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I. INTRODUCTION

The authors of this Article have reviewed significant developments in Illinois civil procedure during the approximate period from June 1988 through June 1989. In some sense, virtually every

case decided, every statute enacted and every rule promulgated affects practice and procedure. Given the limitations of time and space, no treatment of this nature could be exhaustive, and this one is not intended to be. Moreover, it is to be recognized that the selection of cases, rules and statutes, as well as the lessons to be drawn from them, are to some extent subjective and that no two authors would be likely to make the same choices or to emphasize the same aspects of the material. We have used our best judgment to select and discuss the developments we believe will most affect, and most assist, the practitioner who litigates in the courts of the State of Illinois.

Civil procedure was not revised systematically during this *Survey* period. There were no comprehensive statutory reenactments, wholesale revisions of rules or all-encompassing judicial decisions. Changes are interstitial, and of varying importance, and as a result, description of them may seem episodic. Although we have tried to make the discussion self-contained, we probably have assumed at least some background knowledge by the reader, to whom we hope we are rendering a service.

II. INTERPLAY OF THE CODE AND RULES: SECTIONS 2-611 AND 2-611.1 AND NEW RULES 137 AND 375

A. Introduction and Background

Perhaps the most dramatic development of the *Survey* period was the Illinois Supreme Court's adoption of Rules 137[1] and 375[2] that provide, respectively, for the imposition of sanctions upon parties in the state's trial and reviewing courts for frivolous actions, i.e., those not reasonably grounded in fact or warranted by law, and those interposed for an improper purpose. These rules became effective August 1, 1989.

Rule 137 supersedes section 2-611 of the Code.[3] As described below, Rule 137 repeats the language of section 2-611 with three significant changes.[4] One obvious purpose of adopting the Rule

1. ILL. S. CT. R. 137, 1989 Ill. Legis. Serv. No. 2, appendix (West) (effective August 1, 1989).

2. *Id.* para. 375.

3. ILL. REV. STAT. ch. 110, para. 2-611 (1987). *See* ILL. S. CT. R. 137, 1989 Ill. Legis. Serv. No. 2, appendix (West) (committee comments). The Illinois Code of Civil Procedure, chapter 110 of the Illinois Revised Statutes, is referred to hereinafter as both the "Code" and the "Code of Civil Procedure."

4. Section 2-611 remains on the statute book, but is of no effect and should be repealed. The Illinois Supreme Court has held that when a statute and court rule governing procedure conflict, the rule takes precedence. People v. Cox, 82 Ill. 2d 268, 274,

was to effectuate these changes. Another possible purpose is that the court may have believed section 2-611 to be unconstitutional. The court may have viewed section 2-611 as an impermissible legislative attempt to regulate the practice of law, a field that the court considers within its exclusive province.[5]

The General Assembly adopted section 2-611 in its present form in 1984 as part of the Tort Reform Act.[6] Medical and insurance groups had advocated vigorously the Act's adoption to reduce frivolous litigation.[7] Some members of plaintiffs' bar viewed these efforts as an attempt to curtail all litigation, frivolous or not. The Act adopted almost verbatim the language of Federal Rule of Civil Procedure 11[8] and was intended to incorporate the federal courts' interpretations of that Rule.[9]

Capsulizing a great deal of complicated law into one sentence, Rule 11 and section 2-611 were intended to impose sanctions upon both the litigant and the attorney who filed a pleading or other document that was (1) not reasonably grounded in fact, (2) not warranted in law or (3) imposed for an improper purpose. Each one of these three prongs has become almost talismanic. Merely cataloguing conduct, however, does not alert the bar to sanctionable conduct; indeed, great differences among the federal judges in applying the statute have been noted and strongly criticized.[10] The

412 N.E.2d 541, 545 (1980). For an anomalous decision by a downstate appellate court, see Woerner v. Seneca Petroleum, Inc., 175 Ill. App. 3d 329, 529 N.E.2d 660 (3d Dist. 1988), which decided that the ability of corporations to handle small claims *pro se* was governed by section 2-614 of the Code, rather than by the conflicting provisions of Illinois Supreme Court Rule 282(b), because the statute was enacted first. *Id.* at 331, 529 N.E.2d at 662. On the specific subject, *see* Burr and Price, *A Brief Note About A Small Claim*, ILL. B.J., April, 1988, at 414.

5. *E.g.*, Lozoff v. Shore Heights, Ltd., 66 Ill. 2d 398, 401, 362 N.E.2d 1047, 1048 (1977) ("It is for this court to determine who shall be permitted to practice law in Illinois.")

6. An "Act in Relation to the Insurance Crises," 1984 Ill. Laws, P.A. 84-1431 (effective November 25, 1986) (codified at scattered sections of ILL. REV. STAT.).

7. Section 2-611.1 was adopted at the urging of medical and insurance interests for medical malpractice cases arising prior to the adoption of the current section 2-6ll. It contains provisions substantially similar to those contained in section 2-611 prior to its amendment to its current form in 1986. The section, if it was ever used, fell into disuse with the enactment of present section 2-611. Although it is not specifically covered by the committee comments to Rule 137, it would appear that it, too, is superseded by Rule 137, that it is not viable law and that it is ripe for repeal.

8. FED. R. CIV. P. 11.

9. *See, e.g.*, Chicago Title & Trust Co. v. Anderson, 177 Ill. App. 3d 615, 621-22, 532 N.E.2d 595, 599 (1st Dist. 1988); Joseph, *Rule 11 Makes Its Mark in Illinois*, CBA Record, Nóv. 1988, at 23.

10. The federal rule has been criticized as fostering hostility among the bar, creating instead of reducing litigation, impairing the function of attorneys as representatives of

federal courts in the Seventh Circuit have been, and continue to be, particularly stringent in their application of Rule 11.[11]

Rule 137 makes three principal changes, two of which are very significant for the practicing bar.[12] The most important change is the substitution of the word "may" for the word "shall" with regard to the imposition of sanctions. Federal Rule 11 requires (and superseded section 2-611 required) that, once the offending conduct has been found to exist, sanctions must be imposed.[13] Rule 137 makes the imposition of sanctions discretionary. It has been said that state judges were much more reluctant to impose sanctions than federal judges, in part because the latter have lifetime appointments, whereas the former must run for re-election.[14] Rule 137 makes it easier for an Illinois judge to refrain from sanctioning parties and attorneys who may vote or campaign for or against the judge. On the whole, this change is probably for the better because sanctions should be imposed only in the exceptional case.

Another significant change is that Rule 137 requires a judge who imposes sanctions to make specific findings supporting the order. This, too, is a salutory provision that will likely discourage a judge from imposing sanctions. The imposition of sanctions reflects upon an attorney's reputation and integrity;[15] consequently, their imposition should be based on explicit findings from which a reviewing court can better determine whether error has been committed.

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their clients, providing an illegitimate device to permit judges to clear their calendars and intimidating litigants from filing meritorious claims or defenses in fear of sanctions. *See generally* Margolick, *Has the Profession's Attempt to Curb Ludicrous Litigation Boomeranged?*, The New York Times, February 11, 1988, at 13; Elson and Rothschild, *Rule 11: Objectivity and Competence*, 123 F.R.D. 361, 365 (1989) ("Another product of the sanctions explosion is the erosion of civility."); Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1018 (1988) ("The avalanche of rule 11 cases . . . carries with it the potential for increased tension among the parties and with the court. Sanction proceedings can affect personal relations, making it more difficult to conduct the litigation in a rational manner and reach accommodation.")

11. For the latest comprehensive review of the Seventh Circuit's attitude, see Mars Steel Corp. v. Continental Ill. Nat'l Bank, 880 F.2d 928 (7th Cir. 1989).

12. The third change removes special provisions in section 2-611 relating to insurance companies. ILL. S. CT. R. 137, 1989 Ill. Legis. Serv. No. 2, appendix (West) (effective August 1, 1989).

13. *E.g.*, Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1433 (7th Cir. 1987).

14. *See generally* Joseph, *supra* note 9, at 23.

15. In Hays v. Sony Corp. of Am., 847 F.2d 412, 418 (7th Cir. 1988), the court identified Rule 11 violations as a species of negligence or malpractice. *Id.* It is not out of place to remind practitioners that, when charged with a violation, the attorney's professional liability carrier should be notified.

Although Rule 137 has an effective date of August 1, 1989, the Rule does not explicitly provide for retroactive application. Thus, uncertainty as to its application has arisen. One view is that conduct prior to the effective date is governed by section 2-611 because rights established under that section of the Code are vested. Yet, sanctionable conduct that begins before the effective date but continues thereafter raises additional problems. The Rule 137 requirement of specific findings seems to be procedural, and perhaps it should apply without regard to the time at which the conduct arose. The former compulsory imposition of sanctions standard, however, would seem to militate against this conclusion.

Some cases cast doubt on the application of section 2-611 (and, for that matter, Federal Rule 11) to appeals.[16] Illinois Supreme Court Rule 375[17] may make that controversy moot because it contains separate provisions for frivolous appeals.

Problems under section 2-611 are somewhat ameliorated by new Rules 137 and 375. Practitioners, however, should not relax their guard, because they are still subject to sanctions for factually groundless, legally unwarranted or improperly interposed matters. Attorneys still must be concerned about conflicts of interest with their clients,[18] possible substantial liability, and opprobrium that may be cast upon them. As a result, an attorney might become somewhat less of an advocate, and somewhat more of a policeman, with respect to his or her clients.

B. Case Survey: Section 2-611[19]

In Re Estate of Wernick[20] was decided under the "old" section 2-611, which provided an "untrue pleading" standard as the basis

16. *E.g.*, Holcomb v. Federal Deposit Ins. Co., 180 Ill. App. 3d 840, 848-49, 536 N.E.2d 453, 458 (2d Dist. 1989).

17. ILL. S. CT. R. 375, 1989 Ill. Legis. Serv. No. 2, appendix (West) (effective August 1, 1989). The standards under Rule 375 parallel those in Rule 137 applying to the trial court.

18. *See* Joseph, *supra* note 9, at 26-27.

19. Various section 2-611 decisions were rendered during the *Survey* period. Unfortunately, many of them do not clarify whether they were decided under the original version of the statute (1982 Ill. Laws, P.A. 82-280, effective July 1, 1982) or under the current version (ILL. REV. STAT. ch. 110, para. 2-611 (1987) (amended by 1986 Ill. Laws, P.A. 84-1431, effective November 25, 1986)). The statute's original incarnation provided for the imposition of sanctions on those who filed untrue pleadings; the current statutory standard is less rigid and, as discussed previously, covers pleadings that are "after reasonable inquiry . . . [not] well grounded in fact [or] warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, [or are] interposed for any improper purpose . . . ." *Id.*

20. 127 Ill. 2d 61, 535 N.E.2d 876 (1989).

for sanctions. The trial court had declined to impose sanctions, but the appellate court reversed. The supreme court, emphasizing the penal nature of the statute, the burden on the party seeking the sanctions to support them and the inconsequential nature of the only two untrue statements in respondent's pleading, reversed the appellate court on this point.[21]

In *Chicago Title and Trust Company v. Anderson*,[22] the trial court had imposed sanctions upon a mortgagor and his attorney because of a failure to make a reasonable factual inquiry to support the denial of a default. The case was decided under the current version of section 2-611 and serves as a good research tool because it sets out the section's history as well as applicable standards.[23] Declining to apply the federal appellate standards, the court indicated that it would "adhere to Illinois precedent applying the abuse of discretion standard."[24] This case reminds attorneys that they do have an obligation to file subsequent pleadings that correct the mistake, i.e., they cannot stand silent, even though if they learn an allegation made in a pleading they have filed is false, they are not obligated to correct the pleading.

In a case applying the present version of section 2-611, *Herman v. Fitzgerald*,[25] the court decided when a section 2-611 petition may be filed. In this case, the section 2-611 petitioner had served notice within thirty days of the final judgment but had not filed within that time. The Illinois Appellate Court for the Second District found that the filing was untimely and affirmed the dismissal of the section 2-611 petition.[26] Unfortunately, the court's discussion cites cases decided under the former version of section 2-611, with that version's more rigid standards, to bolster what appears to be the correct result.[27]

Wren v. Feeney[28] resulted in an unfortunate, two to one decision that affirmed the imposition of sanctions upon plaintiff's attorney for his failure to determine that the applicable statute of limitations barred his client's cause of action in a medical malpractice case.[29]

21. *Id.* at 82, 535 N.E.2d at 889.
22. 177 Ill. App. 3d 615, 532 N.E.2d 595 (1st Dist. 1988).
23. *Id.* at 623-24, 532 N.E.2d at 600 (The standards, adopted from federal Rule 11, are objective, and require a pre-filing factual inquiry beyond an attorney's reliance on his client.)
24. *Id.* at 625, 532 N.E.2d at 601.
25. 178 Ill. App. 3d 865, 533 N.E.2d 1144 (2d Dist. 1989).
26. *Id.* at 869, 533 N.E.2d at 1147.
27. *Id.*, 533 N.E.2d at 1146.
28. 176 Ill. App. 3d 364, 531 N.E.2d 155 (3d Dist. 1988).
29. *Id.* at 365-66, 531 N.E.2d at 156.

