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POST TRIAL MOTIONS—NEW FLEXIBILITY

In Illinois, post-judgment relief which must be moved for within thirty days of judgment, is governed by three specific provisions of the Illinois Civil Practice Act.¹ These provisions embody the common law principles designed to open, vacate or set aside judgments.² Although the terms were used loosely, opening the judgment allowed a second hearing on the merits, whereas vacating or setting aside the judgment was based solely upon fatal defects apparent on the face of the record. During an "opening" the judgment remained in effect. If the "opening" were successful, however, the judgment was vacated. At common law, only one motion for post-judgment relief was allowed, but it could be made any time during the term³ in which the judgment was entered.⁴ The Civil Practice Act substitutes a uniform thirty-day period in place of the common law term of court, creating a definite period during which the trial court retains power to open, vacate, or set aside the judgment.⁵ Judicial action pursuant to the Civil Practice Act has been less rigid than under the common law and courts are presently relaxing the single post-trial motion rule. This Comment will examine how the practicing attorney may use this new flexibility.⁶

1. ILL. REV. STAT. ch. 110, §§50(5), 68.1, 68.3 (1975). This Comment will deal only with post-judgment remedies available within thirty days after the judgment. Post-judgment motions for a new trial, pursuant to section 72 of the Civil Practice Act, are excluded.

2. See 4A NICHOLS, ILLINOIS CIVIL PRACTICE §4578 (1960); Klingbiel, *Relief from Judgment*, 1951 U. ILL. L.F. 121.

3. At common law, "term of court" was the period of time during which the court retained jurisdiction over the case. There were four regular terms of court: the Hilary Term (January 3 to February 12); the Easter Term (Wednesday fortnight after Easter Sunday to the first Monday after Ascension Day); the Trinity Term (first Friday after Trinity Sunday to Wednesday fortnight); the Michaelmas Term (October 9 to November 29). See A. REPPY, INTRODUCTION TO CIVIL PROCEDURE: ACTIONS AND PLEADINGS AT COMMON LAW (1954).

4. Department of Pub. Works & Bldgs. v. Legg, 374 Ill. 306, 29 N.E.2d 515 (1940); Unbehan v. Fader, 319 Ill. 250, 149 N.E.2d 773 (1926).

5. ILL. REV. STAT. ch. 110, §§50(5), 68.1, 68.3 (1975). Enactment of the uniform thirty-day period is significant. At common law, judgments were often entered shortly before the close of the term, thus affording little or no opportunity to attack the judgment. The Civil Practice Act eliminates this problem without enlarging the jurisdiction of the trial court. The three statutes simply retain most of the common law principles while modifying or abolishing only certain matters relating to time and form. Weaver v. Bolton, 61 Ill.App.2d 98, 209 N.E.2d 5 (2d Dist. 1965); Trupp v. Englewood State Bank, 307 Ill.App. 258, 30 N.E.2d 198 (1st Dist. 1940). A court's power to reconsider its decision still ends when jurisdiction is terminated. However, under the Civil Practice Act, jurisdiction is terminated after thirty days instead of term time.

6. See, e.g., Fultz v. Haugan, 49 Ill.2d 131, 273 N.E.2d 403 (1971) (where the court held

Sections 68.1⁷ and 68.3⁸ of the Civil Practice Act govern the procedures for post-trial relief in jury and non-jury trials and are limited only to motions for judgment *non obstante veredicto*,⁹ judgment notwithstanding the verdict,¹⁰ in arrest of judgment,¹¹ or for new trial.¹² Section 50(5)¹³ prescribes the manner in which any final judgment may be va-

that a party may file successive post-judgment motions); *City of Chicago v. Greene*, 47 Ill.2d 30, 264 N.E.2d 163 (1970), *cert. denied*, 402 U.S. 996 (1971); *Bernitt v. Brown*, 16 Ill.App.3d 774, 306 N.E.2d 513 (1st Dist. 1973) (where the court allowed the defendant to file a motion to vacate a denial of a post-trial motion). See notes 33-38 and accompanying text *infra*.

7. ILL. REV. STAT. ch. 110, §68.1 (1975) provides, *inter alia*:

(2) Relief desired after trial in jury cases, heretofore sought by reserved motions for directed verdict or motions for judgment *non obstante veredicto*, for judgments notwithstanding the verdict, in arrest of judgment or for new trial, must be sought in a single post-trial motion. . . . The post-trial motion must contain the points relied upon, particularly specifying the grounds in support thereof, and must state the relief desired. . . .

(3) Post-trial motions must be filed within 30 days after the entry of judgment. . . .

