



# Litigation Insights

**DECEMBER 2024**

# Moore's Federal Practice

## —TOP THREE HIGHLIGHTS

The following three summaries are this month's Editor's Top Picks from the dozens of decisions added to Moore's Federal Practice and Procedure.

### CLASS ACTIONS

#### **Certification of Issue Class**

*Jacks v.  
DirectSatUSA, LLC*

118 F.4th 888, 2024 U.S. App. LEXIS 25099 (7th Cir. Oct. 3, 2024)

The Seventh Circuit holds that a party seeking certification of an issue class under Rule 23(c)(4) must show that common questions predominate in the resolution of the specific issue or issues that are the subject of the certification motion, and not as to the cause of action taken as a whole.

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### DISCOVERY

#### **Sanctions for Failure to Preserve Electronically Stored Information**

*Gregory v. Montana*

118 F.4th 1069, 2024 U.S. App. LEXIS 24524 (9th Cir. Sept. 27, 2024)

The Ninth Circuit held that Federal Rule of Civil Procedure 37(e) exclusively governs the availability of sanctions for failure to preserve electronically stored information, and a district court may not instead invoke its inherent authority in fashioning such sanctions [see *Gregory v. Montana*, 118 F.4th 1069, 2024 U.S. App. LEXIS 24524 (9th Cir. Sept. 27, 2024)].

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### DISMISSAL

#### **Failure to Prosecute**

*Romano v. Laskowski*

2024 U.S. App. LEXIS 27654 (2d Cir. Oct. 31, 2024) (unpublished)

The Second Circuit held that when a dismissal without prejudice operates in effect as a dismissal with prejudice, the district court must make a finding of willfulness, bad faith, or reasonably serious fault before entering a Rule 41(b) dismissal for failure to prosecute or obey court orders.

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# Win with Jim Wagstaffe

## Current Awareness Insights!

### **Alert: Removal to Federal Court Allowed Before Formal Service**

We live in an age where online checking of the filing of complaints has become commonplace for defendants to obtain copies of complaints well before they are formally served. What flows from this development is that defendants often engage in what has become “snap removal” of such actions to federal court.

The question becomes whether these defendants are allowed to engage in such “snap removals” before service of process and in advance of the otherwise applicable 30-day time limit for removal. In a recent Ninth Circuit case, an insurer received a copy of the complaint before formal service. The question arose whether it was required to wait for formal service before removing the action (under which the 30-day time limit for removal is triggered, 28 U.S.C. § 1446(b)(1)).

The Court held (consistent with the holdings in other circuits) that a defendant (who becomes aware of a complaint) is not required to wait for formal service before removing the action. While it is true that the 30-day time clock does not begin running until receiving a courtesy copy and starts only upon proper service (*Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.* (1999) 526 U.S. 344, 347-349), it is also true that the statute “sets a deadline for removal, not a ‘window’ for removal.”

Significance: Importantly, “snap removal” is fully authorized (and may well avoid the limit on served in-state defendants removing diversity actions when sued by out-of-state plaintiffs). So, feel free to check those online services showing daily civil suit filings in state court. *Mayes v. American Hallmark Ins. Co. of Texas* (9th Cir. August 22, 2024) 2024 U.S. App. LEXIS 21221.

Fed Civ Proc Before Trial: The Wagstaffe Group [§ 8-X\[D\]\[1\]](#)—The Thirty-Day Period for Filing Notice of Removal Runs from Proper Service

## CLASS ACTIONS

### Certification of Issue Class

*Jacks v. DirectSat USA, LLC*

118 F.4th 888, 2024 U.S. App. LEXIS 25099 (7th Cir. Oct. 3, 2024)

**The Seventh Circuit holds that a party seeking certification of an issue class under Rule 23(c)(4) must show that common questions predominate in the resolution of the specific issue or issues that are the subject of the certification motion, and not as to the cause of action taken as a whole.**

➔ **Background.** This was a suit, filed as a class action, by former satellite service technicians against their employer, a company that installs and services residential satellite dishes through Illinois. They alleged violations of the Illinois Minimum Wage Law (IMWL) and the Fair Labor Standards Act (FLSA), arguing that the employer failed to compensate them for time they were required to spend performing work-related tasks off-the-clock and in excess of forty hours per week.