This decision seems incorrect in principle. The dissenting judge pointed out, in vain, that the statute of limitations is an affirmative defense that a defendant may or may not raise; it does not constitute anything unreasonably grounded in the complaint for which sanctions may be imposed.[30]

In *Palmisano v. Connell*,[31] the court reaffirmed the principle that, under the current version of section 2-611, requests for sanctions may be made only in the underlying litigation.[32] The court further held that an unresolved section 2-611 petition is, in effect, an unresolved claim between the parties that prevents an appeal from an otherwise final underlying judgment.[33] The court in *In Re Marriage of Strauss*[34] followed the *Palmisano* rule by dismissing the appeal from a section 2-611 claim. The court suggested, however, that a Rule 304(a)[35] finding of "no just reason" might support an appeal on this issue when other issues remain unresolved.[36]

In *Lee v. Egan*,[37] the trial court had ruled that defendant was entitled to attorneys' fees for vexatious litigation under the former version of section 2-611. On review, the Illinois Appellate Court for the First District noted that on a prior appeal, defendant had not raised the section 2-611 issue and she had not requested a remand for the imposition of additional sanctions; consequently, the court ruled that defendant waived her right to additional sanctions.[38] This decision serves as a warning that the successful section 2-611 petitioner, when defending an award on appeal, should also request the reviewing court to remand the case for the imposition of additional costs incurred in defending an unreasonable appeal or invoke the provisions of Rule 375.[39]

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30. *Id.* at 366, 531 N.E.2d at 156 (Heiple, J., dissenting).

31. 179 Ill. App. 3d 1089, 534 N.E.2d 1243 (2d Dist.), *appeal denied*, 545 N.E.2d 115 (1989).

32. *Id.* at 1095, 534 N.E.2d at 1247.

33. *Id.* The court affirmed the trial court's 2-611 ruling on the merits because the appellant had failed to provide a sufficient record on appeal. Counsel should be aware of the possible trap involved in *Palmisano*. Should a different district court or the supreme court take the contrary position, a notice of appeal filed after resolution of the section 2-611 dispute would be untimely.

34. 183 Ill. App. 3d 424, 539 N.E.2d 808 (2d Dist. 1989).

35. ILL. S. CT. R. 304(a), ILL. REV. STAT. ch. 110A, para. 304(a) (1987) (governing discretionary appeals from orders which do not dispose of the entire proceedings). A *Survey* period amendment to Rule 304(a) is discussed *infra* notes 293-95 and accompanying text.

36. 183 Ill. App. 3d at 431, 539 N.E.2d at 813.

37. 184 Ill. App. 3d 852, 540 N.E.2d 955 (1st Dist. 1989).

38. *Id.* at 854, 540 N.E.2d at 957.

39. *See supra* note 17 and accompanying text.

The court in *Safeway Insurance Co. v. Graham*[40] held that the present version of section 2-611 would not be applied retroactively. *Mucklow v. John Marshall Law School*[41] made the same point with respect to the former version of the statute, holding that the section must be construed strictly. Further, because the statute applied only to pleadings, statements contained in a letter or those made in open court were not sanctionable.[42]

The holding in *Diamond Mortgage Corp. v. Armstrong*[43] stands for the important proposition that section 2-611 does not apply to cases in which sanctions may be imposed for abuse of discovery under Illinois Supreme Court Rule 219.[44] The decision also emphasized that the statute must be stricty construed and that a petition under the statute must allege specifically the conduct charged to be wrongful and the damages incurred. The petitioner carries the burden of proof.[45]

Because the language of Rule 137 is, with the exceptions noted, exactly the same as section 2-611 that it supersedes, the decisions interpreting section 2-611 should govern interpretation of Rule 137 as well.

III. VOLUNTARY DISMISSAL

A. Introduction

Section 2-1009 of the Illinois Code of Civil Procedure[46] permits a plaintiff, counterclaimant or third-party plaintiff to dismiss voluntarily all or part of a pending lawsuit without prejudice at any time before trial or hearing begins. Although at one time section 2-1009 had been interpreted to provide the plaintiff with an almost absolute right to dismiss, decisions in the pre-*Survey* period began to recognize exceptions.[47] During the *Survey* period, the Illinois Supreme Court decided a significant case that extended the trend to eliminate the statute's abusive use.[48] In addition, Illinois appel-

40. 188 Ill. App. 3d 608, 544 N.E.2d 1117 (1st Dist. 1989).
41. 176 Ill. App. 3d 886, 531 N.E.2d 941 (1st Dist. 1988).
42. *Id.* at 897, 531 N.E.2d at 948. The words of the statute itself do not limit liability to pleadings, but rather to all "filings." ILL. REV. STAT. ch. 110, para. 2-611 (1987).
43. 176 Ill. App. 3d 64, 530 N.E.2d 1041 (1st Dist. 1988).
44. ILL. S. CT. R. 219, ILL. REV. STAT. ch. 110A, para. 219 (1987).
45. 176 Ill. App. 3d at 71-2, 530 N.E.2d at 1041.
46. ILL. REV. STAT. ch. 110, para. 2-1009 (1987).
47. *See infra* notes 51-82 and accompanying text. The courts responded in part to vigorous criticism—largely by the defense bar—that the section was being abused.
48. Gibellina v. Handley, 127 Ill. 2d 122, 535 N.E.2d 858 (1989), discussed *infra* notes 51-59 and accompanying text.

late courts defined the scope of the meaning "before trial" within section 2-1009[49] and, in certain circumstances, refused reinstatement after voluntary dismissal.[50]

B. Effect of Pending Defense Motion

In *Gibellina v. Handley*,[51] the Illinois Supreme Court announced a new rule that limits a plaintiff's right to dismiss his case voluntarily. A trial court may now hear and decide a potentially dispositive motion filed by a defendant prior to the filing by a plaintiff of a section 2-1009 motion, when defendant's motion, if favorably ruled upon by the court, could result in final disposition of the case.

Gibellina involved the consolidation of three cases[52] with the following common procedural history. In each case, plaintiff filed a motion for voluntary dismissal after defendant had filed a motion for summary judgment, but before the court had ruled upon the motion. In each case, the trial court granted the defendant's summary judgment motion and denied the plaintiff's motion for voluntary dismissal. The appellate court reversed in each instance, holding that the trial court had no discretion to hear and decide summary judgment motions before granting motions for voluntary dismissal.[53] The supreme court affirmed.

In so doing, the court noted that plaintiffs were flooding the courts with abusive section 2-1009 motions to delay and avoid adverse rulings. Consequently, the court announced the new rule for prospective application only.[54] The court reasoned that retroactive application would have imposed an unfair burden on the present litigants.[55] The court admonished the legislature[56] for its failure to

49. Cummings v. Simmons, 167 Ill. App. 3d 544, 521 N.E.2d 634 (4th Dist. 1988), discussed *infra* notes 61-66 and accompanying text.

50. Johnson v. Sumner, 172 Ill. App. 3d 70, 526 N.E.2d 690 (3d Dist. 1988), discussed *infra* notes 67-78 and accompanying text.

51. 127 Ill. 2d at 137-38, 535 N.E.2d at 866.

52. Gibellina v. Handley, 158 Ill. App. 3d 866, 511 N.E.2d 884 (2d Dist. 1987); Schmitt v. Motorola, Inc., 160 Ill. App. 3d 1059, 513 N.E.2d 1069 (1st Dist. 1987); Ware v. Jabaay, 161 Ill. App. 3d 1160, 526 N.E.2d 1148 (2d Dist. 1987) (unpublished order under Illinois Supreme Court Rule 23).

53. 127 Ill. 2d at 125, 535 N.E.2d at 860. Although each case involved the plaintiff's dilatory conduct in disclosing trial experts as required by Illinois Supreme Court Rule 220, ILL. REV. STAT. ch. 110A, para. 220 (1987), the egregiousness of each plaintiff's conduct varied. Nevertheless, each plaintiff had been barred from presenting expert testimony at trial, and each court had granted summary judgment based upon the respective plaintiff's inability to prove some element of his case absent expert testimony. *Id.*

54. *Id.* at 137-38, 535 N.E.2d at 866. The change was prospective because it constituted a clear departure from prior precedent on this issue.

55. *Id.* The court declined defendants-appellants' invitation to displace section 2-1009 completely by adopting the voluntary dismissal provision of the Federal Rules of

act to curb perceived section 2-1009 abuses, and asserted its own authority to manage the courts.[57]

The announced change substantially modifies the historical priority given section 2-1009 motions over dispositive defense motions. Before deciding the section 2-1009 motion, a trial court may now decide all defense motions filed prior to the section 2-1009 motion that may dispose of one or more causes of action.[58] Because a trial court has discretion as to which motion it will hear first, the defendant's right to have a potentially dispositive motion heard before the section 2-1009 motion is limited. The *Gibellina* court suggested, however, that this discretion may be limited to instances in which the defense motion is without merit.[59] The suggestion seems problematical because it is quite likely that if a defense motion has no merit, in most cases plaintiff would have no incentive to dismiss.

Plaintiffs' attorneys cannot risk an adverse ruling that would dispose of their clients' case on the merits. This change in the law, therefore, makes it extremely important to respond promptly to summary judgment motions and other motions that may dispose the case. It also necessitates a prompt and thorough investigation of each case as quickly as possible. Plaintiff no longer has an unrestrained option of voluntary dismissal as a means of obtaining more time to complete additional discovery, locate experts or prepare affidavits in response to motions for summary judgment.

C. When Does Trial Commence?

Section 2-1009 grants to plaintiff the right to dismiss its case voluntarily only "before trial or hearing begins."[60] In *Cummings v.*

Civil Procedure. FED. R. CIV. P. 41(a). The federal rule permits a plaintiff to take a voluntary dismissal as of right only before the defendant files an answer or motion for summary judgment. *Id.*

56. *See* Kahle v. John Deere Co., 104 Ill. 2d 302, 472 N.E.2d 787 (1984), in which the court also noted the abusive utilization of section 2-1009 and suggested that the legislature amend the statute to prevent such abuse. *Id.* at 310-11, 472 N.E.2d at 791 (Ryan, J., concurring). In *Kahle*, the supreme court affirmed an order granting the plaintiff's motion for voluntary dismissal that had been filed after the trial court had ruled on various motions *in limine* on the date set for trial. The court held that arguments and rulings on pretrial motions did not constitute the commencement of trial. *Id.* at 310, 472 N.E.2d at 790. Thus, the plaintiff's statutory right to dismiss voluntarily could not be denied in this instance. *Id.* The subject of "when trial commences" for purposes of voluntary dismissal analysis is further discussed *infra* notes 60-66 and accompanying text.

57. *Gibellina*, 127 Ill. 2d at 136-37, 535 N.E.2d at 866.

58. *Id.* at 137-38, 535 N.E.2d at 866.

59. *Id.* at 138, 535 N.E.2d at 866.

60. ILL. REV. STAT. ch. 110, para. 2-1009 (1987).

Simmons,[61] the Illinois Court for the Fourth District addressed the issue of when a trial has begun for purposes of section 2-1009 analysis. Four jurors had been sworn in after having been examined by the court and the attorneys for the parties. The trial court then recessed until the following day. On the following day, plaintiff moved for and was granted a voluntary dismissal of his entire case before further jury examination began.[62] Defendant appealed, contending that the swearing in of four jurors constituted the commencement of trial. The court agreed and reversed.[63] Admitting that the question of whether four jurors constituted "a jury" for purposes of section 2-1009 analysis was one of first impression in Illinois, the court relied upon *Kahle v. John Deere Co.*[64] to avoid reaching the issue of whether a jury existed. The court stated that the *Kahle* rationale required a conclusion that trial begins as soon as any prospective jurors are examined.[65] Practical considerations mandated this ruling. If the court had reached the opposite result, the potential for abuse would have approached the same magnitude as under pre-Code law.[66]

D. Reinstatement After Dismissal

In *Johnson v. Sumner*,[67] the third district held that a trial court has no jurisdiction to reinstate, pursuant to section 2-1203(a),[68] counts of a complaint previously voluntarily dismissed, unless the plaintiff had also sought and obtained leave to set aside the dismissal at the time of its entry. *Sumner* was a medical malpractice case brought against two physicians and a hospital. Plaintiff's appeal of the summary judgment entered in favor of the hospital was pending. Although no leave to reinstate had been requested, the day after plaintiff voluntarily dismissed all counts against the doctors, he successfully petitioned the court to vacate the dismissal and re-

61. 167 Ill. App. 3d 544, 521 N.E.2d 634 (4th Dist. 1988).