(4) A post-trial motion filed in apt time stays execution on the judgment.

8. *Id.* §68.3 provides, *inter alia*:

(1) In all cases tried without a jury, any party may, within 30 days after the entry of the decree or judgment or within any further time the court may allow within the 30 days or any extensions thereof, file a motion for a rehearing, or a retrial, or modification of the decree or judgment or to vacate the decree or judgment or for other relief.

(2) A motion filed in apt time stays execution on the judgment.

9. *Id.* §68.1(2). The term judgment *non obstante veredicto* at common law always designated a plaintiff's motion based on the pleadings and was determined by an examination thereof. After the introduction of the statutory judgment notwithstanding the verdict, the two terms were used indiscriminately. *Malewski v. Mackiewich*, 282 Ill.App. 593 (1st Dist. 1935). At common law it was available only to the plaintiff. *Farmer v. Alton Bldg. & Loan Ass'n.*, 294 Ill.App. 206, 13 N.E.2d 652 (4th Dist. 1938).

10. A motion for judgment notwithstanding the verdict, on the other hand, raises the same questions of law as a directed verdict. The issue is whether all the evidence, when viewed most favorably to the opponent, so overwhelmingly favors the movant that no verdict based upon the evidence could ever stand. *Pedrick v. Peoria & E. R.R.*, 37 Ill.2d 494, 229 N.E.2d 504 (1967).

11. A motion for arrest of judgment is a request to stay the judgment, for some intrinsic matter appearing on the face of the record, which would render the judgment erroneous or reversible. *Scott v. Freeport Cas. Co.*, 392 Ill. 332, 64 N.E.2d 542 (1945).

12. A motion for a new trial allows the trial judge to correct errors that might have occurred during the course of the trial. *Magnani v. Trogi*, 70 Ill.App. 2d 216, 218 N.E.2d 21 (2d Dist. 1966). Whether a motion for a new trial will be granted is discretionary with the trial judge and will be reversed only upon a showing of abuse of discretion. *Dobson v. Rosencranz*, 81 Ill.App.2d 439, 226 N.E.2d 196 (2d Dist. 1967).

13. ILL. REV. STAT. ch. 110, §50(5) (1975) provides:

The court may in its discretion, before final order, judgment or decree, set aside

cated. Motions to vacate under section 50(5) are derived from the common law court's inherent power to vacate or set aside its own judgments while it has jurisdiction of the case.¹⁴

Unfortunately, the courts have often failed to distinguish between the two post-trial remedies: (1) post-trial motions pursuant to sections 68.1 and 68.3, and (2) motions to vacate final judgments pursuant to section 50(5).¹⁵ The practitioner, however, must be aware of the exact time and procedural limitations to be followed, in order to avoid foreclosing both trial court and appellate court jurisdiction.¹⁶

Section 68.1 prescribes the post-trial procedure for jury trials,¹⁷ while section 68.3 governs motions in non-jury trials.¹⁸ Both statutes require that the practitioner file his motion within thirty days after entry of judgment or an extension thereof.¹⁹ Furthermore, a timely post-trial motion under either section tolls the time for appeal and stays execution

any default, and may on motion filed within 30 days after entry thereof set aside any final order, judgment or decree upon any terms and conditions that shall be reasonable.

14. *Trogan v. Marquette Nat'l Bank*, 88 Ill.App.2d 428, 232 N.E.2d 160 (1st Dist. 1967); *Charles Ford & Assoc. v. Goldberg*, 7 Ill.App.2d 241, 129 N.E.2d 337 (1st Dist. 1955).

15. For purposes of this Comment, post-trial motions shall refer only to motions pursuant to sections 68.1 and 68.3 of the Civil Practice Act, whereas post-judgment motions shall refer to motions made pursuant to sections 50(5), 68.1, and 68.3. Motions to vacate shall refer only to a motion pursuant to section 50(5), although it is possible to make a motion to vacate a judgment under section 68.3 in non-jury trials.

Post-trial motions provide a broad base for relief in that examination of pleadings and the evidence may be sought. Moreover, post-trial motions may demand alternate forms of relief, or condition the relief upon the denial of some other relief sought in preference thereto. ILL. REV. STAT. ch. 110, §68.1(2) (1975). Motions to vacate, however, merely set aside judgments when there are defects apparent on the face of the record.