The district court certified a class of full-time satellite technicians but, after two other courts decertified similar classes in other actions, vacated its previous certification order and certified a Rule 23(c)(4) issue class to resolve fifteen questions related to the defendant's liability. The case was later reassigned to another district judge, who decertified the issue class as well. The plaintiffs settled their individual claims but reserved their right to appeal the decertification decision, which they did.

➔ **Preliminary Questions.** The court of appeals first noted that a district court's denial of class certification is reviewed for abuse of discretion, and that a district court may certify a class only if the trial court is satisfied, after rigorous analysis, that the prerequisites for class certification have been met.

Before proceeding to the merits, the court of appeals addressed two preliminary questions. First, the plaintiffs argued that the second district court judge erred by refusing to defer to the prior judge's Rule 23(c)(4) certification order for the issues class. However, in a class action any order that grants or denies class certification may be altered or amended before final judgment [Fed. R. Civ. P. 23(c)(1)(C)]. The district court has broad discretion on this matter, and a previous order granting or denying certification (by the same judge or a prior one) does not limit this discretion in any way.

Second, the plaintiffs contended that the district court impermissibly made findings that went to the merits of their claims. However, while a court may not resolve merits issues at the certification stage, merits issues may be considered to the extent they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied. The district court here had done no more than that.

➔ **Decertification of Issues Class Was Proper.** A party seeking class certification must establish the four Rule 23(a) prerequisites: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Additionally, the party must satisfy one part of Rule 23(b), most commonly Rule 23(b)(3), which allows certification of a damages class when the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Another available route is the certification of a class with respect to specific issues under Rule 23(c)(4), as happened in this case.



The interaction between Rule 23(b)(3) and Rule 23(c)(4) had not previously been addressed by the Seventh Circuit. The key question, the court said, is whether a party seeking certification of an issue class under Rule 23(c)(4) in a case requesting damages must show that common issues predominate in the resolution of the entire claim, or is it enough that common issues predominate as to each issue to be certified.

The Fifth Circuit has limited Rule 23(c)(4) classes to instances in which the cause of action, taken as a whole, satisfies Rule 23(b)(3)'s predominance requirement [see *Corley v. Orangefield Indep. Sch. Dist.*, 152 Fed. Appx. 350, 355 (5th Cir. 2005); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996)]. By contrast, the Second, Third, Fourth, Sixth, and Ninth Circuits permit certification under Rule 23(c)(4) so long as common questions predominate in resolving the individual issues to be certified [see *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006); *Russell v. Educ. Comm'n for Foreign Med. Graduates*, 15 F.4th 259, 274 (3d Cir. 2021); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 441 (4th Cir. 2003); *Martin v. Behr Dayton Thermal Products LLC*, 896 F.3d 405, 413 (6th Cir. 2018); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996)]. The D.C. Circuit has staked out a middle ground. It requires district courts to ensure that the common questions within the certified issues predominate over any individual ones. However, as part of the predominance analysis, the D.C. Circuit also requires district courts to evaluate the relationship any certified issues have as to the dispute as a whole to ensure that a certified issue encompasses a reasonably and workably segregable aspect of the litigation [see *Harris v. Med. Transp. Mgmt., Inc.*, 77 F.4th 746, 760–761 (D.C. Cir. 2023)].

Agreeing with the majority view, the Seventh Circuit held that, as part of satisfying its burden under Rule 23, a party seeking certification of an issue class under Rule 23(c)(4) must show that common questions predominate in the resolution of the specific issue or issues that are the subject of the certification motion and not as to the cause of action taken as a whole. The court noted that the 2006 version of Rule 23(c)(4) expressly mandated that the other requirements in Rule 23 be applied only after the issues appropriate for certification had been identified. While the 2007 amendment to Rule 23(c)(4) deleted the clause containing this language, this modification was not intended to substantively change the rule. Moreover, following the Fifth Circuit's approach would render Rule 23(c)(4) superfluous.