62. *Id.* at 546, 521 N.E.2d at 635.

63. *Id.* at 549, 521 N.E.2d at 637.

64. 104 Ill. 2d 302, 472 N.E.2d 787 (1984), discussed *supra* at note 56.

65. *Cummings*, 167 Ill. App. 3d at 548, 521 N.E.2d at 637. In *Kahle*, the court stated "no jury had been selected; no propspective jurors had been sworn; and counsel had made no opening statement. Under the law in effect in this state, trial had not begun." *Kahle*, 104 Ill. 2d at 309, 472 N.E.2d at 790.

66. At common law, a plaintiff was permitted to take a non-suit at any time prior to the entry of a decision by the judge or the jury. *See Kahle*, 104 Ill. 2d at 307, 472 N.E.2d at 789.

67. 172 Ill. App. 3d 70, 526 N.E.2d 690 (3d Dist. 1988).

68. ILL. REV. STAT. ch. 110, para. 2-1203(a) (1987). The statute provides that a party may petition a court to modify or vacate a judgment within thirty days after its entry.

instate the counts against the doctors.[69]

The appellate court reversed, relying on one[70] of a line of Illinois cases applying the "*Weisguth* rule,"[71] in which the Illinois Supreme Court stated that although a court may set aside an involuntary dismissal and reinstate the cause, it has no power to do so following voluntary dismissal unless, at the time of the dismissal, plaintiff seeks and obtains leave to reinstate at a later time.[72] The modern authority for the *Weisguth* rule is *Bettenhausen v. Guenther*.[73]

Justice Stouder, in his concurring opinion in *Johnson v. Sumner*,[74] sees weaknesses in the *Weisguth* opinion, and in *Bettenhausen*'s reliance upon *Weisguth*. First, the voluntary dismissal in *Weisguth* was sought after the conclusion of the plaintiff's case-in-chief at trial. The present statute[75] would preclude voluntary dismissal under these circumstances.[76] Second, the *Weisguth* court offered no discussion of why personal jurisdiction over parties should be lost after voluntary, but not after involuntary, dismissal.[77] Third, the decision lacked a much-needed discussion of the courts' unqualified authority to deal with their judgments for thirty days following entry.[78]

Modern courts' reliance on the *Weisguth* rule may be unsupportable and should be reexamined, especially in view of its recurring significance to practitioners. Not infrequently, cases are settled just prior to a scheduled pre-trial or trial date. Although a settlement may have been agreed upon, it is often not consummated prior to the court date. Unwary plaintiffs' attorneys, in an effort to avoid the time and expense of an additional court appearance, may

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69. *Johnson*, 172 Ill. App. 3d at 71, 526 N.E.2d at 691.

70. Herman v. Swisher, 115 Ill. App. 3d 179, 450 N.E.2d 28 (3d Dist. 1983).

71. Weisguth v. Supreme Tribe of Ben Hur, 272 Ill. 541, 112 N.E. 350 (1916), *superseded by statute as stated in* Kalalnick v. Knoll, 97 Ill. App. 3d 660, 422 N.E.2d 1011 (1st Dist. 1981).

72. *Id.* at 543, 112 N.E. at 351. The court expressed the following reason for the *Weisguth* rule:

> If a plaintiff by his deliberate and voluntary acts secures the dismissal of his suit, he must be held to have anticipated the effect and necessary results of his action, and should not be restored to the position and rights which he voluntarily abandoned. Having taken a non-suit, his only recourse is to begin his action anew.

Id. Cases citing the Weisguth rule are noted in Johnson v. United Nat'l Indus. Inc., 126 Ill. App. 3d 181, 466 N.E.2d 1177 (1st Dist. 1984).

73. 388 Ill. 487, 58 N.E.2d 550 (1944).

74. 172 Ill. App. 3d 70, 526 N.E.2d 690 (3d Dist. 1988) (Stouder, J. concurring).

75. ILL. REV. STAT. ch. 110, para. 2-1009 (1987).

76. *Johnson*, 172 Ill. App. 3d at 73, 526 N.E.2d at 692 (Stouder, J., concurring).

77. *Id.*

78. *Id.*

voluntarily dismiss the case on the court date based upon their settlement expectations. Any order so obtained must expressly provide that the court retains jurisdiction over the case, or that the plaintiff is given leave to move to vacate the order and have the cause reinstated. Otherwise, under present law if the settlement agreement is not consummated, the plaintiff's only recourse is to refile.

IV. REFILING AFTER INVOLUNTARY DISMISSAL

A. Introduction

Essentially, Section 13-217 of the Illinois Code of Civil Procedure[79] permits an action upon which the statute of limitations has run to be refiled within one year after it is voluntarily dismissed, involuntarily dismissed for want of prosecution, or involuntarily dismissed by a federal court for lack of jurisdiction.[80] This fallback protection generates the perceived abuse of the statutory right to dismiss voluntarily,[81] which Illinois courts are now curtailing.[82] The courts, however, have not similarly curtailed the utilization of section 13-217 to refile involuntarily-dismissed suits.

B. Dismissal by Federal Court

In *Suslick v. Rothschild Securities Corp.*,[83] the Illinois Supreme Court addressed the provision of section 13-217 that permits refiling within one year following dismissal by a federal district court for lack of jurisdiction. The court held that the one-year period runs from the date of dismissal, not from the date of the reviewing court's affirmance.[84]

Plaintiff first filed suit in the Northern District of Illinois in May 1980 ("the 1980 case"), in which she alleged that the defendants' trading of various stock options, on behalf of her late husband, violated federal securities laws. The court granted the defendants' motion to dismiss on the grounds that the action was barred by the applicable three-year limitations period.[85] In May 1981, plaintiff filed a second complaint in district court ("the 1981 case") based

79. ILL. REV. STAT. ch. 110, para. 13-217 (1987).
80. *See id.*
81. *Id.* para. 2-1009.
82. *See e.g., supra* notes 51-78 and accompanying text.
83. 128 Ill. 2d 314, 538 N.E.2d 553 (1989).
84. *Id.* at 320-21, 538 N.E.2d at 556.
85. *Id.* at 316, 538 N.E.2d at 554. The district court found that, there being no applicable federal statute of limitations in this case, section 13(d) of the Illinois Securities Law of 1953 applied. *Id.* (citing ILL. REV. STAT. ch. 121-1/2, para. 137.13(D) (1977)).

upon the same factual allegations made in the 1980 case.[86] The court dismissed the 1981 case on the same grounds as the 1980 case, this time without prejudice and with leave to amend.[87]

Plaintiff filed an amended complaint in June 1982, adding a count based on common law fraud. The district court dismissed the amended complaint on December 30, 1982 because the federal securities law claims were time-barred, and thus the court lacked subject matter jurisdiction to retain the pendent state fraud claim. The court denied plaintiff's motion for reconsideration and the Court of Appeals for the Seventh Circuit affirmed.[88]

A week after the court dismissed the amended complaint, plaintiff filed another complaint based on common law fraud in the Circuit Court of Cook County, Illinois ("the 1982 case").[89] The circuit court dismissed this case on two grounds: (1) the complaint was not timely served, as required by Illinois Supreme Court Rule 103(b),[90] and (2) section 2-619(a)(3)[91] barred the action because the 1981 case involving the same subject matter was pending between the parties in the Seventh Circuit.[92]

Plaintiff refiled the present action in the circuit court in November 1984 based upon the same facts and legal grounds as the 1982 action. On defendants' motion, the court dismissed the complaint as barred by the applicable five-year limitations period. The appellate court reversed, holding that section 13-217 tolled the limitations period to permit the timely filing of the present action on either of two bases. The court reasoned that plaintiff could have refiled within one year of the Seventh Circuit's affirmance (in August 1984) of the 1981 case's dismissal. Alternatively, plaintiff could have refiled within one year of the 1982 state case's dismissal (in December 1983).[93]

The Illinois Supreme Court reversed and held that section 13-217 did not save the plaintiff's action on either of the alternative

86. The 1981 case additionally alleged that defendants should be estopped to assert the limitations defense.

87. 128 Ill. 2d at 316-17, 538 N.E.2d at 554.

88. *Id.* at 318, 538 N.E.2d at 555.

89. *Id.*

90. ILL. S. CT. R. 103(b), ILL. REV. STAT. ch. 110A, para. 103(b) (1987). The court determined, apparently on the basis of an unclear record, that the dismissal was without prejudice as to Rule 103(b) grounds. 128 Ill. 2d at 318, 538 N.E.2d at 555.

91. ILL. REV. STAT. ch. 110, para. 2-619(a)(3) (1987). This section identifies various grounds upon which a defendant may seek dismissal, including the existence of another action pending between the parties for the same cause.

92. *Suslick*, 128 Ill. 2d at 318, 538 N.E.2d at 555.

93. *Id.* at 319-20, 538 N.E.2d at 555-56.

bases relied upon by the appellate court.[94] The court stated that the one-year period for refiling commences from the date of a district court's dismissal for lack of jurisdiction.[95] The date of the dismissal's affirmance does not control.[96] The court further stated that the dismissal of the 1982 case did not give rise to a right to refile under section 13-217.[97] It reasoned that, even if the dismissal had been without prejudice on the 103(b) ground, the dismissal based upon section 2-619(a)(3) constituted a dismissal with prejudice, not the type of dismissal embraced by section 13-217.[98]

Moreover, even assuming the dismissal of the 1982 case could be construed as giving rise to a right to refile, the court held that the time for refiling nevertheless had expired one year after the dismissal of the 1981 case. The court explained that only one type of section 13-217 dismissal can serve as the predicate for refiling.[99] Therefore, the dismissal of the 1981 case represented plaintiff's sole opportunity to refile.[100]

A one-year refiling provision that begins to run from the dismissal date may place the plaintiff between a rock and a hard place. *Suslick* implies that a plaintiff must choose between appealing an adverse federal jurisdictional ruling and filing a state court action. Furthermore, the decision is inconsistent as to when an action on appeal in federal court is "pending" for section 2-619(a)(3) purposes. In one part of the opinion, the court suggests that the 1981 case was not still pending at the time it was on appeal.[101] The

94. *Id.* at 321-22, 538 N.E.2d at 556.

95. *Id.* at 320, 538 N.E.2d at 556. The court considered the dismissal date of the 1981 case to be August 2, 1983, the date upon which the district court denied the plaintiff's motion for reconsideration. *Id.* at 320-21, 538 N.E.2d at 556.

96. *Id.* at 320, 538 N.E.2d at 556.

97. *Id.* at 321, 538 N.E.2d at 556.

98. *Id.*

99. *Id.* at 321-22, 538 N.E.2d at 557.

100. The court cited its 1988 decision in Gendek v. Jehangir, 119 Ill. 2d 338, 518 N.E.2d 1051 (1988), as support for the proposition that only one dismissal can be the grounds for refiling under section 13-217. *Suslick* appears to extend the *Gendek* holding. In *Gendek*, the court held that only one voluntary dismissal can serve as the predicate for refiling under section 13-217. *Id.* at 343-4, 518 N.E.2d at 1053. *Suslick*, on the other hand, declared that only one dismissal of any type, either voluntary or involuntary, may give rise to the right to refile under section 13-217.

101. *Suslick*, 128 Ill. 2d at 320, 538 N.E.2d at 556. In discussing its holding that the date of dismissal for lack of federal jurisdiction triggered the right to refile, the court stated that:

> [I]t cannot reasonably be argued that, following the dismissal of the plaintiff's Federal action by the district court . . . the action was still 'pending' in that court. . . . Simply because the defendants . . . erroneously represented to that court that their action was still pending in Federal court does not mean that the

court ascribes no error, however, to the circuit court's dismissal of the 1982 case on section 2-619(a)(3) grounds. Although plaintiff may have failed to raise this issue on appeal, the court should not have relied *sub silentio* on an erroneous dismissal to reach its holding, thereby leaving the law in a state of confusion.