16. It is well settled that for a period of thirty days the trial court retains jurisdiction to set aside its orders. ILL. REV. STAT. ch. 110, §§50(5), 68.1(3), 68.3(1) (1975); *Fox v. Department of Revenue*, 40 Ill.2d 442, 240 N.E.2d 621 (1968); *People v. McCloskey*, 2 Ill.App.3d 892, 274 N.E.2d 358 (2d Dist. 1971). Trial court jurisdiction is foreclosed when thirty days, or an extension thereof, pass without filing a post-judgment motion. *Fox v. Department of Revenue*, 34 Ill.2d 358, 215 N.E.2d 271 (1966); *Brockmeyer v. Duncan*, 18 Ill.2d 502, 165 N.E.2d 294 (1960). Jurisdiction is also ended when a notice of appeal is filed within thirty days, *City of Chicago v. Myers*, 37 Ill.2d 470, 227 N.E.2d 760 (1967), and when a notice of appeal is filed by the only party having a post-judgment motion pending. *Corwim v. Rheims*, 390 Ill. 205, 61 N.E.2d 40 (1945).

Appellate court jurisdiction attaches when a notice of appeal is filed within thirty days after the entry of final judgment or within thirty days after the entry of an order disposing of a post-judgment motion. ILL. REV. STAT. ch. 110A, §303(a) (1975). Extensions of time may be granted in certain circumstances. *Id.* §303(e).

17. See note 7 *supra* for text of statute.

18. See note 8 *supra* for text of statute.

19. ILL. REV. STAT. ch. 110, §§68.1(3), 68.3(1) (1975).

on the judgment.²⁰

The two post-trial motion sections also contain significant differences. For example, in jury trials a post-trial motion pursuant to section 68.1 must particularly specify the grounds in support thereof, and it must state the relief desired.²¹ This is very important since on appeal the practitioner may not argue any point not specifically contained in the post-trial motion.²² In non-jury trials, however, neither the filing of a post-trial motion pursuant to section 68.3 nor the failure to file such a motion limits the scope of review.²³

The fundamental requirement of both sections 68.1 and 68.3 is that all relief desired after trial must be consolidated into a single post-trial motion.²⁴ There is no further language in either section, or in the Illinois Supreme Court Rules, that provides for a second post-trial motion. Thus, it would appear that the filing of a post-trial motion would preclude any subsequent post-judgment relief. Indeed, early judicial interpretation of both post-trial motion sections strictly adhered to the single post-trial motion rule.²⁵ Moreover, the courts examined the effect of permitting successive post-trial motions and warned that there would never be finality to trial court jurisdiction if such motions were permitted.²⁶ The result was that all successive post-trial motions filed beyond the thirty-day limit did not extend the jurisdiction of the trial court and were ruled untimely.

After a series of challenges, the Illinois Supreme Court ruled that subsequent post-trial motions regarded as supplemental or amendatory may be allowed at the discretion of the trial court.²⁷ The policy of per-

20. *Id.* §§68.1(4), 68.3(2).

21. *Id.* §68.1(2).

22. ILL. REV. STAT. ch. 110A, §366(b)(2)(iii) (1975).

23. *Id.* §366(b)(3)(ii).

24. ILL. REV. STAT. ch. 110, §68.1(2) (1975). Although section 68.3 does not have an explicit single post-trial motion provision, it is recognized that section 68.3 contemplates only one such motion as a parallel to the single post-trial motion rule provided for in jury cases by section 68.1. *In re Estate of Schwartz*, 63 Ill.App.2d 456, 212 N.E.2d 329 (1st Dist. 1965). The court has denied a second post-trial motion pursuant to section 68.3 and held that the time for appeal could not be extended by the filing of successive 68.3 motions. *Weaver v. Bolton*, 61 Ill.App.2d 98, 209 N.E.2d 5 (2d Dist. 1965). This case typifies the failure of earlier courts to distinguish between motions to vacate and post-trial motions. Although the court was unclear as to the actual post-judgment relief sought, a fair reading of the case indicates the refusal of the court to allow successive post-judgment motions of any kind.

25. *In re Estate of Schwartz*, 63 Ill.App.2d 456, 212 N.E.2d 329 (1st Dist. 1965).

26. *Id.*

27. *City of Chicago v. Greene*, 47 Ill.2d 30, 264 N.E.2d 163 (1970), *cert. denied*, 402 U.S. 996 (1971). Although *Greene* was a criminal case, the Supreme Court relied on two civil

mitting supplemental amendments only at the discretion of the trial judge appears too restrictive and arbitrary. A better policy would give the practitioner the *right* to file supplemental amendments within the time for filing the original motion or before a hearing on the motion. In this way all practitioners would have an equal opportunity to attack the judgment of the trial court.