Accordingly, a district court can certify an issue under Rule 23(c)(4) so long as common questions predominate as to each issue to be certified, and certification of the proposed issues would be superior to other methods of resolving the litigation. The superiority requirement functions as a backstop against inefficient use of Rule 23(c)(4) because it ensures that courts will not rely on issue certification when there exist only minor or insignificant common questions.

In the present case, the district court had applied a flawed approach: rather than looking to see whether common questions predominated as to each of the remaining fourteen certified issues, the district court had examined whether common questions predominated as to the entire cause of action. However, an appellate court may affirm on any ground supported by the record, so long as the issue was adequately raised before the district court. The court of appeals concluded that, on the present record, the district court's decertification should be affirmed because proceeding to trial on the fourteen certified issues would not be superior to other available methods for fairly and efficiently adjudicating the controversy. This was not a case in which liability and damages could be determined by a simple formula or uncomplicated follow-on proceedings. Instead, determining liability and damages would necessitate hundreds of separate trials to evaluate evidence as to the situation of each technician. Thus, even if the fourteen certified issues were answered, doing so would not materially advance the plaintiffs' claims.

The court of appeals concluded that a class action was not a superior device to resolve the controversy, and affirmed the district court's decision to decertify the class.

→ **Concurrence.** Judge Easterbrook concurred in the majority opinion, but also identified a separate issue: whether the plaintiffs, who had settled their claims, no longer had an interest in the outcome of the proceedings and therefore lacked standing to appeal. While one of the absent class members might intervene as a potential class representative, none had done so. In *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 876 (7th Cir. 2012), the Seventh Circuit had held that incentive awards are proper and that settling plaintiffs who seek one have a continuing interest in the litigation and therefore have standing to appeal. Judge Easterbrook noted that an incentive award would not recompense plaintiffs for any harm done them by the defendant, and that redressability is essential to standing. The concurring opinion did not advocate overruling *Espenscheid*, since a conflict among the circuits would still exist, but suggested that “sooner or later, the Supreme Court (either in litigation or through its power to amend the Rules of Civil Procedure) must address the propriety of incentive awards—and, if these awards ever are proper, the Court needs to identify who pays (the class or the defendant).”

## DISCOVERY

### Sanctions for Failure to Preserve Electronically Stored Information

*Gregory v. Montana*

118 F.4th 1069, 2024 U.S. App. LEXIS 24524 (9th Cir. Sept. 27, 2024)

**The Ninth Circuit held that Federal Rule of Civil Procedure 37(e) exclusively governs the availability of sanctions for failure to preserve electronically stored information, and a district court may not instead invoke its inherent authority in fashioning such sanctions [see *Gregory v. Montana*, 118 F.4th 1069, 2024 U.S. App. LEXIS 24524 (9th Cir. Sept. 27, 2024)].**

→ **Background.** In this action under 42 U.S.C. § 1983, Plaintiff Carrie Gregory alleged that Defendant Tomeka Williams, a Montana Probation Officer, used excessive force on Gregory during a May 15, 2020 encounter that occurred in a parking lot adjacent to the Montana Department of Corrections Probation and Parole Office (“Probation Office”) in the City of Great Falls. Her son, Daniel Gregory (“Daniel”), was being supervised by the Probation Office in connection with his deferred sentence for a conviction of assault with a weapon. Daniel was ordered to report to the Probation Office on May 15 after that office developed grounds to believe he had possessed a firearm in violation of the terms of his supervision.

At the parking lot, several probation officers, as well as officers from the Great Falls Police Department, including Scott Fisher, approached the vehicle containing Gregory and Daniel. The officers directed Daniel to get out of the car and raise his hands. Gregory also stepped out of the vehicle.