C. Dismissal by Court of Claims

In *Edwards v. Safer Foundation, Inc.*,[102] the appellate court expanded the coverage of section 13-217 to include claims dismissed for lack of jurisdiction by the Illinois Court of Claims after the applicable statute of limitations has run. Plaintiff had improperly filed a personal injury lawsuit in the Illinois Court of Claims against the Illinois Department of Corrections and Safer, the private owner of a halfway house in which plaintiff resided.[103] The court of claims dismissed the claim against Safer for lack of jurisdiction.[104] Plaintiff refiled the suit against Safer in the Cook County Circuit Court, pursuant to section 13-217, within one year of the dismissal. On the defendant's motion, the trial court dismissed the suit on the grounds that section 13-217 did not apply to dismissals by the court of claims.[105] Absent the tolling provision afforded by section 13-217, the applicable statute of limitations barred the complaint.[106]

Applying the principle that section 13-217 must be construed liberally in order to further its remedial purpose, the appellate court reversed.[107] Although section 13-217 does not refer expressly to actions dismissed by the court of claims, the appellate court held that the statute's language demonstrated a legislative scheme to broaden its application.[108] The court concluded that the remedial policy of section 13-217 renders the section applicable to any statutory cause of action that creates remedies subject to time con-

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limitations period under section 13-217 is extended to the date of the affirmance of the dismissal by the Federal Court of appeals.

Id.

102. 171 Ill. App. 3d 793, 525 N.E.2d 987 (1st Dist. 1988).

103. *Id.* at 794-95, 525 N.E.2d at 988.

104. *Id.* Safer, a private party, was not amenable to suit in the court of claims. *See* ILL. REV. STAT. ch. 37, para. 439.8 (1987). The court dismissed the claim against the State on other grounds. 171 Ill. App. 3d at 795, 525 N.E.2d at 988.

105. *Id.*

106. *Id.*

107. *Id.* at 798, 525 N.E.2d at 990.

108. *Id.* The language referred to is " '[i]n any of the actions specified in any of the sections of this act *or any other act or in any contract where the time of commencement of any action is limited . . . .*' " *Id.* at 797, 525 N.E.2d at 989-990 (citing ILL. REV. STAT. ch. 110, para. 13-217 (1987)) (emphasis added by court).

straints, including the act upon which plaintiff originally premised his claim.[109]

The Illinois courts have previously employed similar reasoning to permit the refiling of claims arising under the Probate Act,[110] the Wrongful Death Act[111] and the Paternity Act.[112] The broad language in the *Edwards* decision[113] is especially noteworthy because it apparently was unnecessary to resolve the specific issue before the court.

C. *Due Diligence in Service of Process*

The Illinois Supreme Court's decision in *Martinez v. Erickson*[114] signals a slight retreat from its consistent attack on the permissive interplay between Illinois Supreme Court Rule 103(b)[115] and section 13-217. The attack, which began with the court's decision in *O'Connell v. St. Francis*,[116] was prompted because section 13-217 permits dilatory plaintiffs to circumvent Rule 103(b) sanctions by refiling within one year of dismissal.[117] *Martinez* involved two factually related medical malpractice lawsuits, each filed by the same plaintiff within one day of the expiration of the applicable statutes

109. 171 Ill. App. at 798, 525 N.E.2d at 990. The plaintiff's claim was premised on the Illinois Court of Claims Act, ILL. REV. STAT. ch. 37, para. 439.1 (1987).

110. *See In Re* Estate of Breault, 113 Ill. App. 2d 356, 251 N.E.2d 910 (1st Dist. 1969).

111. *See* Kristan v. Belmont Community Hosp., 51 Ill. App. 3d 523, 366 N.E.2d 1068 (1st Dist. 1977).

112. *See* People *ex rel.* L'Minggio v. Parker, 65 Ill. App. 3d 296, 382 N.E.2d 613 (1st Dist. 1978).

113. *Edwards*, 171 Ill. App. 3d at 798, 525 N.E.2d at 990 ("whether a legislative remedy is created under [various acts] or the Court of Claims Act, 'or any other act,' we hold that the remedial policy of section 13-217 applies and [plaintiff] must be permitted to refile his claim . . .").

114. 127 Ill. 2d 112, 535 N.E.2d 853 (1989).

115. ILL. S. CT. R. 103(b), ILL. REV. STAT. ch. 110A, para. 103(b) (1987). Rule 103(b) permits a court, either *sua sponte* or upon the defendant's motion, to dismiss a case for the plaintiff's failure to exercise reasonable diligence to obtain service on the defendant.

116. 112 Ill. 2d 273, 492 N.E.2d 1322 (1986) (holding that a court must consider and rule upon a pending 103(b) motion before ruling upon a plaintiff's motion to dismiss voluntarily and stating that in considering a 103(b) motion in a case refiled pursuant to section 13-217, the court may consider the plaintiff's diligence in effecting service in the original suit).

117. Subsequently, the court has retroactively applied the principles it articulated in *O'Connell*, and it has applied these principles to cases in which the defendant was served for the first time in the refiled action. *See* Catlett v. Novak, 116 Ill. 2d 63, 506 N.E.2d 586 (1987). It has also applied the *O'Connell* principles to cases refiled following involuntary dismissal. *See* Muskat v. Steinberg, 122 Ill. 2d 41, 521 N.E.2d 932 (1988) (suit refiled after dismissal for want of prosecution).

of limitations.[118] Plaintiff voluntarily dismissed the first case nine months after he filed it. The court dismissed the second case for want of prosecution seven months after it was filed. In neither case had the plaintiff even attempted to effect service of process on any defendant.[119]

Plaintiff then refiled a single action against all defendants and served the defendants within three weeks of the refiling date.[120] Relying on *O'Connell* and on plaintiff's lack of diligence in obtaining service in the previously dismissed suits, the trial court granted several defendants' Rule 103(b) motions to dismiss. The appellate court reversed, ruling that *O'Connell* should apply prospectively.[121] After determining that its decision in *Muskat v. Steinberg*[122] was dispositive and that *O'Connell* operated retroactively, the Illinois Supreme Court reversed.[123] The court also remanded, concluding that the trial court may have afforded excessive weight to plaintiff's service efforts in the original cases and inadequate weight to those efforts in the refiled case.[124] The court stressed that a trial court "cannot disregard obvious diligence on the part of the plaintiff in effecting service after refiling."[125]

Of course, plaintiffs who fail to effect service promptly ought not rely on *Martinez* to save their refiled suits from dismissal under Rule 103(b). The totality of the circumstances continues to determine the issue of diligence.[126] After *Martinez*, however, a trial court apparently has no discretion to ignore a plaintiff's diligence in effecting service after refiling.

V. Post-Judgment Proceedings

A. Supplementary Proceedings

In *Bank of Aspen v. Fox Cartage, Inc.*,[127] the Illinois Supreme Court was called upon to define the precise effect of the restraining

118. Martinez v. Erickson, 127 Ill. 2d 112, 113, 535 N.E.2d 853, 854 (1989).
119. *Id.*
120. *Id.* at 113-14, 535 N.E.2d at 854.
121. *Id.* at 115, 535 N.E.2d at 854.
122. 122 Ill. 2d 41, 521 N.E.2d 932 (1988). *Muskat* was decided shortly after the appellate court had reached its decision. In *Muskat*, the supreme court expressly affirmed the retroactive application of the *O'Connell* holding, although it already had applied it retroactively in *Catlett*. *See supra* note 117 and accompanying text.
123. *Martinez*, 127 Ill. 2d at 120, 535 N.E.2d at 857.
124. *Id.* at 121-22, 535 N.E.2d at 857-858.
125. *Id.* at 122, 535 N.E.2d at 858.
126. *Id.*
127. 126 Ill. 2d 307, 533 N.E.2d 1080 (1989).

provisions often contained in citations to discover assets.[128] In *Bank of Aspen*, the citee argued that the restraining provisions of the citation constituted an injunction and should be treated as such for the purposes of section 11-110 of the Code.[129] Furthermore, the citee argued, to the extent section 2-1402 permits the inclusion of restraining provisions in the citation, it is unconstitutional, because the restraining provisions are imposed without notice, without an immediate post-seizure hearing and without the posting of bond.[130]

The supreme court rejected both of the citee's contentions. The court held that the restraining provisions sanctioned by section 2-1402 do not constitute an injunction.[131] Citing the joint committee comments on section 2-1402,[132] the court held that the citation merely constitutes notice to the citee that if he violates the citation's restraining provisions, he risks entry of a money judgment against him, or a criminal contempt citation.[133] The court noted that the citee is not prohibited from transferring property other than that belonging to the judgment debtor.[134] Therefore, if the citee is sufficiently confident that property in his possession is not "property of the judgment debtor," he is free to transfer that property notwithstanding service of the citation.[135]

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128. Citations to discover assets are commonly served by judgment creditors upon judgment debtors or third parties who the judgment creditor believes may be indebted to the judgment debtor. Pursuant to the provisions of section 2-1402 of the Code of Civil Procedure, a citation to discover assets is the pleading which commences a supplementary proceeding. ILL. REV. STAT. ch. 110, para. 2-1402 (1987). Typically, the clerk of court issues the citation, on a pre-printed form, for service on the judgment debtor or third party (the citee). The form contains language prohibiting the citee from making or allowing any transfer or other disposition of property belonging to the judgment debtor or otherwise disposing of any money due to the judgment debtor, until further order of the court, or termination of the supplementary proceedings. The citation usually provides that the citee's failure to comply with the citation's restraining provisions may subject the citee to punishment for contempt or to a judgment for the unpaid balance of the debtor's judgment. Section 2-1402 specifically authorizes the inclusion of this language in the citation. *Id.* para. 2-1402(d)(1).

129. ILL. REV. STAT. ch. 110, para. 11-110 (1987). This section entitles an enjoined party to recover damages it sustains as a result of a wrongfully issued temporary restraining order or preliminary injunction. *Id.* Whether the citation constitutes an injunction also affects the right of a party aggrieved by the issuance of the citation to an interlocutory appeal as a matter of right under Illinois Supreme Court Rule 307(a)(1). ILL. S. CT. R. 307(a)(1), ILL. REV. STAT. ch. 110A, para. 307(a)(1) (1987).

130. 126 Ill. 2d at 312-13, 533 N.E.2d at 1082-83.

131. *Id.* at 315, 533 N.E.2d at 1083.

132. *Id.* at 314, 533 N.E.2d at 1083 (quoting ILL. ANN. STAT. ch. 110, para. 2-1402, joint committee comments at 862 (Smith-Hurd 1983)).

133. *Id.* at 314, 533 N.E.2d at 1083.

134. *Id.* at 316, 533 N.E.2d at 1084.

135. *Id.*

The court also held that the restraining provisions authorized by section 2-1402 are not unconstitutional.[136] In so ruling, the court noted that the service of a citation containing restraining language is not a "pre-judgment seizure" because citations issue only after judgment is entered against the judgment debtor.[137] Moreover, citees are afforded, in any event, an opportunity to obtain an immediate hearing to determine ownership or possessory rights in property that appears to be subject to the citation.[138] The court reiterated that a citee who disposes of property covered by a citation, believing in good faith that the property does not belong to the judgment debtor, could not be punished for contempt but would be liable to the judgment creditor solely for the value of the judgment debtor's property transferred.[139]

In characterizing a citation's restraining provisions as mere notice to the citee of possible penalties in the event of a violation, the court left unresolved whether the restraining provisions are potent enough to constitute the imposition of a lien. Some previous decisions have held that the service of a citation does precisely that by creating a judicial lien on the covered property in favor of the judgment creditor.[140] Others have disagreed.[141] An argument could be made that the *Bank of Aspen* characterization of a citation as mere notice supports the proposition that no judicial lien attaches to property by virtue of its being subject to citation proceedings. A cogent response to this potential argument is that the existence of a lien in favor of another does not prevent the owner or possessor of that property from disposing of it. The lien encumbers the property and merely follows it into the hands of a third party, though it does not prevent the physical transfer of the property. Needless to

136. *Id.* at 323, 533 N.E.2d at 1087.

137. *Id.* at 318-19, 533 N.E.2d at 1085.

138. *Id.* at 322, 533 N.E.2d at 1087.

139. *Id.* at 320-21, 533 N.E.2d at 1086.

140. *See, e.g.*, Asher v. United States, 570 F.2d 682, 683 (7th Cir. 1978) (instituting a proceeding to discover assets under [now, § 2-1402] creates a judicial lien against intangible personal property); *accord In Re* Foluke, 38 B.R. 298, 301 (West) (Bankr. N.D. Ill. 1984).

141. *See, e.g.*, Kaiser-Ducette Corp. v. Chicago-Joliet Livestock, 86 Ill. App. 3d 216, 407 N.E.2d 1149 (3d Dist. 1980) (although a citation proceeding must be instituted to obtain intangible property, a judicial lien is not created against either intangible or tangible personal property unless a writ of execution is delivered to the sheriff). *Accord* Barnett v. Stern, 93 B.R. 962 (West) (Bankr. N.D. Ill. 1988). These decisions fail to note section 2-1501 of the Code, which abolishes writs of execution. ILL. REV. STAT. ch. 110, para. 2-1501 (1987). They also do not seem justified in principle because the service of a citation (which must recite the facts with respect to a judgment) provides all the notice and serves all the functions that the service of a writ of execution would serve. To require a plaintiff to make two services in order to obtain a lien has no evident purpose.

say, questions of adequate notice and fairness to a transferee are raised. It may be that a transferee for fair value without actual or constructive notice of the judgment creditor's rights should be treated differently from other transferees.

