 (1994).

⁷² CODE CIV. PROC. § 1032(a)(4).

party.”⁷³ In identifying the prevailing party for purposes of other statutes awarding attorneys’ fees, the court must analyze which party has prevailed on a practical level.⁷⁴

[C] Sanctions

According to Code of Civil Procedure section 128.7, by filing a complaint, an attorney or unrepresented plaintiff certifies, to the best of the person’s knowledge, information, and belief, formed after an reasonable inquiry, that the complaint is being presented for a proper purpose; that the claims are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and that the allegations have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or

⁷³ Heather Farms Homeowners Ass’n, Inc. v. Robinson, 21 Cal. App. 4th 1568, 1572, 26 Cal. Rptr. 2d 758, 760 (1994).

⁷⁴ Heather Farms Homeowners Ass’n, Inc. v. Robinson, 21 Cal. App. 4th 1568, 1574, 26 Cal. Rptr. 2d 758, 761 (1994).

{discovery}.⁷⁵ Under the prior {sanctions} statute,⁷⁶ the courts held that a plaintiff who engages in sanctionable misconduct may not avoid punishment by dismissing his action.⁷⁷ There is no reason to believe that the courts would reach a different conclusion with respect to sanctions awarded under section 128.7. That statute provides, however, that the party seeking sanctions may not file his motion unless the challenged pleading is not withdrawn or corrected within 30 days after service of the motion.⁷⁸ If the plaintiff is inclined to dismiss his action anyway, he can avoid any possibility of sanctions under section 128.7 by dismissing the action within 30 days after the filing of the motion to impose sanctions.

⁷⁵ CODE CIV. PROC. § 128.7(b).

⁷⁶ CODE CIV. PROC. § 128.5. Section 128.5 still applies to actions filed before 1995. *Id.* § 128.5(b)(1).

⁷⁷ *Frank Annino & Sons Constr., Inc. v. McArthur Restaurants, Inc.*, 215 Cal. App. 3d 353, 358, 263 Cal. Rptr. 592, 595 (1989).

⁷⁸ CODE CIV. PROC. § 128.7(c)(1).

§ 15.08 Relief from Dismissal

Even after the plaintiff has filed a voluntary dismissal with prejudice, the trial court has jurisdiction to vacate the judgment of dismissal under Code of Civil Procedure section 473 where it has been entered as a result of the plaintiff's "mistake, inadvertence, surprise, or excusable neglect."⁷⁹ Normally, one must seek relief under section 473 within six months after the mistaken dismissal was taken.⁸⁰ If, however, the plaintiff's lawyer wholly lacks power to dismiss the cause and acts beyond the scope of his authority in dismissing his client's complaint, his action remains voidable for an indeterminate period, and his client may vacate the unauthorized dismissal within a reasonable time after learning of it, regardless of the time limitations in section 473 and regardless of rules governing

⁷⁹ *Basinger v. Rogers & Wells*, 220 Cal. App. 3d 16, 21, 269 Cal. Rptr. 332, 335 (1990). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 11:35b–:35c, :41.2–.4 (1996).

⁸⁰ CODE CIV. PROC. § 473(b).

relief in instances of extrinsic fraud or extrinsic mistake.⁸¹ Vacating the dismissal action requires strong and convincing proof, and the longer the delay in the application for relief, the stronger and more convincing the factual proof must be.⁸²

⁸¹ Whittier Union High School Dist. v. Superior Court, 66 Cal. App. 3d 504, 507–08, 136 Cal. Rptr. 86, 89 (1977).

⁸² Whittier Union High School Dist. v. Superior Court, 66 Cal. App. 3d 504, 509, 136 Cal. Rptr. 86, 89–90 (1977).