The parties dispute what happened next. According to Williams, Gregory disobeyed several instructions to stay back from the officers as they arrested and handcuffed Daniel. Williams asserted that, sensing a “threat approaching,” she placed herself between Gregory and the other officers, but that Gregory “continued to take small steps forward.” Williams states that, to prevent Gregory from coming any closer, Williams used two hands to push Gregory in her chest, away from the officers. According to Williams, Gregory then began “flailing at,” “hitting,” and “scratching” Williams. Williams allegedly sustained bruises and other injuries as a result. According to Gregory, however, she did not hear any commands from Williams and was observing Daniel’s arrest at a distance when Williams approached her and, without any prompting, violently lifted and twisted her left arm. Gregory alleged that the force bruised and fractured her left elbow and severely injured her left wrist. It is undisputed that, after the encounter between Williams and Gregory, Fisher handcuffed Gregory and placed her into a police car.

The entire encounter was captured by an external surveillance camera that monitored the parking lot and that was operated by the Probation Office.

As a result of the incident, the City charged Gregory with misdemeanor obstruction of a peace officer. Four days after the incident, Gregory’s retained defense counsel, Dan Flaherty, called Wayne Bye, Deputy Chief for Region 3 of the Montana Department of Corrections, to request the relevant May 15, 2020 surveillance footage of the parking lot. Bye responded that he would do his best to get it, but warned that the surveillance system was old. Flaherty suggested that Bye record a copy of the footage with his cellphone, which Bye agreed to do. Later that day, Flaherty followed up with an email addressed to Bye and Neil Anthon, the chief prosecutor for the City, memorializing his request for the footage.



While Bye had some experience with reviewing footage from the internal surveillance system that monitored the inside of the Probation Office, he had no experience with preserving footage from the external surveillance system that monitored the parking lot. Bye knew that the internal surveillance system preserved footage for up to “two to three months.” He did not check the retention policy for the external surveillance system, however, and simply assumed that the May 15, 2020 footage was subject to a standard 30-day retention period. The footage was actually subject to only a 17-day retention period.

Two days after his phone call and email requesting the footage, Flaherty followed up with another email asking Bye to preserve the now almost week-old footage, expressing concern about how long the external surveillance system would retain it. The next day, Bye asked another probation officer, Tim Hides, to assist him with preserving the footage. Bye and Hides first planned to burn the footage from the external surveillance system onto a CD, but they were unable to do so because the power cord for the CD burner had been misplaced. As an alternative, Bye and Hides recorded two copies of the footage using Bye’s state cellphone. The pair then dropped off “disk copies” of the cellphone recording at Flaherty’s and the City Attorney’s offices.

On May 26, 2020, Flaherty reviewed the cellphone recording and concluded that the quality was too poor to clearly make out what was depicted. Flaherty then asked Bye if Flaherty could transfer the original footage onto his flash drive or laptop. Bye explained that applicable state policy prohibited any such connection of a private external device to a state computer. Instead, Bye purchased a new power cord for the CD burner, and he and Hides then attempted to burn the footage onto a CD. However, when they made that attempt, either on May 27 or 28, they discovered that “the files were too large to put on the CDs.” On either June 2 or June 3, Bye and Hides tried instead to transfer the footage onto flash drives. By that time, the surveillance system had already automatically deleted the footage.

Soon after informing Flaherty that the footage had been lost, the City dropped the misdemeanor charge against Gregory. Gregory sued Bye, Williams, Fisher, the State, and the City. She asserted a variety of causes of action against the defendants, but by the start of trial only three claims remained: (1) a § 1983 claim against Williams for excessive force; (2) a state-law claim against Williams for assault and battery; and (3) a state-law claim against the State for negligent infliction of emotional distress.

Gregory filed a motion for sanctions against the State based on its loss of the May 15, 2020 surveillance footage. Gregory asked the district court to grant her a default judgment and to do so pursuant to the court’s inherent authority, rather than under Rule 37. The court rejected Gregory’s request to enter a default judgment. Instead, invoking its inherent authority, the court stated that it would instruct the jury that it was established that “Officer Tomeka Williams used unreasonable force in the seizure of Carrie Gregory,” and the court further held that it would bar any testimony about the lost footage’s content and Bye’s cellphone recording of the footage. The court would, however, submit to the jury the issues of causation and damages, as well as the question whether Williams acted with malice warranting punitive damages. The court acknowledged that its decision effectively granted summary judgment to Gregory on the issue of unreasonable force, but concluded that this sanction was nonetheless warranted. The court expressly found that “Gregory cannot sustain her burden to establish gross negligence or willfulness on the part of the State” and that the State’s conduct amounted only to “recklessness.” The court also rejected Williams’s arguments that it would be unfair to effectively impose a sanction on her when it was the State that had lost the footage.