B. Relief From Judgment

In addition to addressing issues raised by judgment enforcement proceedings, the Illinois Supreme Court also considered circumstances under which a judgment could be set aside. The court in *Kaput v. Hoey*[142] rejected several procedural arguments made by a defendant who sought the reversal of his section 2-1401[143] petition's dismissal. Defendant had filed a pro se appearance to the complaint, which sought "in excess of $15,000" in damages for personal injuries the plaintiff sustained when he allegedly slipped on the defendant's icy sidewalk.[144] Because defendant never answered or otherwise pleaded to the complaint, plaintiff obtained a default judgment against him on January 28, 1983. On May 14, 1984, the court entered orders setting the matter for prove-up of damages and dismissing the case for want of prosecution.[145] The record indicated that the dismissal had been inadvertent and had been vacated by the trial court with the waiver of costs on June 1, 1984. Following the prove up, the court entered judgment against defendant for $29,500 plus costs.[146]

After he had been served in August 1985 with a citation to discover assets, defendant appeared through counsel and petitioned the court to vacate the judgment pursuant to section 2-1401. Defendant argued, *inter alia*, that his failure to receive notice of the default entry rendered the judgment void, that plaintiff was required, but failed, to provide him with notice of both the reinstatement following dismissal and the prove-up on damages, and that plaintiff was required, but failed, to provide notice that he sought damages in excess of the *ad damnum* in his complaint.[147] The trial court rejected these arguments and dismissed the petition to va-

142. 124 Ill. 2d 370, 530 N.E.2d 230 (1988).

143. ILL. REV. STAT. ch. 110, para. 2-1401 (1987). The section provides a comprehensive method by which a party may seek relief from judgments, orders and decrees more than thirty days after their entry.

144. *Kaput*, 124 Ill. 2d at 374, 381, 530 N.E.2d at 232, 235.

145. *Id.* at 374, 530 N.E.2d at 232.

146. *Id.*

147. *Id.* at 380, 530 N.E.2d at 234-235. As required by section 2-1401, the defendant also alleged a meritorious defense to the claim. *Id.* at 385, 530 N.E.2d at 237. Both the trial and reviewing courts, however, held that the defense was legally insufficient. *Id.*

cate. The appellate court affirmed and the supreme court granted defendant's petition for leave to appeal.

The supreme court affirmed, first rejecting the argument that failure to receive notice invalidates a default order.[148] The then-existing version of the applicable notice provision expressly stated that failure to give notice did not "impair the force, validity or effect of the [default] order."[149] Relying on Illinois Supreme Court Rule 104(b),[150] the supreme court also rejected the argument that the defendant was entitled to notice of either the reinstatement following involuntary dismissal or of the hearing on damages.[151] Rule 104(b) deprives defaulted parties of entitlement to notice of subsequent proceedings.[152]

Finally, the supreme court held that on the facts of this case, a judgment of $29,500 could not be deemed to have "surprised" the defendant enough to trigger the notice requirements of section 2-604 of the Code of Civil Procedure[153] and Illinois Supreme Court Rule 105(a).[154] The provisions, whose combined purpose is to avoid surprise to a defendant, require a plaintiff to give notice to a defaulted defendant when relief is sought beyond that requested in the complaint.[155] In this case, the nature of the claim, and the fact that the plaintiff had requested damages in his complaint "in excess of $15,000," defeated the argument that the amount of the final judgment fairly warranted notice.[156]

VI. LIMITATION OF ACTIONS

A. Effect of Suing Deceased Defendant

In *Vaughn v. Speaker*,[157] none of several sections of the Code saved the plaintiffs' complaint from the time bar of the applicable

148. *Id.* at 379, 530 N.E.2d at 234.

149. *Id.* at 378-79, 530 N.E.2d 234 (quoting ILL. REV. STAT. ch. 110, para. 2-1302(a) (1983)). The present version of the section, although transferring the obligation to provide notice of default from the clerk to the moving party, continues to provide that lack of notice does not invalidate the default. ILL. REV. STAT. ch. 110, para. 2-1302 (1987).

150. ILL. S. CT. R. 104(b), ILL. REV. STAT. ch. 110A, para. 104(b) (1987). The rule requires parties to file certificates of court papers's service only on those parties "who have appeared and have not theretofore been found . . . to be in default . . . ." *Id.*

151. 124 Ill. 2d at 380, 530 N.E.2d at 234-35.

152. *Id.* at 380, 530 N.E.2d at 235.

153. ILL. REV. STAT. ch. 110, para. 2-604 (1987).

154. ILL. S. CT. R. 105(a), ILL. REV. STAT. ch. 110A, para. 105(a) (1987).

155. 124 Ill. 2d at 381, 530 N.E.2d at 235.

156. *Id.* at 382, 530 N.E.2d at 235. The court noted, however, that the amount of a default judgment obtained without notice under an open-ended prayer for relief is not limitless. *Id.*

157. 126 Ill. 2d 150, 533 N.E.2d 885 (1988), *cert. denied*, 109 S. Ct. 3218 (1989).

statute of limitations. Plaintiffs filed a personal injury action a few days before the two-year statute of limitations[158] expired. After unsuccessfully attempting service after the statute had run, plaintiffs discovered that the named defendant had died ten months earlier. They then obtained approval "to correct misnomer," filed a second complaint stating the same allegations against the co-executors of the decedent's estate, and served them. The trial court granted the executors' motion to dismiss, holding that the second complaint was time-barred.[159] The appellate court agreed.[160]

The supreme court affirmed,[161] rejecting several statutory arguments advanced by plaintiffs. First, section 13-209 of the Code[162] extends the time limitation for bringing actions against parties who die before the expiration of the otherwise applicable time limit to six months after letters of office issue in the decedent's estate. Plaintiffs, however, had filed their second complaint ten months after letters of office had issued.

Second, the court found that a plain reading of section 2-1008(b)[163] revealed its inapplicability to the present situation.[164] The section permits the substitution of a living party for one who has died. Yet, the term "party" clearly encompasses only individuals over whom the court already has jurisdiction in a pending action.[165] Decedent, having never been served, was not a party for whom his co-executors could be substituted. Similarly, the court held that the provision of the Code applicable to correcting misnomers of parties[166] encompasses only the naming of the right party by the wrong name.[167] Plaintiffs in this case intentionally sued decedent, the wrong party, instead of his estate. Finally, the court rejected the argument that section 2-616(d)[168] operates to save the

158. ILL. REV. STAT. ch. 110, para. 13-202 (1987).

159. 126 Ill. 2d at 155, 533 N.E.2d at 887.

160. *Id.* The appellate court also found, however, that an issue of fact existed as to whether the defendants were estopped to assert a limitations defense. *Id.* at 156, 533 N.E.2d at 887. *See infra* notes 171-73 and accompanying text.

161. 126 Ill. 2d at 167, 533 N.E.2d at 892.

162. ILL. REV. STAT. ch. 110, para. 13-209 (1987).

163. *Id.* para. 2-1008(b).

164. *Vaughn*, 126 Ill. 2d at 158, 533 N.E.2d at 888.

165. *Id.*

166. *See* ILL. REV. STAT. ch. 110, para. 2-401(b) (1987). The section provides in part that misnaming a party "is not a ground for dismissal but the name of any party may be corrected at any time, before or after judgment, on motion, upon any terms and proof that the court requires." *Id.*

167. 126 Ill. 2d at 158, 533 N.E.2d at 888.

168. ILL. REV. STAT. ch. 110, para. 2-616(d) (1987) (pertaining to the amendment of pleadings and their relation back to the originals).

second complaint by allowing its relation back to the first.[169] There was no indication that the estate executors knew that a complaint had been filed prior to the expiration of the two-year limitation period. Absent notice to the prospective defendants, the second complaint cannot relate back to the date on which the first was filed.[170]

Although it held that the statute of limitations barred the complaint, the court remanded the case for a determination as to whether conduct of the decedent's insurer "lull[ed] plaintiffs into delaying their initial filing of suit" by causing them to believe mistakenly that their claim would be settled.[171] Under such circumstances, the doctrine of equitable estoppel might preclude defendants from asserting the limitations defense. In so holding, the court articulated a standard for determining the existence of detrimental reliance, one of the elements of the doctrine.[172] Reliance is detrimental when it plays "a substantial part, and so [is] a substantial factor, in influencing [a] decision."[173]

The 86th General Assembly attempted to remedy the lacuna in the statutes, highlighted by the decision in *Vaughn v. Speaker*, by amending section 13-209 of the Code.[174] Public Act 86-793[175] allows a plaintiff who commences an action without knowledge that defendant is deceased to substitute a personal representative as defendant, provided plaintiff proceeds with diligence to file an amended complaint and to serve process on such representative.[176]

B. Actions for Contribution

The Illinois Appellate Court for the First District squarely has held that third-party actions for contribution based upon medical

169. 126 Ill. 2d at 160, 533 N.E.2d at 889.

170. *Id.*

171. *Id.* at 166-67, 533 N.E.2d at 892.

172. *Id.* at 165, 533 N.E.2d at 891. The court also discussed the doctrine's other five elements. *Id.* at 162-63, 533 N.E.2d at 890 (misrepresentation or concealment of material facts, knowledge of truth by party making misrepresentation, lack of knowledge of truth by party asserting estoppel, expectation of reliance and actual reliance).

173. *Id.* at 165, 533 N.E.2d at 891 (indicating that the standard is also set forth in RESTATEMENT (SECOND) OF TORTS, section 546, comment b (1977)).

174. ILL. REV. STAT. ch. 110, para. 13-209 (1987). This section essentially permits a cause of action to be brought by or filed against a deceased party's representative. *Id.* *See supra* note 162 and accompanying text.

175. 1989 Ill. Legis. Serv., P.A. 86-793 at 3724 (West) (effective January 1, 1990).

176. Unfortunately, the General Assembly amended the Probate Act of 1975, P.A. 86-815, 1989 Ill. Legis. Serv. at 3789 (West) (effective September 7, 1989), in part inconsistently with P.A. 86-793. The effect of inconsistent legislation passed during the same session of the General Assembly is a subject beyond this Article's scope.

malpractice are subject to the limitations period governing medical malpractice actions,[177] rather than the period governing actions brought under the Contribution Among Joint Tortfeasors Act.[178] In *Heneghan v. Sekula*,[179] the trial court dismissed as time-barred defendant-doctor's third-party complaint for contribution against two doctors and a hospital. The appellate court affirmed, holding that the trial court properly had applied the four-year medical malpractice repose statute[180] to appellant's contribution action.[181]

The court reasoned that certain established rules of statutory construction required this result. First, Illinois case law requires that particularized statutes must prevail over more general ones dealing with the same subject.[182] The malpractice statute of repose was narrower and more specific than the contribution statute of limitation,[183] even though the contribution limitations statute had been enacted more recently.[184] Second, absent a definition of the word "action" in the malpractice statute, the courts must give the word its ordinary and popular meaning.[185] Thus constrained, the court could not accept appellant's argument that the word "action" in section 13-212[186] encompassed only certain actions and excluded contribution actions.[187] Third, proper statutory construction mandates the presumption that an express exception in a statute excludes all other exceptions.[188] Because the malpractice statute of repose expressly excludes only actions to which section

177. *See* ILL. REV. STAT. ch. 110, para. 13-212 (1987). This section is a statute of limitations and repose. It requires medical malpractice actions to be brought within two years of the date upon which the claimant discovers the injury, but it precludes the filing of any such action more than four years from the date of the act or omission upon which the claim is premised. *Id.* The section excepts from coverage actions that are concealed fraudulently from the claimant. *See id.* para. 13-215.

178. ILL. REV. STAT. ch. 70, para. 301 (1987). Section 13-204 of the Act contains the applicable limitation period: "No action for contribution among joint tortfeasors shall be commenced with respect to any payment made in excess of a party's pro rata share more than 2 years after the party seeking contribution has made such payment towards discharge of his or her liability." ILL. REV. STAT. ch. 110, para. 13-204 (1987).

179. 181 Ill. App. 3d 238, 536 N.E.2d 963 (lst Dist. 1989).

180. ILL. REV. STAT. ch. 110, para. 13-212 (1987); *see generally supra* note 177 and accompanying text.

181. 181 Ill. App. 3d at 246, 536 N.E.2d at 968.

182. *Id.* at 241, 536 N.E.2d at 965.

183. *Id.* at 242, 536 N.E.2d at 966.