Presently, section 50(5) of the Civil Practice Act explicitly grants the practitioner the right to file a motion to vacate any final judgment within thirty days on any terms that are reasonable.²⁸ The guidelines for considering such motions are based upon the common law principles of right and wrong, prevention of injury, and furtherance of justice.²⁹ Since the granting of this motion is discretionary, the trial court's ruling will be reversed only if justice has not been served or if there was an abuse of discretion.³⁰

Despite its primary use as a means of setting aside default judgments, the language of section 50(5) makes it clear that the section may be used to set aside *any* order, judgment, or decree. However, it is well settled that the practitioner may file only one motion to vacate pursuant to section 50(5).³¹ The filing of a timely motion, however, does not give rise to the right to file successive motions to vacate within the same thirty-day period in order to extend jurisdiction.³² Finally, filing a motion to vacate after a jury trial may not lay the foundation necessary to maintain an appeal.³³ Therefore, while section 50(5) may be used to set

cases as precedent for allowing supplemental or amendatory post-trial motions. The court allowed new issues that were not raised in the previous post-trial motion. *See also* Thomas v. Rossetter, 339 Ill.App. 647, 91 N.E.2d 155 (1st Dist. 1950) (addition to motion for new trial on ground that verdict was the result of passion and prejudice and was excessive).

28. *See* note 13 *supra* for text of statute.

29. *Kehrer v. Kehrer*, 28 Ill.App.2d 296, 171 N.E.2d 239 (4th Dist. 1960); *Widicus v. Southwestern Elec. Coop., Inc.*, 26 Ill.App.2d 102, 167 N.E.2d 799 (4th Dist. 1960).

30. *Engelke v. Moutell*, 20 Ill.App.3d 253, 313 N.E.2d 613 (5th Dist. 1974) (the court found that justice was not served where lower court, on its own motion, entered a default judgment against the defendant and held a default hearing without properly notifying the defendant); *Meneghan v. Calumet Dev. Corp.*, 19 Ill.App.3d 997, 313 N.E.2d 279 (1st Dist. 1974) (abuse of discretion did not lie where the trial court denied a motion to vacate based, in part, on the plaintiff's oral offer of new evidence to support the motion).

31. *Deckard v. Joiner*, 44 Ill.2d 412, 255 N.E.2d 900 (1970); *Weaver v. Bolton*, 61 Ill.App.2d 98, 209 N.E.2d 5 (2d Dist. 1965).

32. *Deckard v. Joiner*, 44 Ill.2d 412, 255 N.E.2d 900 (1970). The court stated that the filing of successive motions to vacate is not only improper, but that such motions may not be used to extend trial court jurisdiction and toll the time for appeal.

33. *See* ILL. REV. STAT. ch. 110A, §366(b)(2)(iii) (1975); *Beanland v. Sweitzer*, 21 Ill. App.3d 121, 314 N.E.2d 736 (5th Dist. 1974); *People v. Amore*, 293 Ill.App.505, 13 N.E.2d 105, *aff'd*, 369 Ill. 245, 16 N.E.2d 720 (1st Dist. 1938).

aside final judgments, its limited effect on the trial court's jurisdiction makes it impracticable in many cases. For this reason, lawyers always have favored making post-trial motions rather than motions to vacate.

The distinction between a section 50(5) motion to vacate and other post-trial motions, however, is crucial. While the scope of post-trial motions is limited to those listed in sections 68.1 and 68.3,³⁴ motions to vacate, pursuant to section 50(5) may be used to set aside any final judgment of the court, including an order denying a post-trial motion. This distinction is significant since it apparently allows the practitioner to circumvent the single post-trial motion rule. In the past, failure of the courts to adequately distinguish a section 50(5) motion to vacate from other post-trial motions deprived the practitioner of the benefits flowing from the court's common law right to set aside its own judgments.³⁵ This failure suppressed the use of a very effective tool for maximizing trial court jurisdiction and moving the court to reconsider its decision.

In *Fultz v. Haugin*,³⁶ however, an attempt was made to distinguish properly a section 50(5) motion to vacate from post-trial motions pursuant to sections 68.1 and 68.3. In *Fultz*, Justice Ryan outlined three options available to a party whose post-trial motion was denied.³⁷ The first option was to file a notice of appeal.³⁸ Second, a party could file a motion pursuant to section 50(5) attacking the order denying the section 68.3 post-trial motion. Third, a party could obtain an extension of time within which to file the section 50(5) motion.³⁹ This decision clearly expanded the rule of earlier cases that strictly adhered to the single post-trial motion rule, but it did not go so far as to reject their specific holdings. Nevertheless, in *Fultz*, the supreme court clearly indicated that the trial court could be given a second opportunity to reconsider its original judgment.⁴⁰ This view is in accord with the belief widely held at common law that a court should always have the power to vacate or

34. See notes 9-11 *supra*.

35. By moving the trial court to reconsider its judgment, the practitioner conserves time and money. The cost of pursuing an appeal in a higher court is far greater than the cost of appearing once again in the trial court. Moreover, the delay imposed by taking an appeal is much greater than the time needed to file and argue a motion to vacate.