About an hour before opening arguments at trial, Gregory objected to the defense’s stated intention to present the testimony of six parole officers who had been present at the May 15, 2020 incident. In view of the

State's intention to indemnify Williams on the claims against her, and in order to simplify the proof, Gregory then voluntarily dismissed the assault and battery claim. To enforce the sanctions awarded, and in light of the dismissal of the assault and battery claim against Williams, the court held that the officers would not be allowed to testify about what they saw during the encounter between Williams and Gregory. They could, however, testify about "what Ms. Gregory was doing after the encounter," and the defense could also address causation by relying upon Gregory's medical records.

Over the defense's objection, the court agreed to play Bye's cellphone recording for the jury. The court first instructed the jury that, because the State had failed to preserve the video, the jury was permitted, but not required, to infer "that the lost surveillance [footage] would have been favorable to [Gregory]." The court's subsequent jury instructions told the jury that "it has been established as a matter of law that Defendant Williams used excessive force against [Gregory] in violation of the Fourth Amendment of the United States Constitution." During deliberations, a juror asked the court to state "[w]hat during the altercation determined that Tomeka used excessive force." The court responded that the jury "need not evaluate the evidence bearing on this issue" because it had "been determined, as a matter of law" that Williams used excessive force against Gregory.

The jury awarded Gregory \$75,000 in damages for her excessive-force claim against Williams, but it determined that Williams had not acted with malice. The jury rendered a defense verdict on the claim against the State for negligent infliction of emotional distress. The court later denied Williams's motion to reduce the judgment and granted Gregory's motion for attorney's fees. Appellants timely appealed.

→ **Court May Not Use Its Inherent Power to Sanction Failure to Preserve Electronically Stored Information.** The Ninth Circuit explained that federal courts have inherent authority to impose sanctions for conduct that abuses the judicial process. This inherent authority often remains available as an alternative source of sanctioning power even when there are statutes or rules that also provide for sanctions. However, the exercise of inherent power can be limited by statute and rule. Accordingly, a court may not invoke inherent authority to contravene the "clear mandate" of an applicable statute or rule. Appellants contended that Rule 37(e) exclusively governs the availability of the sort of sanctions that were imposed for the loss of evidence that occurred in this case and that, as a result, the district court erred by relying on its inherent authority.

Rule 37(e) provides:

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
  - (A) presume that the lost information was unfavorable to the party;
  - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
  - (C) dismiss the action or enter a default judgment.

The surveillance system used by the State to record the Probation Office parking lot was a digital system that was operated using a computer and software. The video footage at issue thus readily qualified as “electronically stored information” within the meaning of the Federal Rules of Civil Procedure. The appellate court found that the footage at issue “should have been preserved in the anticipation or conduct of litigation.” “The State had actual knowledge of its obligation to preserve the footage in connection with Williams’s misdemeanor criminal case, and it was certainly foreseeable that civil litigation could arise from the disputed incident as well.”

The court rejected the State’s contention that it took “reasonable steps to preserve” the footage from being “lost.” In particular, failing to promptly determine how long the surveillance system preserved its information was unreasonable, as was failing to proceed with appropriate dispatch in taking the actual steps necessary to download the video from the system before it was deleted. The State’s actions in making a poor-quality, second-level copy did not satisfy its obligation to take reasonable steps to preserve the information. Furthermore, the footage could not “be restored or replaced through additional discovery.” Thus, all of the conditions required to trigger Rule 37(e) were satisfied: electronically stored information that should have been preserved in the anticipation or conduct of litigation was lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery.

