■ CASE DISMISSALS

Adopt English rules

By Daniel H. Erskine SPECIAL TO THE NATIONAL LAW JOURNAL

IT'S TUESDAY, A FEW days after you filed your answer in which you conclusively illustrated that the law does not support opposing counsel's obviously frivolous lawsuit. On your office desk is an envelope from the court. Thinking it's a procedural notice from the clerk's office about scheduling dates or the like, you nonchalantly tear open the packet to read the correspondence: "The Honorable Judge X hereby dismisses the complaint in its entirety as a matter of law."

You did not file a motion, did not attend a hearing, and have not even had a chance to telephone opposing counsel. The case is dismissed.

If the above sounds like fiction, try litigating in England, where judges are not only given the authority but are commanded by court rule 1.4 to promptly dispose summarily of actions lacking merit. Court rule 3.4 empowers a judge, on his or her own initiative, to dismiss a case because the claim has no reasonable basis in law to maintain the action; the party failed to follow a court rule in bringing the action; or the suit "is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings." Rules 3.3 and 3.4 authorize the judge to dismiss entire claims on his or her own initiative without any prompting by the attorneys for either side. Pursuant to Rule 3.3(4), the judge need not even give the parties an opportunity to argue whether the judge should dismiss the suit. The litigants are only given, under Rule 3.3(5), the opportunity to stay, set aside or vary the order dismissing the case.

An English judge can act on own initiative.

Practice Direction 26 (a binding interpretation of how to utilize the court's powers granted by the Civil Procedure Rules) emphasizes that "the court's duty of active case management is the summary disposal of issues which do not need full investigation and trial." Contrast this active duty to the more passive role our U.S. judges play in the litigation process. Most U.S. judges lack the ability to act on their own behalf to terminate previously initiated lawsuits. The burden falls upon the litigants to move for dismissal.

Most important, the expense to defend these frivolous claims falls upon defendants who retain counsel and incur substantial legal fees. An additional nonmonetary cost is the anxiety associated with being publicly accused of serious legal wrongs, despite the objective fact these allegations possess no actual legal merit.

U.S. judges are generally hesitant to dismiss lawsuits and favor letting juries decide cases. As a result, frivolous cases are often resolved at the appellate level after the time and expense of full-blown litigation (including submission to mandatory alternative dispute resolution). If U.S. judges were empowered by civil rules similar to those governing English actions, then they might feel justified in dismissing obviously frivolous cases without a sense of concern over disposing of matters by judicial initiative.

At base, the question whether to grant U.S. judges greater authority by rule centers upon the perception of the judiciary. Is a judge's role to guard against lawsuits lacking in merit and thereby save court resources and time? Or does a judicial officer merely preside over the action involving two private parties who are charged with resolving their dispute through a mandated procedure, which submits their grievances to other private citizens (i.e. a jury) to peaceably determine their quarrel?

In England, Rule 1.1 expressly articulates that the overriding objective of the court system is to enable "the court to deal with cases justly." English courts are charged with ensuring that cases are dealt with expeditiously and fairly, as well as, according to Rule 1.1(2)(e), allotting a case "an appropriate share of the court's resources, while taking into account the need to allot resources to other cases." By comparison, Fed. R. Civ. P. 1 charges the court to administer and interpret the rules "to secure the just, speedy, and inexpensive determination of every action and proceeding." In addition, the concept of a court acting on its own imitative to strike out material in a pleading is not entirely unknown in U.S. practice. Federal Rule 12(h) permits a federal judge to strike out an insufficient defense in a pleading on his or her own initiative.

Granting additional authority to U.S. judges to dispense with frivolous lawsuits lacking sufficient basis in law merits further attention. English practice provides an excellent example on how to efficiently resolve cases without legal merit. The English court system's overriding objective of ensuring the cost-effective resolution of cases is part of the U.S. federal rules, but the sentiment behind English procedure strongly reflects the practical authority granted to English judges to dispose of frivolous cases. U.S. judges should be given the same power to dismiss suits on their own initiative without the need for litigants to permit the court to act. NLJ

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