184. *Id.* at 243, 536 N.E.2d at 967.

185. *Id.* at 242, 536 N.E.2d at 966.

186. *See* ILL. REV. STAT. ch. 110, para. 13-212 (1987).

187. 181 Ill. App. 3d at 242, 536 N.E.2d at 966.

188. *Id.* at 243, 536 N.E.2d at 966.

13-215 applies,[189] the court concluded that the legislature did not intend to exempt contribution or any other actions from its coverage.[190]

Though the language of section 13-212 required the dismissal of the contribution action, the court concurred with appellant's concern that the court's holding operates to contravene the purpose of the Contribution Act. The Act reflects the General Assembly's concern that liability for wrongs should be shared equitably.[191] To the extent that the court's decision forecloses meritorious contribution claims on procedural grounds,[192] it is inconsistent with this purpose. Nevertheless, the court stated that the legislature, not the courts, must act to obviate these concerns.[193]

C. Relation Back of Amendments

In a medical malpractice action, the Illinois Appellate Court for the Third District addressed whether a plaintiff's amended complaint escaped the limitations time bar by relating back to the original complaint. In *Siebert v. Cahill*,[194] the original complaint alleged the defendant's negligence in puncturing plaintiff's tibial artery during surgery in January 1984.[195] Plaintiff timely filed the complaint within the four-year repose period.[196] Plaintiff's amended complaint alleged negligence solely in the defendant's initial treatment of the same injury. This initial treatment occurred eighteen months before the surgery, and more than four years before the amended complaint was filed. The amended complaint contained no facts concerning the surgical treatment.[197]

In affirming dismissal of the amended complaint, the court re-

189. ILL. REV. STAT. ch. 110, para. 13-215 (1987); *see generally supra* note 177 and accompanying text.

190. 181 Ill. App. 3d at 243, 536 N.E.2d at 967.

191. *Id.* at 245, 536 N.E.2d at 968.

192. *Id.* When a plaintiff discovers his injury within the repose period and does not file his action until very near its expiration, the defendant may not learn of his own contribution claim early enough to file on time. *Id.*

193. *Id.* at 246, 536 N.E.2d at 968. It would seem that the 1984 supreme court decision in Laue v. Leifheit, 105 Ill.2d 191, 473 N.E.2d 939 (1984), requiring that a contribution claim be brought in the action originally filed by the plaintiff, serves to reduce the severity of this problem.

194. 173 Ill. App. 3d 545, 549, 527 N.E.2d 1042, 1045 (3d Dist.), *appeal denied*, 535 N.E.2d 411 (1988).

195. *Id.* at 547, 527 N.E.2d at 1043.

196. *See* ILL. REV. STAT. ch. 110, para. 13-212 (1987) and *supra* note 177. Apparently, the plaintiff also filed the action within two years of his discovery of his injuries, for the defendant did not raise this issue.

197. 173 Ill. App. 3d at 547, 527 N.E.2d at 1043.

jected plaintiff's argument that because all of defendant's treatment of the same injury constituted a single transaction, the cause of action did not accrue until the completion of treatment.[198] Consequently, the court ruled that because the amended complaint related "to a [sic] entirely different occurrence or procedure than the original complaint," it failed to provide the defendant with "all the information necessary to prepare the defense" to the amended complaint.[199] The court concluded that because the amended complaint introduced a new cause of action that did not relate back to that of the original complaint, it constituted a new suit for statute of limitations purposes.[200]

The opinion does not disclose the exact nature of defendant's pre-surgical treatment, and it is possible that plaintiff may have been able, through more artful pleading, to have included in his amended complaint the events set forth in the original complaint so as to describe the physician's treatment as one continuous process. As pleaded in this case, however, the court was able to find the treatment alleged in the first pleading discrete from that in the amended pleading because the allegations in the latter were unrelated to the former.

VII. CERTIFICATION OF MEDICAL MALPRACTICE ACTIONS: CONSTITUTIONALITY

In an important case that the Illinois Supreme Court agreed to review, the Illinois Appellate Court for the First District declared unconstitutional section 2-622[201] of the Code of Civil Procedure.[202] Section 2-622 implements stringent prerequisites to the filing of medical malpractice suits. Section 2-622 provides that, prior to filing suit, plaintiff or plaintiff's attorney must attach to the complaint both an affidavit stating that a health professional has been

198. *Id.*

199. *Id.* at 548, 527 N.E.2d at 1044. The presence of this information in the prior pleading is a prerequisite to invoking the relation-back doctrine embodied in section 2-616(b) of the Code. *Id.*

200. *Id.* at 549, 527 N.E.2d at 1044-45.

201. ILL. REV. STAT. ch. 110, para. 2-622 (1987).

202. DeLuna v. St. Elizabeth's Hosp., 184 Ill. App. 3d 802, 540 N.E.2d 847 (1st Dist.), *appeal granted*, 545 N.E.2d 107 (1989). The *DeLuna* court expressly rejected the second district's reasoning in upholding the constitutionality of section 2-622. *See* Bloom v. Guth, 164 Ill. App. 3d 475, 517 N.E.2d 1154 (2d Dist. 1987), *appeal denied*, 121 Ill. 2d 567, 526 N.E.2d 827 (1988). The third and fourth districts have followed *Bloom*. *See* Sakovich v. Dodt, 174 Ill. App. 3d 649, 529 N.E.2d 258 (3d Dist. 1988), *appeal denied*, 124 Ill.2d 562, 535 N.E.2d 921 (1989); Alford v. Phipps, 169 Ill. App. 3d 845, 523 N.E.2d 563 (4th Dist. 1988).

consulted and has determined that reasonable and meritorious cause exists for filing the action and the actual report of the professional indicating the basis for the determination.[203] Although the section extends the time to fulfill its requirements under certain circumstances,[204] it authorizes dismissal for failure to comply.[205]

In *DeLuna*, plaintiff filed a complaint for professional and hospital negligence arising from the death of plaintiff's decedent following surgery. Plaintiff did not attach the written declarations required under section 2-622.[206] As a result, the trial court sustained the hospital's and the surgeon's temporally distinct motions to dismiss, the former dismissal being without prejudice and the latter with prejudice.[207]

Though numerous state and federal constitutional issues were raised on appeal, the resolution of two rendered the remaining issues moot. The court first concluded that section 2-622 violates the separation of powers mandated by article II and section 1 of article VI of the Illinois Constitution.[208] The court also decided that it had jurisdiction of an appeal from a dismissal order expressly made without prejudice and subject to refiling.[209]

The court ruled that in enacting section 2-622, the legislature "overstepped the bounds of constitutional authority" by impermissibly delegating a judicial role to health care professionals,"[210] thereby barring a court from exercising its inherent authority to hear and determine cases.[211] That the section confers a decision-making, and not merely an advisory, role upon laymen is clear. First, the section essentially empowers a non-judicial professional to determine whether the plaintiff has established a *prima facie* case before reaching the courthouse.[212] Second, failure to file the declarations required by the section mandates dismissal, "even before the judicial process, as we have known it since at least the

203. ILL. REV. STAT. ch. 110, para. 2-622(a)(1) (1987).

204. *Id.* para. 2-622(a)(2) and (3).

205. *Id.* para. 2-622(g). In McCastle v. Sheinkop, 121 Ill. 2d 188, 193, 520 N.E.2d 293, 296 (1987), the supreme court held, following a review of the section's legislative history, that the legislature had not intended to mandate dismissal with prejudice. This holding enabled the court to sidestep the constitutional issues that the *DeLuna* court later squarely addressed.

206. *DeLuna*, 184 Ill. App. 3d at 803, 540 N.E.2d at 848.

207. *Id.* The trial court did not explain its disparate treatment of the motions to dismiss. *Id.*

208. *Id.* at 810, 540 N.E.2d at 852.

209. *Id.* at 810-11, 540 N.E.2d at 853.

210. *Id.* at 810, 540 N.E.2d at 852.

211. *Id.* at 806, 540 N.E.2d at 850.

212. *Id.* at 809-10, 540 N.E.2d at 852.

reign of Henry II, can begin to take its course."[213] That the section bars a court from exercising its exclusive function to hear and decide cases is also clear. The section not only deprives the court of its role in applying the law to determine the sufficiency of the allegations of a complaint[214] but also deprives it of the opportunity to consider "important and perhaps even decisive" issues of fact.[215]

VIII. Discovery of Expert Witnesses

A. Introduction

The Illinois Supreme Court adopted Rule 220[216] in 1984 to eliminate the delay and prejudice caused by the last-minute disclosure of trial experts.[217] Rule 220 requires that a party disclose the identity of its testifying expert witness[218] within 90 days after the substance of the expert's opinion becomes known or at the first pretrial conference, whichever occurs later.[219] The Rule is further structured to ensure that disclosure of all expert witnesses will occur in any event at least sixty days before anticipated trial.[220] The party who retains the Rule 220 expert also must pay the fees the expert

213. *Id.* at 807, 540 N.E.2d at 851. After concluding that section 2-622 was an "all too disturbingly clear" invasion of the court's constitutional authority, the court went on to sustain its jurisdiction over the appeal of the dismissal order, which was without prejudice to plaintiff's right to refile. *Id.* at 810-11, 540 N.E.2d at 852-53. The court distinguished cases supporting the rule that orders containing "without prejudice" language are not final and therefore are not appealable. In those cases, unlike the present one, the right to refile is absolute and unconditional. Such orders cannot ultimately prejudice a party. Here, plaintiff's right was contingent upon compliance with the unconstitutional provisions of section 2-622. Had the plaintiff refiled in compliance with section 2-622, he would have waived his right to have its constitutionality reviewed. The court concluded that all orders that are "without prejudice" are not necessarily non-final when the inability to appeal the order immediately would prejudice the party against whom it is entered. *Id.*

214. *Id.* at 806, 540 N.E.2d at 850.

215. *Id.* at 807, 540 N.E.2d at 850. Note that the hospital discharge summary contained defendant-surgeon's clear admission that decedent's death had resulted proximately from the very surgical acts and omissions the plaintiff alleged. The hospital record containing the admission would not have been before the court except that plaintiff filed it with the memorandum opposing the motions to dismiss. *Id.* at 805, 540 N.E.2d at 849.

216. Ill. S. Ct. R. 220, Ill. Rev. Stat. ch. 110A, para. 220 (1987).

217. Ill. S. Ct. R. 220, Ill. Ann. Stat. ch. 110A, para. 220, committee comments at 438 (Smith-Hurd 1985).

218. Rule 220 defines an expert witness as "a person who, because of education, training or experience, possesses knowledge of a specialized nature beyond that of the average person on a factual matter material to a claim or defense in pending litigation and that may be expected to render an opinion within his expertise at trial." Ill. S. Ct. R. 220, Ill. Rev. Stat. ch. 110A, para. 220(a)(1) (1987).

219. *Id.* para. 220(b)(1)(ii).

220. *Id.*

charges when, for instance, the opposing party elects to depose him.[221] This requirement contrasts with the general rule that the party at whose instance a deposition is taken pays the costs thereof.[222]

Although the identity of possible expert witnesses was discoverable upon request before the adoption of Rule 220,[223] the Rule places the burden of disclosure and cost on the party employing the expert. Moreover, the Rule authorizes the imposition of a potentially deadly penalty for non-compliance: the barring of the undisclosed expert's testimony at trial.[224]

B. Treating Physicians

In *Tzystuck v. Chicago Transit Authority*,[225] the Illinois Supreme Court held that treating physicians are not Rule 220 experts, and therefore are exempt from the disclosure and other requirements of the Rule. The decision resolved two cases that the court had consolidated for oral argument and disposition. In both cases, the plaintiffs had brought personal injury actions against the Chicago Transit Authority ("CTA").

In the first case, plaintiff had disclosed the identity of his treating physician during discovery, and defendant had obtained leave of court to depose him.[226] In response to the CTA's Rule 220 request, plaintiff did not specify that this doctor would testify. Plaintiff responded only generally that treating physicians would testify.[227] After the doctor testified at trial over the CTA's objection, the CTA appealed the $900,000 jury award on the basis, *inter alia*, that the trial court should have barred the testimony because plaintiff had failed to comply with Rule 220's disclosure requirements. The appellate court affirmed the judgment. The supreme court also affirmed.[228]

The supreme court interpreted Rule 220 to encompass only "litigation-related" witnesses, or those engaged only for the purpose of giving expert testimony at trial.[229] It likened treating physicians to

221. *Id.* para. 220(c)(6). The Rule provides for an exception when "manifest injustice would result" from the imposition of this requirement. *Id.*

222. *See id.* para. 204(c).

223. *See id.* para. 201(b) (general discovery provisions).

224. *Id.* para. 220(b)(1)(ii).