The text of Rule 37(e) specifies that, when such a covered loss of information occurs, the court must make the specified findings required by paragraphs (1) or (2) before it may impose a sanction, and those paragraphs require different findings depending on the severity of the sanction. Paragraph (1) sets forth a general authority, “upon [a] finding of prejudice to another party from loss of the information,” to impose remedial sanctions that are “no greater than necessary to cure the prejudice” resulting from the loss. Paragraph (2), however, establishes a more demanding standard before the court may impose certain types of severe sanctions. Such sanctions may be imposed “only upon finding that the party [who caused the loss] acted with the intent to deprive another party of the information’s use in the litigation” [Fed. R. Civ. P. 37(e)(2) (emphasis added)].

The severe sanctions subject to paragraph (2)’s more demanding standard are: (1) presuming that the lost information was unfavorable to the party that caused the loss; (2) instructing the jury that it may or must presume the information was unfavorable to that party; or (3) dismissing the action or entering a default judgment. The advisory committee notes that accompanied the adoption of the amended Rule 37(e) in 2015 warned courts to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2). Thus, for example, a sanction precluding a party from offering any evidence in support of the central or only claim or defense in the case effectively rests on a conclusive presumption that the lost information was unfavorable to that party.

The sanctions selected by the district court in this case fell within the scope of paragraph (2). The district court’s order instructing the jury to take as established that Williams had used excessive force in violation of the Fourth Amendment was simply a more severe form of the sort of presumptions covered by Rule 37(e)(2). The instruction was effectively a conclusive presumption that the lost video was so unfavorable to the State on the issue of excessive force that that ultimate fact at issue should be taken as resolved in Gregory’s favor. Moreover, the district court’s subsequent further instruction to the jury—when the cellphone copy of the footage was introduced—that the jury could infer “that the lost surveillance [footage] would have been favorable to [Gregory]” fell squarely within the language of Rule 37(e)(2)(B). Accordingly, under the plain language of the Rule, these sanctions were “only” available if the court first made the finding of intent to deprive.



Given Rule 37(e)'s careful specification of the findings that must be made before any sanction may be imposed for a covered loss of electronically stored information, it is clear that the rule, by its terms, precludes a court from resorting to inherent authority. The advisory committee stated that, because the rule "authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures," the rule "forecloses reliance on inherent authority or state law to determine when certain measures should be used" [Fed. R. Civ. P. 37(e) advisory committee's note to 2015 amendment (emphasis added)].

Because Rule 37(e) governs both the loss of information and the sanctions imposed in this case, and because the rule's specific requirements preclude invocation of a court's inherent authority, the district court erred as a matter of law by relying upon its inherent authority rather than applying Rule 37(e).

→ **District Court Did Not Make Required Findings.** The Ninth Circuit observed that, although the district court invoked the wrong source of legal authority in imposing sanctions, its error would be harmless if the record reflected that the district court did in fact make the findings that are required by Rule 37(e)(2). The Ninth Circuit found that it did not.

Rule 37(e)(2) requires that, before the court may impose one of the listed sanctions, it must first find that "the party acted with the intent to deprive another party of the information's use in the litigation." The advisory committee notes confirm that the amended rule was specifically intended to abrogate cases that authorized the giving of adverse-inference instructions on a finding of negligence or gross negligence.

The Ninth Circuit explained that the intent required by Rule 37(e)(2) involves the willful destruction of evidence with the purpose of avoiding its discovery by an adverse party. The district court did not find any such intent. On the contrary, the district court specifically rejected even Gregory's lesser argument that the loss of the footage resulted from "gross negligence" and found that "Gregory cannot sustain her burden to establish gross negligence or willfulness on the part of the State" (emphasis added). That finding necessarily precluded any finding that the State or Williams acted with the specific intent required by Rule 37(e)(2). The district court found only that the State's actions amounted to "recklessness," but that is not enough to authorize the severe sanctions imposed by the district court in this case. Accordingly, the Ninth Circuit concluded that Rule 37(e)(2) precluded the district court from imposing the sanctions that it did.

