

## LITIGATION

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## GARZA V. CITIGROUP – THE THIRD CIRCUIT CLARIFIES WHEN A DEFENDANT MAY BE AWARDED ATTORNEYS’ FEES AS COSTS UNDER RULE 41(D)

By Danielle T. Morrison

Federal Rule of Civil Procedure 41(d) authorizes a district court to award a defendant “costs” where a plaintiff who “previously dismissed an action in any court [subsequently] files an action based on or including the same claim against the same defendant.” On February 2, 2018, the Third Circuit held as a matter of first impression that a district court may award attorneys’ fees as the “costs” provided for under Rule 41(d) when the substantive statute under which the lawsuit was filed defines costs to include attorneys’ fees.

In *Garza*, the estate of a Mexican national sued Citigroup and several other defendants in the Southern District of New York, asserting a variety of claims and requesting, in part, the production of information relating to certain bank accounts held by the decedent. In response to a motion to dismiss, Plaintiff filed a notice of voluntary withdrawal under Rule 41(a)(1)(A)(i). Defendants filed a motion to vacate the notice of voluntary dismissal, to dismiss the case with prejudice, and for sanctions under 28 U.S.C. 1927 pursuant to the court’s inherent power to award sanctions to deter continued vexatious litigation. The court denied the motion, but noted that under Rule 41(d) a defendant may recover costs incurred in connection with the previously-dismissed action.

Indeed, the Estate did file a second action – in the District of Delaware, against Citigroup alone – seeking only an accounting of the decedent’s bank accounts, a claim similar but not identical to one of the claims in the first lawsuit. Citigroup filed a motion for judgment on the pleadings and a motion under Rule 41(d) to recover the costs it incurred in the first case, including attorneys’ fees. The Delaware court granted the motion for judgment on the pleadings without leave to amend. The court also granted the motion under Rule 41(d), but did not award attorneys’ fees. The parties cross-appealed and the Third Circuit affirmed in separate opinions.

With respect to the issue of whether attorneys’ fees are included in “costs” under Rule 41(d), the Third Circuit agreed with the district court’s conclusion but not its rationale. The Third Circuit had never addressed whether attorneys’ fees may be awarded as costs under Rule 41(d). However, other Circuit Courts have adopted three interpretations of Rule 41(d): (1) the “Always Awardable Interpretation,” see *Evans v. Safeway Stores, Inc.*, 623 F.2d 121, 122 (8th Cir. 1980) (*per curiam*), (2) the “Never Awardable Interpretation,” see *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 874 (6th Cir. 2000), and (3) the “Underlying Substantive Statute Interpretation,” see *Andrews*

*v. Am.'s Living Ctrs., LLC*, 827 F.3d 306, 310 (4th Cir. 2016) (quoting *Esposito v. Piatrowski*, 223 F.3d 497, 501 (7th Cir. 2000)).

The Third Circuit rejected the “Always Awardable Interpretation” because the plain text of Rule 41(d) does not provide a basis to depart from the American Rule, which requires each litigant to pay its own attorneys’ fees. The Court also declined to follow the “Never Awardable Interpretation” because the Supreme Court has held that “costs” is an “ambiguous term” subject to “varying definitions.” *Marek v. Chesny*, 473 U.S. 1, 8 (1985). In *Marek*, the Court held that attorneys’ fees are awardable under Rule 68 when they are expressly authorized by an applicable statute or other authority. The Third Circuit concluded that the “Underlying Substantive Statute Interpretation” was the only one consistent with *Marek*. Because there was no underlying statute that defined costs to include attorneys’ fees applicable to the case, the Third Circuit affirmed the district court’s denial of an award of costs that included attorneys’ fees.

With *Garza*, the Third Circuit has now provided clarity for determining when a defendant may recoup costs, including attorneys’ fees, under Rule 41(d). In reaching this decision, the Court commented on a defendant’s ability to recover attorneys’ fees as a sanction for bad faith litigation, because district courts have the “inherent power” to award attorneys’ fees “when the losing party has ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons.’” *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-259 (1975). However, the Third Circuit did not address this issue in *Garza* because the issue was waived. ♦

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