225. 124 Ill. 2d 226, 529 N.E.2d 525 (1988).

226. *Id.* at 231, 529 N.E.2d at 527.

227. *Id.*

228. *Id.* at 246, 529 N.E.2d at 534.

229. *Id.* at 234, 529 N.E.2d at 528. This interpretation rejects the argument that the words "retained" and "retaining or employing" in the rule could be broadly construed to

occurrence witnesses. Rule 220 experts develop their opinions solely in anticipation of testifying at trial, but treating physicians and occurrence witnesses develop opinions from observing or participating in the events that give rise to the litigation.[230] The court buttressed its interpretation with cases that similarly construe the comparable provision of the Federal Rules of Civil Procedure.[231]

The court also observed that practicality mandated the conclusion that treating physicians are excluded from the ambit of Rule 220. Neither attorneys nor their clients possess sufficient control over non-retained witnesses to ensure their cooperation in meeting the Rule's extensive discovery obligations.[232] Additionally, because the names, records and opinions of treating physicians are discoverable under other rules, defendants could have prepared for the possible testimony of the witness in issue.[233] Neither defendant could claim it had suffered the "surprise" that the Rule's adoption was intended to eliminate.[234]

The *Tzystuck* decision suggests a number of problematic issues.[235] In *Wilson v. CTA*,[236] the court split 4 to 3 in holding that a

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mean "request." *Id.* *See* ILL. S. CT. R. 220(b)(1) and (c), ILL. REV. STAT. ch. 110A, para. 220(b)(1) and (c) (1987).

230. *Id.* at 235, 529 N.E.2d at 528-29.

231. *Id.* at 236, 529 N.E.2d at 529 (citing FED. R. CIV. P. 26(b)(4), Advisory Committee Notes (1970 amendment) and cases and other materials which support the inapplicability of the federal rule to treating physicians).

232. *Id.* at 237, 529 N.E.2d at 530. Subsection (c) requires the witness' proponent to seasonably supplement information furnished under the rule. *See* ILL. S. CT. R. 220(c)(3), ILL. REV. STAT. ch. 110A, para. 220(c)(3) (1987).

233. 124 Ill. 2d at 238, 529 N.E.2d at 530. The court referred to the general discovery provisions of section 201(b)(1) and to section 204(c), which permits a party to seek leave of court to depose certain witnesses. *See* ILL. S. CT. R. 201(b)(1) and 204(c), ILL. REV. STAT. ch. 110, para. 201(b)(1) and 204(c) (1987).

234. The issue in the second case was whether Rule 220 obligates plaintiff to pay the fees his own treating physician charged for a deposition taken by the CTA. After the appellate court had denied plaintiff's interlocutory appeal of this certified question, the supreme court allowed it and reversed. The court held that treating physicians are not experts within the meaning of Rule 220; therefore, a treating physician's patients are not responsible under subsection (c) for paying their charges for being deposed. 124 Ill. 2d at 240, 529 N.E.2d at 531.

235. In addition to the Rule 220 problems discussed in the principal text, practitioners have raised other Rule 220 questions. For example, must party witnesses be identified as experts? In commercial litigation, custom and usage often determine whether the parties reached an agreement, whether attempted performance complies with an agreement and whether there is a breach. Parties may be called to testify as to the existence of custom and usage. Often, it is not immediately evident that such testimony will be necessary. As a result, the issue of whether such a witness must be identified as an expert arises very late in the proceedings, with potentially drastic results.

Another problem is exemplified by the 1981 supreme court decision in Wilson v. Clark, 84 Ill. 2d 186, 417 N.E.2d 1322 (1981), which permitted an expert to testify without the introduction into evidence of the basis for his opinion. This situation causes problems

treating physician who examined the plaintiff for the first time in three years during a noon recess on the last day of trial nevertheless retained his non-expert status.[237] Hence, plaintiff's failure to disclose him did not bar the doctor's post-recess testimony on the permanence of the plaintiff's injuries. Defendant should have avoided any surprise the testimony engendered by adequate trial preparation rather than by reliance on the "protection" of Rule 220.[238] Justice Ryan, on behalf of the dissenters, said that even if treating physicians are not Rule 220 experts, the trial court should not have allowed this opinion testimony. No amount of trial preparation could avoid the type of surprise that "bushwhacked" this defendant, and which the trial court had erroneously sanctioned in Wilson.[239]

C. Co-workers and Employees

A second issue that the *Tzystuck*[240] decision arguably affects is whether coworkers should be subject to the disclosure requirements of Rule 220 when they opine at trial about the safety of conditions or equipment related to the litigation. Although Rule 220 ambiguously provides that such workers "may" be within its scope,[241] the appellate courts disagree as to whether and when to subject coworkers and employees to the Rule's requirements.[242]

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when new facts are discovered after the witness forms his opinion or when occurrence witnesses upon whose testimony the expert had relied change their testimony.

Finally, in Cook County, Illinois, Circuit Court Rule 3.3 requires that discovery be completed within twenty-four months of the complaint's filing date. Thus, expert witnesses must be hired within this period. In reality, the case probably will not be called to trial for five or more years, so that compliance with the two-year limit results in numerous instances in which the expert originally engaged has died or become unavailable, due to the passage of time.

236. 126 Ill. 2d 171, 533 N.E.2d 894 (1989).

237. *Id.* at 176-77, 533 N.E.2d at 897.

238. *Id.*

239. *Id.* at 177-78, 533 N.E.2d at 897-98 (Ryan, J., dissenting).

240. Tzystuck v. Chicago Transit Auth., 124 Ill. 2d 226, 529 N.E.2d 525 (1988).

241. The Rule's definitional subsection indicates that an expert witness "may be an employee of a party, a party or an independent contractor." ILL. S. CT. R. 220(a)(1), ILL. REV. STAT. ch. 110A, para. 220(a)(1) (1987).

242. *Compare* Meyer v. Caterpillar Tractor Co., 179 Ill. App. 3d 268, 533 N.E.2d 386 (1st Dist. 1988), *rev'd on other grounds*, 135 Ill. 2d 1, 552 N.E.2d 719 (1989) (plaintiff's failure to disclose identities of five coworkers who offered opinion testimony on the unsafeness of procedures at defendant's plant necessitated reversal of $900,000 award for plaintiff) *with* Voyles v. Sanford, 183 Ill. App. 3d 833, 539 N.E.2d 801 (3d Dist.), *appeal denied*, 545 N.E.2d 134 (1989) (allowed testimony of defendant's former employee as to soundness of trailer's braking system without Rule 220 disclosure). *Accord* Smith v. Central Ill. Pub. Serv., 176 Ill. App. 3d 482, 531 N.E.2d 51 (4th Dist. 1988), *appeal denied*, 124 Ill. 2d 562, 535 N.E.2d 921 (1989).

In *Meyer v. Caterpillar Tractor Co.*,[243] the appellate court reversed a $900,000 jury award for the plaintiff because the trial court had permitted five of plaintiff's coworkers to testify as undisclosed experts about whether procedures were safe at the plant where plaintiff was injured.[244] The court did not expressly address plaintiff's argument that, pursuant to *Tzystuck*,[245] coworkers were like treating physicians because they were not "retained" by the plaintiff, and because they formed their opinions in the course of their employment, rather than in anticipation of testifying. The court concluded, however, that the admission of the testimony without prior disclosure "was in total disregard of the requirements of Supreme Court Rule 220"[246] and that it placed defendants at a "distinct disadvantage."[247]

Meyer presented the Illinois Supreme Court with an opportunity to resolve the split in authority. The court, however, decided the case on other grounds and did not address the Rule 220 question.[248] At some point, the court will have to reconcile its statement in *Tzystuck* with the kinds of issues presented in *Meyer*.

IX. LEGISLATION

A. Changes to the Code of Civil Procedure[249]

1. Section 2-209: "Long-Arm" Jurisdiction

Section 2-209 of the Code[250] governs the ability of Illinois courts to exercise personal jurisdiction over non-resident defendants. Public Acts 85-1156[251] and 86-840,[252] respectively, make several changes to the statute. New subsection (a)(6) submits non-resident parties to actions brought under the Illinois Parentage Act of 1984[253] to the jurisdiction of the Illinois courts if the party has performed an act of sexual intercourse within Illinois during the

243. 179 Ill. App. 3d 268, 533 N.E.2d 386 (1st Dist. 1988), *rev'd on other grounds*, 135 Ill. 2d 1, 552 N.E.2d 719 (1990).

244. *Id.* at 286, 533 N.E.2d at 396.

245. 124 Ill. 2d 226, 529 N.E.2d 525 (1988).

246. 179 Ill. App. 3d at 282, 533 N.E.2d at 395.

247. *Id.* at 283, 533 N.E.2d at 396.

248. The court concluded that relief was not available under the Structural Work Act. *Meyer*, 135 Ill. 2d 1, 552 N.E.2d 719 (1990).

249. Some of the discussed legislation was in process and was signed or became effective after the *Survey* period.

250. ILL. REV. STAT. ch. 110, para. 2-209 (1987).

251. ILL. ANN. STAT. ch. 110, para. 2-209 (Smith-Hurd Supp. 1989) (effective January 1, 1989).

252. 1989 Ill. Legis. Serv. at 4069-70 (West) (effective September 7, 1989).

253. ILL. REV. STAT. ch. 40, para. 2501-26 (1987).

period of conception. Neither the meaning nor the constitutionality of this provision is clear.

Of the several other changes, the most far reaching is subsection (c). Early decisions under Illinois' long-arm statute held that the statute was intended to reach all constitutionally permissible out-of-state service.[254] Later decisions indicated that this was not the case.[255] On September 7, 1989, by an act promoted by Plaintiffs' Bar, the General Assembly amended section 2-209[256] to extend the applicability of the long-arm statute to its constitutionally permissible limits.

2. Section 2-411: Capacity of Partnerships to Sue in Their Own Name

Under Illinois common law, a partnership could not sue or be sued in its own name.[257] This rule often caused hardship to plaintiffs who could not ascertain who the partners of a partnership were, or even whether an entity was in fact a partnership. One remedy was a provision in the Assumed Business Name Act[258] that a partnership which failed to register under the Act could be sued in its own name.[259] Another remedy was provided by the amendment of the Illinois Civil Practice Act in 1955 that allowed a partnership to be sued in its firm name.[260]

During the last two or three decades, it became apparent that not allowing a partnership to sue in its own name was an inconvenient anachronism, particularly in light of the existence of national and multi-national partnerships (such as legal and accounting firms) with hundreds of partners and continuous membership turnover. Large partnerships sometimes attempted to evade the section by the questionable device of nominally assigning the firm's claim to one of the partners or a third party. The legislative response was to amend Code section 2-411,[261] effective September 1, 1989,

254. *See* Nelson v. Miller, 11 Ill. 2d 378, 389, 143 N.E.2d 673, 679 (1957) (section 2-209 "reflect[s] a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the [federal Constitution's] due process clause.")

255. *See, e.g.*, Cook Assocs., Inc. v. Lexington United Corp., 87 Ill. 2d 190, 197, 429 N.E.2d 847, 850 (1981) (the boundaries or limits of section 2-209 are not to be equated with the "minimum contacts" test under the due process clause).

256. 1989 Ill. Legis. Serv., P.A. 86-840 at 4070 (West) (effective September 7, 1989).

257. Lewis v. West Side Trust and Savings Bank, 377 Ill. 384, 36 N.E.2d 573 (1941).

258. ILL. REV. STAT. ch. 96, paras. 4-8(a) (1987).

259. *Id.* para. 8(a).

260. 1955 Ill. Laws, Section 27.1, p. 2238, § 1 (now section 2-411 of the Code).

261. ILL. REV. STAT. ch. 110, para. 2-411 (1987).

to allow partnerships to sue in their own names.[262]

3. Section 2-402: Expansion of Respondent in Discovery to All Civil Actions

In 1976, the General Assembly added section 2-402,[263] entitled "Medical Malpractice Respondents in Discovery," to the Code. Plaintiffs in medical malpractice cases were often at a loss, prior to filing suit, as to which of various medical practitioners who had treated them might have commited the act of malpractice that may have caused their injuries. In order to avoid the bar of the statute of limitations, a plaintiff would often sue every medical person or entity who had given treatment and then dismiss those found upon discovery to have had no connection with the injury. Section 2-402 was added in response to the complaints of physicians, who rightly asserted that they were being accused in publicly-filed documents of malpractice when plaintiffs really had no knowledge as to their culpability. The provision allows plaintiff a six-month period beyond the limitations statute to take discovery against "respondents in discovery" to determine whether to name them defendants.