→ **Conclusion.** Applying the above standards, the Ninth Circuit concluded that the district court committed legal error by relying on its inherent authority in imposing the sanctions that it did rather than applying the provisions of Rule 37(e). The court further concluded that, in light of the district court's factual findings, the requirements for imposing such sanctions under Rule 37(e) were not met. And because the sanctions imposed were obviously prejudicial to Williams, the appellate court reversed the judgment against her and remanded for a new trial on the excessive force claim.

# DISMISSAL

## **Failure to Prosecute**

*Romano v. Laskowski*

2024 U.S. App. LEXIS 27654 (2d Cir. Oct. 31, 2024) (unpublished)

**The Second Circuit held that when a dismissal without prejudice operates in effect as a dismissal with prejudice, the district court must make a finding of willfulness, bad faith, or reasonably serious fault before entering a Rule 41(b) dismissal for failure to prosecute or obey court orders.**

- **Background.** Adopting a magistrate judge's report and recommendation, the district court granted Defendant's motion to dismiss without prejudice the complaint of Plaintiff Anthony Romano under Federal Rule of Civil Procedure 41(b). The complaint was dismissed for failure to prosecute after Plaintiff, a prisoner and pro se litigant, refused on two occasions to submit to deposition, despite a court order directing him to do so. Romano raised two challenges on appeal. First, he argued that the district court, in declining to appoint a guardian ad litem, failed to fulfill its duty under Rule 17(c) to inquire into Romano's competence. Second, he contended that the district court erred in dismissing his case under Rule 41(b) without (1) having found that Romano acted with willfulness, bad faith, or reasonably serious fault, or (2) considering the availability of less severe sanctions.
- **District Court Had No Duty of Inquiry Under Rule 17(c).** As to the first issue on appeal, the Second Circuit noted that a court "must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action" [Fed. R. Civ. P. 17(c)(2)]. This obligation arises only after a determination of incompetence; however, Rule 17(c) provides no guidance regarding the circumstances under which an inquiry into a party's competence is required. The Second Circuit has identified two circumstances in which failing to conduct such an inquiry likely would be an abuse of the court's discretion: (1) if a court were presented with evidence from an appropriate court of record or a relevant public agency indicating that the party had been adjudicated incompetent, or (2) if the court received verifiable evidence from a mental health professional demonstrating that the party is being or has been treated for mental illness of the type that would render him or her legally incompetent. On the other hand, standing alone, a litigant's bizarre behavior is insufficient to trigger a mandatory inquiry into his or her competency. The court must balance the need to protect the rights of the mentally incompetent against the potential burden on court administration associated with conducting frequent inquiries into pro se litigants' mental competency.

The Second Circuit found that the parties did not present evidence of a proceeding in which Romano was adjudicated incompetent. Instead, their dispute focused on the second type of evidence. The district court concluded that the record lacked verifiable evidence indicating that Plaintiff's mental illness was of the type that would render him legally incompetent. The Second Circuit agreed.

In arguing to the contrary, Romano pointed to two categories of evidence: (1) his own assertions regarding his diagnosis and treatment for serious mental illness, and (2) prison documentation showing his Office of Mental Health ("OMH") Level 1S classification and his placement in the Intensive Intermediate Care Program ("IICP"). As the district court concluded, this evidence may suggest that Romano almost certainly suffered from some degree of mental illness. However, the record indicated only mental illness, not incompetence; and there was no necessary relationship between the two. Furthermore, Romano's own assertions regarding his diagnosis and treatment did not constitute evidence from a mental health professional.

The court declined to address Romano's argument that the standard should be relaxed for incarcerated pro se litigants because Romano failed to establish that he faced unique obstacles to obtaining medical documentation, above and beyond those faced by non-incarcerated pro se litigants. Indeed, Romano obtained and attached several medical records to his amended complaint, including documentation of his OMH Level 1S classification and IICP placement. As the district court noted, Romano was recently represented by appointed counsel in two other cases. His counsel presumably had the opportunity to raise and investigate competence concerns, including seeking out relevant medical documentation, but they do not appear to have done so.

As a result, the district court had no Rule 17(c) duty to inquire into Romano's competence in this case. It thus did not abuse its discretion in declining to appoint a guardian ad litem.