36. 49 Ill.2d 131, 273 N.E.2d 403 (1971).

37. *Id.* at 135. Although *Fultz* deals with a section 68.3 post-trial motion, it is clear that the options outlined in *Fultz* also apply to section 68.1 motions. See *Bernitt v. Brown*, 16 Ill.App.3d 774, 306 N.E.2d 513 (1st Dist. 1973). See also note 24 *supra*.

38. *Id.* The trial court loses jurisdiction over the case upon the filing of a notice of appeal. See note 16 *supra*.

39. 49 Ill.2d at 135.

40. See *Bernitt v. Brown*, 16 Ill.App.3d 774, 306 N.E.2d 513 (1st Dist. 1973).

set aside its own judgments.⁴¹

In spite of the earlier confusing judicial interpretation of the Civil Practice Act, a reliable structure for obtaining relief after judgment within thirty days may now be delineated. The practitioner should consider which of the following two alternatives would best serve his client's interests. First, the practitioner can file a post-trial motion pursuant to section 68.1 or 68.3. Only one such motion attacking the trial court's original decision may be considered.⁴² The filing of such a motion, however, stays execution on the judgment and tolls the time for appeal.⁴³ Subsequent post-trial motions regarded as supplemental or amendatory may be allowed in the discretion of the trial court.⁴⁴ If the post-trial motion is denied, the practitioner still has the option of filing a section 50(5) motion to vacate the denial within thirty days or an extension thereof.⁴⁵ Although directed at the court's order denying the section 68.1 or 68.3 post-trial motion, the motion to vacate ultimately attacks the trial court's original final judgment.⁴⁶

The second alternative is for the practitioner to attempt to set aside the trial court's judgment by filing a motion to vacate pursuant to section 50(5). However, like the single post-trial motion rule, successive motions to vacate pursuant to section 50(5) will not be considered by the trial court.⁴⁷ Also, in jury trials, the filing of a motion to vacate may not lay the proper foundation for an appeal.⁴⁸ Thus, aside from vacating default judgments, it is apparent that a section 50(5) motion is most effective only when used to attack the trial court's denial of a previous post-trial motion.

These alternatives are sufficient in scope and logical in analysis. Consolidation of all requests for post-trial relief into a single motion serves the purposes to be obtained by post-trial practice.⁴⁹ Because these purposes are served by supplemental or amendatory post-trial motions, the single post-trial motion rule does not appear too harsh or restrictive.

41. See cases cited in note 14 *supra*.

42. *Deckard v. Joiner*, 44 Ill.2d 412, 255 N.E.2d 900 (1970); *In re Estate of Schwartz*, 63 Ill.App.2d 456, 212 N.E.2d 329 (1st Dist. 1965).

43. ILL. REV. STAT. ch. 110, §§68.1(4), 68.3(2) (1975).

44. *City of Chicago v. Greene*, 47 Ill.2d 30, 264 N.E.2d 163 (1970).

45. *Fultz v. Haugan*, 49 Ill.2d 131, 273 N.E.2d 403 (1971).

46. *Bernitt v. Brown*, 16 Ill.App.3d 774, 306 N.E.2d 513 (1st Dist. 1973). The court stated that if the section 50(5) motion to vacate was to be successful, and the order denying the section 68.1 post-trial motion was vacated, the trial court would necessarily proceed to vacate the judgment; otherwise, the section 50(5) motion would be futile.

47. *Weaver v. Bolton*, 61 Ill.App.2d 98, 209 N.E.2d 5 (2d Dist. 1965).

48. See note 33 *supra*.

49. See note 35 *supra*.

Sound legislation has preserved the essential common law principles of these post-judgment motions. Furthermore, the courts, despite occasionally confusing the section 50(5) motion to vacate with other post-trial motions, have strictly interpreted the common law jurisdiction of the trial court for review and reconsideration of its actions. Case law emphasizes the need for complete jurisdiction of the trial court and also the need for a procedurally expedient framework within which to attack the final judgment. Both goals are certainly desirable, and it is reassuring to observe the courts moving in that direction.

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