The section has permitted plaintiffs to obtain through discovery the identities of those potentially liable for their damages, while avoiding the limitations bar and removing any stigma associated with naming defendants who turn out to be not responsible for the injuries. It appeared logical to extend this concept to all civil litigation, and the General Assembly now has done so.[264] The amendment to section 2-402 permits any person or entity in any civil litigation to be made a respondent in discovery. The amendment should be helpful to plaintiffs and their counsel in avoiding sanctions under new Illinois Supreme Court Rule 137[265] for having made allegations against defendants not reasonably grounded in fact.[266]

4. Section 2-607: Bills of Particulars

Previously, the demand for a bill of particulars automatically stayed the time within which the demanding party had to plead,

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262. 1989 Ill. Legis. Serv., P.A. 86-483 at 2621 (West) (effective September 1, 1989).

263. ILL. REV. STAT. ch. 110, para. 2-402 (1987).

264. 1989 Ill. Legis. Serv., P.A. 86-483 at 2620-21 (West) (effective September 1, 1989).

265. *See supra* notes 1-13 and accompanying text (discussion of Rule 137).

266. *See also infra* notes 289-90 and accompanying text (discussion of new Illinois Supreme Court Rule 224, which, it is hoped, the Illinois courts will construe as a cumulative remedy rather than a remedy inconsistent with amended section 2-402).

but no time limit was imposed upon the respondent to furnish the bill. Section 2-607[267] of the Code has been amended[268] to alter the procedure. The statute now requires the respondent to file the bill within twenty-eight days of the demand's service. If respondent fails to do so, or furnishes an insufficient bill, the court may, in its discretion and upon motion, strike the pleading or take other action. It should be remembered that bills of particulars are treated as pleadings, and at least in some instances, a failure to deny matter set forth in a bill results in an admission of the matter.[269]

5. Section 8-2601: Minors' Out-of-Court Statements

Public Act 85-1440, effective February 1, 1989, adds a new section to article VIII of the Code.[270] The section governs the admissibility in civil proceedings of out-of-court statements by a child under thirteen years of age that describe certain unlawful sexual acts. In order for such declarations to be admissible, the court must determine, outside the presence of the jury, the reliability of the declarations, and the declarant child must either testify or be unavailable as a witness. If the declarant is unavailable, other evidence must corroborate the statement. The new section imposes a mandatory jury instruction when evidence is admitted and requires the proponent of the evidence to give reasonable notice to the adverse party of an intention to offer it. This provision may be subject to serious constitutional objections because the opposing party does not appear to be afforded the right to confront and cross-examine.

6. Section 9-111: Condominium Assessment Claims

Prior to its amendment by Public Act 85-1386, section 9-111 of the Code,[271] dealing with the Illinois Condominium Property Act, had permitted the unrestricted award of reasonable attorney's fees to condominium associations that obtained judgments for the nonpayment of common area assessments. The amended section[272] subjects the award of fees to the "reasonableness" standards set

267. ILL. REV. STAT. ch. 110, para. 2-607 (1987).
268. 1989 Ill. Legis. Serv., P.A. 86-646 at 3148-50 (West) (effective September 1, 1989).
269. *See* ILL. REV. STAT. ch. 110, para. 2-607(c) (1987).
270. ILL. REV. STAT. ch. 110, para. 8-101 through 8-2501 (1987) (civil evidence rules).
271. *Id.* para. 9-111 (1987).
272. ILL. ANN. STAT. ch. 110, para. 9-111 (Smith-Hurd Supp. 1989) (effective January 1, 1989).

forth in new subsection (b). The subsection essentially directs the courts to consider the reasonableness of the amount claimed for legal fees in light of the amount in controversy and the nature of the lawsuit.

7. Section 12-101: Judgment Liens

Section 12-101[273] governs generally the creation of liens against real property by the recording of judgments in the county in which the debtor's property is located. When a judgment for child support gives rise to a lien and the debtor has satisfied the judgment, the section permits the debtor to effectuate the release of the lien by serving notice of and recording an affidavit to that effect. New subsection (d)[274] clarifies that the debtor's affidavit operates to release the lien only if the judgment creditor files no affidavit objecting thereto within twenty-eight days of receiving the prescribed notice.

8. Section 15-1507: Foreclosure Sales

Public Act 85-1298 enacts a small but significant change to the notice requirements for judicial foreclosure sales.[275] Notices of sales must be advertised separately in the legal notice and real estate sections of publications that are circulated to the general public in the county in which the property is located.[276] The section previously permitted the two advertisements to be published in the same newspaper. The amendment requires publication of each notice in a different newspaper in counties whose population exceeds three million.[277]

B. Changes to the Supreme Court Rules

1. Rule 3: Rules Committee Practice & Procedure

New Illinois Supreme Court Rule 3,[278] provides for the creation by the Illinois Supreme Court of a committee to receive, assess and conduct hearings on suggestions and proposed rule changes in all areas of the Illinois courts' practice and procedure.

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273. ILL. REV. STAT. ch. 110, para. 12-101 (1987).

274. ILL. ANN. STAT. ch. 110, para. 12-101(d) (Smith-Hurd Supp. 1989) (effective January 1, 1989).

275. *See* ILL. REV. STAT. ch. 110, para. 15-1507 (1987).

276. *Id.*

277. At present, the amendment implicates only Cook County, Illinois property.

278. ILL. S. CT. R. 3, ILL. ANN. STAT. ch. 110A, para. 3 (Smith-Hurd Supp. 1989) (effective January 1, 1989).

2. Rule 23: Disposition of Appellate Cases

Rule 23[279] was amended to provide a procedure pursuant to which parties may request an appellate panel to change the designation of its decision from an unpublished order to a published opinion.[280]

3. Rule 105: Additional Relief Against Defaulted Parties

Amended Rule 105(b),[281] effective January 1, 1989, clarifies the permissible methods by which notice can be served on parties when additional relief is sought against them after they are held to be in default. The Rule formerly required restricted delivery of all notices when served by certified or registered mail. The amendment limits the requirement of restricted delivery to instances of service upon "natural persons." To prove service of notice on other entities, a showing of merely to whom and when the notice was delivered suffices.

4. Rule 137: Sanctions for Bad-Faith Filings

As previously discussed,[282] new Rule 137[283] preempts section 2-611 of the Code.[284] The Rule became effective on August 1, 1989.

5. Rule 201: Discovery

Rule 201[285] was amended by the addition of paragraph (m). The amendment allows the circuit courts to prohibit or otherwise regulate the filing of discovery materials by local rule.[286] This Rule will ease the burden on court clerks of receiving and retaining voluminous discovery materials, such as deposition transcripts.

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279. ILL. S. CT. R. 23, ILL. ANN. STAT. ch. 110A, para. 23 (Smith-Hurd Supp. 1989) (effective January 1, 1989).

280. For an extended discussion of the impact of publication upon legal precedent and courts' workloads, see Beyler, *Selective Publication: An Empirical Study*, 21 LOY. CHI. L.J. 1 (1989).

281. ILL. S. CT. R. 105(b), ILL. ANN. STAT. ch. 110A, para. 105(b) (Smith-Hurd Supp. 1989) (effective January 1, 1989).

282. *See supra* notes 1-18 and accompanying text (discussion of Rule 137 and section 2-611).

283. ILL. S. CT. R. 137, 1989 Ill. Legis. Serv. No. 2, appendix (West) (effective August 1, 1989).

284. ILL. REV. STAT. ch. 110, para. 2-611 (1987).

285. ILL. S. CT. R. 201, 1989 Ill. Legis. Serv. No. 2, appendix (West) (effective August 1, 1989).

286. *Id.* The rule essentially permits the circuit courts to follow the procedure adopted by the Northern District of Illinois. *See* Rule 18 of the General Rules of the United States District Court for the Northern District of Illinois (prohibiting the filing of discovery materials absent court order).

6. Rule 204(c): Depositions of Physicians

Prior to January 1, 1989, the effective date of the amendment to Rule 204(c),[287] doctors who were not subject to the expert witness requirements of supreme court Rule 220[288] could be deposed only upon order of court or the doctor's consent. Following the amendment, a physician's deposition may proceed without a court order only if the deponent consents and the parties agree to the taking of the deposition.

7. Rule 224: Pre-Suit Discovery

New Rule 224[289] affords a device in addition to the expansion by the General Assembly of the "respondent in discovery" mechanism of section 2-402 of the Code[290] for ascertaining the identity of possible defendants and obtaining facts upon which to buttress allegations in a complaint. The Rule requires that a petition be filed stating the reason why the proposed discovery is necessary and the nature of the discovery sought. The Rule provides that the court order allowing the discovery "will limit discovery to the identification of responsible persons and entities . . ." The question of identification of who is responsible is often interwoven with the facts of the transaction, however, and it remains to be seen how much latitude the courts will give to a potential plaintiff.

8. Rule 296: Enforcement of Support Orders

New Rule 296,[291] provides comprehensive rules, definitions, forms and punishment for the circuit court clerks' enforcement of child support orders entered pursuant to the Illinois Marriage and Dissolution Act[292] and related acts.

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287. ILL. S. CT. R. 204(c), 1989 Ill. Legis. Serv. No. 2, appendix (West) (effective August 1, 1989).

288. ILL. S. CT. R. 220, ILL. REV. STAT. ch. 110A, para. 220 (1987). *See supra* notes 225-39 and accompanying text (discussion of treating physicians as expert witnesses).

289. ILL. S. CT. R. 224, 1989 Ill. Legis. Serv. No. 2, appendix (West) (effective August 1, 1989).

290. ILL. REV. STAT. ch. 110, para. 2-402 (1987). For a discussion of amended section 2-402, see *supra* notes 263-66 and accompanying text.

291. ILL. S. CT. R. 296, ILL. ANN. STAT. ch. 110A, para. 296 (Smith-Hurd Supp. 1989) (effective February 1, 1989).

292. ILL. REV. STAT. ch. 40, para. 101 (1987).

9. Rule 304(a): Appeals of Final Judgments that Do Not Dispose of Entire Proceedings

As the committee comments to amended Rule 304(a)[293] explain, the amendment was promulgated to remedy the situation created by the Illinois Supreme Court's decision in *Elg v. Whittington*.[294] The *Elg* decision held that the filing of a post-trial motion on a final judgment that disposes of less than all of the claims among the parties, wherein a Rule 304(a) finding that there is no just reason for the delay of enforcement or appeal has been included, does not toll the time within which a notice of appeal can be filed. The amendment gives the same effect to a post-trial motion in a Rule 304(a) case as Rule 303[295] gives to a post-trial motion in a case that disposes of all claims among the parties: the time to appeal runs from the date of ruling on the post-trial motion.

10. Rule 307: Interlocutory Appeals as of Right

Rule 307 adds to the category of interlocutory orders that may be appealed as a matter of right by including those "terminating parental rights or granting, denying or revoking temporary commitment in adoption cases."[296] The procedure with respect to the appeal of temporary restraining orders also is altered by requiring, in addition to the notice of appeal, a written petition filed within two days of the entry or denial of the restraining order sought. The petition must state the grounds upon which it is based and the relief requested, and must be accompanied by the record. Both parties may file a memorandum, not exceeding fifteen pages, within two days of the filing of the petition. The appellate court then decides the case within two days, but retains authority to change the rules in various ways if it chooses.

11. Rule 310: Appellate Prehearing Conferences

Prior to the August 1, 1989 amendment of Rule 310,[297] an appellate judge who presided at a prehearing conference of a case could not participate in the subsequent decision. The potentially problematic amendment permits a prehearing judge also to participate

293. ILL. S. CT. R. 304(a), ILL. ANN. STAT. ch. 110A, para. 304(a), committee comments (Smith-Hurd Supp. 1989).

294. 119 Ill. 2d 844, 518 N.E.2d 1232 (1987).

295. ILL. S. CT. R. 303, ILL. REV. STAT. ch. 110A, para. 303 (1987).

296. ILL. S. CT. R. 307, ILL. ANN. STAT. ch. 110A, para. 307 (Smith-Hurd Supp. 1989).

297. ILL. S. CT. R. 310, 1989 Ill. Legis. Serv. No. 2, appendix (West) (effective August 1, 1989).

in the decision if the parties agree to this dual function. Realities may impose pressure upon parties to agree to the dual-role arrangement in which the prehearing judge is likely to learn of matters and to form impressions not contained in the record on appeal.

12. Rule 375: Sanctions for Bad Faith Appellate Filings

New Rule 375[298] provides for the appellate court's imposition of sanctions for willful failure to comply with appellate rules and for the prosecution of frivolous appeals.[299]

X. CONCLUSION

The authors hope that the foregoing summary of another active year in numerous areas of civil procedure will be a useful tool, informing the bar of significant developments and providing an effective resource for problems on the cutting edge of the development of the law.

298. *Id.* para. 375.
299. New Rule 375 is more fully discussed *supra* note 17 and accompanying text.