→ **District Court Erred in Dismissing Case Without a Finding of Willfulness.** Under Rule 41(b), if the plaintiff fails to prosecute or to comply with the Federal Rules of Civil Procedure or a court order, a defendant may move to dismiss the action or any claim against it. The Second Circuit has emphasized that dismissal is a harsh remedy that should be imposed only in extreme situations. Further, a pro se litigant's claim, in particular, should be dismissed for failure to prosecute only when the circumstances are sufficiently extreme.

The Second Circuit has identified five factors for a district court to weigh in determining whether dismissal is appropriate: (1) the duration of the plaintiff's failure to comply with the court order, (2) whether plaintiff was on notice that failure to comply would result in dismissal, (3) whether the defendants are likely to be prejudiced by further delay in the proceedings, (4) a balancing of the court's interest in managing its docket with the plaintiff's interest in receiving a fair chance to be heard, and (5) whether the judge has adequately considered a sanction less drastic than dismissal. No one factor is dispositive. Before dismissing a case with prejudice, a district court must also make a finding of "willfulness, bad faith, or reasonably serious fault."

In this case, the magistrate judge assessed the five factors and found that each supported dismissal of Romano's case. However, the magistrate judge also concluded that it was "difficult for the Court to determine whether Plaintiff's refusal to be deposed was truly willful, based on lack of interest in this case, or directly related to mental illness." As a result, the magistrate judge recommended dismissal "without prejudice to renewal." The Second Circuit addressed two issues in this regard: (1) whether the district court was required—and failed—to make a finding of willfulness, bad faith, or reasonably serious fault before dismissing the case; and (2) whether the district court adequately considered less severe sanctions than dismissal.

The Second Circuit has previously held that before dismissing a case with prejudice under Rule 41(b), a district court must make a finding of "willfulness, bad faith, or reasonably serious fault." However, it had not yet ruled in a precedential opinion that dismissals without prejudice require such a finding. The court declined to decide this question in other cases, and found that it need not resolve the question in this case either, as the dismissal without prejudice in this case would operate in effect as a dismissal with prejudice. A dismissal without prejudice is akin to a dismissal with prejudice when the statute of limitations has run on most, if not all, of the plaintiff's various causes of action.

The applicable statute of limitations in this case was three years, and a dismissal without prejudice would not toll the limitations period. Therefore, because Romano's original and amended complaints alleged incidents that occurred in 2018, dismissal of these claims without prejudice would appear to render them time-barred.



In arguing to the contrary, Defendants pointed to the fact that, as late as February 2023, Romano alleged denial of medical care forming the basis for his Eighth Amendment claim remained ongoing. Defendants thus suggested Romano's claims may not be foreclosed by the three-year statute of limitations, because he could potentially allege a continuing violation. The appellate court rejected this argument, finding that such speculation as to the possibility a plaintiff might be able to allege a continuing violation premised in part on the same underlying conduct does not negate the fact that a dismissal without prejudice would likely prove fatal to Romano's claims. To allege a continuing violation against the specific defendants in this case, Romano would have to allege acts involving those defendants that fall within the three-year statutory period. No evidence in the record suggested Romano could do so.

Because the dismissal without prejudice operated in effect as a dismissal with prejudice, the district court was required to make a finding of willfulness, bad faith, or reasonably serious fault. Additionally, the Second Circuit found that the district court did not adequately consider whether sanctions less drastic than dismissal would be effective. Failure to consider a lesser sanction than dismissal is generally an abuse of discretion. While the sanction the district court imposed—dismissal without prejudice—is generally considered less severe than dismissal with prejudice, the dismissal in this case effectively operated as one with prejudice. The district court did conclude that it was “unlikely that lesser sanctions would be effective,” because Romano had plainly refused to submit to deposition and had failed to abide by a court order directing his participation. However, this conclusion may have been premised on the district court's understanding that dismissal without prejudice was a less severe sanction than dismissal with prejudice in this case.

→ **Conclusion.** Therefore, the Second Circuit remanded to the district court to reconsider both (1) whether Romano's conduct constituted willfulness, bad faith, or reasonably serious fault, and (2) whether less serious sanctions may have been effective.